

**RE-INVENTING CRIMINAL JUSTICE:**  
**THE THIRTEENTH NATIONAL SYMPOSIUM**

**FINAL REPORT**

Virtual Symposium

March 12, 13 & 27, 2021

**REPORT OF PROCEEDINGS**  
**13<sup>th</sup> National Criminal Justice Symposium:**  
**Criminal Justice Reform and the Pandemic**

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## Introduction

The 13<sup>th</sup> National Criminal Justice Symposium was convened as a Canada-wide virtual event on March 12<sup>th</sup>, 13<sup>th</sup> and 27<sup>th</sup> 2021.

The Symposium, with the generous support of the Department of Justice Canada and the Canadian Association of Chiefs of Police, is an annual forum for justice leaders to share candid perspectives and solutions regarding the challenge of fashioning a responsive, accessible and accountable criminal justice system. The Symposium topic – “Criminal Justice Reform and the Pandemic” – drew approximately 100 justice leaders together from across Canada including criminal justice practitioners and professionals, Indigenous-serving organizations, non-profit executives, advocates, researchers and other experts.

This past year, all aspects of normal life have been affected profoundly by the global spread of the Covid-19 virus and the associated threat to human life. Prior to the onset of the pandemic, the 2021 Symposium was to continue the dialogue on Indigenous justice begun in Winnipeg in January 2019. Due to the intensive work required to develop an appropriate agenda for that event and the importance of personal connections, as well as the urgent and unprecedented circumstances of the pandemic, the organizing committee elected to reschedule revisitation of the Indigenous justice theme to 2022, and to focus the 2021 event on the response to the pandemic.

Like almost all human systems, the justice system’s reliance on direct, sustained personal interaction has been undercut by the need to contain the virus. Whenever possible, personal contact has been minimized in favour of remote electronic communication. Situations requiring physical proximity have required rigorous planning and complex physical and health protocols for “business as usual” to be conducted. The extreme vulnerability of people in jail as well as corrections staff has required new approaches to remand and the pattern of custody. The urgent requirement to adopt virtual communication in court and other justice processes has created an unplanned mass experiment in the use of communication technologies, the use of which had previously inspired caution. The physical processes used to guarantee safety and security of information have been replaced by virtual approaches. The digital divide in pandemic preparedness amongst social groups has thrown into relief further disparity in access to justice. Finally, new approaches have been adopted without sufficient time being available to assess the ethical implications of these changes.

The Symposium was chaired by the Honourable Judge Raymond Wyant of the Manitoba Provincial Court and facilitated by Mr. Harold Tarbell.

## Agenda design

In designing the Symposium agenda, the organizers were conscious that the video platform did not lend itself to eight-hour days, and with travel being a non-issue, it was decided to focus discussion in two four-hour blocks on consecutive days. Following a two-week period in which

an interim summary was prepared, participants then gathered for a shorter session to reflect on the recommendations which the Symposium might issue.

While human safety and the use of technology were themes which ran throughout the agenda, in its deliberations the organizing committee settled on four distinct areas of interest:

1. **Operational responses to the pandemic.** Here, the intent was to focus discussion not simply on the steps taken and their short-term mitigating impacts, but also to reflect on the longer-term implications of these responses. What have we been able to do which was not possible before? Which myths have been dispelled, and which assumptions confirmed? Given the significant amount of change, what have we learned about the system and the way we used to do business?
2. **The impact of technology.** Technology has impacted most areas of the criminal justice system as a means of facilitating physically distanced work. However, the implications of this are neither one-dimensional nor straightforward. What has technology meant for access to justice, for the efficient use of resources, for the role and standing of the courts, and for the fair and equitable administration of justice? How should we understand these revolutionary changes, what should we keep, and what must we do to ensure these changes are user-centered?
3. **The importance of community and external partnerships.** The pandemic placed the justice system, like all other human systems, under intense stress and a high degree of scrutiny. In particular, the acute vulnerability of prison populations to the pandemic required urgent action. In some cases, existing partnerships showed their immense value. In others, new relationships were established. Existing assumptions about the necessity of incarceration were tested. Long-sought levels of collaboration between the system and the community emerged or were expanded. What have we learned from this, what should we consolidate, and where do we go from here?
4. **Criminal justice ethics in the pandemic.** The significant changes which have occurred during the pandemic have created novel circumstances and new or altered incentives and have required participants to engage in processes designed for a different kind of human interaction. We have also had to balance matters of principle where there is no clear hierarchy of values (e.g., human life *versus* human rights *versus* protection of the public). How should we understand this challenge, and how can we ensure that maintaining the system does not come at a severe ethical cost?

The intent of the Symposium was not simply to discuss these issues, but to but share the personal and institutional experiences of the participants, foster a commitment to effect meaningful change, encourage participants to provide local leadership among criminal justice system actors in their home provincial and territorial justice systems, and in doing so increase the likelihood that ideas for reform are both implemented and sustained. This report contains practical recommendations for action made by participants for the attention of those

responsible for the administration of the criminal justice system at the federal, provincial and territorial levels of government, and for the consideration of the public.

## Day 1 (March 12)

### Session 1: How Covid-19 changed our work and challenged assumptions

#### Panel presentation

To begin the session, members of a multidisciplinary panel – representing the judiciary, Indigenous-serving organizations, corrections, prosecution, policing, and the defence bar – each reflected on one significant change made in their own discipline or sector during the pandemic. Each presenter was asked to consider what was at stake in making this change, what the impact of the change was, and what the longer-term implications of this decision are likely to be. Following the panel's remarks, participants moved into pre-assigned small groups to consider the same set of questions in conversation. Participants then returned to plenary to report out and engage in facilitated discussion of the points raised by the panel and in the small groups.

#### Themes of discussion

Themes emerging in this session from the panel and from participant dialogue were as follows.

#### **The pandemic experience suggests that we were previously jailing too many people.**

The urgent need to preserve public health has led to significant decarceration of many who would previously have been remanded in custody or sentenced to short jail terms. Custodial populations have fallen in federal, provincial and territorial institutions across Canada, aided by the bail provisions in Bill C-75. Importantly, there appears to be little evidence that there has been any corresponding uptick in crime or disorder, although aberrant individual cases of recidivism inevitably draw attention to release decisions (or to police, whether or not they were involved in the release decision). Despite this, levels of incarceration are now creeping back up, suggesting that the system has not absorbed what appear to be the preliminary lessons of the experience. The lack of community supports in some areas has contributed to a revolving door for offenders released into the community. It will be critical to ensure that community mental health and addiction support is properly funded and that increased access to transitional housing is sustained in order to solidify the decrease in incarceration.

#### **The pandemic has slowed incarceration of Indigenous people in remote and Northern areas.**

Due to the health risk in the pandemic as well as the higher health risk of many in Indigenous communities, many who would have been removed from the community, remanded and/or sentenced to jail have remained in the community. Communities have accordingly become more involved in release planning, while fly-in courts have halted. Indigenous justice forms such as sentencing circles have rapidly transformed to incorporate technology: this was a difficult transition for some communities as it lacked the trust and openness that in-person proceedings can provide, but in the longer-term people have adapted and it has been easier to include those for whom travel was always difficult, including Elders. The story is not all positive as the

pandemic has resulted in fewer service options, posing significant hardship for remote communities.

**The pandemic shows our ‘independent’ system as highly interdependent with other systems.**

In the pandemic, the criminal justice system’s intersection with all manner of community and government support has been thrown into stark relief, beyond previous platitudes regarding interdependence. One major benefit has been the realization that our system is in fact able to contemplate and act on necessary changes in a rapid manner. Similarly, our relationships with external partners have through necessity also been tested, expanded and strengthened, perhaps more than ever before. These relationships offer benefit not only during the pandemic but going forward as well, as we seek to resolve the more enduring issues of the criminal system such as Indigenous overrepresentation and the more general challenge of repeat offending, and we should tend and resource these relationships to reflect this learning.

**Use of communications technology in the pandemic has created both benefits and problems.**

The rapid adoption of video and audio as a substitute for in-person appearances has reduced stress on the court system. In remote locations it has increased access and, in some cases, reduced unnecessary nights in custody. The use of video and audio as a venue has also accelerated the criminal justice system’s evolution from dependence on paper and ink. However, it has placed stress on corrections and police who are struggling to find the necessary accommodations and technology to facilitate those appearances remotely from correctional facilities and police detachments. These changes have also had significant impacts on defence counsel who have to adapt to find ways to connect with their clients to obtain instructions, in advance of those hearings. In addition, those aspects of law which rely on the trust and connection of personal contacts (such as working with third-party service providers on bail plans) have suffered, resulting in some languishing in pre-trial detention. Access to and comfort with technology is uneven and has sometimes been applied to the benefit of process efficiency, rather than of the individual person coming before the system.

**Not all pandemic-related issues were novel: the pandemic simply made some more acute.**

A number of the problems experienced in the pandemic were already at issue before 2020, but the rigidity of these situations made matters worse. Mandatory minimums were a major stumbling block at a time when judicial discretion was vital for public and individual health and safety. “First appearance courts,” deemed largely unnecessary by many, were converted to video appearances, which arguably applied technology without resolving the underlying problem: “a better way to deliver a bad product.” The broader issue of unnecessary appearances has likewise shifted mediums, with the challenges associated with frequent video sessions highlighting concern over the pre-existing pattern.

**Many reforms are indicated, but the pace of reform and the pandemic create real complexity.**

The vulnerability of our system and many of its assumptions have been exposed by the pandemic, a crisis which has occurred simultaneously with a national debate over systemic racism. Change, whether to acknowledge and confront racism or to alter long-standing procedures, traditions and rules, requires effective communication, personal and community

connection, and above all trust. At the moment, our reform efforts are hampered greatly by our enforced distance from one another. Going forward, at a time when more change has happened in a short burst than in the previous decades and enthusiasm for new techniques is high, the basic principles of democratic society must still be protected. These include access, the rule of law, and protection of the vulnerable.

## Session 2: Technology, safety and security, and access to justice

### Panel presentation

This session began with the first of two formal presentations at the Symposium, by Mr. Benny Goedbloed, Head of Corrections Information Management for the Belgium Ministry of Justice. Mr. Goedbloed spoke on “The Pandemic in Prisons: technological, legal and ethical considerations.” The corrections experience of the pandemic has varied across the globe, particularly in terms of response. In many areas, we have seen the rapid introduction of ‘new’ technology in prisons. His survey of regional experiences is summarized in **Figure 1**.

Common responses	Region	North America	South America	Asia	Africa	Europe
Body scanners		•	•	•		
Self-service technology for incarcerated people		•				•
Electronic monitoring via apps/text		•		•		
Hi-tech temperature measurement		•		•		•
Remote working environment for staff		•				•
Hi-tech sanitizing equipment		•		•		
Official denial of pandemic			•			
Increase in technology-based security			•			
Increased confinement & isolation has been primary response			•		•	
Create regional information sharing				•		•
Robotic process automation				•		•
AI-based video analysis				•		
Video conferencing tools						•

Figure 1: Common corrections responses to the pandemic, by world regions

State correctional responses have needed to take into account technological, legal and ethical considerations. **Technology variables** include existing IT infrastructure for staff and for those incarcerated, societal access to technology in general, security requirements, and how much privacy factors and users themselves feature in design. **Legal considerations** have included whether it is possible to hold court hearings in prison (Israel, New York and Italy suspended court appearances as an accused person must “appear in freedom” before a judge), whether it was possible to effect conditional release of incarcerated people, human rights issues such as Nelson Mandela rules or WHO recommendations, and government decrees on isolation, quarantine and vaccination as they relate to criminal law and procedure or the correctional population. **Ethical considerations** have included privacy & identity considerations, the necessity of physical contact, the psychological consequences of isolation and confinement, and the extent to which corrections-based health measures are non-discriminatory, effective,

voluntary, safe and responsible. The priority status of those incarcerated regarding vaccine rollout has also been the subject of ethical debate worldwide.

In a facilitated discussion, a multidisciplinary panel drawn from domestic Canadian experience then followed up the presentation by discussing the ways in which the pandemic-inspired use of technology has been beneficial or harmful regarding transparency, fair processes, and access to justice – and what needs to happen to ensure progress which has been made is not lost. Following the panel’s remarks, participants moved into pre-assigned small groups to consider the same set of questions in conversation. Participants then returned to plenary to report out and engage in facilitated discussion of the points raised by the panel and in the small groups.

### Themes of discussion

Themes emerging in this session from the panel and from participant dialogue were as follows.

#### **Use of video technology in courtrooms has created real benefit, which we risk losing if we revert to past practice.**

The widespread use of video conferencing has allowed us to sustain the system for the most part. Beyond this, we have also expanded our ability to collaborate as it is now much simpler and cheaper to engage with a broader representation of interests, including external service partners. Some of these innovations have long been proposed, as the technology is not new, but have gathered dust until the current moment. In the future they may be further exploited to general benefit, but this will not happen without concerted effort and investment in that direction. Infrastructure inside and outside of courtrooms is a priority. We cannot “stop now and think we’re done”: we cannot scale up the gains we have made equitably unless we standardize, invest, educate, and create competence.

#### **The consequences of expanded technology are not evenly experienced or universally positive.**

Many justice interactions are made worse when conducted virtually, and for many people virtual connections are inaccessible, difficult or aversive. In many places, all that is available is an audio connection, which is even more disconnecting. People with some mental health disorders can find it challenging to connect over technology. Confidential solicitor-client interactions are difficult in video proceedings. The familiarity of personal interaction which often helps to ease otherwise challenging circumstances in the criminal process, as well as a sense of gravity where appropriate, are both typically missing over video – as are the informal professional development which comes from working in proximity to mentors and the benefit of in-person support of defendants. There are also many unknowns: is assessing credibility less effective over video (or in person); do we need to test our assumptions in this area? Are defendants at a measurable disadvantage if not appearing in person? There is much we do not understand about what has happened, and convenience is not necessarily synonymous with progress. A prisoner cannot participate in smudge or sweat lodge remotely. A prison cannot be inspected or monitored remotely. Programs, visits, and work release have been either eliminated or severely curtailed during the pandemic. Can we leverage new technology in

custodial centres to facilitate greater video access to family/community supports through installation of video units, rather than phones, for visits?

**The gains we have made from applying technology must be fairly distributed.**

Our immediate focus has been on preserving the central processes of the system itself, but the longer-term imperative must be to place citizens at the centre of service design. If the justice system is to become more reliant on technology as a medium, that raises questions of citizen preferences, government obligation, and general levels of competency. Given the great disparity in abilities and facility with technology, longer-term reliance should be accompanied by investment in technology literacy for citizens, and in technology access. Consideration should also be given to creating a citizen digital identity.<sup>1</sup> All of this in turn can only proceed fairly if specific attention is given to the many aspects of the digital divide: service to remote communities, access for the vulnerable or marginalized, access for those with sensory or mobility challenges, as well as questions of language and literacy issues of many. The voices of litigants, those in custody or being supervised in the community, and communities themselves should matter as much as those of judges and lawyers when it comes to design.

## Day 2 (March 13)

### Session 3: The pandemic as a stimulus to working holistically

#### Panel presentation

This session began with a facilitated multidisciplinary panel, representing the non-profit service sector, housing, social assistance, and policing, who were invited by the facilitator to address the question of cross-sectoral coordination, understanding and partnership during the pandemic. The panel highlighted a case-study in British Columbia from the early weeks of the pandemic, in which the rapid movement of many people who might otherwise have been remanded or in sentenced custody placed significant pressure on housing, social assistance and transition services in the community. Relationships were also under initial pressure, but rapid action to organize a broad coalition of services has since created a model of interagency cooperation on services to the vulnerable and marginalized going forward.

The panel discussion also focused on the intense challenges faced by policing in the first months of the pandemic, during which police legitimacy and social licence to operate were major public issues both nationally and internationally. Multiple, overlapping crises – Covid-19, opioids, police relationship with Indigenous peoples – required police to focus on rebuilding trust in an environment where partnerships with community services were of acute importance, and to focus simultaneously on developing models of crisis intervention which are grounded in collaboration and multidisciplinary expertise.

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<sup>1</sup> A digital identity is a set of validated digital attributes and credentials for the digital world, equivalent in principle to physical identity documents which are commonplace. Normally issued by governments, the purpose of a digital identity is to identify a person uniquely, whether online or offline.

Following the panel's remarks, participants moved into pre-assigned small groups to consider these issues in conversation. Participants then returned to plenary to report out and engage in facilitated discussion of the points raised by the panel and in the small groups.

### Themes of discussion

Themes emerging in this session from the panel and from participant dialogue were as follows.

#### **The pandemic has seen us reinvent roles and partnerships in ways that improved outcomes.**

With the onset of the Covid-19 crisis, many service providers were working outside their usual roles. This included criminal justice system functions like police and defence (for whom this was a significant role challenge), and also many of our agencies and institutions in the broader community. The expansion of roles and in particular the need to ensure rather than assume coordination of responses and processes had the unanticipated beneficial effect of making existing networks and services far more visible. The judiciary benefited from having better-quality information available when making decisions, regarding the network of supportive response and the capacity of that network. Intense collaboration created or renewed interest in post-pandemic co-location of services in justice centres; in client navigators who assist their clients in obtaining services from a range of sources; in expanded investment in support workers; in mental health teams who can provide centralized services to their clients; and in the more general expansion and normalization of collaborative work to ensure safer and more positive and sustainable outcomes.

#### **After years of talk, the pandemic saw the creation of truly collaborative diversion efforts.**

The pandemic made diversion an existential concern, and the need to decarcerate brought many existing issues to the fore regarding the collaborative norms and structures required to achieve this outcome. In all jurisdictions, new or expanded committees focused on diverting people from incarceration. These efforts were successful in diverting many into the community, but at the same time this intense work saw our partner organizations become badly stretched. Going forward, we need to continue to focus on collaboration, and on ensuring sustainable community reintegration planning for both the remanded and sentenced populations. Police and corrections have already been heavily involved in these partnerships, but a whole-system response is required, involving the health and social sectors, municipalities and the business community.

#### **The pandemic reaffirmed the need for community-based diversion and reintegration.**

The system's reliance on community to address the urgent need to divert people from jail has underscored the importance of holistic designs to achieve rehabilitation and reintegration. In this, the colonial system can learn from Indigenous communities, where it is a commonplace approach to situate the problem of wrongdoing within the community as a whole. As one participant remarked "it's time to get rid of thinking inside and outside the box and think inside the circle instead." The justice system need not be used as a blunt instrument to address such

things as nuisance behaviour; instead, client-centered problem-solving can be advanced within communities via connective functions such as Indigenous Justice Centres and/or pivot agents.<sup>2</sup>

**Community-based solutions require us to empower and fund communities.**

Community-based approaches not designed by government have shown their importance during the pandemic. Indigenous communities have an inherent right of self-determination including justice matters. The value of community programming, not simply in times of crisis but also in “normal” times, is evident based on the ways in which communities during the pandemic facilitated the justice system’s long-held aspirations of greater levels of diversion. A sustainable approach to funding is required, as is the recognition that capacity and resources to respond is not even across all communities.

**Collaborating on policy and operations means getting serious about sharing and using data.**

The advances made during the pandemic in reducing the corrections population were not equivalent across the country, with some interventions and methods more effective than others. A sustained approach at community-based collaboration to limit the use of incarceration requires, amongst other things, an evidence-based design with data to support. We are conditioned to protect our data, even with trusted partners, and a new approach is required. We need to effectively share data across the criminal justice system and with our partners, with clear policy goals in doing so. We need to think bigger on those types of items, understanding that we are empowered to collect and utilize data for the benefit of citizens.

## Session 4: Criminal justice and ethics in the pandemic

### Video presentation and prepared remarks

The final session began with a series of eleven pre-recorded video vignettes from justice professionals across the country, reflecting on ethical dilemmas which they have had to confront which have emerged (or have been exacerbated) during the pandemic. The dilemmas are summarized in **Figure 2**.

The videos were followed by the second and last formal presentation at the Symposium. Professor Janine Benedet, Dean *pro tem* of the Allard School of Law at the University of British Columbia, spoke to participants on the subject of “Ethical Considerations for Criminal Justice in the Pandemic.”

Dean Benedet identified three broad kinds of ethical dilemmas: (1) where the ethical course of action is simply unclear or unknown; (2) where the ethical course of action is known, but we are frustrated in our attempts to achieve it; and (3) where a path of action is ordained but we feel it is not right or good. This last situation can create conflict between our personal morality and

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<sup>2</sup> A ‘pivot agent’ is an emergent category within the relational professions in various human service sectors, and is responsible for connecting people, groups, organizations and institutions. They may work with specific clients and/or on the boundaries of different areas of professional practice. See Louis Turcotte et al., “[Ce que nous apprend le travail des agents pivots sur les approches intégrées : analyse exploratoire du cas de l’approche école en santé](#)”; *Service social*, vol. 57, no. 2, 2011, p. 55–73.

our “role morality.” In responding to these dilemmas, we commonly have three options. We may **reason from rules** which set norms of ethical behaviour, as may be contained in professional codes or policies or legislation that direct our behaviour. We may **reason from consequences**, where we seek to maximize good or minimize harm. Finally, we may **reason from values**, using principles as reference points for making decisions about right and wrong.

Sometimes there is a clear rule which provides guidance. Rules are rarely arbitrary and can reflect consensus borne of experience. If the rule produces unjust results, we may need to seek a change, and the criminal justice system has actually changed and suspended all sorts of rules in response to the pandemic. If there is no clear or applicable rule, or the rule is not clear, then it can be useful to return to principles or values. But principles can be in conflict and offer

Speaker	Ethical issue raised
Defence counsel, BC	Plea bargain offers from Crown in pandemic are too good to refuse, but should that affect likelihood of a guilty plea?
Police executive, NL	The difficulty of balancing public health measures, investigative techniques and the public’s feelings of safety.
Prosecutor, MB	Judicial interim release being denied to First Nations defendants as usual conditions harder to meet in pandemic.
Judge, ON	Challenges of client-counsel communication when client at detention centre when conducting virtual proceedings
Corrections executive, NS	Reluctant use of close confinement as a health measure, knowing its effects. Realization that status quo ante was overreliance on incarceration.
Prosecutor, ON	Intersecting crises of racial injustice and pandemic present common challenge of developing competencies to ensure we are not perpetuating injustice.
Defence counsel, AB	Technology sustained our system but has harmful dehumanizing effects. When personal connection is lost, is justice done and seen to be done?
Prosecutor, MB	The pandemic increased use of judicial interim release, but persistent property crime has created pressure on health-driven responses.
Police executive, BC	Dilemma regarding the safety of the community, and of police officers and their families, while conducting the necessary in-person work of policing.
Prosecutor, ON	Victims of intimate partner violence are more likely to recant complaints in the pandemic due to social isolation and pressure on re-housing options.
Judge, AB	Quarantine provisions in jails create delays in accused contact with legal aid. Consequence is delay, with more time spend awaiting process.

Figure 2: Ethical dilemmas in criminal justice emerging or worsening during the pandemic

different paths forward, and may push us in different directions depending on which one we follow. We may again fall back on utilitarian calculus, reasoning from consequences.

In the first video vignette, the Crown – wishing to move cases through the system and decrease load on corrections – is offering deals in plea negotiations that to defence counsel appear like a very good deal, though the client may have a viable chance of acquittal at trial. There may in some circumstances be a rule-based resolution of this dilemma, if the circumstances meet the standard for negotiating a plea. But the most promising path for any such dilemma is not to make a decision in a vacuum but to engage others in the issue and seek advice.

Following these remarks, participants moved into their small groups to consider their own perspectives on ethical dilemmas in the pandemic, then returned to plenary to report out and engage in facilitated discussion of the points raised at the outset and in the small groups.

### Themes of discussion

Themes emerging in this session from the panel and from participant dialogue were as follows.

#### **There is no simple answer as to how one balances an emergency versus traditional ethics.**

In the pandemic, our traditional justice ethical framework has had to compete for space with rival concerns regarding public and individual health, which were similarly laden with ethical issues. There were and are no easy answers. Decision making needs to take into account context – e.g., cultural, social and health contexts, and those contexts can widen or narrow our scope of discretion. The ethical challenges encountered do not simply pit one set of values against another (i.e., justice vs. health), but also place individuals in difficulty through role migration. For example, in some cases accused are seeking advice from the Crowns due to lack of representation. There are many ethical challenges stemming from the under-resourced and under-supported nature of defence counsel, for whom the pandemic has been especially challenging as most (particularly young defence counsel) are not salaried

#### **The pandemic let us assess prior rules and assumptions which were temporarily abandoned.**

Before we revert automatically back to traditional rules – which will require leadership to avoid – we should consider what has worked during the pandemic. We need to have courage to change traditional rules, and in this we need political leadership so that people working in the criminal justice system feel supported, particularly the police. The pandemic appears to have challenged the idea that leniency in pretrial detention will lead to an uptick in crime: we have an ethical responsibility only to bring into the system those who need to be in the system, and it appears we may have been proceeding on incorrect assumptions. Finally, we have learned that we cannot apply our rules in vacuum, as other sets of rules (for health, and for the safety and wellbeing of staff) have had to be balanced against due process of law.

#### **The pandemic response has presented significant challenges to the operation of the courts.**

The courts have had to monitor the extent of pandemic-related change which has been directed by Ministries of Attorney General, with respect to potential infringements on judicial independence. On an operational level, the move to remote work has prevented the informal discussions that can occur when people are together in courts and offices which often serve as opportunities to avoid ethical missteps, particularly for junior staff or counsel. In terms of

transparency, access to the justice system by media has been restricted during the pandemic, which poses a challenge to the open courts principle.

**We must consider whether technology is eroding the values or the humanity of the system.**

Technology, no matter how necessary, should not lead us to abandon the intent of our existing rules. As we have learned, it can help us, but it can also make our processes less human. Does this experience diminish participants' capacity to respond or otherwise conduct themselves as the circumstances, gravity and decorum of a criminal trial require? It may be too early to know this, but we must seek to learn the answer. While the future will likely involve a hybrid approach, it is likely that in some cases, such as those involving youth, we have a duty to return to in-person hearings. We must also address oversight and accountability issues. Oversight mandates must evolve as horizontal and collaborative initiatives develop. A greater emphasis on how we leverage technology to provide access to justice within places of custody is required.

## Day 3 (March 27)

### Session 5 – Recent developments in federal criminal justice legislation

Participants heard a presentation by Mr. François Daigle, Associate Deputy Minister, Department of Justice Canada, on contemporary law reform efforts in criminal law including reference to legislation flowing from the pandemic experience. Mr. Daigle's comments included reference to:

- Bill C-15, which would commit the government to alignment of Canadian law with the United Nations Declaration on the Rights of Indigenous Peoples, and address matters related to self-determination;
- Bill C-21, which would create a “red flag” regime under which anyone could ask judge to remove gun from an individual, if it is believed that possession of a gun by that individual poses a danger, for example in terms of domestic violence;
- Bill C-22, which focuses on reform of sentencing policies that have contributed to overincarceration of Indigenous, Black and marginalized people. The bill would remove mandatory minimums for drug offences, restoring discretion to judges with respect to sentencing balanced against the gravity of offence, and is based on many of the recommendations made by this Symposium in past years; and
- Bill C-23, which would increase the flexibility of the justice system with particular respect to communications and technology, addressing remote appearances, video jury participation, expanded and updated tele-warrant provisions, and electronic fingerprint process. The National Action Committee on Court Operations in Response to COVID-19 in particular has provided important insights for the development of this legislation.

Mr. Daigle also discussed proposed reforms regarding conditional sentence orders in order to decrease use of prison for less serious crimes and reduce incarceration of Indigenous offenders and giving more discretion to peace officers and prosecutors with respect to simple drug

possession, as a complement to the existing federal prosecution directive concerning simple possession. The latter step is consistent with viewing drug use as a health issue rather than a criminal matter, and also consistent with the recent work of the Canadian Association of Chiefs of Police noting the ineffectiveness of substance use charges.

## Recommendations

Following the first two days of the Symposium, participants were provided with several proposed recommendations flowing from the discussion, which were summarized by the Symposium coordinator when participants reconvened on March 27<sup>th</sup>. Participants returned to their small discussion groups to consider the proposed recommendations, followed by facilitated discussion of the groups' observations in plenary.

The Symposium recommendations resulting from this process are as follows:

**1. Expand, fund and normalize collaborative practices and roles adopted in the pandemic.**

A consistent theme to which participants returned was the widespread, timely and effective collaborations amongst justice sector participants, and with external partners. Stakeholders convened at the outset of the pandemic to ensure access to justice was preserved as urgent health and safety measures were implemented. The pace of change during the pandemic has been swift and necessary and has occurred in large measure due to the meaningful collaborations amongst all justice system stakeholders. These collaborations have continued to make positive change for the past year.

The impact of those collaborations cannot be lost and maintaining their benefit will require a concrete plan. We have learned that a redesign of the criminal justice system infrastructure requires broader inclusion of system users and stakeholders to ensure true access to justice, including the defence bar and victims. Without this level of continued communication and collaboration, we will risk returning quickly to the way we historically did business. Moreover, to give life to the other recommendations noted here, continued collaboration will be required.

**2. Incorporate the lessons of the pandemic regarding decarceration into policy and law.**

Criminal justice system actors at all levels must take steps to ensure the positive experience of reduced reliance on jail during the pandemic is reflected in policy, organizational design, budget allocations and collaborative structures going forward, to consolidate the gains made in the struggle against overincarceration. In pursuing this path, it is important to take an evidence-based approach, and to understand why this experience was not uniform across Canada.

This may include but is not limited to expanded presumptions of diversion for categories of defendant, creating funding for community support capacity commensurate with its demonstrated importance, more pre-charge diversion options, meaningful multilateral support for persons with complex needs, and the creation of multidisciplinary diversion committees or other mechanisms driven by client-centered objectives. Executive support of operational choices will be important, including public education particularly for smaller communities and rural areas. An assertive media campaign to change perceptions may be necessary, related to the social as well as financial costs of incarceration and clearly identifying the net fiscal and public safety benefits of applying a greater proportion of resources to prevention and treatment.

This should not be an ad hoc approach. We need to consider both the evidence and issues of principle regarding the use and impacts of incarceration in general.

**3. Acknowledge and fund community-based approaches as truly central to the system, and as enablers of many of the system's long-held aspirations.**

Community partnerships throughout the criminal justice sector have emerged in the pandemic as a central and necessary element of criminal justice functioning, as opposed to an auxiliary set of supports. Now is the time to build lasting, culturally and age relevant approaches and relationships which situate the criminal justice system within the community, and not somehow apart from it. Such an approach must incorporate the voices of lived experience as standard practice.

This should include but is not limited to finding sustained, meaningful funding for community services providing basic needs such as access to health care, shelter, food and education; justice actors' full engagement in problem solving groups; and physical co-location with key partner functions when appropriate to do so. This will require focus on Northern communities and Indigenous communities, and on collaboration between Indigenous and non-Indigenous communities. It will also require public education given the challenge of parochial "NIMBY" neighbourhood opposition to reintegration efforts.

This should also include full integration of community-based programming into custodial centres, ensuring continuity of relationships and support when the person is released from custody, with the use of video technology wherever possible to facilitate the development of relationships while the person is still in custody. It is counterproductive and destabilizing to create these connections with services in-custody and then break them and seek to recreate them with different service providers in the community. Consistency, continuity and stability is necessary for successful reintegration into the community.

This should also include a commitment to institutionalize and invest in a *standardized* data-collection and data-sharing strategy implicating all criminal justice institutions, intended to empower and assess the impact of community-based strategies and partnerships. The strategy should operate from the principle that justice data is data about the community and its wellbeing and should be guided by norms of collaboration and timeliness.

- 4. Acknowledge and respond to the pandemic's profound effect on defence counsel.**  
Defence counsel are an integral part of the justice system, and the pandemic has placed enormous pressures on their ability to remain in practice. The fact that defence are funded through a hybrid of public and private means should not obscure the need to ensure continuity of service in future crises. We must acknowledge the potential long-term impact of practice closures, and plan for future contingencies related to pandemics or other disruptions. In addition, where there have been significant technological changes in courts and process, defence counsel should be supported with ongoing training and technological support.
  
- 5. Conduct a rigorous review of the impact of the "pandemic wave" of technology.**

Technology has allowed the system to function in the pandemic, and has had many different effects on user experience, justice processes, justice efficiencies, and access to justice. Many of the technologies employed had previously been resisted, were adopted from sheer necessity, and have been revolutionary in nature. In addition, regional and urban/rural discrepancies and the difficulties of those unable to use technology (as with some mental disorders) became apparent, with technology emerging as a significant access to justice issue.

Viewing the pandemic as possibly a once-in-a-lifetime experiment and recognizing that both negative and positive outcomes have been observed, it is incumbent on provincial and territorial systems (with federal support) to determine rigorously the merits and detriments of the use of technology, and to demand, expect and support standardized approaches going forward. It will also be necessary to actively educate the public regarding the changing norms and expectations of the system as they emerge. This should include finding the means to ensure the necessary digital literacy, and supporting the implementation and staff needs relative to new technologies. That said, digitization and digital literacy must not be seen as ends in themselves but must be assessed in terms of access to justice; and technological changes must in general be accompanied by consideration of ethics, decorum, and other values.

**6. Reconsider routine criminal justice processes and accountability mechanisms in light of pandemic user experience.**

In part through the use of technology, in the pandemic participants in the criminal justice system have experienced processes which have been altered, delayed, expanded or cancelled. This has provided rare perspective on previous rules and processes. Criminal justice leaders must take advantage of this moment to solicit users' views on what we have learned about necessary and unnecessary process, whether their views have to do with procedural fairness and efficiency, cultural competency, cost, equity, ethics, or any other important value.