



CANADIAN COUNCIL OF CHIEF JUDGES
CONSEIL CANADIEN DES JUGES EN CHEF

April 26, 2017

The Honourable Bob Runciman
The Senate of Canada
Chair, Standing Senate Committee on Legal and Constitutional Affairs
Ottawa, ON
K1A 0A4

Dear Senator Runciman:

Re: Delays in the Criminal Justice System

I am following up on my appearance before your Committee on November 16, 2016, on behalf of the Canadian Council of Chief Judges (“CCCJ”). The Council appreciates the opportunity to elaborate with respect to delays in the criminal justice system. I very much appreciated the opportunity to appear before the Committee last fall. I regret the delay in providing these written submissions. As you may imagine, the intervening months have been extremely busy for all our Chief Judges and courts.

The CCCJ is an organization comprised of the Chief Judges from all of Canada’s provincial and territorial courts. As more than 90% of all criminal cases in Canada are dealt with in our courtrooms, we believe we may be able to offer valuable insights into the causes and consequences of delay and suggestions to address those challenges.

As members of provincial and territorial courts, we are particularly aware of the need for federal, provincial, and territorial cooperation to address the challenges facing the criminal justice system given the split federal and provincial jurisdiction for criminal legislation, appointment of judiciary, and administration of justice.

We are also very aware that no one solution will be appropriate for all jurisdictions. The realities and challenges facing courts in large urban centres such as Vancouver, Winnipeg, Toronto, and Montreal are very different than those in smaller communities across the country, let alone the fly-in First Nation communities served by some of our provincial and territorial courts.

We will address our submissions in the three broad areas addressed in your interim report tabled with the Senate on August 12, 2016.



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1. CONSEQUENCES OF DELAYS

We share the Committee's concern about the consequences of delay for those involved in the criminal justice system, whether as accused persons, offenders, or as victims or witnesses.

The growing numbers of persons in custody on remand is a particular area of concern, given, as the Committee's interim report notes, a significant body of evidence points to increasing numbers of African Canadian and Indigenous persons in the remand population.

In addition, our observation, supported by some recent reports, also points to a growing concern about the number of accused persons in custody awaiting trial with mental health and addiction issues and the lack of treatment and support options available to them.

In addition to the negative impact delay in the criminal justice system has on those most immediately involved in matters before our courts, we are also concerned about the impact delay has on the general public's confidence in the justice system and the courts.

Public confidence in the administration of the justice system is a critical concern for all our courts.

2. CAUSES OF DELAYS

i. Case Management

The courts take very seriously the judiciary's responsibility for case management. The judiciary in our courts are very conscious of the responsibility both for matters resolved in our courts (in trials or guilty pleas) as well as matters that are before our courts for preliminary inquiries before going to superior courts for disposition.

Since my meeting with the Committee this fall, the impact of the Supreme Court's decision in *R. v. Jordan* has been felt in all courts across the country.

Some provinces and some courts have responded to the Jordan timelines by questioning the current necessity for preliminary inquiries. This is an issue of significant current debate in the legal community. While this debate is understandably of great importance, the CCCJ notes that the vast majority (90-95%) of criminal cases are resolved by trial or guilty plea in the provincial/territorial courts.



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We would like to note that in some jurisdictions -- notably British Columbia, New Brunswick, Northwest Territories, Yukon, Prince Edward Island, and Newfoundland and Labrador -- delay is not a significant concern in the courts at this time.

In other jurisdictions, there are significant challenges in addressing delays and consequently case management in our courts has become an even greater focus for our judiciary.

Since my meeting with the Committee some provinces, such as Ontario, have provided additional resources to the court, prosecution, legal aid, and justice support services to address the challenges faced by the Jordan timelines.

It is important to underline that even before the Supreme Court's decision, provincial courts across the country had been tackling the issue of delay with a number of different case management and scheduling initiatives.

Overall, the CCCJ supports early judicial intervention in case management and judicial pre-trials to ensure the efficient use of trial time. Many courts have introduced rigorous and mandatory judicial pretrial, case management or case resolution events. The specific details of the case management initiatives varies across the country and even within a court, so as to best address the local needs, resources, and participants involved.

These judicial case management initiatives are particularly important in addressing the challenges your Committee's interim report notes in relation to multiple accused "mega trials", where the preliminary inquiry alone can take over a month.

Courts across the country are actively engaged in exchanging best practices for case management. The effective allocation of targeted funding to support emerging best practices that are regionally appropriate would be welcomed.

The federal government could usefully play a role in supporting the exchange of best practices.

ii. Charter and constitutional challenges

There has been much written about the pressures on court time from more complex constitutional and Charter challenges. The experience of the courts varies considerably in this respect.

However, it is noteworthy, and the irony is not lost on the judiciary, that currently many courts are experiencing an increase in applications based on unreasonable delay as a result



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of the *Jordan* decision, which in turn places a resource burden on the case management and court resources.

While the time taken in addressing constitutional and Charter challenges can sometimes be seen to increase delays in the courts, it is critical for members of the public to always bear in mind the importance of fair trial rights and the constitutional validity of matters before the court.

iii. Resources

While the Committee's interim report noted the declining number of criminal charges before the courts, little was said about the increasing number of unrepresented litigants, or partially represented litigants.

The challenges of unrepresented accused appearing in our courts -- or those with intermittent or partial representation -- cannot be underestimated.

Funding for and delivery of legal aid services varies enormously across the country. It is difficult to comment on best practices nationally given the range of legal aid delivery services and funding.

However, it is worth noting that the conduct of every stage of a criminal case, from bail to set date, judicial pre-trials to preliminary inquiries, trials, and sentencing is made more challenging for the judicial officers when the accused is either not represented or represented with varying counsel at different events or with limited retainers for specific purposes.

The federal government's role in supporting legal aid services and providing some national standards should be considered.

Delays in the completion and disclosure of routine forensic reports such as cell phone and computer data analysis, and drug and alcohol analysis can also lead to significant delays in the progress of criminal cases. The provision of resources to ensure the timely analysis and disclosure of this material will assist in reducing delays in the criminal justice system.

In addition, the CCCJ notes a significant range in government support for bail and other criminal case workers. The CCCJ wholeheartedly endorses the value of a robust system of court workers to make courts work effectively and fairly. Court worker services are particularly critical to trial fairness in that they assist the court in addressing the specific issues of accused persons and communities currently over represented in our courts and correctional facilities -- notably Indigenous and African Canadian persons as well as persons with mental health issues.



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Courts across the country have dedicated significant effort to undertake appropriate social context judicial education to address the realities of disadvantaged communities who are overrepresented in the justice system. However judicial and other justice education initiatives alone will not address the very significant gaps in service and access to justice. Further resources for critical programs such as Bail Verification and Supervision programs, mental health and Indigenous court workers are critically important.

As noted previously, the need for judicial and court resources to address delays varies across the country.

Allow me to turn our attention now to other areas where courts across the country agree additional government resources and support should be a priority in order to address delays.

3. ADDRESSING DELAYS

i. Diversion, Restorative justice and Therapeutic/ Problem Solving or Specialized Courts

The CCCJ supports restorative justice initiatives, including the use of specialized courts.

Pre- and post-charge diversion programs, as noted in the Committee's interim report, are important initiatives worth encouraging with the policing and prosecution communities. The development of initiatives to address the specialized needs of youth was recognized in the *Youth Criminal Justice Act*. Similar programs to address the special needs of Indigenous and African Canadian communities, as well as persons with mental health and addiction issues, have been explored in a variety of communities across the country.

Further provincial and federal government support for programs that divert appropriate cases out of the criminal justice system to address root causes of the offences will have a positive impact on the courts case load and delays.

To have a meaningful impact institutionally, as well as in individual cases, additional resources for the community, social, health and justice support services associated with restorative justice or therapeutic courts are necessary.



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ii. Innovation in Administration

While the Committee's interim report noted with interest the Saskatchewan experience with "shadow courts", the CCCJ urges some caution in this respect. As with many initiatives, no one solution or initiative will be universally effective in court administration.

While courts across the country routinely "overbook" three to four times the cases scheduled for any given courtroom, based on locally anticipated trial collapse rates, "shadow courts" have not proven feasible nor effective in some jurisdictions, such as Ontario and Nova Scotia.

The use of court user or advisory committees have proven effective in some jurisdictions, but once again -- not universally. In part, this may speak to the need for comprehensive culture change, touched on in the Committee's interim report. An across the board change to a culture of complacency requires the institutional commitment and resources from all parties in the criminal justice system -- police, prosecution, defence bar, legal aid, corrections, community services, as well as the judiciary. It will also require resources from the federal and provincial governments.

The CCCJ and member courts are committed to doing our part towards the change in culture and in undertaking judicial education and case management in this regard.

iii. Provincial Initiatives – and legislative responses

As noted by the Committee in its interim report, a great deal of court time is spent dealing with administration of justice charges. These charges often impact those from marginalized communities, the mentally ill, and those suffering from drug and alcohol addiction. The CCCJ supports any initiatives such as dealing with minor administration of justice charges are dealt with outside the traditional criminal justice system.

Courts facing significant delays and backlog recognize the need for provincial and federal governments to consider legislative responses to address matters before the courts. In all cases, the need to balance constitutional and Charter fairness rights will be a concern.

Courts are supportive of further thoughtful consideration for legislative responses to address challenges in the courts. In addition to consideration being given to legislative amendments to address new and emerging offences and court pressures, it is important to also consider that some federal criminal and provincial road safety and other quasi-criminal offences legislation has not kept up with the demands and opportunities technology offers to address caseloads in our courts.

iv. Technology and Infrastructure



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There is universal agreement by all those involved in the justice system that the courts and justice system do not have the technology and basic infrastructure to effectively serve the public.

There are huge opportunities for government investment in technology to make the criminal justice system more effective and accessible to participants and the public.

As with other resource issues, there is also a significant disparity in the investments made, and consequently services made available, across the country.

Different models of service delivery require different solutions and investments. In Ontario for example, there are over 50 police services, almost all with different IT capabilities and systems feeding into the Ontario Court of Justice. In Nova Scotia and British Columbia, there is a more coordinated set of technology, forms, and practice directions -- and consequently more opportunity for a consistent access to justice across the province.

The opportunities for better justice, delivered more quickly, with technological investment range from video bail hearings; e-disclosure from police services to prosecution and defence counsel; improved judicial and court scheduling practices, including “need a judge, find a judge” video options to deploy judicial resources across wide geographic regions; witness testimony; case management; lawyer-client video conferences to make more appropriate use of court time; data collection and evaluation and public access to case information.

In many jurisdictions, technology is also hampered by aging physical infrastructure. Many historic court facilities, while of great community importance, are not able to be updated to meet the needs of current technology. Investments in courthouses as well as technology are critically important in some jurisdictions.

As technology evolves, there will also be a need for federal and provincial legislation to keep pace with the technology so that courts and justice system participants are able to make effective use of emerging technologies.

v. Data and Evaluation

The CCCJ notes that much of the federal data touching on the criminal justice system comes from provincial and territorial courts. Unfortunately, the types of data gathered and methods of collection vary from jurisdiction to jurisdiction. This then affects the utility of the Federal data used to evaluate the health of the criminal justice system in Canada.



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We suggest the provincial, territorial and federal governments take a uniform approach to the collection of criminal court data across the country. Support from the federal government is needed for this to be successful.

In conclusion, the CCCJ appreciates the opportunity to provide input to the Senate Committee's deliberations on delays in the criminal justice system. This is an issue we care deeply about. Our courts are committed to working collaboratively to address the challenges we face. The criminal justice system depends on cooperation and collaboration from all levels of government, the judiciary and a range of institutionally dependent participants from the policing, legal and corrections professions as well as critically important human services.

We appreciate the time and attention the Committee has provided to this important issue.

Yours sincerely,

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Chief Judge, Nova Scotia Provincial Court
Chair, Canadian Council of Chief Judges