THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN
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October 19, 2016

Delays in Canada's criminal justice system

The Canadian Bar Association's Criminal Justice Section (the CBA Section) appreciates the opportunity to participate again in the Senate Legal and Constitutional Affairs Committee's continuing study of delays in Canada's criminal justice system. We have had the benefit of reading the Senate Committee's August 2016 report, *Delaying Justice is Denying Justice*. We offer additional detail to the issues raised in our February 17, 2016 letter (attached), and other areas of concern.

Disclosure Practices

Disclosure must be provided in a consistent and readable format. Too much time is spent simply trying to get digital disclosure to work and defence counsel often has to send it back for reformatting.

Case Management

Court administrators might consider specific court times for judgment and sentencing matters. Judges often attempt to work these matters into trial lists, so scheduled cases can be delayed even when the time estimated was accurate.

Modernizing Routine Appearances

Reduce routine court appearances where possible.

Allow for counsel participation by phone or email when appropriate. Matters are often delayed when counsel is occupied on an extended trial but is required to appear in person at another courthouse.

Prioritizing Early Resolution and Diversion

Assign judges early in the process, so issues can be promptly and consistently addressed.

Expand diversion programs so that more offences are eligible. The prosecution of minor offences can consume an inordinate amount of time.

Quebec has an extensive youth alternative measure programs that could be studied.

Self Represented Accused and Legal Aid

People often do not know how to go about getting legal aid, particularly vulnerable people.

Greater federal leadership and support for legal aid is required.

Legal aid policies must be reviewed so more people get help, especially for serious criminal offences. CBA has recently released a report on Legal Aid Benchmarks that propose common goals for Canada's legal aid system.

Changes to Impaired Driving

Impaired driving charges are the most litigated of all offences, and consume an inordinate amount of court time. Changes to deal with drug impaired driving will attract similar legal scrutiny, and should be approached cautiously.

Impact in Territories and on Indigenous People

Challenges to the justice system experienced in southern Canada can be exacerbated in the Territories, with a particular impact on Indigenous people.

Low level and administration of justice offences, driven by substance abuse and addiction, overwhelm dockets in the north. Alternative courts would help divert or streamline these matters early.

The intergenerational effects of trauma from forced relocations, residential schools and more is evident everywhere.

Core funding for *Gladue* Reports is needed. Resources for the reports are limited, with no set criteria or minimum standards.

When disclosure to the Crown is delayed, Crown often sends it to defence just before a first appearance and matters are invariably adjourned. Waiting for disclosure from evidence sent to labs in southern Canada is another problem.

With few legal aid staff and private counsel, conflicts are common for cases with several co-accused, which can mean more unrepresented accused.

Bail is a big problem, as clients struggling with addictions are often held because of past records. (See Auditor General's report on the Yukon: bail denied is mostly due to alcohol breaches. The report also details lack of programming and especially culturally appropriate programming).

Mandatory minimum sentences exacerbate the over representation of Indigenous people in jails and prisons. Those sentences limit Crown and judicial discretion, and make any consideration of *Gladue* factors unlikely.

Lawyers report a lack of access to clients. The new institution in Whitehorse has only two meeting rooms in the entire facility.

There are not enough treatment programs, and many clients' cognitive level is so low that they are ineligible for the few programs available.

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February 17, 2016

Via email: lcjc@sen.parl.gc.ca

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

Dear Senator Runciman:

Re: Study on matters pertaining to delays in Canada's criminal justice system

The Canadian Bar Association's Criminal Justice Section (the CBA Section) appreciates the opportunity to participate in your study of delays in Canada's criminal justice system. The CBA is a national association of over 36,000 members, including lawyers, notaries, academics and law students, with a mandate to seek improvements in the law and the administration of justice. The CBA Section consists of a balance of experienced Crown and defence lawyers from all parts of Canada, lawyers who are in criminal courts on a daily basis.

The CBA Section recognizes both the timeliness and importance of your Committee's review. In some jurisdictions, even a one day trial is routinely set from eight to ten months after a date is requested.

We have significant expertise to offer, and a broad network of contacts to call on for input. However, we were severely constrained by having limited notice about this opportunity. We would be happy to appear before the Committee on a subsequent occasion, with more notice, at which time we could provide additional detail.

We outline some key areas of concern below.

Stinchcombe Disclosure

One of the less understood causes of court delay concerns preparation of disclosure. The volume of contemporary disclosure has increased dramatically over the past 25 years, which causes significant delays given that defence counsel must review this material before scheduling substantive hearing dates.

Delays also arise in preparing disclosure before it is sent to defence counsel. The Crown commonly requests several adjournments to receive initial or subsequent disclosure, and further

adjournments to complete its vetting procedure. This process is time consuming, to redact phone numbers, addresses, privileged information and so forth, necessitating further delays. Once disclosure is finally received, defence counsel then requires additional time to review the material.

The CBA Section suggests improved Crown and police policies for preparing disclosure, particularly for matters that do not require immediate charge approval. The goal should be to have near complete disclosure ready at the first appearance. Particularly in busy jurisdictions like Toronto and Vancouver, it is common for the initial appearance to be adjourned several weeks to obtain basic disclosure.

In addition, we recommend that police services be permitted to hire experienced counsel and support staff to vet disclosure before it is given to Crown counsel. This would eliminate the need for different agencies to review the same material for vetting purposes.

Accurately Estimating Time Required

A proper estimate of court time required for a case is vital to the efficient administration of justice. Significant delays can arise because trials or other hearings are improperly scheduled initially. When that happens, the entire system suffers when the case inevitably goes off of the rails and more time is needed. After rescheduling, the minimal flexibility in the system is lost as the matter must continue to be heard by the presiding judge, severely limiting the court time available for the parties. In addition, once the need for rescheduling becomes apparent, calendars have filled with other matters, requiring even further delays to accommodate counsel for the Crown and accused.

The CBA Section recommends a more robust pre-trial procedure, requiring appearances before case management judges with focused submissions on the structure and anticipated nature of trials and hearings. Witness lists should be promptly provided along with detailed time estimates for examinations and submissions. It is better to have slightly more delay at the intake stage to ensure an accurate estimate of time required than for the matter to be hastily scheduled and rescheduled when it becomes obvious that more time is needed.

Modernizing Intake Routine Appearances

Commonly, counsel or articled students appear in several courts in one day for a series of "check-ins" or otherwise routine appearances. Court and counsel time is occupied by "keeping up the appearances", when there is nothing substantive to canvass with the court. These appearances often involve repeating requests for disclosure that has not been received, or otherwise adjourning matters to facilitate intake procedures necessary to move the file along in the system.

With technological advances, the justice system should be able to manage these routine intake appearances more efficiently. The CBA Section recommends developing an online system for routine appearances where the accused or counsel can appear electronically, unless there is a dispute that requires judicial oversight.

Prioritizing Early Resolution

The most efficient way to cut delay in the system is to encourage timely resolution of cases. In our experience, over 90% of criminal cases do not end with a trial. If trials are not set unnecessarily, then no court time is wasted when the matter is inevitably resolved. A system organized to prioritize early resolutions will mean more court time remains available at an earlier stage.

Unfortunately, obstacles inherent in the system discourage early resolution. First, inadequate or untimely disclosure can mean counsel is unable to provide competent advice about the strengths

and weaknesses of a case. In some regions, “intake” prosecutors make decisions about early resolution, but if this goes nowhere, the file is reassigned to a “trial” prosecutor who completes disclosure and otherwise assumes conduct of the case. At that point, the prospect of conviction is often re-evaluated with a more complete picture of the case, possibly resulting in stays of proceedings or more reasonable plea negotiations (if the Crown realizes the case is weak). However, that more complete picture is only available many months down the road, when disclosure is complete.

Second, mandatory minimum sentences and constraints on Crown discretion in resolving cases add to the problem. More cases go to trial and as a result courts are more fully booked, causing delays. The CBA has a long history of opposition to mandatory minimum sentences, for reasons including the injustices that can result and their impact on justice efficiencies.

Third, rules about legal aid funding can discourage early resolution. Often, counsel are paid a small fraction for successfully convincing Crown counsel to stay or withdraw a charge, which can require significant time and dispute resolution skills, compared to what they are paid to wait for a hopeless trial to unfold and then secure an acquittal. In some jurisdictions, like Ontario, we note that block fees for a number of cases are paid to counsel. This method of compensation tends to encourage early resolution.

Finally, a more robust Crown charge approval system would assist in weeding out cases earlier in the process. The CBA Section recommends that all jurisdictions follow the “substantial likelihood of conviction” test set for charge approval in British Columbia. This high standard for charge approval will inevitably screen out weaker cases destined for plea discussions or withdrawal or stays of proceedings.

Judicial Resources

In many jurisdictions, including Manitoba and Alberta, vacancies on the Bench have been left unfilled for years. Filling vacancies and appointing experienced criminal lawyers as judges would go far in addressing criminal court delays. In some jurisdictions, investments in more Crown counsel have been made but without corresponding increases in judges’ time available, and court delay remains a problem.

While bail itself does not cause trial delays, in jurisdictions like Ontario, bail hearings drain judicial resources. In other jurisdictions, hearings are done on the submissions of counsel. In Ontario witnesses are called, an officer may give evidence and an accused will not get bail unless all the sureties testify and are cross-examined. This consumes significant court time and could be streamlined.

Legal Aid

In 2012, the CBA called for a comprehensive review of federal funding for criminal legal aid, to address what it characterized then as a crisis in criminal legal aid funding jeopardizing the efficiency and effectiveness of the entire system.

Enhanced federal funding and responsibility for legal aid would go far in addressing court delays. In addition, legal aid plans must be resourced to attract experienced criminal lawyers, especially for serious matters where significant periods of incarceration are at stake. Similarly, Crown offices must be able to attract sufficient numbers of experienced counsel to handle complex or serious cases. More junior counsel at the Crown may be unable or unwilling to take swift action. More junior counsel for the defense may be unable or unwilling to press forward when confronted with tough decisions.

All people charged with anything more than very minor offences should have counsel with them in criminal court. Unrepresented accused too often flounder alone in criminal court and put judges and the Crown in an untenable position.

Law Reform Commission of Canada

In the past, the Law Reform Commission of Canada consistently produced carefully researched reports and recommendations that were available to Parliament and policy makers to guide legislative initiatives. The Commission should be reinstated. The effective functioning of the criminal justice system depends on a properly resourced body to build an evidence-based foundation for further legislative changes.

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Finally, we suggest a cautious approach when considering changes to fundamental concepts of criminal law. Changes must be preceded by thorough and particularized consultations with the professionals regularly involved in all aspects of the criminal justice system. Complex and often interrelated issues are at play, and an adjustment that may seem uncontroversial can have unanticipated ripple effects in other areas of the system.

Thank you for the opportunity to offer our views.

Yours truly,

(original letter signed by Gaylene Schellenberg for Suzanne Costom)

Suzanne Costom
Chair, CBA Criminal Justice Section