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This working paper was prepared by the Law Reform Commission of Canada before its abolition in February 1992. The tentative recommendations contained therein received the approval of the Commission members, listed below, prior to that date. Also listed are the names of the co-ordinator, consultants and special adviser who contributed to the research and writing of the working paper.

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Editor's Note

In keeping with the proposal advanced in *Equality for All: Report of the Parliamentary Committee on Equality Rights,* we have conscientiously endeavoured to draft this working paper in gender-neutral language. In doing so, we have adhered to the standards and policies set forth in *Toward Equality: The Response to the Report of the Parliamentary Committee on Equality Rights* pertaining to the drafting of laws, since the Commission's mandate is to make proposals for modernizing Canada's federal laws.

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Acknowledgements

We are indebted to all those individuals consulted during the preparation of this working paper. Members of our standing advisory panels, comprising representatives of the judiciary, the practising bar (both Crown and defence), law teachers and the police, regularly advise us on our work in development. We are truly grateful to all of them and hereby acknowledge their considerable influence on our work.

As well, in the course of our research we communicated with officials involved in the administration of courts at the various levels. We thank them for the valuable information they were able to provide.

The views expressed in this working paper are those of the Commission, and do not necessarily reflect those of Parliament, the Department of Justice or any of the individual consultants.

There is nothing novel about the notion of trial within a reasonable time. Indeed, it is one of the oldest of our legal rights, albeit traditionally one of the least adequately protected. Its genesis goes back to at least *Magna Carta* in 1215 . . . The great defect of *Magna Carta*, however, lay in its failure to provide adequate mechanisms for the enforcement of the rights it purported to guarantee.

La Forest J., *Rahey* v. *The Queen*

CHAPTER ONE

The Need for Trial within a Reasonable Time

I. Trial within a Reasonable Time Is Desirable

This working paper undertakes a crucial task in the area of criminal procedure: the improvement of procedural mechanisms to ensure trial within a reasonable time. It concentrates on the initial stages, or "front end", of the criminal process, from the time a person is charged with an offence to the time trial commences. It provides clear and workable methods for expediting the post-charge, pre-trial process in a manner that preserves procedural fairness.

The pre-trial stages of the criminal process necessarily take some time. The use of procedural options — for example, re-elections, motions for particulars, applications for change of venue — can delay matters, and the requirements associated with investigating and prosecuting particular offences take time. Delay may also result from the inefficient use of resources.

Not all delay is undesirable. A procedural scheme that would move cases to trial too quickly could diminish the quality of justice, by preventing the use of options that promote fairness to the accused, or by resulting in deficient investigations or poor preparation by counsel. One commentator has noted that "[s]low justice is bad, but speedy injustice is not an admissible substitute."[1] Similarly, Mr. Justice Lamer has stated that undue haste can make a trial unfair. What he called "[a]ssembly-line justice"[2] can result in a breach of the accused's right to a fair trial, which is guaranteed under section 7 and paragraph 11(*d*) of the *Canadian Charter of Rights and Freedoms*.[3]

The real goal of any scheme to provide trial within a reasonable time must be to strike a balance between two of the governing principles of criminal procedure: efficiency and fairness. Unnecessary delay must be avoided, but the participants must be given adequate opportunity to protect the interests of both the state and the accused.

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1. Maurice Rosenberg, "Court Congestion: Status, Causes, and Remedies" in The American Assembly, *The Courts, the Public, and the Law Explosion* (Englewood Cliffs, N.J.: Prentice-Hall, 1965) 29 at 58.

2. *Mills* v. *The Queen*, [1986] 1 S.C.R. 863 at 941. See also the suggestion by Judith A. Osborne, *Delay in the Administration of Criminal Justice: Commonwealth Developments and Experience* (London: Commonwealth Secretariat, 1980) at 6, that "[t]ime is needed for the emotions aroused by a criminal act to subside, thus enabling the accused to get an unbiased hearing".

3. Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11.

Efficiency, as we explained in Report 32, *Our Criminal Procedure*,[4] requires that prosecutions be conducted in a timely, but not hasty, fashion. Inordinate delay can frustrate the main objectives of our justice system: it can jeopardize the search for truth,[5] impede punishment and deterrence[6] and interfere with rehabilitative prospects.[7] Fairness requires that the criminal process be deliberate rather than rushed,[8] but also demands that potential hindrances to an accused's defence, and unnecessary hardship, be minimized. Undue delay allows memories to fade[9] and witnesses to become unavailable,[10] which can be unfair to both the individual and society. Delay can also increase the difficulties that are inevitably experienced by persons who are charged with crimes.[11] In this working paper, we are concerned with both the individual and societal interest in reducing delay.

The inconvenience or suffering caused to an accused by delay is most apparent in the case of persons detained for lengthy periods,[12] but it has other consequences. Whether an accused awaiting trial is in custody or not, the impact of an unresolved criminal charge can be crippling. In *Mills*, Mr. Justice Lamer noted that accused persons may suffer

> stigmatization of the accused, loss of privacy, stress and anxiety resulting from a multitude of factors, including possible disruption of family, social life and work, legal costs, uncertainty as to the outcome and sanctions.

. . .

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4. Law Reform Commission of Canada [hereinafter LRC], *Our Criminal Procedure*, Report 32 (Ottawa: The Commission, 1988) at 24.

5. Shimon Shetreet, "The Limits of Expeditious Justice" in *Expeditious Justice: Papers of The Canadian Institute for the Administration of Justice* (Toronto: Carswell, 1979) 1 at 14-15 [hereinafter *Expeditious Justice*].

6. *Ibid.* at 10. On the relationship between delay and the deterrent effect of punishment, see Ezzat Abdel Fattah, "Deterrence: A Review of the Literature" in LRC, *Fear of Punishment: Deterrence* (Ottawa: Supply and Services, 1976) 1 at 31, 101. On the goal of deterrence generally (and the likelihood of its fulfilment), *see Sentencing Reform: A Canadian Approach: Report of the Canadian Sentencing Commission* (Ottawa: Supply and Services, 1986) at 135-38 (Chairman: The Hon. J.R. Omer Archambault) [hereinafter *Sentencing Reform*].

7. Shetreet, *supra*, note 5 at 14-15. As to the efficacy of rehabilitation generally, see *Sentencing Reform, supra*, note 6 at 138-39.

8. See *Our Criminal Procedure, supra*, note 4 at 23.

9. See Shetreet, *supra*, note 5 at 14-15. See also The Hon. J.O. Wilson, *A Book for Judges* (Ottawa: Supply and Services Canada, 1980) at 35.

10. See Wilson, *supra*, note 9 at 35.

11. See The Royal Commission on Criminal Procedure, *Report*, Cmnd 8092 (London: HMSO, 1981) para. 8.32, (Chairman: Sir Cyril Philips) [hereinafter Philips Commission], where the unfairness of delay to innocent or detained persons not subsequently sentenced to imprisonment is discussed.

12. *Cf.* the point made by the Philips Commission, *ibid.*, para. 8.32.

> [M]any pay no more than lip service to the presumption of innocence. Doubt will have been sown as to the accused's integrity and conduct in the eyes of family, friends and colleagues. The repercussions and disruption will vary in intensity from case to case, but they inevitably arise and are part of the harsh reality of the criminal justice process.[13]

The impact of pre-trial delay on accused persons was further considered by the Supreme Court of Canada in *R.* v. *Rahey*.[14] There, Mr. Justice La Forest said:

> [T]he principal interests of the accused relevant to trial within a reasonable time are first, the liberty interest, which may be impaired either by imprisonment or by bail conditions; second, the security interest, which as a general rule is impaired by the anxiety, stress and stigmatization arising out of delay . . . and third, the fair trial interest, which may be impaired in this context to the extent that delay foreseeably damages the ability to present an effective defence.[15]

Steps to guarantee that trials take place within a reasonable time are desirable for reasons not related to the accused. The Supreme Court has stated that "society surely has an interest in the prompt and effective prosecution of criminal cases"[16], and indeed has decided that this interest is implicitly protected by paragraph 11(*b*) of the *Charter*.[17] The United Kingdom's Royal Commission on Criminal Procedure has noted that delay can have an unfortunate effect on victims and witnesses.[18] The American Bar Association's *Standards Relating to Court Delay Reduction*[19] state that "[d]elay devalues judgments, creates anxiety in litigants and uncertainty for lawyers, results in loss or deterioration of evidence, wastes court resources, needlessly increases the costs of litigation, and creates confusion and conflict in allocation of court resources."[20] Delay, particularly through multiple adjournments, can make successful prosecutions less likely.[21]

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13. *Supra*, note 2 at 920.

14. [1987] 1 S.C.R. 588.

15. *Ibid.* at 647.

16. *R.* v. *Conway*, [1989] 1 S.C.R. 1659 at 1692.

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

18. The Philips Commission, *supra*, note 11, para. 8.32, presumably referring to the prolongation of anxiety.

19. American Bar Association National Conference of State Trial Judges, *Standards Relating to Court Delay Reduction* (Chicago: ABA, 1985) [hereinafter *ABA Standards*], attached as appendix B to Maureen Solomon and Douglas K. Somerlot, *Caseflow Management in the Trial Court: Now and for the Future* (Chicago: American Bar Association, 1987).

20. *ABA Standards, supra*, note 19 at 73.

21. See Osborne, *supra*, note 2 at 13 where she suggests:

> When a case is repeatedly postponed witnesses often give up and do not return for the next scheduled appearance. This may force the prosecutor to drop the charge because of a lack of evidence or to agree to reduce the charge or give some other consideration in return for a guilty plea. Once again, knowledgeable defendants, usually those who have been in the court on several previous occasions, may try to take advantage of the system's delays and turn them to their advantage by out-waiting the witnesses.

Against this view, however, see Peter H. Solomon, Jr., *Criminal Justice Policy, from Research to Reform* (Toronto: Butterworths, 1983). At 53, Solomon discusses U.S. research suggesting that there is no

There are circumstances in which an accused may want delay, a fact the Supreme Court has pointed to as evidence of a societal interest in reducing delay.[22] An accused might plead not guilty simply to gain time to present a more favourable impression at sentencing — by, for example, having already paid restitution, or having obtained a job.[23] This type of behaviour is not necessarily objectionable. On the other hand, of course, some accused will seek delay to take advantage of the fact that memories fade and witnesses become unavailable over time. Indeed, one controversial suggestion is that many accused persons do not actually want a trial within a reasonable time: they want that right to be violated and a remedy granted as a result.[24]

Finally, it must be noted that the right to trial within a reasonable time already exists by virtue of paragraph 11(*b*) of the *Charter*. A *Charter* remedy will therefore be granted to those whose rights are violated. It would be preferable, however, for the justice system to avoid the initial violation. Thus, it is in the interest of not only the accused but the justice system as a whole that trials take place within a reasonable time.

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relationship between the length of a case and the likelihood of dismissal through deterioration of the evidence. Solomon also suggests that in his study of data from "Robert County" in Ontario, the loss of testimony due to delay cannot be taken to account for any of the thirteen dismissals.

On the contrary, Ejan MacKaay in *The Paths of Justice — A Study of the Operation of the Criminal Courts in Montreal* (Montreal: Groupe de Recherche en Jurimétrie, 1976) (a study prepared by the LRC) at 24, points to a high rate of withdrawal of charges after re-election, the path most associated with delay, suggesting that one possible explanation is "that as a result of the extremely long delays the Defense succeeds here in weakening the Crown's case."

Solomon argues in general, *ibid.* at 56, that "[d]elay is not the serious problem it is often taken to be." Against this, it has been suggested that his view "does seem to underestimate the costs to the accused of *unwanted* delay": Curt T. Griffiths and Simon N. Verdun-Jones, *Canadian Criminal Justice* (Toronto: Butterworths, 1989) at 250.

22. See *Askov, supra,* note 17 at 1221-23.

23. Osborne, *supra,* note 2 at 70, citing W.T. Westling, "Plea Bargaining: A Forecast for the Future" (1976) 7 Sydney L. Rev. 424 at 425.

24. See The Hon. Mr. Justice David Doherty, "Delay," (a paper presented at the National Criminal Law Program, Tactics, Procedure and Practice, Dalhousie University, July 1989), and *R.* v. *Fogarty* (1988), 46 C.C.C. (3d) 289 at 315 (N.S.S.C.A.D.) where Chipman J. suggests that "delay is usually courted by an accused." See also *R.* v. *Morin,* (19 April 1990), (Ont. C.A.) which cites Doherty J.'s paper, as well as The Hon. Thomas G. Zuber, *Report of the Ontario Courts Inquiry* (Toronto: Ontario Ministry of the Attorney General, 1987), and concludes, at 12, that only minimal weight should be attached to any prejudice to the accused presumed to arise out of delay, because "many accused persons do not want an early trial. It is often said that in the case of an accused with a weak case, delay usually benefits the defence."

It may well be true that there is a natural human tendency to put off the unpleasant, including criminal trials. In our view, however, such a reaction on the part of an accused does not alter the inherent disadvantages of delay for that accused.

II. The *Charter* Guarantee Is Not Sufficient

Charter paragraph 11(*b*) entitles a person charged with an offence "to be tried within a reasonable time". However, the procedural mechanism for asserting that right is set out only in general terms in subsection 24(1) of the *Charter*. According to that provision:

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

It can be argued that this statement of the right in the *Charter* is sufficient — that interpretation of the *Charter* and the development of the paragraph 11(*b*) right should be "litigation driven" (that is, shaped by specific cases) rather than achieved through legislation. For several reasons, however, we suggest that matters should not be left entirely to the *Charter*.

First, even if a standard no higher than that set out in the *Charter* were desirable, optimum practical results and expeditious justice are not likely to emerge swiftly from protracted constitutional struggles in the courts. The courts have been given a greatly expanded role with the *Charter*, but their essential function has not changed. They do not function as legislating bodies; their principal task is adjudicating conflicts brought before them. Rather, it is the role of Parliament to advance and enhance constitutional rights through legislative standards which the *Charter*, by its very nature, can provide only in general terms. As Chief Justice Dickson stated in *Hunter* v. *Southam Inc.*:

> While the courts are guardians of the Constitution and of individuals' rights under it, it is the legislature's responsibility to enact legislation that embodies appropriate safeguards to comply with the Constitution's requirements.[25]

We agree. In our view, the *Charter* can and should be given life through legislation passed by Parliament.

Further, we suggest that a standard higher than that set out in the *Charter* is desirable in any such legislative provision. The rights in the *Charter* establish a minimum standard for the preservation of individual freedom. Therefore, only clear violations will attract *Charter* remedies. There is a gap, however, between the time within which a case ought ideally to be dealt with and the time when a *Charter* violation arises: delay can be undesirable without being unreasonable.[26]

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25. [1984] 2 S.C.R. 145 at 169.

26. However, the *Askov* decision, *supra*, note 17, whatever the intention of the Supreme Court, has certainly been interpreted by other courts to impose a minimum standard for all cases. The facts of the case itself qualify it as an egregious violation: Cory J. stated, at 1239, that the case is "one of the worst from the point of view of delay in the worst district not only in Canada, but so far as the studies indicate, anywhere north of the Rio Grande." In considering the adequacy of resources, however, the court indicated the standard that it felt would have been appropriate, based on the performance in comparable courts: a period of six to eight months from committal to trial. This standard has had an effect on other cases: within one

Another advantage of statutory rules or internal court goals is that they can more easily be adjusted and fine-tuned: constitutional standards, in contrast, are difficult to amend. This will be particularly valuable in the case of the right to a trial within a reasonable time. We anticipate that other legislative innovations we have suggested will decrease the time required to deal with cases, thereby decreasing the time within which trials ought to occur: in this event, the time-limit can be adjusted accordingly. By the same token, if legislative standards are established which turn out to be unreasonably restrictive, they too can be more readily adjusted. Standards established by judicial decisions are not so easily amended.

In addition, statutory provisions are not restricted to establishing time-limits. A *Charter* decision can do little beyond setting a maximum allowable delay and providing a remedy when it is exceeded. While this approach may be satisfactory from the perspective of the individual accused, it does not address the societal interest. Statutory provisions, on the other hand, can address the underlying causes of delay, rather than merely responding to failures to meet the standard.

Finally, we believe that explicit standards would promote desirable and uniform practices, and avoid much of the otherwise inevitable confusion about the state of the law. Such solutions could also reduce the burden that Canadian courts currently face in developing procedures for the assertion of *Charter* rights.

We therefore reject the *status quo* as a means for promoting trial within a reasonable time. Parliament, through a comprehensive program aimed at providing expeditious justice, should augment the *Charter* provision with specific statutory provisions. Ultimately, statutory standards should (in tandem with other initiatives) reduce the need for counsel to engage in lengthy constitutional litigation. The *Charter* must remain as a safeguard where statutory procedures are deficient in some respect, but legislative provisions should reduce the frequency with which its invocation will be necessary.

III. The Scope of This Working Paper

This working paper will focus primarily on the time between an accused's being charged and the commencement of trial. It is here that many of the inefficiencies of our current procedural law are evident. Some are attributable to the complexity of the pre-trial process. To the degree that this is true, it is our task to distinguish between necessary and unnecessary complexity.

The current pre-trial process is complex partly because procedures must provide an acceptable level of fairness to the accused. Although efficiency is valued, our system of

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month after the *Askov* decision, *e.g.*, charges had been dropped against 3,400 people in Ontario because of delay. Richard Mackie, "Ontario Attacks Backlog in Courts", *The [Toronto] Globe and Mail* (22 November 1990) A-1.

criminal law is premised on what the *Charter* calls "principles of fundamental justice."[27] Just as it forbids the use of violence to obtain confessions, our system employs a number of procedural safeguards designed to promote fairness to the accused. It does not, for example, require an accused person to be tried in a community where prejudice may preclude a fair trial; it allows the accused to obtain further details about the nature of charges; it allows an accused to be tried separately from a co-accused where that procedure is necessary to secure a fair trial, and so on. To simplify some elements of the process would be to infringe upon rights that have come to be regarded as fundamental to the criminal process. Our system of criminal justice would likely be more efficient, but much more brutal. We would also almost certainly violate constitutional guarantees governing the trial of criminal offences.[28]

What must be remedied are procedural anomalies that complicate the current pre-trial process and delay the holding of trials without providing offsetting advantages. Since our *Criminal Code* was first enacted in 1892, many amendments have been made to the procedures for bringing cases to trial. Procedural amendments appear often to have been introduced to solve the problems of the day, with too little regard for their complicating effect on the criminal process as a whole. The resulting anomalies often serve as devices which Crown and defence counsel have learned to manipulate to their own advantage. While some forms of "manipulation" of the criminal process are contemplated — procedural options are, after all, designed to be used — others are not.[29]

We should not allow the prosecutor or police to manipulate procedure in order to gain more time to prepare a case that has been neglected, or allow the accused to secure delay simply so that memories of witnesses will fade and their evidence become unreliable. By eliminating some of the procedural anomalies that permeate the present *Criminal Code*, we can reduce the improper manipulation of procedures that apply to the post-charge, pre-trial process.

Seen in this light, our scheme to help guarantee trial within a reasonable time is much broader than the proposals contained in this working paper. Indeed, only a relatively small portion of that scheme is set out here. Many of our recommendations in earlier working papers have also been directed, in whole or in part, towards exactly this goal.

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27. *Charter*, s. 7.

28. For example, *Charter* s. 11(*e*) provides the right "not to be denied reasonable bail without just cause". This right could conceivably be violated if the *Criminal Code* (R.S.C. 1985, c. C-46) contained no procedure to review an order made at a judicial interim release hearing that an accused be detained in custody. It is also arguable that the right guaranteed by *Charter* s. 7 — "the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice" — would be violated if the accused were unable to obtain a fair trial locally because of strong prejudice among the citizens.

29. It has been said that "many of the devices and rules of the adversary system of litigation as we conduct it are not geared for, but are aptly suited to defeat, the speedy resolution of the issue central to the prosecution": Judge Stephen Borins, "Efficient Criminal Procedure" in *Expeditious Justice, supra*, note 5, 145 at 154.

For example, we have noted elsewhere that "the existence of multiple levels of criminal trial courts has been referred to as 'a natural mechanism for delay.' "[30] Accordingly, we have proposed the creation of a unified criminal court, to increase the efficiency of the system.

Similarly, the present system for classifying offences into summary conviction, indictable or hybrid offences, which we have described as "unnecessarily complex and full of anomalies" and as having inconsistencies that "militate substantially against its utility",[31] can lead to confusion and improper manipulation for tactical advantage. We have therefore recommended a new, more workable system of classification.[32]

Equally, the present requirements in the *Code* for charge documents do not set out in any detail the proper structure for an information, thereby making motions to quash more likely. Quashing for purely technical reasons does not prevent the Crown from relaying charges, and so in general the only result is additional delay. We have therefore proposed a scheme that will set out in legislation the structural requirements of a charge document and allow for amendment in the face of most errors:[33] this step would reduce needless litigation and unprofitable delay while providing greater protection to the rights of the accused.

Our proposals to regulate plea negotiations[34] and to have prosecutors advise police on the appropriateness of laying charges[35] could both act to reduce the caseload that criminal courts are required to handle. The disclosure scheme we have proposed could in some cases eliminate the need for a preliminary inquiry, and in others encourage a guilty plea — in either case shortening the time required to deal with the matter.[36]

All of the above recommendations are attempts to improve the efficiency of the criminal justice system without sacrificing its fairness. They are all aimed at making the system work more expeditiously, and so can be regarded, whatever other justifications may also be offered for them, as proposals to help guarantee that trials are held within a reasonable time.

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30. LRC, *Toward a Unified Criminal Court*, Working Paper 59 (Ottawa: The Commission, 1989) at 12, quoting Association of Provincial Criminal Court Judges of Ontario, Report of the Provincial Criminal Court Judges' Special Committee on Criminal Justice in Ontario (Toronto: The Association, 1987) at 66 (Chairman: His Honour Judge David Vaneck).

31. LRC, *Classification of Offences*, Working Paper 54 (Ottawa: The Commission, 1986) at 1.

32. *Ibid.*

33. LRC, *The Charge Document in Criminal Cases*, Working Paper 55 (Ottawa: The Commission, 1987).

34. LRC, *Plea Discussions and Agreements*, Working Paper 60 (Ottawa: The Commission, 1989).

35. LRC, *Controlling Criminal Prosecutions: The Attorney General and The Crown Prosecutor*, Working Paper 62 (Ottawa: The Commission, 1990) [hereinafter *Controlling Criminal Prosecutions*].

36. LRC, *Disclosure by the Prosecution*, Report 22 (Ottawa: The Commission, 1984).

This working paper, then, does not by any means constitute our full scheme for providing that trials take place within a reasonable time: many proposals made elsewhere are also a part of it. However, we do discuss here several pre-trial procedures that, we suggest, can be made more efficient without sacrificing fairness. In particular, we will look at the present system of elections, at the preliminary inquiry and at pre-trial mechanisms for expediting the trial itself. In addition, we will recommend a system of time-limit legislation and discuss administrative steps that courts can take to increase their ability to control delay. Our recommendations will have different impacts on different actors within the system. Some, such as applications for remedies, are for the benefit of the accused. Others — for example, those concerning the election process — are primarily designed to prevent accused persons from creating delay. Yet others, such as time-limits for commencement, are in the general interest of guaranteeing an expeditious trial, which will reduce anxiety for all parties and produce a greater likelihood of an accurate result.

CHAPTER TWO

Approaches to Guaranteeing Trial within a Reasonable Time

I. The Causes of Delay

Before delay can be remedied, its causes must be identified: a scheme that does not address the root causes cannot succeed. In particular, an important initial question is whether lack of resources is a major cause of delay. If lack of resources is normally the cause, then the solution to delay is readily apparent: if it is not the cause, then more creative solutions must be found.

It is our view that delay is most often attributable to the way resources are used rather than to any limit on the resources available. Since this premise has a major impact on the approach to be taken, it is necessary to establish the point first.

II. Lack of Resources Is Not the Primary Cause

A number of causes for delay have been asserted. Studies prepared for the federal Department of Justice[37] (based on interviews with judges and court administrators rather than on a statistical study of the operation of courts) have suggested that the causes include: resource-related reasons such as the shortage of court facilities and personnel, a scarcity of experienced prosecutors and the time needed to prepare preliminary inquiry transcripts; administrative reasons such as the organization of circuits and assizes, scheduling deficiencies, lack of co-operation between judges and ineffective judicial control of calendars; and other factors such as the increasing complexity of modern criminal cases, the time needed to prepare for trial, the inadequacy of timely disclosure mechanisms and the need to provide opportunities for fundamental rights (such as the right to counsel) to be exercised. The British Royal Commission on Criminal Procedure, in its 1981 report, concluded that delay was largely attributable to the number of cases and the insufficiency of resources.[38] Thus a major factor governing delay, according to these studies, is the level of resources available to a court.

In contrast, other studies have suggested that lack of resources is not a significant factor. First, it has been argued that "delay may be caused, at least in part, by the

37. See Carl Baar, "Federal Speedy Trial Legislation: An Initial Impact Assessment" (1982) [unpublished] [hereinafter Baar (1982)]; and Carl Baar, "Time Limit Legislation in Criminal Cases: A Follow-up Assessment" (1984) [unpublished] [hereinafter Baar (1984)].

38. Philips Commission, *supra*, note 11, para. 8.35.

inefficient use of existing resources.''[39] Some studies have shown that judges spend surprisingly little time each day on the bench.[40] One study, noting the low number of hours, also pointed out that the court nonetheless dealt with all matters brought before it on every day, concluding that excess capacity existed, and that delay ''cannot therefore be traced to lack of courtroom resources.''[41] Computer simulations based on data gathered in Canadian courtrooms have concluded that lack of resources is not a significant factor.[42]

A recent study of the operation of criminal trial courts also supports this conclusion.[43] It notes that:

> There appears to be no statistical relationship between the time a District Court takes to handle its criminal cases and the amount of time its courtrooms are used. If anything, one notes that the ''least efficient'' space utilization is by the most expeditious court, and one of the two ''most efficient'' courts — measured by space utilization — is easily the slowest.[44]

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39. Griffiths and Verdun-Jones, *supra*, note 21 at 245 [emphasis omitted].

40. See, *e.g.*, Robert G. Hann, *Decision Making in the Canadian Criminal Court System: A Systems Analysis*, 2 vols. (Toronto: Centre of Criminology, University of Toronto, 1973) at 176-77, who states that judges in his study spent an average of 2.45 hours per day hearing cases. See also Michael D. Walker, ''Congestion and Delay in the Provincial Court (Criminal Division)'' (1984) 42 U.T. Fac. L. Rev. 82 at 88-89, who notes that judges of the Ontario Provincial Court spent, in 1981-82, an average of only 2.6 hours per day in court. Walker cites this statistic to support the suggestion that some judges may not work as hard as they should, but other conclusions could equally be drawn. It may simply be that scheduling practices need to be adjusted to guarantee that more work is available for judges on any given day. Griffiths and Verdun-Jones, *supra*, note 21 at 245, point out that the cause might equally be inefficient charging practices resulting in withdrawals and consequent wasted court time.

    Figures for 1988 to 1990, at least in some courts, show improvement in this figure. In the Brampton District Court house between July 1, 1988 and December 31, 1988, the average court day was approximately 3 hours. During the period from April 1, 1989 to March 31, 1990, the average court day was 4.1 hours, Rick Haliechuk, ''Auditor's Study Shows Ont. Courts Underutilized'', *The Lawyers Weekly* (23 November 1990) 2.

    It should be noted, of course, that time spent in court does not represent a judge's complete work day.

41. Hann, *supra*, note 40 at 177.

42. See, *e.g.*, MacKaay, *supra*, note 21 at 69. MacKaay notes, that a simulated reduction by half of the number of courts available to conduct judge-alone trials did not increase delay in those courts. See also Robert G. Hann and Lorne P. Salzman, *Cancourt — I: A Computerized System Simulation Model to Support Planning in Court Systems* (Toronto: Centre of Criminology, University of Toronto, 1976) at 64-65. It must be noted that demand on the courts since those studies has increased.

43. Prepared by Prof. Carl Baar, and attached to his affidavit to the Supreme Court of Canada in *Askov*, *supra*, note 17.

44. *Ibid.* This data is drawn only from Ontario courts, though the study as a whole also considers courts in British Columbia and New Brunswick, and compares the data to similar figures from the United States and Australia. For the latter half of 1988, London District Court, with a median upper court time of 105 days, did not use its courtrooms 61% of the time. Brampton District Court, with a median upper court time of 423 days, only left its courtrooms unused 42% of the time.

Although the percentage of time a courtroom is in use is not the only measure of how resources are used, we nonetheless believe this finding to be significant.[45]

Evidence that the level of resources is not the key issue is also found in ongoing delay-reduction projects in Ontario. Under those projects, courts were only to receive additional judicial appointments when they had demonstrated that they were using their existing resources efficiently. The Ottawa Provincial Court (Criminal Division), after instituting various delay-reduction procedures, brought its delay down from fourteen to ten months. Two additional judges were therefore appointed to the court: however, this increase in resources did not result in any further decrease in delay. It was noted that "the solution to the problem of delay did not necessarily dictate additional expenditures and additional judges, but that careful planning and effective management remained the essential components."[46]

Further, empirical studies from the United States have found that delay is not related to a court's level of resources. Rather, those studies found that the causes of delay were quite limited. *Justice Delayed*, a statistical survey of twenty-one courts across the United States, concluded that: "delay . . . does not emerge as a function of court size, judicial caseload, 'seriousness' of cases in the caseload, or the jury trial rate."[47] In that study, both the charging process used in criminal cases and the amount of judicial control over pre-trial stages of a case had some correlation to the delay, but the study concluded that

> informal expectations, attitudes, and practices of attorneys and judges have a great deal more to do with trial court delay. . . . If any one element is essential to the effort to reduce pretrial delay, it is concern by the court with delay as an institutional and social problem.[48]

Follow-up studies have reached a similar conclusion concerning resources. Two studies have repeated the type of research done in *Justice Delayed*, and looked at delay-

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45. Note also the suggestion that:

> [D]espite all the congestion in our Courts, "courtrooms at all levels are frequently silent and deserted in the afternoon with no business being done." Courtroom utilization is often low due to adjournments of otherwise full dockets. Judges, who theoretically have control over adjournments, are frustrated in their attempts to dispose of case backlogs and dispense justice because, in fact, as the system presently stands, Judges have little or no control over the varied factors which result in adjournments.

Gerald L. Gall, "Efficient Court Management" in *Expeditious Justice, supra*, note 5 at 109, quoting Perry S. Millar and Carl Baar, "A Management Philosophy for the Canadian Courts" (1979) U.W.O. L. Rev. 199 at 202.

46. Affidavit of Richard F. Chaloner, Deputy Attorney General (Ontario), filed in *Askov, supra*, note 17 at 14-15.

47. Thomas Church, Jr., Alan Carlson, Jo-Lynne Lee *et al.*, Justice Delayed: The Pace of Litigation in Urban Trial Courts (Williamsburg: National Centre for State Courts, 1978) at 5 [hereinafter *Justice Delayed*].

48. *Ibid.*

reduction programs instituted in several courts.[49] Assessing the correlation between delay and resources, and finding that some courts had increased their per-judge caseload while simultaneously reducing delay,[50] one study concluded that

> problems of trial court delay cannot be cured simply by adding more judges. Clearly, lower per-judge workloads do not automatically result in speedier dispositions, nor does an increase in workload necessarily lead to slower disposition times. The relationship between workloads and case processing times appears, rather, to be a very complex one in which a number of other factors — including changes in the court's approach to managing its caseload — are involved.[51]

We believe that the level of resources available to courts is not usually a significant factor in determining delay.[52] Rather, failing extreme shortage the real issues are, we feel, the better use of existing resources[53] and changes to the attitudes and expectations of practitioners and courts.[54]

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49. See Barry Mahoney, Alexander B. Aikman, Pamela Casey *et al.*, *Changing Times in Trial Courts: Caseflow Management and Delay Reduction in Urban Trial Courts*, (Williamsburg: National Center for State Courts, 1988) [hereinafter *Changing Times*] and John Goerdt, *Examining Court Delay: The Pace of Litigation in 26 Urban Trial Courts, 1987* (Williamsburg: National Center for State Courts, 1989) [hereinafter *Examining Court Delay*].

50. The most dramatic example was the criminal court in the Bronx, which, between 1976 and 1985, had a 54% increase in the number of filings per judge, but reduced its median upper court handling time (one measure of delay used in the study) from 328 to 152 days: *Changing Times, supra*, note 49 at 102.

51. *Changing Times, supra*, note 49 at 104. See also Principal Finding 3 (*ibid.* at 193), that "[t]he pace of civil and criminal litigation is not clearly correlated with the size of the court, population of the jurisdiction, composition of the caseload, per-judge caseloads, or the percentages of cases that proceed to jury trial." Similarly, *Examining Court Delay, supra*, note 49 at 104, suggests that "in general, a larger caseload per judge was not linked to court delay. . . . adding more judges probably should not be the first policy option for courts concerned about reducing delay, *particularly* those with relatively slow case processing times. Adding more judges could simply add to the court's inefficiency." The study also notes, however, that "a larger caseload per judge does at some point lead to longer case processing times and, under certain conditions, could justify the addition of new judges to a court", but notes that particularly with slower courts, improvement should first be sought by better use of resources (*ibid.* at 104).

52. It has been pointed out that adding resources may have effects other than reducing delay. If more courts were established, then judges might perceive that they had more time to consider decisions. Although this could have a beneficial effect on the quality of judgments, it would have no effect on delay. Equally, police might perceive the increase in resources as a reason to exercise less frequently their discretion not to charge: Debra Wilson, "Delay in the Criminal Justice System" (1987) 8 Can. Crim. Forum 116 at 118-19.

53. Note *R.* v. *Bruno* (1989), 73 C.R. (3d) 17 (Ont. Dist. Ct), in which Borins J. dismissed charges against several accused owing to a violation of their right to a trial within a reasonable time. Borins J. notes, at 23, that on the fourth and last occasion on which the case was scheduled for trial but was unable to proceed, he was presiding over a largely empty courtroom in the same building, and "would have had no difficulty in starting this case on the morning of 23rd October had I been asked to do so."

54. We accept that some courts will not have sufficient resources to deal with their caseload. In *Askov, supra*, note 17, *e.g.*, Cory J. notes, at 1237, that a major delay-reduction program had been undertaken in the Brampton Provincial Court, but that in that court "the program alone is obviously insufficient" in that although delay had stabilized, it had not improved. Cory J. concluded that more efficient use of resources is not sufficient in that court, and that "[m]ore resources must be supplied to this district".

III. Attacking Delay

Based on our belief about the primary causes of delay, we feel that two major approaches can be adopted. Most importantly, we suggest that administrative measures can be taken by trial courts to improve their ability to manage their caseflow and to prevent an abuse of their process. In addition, statutory time-limits for the prosecution of criminal charges can, we believe, assist in guaranteeing the success of those administrative measures.

There should be a greater emphasis in Canadian courts on caseflow-management techniques. Research indicates that certain features are common to successful management systems. Some of the techniques used — such as early screening of charges by prosecutors, early disclosure and early resolution of motions — are appropriate for legislation, and we have incorporated them into proposals in this and other working papers.[55] But, to a large extent, delay-reduction techniques must be tailored to individual courts and adopted voluntarily. We shall therefore discuss caseflow management in some detail, to make clear the benefits it promises.

There are benefits as well to establishing statutory limitation periods. Legislative norms send a clear and explicit message to the key participants in the system, and affect their behaviour. It has been argued that "[c]ourts in which a one-year processing time is considered both normal and acceptable will be less concerned about pushing a six-month-old case than a court where 180 days to trial is the outside limit."[56] The enactment of time-limits, it has been suggested, would cause courts and Crown attorneys' offices to establish more adequate monitoring systems to ensure that cases are not left beyond the time-limits.[57] Similarly, another analyst writes that the only real incentive to meaningful plea negotiation is the imminence of trial,[58] and so plea negotiations are likely to be moved forward by the spur of an earlier trial date.

It should be noted that the delay-reduction program in Brampton had succeeded in increasing the disposition rate of the court by 20% in the first year (the period Cory J. considered), which reduced the delay from 15 to 13 months: Chaloner, *supra*, note 46 at 18.

55. See, respectively, *Controlling Criminal Prosecutions, supra*, note 35, recs 18-21 at 73; *Disclosure by the Prosecution, supra*, note 36 at 20-21; and recs 33-41, below.

56. *Justice Delayed, supra*, note 47 at 62. The study also notes that "faster courts are differentiated from slower courts not so much by whether case-management controls are utilized in criminal case processing but rather by when those controls are applied."

57. Baar (1984), *supra*, note 37 at 31. *Justice Delayed, supra*, note 47 at 49, suggested that "a speedy trial rule . . . need not affect criminal case disposition at all. But a rule or standard with 'teeth,' one that carries operational consequences if violated and that cannot be easily waived by the defense, may indeed affect the disposition of criminal cases." *Changing Times, supra*, note 49 at 63, found no correlation between speedy trial laws or time standards (administrative goals for case handling) and speedy felony case processing times, though it suggested that "it may simply be too early to tell what effect [time standards] will have on the pace of litigation. The limited experience to date provides strong indications that . . . they can be an important part of a comprehensive program to reduce or prevent delays."

58. *Changing Times, supra*, note 49 at 81.

We shall return later to the question of why both approaches should be adopted.[59] First, however, each approach needs to be explored in some detail.

A. The Administrative Approach — Caseflow Management

The primary approach that we recommend for the reduction of delay is the use of caseflow-management techniques. As suggested by research from the United States, these techniques are more effective than legislation in controlling and reducing delay. One leading team of commentators has put it thus:

> Control of case progress by rule, automatic deadlines and sanctions has begun to be deemphasized in favour of court supervision of case progress involving direct consultation with the lawyers in the case and tailoring a disposition track and timetable to the characteristics of each case.[60]

We have already noted that some of our proposals would assist in allowing courts to supervise cases more closely. The proposals we have made in earlier papers for disclosure by the prosecution, or the proposals we will make in this paper for pre-trial conferences with a broader mandate, would serve well to increase the supervision of cases and ensure that they are expeditiously brought to trial. Most of the steps that would need to be taken, however, are not suitable for legislation; rather, they must be tailored to individual courts, and would depend upon the active participation of those courts. Accordingly, we shall at this time discuss in some detail the principles of caseflow management as they have been developed in the United States, and whether those principles are likely to be of assistance in Canada.

1. The Principles of Caseflow Management

"Caseflow management" can be defined as "supervision or management of the time and events involved in the movement of a case through the court system from the point of initiation to disposition, regardless of the type of disposition."[61] This area has been the subject of study in the United States for some years.

In 1972, the American Bar Association commissioned a paper on caseflow management in trial courts.[62] Since that time, a considerable body of knowledge, including reports based on empirical studies of the workings of a number of trial courts,

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59. See below at 49., under "Both the Administrative and Legislative Approaches Are Necessary."

60. Solomon and Somerlot, *supra*, note 19 at 12.

61. *Ibid.* at 3. Note that this definition, like the techniques of caseflow management generally, is equally applicable to civil trial courts. Indeed, much of the literature and the rules for expeditious handling set out therein is designed with both criminal and civil cases and courts in mind.

62. Maureen Solomon, *Caseflow Management in the Trial Court* (Chicago: American Bar Association, 1973).

has been gathered.[63] The American Bar Association, asserting that "the techniques of court delay reduction are no longer experimental",[64] has created standards for reducing delay.

No single plan can be adopted by all courts that will universally result in the reduction of delay. One source from the United States has said:

> No two jurisdictions, even within the same state, follow exactly the same procedures and there is no single model that will be universally applicable. There are, however, a number of litigation management practices and techniques that are commonly used in jurisdictions that do an effective job of managing their felony caseloads and conduction trials efficiently.[65]

The fundamental premise of caseflow management is that judges must accept responsibility for the active supervision and management of every case, from filing to disposition.[66] The other primary actors in the system — defence counsel and prosecutors — may each have reasons to welcome delay in individual cases. But there is always a public interest in the expeditious handling of cases, and so it is the responsibility of judges to limit delay.

Active supervision of the progress of cases involves several steps. There is not perfect agreement on a precise list of steps, but clearly the major requirements are:

(1) early and continuous control of cases;

(2) time standards governing the case as a whole and intermediate steps in the process;

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63. A partial list includes *Justice Delayed, supra*, note 49; Steven Flanders, *Case Management and Court Management in United States District Courts* (Washington, D.C.: Federal Judicial Center, 1977); Larry L. Sipes *et al., Managing to Reduce Delay* (Williamsburg, Va.: National Center for State Courts, 1980); John Paul Ryan, Marcia J. Lipetz, May Lee Luskin and David W. Neubauer, "Analyzing Court Delay-reduction Programs: Why Do Some Succeed?" (1981) 65 Judicature 58; David W. Neubauer *et al., Managing the Pace of Justice: An Evaluation of LEAA'S Court Delay-Reduction Programs* (Washington: National Institute of Justice, 1981); Ernest C. Friesen, "Cures for Court Congestion" (1984) 23 Judges' Journal 4; Larry L. Sipes, "Where Do We Go from Here? The Next Step in Reducing Delay" (1984) 23 Judges' Journal 44; Barry Mahoney and Larry Sipes, "Zeroing in on Court Delay" (1985) Court Management Journal 8; Lawyers Conference Task Force on Reduction of Litigation Cost and Delay, *Defeating Delay: Developing and Implementing a Court Delay Reduction Program* (Chicago: The Task Force, 1986); Solomon and Somerlot, *supra*, note 19; *Changing Times, supra*, note 49; Barry Mahoney and Dale Anne Sipes, "Toward Better Management of Criminal Litigation" (1988) 72 Judicature 29; and *Examining Court Delay, supra*, note 49.

    For further literature, see also "Court Delay: A Bibliography" (1985) Court Management Journal 20.

64. *ABA Standards, supra*, note 19 at 75.

65. Mahoney and Sipes (1988), *supra*, note 63 at 35.

66. See Solomon, *supra*, note 62 at 30-47, as discussed in Perry S. Millar and Carl Baar, *Judicial Administration in Canada*, (Kingston: McGill-Queen's University Press, 1981) at 202.

(3) constant monitoring and measuring of compliance with the time standards; and

(4) firm dates for trial and intermediate steps, through strict control of adjournments.

We shall discuss each of these elements, as well as other factors that have also been suggested to be important.

(a) Early and Continuous Control of Cases[67]

Early and continuous control of criminal cases can be achieved in several ways. Early screening and charge decision making, although not done by the courts, are the first steps towards the expeditious processing of cases.[68] Equally, to the extent possible, arrangements should be made with the local bar, particularly legal aid, to see to it that defence counsel are appointed at the earliest possible stage.[69]

Primarily, however, early and continuous control should be exercised through the use of court powers. Early control means that "the commencement of a case by arresting a defendant . . . triggers a monitoring process. . . . [T]hen a system takes over in which the case will be brought up for review at a fixed time in the future."[70] Continuous control "requires that each scheduled control point or event causes the next control point to be fixed."[71] In practice, there are a number of ways in which these goals can be achieved.[72] The scheduling of cases should not be left to the prosecutor's office.[73] Early discovery and early resolution of motions are both valuable,[74] and can be achieved

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67. *Examining Court Delay, supra*, note 49, found, at xv, that "early and continuous control over case events was the best predictor of faster case processing times."

68. Mahoney and Sipes (1988), *supra*, note 63 at 35: "The quality and efficiency of prosecutorial case management, particularly in the initial post-arrest stages of a case, can have significant impact on the pace of litigation in the jurisdiction and on the outcomes of specific cases."

69. *Ibid.*: "With a defense attorney in the picture at an early point, future events can be scheduled and both the prosecution and the defense can prepare for subsequent proceedings in the case."

70. Friesen, *supra*, note 63 at 7. Similarly, see Flanders, *supra*, note 63 at 51: "An automatic, routine system to move cases through all preliminary stages is a necessary but not sufficient condition for expeditious handling of criminal cases."

71. Friesen, *supra*, note 63 at 7.

72. Solomon and Somerlot, *supra*, note 19 at 13, note that "[m]ost of the systems have been characterized by early court attention to the case (often in the form of a conference between a judge and the attorneys), creation and monitoring of deadlines for completion of subsequent events in the life of the case (such as discovery deadlines), and mechanisms for identifying and dealing specially with complex cases."

73. *ABA Standards, supra*, note 19, commentary to s. 2.51 at 80. Such an approach, the ABA says, "improperly delegate[s] to counsel supervisory control over the pace of the case".

74. See *Examining Court Delay, supra*, note 49 at 80-83. Also, note the finding at 101-02 that a firm trial date is the most important factor, and that firm trial dates are most likely to be found where there is early resolution of motions.

through pre-trial conferences.[75] "Firm but uniform policies must . . . be worked out with respect to adjournments, disclosures of evidence, the avoidance of last-minute guilty pleas on the day of trial, the reduction of stays on the day of trial, pre-trial conferences, trial scheduling conferences if any, and so forth."[76]

One technique commonly used to achieve continuous control is "short scheduling." The notion behind this technique is that time-limits should be imposed administratively for each of the steps along the way. In one court's scheme, after a not-guilty plea a pre-trial conference is held within one week, and a scheduling conference is held within two weeks after that. If matters are not resolved by that time, the trial date is set, normally at between fourteen to twenty-one days later.[77] The purpose of short scheduling is twofold. First, such deadlines ensure "that the lawyers are prepared, that obstacles to conducting a trial are cleared away early and that there is opportunity for informed negotiation".[78] In addition, proponents of the system claim that

> [e]xperimentation with short scheduling techniques supports the view that when a "triggering" event is enforced within two weeks of an important event, there are fewer requests for continuances. . . . a structured plea negotiation conference at a date and time certain before the status conference or trial reduces the number of continuances requested at the later time.[79]

(b) Time Standards

Closely related to the notion of continuous control is the idea that time standards should be set. These standards, set administratively by each individual court, can govern either the overall case or intermediate steps.[80]

Either sort of time standard performs the same function as legislated limitation periods: it helps guarantee in a practical way that cases will come to trial within a reasonable time. In addition, however, time standards for intermediate steps can perform an educative function. If the overall limitation period is one year, for example,

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75. Mahoney and Sipes (1988), *supra*, note 63 at 35-36. Note, at 36, the observation that "[e]arly resolution of motions is only possible, however, if the system is one in which defense counsel is appointed early and can obtain prompt disclosure of the prosecution's case."

76. Millar and Baar, *supra*, note 66 at 203.

77. Mahoney and Sipes (1988), *supra*, note 63 at 35-36.

78. *Ibid.* at 36.

79. Friesen, *supra*, note 63 at 7.

80. See *ABA Standards*, *supra*, note 19, s. 2.51B and 2.51C at 79, calling for "[p]romulgation . . . of time standards for the overall disposition of cases" and "establishment of times for conclusion of critical steps in the litigation process".

> it takes a year for parties and counsel to find out whether the court truly is committed, or will be able, to meet the standard. Intermediate time guidelines foster the perception that the court is serious about meeting the overall guidelines.[81]

The intervals established must be

> long enough to allow adequate preparation but short enough to encourage that preparation. It is an observable fact that tasks tend to be completed near the deadline for completion. A court can take this phenomenon into account and assure attorney preparation by creating realistic time frames in the caseflow process.[82]

However, the way in which time standards are set and introduced is also important. We have noted already the operating assumption of the American literature that the local legal culture is the primary determinant of the pace of litigation. This fact must be taken into account, therefore, in establishing standards. It has been suggested, for example, that courts should not unilaterally impose time standards, but rather should establish them through consultation with the bar, and with other agencies whose operation affects caseflow.[83] This process of consultation is said to produce greater commitment to the standards on everyone's behalf,[84] and to have "the greatest likelihood of changing the expectations of the 'local legal culture'."[85] Furthermore, it is recommended that such reforms should be introduced gradually.[86] This is particularly the case when a court is seriously delayed at the time the standards are introduced.[87]

Time standards need not be simple limitation periods. The American Bar Association standard for the handling of felony cases, for example, is that "90% of all felony cases should be adjudicated or otherwise concluded within 120 days from the date of arrest; 98% within 180 days and 100% within one year."[88] The justification for establishing these incremental standards is that "cases on a docket are not homogeneous, but instead reflect a few complex cases mixed in with a sizeable majority of relatively simple cases."[89] This type of standard, however, is not very useful in managing individual cases: accordingly, intermediate deadlines are also advisable.[90]

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81. Solomon and Somerlot, *supra*, note 19 at 20.
82. *Ibid.* at 4.
83. *Ibid.* at 11.
84. *Ibid.*
85. *Ibid.* at 17.
86. Ryan *et al.*, *supra*, note 63 at 70. See also, for discussion of the same suggestion in the Canadian context, Millar and Baar, *supra*, note 66 at 204-05.
87. Solomon and Somerlot, *supra*, note 19 at 20.
88. *ABA Standards, supra*, note 19, s. 2.52D at 84.
89. *Ibid.*, commentary to s. 2.52 at 85.
90. Solomon and Somerlot, *supra*, note 19 at 19.

(c) Monitoring and Measuring Compliance with Time Standards

Without some system for monitoring the progress of cases, it is impossible to know whether time standards are met. Accordingly, it is important that such a monitoring system be established.

In this regard, it has been suggested that the statistics most often gathered by courts do not reveal the most useful information. The information easiest to gather tends to reflect only the past — the median time taken to dispose of cases, for example. However, "[c]losed cases cannot be affected by changes in the caseflow management system".[91] More useful is information about the pending caseload. Thus, it should be possible to determine easily the age of any given pending case, or the age of the pending caseload for each major case type.[92] Similarly, it would be useful to have a system that identifies cases not in compliance with intermediate time standards.[93] Some delay-reduction programs use a "tickler" system, so that cases in danger of exceeding a limitation period are brought forward before they pass that period.[94]

The guiding principle is, "measure what you want to control".[95] Accordingly, other information worth gathering would be the number of trials adjourned and the reasons therefor (request of counsel, unavailability of judge and so forth) or statistics on the number of cases resulting in a plea or withdrawal of charges when a pre-trial conference is held, compared to when one is not held. In particular, statistics that allow the measurement of innovations for their effectiveness should be gathered.[96]

(d) Firm Dates for Trial and Intermediate Steps

In many ways, establishing firm dates for trial is the most important factor.[97] There are two main reasons why trial dates collapse: adjournments requested by counsel and the unavailability of judges or courtrooms.

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91. *Ibid. at 22.*

92. *Ibid.* at 23. *Examining Court Delay, supra,* note 49 at 79, suggests that information relating to four issues is pertinent: the number of cases in the system, the number leaving, the age of cases in the system and at disposition and the frequency of postponements.

93. Solomon and Somerlot, *supra,* note 19 at 23.

94. *Changing Times, supra,* note 49 at 141, notes a system in the Detroit Recorder's Court, where every file that reached 120 days was stamped CASE AGE ALERT in large blue letters.

95. Solomon and Somerlot, *supra,* note 19 at 22.

96. *Ibid.* at 23. Note also that the mere publication of the statistics can have an ameliorative effect. *Changing Times, supra,* note 49 at 174, points out that, in Kansas, statistics were published every quarter showing how each district court ranked in reducing its number of old pending cases. There were no formal sanctions involved, but nonetheless "no court has ever ranked at the bottom of the list for two successive quarters."

97. *Examining Court Delay, supra,* note 49 at 101, states that "[t]he most important predictor of faster case processing times was a firm trial date policy".

Adjournments, particularly late adjournments, cause delay in three ways. First, the case adjourned takes longer. Second, court time may simply be lost, contributing to a slower general rate. Finally, and most importantly, if courts are lenient with adjournments, there is a greater likelihood that counsel will seek adjournments. In this event, a cycle is set up, generating more delay.

When a court is known to grant adjournments quite readily it has been argued:

> [A]n attorney is less likely to make the necessary effort to be prepared when he has a number of matters competing for his attention. He will devote his time to the most pressing business, and will seek postponement of less urgent matters, including cases set for trial in which a continuance can be obtained. Each time the court grants a continuance due to unreadiness, it reinforces counsel's perception of the court's leniency. . . .
>
> In summary, a lenient attitude toward continuances reinforces attorney tendencies to delay case preparation, which leads to more unreadiness and more wasted judge time.[98]

It is important, therefore, that there be strict control over adjournments: "It is through the continuance policy and scheduling practices that the court establishes or alters attorneys' expectations concerning readiness."[99] "Through leniency in continuing scheduled trial dates, even a court that has adopted the philosophy of court responsibility loses control of the process."[100]

The effect of postponements owing to the unavailability of judges or courtrooms is similar to the effect of a lenient policy on adjournments: "If there is a strong doubt that events will occur, preparations will not take place and even those cases that reach trial on time more often will fall out for unexpected reasons.[101]

The commonest reason why judges or courtrooms are sometimes unavailable is the oversetting of cases. Oversetting is necessary, since there will always be cases that are resolved at the last moment. To the extent possible, however, courts should attempt to guarantee that it will never be impossible to deal with a case on the original trial date. Specific steps to achieve this goal have been recommended[102] — for example, organizing judge's time so that chambers work is done when cases do not materialize, and having a back-up judge available if an unanticipated number of cases actually proceed to trial. It has also been suggested that to err on the side of caution is wiser: "[A]n occasional dark courtroom due to undersetting is preferable to rolling over masses of trials due to oversetting."[103] Similarly, if a court finds that it tends to have too few cases ready to proceed on the scheduled date, the appropriate response is to schedule not more, but

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98. Solomon, *supra*, note 62 at 34.

99. Solomon and Somerlot, *supra*, note 19 at 24.

100. *Ibid.* at 28.

101. Friesen, *supra*, note 63 at 52.

102. *Ibid.* at 52.

103. *ABA Standards*, *supra*, note 19, commentary to s. 2.51E.

fewer, cases. In general, if too few cases are ready, it is because many of the lawyers involved did not really expect to be called upon to proceed. If fewer cases are scheduled in the short term and, as a result, trial dates are more reliable, then lawyers expect their cases to be reached and are therefore more likely to be prepared.[104]

(e) Other Factors

In addition to the elements set out above, several other factors are held to be important to successful delay reduction through caseflow management. Several commentators note that successful programs seem to require a leader, ideally a chief or senior judge, who is committed to the concept of court responsibility for case progress: "The presence of a set of 'true believers' who hold some positions of influence seems essential."[105]

The importance of the bar's co-operation in establishing a delay-reduction program has also been pointed out. Since the local legal culture is the primary determinant of delay, a change of attitude on the part of counsel is required. Members of the local bar should therefore be actively involved at the planning stage of any delay-reduction program,[106] lawyers' schedules should be reasonably accommodated when possible[107] and the program must make clear the benefits to be gained by each of the participants.[108]

Finally, some mechanism must exist to recognize unusually complex cases. The American Bar Association standards call for "[p]rocedures for early identification of cases that may be protracted, and for giving them special administrative attention where appropriate."[109] The advantage of this approach is that it not only avoids applying standards that may be unreasonable in a particular case, but also removes complex cases from the system, so that "most cases can proceed at a reasonable pace, not delayed by the complex case."[110]

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104. Solomon and Somerlot, *supra,* note 19 at 26-27.

105. Ryan et *al., supra,* note 63 at 70. See also Solomon and Somerlot, *supra,* note 19 at 7; *Changing Times, supra,* note 49 at 197. Indeed, *Examining Court Delay, supra,* note 49 at 107, suggests that it would be appropriate to have future research into court leadership and leadership development.

106. Solomon and Somerlot, *supra,* note 19 at 10-11.

107. Friesen, *supra,* note 63 at 7.

108. Ryan et *al., supra,* note 63 at 73-74.

109. *Supra,* note 19, s. 2.51D. Those standards, setting out when 90%, 98% and 100% of cases must be completed, are specifically designed to allow for occasional complex cases: commentary to s. 2.52.

110. Solomon and Somerlot, *supra,* note 19 at 19. *Examining Court Delay, supra,* note 49 at 105, notes that a high percentage of certain case types (*e.g.*, drug offences) seems to be correlated to delay, noting that this finding "provides some empirical basis for subjecting specific case types to differentiated case management".

2. Caseflow Management in Canada

One legitimate concern about acting on research conducted in the United States is whether the data and conclusions are transferable to Canada. It has been noted in a similar context that "[t]hough the two legal systems share common origins, they differ significantly in legal culture, procedural complexities, root sources of administrative authority, and judicial heritage."[111]

It is therefore necessary to examine the situation in Canadian courts. Statistically based studies are not common: the most complete such studies, dating from the 1970s, assess procedures that in some cases have changed considerably, given the effect of time and the influence of the *Charter*. Although more recent experiments and changes in procedures in various courts exist, the results have not always been systematically evaluated or widely reported. However, the information available provides clear indications that the problems reported in the United States as the causes of delay are also problems here, and that a similar approach in Canada could be successful in reducing delay.

The absence of caseflow-management procedures in Canadian courts, at least until recently, has been noted. A study of the provincial criminal courts in Toronto concluded that delay was not caused by the high input of cases into the system, but rather by that system's scheduling and processing practices.[112] In the *White Paper on Courts Administration* by the Ontario Ministry of the Attorney General, the divided administrative structure of the court at the time was considered to prevent "any real progress in the key area of case-flow management."[113] Millar and Baar noted that "[i]f the principles of caseflow management are considered for purposes of discussion, then it must be agreed that most Canadian courts disregard the majority or all of them."[114] Control over the caseload involves taking the initiative to set dates, keeping control over adjournments and monitoring the progress of individual cases, but "in most criminal courts today, one if not all of these elements is missing."[115] A report for the federal Department of Justice has

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111. Millar and Baar, *supra,* note 66 at xviii.

112. Hann, *supra,* note 40 at 183.

113. Ministry of the Attorney General, *White Paper on Courts Administration* (Toronto: The Ministry, 1976) at 7.

114. *Supra,* note 66 at 208, see chap. 8.

115. *Ibid.* at 215. Millar and Baar also suggest at 212-13, that:

> Criminal courts rarely monitor the progress of cases . . . judge, lawyer, and witness time is squandered in adjournments; and the courts themselves are baffled and reluctant to assume meaningful control over the process. Many judges persist in the belief that they are controlling the process because they are ratifying the adjournments; in fact . . . the process is controlling them.

concluded that those hoping to decrease inefficiency in criminal proceedings should look to "pre-trial court procedures, case scheduling, transcript preparation and so on."[116]

Further, the level of statistical information generally available concerning the operation of courts in Canada is insufficient. The federal Department of Justice report has noted

> that almost no reliable statistics were available to document the nature and extent of possible problems, let alone provide an adequate information base to guide the review process. . . . More generally, Canada is one of the few developed countries without national court statistics that could be used to help improve the administration of justice or even to provide accountability to the public.[117]

Commentators have indicated that a paucity of working data is characteristic of courts in Canada,[118] and studies of individual courts have pointed to the same shortcoming.[119]

There is also evidence in Canada that adjournments are granted too easily, constituting a major source of delay. A study of Toronto courts found that only 1 per cent of requests for adjournments were refused.[120] Adjournments to set a trial date or to prepare for trial accounted for 79.3 per cent of remands.[121] However, "only 45.0% of the remands given on the undertaking (by all parties concerned) that a trial or preliminary

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116. *Some Statistics on the Preliminary Inquiry in Canada* (Ottawa: Department of Justice, 1984) [hereinafter *Preliminary Inquiry Statistics]* at 55.

117. *Ibid.* at 1.

118. Millar and Baar, *supra*, note 66 at 227.

119. See Walker, *supra*, note 40 at 97 n. 97, where he notes that the 1981-82 report of the Ontario Ministry of the Attorney General has no statistics on the number of accused appearing in court each day, though it does have less useful statistics on the number of charges. MacKaay, *supra*, note 21 at 95, called for the institution in Montreal of system of continuous data collection, while Hann, *supra*, note 40 at 459, suggests that most of the problems he points to in his report would not have developed if an adequate system of gathering information had been in place, and suggests there is an immediate need for a court management information system.

    Not all courts currently suffer from a shortage of statistical data. In British Columbia, for example, the Court Services Branch of the Ministry of the Attorney General gathers data on all the courts in the province, and distributes the results to the courts and Regional Crowns. Cases are tracked from first appearance, and it is possible to determine, *e.g.*, what percentage of the caseload has been in the system for more than a particular length of time.

    In Ontario, the Integrated Courts Offences Network (ICON) is expected to be operational by the end of 1992. ICON will allow participants in the system to determine, among other things, the counts available by specific charge, the number of dispositions by type of charge, disposition times, and length of trials by type: see Nancy Dawson, "Drowning in Delay: Practical Aspects of Delay Reduction" (July 1990) [unpublished] at 22.

    The Canadian Centre for Justice Statistics is developing, but does not yet have in place, a criminal court survey which will track the dates of five types of appearances in criminal matters, as well as the types of offences, the election by the Crown, and so forth.

120. Hann. *supra*, note 40 at 457.

121. *Ibid.* at 273.

inquiry would start at the next court appearance actually resulted in a trial or preliminary inquiry at that next appearance."[122] That same study showed that 77 per cent of cases in court on any given day are there after adjournments, or after having been postponed from earlier in the day.[123]

Two Canadian computer simulations also point to adjournments as the major source of delay in the courts. A Toronto-based study found that a 15-per-cent reduction in the number of adjournments should result in a reduction of slightly over 50 per cent in the median number of days to deal with cases.[124] Similarly, in a computer simulation based on data gathered in Montreal courts, "even a modestly increased strictness" was shown to "decrease delays by as much as 30 to 50% in the trial courts."[125]

The Ontario Ministry of the Attorney General has noted the need for greater information on the availability of all parties who are necessary to ensure that cases can proceed when scheduled, and for more informed estimates of court time necessary for each case, to minimize the problem of cases not being completed.[126] On the other hand, evidence as to whether Canadian courts have difficulties scheduling cases owing to the unavailability of judges or courtrooms in less conclusive. While some courts report rarely if ever facing this problem,[127] it certainly does arise in others.[128]

More recently, programs have been instituted to increase the efficiency of a number of courts across the country. Generally, these programs have been aimed at various aspects of the pre-trial process, to allow courts to improve the use of resources already

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122. *Ibid.* at 457. The author notes, at 271, that the reason given for an adjournment was in many cases "very misleading" and concludes, at 275-76, that, from the perspective of counsel, there is no real cost to such behaviour, and that judges do not impose sanctions significant enough to control this lengthening of the career of a case.

    It seems likely that the percentage of adjournments refused today must be higher, due to the influence of the *Charter* if nothing else.

123. *Ibid.* at 199.

124. Hann and Salzman, *supra*, note 42 at 64, figure 31 at 65. In fact, this reduction in total time results even allowing a simultaneous 10% increase in the number of cases entering the system.

125. MacKaay, *supra*, note 21 at 96. At 87, he notes that in the case of trial by judge alone, these benefits flow without any significant increase in working hours, though in the case of magistrates, a 12% increase in working hours results.

126. Ministry of the Attorney General, *Annual Report*, 1986-87 (Toronto: The Ministry, 1988) at 69. Note that studies from a decade earlier of individual courts in Montreal and Toronto had suggested that the problem was not a significant one. MacKaay, *supra*, note 21 at 44, notes that there were no instances of overcrowding preventing a judge and jury trial and, at 50, that in judge alone trials, only 1.5% of adjournments were due to a congested docket. At 54, he points that only in front of magistrates does the problem begin to seem significant, where 14% of adjournments are due to a congested docket. Similarly, Hann, *supra*, note 40 at 177, notes that "[a]t no time were charges not dealt with because court personnel could not find more than the average available time."

127. See the discussion of the Saskatoon Court of Queen's Bench, below.

128. See, *e.g.*, *R.* v. *Bruno*, *supra*, note 53. See also the remarks of Chaloner, *supra*, note 46 at 9-10.

available. They show, in many ways, that increased caseflow management can be successful in Canada as a means of reducing delay.[129]

In Saskatoon, for example, the Court of Queen's Bench began a program in late 1985 with the goal of reducing delay from its level of approximately eight to ten months down to a level of three months. That goal was achieved, primarily through improvements in scheduling that made better use of the court time available and that encouraged counsel to deal with matters more promptly.[130]

When the above delay-reduction program began, only 25 per cent of scheduled trial days were actually being used — settlements, changes of plea and re-elections were taking place on the day set for trial, with a consequent loss of the use of that time.[131] The Registrar of the court began a more active scheduling program, involving monthly scheduling meetings with all counsel seeking trial dates. In addition, the Registrar began to spend a great deal of time contacting counsel to confirm, in advance of trial dates, that they were still needed — the Registrar estimates that 75 per cent of his time is spent communicating with counsel for this purpose. As a result, much court time which formerly had been lost is now put to good use for either trials or pre-trial conferences that are scheduled into the time that becomes available.[132]

The Registrar indicates that the system works, given the co-operation of judges and lawyers. Once the system was in place, counsel regularly appearing in the Court of Queen's Bench had calendars on the same schedule as the court, so that maintaining the improved pace was not a difficulty. In addition, it has reportedly become the norm for counsel to notify the Registrar in advance of intended guilty pleas (or settlements in civil matters), whereas previously that news might not have been communicated to the court before the trial date.[133]

Other courts have undertaken similar "active scheduling" procedures. The Saskatoon Provincial Court, for example, appointed a Trial Co-ordinator in early 1988 in an attempt

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129. The examples discussed below are not the only experiments or projects that have been conducted in Canada, but are representative of the steps that can be taken.

130. Information provided by private communication with Dennis Barizowsky, Registrar of the Court of Queen's Bench, Saskatoon (December 1990). At the time the information was provided, the delay had become 4-5 months, owing to an unusual number of long trials (3-7 weeks) scheduled for the following months.

131. *Ibid.* These figures, and others, are approximate — the Saskatoon Court of Queen's Bench does not have exact statistics on these matters. Note that the court has both a civil and criminal jurisdiction.

132. *Ibid.* The Registrar reports that the court does not face a problem in completing its scheduled cases each day. When the program first began in late 1985, there were a few cases that could not proceed because they could not be reached on their scheduled trial date, but since that time all cases have gone ahead.

133. Indeed, apparently pre-trial conferences are not generally used in criminal matters in Saskatoon, though they are in other Saskatchewan jurisdictions, because in Saskatoon the degree of communication that has become normal is such that they are felt unnecessary.

to reduce delay.[134] The Trial Co-ordinator, who is a justice of the peace, personally hears the first appearances and sets trial dates for matters that will appear in all courts. Through setting the schedules for all courts[135] and moving matters between courtrooms on the trial date where necessary, and with the co-operation of judges and counsel,[136] the Trial Co-ordinator has reduced delay from seven months (in late 1987) to between ninety and a hundred days (in late 1990).[137]

More active caseflow management has also been started recently in Winnipeg.[138] The goal of that program has been to move decision-making points to an earlier stage of the process, so that trial dates are, as much as possible, only set in matters that will genuinely go to trial. Target times are set at three points in the process; any case exceeding the target is pulled out of the system, and the matter is either discontinued or moved ahead.[139] All incoming charges are screened, usually before being laid. In addition, there is a "screening court," which performs similar functions to those of a pre-trial conference, allowing counsel to enter into plea negotiations or to narrow the issues for trial. A trial date is generally set at the screening court. This more active management has resulted in reduced delay, in the space of one year, from approximately fourteen months to six months, or to three months in the case of accused persons in custody.[140]

Montreal has one of the longest-standing caseflow-management programs in Canada; measures were first introduced approximately fifteen years ago.[141] First, the court has a strict adjournment policy, which requires a written request, submitted eight days in advance of the scheduled appearance. Further, it follows a policy of "short-scheduling," with each individual step in the process set within a time-limit. In addition, "special" cases — those expected to last a half-day or more for either preliminary inquiry or

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134. Information provided by private communication with John Cherneski, Trial Co-ordinator, Provincial Trial Court, Saskatoon (December 1990).

135. *Ibid.* Generally, counsel call the Trial Co-ordinator in advance to choose a date, and then appear in court to set it. The Co-ordinator relies on counsel's estimates of the time required for each case, but sets four hours for the morning, and four hours for the afternoon, to allow for matters that will fall through.

136. *Ibid.* Since all dates are set by one person, it has become increasingly common for counsel to inform the Trial Co-ordinator in advance of intended changes in plea.

137. *Ibid.* The period measured is that from the time an accused appears with counsel ready to set a date to the date actually set, and so is a shorter period than the one for which we propose limitation periods. Another result of the scheduling system has been to double the amount of time each court actually sits each day, from approximately one and a half hours to more than three hours.

For further information on steps taken in Saskatchewan, see Graeme G. Mitchell, "Beyond Systemic Delay: The Saskatchewan Experience" (1990) 79 C.R. (3d) 328.

138. Information provided by private communication with Stuart Whitley, Assistant Deputy Attorney General, Manitoba (December 1990).

139. *Ibid.* Or, if defence counsel requests it, leave the matter is left for the scheduled date, but the defence counsel's request is noted on the record.

140. See *supra*, note 137.

141. Information provided by private communication with The Hon. Mr. Justice Jean-Pierre Bonin, Associate Chief Justice, Cour du Québec, Chambre criminelle et pénale (March 1991).

trial — are put into a different stream, and scheduled for a single courtroom. By separating out these cases, and paying close attention to the schedule in the courtrooms where these cases are heard, the court can more easily avoid losing large portions of time. Cases in Montreal now suffer from less delay than in 1974, when the caseload was only 25 per cent of its current volume.

In Vancouver Provincial Court, a disclosure court has been instituted as part of a pilot project.[142] Although not aimed at the problem of unreasonable delay,[143] the project is allowing cases to be managed better, reducing the number of cases scheduled for trial and the number of witnesses necessary at trial and allowing discussion of possible resolutions. As with other projects, the steps taken do not so much change the ways in which cases are resolved as they change when the cases are resolved: more cases are disposed of at an earlier stage.

Similarly, in Ontario, pilot projects to reduce delay without increasing resources have been commenced in the provincial courts. These projects involve measures such as early provision of facts to and early review of charges by Crown attorneys, earlier return dates for first appearances, more structured disclosure and increased use of pre-trial systems.[144] One of the major objectives of these initiatives was to identify at an early stage cases that would not proceed to trial, so that those cases would not interfere with effective scheduling.[145]

For example, Crown attorneys involved in the pilot projects have conducted inventory reviews, to determine whether matters set for trial could be removed from the system at

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142. Information provided by private communication with Michael Hicks, Deputy Regional Crown Counsel for Vancouver (December 1990). At the time, the pilot project had been in place for one year, and was scheduled to continue approximately six more months.

143. *Ibid.* Matters are reported to go through the Provincial Court in 3-4 months, or 4-6 weeks where an accused is in custody.

144. W.G.C. Howland, F.W. Callaghan, W.D. Lyon, R.C. Hayes, H.T.G. Andrews *et al.*, "Reports on the Administration of Justice in Ontario on the Opening of the Courts for 1990" (1990) 24 L. Soc. Gaz. 5. These projects will be compared to control groups, and the report states, at 23:

> It is expected that within one to two years, the information generated from this pilot project will either provide convincing evidence that case flow management should be brought in across the province, or that other alternatives for speeding up the disposition of cases should be examined.

The pilot project committees have been established in Durham Region (Oshawa), Peel Region (Brampton), Simcoe County (Barrie), Scarborough, York Region (Newmarket) and Ottawa. The members of the committees include representatives of "the judiciary, Crowns, defence bar, Legal Aid, Police, courts administration, trial coordinators, and in some areas federal prosecutors and probation officers" — see Dawson, *supra*, note 119 at 7.

145. Chaloner, *supra*, note 46 at 9. One of the steps taken was to appoint a Trial Co-ordinator for each of the provincial courts covered by a pilot project. Simply overbooking trial courts on the assumption that some cases would not actually go to trial "often resulted in trials not being reached, adding to the delay in those cases, as well as to the considerable inconvenience caused to witnesses, accused and counsel" (at 9-10). Accordingly, a more active process, in which the Trial Co-ordinator wrote to all defence counsel well in advance of each trial date to determine the status of each case, was adopted.

an earlier stage than the trial date. In the Scarborouugh delay reduction project, each matter scheduled for trial between January 1, 1990, and March 31, 1990, was reviewed to see whether a disposition could be agreed to: if so, the matter was brought forward, so that later court time would be saved.[146] In this way, 143 cases scheduled for trial were resolved, saving the time of 431 witnesses and saving the police department $34,000. More interesting, however, was the reaction of defence counsel. Within two weeks after commencement of the project, defence counsel began coming to the delay-reduction Crown on matters just entering the system, attempting to reach a resolution without setting a trial date. An additional 46 cases were resolved in this way, saving the time of 182 witnesses and saving the police department $15,300.

Similarly, the Delay Reduction Committee in Ottawa instituted a special victim/accused pre-trial conference court, intended "to provide a means for both the Crown and Defence to better assess whether a trial date need be set and to explore the possibility of resolving cases in a satisfactory manner to all parties at an early opportunity."[147] Twelve such special courts were held over approximately six months, resolving 71 per cent of the cases heard, and saving 724 hours of court time.[148]

Accordingly, various courts across the country have tried particular aspects of caseflow management, including early resolution of matters through greater screening and increased disclosure, pre-trial consideration of issues and improved scheduling. The success of the measures seems to depend on the co-operation of the participants in the system, but with that co-operation it is possible to move the decision points in criminal cases to an earlier stage, so that matters can be resolved without loss of court time. In each instance, the increased caseflow management has been useful and productive in reducing delay.

3. Conclusion

There is reason to think that the administrative approach of caseflow-management techniques could be successful in Canada. We do not suggest that every court in the country is unreasonably delayed. Still, the problems that are said to be the causes of delay in the United States are also present in Canada. But the techniques said to be the solution to those problems in the United States have, until recently, been lacking in Canada. It

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146. John B. McMahon, "The Scarborough Delay Reduction Pilot Project Report" (January 1990) at 5-7 [unpublished]. The report notes that some of these cases at least would presumably have been resolved without trial in any event.

147. See memorandum by Andrejs Berzins, Q.C., "Re: Victim/Accused Pre-trial Conferences", attached as appendix C at 1, to Dawson, *supra*, note 119. The conferences were primarily intended for cases where restitution was the main issue, where the victim and accused knew each other, where special circumstances existed or in s. 810 applications.

148. See Berzins, *ibid.* at 1. The figure of 724 hours was arrived at by assuming that each of the 362 cases resolved during the project (Sept. 7, 1989 to Feb. 20, 1990) would have been scheduled for two hours. No deduction was made for the time taken by the pre-trial conference court.

seems likely that the same root cause — the expectations of participants in the system — underlies delay in each jurisdiction,[149] and that the same solutions will therefore succeed in each.

RECOMMENDATION

1. Courts should establish standing committees, consisting of judges, representatives from the prosecution and defence bar, court administrators, police and others involved in the administration of justice, to develop and implement initiatives for improved caseflow-management techniques.

B. The Legislative Approach — Statutory Limitation Periods

1. Limitation Periods Currently in the *Criminal Code*

Specific time limitations are not foreign to the *Criminal Code*. These limits exist both in the pre-charge and post-charge context. In summary conviction matters, for example, "[n]o proceedings shall be instituted more than six months after the time when the subject-matter of the proceedings arose."[150] Similarly, limitation periods exist for some individual steps in the course of a prosecution.[151]

We believe that time-limits should continue to form an integral part of the post-charge, pre-trial process and that their role should be enhanced. The existence of time-limits within the present *Code* confirms the proposition that "the criminal justice system

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149. Note the observation in Walker, *supra*, note 40 at 88 n. 34, that

> police, lawyers, court staff and judges have all adapted to the present problems, many of them to the degree that they actually believe the process is operating as efficiently as possible. Delay becomes a self-fulfilling prophecy — if the parties believe it takes 3 weeks to apply for legal aid, then it begins to take exactly that long. [note 34: participants in the process begin to expect a certain number of remands and adjournments as a matter of course. Similarly the Court expects the parties to ask to be remanded.]

150. *Criminal Code*, s. 786(2). The institution of proceedings in indictable matters is not generally subject to limitation periods, but this rule is not absolute — see s. 48(1) of the *Criminal Code*, which provides that "[n]o proceedings for an offence of treason as defined by paragraph 46(2)(*a*) shall be commenced more than three years after the time when the offence is alleged to have been committed."

151. See, *e.g.*, *Code* s. 516, limiting adjournments of a judicial interim release hearing to three days without consent; s. 525, requiring a review of the continued detention of an accused after a fixed period of time; s. 537(1)(*a*), limiting adjournments of a preliminary inquiry to eight days without consent; s. 537(2)(*b*), allowing a potentially mentally disordered accused to be remanded for observation for no more than thirty days; s. 561, fixing various limitation periods for re-elections as to mode of trial; or s. 579, allowing a maximum of one year for recommencement of proceedings following a stay.

should be capable of functioning adequately within relatively narrow periods of delay."[152]

The *Criminal Code* contains no general provision requiring that trial commence within a certain period — or, indeed, that it be completed within a certain period. The *Code* addresses *some specific* delays in the pre-trial process, but ignores their *collective* impact. We believe that such provisions should exist.[153]

In particular, provisions should be introduced that complement the caseflow-management techniques we have recommended. Time-limits that depend exclusively or primarily on counsel for enforcement will necessarily be less effective: either defence or Crown, or indeed both, may frequently see a benefit in delay which is unnecessary from the perspective of the justice system. However, the judiciary always has an interest in seeing to it that the court's caseload is handled expeditiously. Judges can take a more active interest in the pace at which litigation proceeds without abandoning the neutral decision-making role which the adversary system assigns to them; indeed, the whole idea of caseflow management requires them to do so. A system of time-limits could capitalize on this fact.

RECOMMENDATION

2. A system of statutory time-limits should be enacted to promote trial within a reasonable time.

2. The Period to Which Statutory Provisions Should Apply

(a) Starting-Points

The question here is, When should the limitation periods begin and end? Our conclusion is that they should begin only after charges have been laid, and that they should end once the trial has commenced. The investigative period before charges are laid and the time of the trial itself raise considerations different from those relevant to this working paper.

152. *Mills, supra,* note 2 at 938, Lamer J.

153. This working paper does not recommend time-limits applicable to the pre-charge period: we have addressed this issue in *Classification of Offences, supra,* note 31. In rec. 19 at 45 of that paper, we proposed "[t]hat no proceedings in respect of a crime punishable by two years or less imprisonment be instituted more than one year after the time when the subject-matter of the proceedings arose and the identity of the offender has been ascertained by investigators."

For constitutional purposes, "the time frame to be considered in computing trial within a reasonable time generally runs only from the moment a person is charged."[154] The Supreme Court held in *R.* v. *Kalanj* that "a person is 'charged with an offence' within the meaning of s. 11 of the *Charter* when an information is sworn alleging an offence against him, or where a direct indictment is laid against him when no information is sworn."[155] Some early *Charter* decisions had suggested that in exceptional circumstances time might begin to run prior to the formal laying or preferring of a charge,[156] but it now appears to be settled that pre-charge delay is irrelevant.[157]

We agree that the appropriate starting-point for a limitation period is generally the moment when some type of charge document is issued. To the circumstances mentioned in *Kalanj,* however, we would also add that a limitation period should commence when a person is arrested without a warrant.[158] We agree with Mr. Justice Lamer, dissenting in *Kalanj,* that an accused's right to trial within a reasonable time should not vary depending on whether the arrest was made with or without warrant.[159]

Mr. Justice Lamer also argued that the appropriate point at which to commence a limitation period is the time at which the accused first knows of the charges.[160] With respect, we do not agree with that proposition. Our statutory scheme embraces a broad concept of fairness as one of its governing principles. The interests to be protected by this scheme extend beyond the subjective experience of the accused.[161] The public interest in ensuring against the fading of memories or the unavailability of witnesses, for example, would not adequately be protected if time begins to run only at the point when the accused becomes aware of the charge. Accordingly, we would focus on the time a

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154. *Carter* v. *The Queen,* [1986] 1 S.C.R. 981 at 985, *per* Lamer J. (delivering the judgment of Dickson C.J., Beetz, Estey, McIntyre, Chouinard, Le Dain, La Forest JJ., and himself).

155. [1989] 1 S.C.R. 1594 at 1607.

156. See, *e.g.,* the judgment of Lamer J. in *Carter* v. *The Queen, supra,* note 154.

157. *R.* v. *Kalanj, supra,* note 155, *per* McIntyre J., concurred in by La Forest and L'Heureux-Dubé JJ. McIntyre J. did leave open the possibility that pre-charge delay might be relevant to a breach of *Charter* s. 7: see *ibid.* at 1611.

158. This approach differs from *Kalanj, supra,* note 155, in which two accused were arrested without warrant and released, and not actually charged with an offence for eight months. The majority of the Supreme Court held that that eight-month period should be considered pre-charge delay and not included in the calculation.

159. *Ibid.* at 1613-14.

160. A proposal Lamer J. had first made in *Mills, supra,* note 2.

161. As indeed does s. 11(*b*) of the *Charter*: see *Askov, supra,* note 17 at 1219-23. In addition, *cf.* Wilson J.'s distinction between "the legal as opposed to the psychological . . . effect of the delay" in *Mills, supra,* note 2 at 969.

summons or warrant is issued, or on the time an arrest is made without warrant,[162] rather than when the summons or warrant is executed or its existence is otherwise made known to the accused.

(b) Termination Points

It is also necessary to determine the point at which a post-charge limitation period should end. In particular, should the period run to the commencement or to the end of the trial? We believe that, for purposes of our proposals, it should run only to the commencement of the trial.

Some jurisdictions have established limitation periods respecting the entire criminal process — from the commencement of the investigation to the end of the trial and all appeals.[163] In our view, however, the elasticity of the trial process militates against establishing time-limits that include the trial itself. It is difficult to set out a "standard" time for completing a trial.[164] The number of witnesses and the time spent examining and cross-examining them, for example, will vary greatly from trial to trial. So will the complexity of issues and the amount of evidence involved. A trial for a simple theft can be completed much more expeditiously than one involving a complex commercial fraud. For this reason, we believe that the statutory limitation period should run only to the commencement of trial — that is, the point at which the accused is "given in charge to the jury"[165] or, in a non-jury case, evidence is heard.[166] If the prosecution adjourns the case unnecessarily once the trial has commenced, or if "systemic" or other delays prevent the trial from proceeding in good time, it will always be open to the presiding judge to find an abuse of process or a violation of *Charter* section 7 or paragraph 11(*b*) or (*d*), and to grant an appropriate remedy.

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162. Rec. 4, below at 35, speaks generally in terms of "issuance of process." This expression would cover the issuance of an appearance notice as well: see LRC, *Compelling Appearance, Interim Release and Pre-trial Detention*, Working Paper 57 (Ottawa: The Commission, 1988). The running of time for the purposes of a post-charge time-limit would commence upon the issuance of an appearance notice, not upon its subsequent confirmation.

163. See Osborne, *supra*, note 2, and Gilles Létourneau, *The Prerogative Writs in Canadian Criminal Law and Procedure* (Toronto: Butterworths, 1976) at 280, 327.

164. Though note that in *Preliminary Inquiry Statistics, supra*, note 116, it was found that 80.2% of all cases had an elapsed time for trial of only one day — see *ibid.*, table 4.6 at 49.

165. See *Morin* v. *The Queen* (1890), 18 S.C.R. 407 at 411-12; *R.* v. *Dennis*, [1960] S.C.R. 286; *R.* v. *Emkeit* (1971), 3 C.C.C. (2d) 309 at 318-20 (Alta S.C.A.D.); *R.* v. *Blair* (1975), 25 C.C.C. (2d) 47 (Alta S.C.A.D.); *R.* v. *Rowbotham* (No. 4) (1977), 2 C.R. (3d) 244 (Ont. Co. Ct); *R.* v. *Hatton* (1978), 39 C.C.C. (2d) 281 (Ont. C.A.); *R.* v. *Parker* (1981), 62 C.C.C. (2d) 161 (Ont. H.C.J.); *Basarabas* v. *The Queen; Spek* v. *The Queen*, [1982] 2 S.C.R. 730.

166. See *R.* v. *Craske*, [1957] 2 All E.R. 772 (Q.B.); *R.* v. *Ibrahim* (1957), 42 Cr. App. R. 38 (C.C.A.); *R.* v. *Miller* (1958), 120 C.C.C. 335 at 339 (Alta S.C.A.D.); *R.* v. *Bennet*, [1960] 1 All E.R. 335 (Q.B.). *Cf.: R.* v. *Bercov* (1949), 96 C.C.C. 168 at 174-75 (Alta S.C.A.D.); *Riddle* v. *The Queen*, [1980] 1 S.C.R. 380 at 398. But see *Clement* v. *The Queen* (1955), 22 C.R. 290 (Que. Q.B.).

RECOMMENDATION

3. "Post-charge time-limits" should govern the period between the moment of charge and the commencement of trial.

4. For the purpose of determining whether a post-charge time-limit has elapsed

(a) a person is charged as of the issuance of process, the laying or preferring of a charge or the arrest of the person without warrant; and

(b) a trial commences when the accused is given in charge to the jury or, in a non-jury case, when evidence is heard.

3. The Length of Limitation Periods

Statutory post-charge time-limits could be stated in a very general fashion, to provide maximum flexibility. However, too much flexibility breeds uncertainty. The creation of limits not significantly more specific than in paragraph 11(*b*) of the *Charter* would amount to a failure by Parliament to breathe meaning into the broad and general words of the *Charter*. Parliament would have missed the opportunity to supplement the *Charter* with clear, accessible legislative provisions.

Fixed periods, which cannot be relaxed even where compelling justification exists, would be equally unacceptable.[167] Different cases necessarily take different times, depending on the type of crime involved, the necessity for pre-trial motions and so forth. For this reason, we would favour a middle ground that combines the virtues of flexibility and certainty in a meaningful way. Accordingly, we recommend the statutory implementation of specific but presumptive time-limits on post-charge, pre-trial delay. By "presumptive" we mean that the time-limits should be extendible, but only in limited and predefined circumstances.

The need for reasonable flexibility in the time-limits is seen in recent *Charter* cases concerning trial within a reasonable time. In *Askov*, Mr. Justice Cory indicated that, for purpose of that case, "delay in a range of some six to eight months between committal and trial might be deemed to be the outside limit of what is reasonable."[168] However, although the Supreme Court balanced relevant factors in deciding that a violation of the *Charter* had occurred in the *Askov* case, many later cases have merely paid "lip service. . . to the required balancing of the four factors" and the

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167. As regards the dangers of fixed and inflexible statutory post-charge time-limits, see A.W. Mewett, "Timely Trials" (1982-83) 25 C.L.Q. 401 at 402-03. See also Simon Shetreet, "Time Standards for Justice" (1979) 5 Dalhousie L.J. 729 at 731-36. See also New South Wales Law Reform Commission, *Criminal Procedure: Procedure from Charge to Trial: Specific Problems and Proposals*, Discussion Paper 14, vols. 1-2 (Sydney: The Commission, 1987) vol. 1 at 76, 83-84 and 88.

168. *Supra*, note 17 at 1240.

> six to eight months referred to in *Askov* is then given the force of a judicially developed limitation period. This ... reduces the concept of reasonableness in s. 11(*b*) to a simplistic computation of time.[169]

The result has been that a judicial stay — a remedy intended for use "only in the 'clearest of cases' "[170] — was granted in Ontario in approximately 35,000 criminal cases in a six-month period.[171]

Mr. Justice Lamer noted in the *Mills* case that "when judges assess the situation in individual cases, they will be measuring the delays against some norm each judge considers to be *prima facie* the tolerable limit for the ordinary, average cases," in order to fix the "approximate point at which the courts may properly look to the Crown to justify additional delay."[172] Later Supreme Court decisions have made similar observations: in *R.* v. *Smith,*[173] for example, the court stated that "[i]t may be that a *de facto* shift of the burden of proof occurs in the minds of individual judges in the overall assessment of reasonableness."[174] Rather than having each judge individually set a length of delay beyond which an explanation seems called for, we propose the setting of a uniform period.

The length of the limitation period should in part depend on the nature of the crime involved. Less serious crimes can generally be brought to trial in less time than those that are more serious. Equally, as the United States Supreme Court noted in *Barker v. Wingo,* "the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge."[175] The more serious crimes command a greater public interest and generally demand denunciation through a public trial. The public would be especially disturbed if an accused charged with a serious offence were permitted to rely on a brief limitation period, either as a salvation or as a means of gaining some substantial advantage.

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169. *R.* v. *Bennett* (1991), 3 O.R. (3d) 193 at 208 (C.A.), Arbour J.

170. *R.* v. *Keyowski,* [1988] 1 S.C.R. 657.

171. *Bennett, supra,* note 169 at 205.

172. *Supra,* note 2 at 942-43. His Lordship continued, at 943:

> Such a period, of course, is, I should repeat, no more than a reference point. It may well be that a balancing of the four criteria of reasonableness will lead to a finding of a violation for lesser periods of delay. Conversely, greater periods of delay may well be held to be reasonable depending upon, once again, an assessment and a weighing of the criteria. What does happen, and that is a reality that must be acknowledged, is that there comes a time when the judge turns from the applicant to the Crown to be told what is exceptional in the case.
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> Lamer J. was dissenting in the result in this case.

173. [1989] 2 S.C.R. 1120.

174. *Ibid.* at 1132, citing *Conway, supra,* note 16 at 1675.

175. 407 U.S. 514 at 531 (1972).

Setting the length of the presumptive limitation period is not an easy task. There would be little value in setting too generous a time-limit. If, for example, we were to set a limit no shorter than the time it currently takes to bring 90 per cent of cases to trial in any jurisdiction, then we would simply be legitimizing inefficiency. Legislative provisions that merely approve the present pace of criminal cases would not speed up the justice system. Indeed, it is difficult to see any reason to create such limitation periods: they would avoid, not address, the problem. At the same time, limitation periods must not be so stringent as to be unrealistic. If the standard is such that the justice system cannot reasonably hope to deal with even the average case in the time allowed, then the limitation periods would act against the public interest in the efficient prosecution of crime.

Accordingly, it must be borne in mind that the time-limits we propose are not inflexible. First, we will make provision in circumstances defined below for a judge to depart from the limits in certain circumstances. In addition, we will be proposing ways, in both the long and short term, for the limitation periods themselves to be changed.

For less serious crimes (summary conviction offences or those punishable under our proposed new classification scheme by imprisonment for two years or less), we propose a time-limit of six months. For more serious crimes, we propose a time-limit of one year where the accused has elected a preliminary inquiry and six months where the accused has not. The period applicable to hybrid offences, if they are retained (our proposed classification scheme would abolish them)[176] will depend on the Crown's election, which should be made at or before the time at which a date is fixed for trial.

The above time-limits are similar to those that we recommended in Report 9, *Criminal Procedure — Part I: Miscellaneous Amendments*.[177] In that report, we proposed that an accused who has not been brought to trial within either 180 days (in the case of summary conviction offences) or one year (in the case of indictable offences) should be entitled to apply for a discharge.[178] Our research in relation to that report confirmed that those limitation periods were workable and would not place the law beyond the capacities of its principal participants.

We believe that the passage of time has not affected our conclusion in Report 9, and that the time-limits we proposed are still workable. Surveys of chief justices and court officials across the country in 1982 and 1984 found that the courts generally expected to be able to meet similar deadlines.[179] No directly applicable national statistics are

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176. *Classification of Offences, supra,* note 31, rec. 31 at 33.

177. LRC, *Criminal Procedure — Part I: Miscellaneous Amendments,* Report 9 (Ottawa: Supply and Services Canada, 1978).

178. *Ibid.* at 25.

179. Baar (1982), and Baar (1984), *supra,* note 37. The limitation periods in question, from a proposed *Criminal Code* amendment, would have required preliminary inquiries or trials in provincial courts to take place within six months after first appearance, and trials in superior court to take place within six months after

available: however, a recent study by Carl Baar of courts in New Brunswick, Ontario and British Columbia provides figures which cast some light on our proposals.[180]

Since our proposed limitation period is presumptive, it need not be one that every case will meet. Rather, it should be aimed toward the typical or average case: in a typical case, the possibility of extra time would exist. The best indication of the time required by an average case, we suggest, is the median handling time — the time within which 50 per cent of cases are disposed of.

TABLE 1

Median Total Time in Criminal Cases Disposed of in Upper Court — Locations in the United States, Canada and Australia

Location	Median (in days)
Portland, Oregon	55
Detroit Recorders Court, Michigan	58
Dayton, Ohio	61
San Diego, California	77
Phoenix, Arizona	78
New Orleans, Louisiana	83
Oakland, California	87
Minneapolis, Minnesota	88
Wichita, Kansas	115
Cleveland, Ohio	121
Providence, Rhode Island	122
Miami, Florida	123
Wayne County, Michigan	133
Pittsburgh, Pennsylvania	149
New Brunswick (Q.B.)	**152**
Jersey City, New Jersey	163
Vancouver, British Columbia (Co. Ct)	**224**
London, Ontario (Dist. Ct)	**239**
New Westminster, British Columbia (Co. Ct)	**290**
Newark, New Jersey	300
Ottawa, Ontario (Dist. Ct)	**315**
Toronto, Ontario (Dist. Ct)	**327**
St. Catharines, Ontario (Dist. Ct)	**349**
Victoria, Australia	430
Brampton, Ontario (Dist. Ct)	**607**

NOTE: This table, prepared by Carl Baar, incorporates Canadian and Australian data into a table of American statistics published in *Changing Times, supra,* note 49 at (see Baar, *supra,* note 43 at 11).

committal at a preliminary inquiry. With only a few exceptions, the courts felt that they were able to meet those deadlines. Any difficulties that were expected would have been in superior courts rather than in provincial courts.

180. Baar, *supra,* note 43. The study examined ten courts — three in New Brunswick, five in Ontario and two in British Columbia, based on cases filed in those courts in 1987.

Baar's study gathered data on the time taken for indictable offences to be disposed of in superior courts. On the ten courts studied, all but one had a median time for handling cases of less than one year.[181] Further, the figures in table 1 show the time taken to *dispose of indictable* cases in upper court. Our limitation periods would cover only the period to commencement of trial, the median time for which will be less.[182] On that basis, then, one year appears to be longer than necessary as a limitation period.[183]

There are other indications that one year (and by implication, six months in summary conviction cases) may be excessive as a limitation period. *Preliminary Inquiry Statistics,* for example, found a median elapsed time from first appearance to preliminary of sixty-one days, and from committal at the preliminary to plea of eighty-two days.[184] Again, these figures are not directly applicable, since our limitation periods would begin sooner than first appearance, and in many cases would end later than the time of plea. Nonetheless, those figures suggest that much less time than six months or one year is required.

We would also note that time-limit legislation and case-processing time standards have become commonplace in many jurisdictions in the United States since the early 1970s. Generally speaking, those limitation periods are much stricter than those we propose. The federal *Speedy Trial Act of 1974,*[185] for example, only allows for 30 days from arrest to indictment, and 70 days from indictment to trial.[186] In Kansas, time standards call for all felony cases to be disposed of within 120 days, and in New Jersey, the state Supreme Court set a goal of 135 days from arrest for the disposition of all

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181. See table 1, *supra* at 73. The only Canadian court failing to settle cases within one year is the Brampton District Court in Ontario (the court considered in *Askov, supra,* note 17). That court is markedly slower than any other in the sample: its median time for settling cases is 607 days, more than double that in any of the New Brunswick or British Columbia courts, and well beyond that of the next slowest court, the St. Catharines District Court with a median time of 349 days. Note that only eight Canadian courts are shown in table 1, since the three courts in New Brunswick are represented by a single figure for the province.

182. Although not, in all likelihood, by a very great margin: as noted earlier, *Preliminary Inquiry in Canada, supra,* note 116, found that 80.2% of all cases had an elapsed time for trial of only one day — see *ibid.,* table 4.6 at 49.

183. Note as well the decision in *Askov, supra,* note 17 at 1240, which held that, at least as far as the Peel District Court is concerned: "delay in a range of some six to eight months between committal and trial might be deemed to be the outside limit of what is reasonable." This period, of course, does not take account of the time between commencement of charges and committal for trial.

184. *Supra,* note 116, tables 4.9 and 4.10 at 53-54. The median elapsed time for the preliminary itself was only one day — see *ibid.,* table 4.2 at 43.

185. 18 U.S.C. ss 3161-3174.

186. *Ibid.* Note that these time-limits were phased in. When the Act first came into effect on July 1, 1975, limitation periods of 60 days from arrest to indictment 10 days from indictment to arraignment, and 180 days from arraignment to commencement of trial were allowed. These limits were gradually reduced, and became fully effective in July 1981. There are grounds in the Act for excluding some time from consideration.

criminal cases.[187] We do not suggest that the situation in Canada is perfectly comparable to that in the United States.[188] Nonetheless, these examples do show that tighter limitation periods than we propose should be feasible.[189]

To allow for the tightening of the limitation periods, we propose two things. First, funds should be made available for a national study to determine the effect of the limitation periods once they are imposed, and the ability of courts to comply with them. The proposed time-limits are longer than we believe strictly necessary: it should be possible in many courts for shorter limitation periods to be imposed even at present. Since we also propose measures that would allow cases to be dealt with more expeditiously than at present, it is doubly true that some shorter limitation period is desirable. The study would determine what the appropriate period should be.[190]

Indeed, we suggest that the process of reviewing the time-limits could be an ongoing task. We have already proposed that, in establishing case flow management, national compilations should be made of the local figures each court will keep. It would be a relatively simple addition to that task, we suggest, for the limitation periods periodically to be reviewed against the empirical data gathered, to determine whether they remain realistic or can be made stricter. This step would ensure the regular adjustment of the limitation periods across the country. Such a gradual reduction of time-limits would allow

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187. *Changing Times, supra,* note 49 at 171, 181.

188. Though note that Lamer J., dissenting in *Mills, supra,* note 2 at 938-39, cites a number of statutes from various American jurisdictions setting out limitation periods much shorter than those we propose here.

189. Christine Waler, "Speedy Trial Legislation: A Critical Appraisal" attached as an appendix in Baar (1982), *supra,* note 37 at 26, notes that:

> One year appears to be an unprecedented length of time in a speedy trial statute. In the United States, time limits from arrest to trial range from seventy-five days in California to six months in Pennsylvania. In Israel, Criminal Procedure Law calls for a time limit of ninety days from arrest to filing of a charge, and a further sixty days from the filing of the charge to the commencement of trial. In addition, Israel provides a maximum of one year from arrest to judgment. In Scotland,
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> 'where an accused has been incarcerated for eighty days, and an indictment is served upon him, and he is detained in custody after the expiry of that period of eighty days, then, unless he is brought to trial within one hundred and ten days of the date of his being committed till liberated in due course of law, he shall forthwith be set at liberty and declared forever free from all questions of process for the crime with which he was charged.'

190. Note, in this regard, the procedure followed in Great Britain, in connection with time-limits that came into effect in some parts of that country in April 1987. Home office, *Pre-Trial Delay: The Implications of Time Limits,* Research Study 110 (London: HMSO, 1989) at 1, reports the results of field trials to determine the ability of various courts to comply with statutory limitation periods: the trials "were designed to examine the practical implications of time limits for the parties and the courts and to assist in identifying deadlines which were realistic yet tight enough to act as a discipline".

> We considered but rejected the possibility of providing limitation periods that would automatically be reduced after a certain period, as the U.S. *Speedy Trial Act of 1974,* had done — see *supra,* note 185. We felt that a greater empirical basis was necessary for making the determination. In the United States, in fact, it became necessary to delay full implementation of the final limitation periods in the Act.

for a more orderly response than that which followed the Supreme Court of Canada decision in *Askov*.[191]

Secondly, we propose that each province should have the immediate option of imposing shorter time-limits than those in our proposed Code of Criminal Procedure. It is apparent from table 1, for example, that the median time for disposing of cases in New Brunswick is considerably shorter than the median time in any of the Ontario or British Columbia courts. It would be desirable in that province, therefore, and in any other province in a similar position, to allow immediately for time-limits that more accurately reflect reality. It would *not* be open to provinces to introduce limitation periods less strict than those in the Code of Criminal Procedure. Allowing for different limitation periods in different provinces, provided that a minimum standard is maintained, would not violate the Charter.[192] Further, this step would support the caseflow-management techniques each court should adopt, in particular internal time standards.

As a separate issue, we feel that special provision should be made for persons who are detained in custody pending trial. Although unnecessary delay causes prejudice to any accused, the prejudice is particularly apparent and acute when an accused's liberty has been removed. We have already made provision in *Working Paper 57, Compelling Appearance, Interim Release and Pre-trial Detention*,[193] concerning conditions of pre-trial custody and applications to expedite proceedings; in addition, we would impose stricter time-limits for commencing proceedings in respect of accused persons who have been detained. This step would attach greater priority to bringing those trials on quickly.

For the moment, we propose that, in the case of accused persons who are detained in custody, each of the limitation periods should be halved. However, these limitations periods should also be subject to the same scrutiny and provincial variation as the overall limits, in the expectation that they can be shortened. The *Criminal Code*, for example, requires in section 525 that the continued detention of an accused be reviewed after ninety days in the case of an accused charged with an indictable offence (other than one mentioned in section 469), and after thirty days in the case of a summary conviction offence. It may be that these limits are appropriate goals at which to aim.[194]

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191. *Supra*, note 17.

192. Paragraph 11(*b*) of the *Charter* would not be violated, since the six-month \ one-year limits we propose are within the bounds of the *Charter* guarantee. There would also be no violation of the s. 15 equality right guarantee: "unequal treatment which stems solely from the exercise, by provincial legislators, of their legitimate jurisdictional powers cannot be the subject of a s. 15(1) challenge on the basis only that it creates distinctions based upon province of residence." (*R. v. S. (S.)*, [1990] 2 S.C.R. 254 at 288).

193. *Supra*, note 162 — see recs 32, 55-63 at 70, 88-94.

194. See Lamer J., dissenting in *Mills*, *supra*, note 2 at 938, where he relies on this limitation period among others to show that the "criminal justice system should be capable of functioning adequately within relatively narrow periods of delay." Shetreet, *supra*, note 5 at 55, relies on this section of the *Code* to suggest that an "innovative approach" to encourage expedition on the part of the prosecution would be "[a] judicial policy allowing for release of those who are kept in custody without trial because of undue delay".

RECOMMENDATIONS

5. (1) The trial of an accused charged with a summary conviction offence (or, under our proposed new classification scheme, a crime punishable by a maximum of two years' or less imprisonment) should start within six months; if the accused is detained in custody pending trial, the time-limit should be three months.

(2) The trial of an accused charged with an indictable offence (or, under our proposed new classification scheme, a crime punishable by a maximum of more than two years' imprisonment) should start within one year where the accused has elected a preliminary inquiry, and six months where the accused has not; if the accused is detained in custody pending trial, the time-limit for the trial should be six months where the accused has elected a preliminary inquiry, and three months where the accused has not.

6. Post-charge time-limits should be presumptive, but courts should be permitted, in individual cases, to exceed the time-limits only in the circumstances set out in recommendation 8(1).

7. (1) The time-limits should be the subject of ongoing empirical study, and should be adjusted periodically to such periods as that study indicates are appropriate.

(2) Provinces should have the authority, at any time, to reduce the time-limits for the commencement of a trial within their jurisdiction.

4. The Mechanics of Limitation Periods

The mechanism we propose for enforcement of the time-limits is quite straightforward, and complements the caseflow-management techniques we have suggested. We recommend that the judge should be required to set the case for trial within the time-limit unless certain specified circumstances justify setting it outside that period.

By placing responsibility for complying with the time-limit on the judge, we hope to accomplish two main things. First, we believe that this step would reinforce the judge's role as the person with primary responsibility for management of the caseflow, as well as providing a more obvious authority for the judge to require certain dates. Secondly, because responsibility for enforcing the time-limits is not placed on counsel, we believe that the scheme has a greater likelihood of success. In many cases, the accused may be perfectly happy with delay, making it unlikely that defence counsel would seek to enforce limitation periods. Because of administrative pressures, Crown counsel may be equally unlikely to take any extra steps to ensure that the matter comes to trial promptly. The judge, however, is charged with the responsibility to protect both the public interest and the interest of the accused, and is also responsible for taking charge of the calendar. As

a result, we feel that the judge is the most appropriate person to ensure compliance with the time-limits.

It is necessary to define with some precision the reasons that will justify setting a case for trial outside the time-limit. The list must be specific and exhaustive: any general, non-specific ground (for example "where the interests of justice require") could easily undermine the limitation periods.

We suggest that the reasons that would justify setting a case outside the time-limits fall into two main categories: requirements of the Crown and requirements or behaviour of the accused. Not everything that might fall under each category would justify delay. Nor would the existence of any of these factors automatically mean that the case would be set outside the time-limit: each factor is merely one that the judge should consider in determining whether an unusual amount of time is required.

First, the requirements of the Crown should justify allowing additional time for commencement of the prosecution. There may be circumstances beyond the control of the prosecutor that prevent important evidence from being called — a witness may be hospitalized and unable to testify within the limitation period, for example. There may be unusual but justifiable delay between the time a warrant is issued and the time the accused is arrested — for example, where shortly after a warrant is issued it becomes apparent that continued observation of the accused might lead to the arrest of co-conspirators. The facts of a case may be so complex as to make it unreasonable to expect the Crown to be prepared within the ordinary limitation period.[195] In such complex cases, the preliminary inquiry may take an extraordinary length of time. In any of these unusual situations, we suggest it is reasonable to allow a case to be set for trial outside the limitation period.

In addition, there may be a change in circumstances or discovery of facts subsequent to the laying of charges reasonably requiring that new charges for the same or substantially the same crime be laid. In these circumstances as well, we suggest that additional time should be allowed. This point, which ties in with recommendations we have made elsewhere about temporarily discontinuing charges, requires some explanation.

We proposed in Working Paper 62, *Controlling Criminal Prosecutions: The Attorney General and the Crown Prosecutor,*[196] that the power of the Crown prosecutor to stay or withdraw charges should be replaced by the power to permanently or temporarily discontinue charges. Discussion of the time-limit for commencing new proceedings after a temporary discontinuance was postponed to this working paper.[197]

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195. Recall, in the discussion of caseflow-management techniques, the suggestion that complex cases should be removed from the system so that ordinary cases are not backlogged behind them: see above at 23.

196. *Supra,* note 35, recs 34-45 at 102-114.

197. *Ibid.,* rec. 43 at 111.

In fact, we do not propose to make any special provision allowing a greater period of time when a temporary discontinuance has been entered. Rather, we believe that the ordinary rules for allowing a case to be set for trial outside the limitation periods are sufficient.

If the Crown temporarily discontinues charges, there will normally come a time when proceedings against the accused begin again.[198] When this occurs, the proceedings commence from the start — if the intention of the Crown were merely to introduce a long pause into the proceedings, an adjournment would be the proper mechanism. In general, following a temporary discontinuance the trial must still commence within the time-limit that began from the original laying of charges: the temporary discontinuance does not automatically allow the case to be set outside that limit.

However, where the factors that caused the Crown to enter the temporary discontinuance are reasonable, additional time should be allowed. One such factor has been suggested already, namely, where circumstances beyond the control of the Crown prevent the calling of important evidence. The other major reason that might justify more time after a temporary discontinuance, we suggest, is the one offered here — that a change in circumstances or discovery of facts subsequent to the laying of charges reasonably requires the laying of new charges for the same or substantially the same crime.[199] In either of these cases, a judge could choose to set the case for trial outside the limitation period. In this way, the temporary discontinuance would not automatically gain the prosecutor additional time — the Crown would have the right not to continue with one set of charges, but would only gain additional time if it could justify the delay.[200]

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198. If they do not, of course, then the accused has no need to be concerned about the temporary discontinuance; in accordance with rec. 37(2) in *Controlling Criminal Prosecutions, ibid.* at 102, it will become permanent on the expiry of the limitation periods set out in rec. 5, above at 42.

199. Some explanation should be offered as to why this factor is limited to cases where charges for "the same or substantially the same crime" are laid. If the later charges are for the same crime (*i.e.*, a theft charge is replaced by another theft charge, concerning exactly the same incident), then the limitation period runs from the time that the first charge was laid. If the later charges are for a different crime, a question arises for the court: Is this new charge for "substantially the same crime" as the previous charge? This question should be answered according to the criteria set out in LRC, *Double Jeopardy, Pleas and Verdicts*, Working Paper 63 (Ottawa: The Commission, 1991), and amounts to this: If the previous charges had been pursued to judgment, would the accused be able to meet this later charge with a plea of *autrefois acquit* or *autrefois convict?* If the answer is yes, then the later charge is for substantially the same crime as the earlier charge, and the situation should be treated as if the same charge had been laid again — the limitation period would commence from the time of the earlier charge, and the trial could only be set outside the limitation period if one of the justifications in this recommendation exists. However, if the answer is no, then the previous charge is simply not relevant — a new and different charge has been laid. In this case, it should make no difference that any previous charges were laid, whether temporarily discontinued or not — the limitation period would run from the time the new charge is laid.

200. Note that a decision to refuse to allow the case to be set outside the limitation period is not necessarily equivalent to terminating proceedings or entering an acquittal. The Crown is merely required to proceed within the ordinary limitation period, which may, in the circumstances, mean proceeding without some piece of evidence.

The other major factor we suggest a judge should consider in setting a trial date is the requirements and behaviour of the accused. We do not propose to circumscribe this category as narrowly as the previous one. Rather, we simply recommend that delay requested or caused by the accused should be relevant. If the judge grants an accused's request for an adjournment, for example, then it is reasonable to allow the trial to occur outside the limitation period. Recall, however, that we have stressed the importance to proper control of the docket of a strict adjournment policy: we anticipate that judges would not routinely grant adjournments requested by either side.[201]

Other behaviour of the accused could justify a departure from the limitation period. An accused might evade service or abscond after service, for example. Additional delay would not always be caused by such action — the accused might be apprehended before the next scheduled court appearance — but where delay is caused, it is no longer reasonable to expect that the case can be dealt with in the ordinary time.[202] An accused might also bring a series of pre-trial motions. Again, this action would not necessarily result in delay — in many cases, there would be no reason that a trial date could not be set before the pre-trial motions are heard, and no reason that the pre-trial motions should prevent the Crown or defence from being prepared for trial. In either case, nonetheless, the presence of such motions would be a factor which the judge should consider.[203]

Note that the question of waiver by the accused would not arise under this factor. Waiver is acquiescence by the accused to a delay caused by someone or something else: it is not caused or requested by the accused. There are sound reasons why waiver should not be a consideration. Recall that American research into caseflow management suggests that a scheme allowing for waiver by the accused is less likely to succeed.[204] It is

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201. Although a strict adjournment policy is crucial to the success of caseflow management, it would be inappropriate to attach any legislative limits to the grounds on which an accused may seek, or a judge may grant, an adjournment. Caseflow management must flow from the court itself, in accordance with the needs of that court's caseload. Reduction of the policy to a set of externally imposed rules is likely only to lessen the effectiveness of the system.

202. The same may be true if an accused has left the jurisdiction for legitimate reasons, unaware of pending charges. The police may have no notion of the accused's location, and so be unable to serve or arrest the person. In other cases, the police may know the accused's whereabouts, but decide that it would be an inappropriate use of the resources to attempt to apprehend the accused on the other side of the country. In either case, the police might issue a warrant for the arrest of the accused (so that other police forces would be aware, through the Police Computer CPIC (Canadian Police Information Centre), that that person is wanted) but take no other active steps to seek the accused. We believe that this course of action can be reasonable. Further, we believe the allocation of resources for the investigation of crime to be a matter properly within the discretion of police forces, a matter with which courts should not normally interfere. Not to allow the possibility of setting these cases outside the limitation period would virtually be to impose time-limits for the *investigation* of all crimes.

203. A judge might also consider whether the motions were frivolous, or justified and indeed successful.

204. *Justice Delayed, supra*, note 47. That study bound no correlation between speedy trial standards and case-processing times, attributing the lack of correlation to the number of cases in which the standards were held not to apply. The study concluded, at 49, that:

> It appears that a speedy-trial rule — regardless of the time limits specified —need not affect criminal case disposition time at all. But a rule or standard with 'teeth', one that carries operational

understandable that this should be so. Our scheme for providing trial within a reasonable time is not intended merely to protect the rights of the accused: it is intended as well to protect the public interest in having the criminal justice system work in a timely manner, even where the accused might prefer delay. To allow the accused to waive those time-limits would be to defeat the purposes of the scheme. The accused should not be able to waive benefits that are intended for the victim and society as a whole.

In the same vein, an agreement between Crown and defence that a case should be set outside the limitation period is not a justification for delay. Where defence counsel agrees, for example, with the Crown's contention that the recent discovery of new evidence makes additional time necessary, the judge will probably be more inclined to set the case outside the limitation period. However, the judge must be satisfied that the additional time is really justified on an enumerated ground: the mere agreement of counsel is not sufficient.

One or two final observations should be made. First, the requirement to set a trial date within the limitation period is not restricted to any one time. The limitation period should apply whether the trial date is first being set, an adjournment is being granted or a temporary discontinuance has been entered. Secondly, once the decision has been made to set a trial outside the limitation period, our scheme provides no restriction as to the period within which the case must be set down. We do not feel it necessary to provide precise guidance on this point. By definition, any case that is set outside the limitation period must be unusual in some way, making it difficult to predict exactly how much additional time is appropriate. Further, assuming that a case is set for a specific date outside the limitation period,[205] we would expect a judge still to have reference to the factors we have set out above in considering any further adjournments. In addition, we see this statutory scheme as an adjunct to the caseflow management we have also proposed. Even having decided to set a case outside the time-limit, a judge would still be concerned to have it come to trial as quickly as possible. In the circumstances, we place some reliance on the ordinary incentive judges will have not to allow their dockets to become backlogged. Finally, of course, the *Charter* can provide a remedy, should the delay become so excessive as to violate the rights of the accused.

RECOMMENDATION

8. (1) A judge shall not set a trial date outside the time-limit, unless to do so is appropriate owing to

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consequences if violated and *that cannot be easily waived by the defense*, may indeed affect the disposition of criminal cases [emphasis added].

205. We have not recommended that a judge must set a case for a specific date when it cannot be set within the limitation period: although this step is desirable, it is a matter appropriate to caseflow management, not legislation.

(a) the requirements of the Crown, based on

(i) circumstances beyond the control of the prosecutor that prevent the prosecutor from calling important evidence,

(ii) unusual but justifiable delay in service of an information or execution of an arrest warrant,

(iii) unusual complexity in the facts of the offence, causing the prosecutor to need additional time to prepare for trial,

(iv) the necessary length of the preliminary inquiry, or

(v) a change in circumstances or discovery of facts subsequent to the laying of charges reasonably requiring that the prosecutor have further time to lay new charges for the same or substantially the same crime and prepare for trial; or

(b) delay requested or caused by the accused.

(2) When setting a trial date outside the time-limit, the judge shall note on the record the reasons justifying that action.

5. Review of Decisions

The decision of the court to set a case for trial outside the limitation period, or not to do so, should be reviewable at the instance of either the Crown or the accused. However, the grounds for review and the particular procedures to be followed in a review application are not addressed here. These matters will be discussed at length, in the context of similar applications, in our forthcoming working paper, "Extraordinary Remedies."

It should, of course, be noted that particular difficulties can arise in the context of reviewing these decisions. If the judge does not set a case outside the limitation period following an application based on unusual complexity, for example, then the Crown is already operating on a very restricted schedule: it may, practically speaking, be very difficult in the circumstances to appeal that decision. By the same token, an accused who appeals a decision setting a case outside the limitation period may be met with the later claim that the appeal itself (particularly if unsuccessful) has caused further delay.

RECOMMENDATION

9. The decision of a court regarding whether to set a trial date outside the time-limit should be reviewable, and should be governed by the procedures regarding judicial review set out in our forthcoming working paper, "Extraordinary Remedies."

6. Failure to Meet the Limitation Periods

The question arises of the consequences flowing from a failure to commence a trial within the time-limit. In our opinion, a termination order[206] should be issued, preventing any continuation of the prosecution. This order would not be issued, of course, if a judge has decided in accordance with recommendation 8 to set the trial date outside the time-limit. Further, the termination order should not be issued until the limitation period has actually passed.

Charter litigation holds that a stay is the appropriate remedy in the event of a violation of paragraph 11(*b*).[207] That fact supports our proposal, although a failure to meet the limitation periods we set out would not always be a *Charter* violation. Further, courts and prosecutors' offices have the greatest ability to control the speed with which individual cases move. Therefore, the impetus to move a case along expeditiously must be given to those actors.[208] This remains true, even though the limitation periods are not exclusively for the benefit of the accused.[209]

Accordingly, we recommend that, if the limitation period passes without proceedings having commenced or a judge having decided that a later date is appropriate, then on application a termination order should be issued. The order could be issued on the judge's own motion or on application by the defence.

RECOMMENDATION

10. When the time-limit expires without either proceedings having commenced or the matter having been set for trial outside that time-limit in accordance with recommendation 8, a judge shall on application or on the judge's own motion issue an order terminating the proceedings.

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206. The termination order is a new order that we propose, equivalent to a judicial stay: see our forthcoming working paper, "Remedies in Criminal Proceedings."

207. See *Mills, supra*, note 2, judgments of Lamer and Wilson JJ.

208. Recall the conclusion in *Justice Delayed, supra*, note 47 at 49, that speedy trial standards could not have an effect on case processing time unless they had "teeth" and carried "operational consequences if violated": see *supra*, note 204.

209. Baar (1982), *supra*, note 37 at 63, suggests that the protection of the public interest in having trials within a reasonable time requires a monitoring mechanism to "provide the basis for resource allocation decisions and management plans, as well as learning and competition among participants in the criminal justice system", but that "[r]ealistically... the monitoring mechanism is not as likely to develop without the prodding of a Code section."

IV. Both the Administrative and Legislative Approaches Are Necessary

A legitimate question is whether delay must be attacked both administratively and legislatively: perhaps it is only necessary to approach the problem in one way. Particularly relevant to this question are possible objections to adopting statutory limitation periods at all.

For example, there are questions as to whether statutory limitation periods actually have any effect on delay. *Justice Delayed* found that "the pace of criminal litigation is not linked in any direct way to the duration of a court's speedy-trial standards."[210] This finding, supported in the follow-up study, *Changing Times*,[211] suggests that there might be no value in introducing time-limit legislation.

Further, it may be objected that statutory limitation periods would impose obligations disproportionate to the benefits gained. There will be some inconvenience and expense in making and considering applications to set matters outside the limitation periods. If the limitation periods are lenient enough that courts have no difficulty reaching them, then very little is accomplished in exchange for all the extra work. If, on the other hand, they are so strict that they cannot be met, cases would be dismissed for reasons unrelated to their merits.

Finally, some commentators have objected to statutory limitation periods on the ground that maximums tend to turn into minimums.[212] It is argued that there is only a small mental adjustment from feeling that a case has to be commenced within six months, to feeling that the case does not have to be commenced before six months. Accordingly, it is argued, those courts that presently decide the average case in less than the proposed limitation period would be more likely to slow down than to speed up.[213]

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210. *Supra*, note 47 at 48. The study does concede, however, at 49, that "there is little relationship between the number of days in a courts's speedy-trial provision and its felony processing time does not necessarily mean that speedy-trial provisions are without effect."

211. *Supra*, note 49 at 63: "Neither the speedy trial laws nor the time standards are clearly correlated with speedy felony case processing times." The study continues, however, to note that "[g]iven the fact that time standards are still in a very early stage of development in most jurisdictions, it may simply be too early to tell what effect they will have on the pace of litigation." Subsequent studies, of course, show the value of time standards.

212. See, *e.g.*, Mewett, *supra*, note 167.

213. It has also been suggested that setting limits could have a detrimental effect on the ability of the court to negotiate for resources: if a court can handle the majority of its cases in less than the proposed time-limits, it may be argued that its resources are already adequate. It must be recognized, however, that this argument can cut both ways: if a court has taken all measures that could be expected to reduce delay but is still backlogged, its bargaining position for more resources is considerably enhanced. Note the observation by Howland, C.J.O. (as he then was), that delay-reduction pilot projects in his province "have proved to be of positive assistance in persuading the Attorney General of the need to make additional appointments and not merely to fill vacancies." (Howland *et al.*, *supra*, note 144 at 7). See also *Askov*, *supra*, note 17 at 1237, where the Supreme Court of Canada relied on the fact that delay in the Peel District Court had been stabilized, but not reduced, by a delay-reduction program to conclude that more resources were required.

To a certain extent, these arguments are not difficult to address. We are confident, for example, that the statutory scheme we propose would be more effective than those in the United States. We say this because we have had the opportunity to take notice of the factors that seem to undermine time-limit legislation in the United States, and to avoid introducing those same flaws in our recommendations here.

The United States federal *Speedy Trial Act of 1974*, for example, contains many exceptions to its provisions.[214] That Act allows dismissal of charges "without prejudice" when the time-limit expires, in which case new charges for the same offence may be laid. In addition, the time-limit may be extended on the very broad grounds that "the ends of justice served by taking such action outweigh the best interest of the public and defendant in a speedy trial."[215] The Act also allows prosecutors to lay new charges against an accused and to start the clock running again.[216] It has been suggested that "the act's loopholes are being exploited to provide the appearance of compliance without any substantial change."[217]

Similarly, it has been noted that "state courts have almost uniformly been liberal in granting waivers, and the result has been, in effect, to nullify state time-limit requirements",[218] a suggestion supported in *Justice Delayed*.[219]

Given the experience in the United States to draw on, it is possible to avoid certain errors. Accordingly, we have limited and specified the grounds on which cases may be set outside the limitation period, avoiding any catch-all ground. We have not allowed recommencement after dismissal. We have not allowed withdrawal and re-laying of charges to create an automatic extension. We have not allowed waiver to extend the limitation period.

We believe, therefore, that it is possible to learn from the time-limit legislation of other jurisdictions, and enact a scheme of limitation periods that would have a real impact on delay.

There is little more we can say about the political question of resource allocation. We have outlined earlier the reasons why we believe trial within a reasonable time to be an important goal, protecting both individual and societal rights. The decision in *Askov*, refusing to allow lack of resources to justify a breach of *Charter* s. 11(*b*), sets a minimum standard for the resources that must be allocated to the task. Ultimately, however, provided that the minimum guarantee in the *Charter* is met, it is for governments to decide where the protection of that right ranks in comparison to the other interests of society. See, on this issue, Stephen G. Coughlan, "*R. v. Askov* — A Bold Step Not Boldly Taken" (1990-91) 33 C.L.Q. 247.

214. *Supra*, note 185.

215. *Ibid.* s. 3161(h)(8)(A).

216. *Ibid.* s. 3161(h)(B)(6).

217. Malcolm M. Feeley, *Court Reform on Trial* (New York: Basic Books, 1983) at 173.

218. *Ibid.* at 169.

219. *Supra*, note 47 at 78-79.

The other objections can also be met. In part, we can address the suggested problems by monitoring the limitation periods: we expect that they are too lenient now and can be reduced. This process would see to it that the limits are set at a level that results in real benefits. It would also help to guarantee that courts do not, in practice, convert the maximums into minimums.

Further, evidence suggests that many courts already attempt to deal with cases expeditiously, and succeed in doing so. Some research indicates, for example, that New Brunswick manages to deal with 50 per cent of its criminal cases within 152 days, and 90 per cent within 270.5 days.[220] These handling times have been accomplished, not because of a possible sanction for slower handling, but, we suggest, out of a concern for providing justice within a reasonable time. There is no reason to suppose that this concern would be diminished if statutory limitation periods are added to the *Code*.[221] On the contrary, we believe that limits would enhance that concern. This would particularly be the case, given that we have provided the option for each province to impose stricter limitation periods than we propose, to reflect the reality of that jurisdiction.

At the same time, the limitation periods themselves, it must be acknowledged, would not be directly responsible for bringing about any reduction in delay. Those time-limits would help guarantee that the expeditious handling of cases is encouraged and that any improvement is institutionalized. However, the actual reduction in time would be brought about by some changes in how cases are handled, either through different procedures for elections, the earlier resolution of issues, improved scheduling or some other aspect of caseflow management. It might be argued, therefore, that the limitation periods are not the cause of the reduction, and so are not essential to successful reduction of delay.[222] In that event, are statutory limitation periods required at all? Would administrative measures suffice?

There would be potential advantages to proceeding merely by administrative means. No legislative scheme would be needed, thus making initial implementation simpler. Individual courts could adopt time standards more suited to their own needs, and the fine-tuning of those standards would be easier. Standards set internally by the court would not be viewed as an infringement on the independence of the judiciary; further, self-imposed standards could be set after consultation with other participants in the process, making more likely the commitment of both judges and practitioners.[223] Because no additional benefit from delay would flow to any party, no party would have any additional motive

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220. Baar, *supra*, note 43. These figures are based on cases in the Provincial Court and Queen's Bench in 1987 (Fredericton, Saint John, Moncton) and 1988 (Fredericton, Moncton). Note that these times are to completion of the case, not to commencement.

221. Baar (1984), *supra*, note 37 at 29.

222. See Feeley, *supra*, note 217 at 185, where he notes that "[i]mposing time limits does little to tackle the various underlying causes of delay of all sorts, nor does it do anything substantial to affect the incentives of court officials, a step that appears to be indispensable to devising effective management improvements."

223. Solomon and Somerlot, *supra*, note 19 at 16.

to seek delay. The objection that the time-limits are justified partly on the societal interest in expeditious justice, but that the sanction for non-compliance inures solely to the benefit of the accused, could no longer be made.

However, we are of the opinion that statutory limitation periods ought also to be enacted. We believe that a joint approach would be more successful than a call for administrative measures alone. Because we do not and cannot recommend specific steps, simply proposing "caseflow management" may seem like calling for improvement without offering any real assistance in making those improvements.

Most of the benefits of the administrative approach would still exist even if legislated limitation periods were also imposed. Statutory limits do not interfere with a court's establishing its own time standards, provided those standards are no greater than the statutory limitation period. Indeed, given that the statutory periods would be simple deadlines for the commencement of all trials, there would be advantages to having, in addition, internal court time standards for individual steps in each case, or incremental standards for the commencement of 90, 98 and 100 per cent of all cases. Such standards could be established in consultation with the local bar and other participants in the system, thereby promoting commitment to them on the part of all participants.

Further, an administrative scheme could benefit from the existence of statutory rules. Without a legislative scheme backing up the administrative measures, uniformity and success would be threatened. Different courts would set different time standards: this might create problems of inequality even within a jurisdiction. In addition, self-imposed standards might simply justify the rate at which cases are currently processed.[224] While some courts do operate efficiently and expeditiously now, this is not true of all courts: mere administrative reforms may have the least impact where they are most needed.

In addition, without a statutory requirement one could not be certain that all courts were, in fact, taking action. The success of a caseflow-management program is said to depend on a strong leader within a court: it is clearly not helpful merely to recommend that someone should take on this role. To guarantee that action is taken, a statutory obligation is needed.

Improvements in the United States, for example, even if they are directly attributable to improved caseflow management, might never have been made had it not been for the impetus of federal and state speedy trial laws. It has been suggested that some indirect advantages have flowed from the federal *Speedy Trial Act of 1974*,[225] including that:

> It has also been an important impetus for modernization within the courts themselves; district court clerk's offices have been enlarged; administrative innovations have been

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224. Note the similar observation in Millar and Baar, *supra*, note 66 at 216, that "it is fruitless to urge judges to 'adopt a stiffer adjournment policy.' The invariable answer of judges is that they never grant an adjournment unless it is necessary."

225. *Supra*, note 185.

> adopted; scheduling practices have been tightened up; and grand jury sessions have been increased. New methods for tracking the flow of cases through the courts have been tried. Many courts now have a rudimentary "early warning" system to alert them of approaching time limits in individual cases. The act has also accelerated long-standing plans to institute a computer-based management system in the federal courts.[226]

Analysts have also argued that similar advances in Canada are not likely to be made without statutory incentive.[227]

We believe it necessary to have sanctions against failure to meet a legislated standard, to guarantee uniformity and provide real incentive for improvement. The United States research suggests that the "local legal culture" is the primary determinant of delay. To the extent that any steps can be taken at a national level to influence opinions and expectations, only time-limit legislation can show a commitment to more expeditious handling.

Accordingly, we believe that statutory changes could contribute to reducing delay, and that a system of statutory time-limits should be introduced. As noted earlier, some of the changes we recommend are in other working papers, including a new system for classification of offences, different requirements concerning charge documents, early review of charges by Crown prosecutors, regulation of plea negotiations and early disclosure.[228] Further, we will be recommending in this working paper changes with regard to pre-trial conferences and pre-trial motions, both of which would allow a court to exert earlier control over cases. We also recommend changes to the election and re-election procedure, to prevent the defence from interfering unnecessarily with that control. We are confident that statutory limitation periods are appropriate and desirable as part of an overall system of legislative change and statutory control over the pace of litigation, and as support for the caseflow-management systems that can most readily allow courts to increase the speed with which they handle their caseloads.

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226. Feeley, *supra*, note 217 at 173-74.

227. See, *e.g.*, Baar (1982), *supra*, note 37 at 63, where he suggests that a monitoring mechanism is needed for planning resource allocation and management plans in the court, but that "[r]ealistically . . . the monitoring mechanism is not as likely to develop without the prodding of a Code section." Similarly, in *Delay Reduction as Public Policy: Explaining Canadian-American Differences in the Pace of Criminal Cases* (Prepared for Presentation at the Interim Meeting of the Research Committee on Comparative Judicial Studies, International Political Science Association, London, England, August 21, 1990), Carl Baar notes that criminal case-processing times are routinely much shorter in the United States than in Canada, and considers a number of possible explanations. Among other things, he notes, at 20, that "[s]tatutory or rule-based time limits for criminal cases have been adopted in the United States, but are completely absent in Canada." Comparing the number of cases in each jurisdiction completed within 180 days, he notes, *ibid.*, that "the very existence of the standard may have some effect."

228. See the discussion at 00-00.

V. A Study of the Operation of Criminal Courts

In addition to our recommended statutory and administrative approaches to delay reduction, it would, we believe, be valuable to have a nation-wide study of the operation of criminal courts. Such a study could assist in the implementation of our proposals in several ways.

First, such research could determine the delay currently involved in trying cases. Some information is available,[229] but more complete data would make it possible to assess whether delay-reduction techniques are successful. In addition, this information would be used to adjust our proposed limitation periods. We recommend six-month and one-year time-limits for various types of cases; however, we also note that those limits are generous, and could be reduced both based on the current ability of courts and taking into account improvements due to recommended changes in procedure.[230] To make these adjustments rationally, of course, a standard against which to compare as well as a method of measurement would be necessary. In this respect, the study would be similar to one conducted in Great Britain in connection with that country's implementation of limitation periods.[231]

Secondly, it would be valuable to have information gathered with a specific view toward consideration of delay-reduction techniques. Information that enables one to check for any correlation between the type of calendaring system used or the use of pre-hearing conferences and the total time taken to decide cases would allow courts to decide on the most appropriate administrative procedures to reduce delay.

To a large extent, data on the operation of criminal courts is more usefully gathered by individual courts, rather than by a nation-wide study. It is the individual court which must implement delay-reduction techniques; thus, each court must be in a position to make comparisons. At the same time, a nation-wide study would be useful in determining the types of techniques that can be expected to succeed. In effect, we are calling for research similar to that used in the American studies: *Justice Delayed*,[232] *Changing Times*[233] and *Examining Court Delay*.[234] Existing evidence suggests that the techniques

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229. See, *e.g.*, Baar, *supra*, note 43, or *Preliminary Inquiry Statistics, supra*, note 116. In addition, some individual courts keep records showing the length of time cases take on average to proceed through the system: see, *e.g.*, the statistics for courts in Montreal, Longueuil and Terrebonne cited by Cory J. in *Askov, supra*, note 17 at 1239-40. When the criminal court survey being developed by the Canadian Centre for Justice Statistics is in place, it will, among other things, reveal the length of time taken to dispose of cases, through tracking the dates of five types of appearances.

230. We have also noted the possible objection that time-limits might cause some courts to slow down rather than speed up. Another value of this study would be to monitor whether any such effect is observable, thereby allowing for steps to be taken to counteract the problem.

231. See *Pre-trial Delay: The Implications of Time Limits, supra*, note 190.

232. *Supra*, note 47.

233. *Supra*, note 49.

234. *Supra*, note 49.

noted in those studies would also work in Canada. It is nonetheless possible that attitudinal differences between the way in which law is practised in Canada and in the United States make the American research less useful here.

Finally, one further purpose could be served by such a study, although only by a considerable broadening of its scope. We have stated that the study should attempt to measure the speed with which courts can process cases — that is, their efficiency. But the operation of the courts must be based not just on efficiency, but also on fairness. Accordingly, the study might also attempt to assess courts' fairness of operation.

It has been suggested, for example, that national standards for justice services should be established in Canada, and that "[t]he quality and expedition of justice should as far as possible comply with those recommended standards and the regional disparity and difference should be mitigated."[235] Such standards might be established along lines similar to those in a project of the National Center for State Courts in the United States. The Center has issued *Tentative Trial Court Performance Standards*,[236] which propose the evaluation of courts on five scales: access to justice; expedition and timeliness; equality, fairness and integrity; independence and accountability; and public trust and confidence. Those scales are divided into twenty-two specific measures, such as "safety, accessibility, and convenience," "compliance with schedules," "clarity," "public education" and "judicial independence and accountability."[237]

Our proposed project would be much more ambitious than a simple gathering of statistics on delay. Further, although they would be desirable, these standards would not be essential to a study aimed at gathering data for use in delay-reduction programs. Accordingly, we recommend this only as a possible aspect of the study.

We have no recommendation concerning precisely who should conduct this study. Clearly, significant involvement by the judiciary would be appropriate, as would the participation of both federal and provincial officials responsible for dispensing services to the courts. While the study should not compromise the independence of the judiciary, other viewpoints are needed as well. The involvement of bodies such as the Canadian Judicial Council, the Canadian Institute for the Administration of Justice or the Canadian Centre for Justice Statistics, depending on the exact nature of the study, might be appropriate.

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235. Shetreet, *supra*, note 5 at 45.

236. Commission on Trial Court Performance Standards, *Tentative Trial Court Performance Standards with Commentary* (Williamsburg, Va.: The Commission, 1989).

237. *Ibid.*

RECOMMENDATION

11. (1) Resources should be made available for an ongoing study of the operation of trial courts to determine, among other things, the speed with which criminal cases are processed, the factors relevant to delay and the appropriate length for time-limits.

(2) The study should gather statistics which would provide an empirical basis for setting and comparing the standards governing the operation of trial courts.

(3) If possible, resources should be made available to establish trial court performance standards against which to measure the efficiency and fairness of the operation of trial courts.

CHAPTER THREE

Simplified Election and Re-election Procedures to Expedite Trials

I. Introduction

In this chapter, we examine election and re-election — the process by which an accused can choose the mode of trial. Historically, elections were intended as a means of ensuring a prompt trial: the accused could avoid, for example, waiting for the commencement of the next sitting of a court with a jury. However, the *Criminal Code* provisions dealing with election and re-election have become unduly complex, allowing improper manipulation that impedes the movement of cases to trial. We will therefore recommend ways to provide greater procedural clarity and bring cases to trial more quickly, without sacrificing the essential rights of the accused.

Before turning to the election process itself, however, we must examine a subsidiary issue — the preliminary inquiry.[238]

II. The Role of the Preliminary Inquiry in a Revised Election Process

In 1974, the Commission took the position that the preliminary inquiry should be replaced by a system involving disclosure by the prosecution and examination of Crown witnesses by the defence on application.[239] Since that time, there has been considerable debate in Canada about the desirability of the preliminary inquiry mechanism.

In 1980, the federal Department of Justice invited submissions from the provinces concerning whether the preliminary inquiry should be replaced by some alternative system. In response, the Bench and Bar Council of Ontario established a committee, the Martin Committee, to look at the matter. That committee's majority report stated that preliminary inquiries were becoming too long and made unnecessary and excessive

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238. A preliminary inquiry is, as its name suggests, a hearing held before a justice after the accused is charged with an indictable offence but before trial. The justice is required by *Code* s. 535 to "inquire into that charge and any other indictable offence, in respect of the same transaction, founded on the facts that are disclosed by the evidence taken in accordance with this part." After all the evidence has been taken, the justice decides whether there is sufficient evidence to put the accused on trial. If there is, the justice orders the accused to stand trial. If there is not, the justice must discharge the accused (*Code* s. 548). Preliminary inquiries are held only where the accused elects a mode of trial that requires a preliminary or where the *Code* obliges the accused to undergo a mode of trial that is preceded by a preliminary inquiry (as is the case with offences set out in *Code* s. 469).

239. See LRC, *Discovery*, Working Paper 4 (Ottawa: Information Canada, 1974).

demands on court time.[240] The minority report disagreed, however, arguing that there were many subsidiary benefits to the preliminary inquiry. In addition, the minority report prompted the Criminal Lawyers' Association to issue a report of its own,[241] holding that the preliminary inquiry was a desirable step, which provided its own analysis of the statistics relied on by the majority of the Martin Committee as well as further statistics of its own. Subsequently, the federal Department of Justice produced a report providing data gathered from a study of thirteen courts in nine provinces.[242]

This working paper will not retract the position taken in our 1974 working paper[243] to eliminate the preliminary inquiry, although we do intend to re-examine the issue in the future. For the moment, we will put forward revised procedures for elections and re-elections, procedures which determine whether a preliminary inquiry will be held.

Accordingly, we shall consider at this stage the very restricted question of whether abolishing the preliminary inquiry would assist in eliminating delay and thus facilitate trials within a reasonable time. The proposals that we will make concerning election and re-election assume that the preliminary inquiry will continue to be available to the accused in certain circumstances.

The Martin Committee's majority report, in recommending the replacement of preliminary inquiries by a "paper committal" system, stated that preliminary hearings

> are becoming excessively long, making unnecessary and excessive demands upon judicial time and imposing severe hardship on witnesses who may be required to attend on several occasions as a result of adjournments.[244]

That report points to a dramatic increase in the number of preliminary inquiries held — a projected increase of 165 per cent between 1976 and 1982.

Still other statistics concerning preliminary inquiries have been generated by the debate. The Criminal Lawyers' Association, for example, argues that at most 5 per cent of all criminal cases involve a preliminary inquiry: no large-scale reduction of delay or

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240. *Report of the Special Committee on Preliminary Hearings* (Toronto: Bench and Bar Council of Ontario, 1982) (Chairman: G. Arthur Martin) at 4) [hereinafter the Martin Committee].

241. Criminal Lawyers' Association, *The Preliminary Hearing* (Toronto: The Association, 1982).

242. *Preliminary Inquiry Statistics, supra,* note 116, at vii-ix. The study was intended to provide empirical information concerning how long preliminary inquiries take, how many witnesses are called, how many cases are screened out at the preliminary, how many cases have charges amended as a result of the preliminary and how often a guilty plea follows a preliminary. Information from Alberta was not available for the study.

243. *Discovery, supra,* note 239. Indeed, we would note that the preliminary inquiry has, since we first considered the issue, come under scrutiny in several other Commonwealth countries. Great Britain has replaced the preliminary inquiry with a "paper committal" system: see the discussion in Martin Committee, *supra,* note 240, and see Criminal Lawyers' Association, *supra,* note 241.

244. Martin Committee, *supra,* note 240 at 4.

elimination of hardship to witnesses can therefore be found in that area, it suggests.[245] That report also argues that "[t]he preliminary hearing surely succeeds in its function whenever cases are found to be too weak to justify a trial", and notes that 10 to 15 per cent of preliminary inquiries result in discharges.[246] In addition, in 38 per cent of the cases in the study sample, defence counsel waived the evidence at the preliminary inquiry: the report suggests that in this way "the safeguards of the preliminary hearing are secured at no loss to the Court, the witnesses or the Accused."[247]

In our view, many of the statistics gathered do not assist greatly in determining whether preliminary inquiries should be retained.

Consider, for example, the suggestion that the preliminary inquiry clearly is acting as it should in the 10 to 15 per cent of cases that result in discharges. Should not a procedure be known to be working more often than that to be justified? However, one might equally well claim that the purpose of the preliminary inquiry is to see to it that only persons against whom a *prima facie* case can be shown should have to face a trial. On this definition, and on the same statistics, the procedure could be claimed effective 85 to 90 per cent of the time. Indeed, if those two criteria were combined, the procedure would be known to be effective 100 per cent of the time.

Clearly, this argument is flawed. The real issue is whether the preliminary hearing results in the discharge of those cases that should be discharged, and the committing of those that should be committed.[248] Mere percentages cannot show this.[249]

Other statistics exist, although many of them are also ambiguous. For example, *Preliminary Inquiry Statistics* indicates that 82 per cent of accused committed for trial are found guilty of all or some charges, 71 per cent of these owing to a guilty plea. Therefore, only 11 per cent are convicted after a trial. Similarly, 67 per cent of all

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245. *Supra*, note 241 at 17.

246. *Ibid.* at 19.

247. *Ibid.* at 20. One might question precisely what safeguards have been preserved, since the accused has given up the possibility of a justice deciding that there is insufficient evidence to justify trial. If what is meant is that the possibility of the preliminary inquiry has guaranteed that the defence received adequate disclosure, then certainly it does not seem that the preliminary itself has been important.

Note also in this regard the analysis in Baar, *supra*, note 43. His figures show that, for Ontario courts, "waiving a preliminary hearing has no relationship to the elapsed time from first appearance to committal in the Provincial Court [but] cases in which the preliminary hearing was waived are disposed of earlier in District Court than cases which were committed only after the preliminary hearing was held." In New Brunswick, waiver of the preliminary inquiry reduced elapsed time in both levels of court.

248. MacKaay, *supra*, note 21 at 103, notes that if preliminary inquiries successfully performed a weeding-out function, there should be fewer acquittals at trials occurring after a preliminary inquiry than in cases that proceed to trial without a preliminary inquiry: in fact, his study found the opposite to be true.

249. Consider an analogy to trials. The purpose of the burden of proof and the presumption of innocence is to guarantee that the innocent are not convicted. Figures from *Preliminary Inquiry Statistics, supra*, note 116, show that 6% of accused are acquitted at trial. It would be odd to conclude from this fact that we only know the criminal justice system to work 6% of the time.

accused re-elect to a lower court after a preliminary inquiry, and 77.5 per cent of those re-electing down plead guilty to some or all charges.[250] This fact may indicate that the preliminary inquiry has acted to prompt a guilty plea. The report suggests that one inference "is that preliminaries are quite effective at clarifying pleas, thereby saving the expense of major trials."[251] Equally, however, as the report notes, the high rate of change of plea might indicate that the accused had always intended to plead guilty, and only chose a preliminary inquiry to delay matters.[252] Therefore, whether these figures show preliminary inquiries acting to reduce delay or to increase it is simply not clear.

The Department of Justice study shows 10 per cent of preliminary inquiries resulting in discharges and 9 per cent leading to a clarification of charges.[253] In these cases at least, there seems to be an argument that the preliminary inquiry has reduced the time required for the case. However, that same study shows that the median time for disposing of a case involving a preliminary inquiry is more than four times the median for cases not involving a preliminary inquiry.[254] In one sense, then, the question becomes whether it is worth increasing the delay in 81 per cent of cases with preliminary inquiries in order to reduce it in 19 per cent.[255]

Further, one must consider the actual times taken. The Department of Justice study found the median time from first appearance to preliminary inquiry to be sixty-one days.[256] In contrast, cases without a preliminary inquiry had a median time of forty-two days from first appearance to verdict — that is, to full disposition. On this basis, it seems that even the cases that were discharged at a preliminary hearing could have been dealt with more promptly by proceeding immediately to trial (where presumably an acquittal would have been the result).

As always, however, there are other relevant factors. The study notes that trials in provincial court more frequently involve guilty pleas.[257] It is possible that trials without a preliminary inquiry are scheduled more quickly, because the greater likelihood that a trial will not actually be necessary is taken into account. Without particular figures on this point, it is difficult to be certain. Further, if no preliminary inquiries were held, the median time for all trials should in some way be affected.

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250. *Supra*, note 116 at 68, 70, and table 5.6 — the 77.5% figure is calculated from the figures in table 5.6.

251. *Ibid.* at 70.

252. *Ibid.* at 65.

253. *Ibid.* at 58. The effectiveness of the Canadian preliminary inquiry system stands in contrast to that of the English "paper committal" system. The report also notes, at 58, that of 86,000 defendants in one English study, just over 2% were discharged at the committal stage for lack of evidence.

254. *Ibid.* at 55.

255. Similarly, MacKaay, *supra*, note 21 at 43, notes that based on the cases in his study "[t]o avoid one trial by judge alone, nine preliminary inquiries must be held with the extensive delays that accompany them. In the eyes of court administrators this is surely an unattractive exchange."

256. *Preliminary Inquiry Statistics, supra*, note 116 at 52.

257. *Ibid.* at 66.

Clearly, a preliminary inquiry causes a case to take longer and is therefore a source of delay in the 5 per cent of prosecutions where one is held.[258] Solely on the question of reducing delay, eliminating the preliminary inquiry would appear desirable. However, greater efficiency should not be introduced into the system at the expense of fairness. The preliminary inquiry is not primarily intended, after all, to reduce delay, and so should not be judged solely on whether it does this.[259]

Accordingly, we will look at the preliminary inquiry in greater detail in a later working paper. If we decide therein that some other procedure could reasonably and fairly replace the preliminary inquiry, additional advantages will be possible in time saved.[260] For the moment, however, we assume in designing a system for elections that the preliminary inquiry will continue to be available to the accused.

III. Election, Deemed Election and Re-election Provisions in the Present *Criminal Code*

A. Elections

1. General

An election is a choice given to a party — usually the accused — in criminal proceedings. The choice affects the mode of trial and the forum in which it will be held. The election also determines whether a preliminary inquiry will be held.

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258. See Criminal Lawyer's Association, *supra*, note 241 at 17.

259. Some suggested benefits of the preliminary inquiry are to enable accused persons to: discover the case they must meet; supply the basis on which the credibility of witnesses may later be impeached; pin down witnesses on their testimony; discover helpful leads or evidence; and provide the basis for deciding whether a guilty plea should be entered by the accused or (in the case of a guilty plea to a less serious offence) accepted by the prosecutor (Martin Committee, *supra*, note 240, appendix A, Minority Report at 1). Other benefits attributed to the preliminary inquiry are that it may clarify for the prosecution the appropriate charge, and permit defence counsel to test lines of cross-examination (*Preliminary Inquiry Statistics, supra*, note 116 at 9-12). Similarly, it is suggested that if the parties subsequently conclude a plea agreement, there is less likelihood of complaint of a cover-up or unnecessarily favourable treatment of the accused (Criminal Lawyer's Association, *supra*, note 241 at 5). In addition, evidence taken at the preliminary inquiry may in certain circumstances be read at trial (*Criminal Code*, s. 715).

260. Though note must be taken of the observation in *Preliminary Inquiry Statistics, supra*, note 116 at 55, that the delay associated with preliminary inquiries is not primarily attributable to the time taken to hold the inquiry itself, but rather to out-of-court procedures associated with the preliminary. The average preliminary inquiry took an actual and elapsed time of only one day: however, the median time from first appearance to committal was 61 days, and from committal to trial 82 days.

An accused charged with an indictable offence that permits an election is taken before a justice.[261] *Code* subsection 536(2) requires the justice to take the election by addressing the accused as follows:

> You have the option to elect to be tried by a provincial court judge without a jury and without having had a preliminary inquiry; or you may elect to have a preliminary inquiry and to be tried by a judge without a jury; or you may elect to have a preliminary inquiry and to be tried by a court composed of a judge and jury. If you do not elect now, you shall be deemed to have elected to have a preliminary inquiry and to be tried by a court composed of a judge and jury. How do you elect to be tried?

The accused then elects a mode of trial — provincial court judge, judge alone or judge and jury. The pre-trial and trial procedures that ensue are determined in part according to this election. Table 2, below at page 69, is a chart of the existing *Criminal Code* election and re-election procedures.

2. Restrictions on the Right to Elect

There are, however, qualifications and exceptions to the above general right to elect. Perhaps the most significant is the power of the Crown to elect to try hybrid offences by way of summary conviction — trials for summary conviction offences are held in provincial court without the benefit of a preliminary inquiry — instead of indictment. No election is permitted for the trial of hybrid offences tried by way of summary conviction.

Indictable offences set out in *Criminal Code* section 553 permit no election by the accused. They are generally tried by a provincial court judge without a jury.[262] Offences listed in section 469 must be tried by a superior court judge,[263] normally with a jury.[264] Section 473 of the *Code* provides, however, that "an accused charged with an offence listed in section 469 may, with the consent of the accused and the Attorney General, be tried without a jury by a judge of a superior court of criminal jurisdiction." Thus, the accused has no *right* of election for section 469 offences, and can be tried without a jury only if the Attorney General consents. In addition, the accused remains obliged to be tried by a superior court judge; the accused cannot elect to be tried in any other level of court.

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261. *Criminal Code* s. 2 provides *inter alia* that " 'justice' means a justice of the peace or a provincial court judge, and includes two or more justices where two or more justices are, by law, required to act or, by law, act or have jurisdiction".

262. But see below, where we describe an exception to this rule allowing the Attorney General to force a jury trial for s. 553 offences. See also David Doherty, "Elections and Re-elections" in Vincent M. Del Buono, ed., *Criminal Procedure in Canada* (Toronto: Butterworths, 1982) 187 at 189; *R.* v. *Beaudry* (1966), 50 C.R. 1 (B.C.C.A.); *R.* v. *Scherbank*, [1967] 2 C.C.C. 279 (Ont. C.A.); *R.* v. *Holliday* (1973), 12 C.C.C. (2d) 56 (Alta S.C.A.D.); *R.* v. *Coupland* (1978), 45 C.C.C. (2d) 437 (Alta S.C.A.D.).

263. *Criminal Code*, ss 468, 469.

264. *Criminal Code*, s. 471.

Even elections relating to the bulk of indictable offences — those that are *not* listed in *Code* section 469 or 553 — are not unqualified. Section 568 permits the Attorney General to compel a jury trial, despite the election of the accused, where the alleged offence is punishable by more than five years' imprisonment.

Further, the Attorney General may use a different route to compel jury trials for indictable offences, even those punishable by five years' imprisonment or less. Under *Code* section 577, the Attorney General may, in certain circumstances, prefer a direct indictment. The preferring of a direct indictment results in the accused's being "deemed" to have elected trial by judge and jury.[265] Although that same section permits the accused to re-elect trial by judge alone, that re-election may only be made with the written consent of the prosecutor. Accordingly, the Attorney General, through the agency of the prosecutor, can compel trial by jury even for indictable offences punishable by five years' imprisonment or less.[266]

There is another qualification to the right to elect. Although an accused may elect a general mode of trial — provincial court judge, judge alone or judge and jury — that election does not allow the accused to choose the specific *forum* of the trial. While an accused in Nova Scotia may elect trial by judge alone, "judge" is defined to mean either "a judge of the superior court of criminal jurisdiction of the province or a judge of a county court".[267] Although the accused chooses the general mode of trial, the prosecution chooses the precise forum.[268]

B. Deemed Elections

The *Criminal Code* envisages situations in which the accused, rather than making an election, is "deemed" to elect a given mode of trial, and is thereafter treated in accordance with that election.

Deemed elections sometimes act as limitations on the accused's right to elect mode of trial. For example, *Code* section 567 provides in part that

> where two or more persons are charged with the same offence, unless all of them elect or re-elect or are deemed to have elected, as the case may be, the same mode of trial, the justice, provincial court judge or judge. . . may decline to record any election, re-election or deemed election for trial by a provincial court judge or a judge without a jury. . .

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265. *Criminal Code*, s. 565(2).

266. For a more detailed discussion of the ability of the Attorney General to compel trial by jury by using his or her power to prefer direct indictments, see Doherty, *supra*, note 262 at 212-14. Note that Doherty's study referred to the *Code* before the preferred indictment and election provisions were amended in 1985.

267. *Criminal Code*, s. 552(*c*).

268. See Doherty, *supra*, note 262 at 194-97. Note that while the general comments and references to court decisions remain accurate, several of the *Code* provisions referred to in Doherty's article have been subsequently amended by the *Criminal Law Amendment Act, 1985*, R.S.C. 1985, c. 27 (1st Supp.).

The accused will then be deemed by paragraph 565(1)(*b*) to elect trial by judge and jury. Similarly, subsection 555(1) provides that:

> Where in any proceedings under this part an accused is before a provincial court judge and it appears to the provincial court judge that for any reason the charge should be prosecuted by indictment, he may, at any time before the accused has entered on his defence, decide not to adjudicate and shall thereupon inform the accused of his decision and continue the proceedings as a preliminary inquiry.

Paragraph 565(1)(*a*) will then deem the accused to have elected trial by judge and jury. Also, when a direct indictment is preferred against an accused, the accused is deemed under section 565 to have elected trial by judge and jury.

An accused who refuses to elect when put to the election under *Code* section 536 is deemed, by paragraph 565(1)(*c*), to elect trial by judge and jury.

Deemed elections are not for trial by judge and jury in every case. In cases "[w]here an indictment has been preferred against a person who is at large, and that person does not appear or remain in attendance for his trial"[269] and the accused "has elected or is deemed to have elected to be tried by a court composed of a judge and jury",[270] the accused may not be tried by judge and jury unless one of two conditions is met: either the accused must show "to the satisfaction of a judge of the court in which he is indicted that there was a legitimate excuse for his failure to appear or remain in attendance for his trial",[271] or the Attorney General must compel trial by judge and jury by using the authority conferred under *Code* section 568.[272] Where neither of these two conditions has been met, the accused "is deemed to have elected under section 536 to be tried by a judge of the court in which he is indicted without a jury" and is given no right to re-elect.[273]

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269. *Criminal Code*, s. 597(1).

270. *Criminal Code*, s. 598(1). There is the additional requirement, also in s. 598(1), that "at the time he failed to appear or to remain in attendance for his trial, he had not re-elected to be tried by a court composed of a judge without a jury or a provincial court judge without a jury".

271. *Criminal Code*, s. 598(1)(*a*).

272. *Criminal Code*, s. 598(1)(*b*).

273. *Criminal Code*, s. 598(2).

C. Re-elections

1. General

The *Criminal Code* generally allows an accused who has elected a mode of trial, or who has been deemed to elect a mode of trial, to change his or her election. Sometimes the accused may re-elect as of right. Other times, re-election requires the consent of the prosecution.

The right to re-elect is frequently employed, particularly following completion of preliminary inquiries. The Department of Justice study into preliminary inquiries reviewed elections and re-elections in 7,219 cases involving indictable offences.[274] It found that, of 1,800 cases in which the accused was committed for trial following a preliminary hearing, only 8 per cent were ultimately tried by judge and jury, although 71 per cent of the accused had originally elected to be tried that way. The vast majority of accused had re-elected, in about equal numbers, to be tried by judge alone or by magistrate.[275] The study noted that most pleas of "guilty to all charges" or "guilty to some charges" were linked to re-elections. The conventionally accepted sequence of events is that an accused is committed for trial after a preliminary hearing, decides to plead guilty and, as a result, re-elects a judge alone to expedite matters.[276]

2. Restrictions on the Right to Re-elect

Like election and deemed election provisions, re-election provisions are subject to several qualifications and restrictions. This fact further complicates the pre-trial process.

Criminal Code subsection 561(1) entitles "[a]n accused who elects or is deemed to have elected a mode of trial other than trial by a provincial court judge" to re-elect "as of right" (that is, without consent) in only one circumstance. The accused may re-elect "another mode of trial other than trial by a provincial court judge", provided he or she does so "at any time before the completion of the preliminary inquiry or before the fifteenth day following the completion of the preliminary inquiry".[277] The accused may, "on or after the fifteenth day following the completion of the preliminary inquiry" re-elect "any mode of trial," provided he or she has the written consent of the prosecutor.[278] The prosecutor's consent is also required if, "at any time before or after the

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274. *Preliminary Inquiry Statistics, supra,* note 116 at 38.

275. *Ibid.* at 31-32.

276. *Ibid.* at 68.

277. *Criminal Code,* s. 561(1)(*b*).

278. *Criminal Code,* s. 561(1)(*c*).

completion of the preliminary inquiry,"[279] the accused wishes to re-elect trial by provincial court judge.

Further, *Code* subsection 561(2) provides, among other things, that "[a]n accused who elects to be tried by a provincial court judge may, not later than fourteen days before the day first appointed for the trial, re-elect as of right another mode of trial". If fewer than fourteen days remain, the accused must obtain the prosecutor's written consent to re-elect.[280]

An accused charged with an offence set out in section 470 also has a limited ability to re-elect a mode of trial. Taken together, sections 469 and 470 require that the accused be tried by a superior court of criminal jurisdiction.[281] Subsection 473(1), however, allows the accused to consent to trial without a jury, if the Attorney General also consents. Subsection 473(2) provides that the accused's consent and that of the Attorney General "shall not be withdrawn unless both the accused and the Attorney General agree to the withdrawal." Accordingly, an accused who initially received the consent of the Attorney General for trial by superior court judge alone may only "re-elect" (although this term is nowhere used in the section) trial with jury if the Attorney General consents.

An absconding accused who has been deemed to elect trial by judge alone has no right to re-elect.[282] Similarly, a court may decline to record any re-election by multiple accused persons for trial by provincial court judge or by judge without a jury unless all of the accused re-elect the same mode of trial.[283] The multiple accused will subsequently be deemed, in accordance with *Code* paragraph 565(1)(*b*), to have elected trial by judge and jury.

A further right of re-election is found in *Code* paragraph 686(5)(*a*), which allows an accused, where the court of appeal orders a new trial, to re-elect to have that trial before a judge and jury. The accused has no right, if the original trial was by judge and jury, to elect any other mode for the new trial.

These provisions demonstrate that the right to re-elect, like the right to elect, is not unqualified. There is no right of re-election in some cases. In other cases, re-elections are permitted with the consent of the prosecutor or the Attorney General. Moreover, even if the accused wishes to re-elect trial without a jury, the Attorney General may still compel trial by judge and jury under *Code* section 568. Similarly, the Attorney General may prefer a direct indictment under section 577; in this event, the accused will be deemed

279. *Criminal Code*, s. 561(1)(*a*).

280. *Criminal Code*, s. 561(2).

281. See Doherty, *supra*, note 262 at 189.

282. *Criminal Code*, s. 598(2).

283. *Criminal Code*, s. 567(*a*).

under subsection 565(2) to have elected trial by judge and jury, and may re-elect trial by judge alone only with the consent of the prosecutor.

IV. Justification for Elections and Re-elections

As noted, elections were originally justified as a method of expediting trial. The period of anticipation could be reduced by allowing the accused a choice as to mode of trial. Equally, the state benefited by saving the expense of a full jury trial if the accused elected to be tried without jury. Re-elections, it must be assumed, were designed out of a sense of fairness to an accused who might wish to reconsider an initial election.

Current justifications for elections and re-elections have elaborated little on the original theme. One contemporary author speaks of elections and re-elections as devices to promote fairness to the accused.[284]

How exactly do elections and re-elections contribute to the perception of fairness to the accused? They give the accused a limited power to determine the procedures that will govern the pre-trial and trial stages of a prosecution. If the accused elects trial by provincial court judge, there will be no preliminary inquiry. However, if the accused elects any other mode of trial, there generally will be one. The accused may want to use a preliminary inquiry to ascertain the strength of the prosecution's case. He or she may also want to use the preliminary inquiry to delay the onset of trial, or may hope that the preliminary inquiry shows the evidence to be insufficient to justify a trial.

Elections and re-elections also permit the accused to determine whether to have a trial by jury. The accused may believe that a jury will be more sympathetic. On the other hand, he or she may fear a prejudicial attitude amongst jurors and seek to avoid them.

The *Charter* and the *Criminal Code* guarantee to an accused the right, in certain cases, to trial by jury. Elections and re-elections are procedural devices that permit the right to be waived.

The defence may also use election or re-election to choose a particular level of trial court because of a perception that its court of choice will be more lenient or receptive than another to legal argument. The defence may believe that the trial stage will be reached more quickly, or slowly, by choosing one mode of trial over another.

In addition, re-elections permit the rethinking of a hastily made election. This feature of the process is important where the accused was unrepresented at the time of the original election, or has retained new counsel who considers another mode of trial more advantageous. Re-elections also permit multiple accused persons, who earlier had

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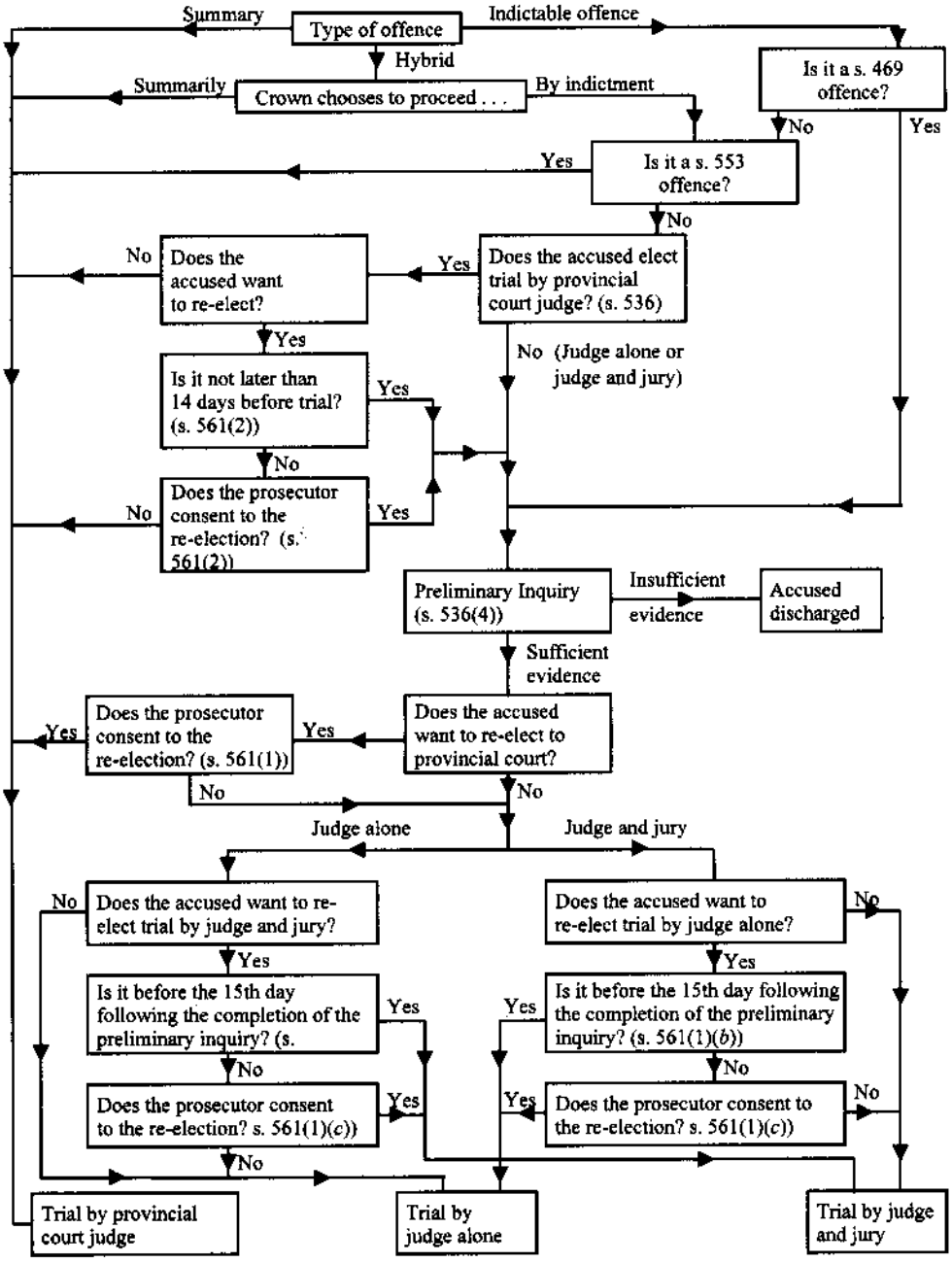
284. Doherty, *supra,* note 262 at 227.

conflicting preferences as to mode of trial, to reach a consensus. They permit an accused to plead guilty promptly. Conversely, they may provide an advantage to an accused through the delay caused by re-electing.

Yet despite the perception of additional fairness to the accused that elections and re-elections import, they can enormously complicate and lengthen the pre-trial process. They permit improper manipulation, causing unnecessary delay. Elections and re-elections can be simplified, and the scope for improper manipulation of these procedures substantially reduced, without sacrificing procedural fairness or legitimate advantages.

TABLE 2

Criminal Code Election and Re-election Procedures



NOTE A: The re-election procedures when an accused has elected trial other than by provincial court judge are shown as following the preliminary inquiry; *Code* s. 561(1) also allows those re-elections to be made prior to the preliminary inquiry. Normal election and re-election procedures are not available for offences listed in s. 469, which must be tried by judge and jury.

NOTE B: The *Code* contains no provision preventing an accused who has re-elected once from re-electing a second time. However, some case law suggests that one re-election exhausts the right to re-elect: see *Ishmail* v. *The Queen* (1981), 22 C.R. (3d) 81 (B.C.S.C.).

NOTE C: This chart does not indicate any deemed elections or any limitations created by powers of the Crown or a judge.

V. Proposed Revisions to Election, Deemed Election and Re-election Procedures

Here we suggest several revisions to the election and re-election process.[285] We shall examine these revisions based on the classification scheme we proposed in Working Paper 54, *Classification of Offences*,[286] and based on a unified (or substantially unified) criminal court system.[287] Table 3, below at page 73, is a chart showing our proposed election procedures.

A. Elections

The first issue, of course, must be when an election is called for at all. In Working Paper 54, *Classification of Offences*,[288] we recommended simplifying the current classification scheme. All section 553 indictable offences — those within the absolute jurisdiction of provincial court judges — would be reclassified as crimes punishable by two years' or less imprisonnement.[289] All other indictable offences now punishable by a maximum of two years' imprisonment and all summary conviction offences would be reclassified as crimes punishable by a maximum of two years' or less imprisonment.[290] All remaining *Criminal Code* offences would fall within the second class of crimes — those punishable by a maximum of more than two years' imprisonment.[291]

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285. These changes replace earlier recommendations we made concerning elections and re-elections in *Criminal Procedure — Part I: Miscellaneous Amendments, supra,* note 177.

286. *Supra,* note 31.

287. As proposed in *Toward a Unified Criminal Court, supra,* note 30. Only Nova Scotia still retains a three-tiered criminal court structure, but a recent report in that province supported the principle of a unified criminal court, although recommended against implementation until at least one pilot project had been established in Canada, and opinions on various aspects of procedure had been provided by the Law Reform Commission of Canada: see *Report of the Nova Scotia Court Structure Task Force* (Halifax: The Task Force, 1991).

288. *Supra,* note 31.

289. *Ibid.* at 36. At that time, present *Code* s. 553 was s. 483.

290. *Ibid.*, recs 11 and 13 at 38.

291. *Ibid.*, rec. 12 at 38. It is also worth noting our proposal in *Controlling Criminal Prosecutions, supra,* note 35, rec. 26 at 87, concerning *Code* ss 469 and 473. This later proposal amends slightly our recommendations in *Classification of Offences* (*supra,* note 31), simplifying the matter still further. *Code* s. 469 places certain offences within the exclusive jurisdiction of a superior court of criminal jurisdiction. The effect of that section and s. 473 is to prevent an accused charged with a s. 469 offence from having a non-jury trial without the consent of the Attorney General. We originally recommended retaining the distinction established by s. 469, but postponed considering whether the consent requirement in s. 473 is necessary. We have decided that, in any case where an election is called for, the accused should have the same options: *i.e.*, no consent should be necessary. In that event, it is simplest not just to remove the consent requirement, but to remove the distinction that gave rise to the need for consent in the first place. Accordingly, we recommended that no crimes should be in the exclusive jurisdiction of a superior court of criminal jurisdiction: *i.e.*, the exceptions to the jurisdiction of a court of criminal jurisdiction should be removed from s. 469. This change would allow any accused to choose trial by judge alone as an original

Under our scheme, an accused would have the right to a preliminary inquiry and to elect the mode of trial only if charged with a crime punishable by a maximum of more than two years' imprisonment. The procedural advantages of elections and preliminary inquiries — and the additional complexity and possible delays that they occasion — should be reserved for more serious offences.[292]

We propose separating the decision as to whether to have a preliminary inquiry from the election as to mode of trial: an accused should make an independent decision about each question.

On first appearance, the accused would elect whether to have a preliminary inquiry. Once that inquiry is over, or if the accused chooses not to have an inquiry, the accused would elect mode of trial.

On either occasion, the judge could grant the accused an adjournment to consider the decision. This adjournment would be useful, especially when an accused is choosing whether to have a preliminary inquiry, to allow him or her the opportunity to obtain legal counsel. In addition, a delay would allow the accused to obtain adequate disclosure, which may affect the decision.[293] We anticipate that a short adjournment would suffice for these purposes.

This procedure complements our recommendation in Working Paper 63, *Double Jeopardy, Pleas and Verdicts*, concerning the time for entering a plea.[294] We propose there that the accused be permitted to enter a plea on first appearance, but not be required to enter a plea until after electing not to have a preliminary inquiry or after being committed to stand trial following the preliminary inquiry.

Those outlined above would be the ordinary rules concerning preliminary inquiries and elections as to mode of trial. We also propose retaining three exceptions, although we do not expect them to be generally applied.

The prosecutor should, we propose, have the power to insist on a preliminary inquiry even if the accused chooses not to have one. This power enables the Crown, for example, to test the credibility of its own witnesses or preserve the testimony of a terminally ill witness. As at present, such evidence could later be read at trial.[295] However, the

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election. In that event, the question of waiving the jury would not arise, and s. 473 could be removed from the *Code*.

292. Under the present classification scheme, this means that, as at present, there will be no election for offences punishable on summary conviction or for s. 553 indictable offences. Those latter offences are within the absolute jurisdiction of the provincial court judge, and are among the least serious indictable offences in the *Criminal Code*.

293. See our proposals concerning disclosure in *Disclosure by the Prosecution, supra*, note 36.

294. *Supra*, note 199, rec. 20 at 78.

295. *Criminal Code*, s. 715.

prosecutor should only be able to exercise this power before the accused chooses whether to have a preliminary inquiry. Reversals of an accused's decision should only be allowed for compelling reasons, which we suggest do not exist in these circumstances. Further, if this power could be exercised at a late stage, a prosecutor could improperly use it to obtain delay where no justification for setting a case outside the time-limits exists: if a preliminary inquiry is held, the time-limit for commencement of trial would change from six months to one year.

Second, *Code* section 577 currently gives the Attorney General personally the right to prefer a direct indictment, requiring the accused to go to trial without a preliminary inquiry having been held. Such a power might be justified where witnesses have been threatened or where witnesses are elderly persons who may not be able to testify if the trial is delayed. In Working Paper 62, *Controlling Criminal Prosecutions,*[296] we recommended that this power be retained, but amended. We proposed there that the Attorney General personally be able to require a case to go to trial without a preliminary inquiry, but that the court which is to hear the trial be empowered to adjourn the case pending full and fair disclosure. To provide some protection for an accused in this situation, we propose that guidelines should be established concerning when the power may be used,[297] and stipulating that the accused be given reasons for the preferment.[298]

Finally, we feel that the Crown should be able to insist on a jury trial. The Attorney General now has this power directly for offences punishable by more than five years' imprisonment,[299] and indirectly for other indictable offences.[300] We recommended in Working Paper 62, *Controlling Criminal Prosecutions,* that the Attorney General should be able to compel a jury trial in the case of any offence punishable by more than two years' imprisonment.[301] The continued existence of that power is justified by the nature

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296. *Supra,* note 35.

297. *Ibid.,* rec. 31 at 94. Specifically, we proposed, that the guidelines should include the following factors:

> (a) the fear that the security of the prosecution's witnesses or of other persons involved in the prosecution is jeopardized;
>
> (b) the need to try the charge as soon as possible in order to preserve the Crown's case;
>
> (c) the need to avoid a multiplicity of proceedings; and
>
> (d) the need to avoid unconscionable delay or unduly prolonged proceedings that cannot otherwise be avoided.

298. *Code* s. 577 also allows the Attorney General to prefer a charge despite a discharge after a preliminary inquiry. We proposed in *Controlling Criminal Prosecutions, supra,* note 35, that this power should be retained, but with some restrictions: the permission of the court which is to hear the case should be required, and should only be granted if the discharge was obtained through application of an erroneous legal principle or a fraud on the administration of justice.

299. *Criminal Code,* s. 568.

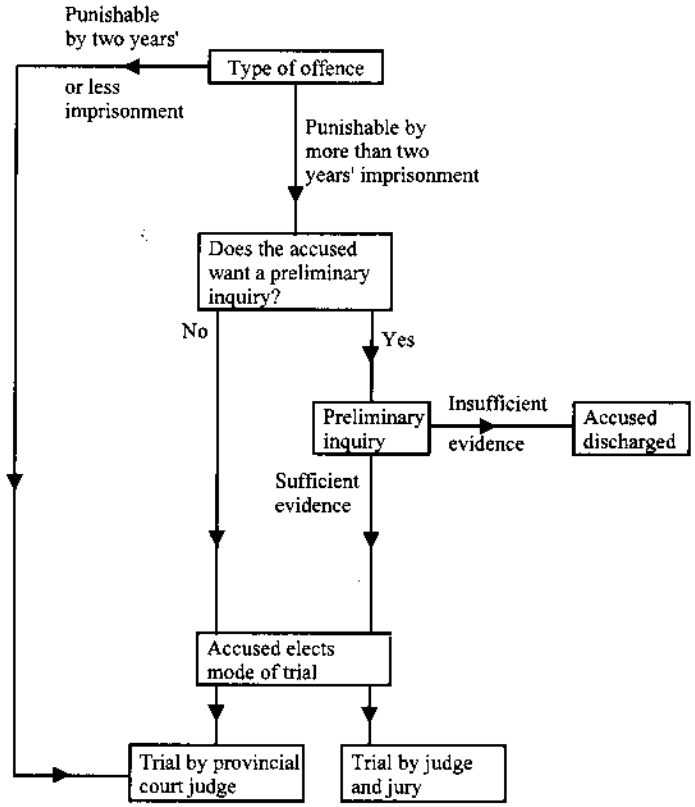
300. The Attorney General can prefer a direct indictment under *Code* s. 577, in which case *Code* s. 565(2) directs that the accused will be deemed to have elected trial by judge with a jury and cannot re-elect without the consent of the prosecutor.

301. See *supra,* note 35, rec. 25 at 85-86.

of some offences (for example, those involving obscenity, where community standards may be at issue) or of some offenders (for example, where the accused is a judge or high official in the Justice Department, trial by jury may seem more likely to guarantee the appearance and fact of impartiality). At the same time, since the power overrides the election of the accused, it should be used with restraint; for that reason, we recommend that it be exercised by the Attorney General personally.[302]

TABLE 3

Our Proposed Election Procedures



NOTE: This chart does not indicate any deemed elections or any limitations created by powers of the Crown.

302. Because of these other restrictions on the use of this power, we do not feel it necessary to require the Attorney General's decision to compel a jury trial to be made at or before the time the accused makes an election.

RECOMMENDATIONS

12. There should be no preliminary inquiry and no election in respect of crimes punishable by two years' or less imprisonment.

13. A person charged with a crime punishable by more than two years' imprisonment should have the right to a preliminary inquiry and to elect mode of trial.

14. (1) An accused should choose whether to have a preliminary inquiry on first appearance, or on a date set by the judge at first appearance.

(2) If an accused chooses not to have a preliminary inquiry, the accused should elect mode of trial on first appearance, or on a date set by the judge at first appearance.

(3) If an accused chooses to have a preliminary inquiry, the accused should elect mode of trial at the end of the preliminary inquiry, or on a date set by the judge at the end of the preliminary inquiry.

15. The prosecutor should be able, at any time before the accused chooses whether to have a preliminary inquiry, to require that a preliminary inquiry be held.

16. In accordance with our recommendations in Working Paper 62, *Controlling Criminal Prosecutions,* the Attorney General personally should have the power to prefer a charge, notwithstanding that the accused has not had a preliminary inquiry.

17. In accordance with our recommendations in Working Paper 62, *Controlling Criminal Prosecutions,* when the crime charged is punishable by more than two years' imprisonment, the Attorney General personally should have the power to require, notwithstanding any election by the accused, that the accused be tried by judge and jury.

B. Deemed Elections and Choices Regarding Preliminary Inquiries

Our changes concerning deemed elections would simplify matters. At present, *Code* subsection 565(1) deems an accused to elect trial by judge and jury when: (a) a provincial court judge converts a trial into a preliminary inquiry;[303] (b) two or more co-accused cannot agree on mode of trial; or (c) the accused refuses to elect. Further, *Code* subsection

303. Under *Code* s. 555(1).

565(2) deems an accused to elect trial by judge and jury when the Attorney General prefers a direct indictment.[304]

We do not propose any change to the deeming provisions when multiple accused disagree or an accused refuses to elect. Both of these occasions call for deeming provisions, since the accused will, in effect, have failed to make a choice. In each case, the accused is deemed to elect trial by judge and jury. This approach, consistent with the philosophy underlying paragraph 11(*f*) of the *Charter*,[305] reflects an assumption that trial by jury is an option which most accused persons would like to have available.

Some discussion of the deemed election provisions relating to multiple accused is necessary, however. Under the three-tiered court structure, the present deeming provisions mean that even if none of the accused wants a jury trial, each is deemed to elect trial by judge and jury. In our view, this approach is illogical. If three-tiered court structures were common, we would suggest that section 567 be altered.[306] Where co-accused persons do not agree as to mode of trial, it would be more sensible to deem them all to elect the "highest" mode of trial chosen by any one of them. Only if at least one accused wants a jury trial should they all be deemed to elect trial by judge and jury.

Under a unified or substantially unified court structure, this difficulty disappears. The only options open to an accused would be trial by judge and jury or trial by judge alone (which, depending on the structure, might be conducted by a provincial court judge). If co-accused disagree, then necessarily one of them would have chosen trial by judge and jury, and so section 567 brings about a sensible result.

We do not feel that a deeming provision is necessary when a provincial court judge converts a trial into a preliminary inquiry, because in our opinion this power should not continue to exist. Under *Code* subsection 555(1), a judge may convert a trial when it appears that "for any reason" the charge should be prosecuted by indictment. In fact, it has been held that despite this broad wording, a judge must have a "judicial reason" for overruling an accused's election, such as "evidence of an extraordinary nature" suggesting that "that more serious charges should be considered by the Crown."[307] Even when limited in this way, however, there is in our opinion no need for the power. In general, the accused should have the right to elect a mode of trial. Further, prosecutorial and judicial discretion should be kept distinct. To allow a judge to override an accused's election in order to suggest obliquely to the Crown that more serious charges

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304. Under *Code* s. 577. We recommend in *Controlling Criminal Prosecutions, supra*, note 35, rec. 29 at 93, that the power to prefer an indictment without a preliminary inquiry should be available to the Attorney General personally, subject to guidelines, and that the court should be able to adjourn proceedings pending full and fair disclosure to the accused.

305. That provision provides most persons who are charged with offences punishable by a maximum penalty of five years' imprisonment or more with the right "to the *benefit* of trial by jury" [emphasis added].

306. As noted above, this issue is only relevant to Nova Scotia; see *supra*, note 287.

307. *R.* v. *Babcock* (1989), 68 C.R. (3d) 285 at 287-88 (Ont. C.A.).

should be considered violates both of those principles. Accordingly, we suggest that subsection 555(1) — which appears to be infrequently used in any event — should be repealed. If this were done, no deeming provision would be necessary.[308]

Finally, we recommend dispensing with any deeming provision when the Attorney General prefers a direct indictment. Such a provision, under our proposals, would have no practical consequences. In the event of a direct indictment, the trial will necessarily take place in the superior court where the indictment is laid, in front of a jury. To deem that result to be the election of the accused would not change matters: it would merely introduce the fiction that the accused is happy with the state of affairs.[309]

We suggest a change to section 598 of the *Code*. That section provides that, where an accused fails to appear or remain in attendance at a jury trial, the accused shall not be tried by a judge and jury unless the accused satisfies the court that there was a legitimate excuse for the absence, or the Attorney General exercises the power in section 568 to compel a jury trial. Subsection 598(2) deems the accused to have elected to be tried by a judge of the court with the indictment without a jury. We suggest that the final result is appropriate, although once again it is not apparent that any deeming provision is necessary.

If the accused is not present for trial and is at fault for that absence, the additional expense and inconvenience of a jury trial is not warranted. This procedure is particularly useful in combination with *Code* section 475, which we propose should stand.[310] That section allows a trial to continue in the absence of an accused who has absconded. In that event, the trial can continue more quickly and efficiently without, in the circumstances, sacrificing fairness if the jury is dispensed with.[311]

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308. *Code* s. 555 also considers another situation. If at trial it becomes apparent that an offence within the absolute jurisdiction of a magistrate has been mistakenly laid (*e.g.*, where theft under $1,000 is charged, but the evidence shows the theft to have been over $1,000) then under s. 555(2) the judge puts the accused to an election and, in accordance with that election, continues with either a trial or a preliminary inquiry. No deemed election is necessary under this procedure. Note, however, that our recommendations in *Classification of Offences, supra*, note 33, recs 7-14 at 29-40, to abolish these absolute jurisdiction offences would make the procedure unnecessary.

309. The only circumstance we can envision where any practical consequence might follow is in the case of co-accused, one of whom might thereby be deemed to elect a judge and jury, while the other has elected judge alone. However, in any such case, either a direct indictment would be laid against both accused, or the trial of the two accused would be severed and the difficulty of disagreeing co-accused would not exist.

310. Though we do make recommendations to improve the section, and make it operate more fairly: see *Double Jeopardy, Pleas and Verdicts, supra*, note 199, rec. 17 at 74.

311. The constitutional status of s. 598(2) has yet to be definitively resolved. In *R.* v. *Bryant* (1984), 16 C.C.C. (3d) 408, the Ontario Court of Appeal held the section (then s. 526.1) to be an unjustified infringement of *Charter* s. 11(f). In the more recent case of *Re McNabb and The Queen* (1986), 33 C.C.C. (3d) 266 at 266-67, the British Columbia Court of Appeal expressed the opposite view. In its opinion, an accused who has failed to attend or remain at a jury trial without an acceptable reason has "failed to *exercise* his right to trial by jury [emphasis added]" and therefore "cannot be heard to complain that he was deprived of that Charter right." Even if s. 598(2) runs contrary to *Charter* s. 11(*f*), the court added, it constitutes a

At present, subsection 598(2) has certain consequences for re-elections. However, those consequences would no longer have any significance under our re-election scheme, leading us once again to conclude that no deeming provision is necessary.

It would be necessary, under our proposals, to have separate deeming provisions relating to the preliminary inquiry. First, an accused refusing to make a decision should be deemed to choose to have a preliminary inquiry: this approach would best protect the interests of the accused. Second, co-accused persons who do not agree should be deemed to choose to have a preliminary inquiry. One might initially think that no real problem arises — that co-accused need not make the same choice on this matter. However, under our time-limit proposals and under the *Charter,* the time within which trial must be reached would vary depending on whether a preliminary inquiry is held. Since the same time-limit must apply to all of the co-accused, they should all be deemed to elect to have a preliminary inquiry. It is preferable to require all of the co-accused to have the preliminary inquiry than to deprive some of them of a possible benefit.

RECOMMENDATIONS

18. An accused should be deemed to elect trial by judge and jury where:

(a) the accused does not make an election when called upon to do so; or

(b) in the case of co-accused, the co-accused separately elect, or are deemed to elect, different modes of trial.

19. An accused should be deemed to choose to have a preliminary inquiry where

(a) the accused does not make a decision concerning a preliminary inquiry when called upon to do so; or

(b) in the case of co-accused, any of two or more co-accused chooses or is deemed to choose to have a preliminary inquiry.

C. Re-elections and Waiver

While elections and deemed elections concerning mode of trial would remain substantially the same under our proposals as they are now, we would significantly change re-elections.

We outlined earlier in this chapter the justifications given for allowing an accused to re-elect after an election, after a deemed election or even after a previous re-election. We suggest, however, that those justifications are not sufficient to warrant the labyrinth of

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"reasonable limit" on an accused's s. 11(*f*) right that is "demonstrably justified in a free and democratic society." We agree.

procedures associated with re-elections. Accordingly, we propose three basic rules to simplify re-elections.

Under our recommendations, an accused's election need not be made at the first appearance: if there is a preliminary inquiry, the election would follow that; otherwise, election could be postponed to a date set by the judge. This procedure would help ensure that the accused's first election is an informed one. Where the accused remains unrepresented at the second appearance, the judge would have a general duty to ensure that the accused's right to an informed election is satisfied. In addition, the judge would have a special duty to ensure an informed election where the accused, although represented, had only recently retained counsel. Here, the judge should permit sufficient time for the accused to assess the merits of each mode of trial.

Given that the accused makes the initial election with the benefit of counsel and after having the opportunity to weigh the merits of the procedural options, we propose that he or she should be bound by that decision. Once an accused has made an informed election, no re-election ought to be allowed. The accused should, however, be allowed to change to a plea of guilty at any time, and enter that plea in front of the trial court.

Two refinements can be made, although neither is an exception to the general rule. First, at present accused persons often re-elect to a provincial court judge simply to plead guilty to all or some charges.[312] Presumably in such cases, the original election was made only in order to have a preliminary inquiry and allow the defence to evaluate the Crown's evidence. Under our scheme, this maneuver would be unnecessary, because the decision whether to have a preliminary inquiry would be distinct from the election as to mode of trial. However, the accused may still want the opportunity to enter a guilty plea at an early date following the preliminary inquiry. We suggest, therefore, that an accused should be able to enter a guilty plea during or at the end of the preliminary inquiry. In addition, if at the end of the preliminary inquiry a date is set for the accused to make an election, a guilty plea could also be entered on that date. We would not allow a guilty plea to be entered in front of a provincial court judge after an election for some other court: to do so would require the transfer of files from one court to another, and would introduce the possibility of improper delay.

Secondly, from the standpoint of convenience, speed and thrift, it makes sense to allow an accused who has elected trial by judge and jury to choose later not to have a jury. Once again, it would not be necessary to introduce a power to re-elect. Indeed, allowing that choice to be made by way of re-election is likely to introduce delay, since there would probably be a waiting period for an available trial date in the new court. Rather than allowing for a re-election, we propose that the accused should be able to waive the jury at the already scheduled trial. The effect of this provision would be to allow the accused to have a non-jury trial without a change of trial date.

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312. See *Preliminary Inquiry Statistics*, supra, note 116 at 68.

We would require that, in order to waive the jury in the above circumstances, the accused have the consent of both the trial court and the prosecutor. At first glance, this may seem inconsistent with our earlier proposal to remove the requirement for prosecutorial consent to waive the jury for section 469 offences.[313] The significant difference, however, is that with section 469 offences the accused had no say in the decision to have a trial by jury; in this case, the waiver would come only after an initial election by the accused personally for a trial by jury.

Further, in any jurisdiction without a unified criminal court system, the waiver of a jury creates the anomaly that an accused will have a trial by judge alone, but not in the court that normally hears trials by judge alone. We wish, therefore, to guard against any attempts to bypass completely one level of court in the belief that another level is likely to sentence more leniently. This consideration, we believe, justifies a consent requirement.[314]

We should make some mention of the special circumstances of re-electing when a new trial has been ordered. In our view, there is no good reason to allow an accused to re-elect trial by jury, but not to allow any other re-election. Rather, we suggest that when the court of appeal orders a new trial, the accused should have the same right of election regarding mode of trial as he or she has for the original trial.[315]

We should also make note of waivers regarding preliminary inquiries. The main purpose of a preliminary inquiry is to determine whether there is evidence to justify sending the accused to trial. In our view, the accused ought to be permitted to concede this point at any stage. Further, it would make sense from considerations of convenience, speed and thrift for the accused to have this option. Accordingly, we would allow an accused who has chosen to have a preliminary inquiry to waive that inquiry at any time. The same considerations do not apply, however, to an accused who has elected not to have a preliminary inquiry. To allow a change of decision in that circumstance would simply be to incorporate a means for gaining unnecessary delay.

Implementation of these proposals should greatly simplify re-elections and prevent their use as instruments of delay. The accused would no longer be able to delay the onset of trial by a re-election that requires changes in administrative arrangements, the transfer of documentation and the availability of judges and prosecutors in the court to which the accused has re-elected. The result would be a process that remains fair, but one rid of its tendency to increase delay and its unnecessary complexity.

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313. Which we accomplish by eliminating the exceptions to the jurisdiction of a court of criminal jurisdiction now found in *Code* s. 469.

314. Under a completely unified criminal court, this objection would not arise, and it might be that no consent requirement would be necessary.

315. See the *Uniform Law Conference 1991, Criminal Law Section*, "Right to Elect Mode of Trial after Order for New Trial by Court of Appeal" for essentially the same recommendation.

RECOMMENDATIONS

20. No re-election should be permitted after an *informed* election; however, an accused should be permitted to plead guilty before the trial court at any time, on notice to both the prosecutor and the court.

21. An accused should be permitted to enter a guilty plea before a provincial court judge during or at the end of the preliminary inquiry, or on the date set for electing mode of trial.

22. An accused should be permitted, at any time before the calling of evidence, to waive the jury, provided that both the prosecutor and the court consent.

23. When the court of appeal orders a new trial, the accused should be given an election as to mode of trial.

24. An accused who has chosen to have a preliminary inquiry should be permitted to waive the preliminary inquiry at any stage.

CHAPTER FOUR

Pre-trial Mechanisms for Expediting Trials

I. Introduction

We have noted earlier that caseflow management is an important step toward guaranteeing trial within a reasonable time.[316] In particular, courts must not be content to wait until cases wend their way to trial, but rather must be actively involved with moving cases forward. It has been suggested that "faster courts are differentiated from slower courts not so much by whether case-management controls are utilized in criminal case processing but rather by when those controls are applied."[317] Some of the particular characteristics of fast courts, it is suggested, are early disclosure of the prosecution's evidence, early filing and resolution of motions (including motions regarding admissibility of evidence) and the scheduling of motions hearings and pre-trial conferences at short intervals.[318]

We have already, in other working papers, made recommendations that would help achieve the above-mentioned goals.[319] In this chapter, we examine further the means by which the early resolution of matters can be brought about. These steps would have two benefits. First, they would actively involve the court in cases at an earlier date, encouraging early resolution of particular matters or of the case itself: that involvement should assist in reducing the time required to reach trial. Second, early resolution of particular issues would result in reducing the time necessary for the trial itself. Indeed, in particular cases, it could eliminate the need for trial entirely.

Delays before and at trial can often be traced to the inefficiencies of the pre-trial process. Where issues capable of being resolved early are left to fester, they can complicate trials and delay justice. Until recent amendments to the *Criminal Code*,[320] it was arguable that a major deficiency in our criminal procedure was its apparent lack of impetus toward the early resolution of certain issues. This lack may have appeared to encourage putting off until tomorrow what could be done today.

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316. See the discussion at 18-19.

317. *Justice Delayed, supra,* note 47 at 62.

318. *Changing Times, supra,* note 49, principal finding 7 at 194-95.

319. See, *e.g., Disclosure by the Prosecution, supra,* note 36, or *Plea Discussions and Agreements, supra,* note 34.

320. *Code* s. 625.1, added by the *Criminal Law Amendment Act, 1985, supra,* note 268, s. 127, making pre-hearing conferences mandatory in the case of jury trials, and available in other cases on agreement of the parties, to "consider such matters as will promote a fair and expeditious hearing."

Compounding this failure to encourage the early resolution of various issues has been a failure to encourage the parties to share, at an early stage, information about the case to be met. An accused who prepares for trial without knowing the case to meet is forced to spend an inordinate amount of time preparing to respond to issues that the prosecution may not raise. Similarly, the prosecution must be ready for every issue that the defence might raise. The accused may, for example, contest the voluntariness of a confession, dispute evidence and points of law, raise specific defences (such as insanity), contest the qualifications of expert witnesses produced by the prosecution, seek a change of venue, attempt to change an election and so on.

If the accused and the prosecution can agree, even in part, on a statement of facts, considerable time may be saved both in preparation and at trial. Time may also be saved if the parties are able to agree beforehand on the legal issues involved in the case. Similarly, if particular issues can be decided early, even by a decision of the court, the focus of the trial can be narrower. When the parties, to the extent possible and consistent with their relative positions within the adversary system, know the case that they each must meet and are able to resolve preliminary issues before trial, they can better estimate the time required for trial. Court time could then be administered more efficiently. Further, bringing the parties together at the pre-trial stage may result in plea negotiations that eliminate the need for trial.

In this chapter, we explore two mechanisms that can help expedite and simplify the handling of criminal cases: pre-trial motions and pre-hearing conferences. These procedures may be used to shift the "centre of gravity" of the criminal process by promoting the early resolution of issues that might otherwise be left until much later in the process. They could promote a fuller understanding of the case each party must meet, and encourage the making of fundamental decisions about legal or procedural issues earlier rather than later. Although these steps would themselves take time, we expect that they would produce a net reduction in the time needed for a criminal case.

II. Pre-trial Motions

A. Pre-trial Motions Should Be Permitted

Pre-trial motions are those that can conveniently be disposed of in advance of the trial and in the absence of the jury, the resolution of which does not depend on the evidence to be heard or developed in the case proper. Pre-trial motions are designed to resolve contentious issues at an early stage.

Before the 1980 decision of the Supreme Court of Canada in *R.* v. *Chabot,*[321] it had been accepted in some quarters that after an indictment is preferred, applications relating thereto can be brought by way of pre-trial motion "before any Judge who, in accordance with the practice of the Court, will hear such applications",[322] and that a judge hearing a motion of this sort does not thereby become seized of the matter.[323] Indeed, it was considered preferable in some cases for a judge other than the trial judge to hear the motions, since the motions judge might need to review the transcript of evidence at the preliminary inquiry.[324]

In *Chabot*, however, the Supreme Court held that an indictment is not preferred against an accused until it is "lodged with the trial court at the opening of the accused's trial, with a court ready to proceed with the trial."[325] Arguably, one effect of this ruling is to preclude the use of pre-trial motions: if an indictment has not been preferred, the court has no jurisdiction to deal with a matter.[326]

We recommend the enactment of a general statutory provision to authorize pre-trial motions. Such a provision would, in our opinion, be beneficial because it would enable courts to resolve many contentious issues before the commencement of trial. Early resolution of motions is an important aspect of effective caseflow management.[327]

The early resolution of contentious issues by means of pre-trial motions would permit the defence and prosecution to concentrate on the main elements of the trial, while having to fear fewer surprises. Because issues would be resolved early in the proceedings, both

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321. [1980] 2 S.C.R. 985.

322. *R.* v. *Deol* (1979), 51 C.C.C. (2d) 40 at 42 (Alta Q.B.), Kerans J.

323. *Ibid.* at 46.

324. *Ibid.*

325. *Supra*, note 321 at 999, Dickson J. (as he then was).

326. See R.E. Salhany, *Canadian Criminal Procedure*, 5th ed. (Aurora: Canada Law Book, 1989) at 189. In *R.* v. *Brackenbury* (1981), 61 C.C.C. (2d) 6 (Alta Q.B.), it was held that the remarks of the Supreme Court in *Chabot* were *obiter* insofar as they affected the Alberta practice, but in *R.* v. *Dahlem* (1983), 25 Sask. R. 10 (Q.B.), *Chabot* was taken to preclude entering a stay before an indictment was formally preferred: see Salhany, *supra* at 189, n. 79.

    Note that the power to deal with some particular motions is included in the *Code*. *E.g.*, under s. 591(4), an order severing the counts in an indictment may be made "before or during the trial". An order for change of venue under s. 599(1) may be made "at any time before or after an indictment is found". Indeed, under *Code* s. 601, an objection to a defect on the face of an indictment must be made before plea, or leave of the court is required.

    Note also that in *Mills, supra,* note 2 at 494-95, McIntyre J. speaks of pre-trial motions as an appropriate way to deal with *Charter* applications, and appears to assume that they are available in wider circumstances than the particular cases cited here, and noted by him. McIntyre J. does not discuss the *Chabot* decision in this context.

327. *Examining Court Delay, supra,* note 49 at 80-83; Mahoney and Sipes (1988), *supra,* note 63 at 35-36; *Changing Times, supra,* note 49 at 195.

sides would enter the trial with a much clearer picture of their respective cases. Indeed, a decision on the pre-trial motion might make the subsequent trial unnecessary. If the constitutional validity of a law were successfully challenged, for example, no trial would be required. Similarly, a decision regarding, for example, the violation of a *Charter* right or the success of a particular legal argument may cause either the defence or the prosecution to reconsider whether to contest the trial.

RECOMMENDATION

25. (1) Both the prosecution and the defence should be permitted to bring pre-trial motions, as described in these recommendations, in respect of all crimes.

(2) Pre-trial motions should be defined as motions that can conveniently be disposed of in advance of the trial and in the absence of the jury (where the trial involves a jury), the resolution of which does not depend on the evidence to be heard in the case.

B. Motions before the Trial Judge at the Outset of Jury Trials

To a certain extent, Parliament has already acted to override the effect of the *Chabot* decision. In 1985, subsection 645(5) was added to the *Code*, providing as follows:

> In any case to be tried with a jury, the judge before whom an accused is or is to be tried has jurisdiction, before any juror on a panel of jurors is called pursuant to subsection 631(3) and in the absence of any such juror, to deal with any matter that would ordinarily or necessarily be dealt with in the absence of the jury after it has been sworn.

The advantages of this provision, with respect to streamlining the trial process and saving jurors' time, are obvious.

At the same time, in our view, subsection 645(5) does not do as much as could reasonably be done to override *Chabot*. It appears to allow only the judge who will eventually preside at trial to hear motions.[328]

Motions concerning admissibility and similar matters should, we feel, be reserved to the trial judge, on the grounds that they are closely related to the merits of the case. Because we also believe that the trial judge should be given flexibility as to when to hear those motions, we suggest that *Code* subsection 645(5) be retained. In addition, however, a power to hear some motions should, in our view, be available in other forums. Thus, we also recommend expansion of the power to bring pre-trial motions.

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328. See Salhany, *supra*, note 326 at 189-90.

RECOMMENDATION

26. In any case to be tried by judge and jury, the judge before whom an accused is to be tried should have jurisdiction, before any juror on a panel of jurors is called and in the absence of any such juror, to deal with any matter that would ordinarily or necessarily be dealt with in the absence of the jury after it has been sworn.

C. Forum for Bringing Pre-trial Motions and Their Effect

Our definition of pre-trial motions in recommendation 25(2) already excludes matters that we feel should be reserved to the trial judge. As a result, we suggest that any judge of the same level of court as the trial judge should be permitted to hear a pre-trial motion. In addition, if a motion is brought before the accused has elected a mode of trial, pre-trial motions would be heard by the provincial court. In any jurisdiction with a unified criminal court, of course, the motion would be brought before that court at any stage.

Wherever it is made, the decision on the pre-trial motion would have the same effect as if made at trial. One of these effects would be to provide grounds for an appeal. Another is that the decision would be binding on the trial judge, and the matter could not be raised again at trial.[329] In most circumstances, this result would not be contentious: the decision would have been made by a judge of the same level of court as the trial judge. However, in the event that the motion is brought before the accused has elected, but he or she eventually elects to a higher court, the result would be that a provincial court decision is binding on a higher court.

We do not see in this result any real cause for concern. The most appropriate time to bring many motions would be early in the proceedings, prior to a preliminary inquiry. At that stage, the matter is being dealt with by the provincial court, and so pre-trial motions could most efficiently be brought there. If the result of that motion is not binding at trial, there is very little reason to have brought the application in the first place. We would observe, however, that in a jurisdiction with a unified criminal court this objection would not arise.

A more contentious issue, we suggest, is whether the judge who hears a pre-trial motion should be allowed to preside at trial. In our opinion, there is no reason to forbid this practice. There seems to be no particular reason, for example, to preclude a judge who hears a pre-trial application for particulars from subsequently trying the case.

At the same time, there will be circumstances in which it would be advisable for a different judge to hear the trial — for example, where a judge hears, on a pre-trial motion, evidence that would not be admissible at trial. We do not see any need for a blanket exclusion of judges in this situation. We are confident that judges can, for the most part,

329. Except in the special circumstances discussed below under "Renewal of Pre-trial Motions" at 89.

disregard evidence that has no legal effect. Nonetheless, some mechanism for challenging the appropriateness of particular assignments is required.

We suggest that the decision as to whether the judge hearing a pre-trial motion will preside at trial should be left to the judge in charge of assignments. This approach would permit maximum flexibility in the assignment of judges, which in turn should reduce delays in the system. In addition, it should be possible for a judge who has heard a pre-trial motion to be disqualified on the grounds of real or apprehended bias. A motion to disqualify a judge could be made by either the defence or the prosecution, or the judge might personally decline to try the case. This approach would resolve possible instances of bias while preserving flexibility.

Furthermore, a judge who hears a pre-trial motion should generally, we feel, be permitted to preside at a pre-hearing conference. The judge could then both encourage the parties to reach a consensus on non-contentious issues and rule on motions concerning contentious issues: there is no inherent incompatibility in allowing the same judge to handle both types of matter. At the same time, it should not be compulsory for pre-trial motions to be brought before the pre-hearing conference judge. Moreover, any party should be able to apply for the judge to be disqualified from performing the dual function on grounds of real or apprehended bias, and the judge should be able to decline to perform both functions on the same grounds.

RECOMMENDATIONS

27. A decision made on a pre-trial motion should have the same effect as if made at trial.

28. (1) A pre-trial motion may be brought before the trial judge, another judge of the same level of court or, where the motion is brought before the accused has elected a mode of trial, a provincial court judge.

(2) Either the defence or the prosecution may move to have a judge who has heard a pre-trial motion disqualified from trying a case on grounds of bias, whether real or apprehended.

(3) A judge who has heard a pre-trial motion may decline to try the case to which the motion relates on grounds of possible bias.

29. Subject to the right of either the defence or the prosecution to apply to have the judge disqualified for real or apprehended bias, and of the judge to decline on those grounds, it should be permissible for the same judge to hear pre-trial motions and preside at a pre-hearing conference.

D. Issues to Be Resolved by Way of Pre-trial Motions

Pre-trial motions should be confined to motions that can be conveniently disposed of in the absence of the jury (where there is a jury), the resolution of which does not depend on the evidence to be heard or developed in the case proper. We do not feel that we can exhaustively detail the matters that would be the proper subject of pre-trial motions. Instead, we prefer to provide an inclusive list of matters that should generally be capable of being disposed of by pre-trial motion.

One type of motion has been consciously excluded from our list. Since we have recommended that judges other than the trial judge be able to hear pre-trial motions (recommendation 28), we suggest that motions with which a trial judge would normally deal in the absence of the jury — primarily questions of the admissibility of evidence — should not be included in the list of appropriate subjects for pre-trial motions. That is not to say that these matters are never capable of being dealt with at an early stage. They should, however, be reserved for the trial judge.

In addition, we recognize that in particular cases a judge may feel more information is required than can reasonably be led on a pre-trial motion. Accordingly, we recommend that the pre-trial motions judge be empowered to defer a motion to trial when necessary.

RECOMMENDATION

30. (1) A pre-trial motion may be brought to determine, among other things, applications:

(a) in bar of proceedings or conviction;[330]

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330. It has been held in some cases that double jeopardy pleas cannot be asserted at various preliminary stages: see, *e.g.*, *R.* v. *Martin*, [1979] 4 W.W.R. 765 (Sask. Q.B.), *Re Schmidt and the Queen* (1984), 44 O.R. (2d) 777 (C.A.), or *Re R.* v. *Rothman*, [1966] 4 C.C.C. 316 (Ont. H.C.). However, those decisions are based on jurisdictional grounds: that a preliminary inquiry is merely intended to determine whether there is sufficient evidence to put the accused on trial, or that a prerogative writ should not be used when other remedies are available. However, we proposed creating statutory authority for pre-trial motions to be heard, including by the provincial court. In that event, the jurisdictional objection in those cases would not arise.

It is noted in *Martin, supra* et 767, that "where an accused has elected trial by judge and jury, it would be more convenient to dispose of motions such as this by application to a chambers judge rather than raise the plea of autrefois acquit before the judge just before arraignment and while the jury array is in the courtroom."

Former Chief Justice Dickson suggested in *R.* v. *Prince*, [1986] 2 S.C.R. 480, that courts should normally decline to hear motions for a prerogative remedy in bar of conviction — *i.e.*, a ruling that two offences are similar enough that, although an accused is guilty of both, a conviction can only be entered for one (a rule first formulated in *Kienapple* v. *The Queen*, [1975] 1 S.C.R. 729). The justification for that conclusion is that "erroneous application of the *Kienapple* principle prior to the conclusion of the trial" is a source of delay (*Prince, ibid.* at 508). We agree that a judge who feels more information is required

(b) to permanently discontinue proceedings;

(c) for change of venue;

(d) with respect to deficiencies in charge documents;

(e) to challenge the jurisdiction of a court or judge;

(f) to sever counts or accused;

(g) for remedies under the Code of Criminal Procedure;

(h) for remedies under *Charter* subsection 24(1); and

(i) to challenge the constitutional validity of the statute creating the crime.

(2) A judge hearing a pre-trial motion who lacks sufficient information to decide the motion may defer the matter to trial.

E. Time for Bringing Pre-trial Motions

The major value of pre-trial motions is their ability to determine important matters at an early date, without waiting for trial to commence. Accordingly, we suggest that it should be possible to bring a pre-trial motion at any time after the laying of a charge. A pre-trial motion might be brought early in the proceedings to resolve a question of law: if the accused brings a motion asserting that the charge fails to disclose an offence known to law, the case could be terminated without further delay. The appropriate time would vary with the type of motion.

It would be administratively easier to have all pre-trial motions brought at the same time. However, the outcome of one pre-trial motion may give rise to others. If a motion that a charge discloses no offence known to law is unsuccessful, an accused may wish to bring other motions — for example, to sever a joint trial, or alleging to the breach of a *Charter* right. We therefore do not make any recommendation requiring all pre-trial motions to be brought at the same time. We are confident that attempts to prolong the pre-trial process by unnecessarily bringing one motion after another in separate proceedings would be viewed as an abuse of process and met with rebuff in the courts.

We attach only one restriction to the timing of pre-trial motions. To avoid parallel proceedings, pre-trial motions before a different judge should not be permitted while a preliminary inquiry is in progress. At present, the power of a judge hearing a preliminary inquiry to grant motions is quite limited. In particular, a preliminary inquiry court is not a court of competent jurisdiction to grant a *Charter* remedy for a violation of the right to trial within a reasonable time.[331] Under our proposals in Working Paper 59, *Toward* a

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should be entitled to defer the motion to trial, but we see no need to prohibit hearing a motion in bar of conviction in every case.

331. *Mills, supra,* note 2.

Unified Criminal Court,[332] in our forthcoming working paper to be entitled "Remedies in Criminal Proceedings"[333] and here, a judge hearing a preliminary inquiry would have broader powers than at present, and bringing pre-trial motions would be possible at the preliminary inquiry itself. In any event, we recommend that pre-trial motions should not be allowed elsewhere while the preliminary inquiry is in progress.

RECOMMENDATION

31. (1) A pre-trial motion may be brought at any time between the laying of a charge and the commencement of trial.

(2) While a preliminary inquiry is in progress, no pre-trial motion shall be brought before any judge other than the judge conducting the preliminary inquiry.

F. Formalities of Pre-trial Motions

Although we are not, at this stage, wedded to precise and rigid requirements concerning the form in which pre-trial motions must be brought, we are in favour of some uniformity. We would expect little argument against the suggestions that such motions be in writing, disclose the grounds upon which they are being brought and be supported by affidavit and that reasonable notice be required.

RECOMMENDATION

32. Pre-trial motions should be made in writing and on reasonable notice, disclose reasonable grounds and be supported by affidavit.

G. Renewal of Pre-trial Motions

Generally speaking, a single pre-trial motion should not be permitted to be brought more than once. The main purpose of pre-trial motions is to settle matters early so as to reduce delay: if re-litigation of the same points were possible either before or at trial, then delay would likely be increased rather than reduced.

We would not, however, flatly prohibit subsequent applications concerning the same matter by the accused or the prosecution. They should be allowed when based on new grounds or, where appropriate, fresh evidence.

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332. *Supra,* note 30.

333. *Supra,* note 206. We anticipate recommending in that working paper that all courts should have the same jurisdiction to grant remedies.

By *new grounds* we mean facts that would have been relevant to a previous pre-trial motion and did not exist at the time the previous application was made. For example, an accused might apply unsuccessfully for a change of venue, based on prejudicial pre-trial publicity. If, subsequent to that application, there were additional publicity which might further jeopardize the accused's chance of receiving a fair trial, then a new application could be made. Additional publicity prior to the previous motion which ought to have come to the attention of the accused, but did not, would not create a new ground.[334]

We would treat fresh evidence similarly. Fresh evidence should justify a subsequent application only in circumstances analogous to those suggested in the unanimous judgment of the Supreme Court of Canada in *Palmer* v. *The Queen*.[335] There the court, in considering the admissibility of fresh evidence, said:

> From these and other cases, many of which are referred to in the above authorities, the following principles have emerged:
>
> (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases: see *McMartin* v. *The Queen*.
>
> (2) The evidence must be relevant, in the sense that it bears upon a decisive or potentially decisive issue in the trial.
>
> (3) The evidence must be credible in the sense that it is reasonably capable of belief, and
>
> (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.[336]

We are convinced that such applications would be rare and, in any event, unlikely to succeed. A judge on the subsequent motion would probably hesitate to reverse the findings of the first judge unless the evidence were compelling.

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334. Similarly, if an accused had brought a pre-trial motion applying for a termination order based on an alleged abuse of process, then only alleged misbehaviour subsequent to that time could form the basis for a later application on the same ground. Objectionable behaviour by the *Crown* which had not been complained of at the time of the first motion could not later be raised.

335. [1980] 1 S.C.R. 759.

336. *Ibid.* at 775.

RECOMMENDATION

33. Subsequent motions in respect of the same subject-matter should be permissible when based on a new ground that did not exist at the time of the original motion, or on fresh evidence that

(a) could not, by due diligence, have been led at the original motion;

(b) is relevant;

(c) is credible; and

(d) if believed, could have affected the result of the original motion.

H. Review of Decisions on Pre-trial Motions

The object of pre-trial motions is to simplify and clarify the case against the accused, and ultimately to expedite the trial process. If the decision on a pre-trial motion is immediately reviewable, it may defeat the purpose of the procedure. Instead of expediting the trial, pre-trial motions could become a source of delay, with appeals clogging the pre-trial process. Accordingly, *pre-trial* review of those decisions must be restricted.[337]

We will, in a forthcoming working paper,[338] be considering review of all types of judicial decisions. We would postpone until that time any discussion of judicial review of decisions on pre-trial motions.

RECOMMENDATION

34. Judicial review of decisions on pre-trial motions should not be available before a final verdict has been reached in a trial, except as will be provided in our forthcoming working paper, "Judicial Review in Criminal Cases."

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337. We have noted earlier that decisions made on a pre-trial motion have the same effect as if decided at trial, and therefore can form the basis for an appeal. Thus, a decision on a pre-trial motion can be reviewed after the trial has been completed on ordinary grounds of appeal.

338. To be entitled "Judicial Review in Criminal Cases." Note that in the case of pre-trial motions, the decision under review will often be that of a superior court judge. That working paper will be making recommendations concerning this situation.

III. Pre-hearing Conferences

A. Their Origins and Development

Before 1985, the *Criminal Code* did not provide for any general form of hearing to address preliminary issues. Although applications could be brought before trial in respect of several issues,[339] no general power existed to consider and discuss preliminary matters.

Research has shown that the most effective method for reducing delay in the courts is through improved caseflow management.[340] Fundamental to that management is early and continuous control, which consists in a judge's being aware of and monitoring the case from an early time, early disclosure and the early resolution of issues. In some jurisdictions cases are slotted into different "tracks" depending on their complexity,[341] while in other jurisdictions a timetable for each case is worked out in consultation with the parties.[342] The pre-hearing conference is well-suited to all of these functions.[343]

Even before the introduction of the *Code's* current provisions relating to pre-hearing conferences, brought into force only in 1989, some jurisdictions had introduced their own systems of pre-trial meetings in which the parties, aided by a judge, — generally not the judge who would ultimately try the case — would attempt to resolve various issues to expedite the trial.[344] *Code* section 625.1[345] contains a formal mechanism, called a "pre-hearing conference," by which all systems of pre-hearing conferences have acquired a statutory basis.

Code section 625.1 provides as follows:

> (1) Subject to subsection (2), on application by the prosecutor or the accused or on its own motion, the court before which, or the judge, provincial court judge or justice before whom, any proceedings are to be held may, with the consent of the prosecutor and the accused, order that a conference between the prosecutor and the accused or counsel for the accused, to be presided over by the court, judge, provincial court judge or justice,

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339. *E.g.*, applications to quash indictments for defects in substance or form, applications for particulars, applications to sever counts in indictments or to sever trials of accused persons who were to be jointly tried: Salhany, *supra*, note 327 at 189.

340. See the discussion at 16-30, above.

341. *Examining Court Delay*, *supra*, note 49 at 105.

342. Solomon and Somerlot, *supra*, note 19 at 12.

343. Mahoney and Sipes (1988), *supra*, note 63 at 35-36.

344. See, *e.g.*, in Ontario, The Hon. Chief Justice G.T. Evans, "Pre-trial Procedures, Conferences and Disclosures" in Sandra Oxner, ed., *Criminal Justice: Papers prepared for presentation at the Canadian Institute for the Administration of Justice Conference on Criminal Justice held at Halifax, October 28, 29 and 30, 1981* (Toronto: Carswell, 1982) 23 at 28-29.

345. See *supra*, note 320.

be held prior to the proceedings to consider such matters as will promote a fair and expeditious hearing.

(2) In any case to be tried with a jury, a judge of the court before which the accused is to be tried shall, prior to the trial, order that a conference between the prosecutor and the accused or counsel for the accused, to be presided over by a judge of that court, be held in accordance with the rules of court made under section 482 to consider such matters as will promote a fair and expeditious trial.

Subsection 482(1) of the *Code* permits superior courts of criminal jurisdiction and courts of appeal to "make rules of court not inconsistent with this Act or any other Act of Parliament". Subsection 482(2) gives similar rule-making powers to courts of criminal jurisdiction other than superior courts and courts of appeal: however, the rule-making powers of the provincial courts may be exercised only with the assent of the provincial lieutenant governor in council. Among the rule-making powers authorized under section 482 is one to "regulate in criminal matters the pleading, practice and procedure in the court *including pre-hearing conferences held pursuant to section 625.1*".[346] Notwithstanding the grant of rule-making powers to the courts, "the Governor in Council may make such provision as he considers proper to secure uniformity in the rules of court in criminal matters"[347] Rules of court made under section 482 must be published in the *Canada Gazette*.[348]

The pre-hearing conferences envisaged in the *Code* are therefore a hybrid — half the creation of statute, and half the creation of regulation. Every province and territory has prepared rules[349] governing pre-hearing conferences in the superior court under *Code* section 625.1.

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346. *Criminal Code*, s. 482(3)(*c*) [emphasis added].

347. *Criminal Code*, s. 482(5).

348. *Criminal Code*, s. 482(4).

349. *British Columbia Supreme Court Rules Respecting Pre-Trial Conferences*, SI/86-102; *Alberta Court of Queen's Bench Rules Respecting Pre-Trial Conferences*, SI/86-79; *Saskatchewan Court of Queen's Bench Rules Respecting Pre-Trial Conferences*, SI/86-158; *Manitoba Court of Queen's Bench Rules Respecting Pre-trial Conferences (Criminal)*, SI/85-210; *Ontario District Court Rules Respecting Pre-hearing Conferences in Criminal Matters*, SI/86-214; *Quebec Superior Court Rules of Practice Respecting Criminal Matters*, SI/86-81; *New Brunswick Court of Queen's Bench Rules Respecting Pre-Trial Conferences*, SI/86-78; *Prince Edward Island Supreme Court Rules Respecting Pre-Trial Conferences*, SI/86-87; *Nova Scotia Supreme Court Rules Respecting Pre-Trial Conferences*, SI/86-103; *Newfoundland Trial Division of the Supreme Court Rules Respecting Pre-Trial Conferences*, SI/86-80; *Northwest Territories Supreme Court Rules Respecting Pre-Trial Conferences*, SI/86-86; *Yukon Territory Supreme Court Rules for Pre-Hearing Conferences in Criminal Matters*, SOR/88-427.

B. The Pre-hearing Conference as a Mechanism for Achieving Consensus on Non-contentious Issues

Pre-hearing conferences could be put to a number of uses, any of which could make the pre-trial process more efficient without sacrificing fairness. Indeed, in most cases, the fairness of the system would be enhanced by a pre-hearing conference.

The pre-hearing conference could serve as a forum for disclosure. The Crown might disclose more fully the evidence it intends to introduce at trial and the sentence it will seek on conviction, a procedure that would be particularly useful to the defence if there is no preliminary inquiry. The need for an application for particulars might be avoided by raising the issue at a pre-hearing conference.

Equally, a pre-hearing conference might be an appropriate forum for the parties to enter into plea negotiations.[350] Successful negotiations would eliminate the need for a trial, thus dramatically increasing the efficiency of the system.

Even if plea negotiations cannot resolve the entire matter, a pre-hearing conference could be used to seek agreement between the parties on issues that are not seriously in dispute: a statement of facts might be agreed on, or the defence might admit continuity of possession of exhibits or ownership of goods. Agreement could be reached over whether particular legal issues will be raised at trial: for example, whether a *Charter* violation will be alleged or whether a dangerous-offender application or application for increased punishment will be made. Any of these uses would narrow the issues to be dealt with at trial and allow both sides to make better use of their preparation time.

The pre-hearing conference might also be an opportunity for the court to exert control over a case and see to it that matters are dealt with expeditiously. In many areas, agreement between the parties being unobtainable, the issues have to be settled by the court. Often, however, those issues need not wait for resolution at trial: the admissibility of certain evidence, for example, or an allegation of abuse of process, might be dealt with by a pre-trial motion. Their early resolution, where possible, and the early concern with and control of cases by the courts engendered thereby, would greatly assist in moving cases to trial promptly by settling some cases and reducing the time necessary to hear others.

Finally, where these other functions of the pre-hearing conference have been fulfilled, the parties would be in a much better position to estimate the time necessary to conduct the trial, or indeed whether a trial is likely to be necessary. If the exact trial date is not scheduled until after the pre-hearing conference (but is scheduled for shortly after the conference), then it is likely both that fewer cases would be scheduled for trial and that scheduled cases would proceed on the date set. In that event, the ability to schedule trials

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350. Note, however, that if plea negotiations were to take place at a pre-trial conference, then under our recommendations in *Plea Discussions and Agreements, supra*, note 34, the conference would have to be held in front of a judge other than the one who would preside at trial.

realistically would be greatly enhanced, and this improved ability to use the resources available would improve the court's ability to move all cases expeditiously to trial.[351]

Pre-hearing conferences thus have the potential for focusing issues and significantly reducing surprise, confusion and the complexity of criminal trials. By reducing the length of individual trials, they may alleviate congestion and facilitate the movement of other cases to trial.[352] For these reasons, we support the use of pre-hearing conferences.

At the same time, certain potential functions of a pre-hearing conference are inconsistent with one another. If the court wants to use the conference to encourage pre-trial motions, then an early conference date is desirable. On the other hand, estimates of the time needed to conduct the trial or of the need for trial at all are likely to be more reliable shortly before trial.[353] Accordingly, although pre-hearing conferences have many potential benefits, a choice may have to be made as to which benefits will be sought. Alternatively, a court may wish to hold more than one conference.

C. The Structure of the Pre-hearing Conference Should Be Set Out in Greater Detail

The 1985 amendments to the *Criminal Code*[354] created statutory authority for pre-hearing conferences. The framework of the pre-hearing conference is established by section 625.1, while details of its operation and the subjects it might cover are largely left to be determined by the provinces under the subsection 482(1) rule-making power. The advantages of setting out a detailed structure in the *Code* are substantial uniformity and accessibility. The advantages of setting out a detailed structure in the *Code* are substantial uniformity and accessibility. The advantage of using provincial rules of court is flexibility; pre-trial problems peculiar to one province might not be addressed by a rigidly uniform scheme.

The *Code* provision does not specify what matters might be considered at the conference; it simply provides authority to "consider such matters as will promote a fair and expeditious hearing."[355] The specifics are left to the judiciary in each province under the subsection 482(1) rule-making power.

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351. Recall that "[t]he most important predictor of faster case processing times was a firm trial date policy": *Examining Court Delay, supra,* note 49 at 101.

352. See Borins, *supra,* note 29 at 147.

353. At this stage, counsel are likely to be more certain of the witnesses they will call.

354. *Criminal Law Amendment Act,* 1985, *supra,* note 268; *Miscellaneous Statute Law Amendment Act, 1987,* R.S.C. 1985, c. 1 (4th Supp.).

355. *Criminal Code,* s. 625.1(1).

The provinces and territories have expanded on the general direction contained in the *Code*. Some uniformity is inevitable. Every province, for example, requires the attendance of counsel for the accused and a prosecutor — generally the prosecutor who will appear at trial or senior counsel in charge of prosecutions. The rules in general note that the conference is to be informal, in chambers and conducted without prejudice to the rights of the parties,[356] and that nothing prevents the holding of further informal conferences to deal with other matters.[357] In addition to these relatively routine matters, however, every jurisdiction's rules regarding *Code* section 625.1 envisage the pre-hearing conference as considering the nature and particulars of any preliminary motions that counsel intend to make and the nature and particulars of any matter arising in the course of the trial that would normally be dealt with in the absence of the jury.[358] The rules also generally allow the judge to set a date prior to the commencement of trial for these matters to be heard and determined.[359] Other matters which might have been raised are not typically included for discussion at pre-hearing conferences: the extent of disclosure, the possible settlement of particular issues or agreement on facts, the possibility of plea negotiations and the length and date of trial are each mentioned in only two or three jurisdictions.[360]

We agree that provincial differences should figure in the structure of pre-hearing conferences. At the same time, we suggest that the 1985 *Criminal Code* amendments[361] are too broadly stated. It would be more appropriate to shift the balance somewhat, by describing in the *Code* elements that ought to be common to pre-hearing conferences in all provinces. In particular, elements appropriate to increased caseflow management should be incorporated.

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356. Only Manitoba and Quebec do not state this, though neither assert that the proceedings are binding or with prejudice to the parties. In Quebec, however, the conference is held in court and the proceedings are recorded. See *supra*, note 349.

357. Again, only Manitoba and Quebec do not explicitly state this. See *Supra*, note 349.

358. Every province and territory includes provision for these matters to be raised, though with some differences in emphasis. Quebec refers not to matters which would be dealt with in the absence of the jury, but to questions of law concerning admissibility of evidence. The Yukon Territory does not specifically call for the judge to inquire whether preliminary motions will be raised, but does provide the power to schedule the hearing of such motions before trial.

359. Generally the judge presiding at the conference is given the ability to schedule a time for hearing preliminary motions, but only the trial judge has the ability to determine when matters which would be dealt with in the absence of the jury will be heard. Only Ontario and Quebec do not specifically give the judge conducting the conference the power to schedule a time for hearing motions. Under the Quebec rules, however, whether issues should be resolved before the jury is chosen is a matter for discussion. Under the Ontario rules, it seems to be presumed that preliminary motions will be brought at the outset of trial.

    In light of the *Chabot* decision, *supra*, note 321, it does not appear that a judge can deal at present with pre-trial motions other than those specifically provided for in the *Code* — *e.g.*, under s. 599 for change of venue. Our recommendations above, of course, would remedy this situation.

360. These matters are variously included in the rules of Ontario, Quebec and the Yukon Territory, *supra*, note 349.

361. *Supra*, note 268.

There has, in fact, been considerable agreement among the provinces and territories about the appropriate functions of a pre-hearing conference.[362] Every jurisdiction has opted for a model that allows the court to determine at an early stage the issues that will arise in a case, and almost all have given the pre-hearing judge the power to set an early date for resolving those issues. In light of this, we suggest that the consistency found in that area should be legislated in the *Criminal Code*.

Initially, we would provide in the *Code* that a pre-hearing conference judge should determine whether either party intends to raise any matter capable of being dealt with by way of pre-trial motion, and should be able to schedule a date prior to trial for hearing those motions. Matters included would be motions in bar of proceedings or of conviction, applications for remedies under the Code of Criminal Procedure or under the *Charter*, and other similar motions (see recommendation 35). Further, there may be other matters that do not qualify as pre-trial motions but that ought also to be determined at an early date. This distinction is reflected at present in most provinces' regulations, which deal separately with matters that would normally be dealt with in the absence of the jury. Our recommendations, in particular recommendation 35, preserve the approach taken by the provinces: although any judge conducting the conference should be able to determine whether such issues exist, only the trial judge could actually schedule the matter for hearing and decide it.

There is a clear advantage in requiring that these issues be considered at a pre-hearing conference. It is possible now, for example, for motions that are to be dealt with in the absence of the jury to be heard by the trial judge at an earlier time. However, the prosecutor or the defence will not always be anxious to bring matters on for an early hearing. Accordingly, if choice is left entirely to the parties, these proposals for pre-trial motions may be of little value, owing to underuse. Alternatively, if the court, which always has an interest in proceeding expeditiously to trial, were given the power to determine whether such motions exist and to schedule them for hearing, then the full benefit of the provisions could be obtained.

We would also go beyond those matters included at present in the provincial regulations, and allow for several other issues to be raised. Pre-trial motions are necessary only where there are points of diagreement between the parties. In the course of discovering these matters, the judge will also be determining the matters about which the parties do not disagree. It would therefore be appropriate for the judge to determine whether an agreed statement of facts can be prepared, and whether either side is willing to make any admission — for example, relating to continuity of evidence.

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362. In late 1985, the Canadian Judicial Council formed a committee consisting of the Chief Justices of Trial Divisions of Courts across Canada or their representatives. This committee met in February 1986, and prepared draft rules for pre-hearing conferences. The majority of courts adopted these rules or slightly amended versions of them (personal correspondence from The Honourable Constance Rachelle Glube, Chief Justice, Trial Division, Supreme Court of Nova Scotia, July 10, 1990).

Finally, if the pre-hearing conference is to be used as an opportunity for the court to exercise control over cases, then it would be appropriate to raise scheduling matters. The judge could determine the parties' estimates of the time necessary to conduct the trial and set an appropriate date for commencement.[363]

Specific inclusion of these matters does not mean that the *Code* provision should not still leave the provinces with a power to tailor the pre-hearing conference to consider other "matters as will promote a fair and expeditious hearing."[364]

Using the pre-trial conference to allow the court to exercise control at an early stage would have clear benefits for bringing cases to trial within a reasonable time. Incorporating that purpose into the *Code* itself would be an important recognition of the commitment to the expeditious handling of cases. At the same time, there would be scope for provincial differences in handling the matters and different methods of caseflow management: the decision as to how to proceed, once areas of agreement and disagreement have been determined, must necessarily remain with the court.[365]

One further advantage to legislating matters would be the greater accessibility the rules would thereby have: all provincial rules would for the most part appear in one place, namely, the *Criminal Code*, rather than scattered throughout the *Canada Gazette*.[366]

Finally, legislating that these matters shall be dealt with at a pre-trial conference would not preclude other informal conferences, or the hearing of other matters. In Report 22, *Disclosure by the Prosecution*,[367] for example, we described an experimental project in Montreal in which a disclosure conference took place between counsel alone, followed by a hearing before a justice. That procedure led to the settlement of 26.4 per cent of cases at the conference, and increases in the number of guilty pleas and withdrawn charges. There is no reason arguing against the inclusion of such a procedure as an aspect

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363. Even though such estimates would likely be less accurate than they would be if the conference were closer to the trial date, it is still worth making them.

364. *Criminal Code*, s. 625.1.

365. It is worth noting the various levels of obligation the provinces and territories impose on counsel to disclose the existence of anticipated pre-trial motions. Six jurisdictions say that counsel "shall disclose" any preliminary motions or matters which they intend to make (B.C., Alta, Sask., Man., P.E.I., and the N.W.T.). Two say counsel "shall be encouraged to disclose" such matters (N.B. and N.S.), and one says counsel "may disclose" the motions (Nfld). Two other provinces merely refer to such motions as matters to be raised at the conference (Ont. and Que.). In our view, the goal of control by the court over cases makes advisable some level of obligation beyond permitting counsel to bring such matters to the judge's attention. At the same time, we recognize that a strict obligation may create conflicts, particularly with defence counsel's solicitor-client obligations. It is also difficult to see how one could enforce such an obligation, or indeed whether it is advisable to require counsel to disclose every matter which "may arise" in the course of trial. In any event, however, we are content to leave these questions to be determined by each jurisdiction, as part of a caseflow-management plan.

366. See *supra*, note 349.

367. *Supra*, note 36 at 6-9.

of a pre-trial conference that also considers whether any pre-trial motions should be made. As with our other recommendations to expedite the hearing of criminal cases, this recommendation should not be looked at in isolation.

RECOMMENDATION

35. (1) Section 625.1 of the *Criminal Code* should be amended to provide that pre-hearing conferences consider

(a) who will act as counsel for the prosecution and the defence;

(b) whether the accused or the prosecutor intends to raise any matter capable of being dealt with by way of pre-trial motions;[368]

(c) the date on which, in the pre-hearing conference judge's discretion, any matter referred to in paragraph (b) will be heard and determined;

(d) whether the accused or the prosecutor intends to raise any matter that would normally be dealt with in the absence of the jury after it has been sworn, and the anticipated length of time that the matter will require for hearing;

(e) the date on which, in the trial judge's discretion, any matter referred to in paragraph (d) will be heard and determined;

(f) whether an agreed statement of facts can be prepared;

(g) whether either party is prepared to make any admissions;

(h) the time necessary to conduct the trial; and

(i) the appropriate date for commencing the trial.

(2) The judiciary should be permitted, by means of rules of court and as it sees fit, to add to the list of issues that may be considered at a pre-hearing conference.

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368. At present, the strictest rules require that "counsel shall disclose to the judge the nature and particulars of any preliminary motion which counsel intend to make": see, *e.g.*, *British Columbia Supreme Court Rules Respecting Pre-Trial Conferences*, *supra*, note 349, s. 5. Apparently, if counsel do not *intend* to deal with a matter by way of pre-trial motion, even though it is capable of being dealt with in that way, the British Columbia provision does not require counsel to disclose it. Our recommendation asks whether counsel intend to raise an issue and whether the issue can be raised by pre-trial motion — whether counsel actually intended to raise it on a pre-trial motion or at trial does not matter.

D. The Availability of Pre-hearing Conferences

Section 625.1 appears in *Criminal Code* Part XX, dealing with preferring indictment. That provision also applies "with such modifications as the circumstances require" to summary conviction proceedings, by virtue of *Code* section 795.

In our estimation, it makes sense for the pre-hearing conference to be available for both summary conviction and indictable offences, provided there is discretion concerning its use. The procedure has similar merits for both classes of offences; it simplifies and clarifies issues and promotes expedition at trial. If the pre-hearing conference is to improve caseflow management, it must be generally available. It should, we believe, be provided for by statute for both classes of crimes under the new classification scheme proposed in our Working Paper 54, *Classification of Offences.*[369]

RECOMMENDATION

36. Pre-hearing conferences should be available for all trials.

E. Pre-hearing Conferences Should Not Be Mandatory

Under *Criminal Code* subsection 625.1(2), pre-hearing conferences are mandatory for jury trials. With non-jury trials, those conferences will be held only if the prosecutor and accused both consent. The implication is that the potential saving of time, confusion and expense is of particular importance in jury trials.

In his *Report of the Ontario Courts Inquiry,* Mr. Justice Zuber noted that the length and difficulty of a trial does not depend on the presence of a jury, and that pre-hearing conferences may have equal value in non-jury cases.[370] Accordingly, he expressed the view that the consent of the parties ought not to be required in non-jury cases: the court should be able to order a pre-hearing conference.[371] We are of a similar opinion. From the perspective of caseflow management, the court must have this control.

In addition, we would go one step further. In our view, both the prosecution and the defence should also have the right to compel a pre-hearing conference. If either party wishes to discuss matters that it believes "will promote a fair and expeditious trial",[372] we see no reason for preventing such a conference. While it is possible that a party who is forced to participate in a pre-hearing conference may feel an obligation to make

369. *Supra,* note 31.

370. *Supra,* note 24 at 214.

371. *Ibid.*

372. *Criminal Code,* s. 625.1(2).

concessions, that danger could be avoided simply by making the absence of any such obligation clear in the legislation.

At the same time, we have doubts about the value of requiring pre-hearing conferences to be held for all jury trials. If neither the judge nor any of the parties believes there is any matter requiring discussion, a mandatory pre-hearing conference would be of little value.[373]

Accordingly, we would establish the same requirements for all trials, whether jury or non-jury: a pre-hearing conference should be held if either party or the court requests it.

We expect that some courts may choose to require pre-hearing conferences in all cases, or in all of the more serious cases.[374] In many ways, this would be a desirable course of action. In some cases, neither the defence nor the prosecution may wish to be seen to initiate the conference. In others, neither the defence nor the prosecution may be particularly looking to expedite the process. A presumption that a pre-hearing conference will occur, however, would help to guarantee the court's ability to take effective, early control of cases. Once again, although we believe such a practice to be desirable, we would leave the decision to individual courts.

RECOMMENDATION

37. (1) A pre-hearing conference should be held, in both jury and non-jury trials, whenever ordered by the court on its own motion or requested by the accused or the prosecutor.

(2) There should be no obligation on either the accused or the prosecutor to make concessions at a pre-hearing conference.

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373. We note, in this regard, a plan in Great Britain for pre-hearing conferences discussed in *The Distribution of Criminal Business between the Crown Court and Magistrates' Court: Report of the Interdepartmental Committee,* Cmnd 6323 (London: HMSO, 1975). An experiment with conferences in the Crown Court is described at 117-18, in which a number of issues similar to those we recommend be discussed were raised on a "summons for directions" — in essence, a pre-trial conference. The report concludes that the experiment was successful, reducing the anticipated length of the cases in which it was used. However, the report suggests that the procedure would involve more time, trouble and expense than was saved in uncomplicated cases, and that it should therefore not be mandatory.

    A similar plan has now been instituted nationally: see Celia Hampton, *Criminal Procedure* (London: Sweet & Maxwell, 1982) at 178.

374. Indictable offences under the present classification scheme, or offences punishable by two years' or more imprisonment under our proposed reclassification.

F. Agreement Reached at Pre-hearing Conferences Should Not Bind the Parties

Code section 625.1 does not say whether agreements reached at pre-hearing conferences should bind the parties. In our view, they should not.

Our opinion coincides with what appears to be the practice to date.[375] We are confident that the parties to any agreement — for example, to an agreement statement of facts — will not capriciously abrogate it. If new information comes to light, or if the parties decide to alter their strategies, they should be permitted to do so. A party who wishes to rescind an agreement, however, should be required to give reasons to the court. This requirement should act as a moral check, at least, on any party who seeks to cast aside an agreement. If necessary, the court could grant an adjournment to the party adversely affected by the abrogation of the agreement.

RECOMMENDATION

38. (1) Agreements made at a pre-hearing conference should not be binding.

(2) A party wishing to abrogate an agreement made at a pre-hearing conference should be required to explain to the court the reasons for abrogating the agreement.

(3) The court should be permitted to grant an adjournment to a party adversely affected by the abrogation of an agreement.

G. Judges Presiding at Pre-hearing Conferences Should Be Permitted to Preside at Trial

Code section 625.1 appears to permit the judge presiding at a pre-hearing conference to preside over the subsequent trial.[376] Provincial and territorial rules under that section adopt the same permissive stance.[377]

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375. All provinces and territories, with the exception of Manitoba and Quebec, include in their rules a statement to the effect that the conference shall be "without prejudice to the rights of the parties": see *supra,* note 356. Our proposal also coincides generally with a proposal tentatively advanced by the New South Wales Law Reform Commission, *supra,* note 167, vol. 2 at 401 and 410.

376. *Cf. Criminal Procedure — Part I: Miscellaneous Amendments, supra,* note 177 at 13.

377. The regulations in Manitoba expressly provide that the pre-hearing conference judge may preside at trial; *Manitoba Court of Queen's Bench Rules Respecting Pre-trial Conferences (Criminal), supra,* note 349, s.1. No other province or territory explicitly mentions the issue, though the regulations in many jurisdictions implicitly allow the trial judge to preside at the conference, by differentiating between the powers, apparently exercisable at the conference, of a judge conducting the pre-hearing conference and the powers of the trial judge.

We believe that pre-hearing conference judges should be permitted to preside at trial.[378] A judge who presides over a pre-hearing conference will have some familiarity with the issues, which may save time at trial. Indeed, if the principles of caseflow management discussed earlier in this working paper are to be applied, then having the pre-hearing conference conducted by the judge who eventually hears the case would normally make sense.

However, it should remain open for the defence or the prosecution to apply to have a judge disqualified for possible bias. The judge should also be permitted to decline to try the case.

This approach would keep the system of assigning judges to cases flexible, while providing for situations in which it would be inappropriate for the pre-hearing conference judge to preside at trial. It should be embodied in the legislative provisions governing pre-hearing conferences. We make no recommendation, however, on the advisability of a statutory *preference* for the pre-hearing conference judge to preside at trial.

RECOMMENDATION

39. (1) Having presided at a pre-hearing conference should not disqualify a judge from presiding at trial.

(2) Either the defence or the prosecution should be permitted to move to have a judge disqualified on grounds of bias, whether real or apprehended.

(3) A judge who presides at a pre-hearing conference should be permitted to decline to try the case to which the conference relates on grounds of possible bias.

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378. See New South Wales Law Reform Commission, *supra*, note 167, vol. 2 at 400-401 and 409.

SUMMARY OF RECOMMENDATIONS

Caseflow Management

1. Courts should establish standing committees, consisting of judges, representatives from the prosecution and defence bar, court administrators, police and others involved in the administration of justice, to develop and implement initiatives for improved caseflow-management techniques.

Statutory Limitation Periods

2. A system of statutory time-limits should be enacted to promote trial within a reasonable time.

3. "Post-charge time-limits" should govern the period between the moment of charge and the commencement of trial.

4. For the purpose of determining whether a post-charge time-limit has elapsed

(a) a person is charged as of the issuance of process, the laying or preferring of a charge or the arrest of the person without warrant; and

(b) a trial commences when the accused is given in charge to the jury or, in a non-jury case, when evidence is heard.

5. (1) The trial of an accused charged with a summary conviction offence (or, under our proposed new classification scheme, a crime punishable by a maximum of two years' or less imprisonment) should start within six months; if the accused is detained in custody pending trial, the time-limit should be three months.

(2) The trial of an accused charged with an indictable offence (or, under our proposed new classification scheme, a crime punishable by a maximum of more than two years' imprisonment) should start within one year where the accused has elected a preliminary inquiry, and six months where the accused has not; if the accused is detained in custody pending trial, the time-limit for the trial should be six months where the accused has elected a preliminary inquiry, and three months where the accused has not.

6. Post-charge time-limits should be presumptive, but courts should be permitted, in individual cases, to exceed the time-limits only in the circumstances set out in recommendation 8(1).

7. (1) The time-limits should be the subject of ongoing empirical study, and should be adjusted periodically to such periods as that study indicates are appropriate.

(2) Provinces should have the authority, at any time, to reduce the time-limits for the commencement of a trial within their jurisdiction.

8. (1) A judge shall not set a trial date outside the time-limit, unless to do so is appropriate owing to

(a) the requirements of the Crown, based on

(i) circumstances beyond the control of the prosecutor that prevent the prosecutor from calling important evidence,

(ii) unusual but justifiable delay in service of an information or execution of an arrest warrant,

(iii) unusual complexity in the facts of the offence, causing the prosecutor to need additional time to prepare for trial,

(iv) the necessary length of the preliminary inquiry, or

(v) a change in circumstances or discovery of facts subsequent to the laying of charges reasonably requiring that the prosecutor have further time to lay new charges for the same or substantially the same crime and prepare for trial; or

(b) delay requested or caused by the accused.

(2) When setting a trial date outside the time-limit, the judge shall note on the record the reasons justifying that action.

9. The decision of a court regarding whether to set a trial date outside the time-limit should be reviewable, and should be governed by the procedures regarding judicial review set out in our forthcoming working paper, "Extraordinary Remedies."

10. When the time-limit expires without either proceedings having commenced or the matter having been set for trial outside that time-limit in accordance with recommendation 8, a judge shall on application or on the judge's own motion issue an order terminating the proceedings.

11. (1) Resources should be made available for an ongoing study of the operation of trial courts to determine, among other things, the speed with which criminal cases are processed, the factors relevant to delay and the appropriate length for time-limits.

(2) The study should gather statistics which would provide an empirical basis for setting and comparing the standards governing the operation of trial courts.

(3) If possible, resources should be made available to establish trial court performance standards against which to measure the efficiency and fairness of the operation of trial courts.

12. There should be no preliminary inquiry and no election in respect of crimes punishable by two years' or less imprisonment.

13. A person charged with a crime punishable by more than two years' imprisonment should have the right to a preliminary inquiry and to elect mode of trial.

14. (1) An accused should choose whether to have a preliminary inquiry on first appearance, or on a date set by the judge at first appearance.

(2) If an accused chooses not to have a preliminary inquiry, the accused should elect mode of trial on first appearance, or on a date set by the judge at first appearance.

(3) If an accused chooses to have a preliminary inquiry, the accused should elect mode of trial at the end of the preliminary inquiry, or on a date set by the judge at the end of the preliminary inquiry.

15. The prosecutor should be able, at any time before the accused chooses whether to have a preliminary inquiry, to require that a preliminary inquiry be held.

16. In accordance with our recommendations in Working Paper 62, *Controlling Criminal Prosecutions,* the Attorney General personally should have the power to prefer a charge, notwithstanding that the accused has not had a preliminary inquiry.

17. In accordance with our recommendations in Working Paper 62, *Controlling Criminal Prosecutions,* when the crime charged is punishable by more than two years' imprisonment, the Attorney General personally should have the power to require, notwithstanding any election by the accused, that the accused be tried by judge and jury.

18. An accused should be deemed to elect trial by judge and jury where:

(a) the accused does not make an election when called upon to do so; or

(b) in the case of co-accused, the co-accused separately elect, or are deemed to elect, different modes of trial.

19. An accused should be deemed to choose to have a preliminary inquiry where

(a) the accused does not make a decision concerning a preliminary inquiry when called upon to do so; or

(b) in the case of co-accused, any of two or more co-accused chooses or is deemed to choose to have a preliminary inquiry.

20. No re-election should be permitted after an *informed* election; however, an accused should be permitted to plead guilty before the trial court at any time, on notice to both the prosecutor and the court.

21. An accused should be permitted to enter a guilty plea before a provincial court judge during or at the end of the preliminary inquiry, or on the date set for electing mode of trial.

22. An accused should be permitted, at any time before the calling of evidence, to waive the jury, provided that both the prosecutor and the court consent.

23. When the court of appeal orders a new trial, the accused should be given an election as to mode of trial.

Pre-trial Mechanism for Expediting Trial

24. An accused who has chosen to have a preliminary inquiry should be permitted to waive the preliminary inquiry at any stage.

25. (1) Both the prosecution and the defence should be permitted to bring pre-trial motions, as described in these recommendations, in respect of all crimes.

(2) Pre-trial motions should be defined as motions that can conveniently be disposed of in advance of the trial and in the absence of the jury (where the trial involves a jury), the resolution of which does not depend on the evidence to be heard in the case.

26. In any case to be tried by judge and jury, the judge before whom an accused is to be tried should have jurisdiction, before any juror on a panel of jurors is called and in the absence of any such juror, to deal with any matter that would ordinarily or necessarily be dealt with in the absence of the jury after it has been sworn.

27. A decision made on a pre-trial motion should have the same effect as if made at trial.

28. (1) A pre-trial motion may be brought before the trial judge, another judge of the same level of court or, where the motion is brought before the accused has elected a mode of trial, a provincial court judge.

(2) Either the defence or the prosecution may move to have a judge who has heard a pre-trial motion disqualified from trying a case on grounds of bias, whether real or apprehended.

(3) A judge who has heard a pre-trial motion may decline to try the case to which the motion relates on grounds of possible bias.

29. Subject to the right of either the defence or the prosecution to apply to have the judge disqualified for real or apprehended bias, and of the judge to decline on those grounds, it should be permissible for the same judge to hear pre-trial motions and preside at a pre-hearing conference.

30. (1) A pre-trial motion may be brought to determine, among other things, applications:

(a) in bar of proceedings or conviction;

(b) to permanently discontinue proceedings;

(c) for change of venue;

(d) with respect to deficiencies in charge documents;

(e) to challenge the jurisdiction of a court or judge;

(f) to sever counts or accused;

(g) for remedies under the Code of Criminal Procedure;

(h) for remedies under *Charter* subsection 24(1); and

(i) to challenge the constitutional validity of the statute creating the crime.

(2) A judge hearing a pre-trial motion who lacks sufficient information to decide the motion may defer the matter to trial.

31. (1) A pre-trial motion may be brought at any time between the laying of a charge and the commencement of trial.

(2) While a preliminary inquiry is in progress, no pre-trial motion shall be brought before any judge other than the judge conducting the preliminary inquiry.

32. Pre-trial motions should be made in writing and on reasonable notice, disclose reasonable grounds and be supported by affidavit.

33. Subsequent motions in respect of the same subject-matter should be permissible when based on a new ground that did not exist at the time of the original motion, or on fresh evidence that

(a) could not, by due diligence, have been led at the original motion;

(b) is relevant;

(c) is credible; and

(d) if believed, could have affected the result of the original motion.

34. Judicial review of decisions on pre-trial motions should not be available before a final verdict has been reached in a trial, except as will be provided in our forthcoming working paper, "Judicial Review in Criminal Cases."

35. (1) Section 625.1 of the *Criminal Code* should be amended to provide that pre-hearing conferences consider

(a) who will act as counsel for the prosecution and the defence;

(b) whether the accused or the prosecutor intends to raise any matter capable of being dealt with by way of pre-trial motion;

(c) the date on which, in the pre-hearing conference judge's discretion, any matter referred to in paragraph (b) will be heard and determined;

(d) whether the accused or the prosecutor intends to raise any matter that would normally be dealt with in the absence of the jury after it has been sworn, and the anticipated length of time that the matter will require for hearing;

(e) the date on which, in the trial judge's discretion, any matter referred to in paragraph (d) will be heard and determined;

(f) whether an agreed statement of facts can be prepared;

(g) whether either party is prepared to make any admissions;

(h) the time necessary to conduct the trial; and

(i) the appropriate date for commencing the trial.

(2) The judiciary should be permitted, by means of rules of court and as it sees fit, to add to the list of issues that may be considered at a pre-hearing conference.

36. Pre-hearing conferences should be available for all trials.

37. (1) A pre-hearing conference should be held, in both jury and non-jury trials, whenever ordered by the court on its own motion or requested by the accused or the prosecutor.

(2) There should be no obligation on either the accused or the prosecutor to make concessions at a pre-hearing conference.

38. (1) Agreements made at a pre-hearing conference should not be binding.

(2) A party wishing to abrogate an agreement made at a pre-hearing conference should be required to explain to the court the reasons for abrogating the agreement.

(3) The court should be permitted to grant an adjournment to a party adversely affected by the abrogation of an agreement.

39. (1) **Having presided at a pre-hearing conference should not disqualify a judge from presiding at trial.**

(2) **Either the defence or the prosecution should be permitted to move to have a judge disqualified on grounds of bias, whether real or apprehended.**

(3) **A judge who presides at a pre-hearing conference should be permitted to decline to try the case to which the conference relates on grounds of possible bias.**

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Appendix I

TRIAL WITHIN A REASONABLE TIME: DOES THE RIGHT STILL EXIST?*

by

Stephen G. Coughlan**

In *R.* v. *Morin* (1992), 12 C.R. (4th) 1, ante, the Supreme Court of Canada returns to the controversial issue of trial within a reasonable time for the first time since its decision in *R.* v. *Askov*.[1] The *Askov* decision had far-reaching consequences for the justice system,[2] and was obviously squarely in the justices' minds as they decided *Morin*. On the face of it, this decision is a reminder of what *Askov* really decided, rather than a departure from it.[3] A closer look, however, shows that the new emphasis given to prejudice may have radically changed the s. 11(*b*) right, to the extent that its existence in any meaningful way is threatened.

Morin sets out four factors to be considered in analyzing whether s. 11(*b*) of the *Charter* has been violated:

1. the length of the delay;
2. waiver of time periods;
3. the reasons for the delay, including
    (a) inherent time requirements of the case,
    (b) actions of the accused,
    (c) actions of the Crown,
    (d) limits on institutional resources, and
    (e) other reasons for delay; and
4. prejudice to the accused.

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** Consultant with the Law Reform Commission of Canada until its abolition. The views in this article are those of the author, though the author expresses his gratitude for permission to rely on material gathered for the commission.

1 [1990] 2 S.C.R. 1199, 79 C.R. (3d) 273, 113 N.R. 241, 49 C.R.R. 1, 59 C.C.C. (3d) 449, 74 D.L.R. (4th) 355, 75 O.R. (2d) 673, 42 O.A.C. 81.

2 The court notes that between October 22, 1990, and September 6, 1991, a total of 47,000 charges were stayed or withdrawn in Ontario. This figure can be contrasted to Justice Cory's expectation in *Askov*, ibid., that "such relief will be infrequently granted" (p. 319 (C.R.)).

3 In this respect it is similar to the Ontario Court of Appeal decision *R.* v. *Bennett* (1991), 6 C.R. (4th) 22, 3 O.R. (3d) 193, 46 O.A.C. 99, 64 C.C.C. (3d) 449, 7 C.R.R. (2d) 145.

With minor variations, this list is essentially the same as that in *Askov* and in *R.* v. *Smith*.[4] The differences in *Morin* arise from how these factors are applied, and primarily from the emphasis given to the role of prejudice.

In *Morin*, the court arrives at a guideline of 8 to 10 months as the appropriate length of time for cases to remain in provincial court. Mindful of the effect of the similar guideline in *Askov*,[5] Justice Sopinka goes to some pains to stress that this figure is a guideline only, that it is not a fixed limitation period, and that a variety of factors can justify greater periods of delay. Indeed, presumably to make the point as forcefully as possible, the court lays down an 8- to 10-month guideline, but then immediately finds no *Charter* violation from the 12- to 14-month delay in *Morin*.[6] This approach creates some difficulties.

Comparing Jurisdictions

Morin does differ from *Askov* in some ways. The most obvious departure from *Askov* is the court's backing away from comparing jurisdictions as the approach to determining and appropriate level of systemic delay. The court now suggests that such comparisons should be made only with caution and as a rough guide, noting that "the manner in which criminal charges are dealt with in Montreal and Brampton [the courts compared in *Askov*] is sufficiently dissimilar so as to make statistics drawn from the two jurisdictions of limited comparative value" [p. 20, ante].

This retraction is unfortunate. The approach in *Askov* was better designed to guarantee that courts deal with cases expeditiously. Comparing jurisdictions allows one to avoid setting an arbitrary guideline, by looking to "what has in fact been accomplished in various jurisdictions."[7] Further, the standard was not an onerous one: it involved "more than doubling the longest waiting period to make every allowance for the special circumstances in Peel."[8] Finally, while it is true that cases are dealt with differently in Montreal and Brampton, those differences may be the most relevant consideration. The courts in Montreal have a 15-year history of using caseflow management techniques in order to operate more efficiently. These measures, including a strict adjournment policy, time limits for individual steps in the process, and the separating-out of complex cases, allowed the Montreal courts to reduce delay in handling cases despite a fourfold increase in caseload since 1974.[9] In contrast, the Brampton court had suffered from extreme delay since at least 1981, but only adopted caseflow management techniques aimed at reducing

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4 [1989] 2 S.C.R. 1120, 73 C.R. (3d) 1, 52 C.C.C. (3d) 97, 102 N.R. 205, 63 Man. R. (2d) 81, 45 C.R.R. 314.

5 A period of six to eight months between committal and trial in the upper court.

6 Similarly, in a decision released the same day, *R.* v. *Sharma* (1992), 12 C.R. (4th) 45 (S.C.C.), post, the court allows a 13-month delay.

7 *R.* v. *Mills*, [1986] 1 S.C.R. 863, 52 C.R. (3d) 1, 26 C.C.C. (3d) 481, 29 D.L.R. (4th) 161, 21 C.R.R. 76, 67 N.R. 241, 16 O.A.C. 81, per Lamer J., adopted in *R.* v. *Askov*, supra, note 1 at p. 303 (C.R.).

8 *Askov*, supra, note 1 at p. 313 (C.R.)

9 See Law Reform Commission of Canada, *Trial Within A Reasonable Time*.

delay late in 1988[10] — after all the events in *Askov* had taken place.[11] The dissimilarity between the way the two jurisdictions deal with criminal charges may be that one is efficient and the other is not: exactly the kind of difference that tells us delay in the slower court is not justified.

It is only by making such comparisons that we can determine what is a reasonable time. The *Morin* decision, however, allows "local practices and conditions" to decide the inherent time requirements for cases in different regions, and therefore reduces the need for inefficient courts to improve their procedures.

The Role of Prejudice

The most significant development in *Morin* is its treatment of prejudice as a factor in determining s. 11(*b*) violations. However, the decision makes it difficult to determine precisely the role prejudice is to play.

The debate over the proper role of prejudice in determining s. 11(*b*) violations dates to the first Supreme Court decision relevant to that section, *R.* v. *Mills*,[12] and the decisions of Justice Lamer (as he then was) and Justice Wilson.

In *Mills*, Justice Lamer argued that everyone charged with a criminal offence suffers prejudice: the prejudice of stigmatization, loss of privacy, stress and anxiety, and so on. We accept that a certain amount of such prejudice is unavoidable. However, the very reason the *Charter* guarantees trial within a "reasonable" time is to see to it that accused persons suffer that prejudice for as short a period of time as possible: "prejudice is part of the *rationale* for the right and is assured by the very presence of s. 11(*b*) in the Charter."[13] As a result, proof of prejudice is not necessary. Further, any other prejudice an accused may have suffered due to delay — such as having been held in custody, or having lost a witness, for example — is only relevant to s. 7 or s. 11(*d*). Lamer describes the interest in limiting stress and stigmatization as a security interest, distinct from liberty and fair trial interests.

Justice Lamer therefore wishes to prevent accused persons from leading evidence of prejudice to fair trial interests. In his view, the prejudice to the accused's security interest flowing from the mere passage of time is sufficient alone to show a violation of the s. 11(*b*) right. But if some accused persons lead evidence of other types of prejudice, it will seem that that evidence strengthens those cases — and conversely that a case without evidence of other types of prejudice is weaker, the conclusion he wishes to avoid.

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10 *Askov*, supra, note 1 at pp. 309-313 [79 C.R. (3d)].

11 The Supreme Court concludes that these techniques would not be sufficient in Brampton. Some studies show, however, that when caseflow management is first introduced, there may in the short term be no apparent improvement, and indeed an apparent increase in the average handling time for cases, as the older cases are cleared out of the system. See Barry Mahoney and Larry Sipes, "Zeroing In On Court Delay" (1985) Court Management J. 8 at 12.

12 Supra, note 7.

13 Ibid. at p. 71 (C.R.).

In order to avoid this result, prejudice is to be irrebuttably presumed, and evidence is not only not necessary, it is not even "relevant to establishing a violation of s. 11(*b*)."[14]

Justice Wilson takes issue with this approach. First, she suggests that the impairment to the accused's security interest must arise from delay rather than from the fact of being charged: stigmatization and stress still arise, she says, even if the accused is tried within a reasonable time. This disagreement between the two judges, however, is more formal than substantive. Justice Wilson agrees with Justice Lamer that stress and stigmatization alone can be sufficient forms of prejudice to justify a remedy, and that the purpose of s. 11(*b*) is to guarantee that an accused need not suffer those forms of prejudice beyond a reasonable time. She chooses, however, to characterize the situation differently, saying that "at some point what was theretofore lawful prejudice becomes unlawful and unconstitutional delay."[15]

More significantly, Justice Wilson argues that evidence of other types of prejudice is relevant. In her view, the various subsections of s. 11 cannot be treated as "watertight compartments."[16] Accordingly, she suggests that evidence of prejudice to a fair trial right should be admissible in considering s. 11(*b*).

The dispute in *Mills* — continued in *R.* v. *Rahey*,[17] *R.* v. *Kalanj*,[18] *R.* v. *Conway*,[19] and *Askov* — is between two reasonable positions. On the one hand, it does sound very formalistic to insist that s. 11(*d*) must be kept perfectly distinct, with no potential for overlap. Equally, it seems sensible that an accused who loses evidence due to delay should claim an infringement of the right to be tried within a reasonable time. On the other hand, Justice Lamer fears that in the long run, allowing such evidence will weaken the s. 11(*b*) right.

Unfortunately, *Morin* has shown that Justice Lamer was correct.

Both justices concurred in *Smith*, which held that prejudice was one of the factors to be balanced, but explicitly referred to the disagreement over whether prejudice to a fair trial interest was relevant, and whether prejudice was to be inferred or irrebuttably presumed.[20] In *Askov*, however, Justice Cory holds for the majority that "[i]t should be inferred that a very long and unreasonable delay has prejudiced the accused. . . . Nevertheless, it will be open to the Crown to attempt to demonstrate that the accused has not been prejudiced."[21] Further, evidence of additional prejudice should be relevant. He

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14 Ibid. at p. 71 (C.R.).

15 Ibid. at p. 91 (C.R.).

16 Ibid. at p. 92 (C.R.).

17 [1987] 1 S.C.R. 588, 57 C.R. (3d) 289, 75 N.R. 81, 78 N.S.R. (2d) 183, 193 A.P.R. 183, 33 C.C.C. (3d) 289, 39 D.L.R. (4th) 481, 33 C.R.R. 275.

18 [1989] 1 S.C.R. 1594, 70 C.R. (3d) 260, [1989] 6 W.W.R. 577, 48 C.C.C. (3d) 459, 40 C.R.R. 50, 96 N.R. 191.

19 [1989] 1 S.C.R. 1659, 70 C.R. (3d) 209, 49 C.C.C. (3d) 289, 40 C.R.R. 1, 96 N.R. 241, 34 O.A.C. 165.

20 *Smith*, supra, note 4 at pp. 10-11 (C.R.). *Smith* is the only unanimous decision of the Supreme Court on s. 11(*b*), other than the very brief oral decision in *R.* v. *Stensrud*, [1989] 2 S.C.R. 1115, 52 C.C.C. (3d) 96, 103 N.R. 191, 44 C.R.R. 281, 81 Sask. R. 293.

21 *Askov*, supra, note 1 at pp. 305-306 (C.R.).

suggests that this decision is "closer to the views expressed by Wilson J. in *Mills*,"[22] though his reasoning is based on different factors (the need to recognize a societal interest in trial within a reasonable time). Further, *Askov* does not clearly state what sort of interest must be prejudiced: the accused's security, liberty, or fair trial interest.

In *Morin*, Justice Sopinka states that security, liberty, and the right to a fair trial are all relevant, and that prejudice to each is in issue. In fact, the majority decision relies heavily on the role of prejudice, but there are several problems with the way in which it does so.

The first is pointed out by Justice Lamer in dissent. In previous cases, no one had argued that prejudice to the accused's security interest through stress and stigmatization was not relevant — merely that other forms of prejudice were relevant as well.[23] But the majority in *Morin* take the absence of those other types of prejudice to be determinative — just the result Justice Lamer had feared in *Mills*. The majority appear to have ignored the prejudice to the accused's security interest.[24]

The majority merely observe that the accused "led no evidence of prejudice" [p. 27, ante]. Lamer C.J.C. points out that this approach places the burden of proof on the accused, reversing the doctrine in *Askov*.[25] Beyond this, it is difficult to believe the court really intends that an accused should lead evidence of prejudice to a security interest. It is easy to see how an accused would show prejudice to liberty or fair trial interests — by showing that bail conditions were onerous, or that evidence was lost due to delay. But is an accused also required to call neighbours who became stand-offish to testify about their lower opinion of the accused? Should an accused call medical evidence to show that he or she found the waiting period especially stressful? Inviting evidence on these points imports the "thin skull" doctrine into *Charter* litigation: a particularly nervous and sensitive accused will have greater rights. Such an approach is possible but does not immediately seem desirable.

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22 Ibid. at p. 300 (C.R.).

23 In *Mills*, supra, note 7, for example, Justice Wilson stated that "there may be cases of delay which is unreasonable even though it has not impaired the accused's ability to make full answer and defence. I do not doubt this for a moment. Length of time itself may be the culprit for the psychological and sociological reasons my colleague has identified" (p. 92 (C.R.)). Similarly in *Smith*, supra, note 4, the unanimous court held that " 'a criminal charge will be hanging over [the accused] for a substantial period of time'. This is the very essence of prejudice to the security interests of a person charged with an offence" (p. 16 (C.R.)).

24 In *Sharma*, supra, note 6, released the same day as *Morin*, the majority briefly discuss the prejudice to the accused's security interest, noting that his familiarity with the criminal justice system due to previous charges "may reduce the stress and anxiety of pending proceedings" [p. 55, post]. In *Morin*, however, no explicit consideration is given to the accused's security interests.

25 Sopinka J. seems to deny that *Askov* had placed any burden on the Crown, citing a passage in *Smith*, supra, note 4, to the effect that "the accused has the ultimate or legal burden of proof throughout. . . . [A] secondary or evidentiary burden of putting forth evidence or argument may shift, depending on the circumstances of each case" (p. 11 (C.R.)). But this general passage is not inconsistent with the subsequent, and very specific, statement in *Askov*, supra, note 1, that "the onus [is] on the Crown to demonstrate that any action of the accused deliberately caused the delay or constituted waiver, *or that the delay caused no prejudice to the accused* (emphasis added)" (p. 308 (C.R.)).

Further, it is unclear how prejudice relates to the 8- to 10-month guideline and the role that it properly plays. The court seems to lay down an approach but then immediately to depart from it.

In discussing "the length of the delay," the court suggests that a s. 11(*b*) inquiry should only be undertaken if the delay "is of sufficient length to raise an issue as to its reasonableness," or if the length is unexceptional but the accused leads evidence of prejudice. Accordingly, unusual prejudice needs to be proven if the delay is within the guideline, but need not be proven if the case is outside the guideline. Similarly, in discussing the purpose of the guideline, Justice Sopinka states that "[i]f an accused is in custody or . . . otherwise experiences substantial prejudice, the period of acceptable institutional delay may be shortened to reflect the court's concern. On the other hand, in a case in which there is no prejudice or prejudice is slight, *the guideline may be applied* to reflect this fact" [p. 21, ante] (emphasis added).[26]

This approach makes perfect sense: the guideline should cover the ordinary case, and in the ordinary case the accused is likely to have suffered little or no prejudice — only the usual prejudice to security interests. But in that event, although the accused might choose to lead evidence of prejudice even in a case where the delay is outside the guideline, it is not necessary. By the same token, if the case is outside the guideline, the fact that little or no prejudice is present is unimportant — a remedy should be granted unless some other factor justifies the delay.

Unfortunately, though this approach seems fairly clear, the actual decision in *Morin* is not consistent with it. The court lays down a guideline of 8 to 10 months. Justice Sopinka then makes no special comment on most of the other factors, except to note that the limits on institutional resources in this case justify allowing the high end of the guideline, 10 months. In fact, however, the delay was 14 months (or perhaps 12 months — there is a little ambiguity on this point[27]). The only factor to which the court refers in deciding not to allow a remedy despite this failure to meet even the high end of the guideline is that "there was little or no prejudice occasioned by the delay" [p. 28, ante].

Accordingly, the court fails to follow the test it has just laid down. According to the court's test, the guideline will be applied when there is little or no prejudice. But in

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26 Further, Sopinka J. states that "prejudice to the accused can be inferred from prolonged delay" [p. 22, ante]: presumably, delay is "prolonged" when it is greater than the guideline says is reasonable.

27 Sopinka J. finds that the *institutional* delay was only 12, not 14, months, saying that 12 months is "the time from which the parties were ready for trial until the period at which the courts were able to accommodate this case" [p. 26, ante]. If one is to infer from this that the relevant period of delay is only 12 months, then the decision is inconsistent with *Kalanj*, supra, note 18, which calls for delay to be measured from the time a charge is laid – a decision reaffirmed in this case. If this is not the significance of the 12-month figure, it is hard to see what significance it has: "institutional delay" has not in past cases been something the court felt obliged to identify by a particular number of months. Sopinka J. also specifies the amount of time counting as the inherent requirements of the case, a step repeated in *Sharma*, supra, note 6. Perhaps later cases will clarify whether this is intended to be a new approach.

this case, delay greater than the guideline is allowed because there is little or no prejudice.[28]

Two other observations can be made regarding the role the court has assigned to prejudice.

First, if the court is to expand the significance of prejudice in the way it seems to have here, there may no longer be any reason to include "waiver" among the four factors that courts must balance. Any behaviour which would count as waiver could equally well be used to show that the accused did not feel that he or she suffered any prejudice. There seems no purpose to be served in considering the same behaviour twice.

Second, the court's desire to stress actual prejudice to a greater degree is motivated by the sentiment that:

> "An accused is often not interested in exercising the right bestowed on him by s. 11(*b*). His interest lies in having the right infringed by the prosecution so that he can escape a trial on the merits."[29]

Indeed, the court suggests that most accused do not want to be tried quickly, but "s. 11(b) was designed to protect the individual, whose rights are not to be determined on the basis of the desires or practices of the majority" [p. 23, ante]. Implicitly, then, the right to a trial within a reasonable time is being restricted to the minority who genuinely want judgment as soon as possible.[30]

Under this approach, the right to trial within a reasonable time will be possessed by a minority rather than by "any person charged with an offence." Still, anyone who really wants the right will apparently have it, and so perhaps no legitimate cause for complaint can be raised.

Nonetheless, it is appropriate also to look at the purpose behind enforcing s. 11(*b*). There are two interests to be protected by insisting on trials within a reasonable time: that

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28 The decision is also hard to reconcile with the earlier decision in *Smith*, supra, note 4, where Sopinka J. held for the unanimous court that "[h]aving found that the delay is substantially longer than can be justified on any acceptable basis [the delay in *Smith*, as in *Morin*, was 14 months], it would be difficult indeed for me to conclude that the appellant's s. 11(*b*) rights have not been violated because the accused has suffered no prejudice" (p. 15 (C.R.)).

29 *Morin*, p. 23, ante, citing "Delay," a paper by Doherty J. at the National Criminal Law Program, Halifax, July 1989. Before his appointment to the bench, Doherty J. had been counsel for the Crown in *Mills*, supra, note 7.

30 This rationale should not pass without comment. The approach assumes that because accused persons want delay, they benefit from delay: that is, that the desire for delay and an interest in delay are the same thing. However, an innocent accused may fear the result of a trial – or just the experience of being put on trial – and be happy to see it delayed, thought in fact that delay is prejudicial (just as a great number of people postpone visits to the doctor, though they are worse off for doing so). The human tendency to avoid unpleasant experiences surely does not deserve the constitutional significance it is being given. Further, to the extent that this rationale works on the assumption that most accused are in fact guilty, it violates the presumption of innocence, and so should not help shape the common law. Finally, it is not at all clear that delay actually benefits most accused, even those who are "guilty-in-fact." As David Paciocco points out, any alleged weakening of the Crown's case is of no significance unless it is great enough to result in an acquittal: see "*Morin*: The Transitional Reasonableness of Excessive Systemic Delay" (1990) 76 C.R. (3rd) 56.

of the accused in receiving a remedy where this right is violated, and that of society in having a justice system which operates quickly and efficiently. The court reaffirms here that the societal interest is also to be protected by s. 11(*b*).

In *Morin*, the court takes the failure of the accused to accept a general offer to find earlier trial dates to show that the accused did not feel she was prejudiced. But the nature of this offer was to make special accommodation for some accused rather than to make the system as a whole more expeditious. The court seems to say, therefore, that an accused who allows the system to proceed at its ordinary pace is foreclosed from seeking a remedy under s. 11(*b*). This approach removes any incentive for the system to improve its ordinary pace: *Charter* remedies will not be granted if the system as a whole is unreasonably delayed, so long as a few accused can have their trials expedited.[31]

Again, one can argue this result is acceptable, since staying charges against some accused persons acts in only the grossest way to speed up the process. At the same time, eliminating that incentive will paradoxically be inconsistent with the overall societal interest in having the justice system operate quickly and efficiently as the norm rather than as the exception.

Conclusion

The court has, from its earliest decisions, said that it does not want to adopt the approach of the United States Supreme Court in *Barker* v. *Wingo,*[32] an approach that essentially undermined the American guarantee to trial within a reasonable time. In large part, the court's disagreement with the American approach focused around the role proof of prejudice was to play in assessing a violation.

The decision in this case, by stressing proof of prejudice, has moved much closer to the American position. It may simply be that the court's desire to demonstrate that a guideline can be departed from caused it to find that there was no s. 11(*b*) violation. If that is not so, however, then proof of prejudice has taken on a very great significance. Despite listing the same factors as ever, the court will have charted a very new approach to the right to trial within a reasonable time. Only future decisions will show whether that right still exists in any meaningful way.

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31 It is also not easy to reconcile this approach with the court's earlier claims that "there is no obligation. . . on the part of the accused to press the case on": *Smith*, supra, note 4 at p. 14 (C.R.).

32 407 U.S. 514, 33 L.Ed.2d 101, 92 S.Ct. 2182 (1972).