CHARGE SCREENING PRACTICES AND CROWN EVIDENTIARY THRESHOLDS IN CANADA

A report prepared for the Steering Committee on
Justice Efficiencies and Access
to the Criminal Justice System

November 28, 2023

Paul Lindsay, Policy Consultant (Retired Assistant Deputy Attorney General, Criminal Law Division, Ministry of the Attorney General, Ontario)

Carmen Elmasry, Crown Counsel, Criminal Law Division, Ministry of the Attorney General, Ontario

Anousheh Showleh, Senior Divisional Coordinator, Criminal Law Division, Ministry of the Attorney General, Ontario

DJ Tokiwa, Articling Student, Criminal Law Division, Ministry of the Attorney General, Ontario

Eunwoo Lee, Articling Student Criminal Law Division, Ministry of the Attorney General, Ontario

Acknowledgements:

Howard Chow, Deputy Chief, Vancouver Police Department, British Columbia

TABLE OF CONTENTS

APPENDICES

FOREWORD

With police investigations becoming increasingly complex and prosecutions ever more sophisticated, Canada's criminal justice system faces new challenges to ensure it sustains the public's confidence. It is imperative that justice system participants, including the Crown and police, work together to find solutions to maintain an efficient and effective justice system that operates fairly to all: the accused person, victims of crime and the public. After extensive consultation with a broad range of justice participants across Canada, including police associations, prosecution services, legal aid societies, governmental and community agencies, and academics, this report makes a number of recommendations based on these fundamental principles with the goal of enhancing justice efficiencies and access to the criminal justice system. This report should not be read and understood as if each of the recommendations were to be implemented by each of the provinces and territories in their entirety. The committee is aware that the various Canadian criminal justice systems are grappling with different issues and that some have already incorporated several of the report's recommendations. The committee drew on the best practices of each of these systems in developing the recommendations.

EXECUTIVE SUMMARY

A. Mandate of the Project

A sub-committee of the Steering Committee on Justice Efficiencies and Access to Criminal Justice [the "Steering Committee"] was tasked with examining the implications of pre-charge vs. post-charge screening and the differing Crown screening evidentiary thresholds in Canada.[1] The sub-committee formed a working group which consulted with a broad range of justice system participants, reviewed available statistics, analysed various charge screening protocols, and based on that work produced this report.

Specifically, the sub-committee examined:

1. the impact and/or benefits of the Crown screening charges at the pre-charge and post-charge stages, and considerations related to the *Jordan* (delay) risk, public or victim safety, overrepresentation of Black, Indigenous, racialized, or marginalized individuals in the criminal justice system, and pandemic backlog recovery; and,

[1] For a list of the members of the sub-committee and working group, reference should be made to the Discussion Deck in Appendix "D". Note: Frank Bosscha was appointed to the Alberta Provincial Court in February 2023 and did not participate in the creation of this report.

2. the impact and/or benefits of the various Crown screening evidentiary thresholds[2] employed by each prosecution service, *e.g.,* "reasonable prospect of conviction" vs. "reasonable likelihood of conviction" vs. "substantial likelihood of conviction."

In this report, the term "charge screening" is used as a generic term referring to **any form** of Crown review of proposed charges or charges already laid, including pre-charge Crown consultation, Crown assessment, Crown approval, and Attorney General consent.

Some of the policy areas which the working group examined include:

- Time to trial – the *Jordan* risk;[3]
- Public or victim safety;
- Overrepresentation of Black, Indigenous, racialized, or marginalized individuals in the criminal justice system;
- The backlog of criminal cases accumulated in the justice system as a result of the COVID-19 pandemic;
- Compliance with the Constitution and the law – *e.g.,* any barriers imposed by the *Charter of Rights and Freedoms (Charter)*, *Criminal Code* and other federal or provincial statutes;
- Police and Crown operations and resources; and,
- An accused person's reputation, finances, liberty, etc.

B. Recommendations

Preface

A number of studies and reports have considered significant issues facing the modern justice system post-*Charter*, including questions of delay and disclosure, and have

[2] The evidentiary threshold is one part of the Crown's charge screening standard. In addition to reviewing a charge to determine if it meets a particular evidentiary threshold, a prosecutor must also determine whether it is the public interest to proceed with the charge. Unless the charge meets both the evidentiary threshold and the public interest test, the prosecutor must discontinue the prosecution of the charge. The Crown has an ongoing duty to screen the charge throughout the criminal proceeding, until the completion of the trial and, where appropriate, up to and including any appeal.

[3] *R. v. Jordan* 2016 SCC 27 mandates that criminal trials must be completed within 18 months in the provincial court and 30 months in the superior court, absent defence-caused delays, discrete events, and/or exceptional circumstances. Trials that are not completed within these ceilings are presumed to have violated the accused person's rights under s.11(b) of the *Charter of Rights and Freedoms*. The only remedy for a s.11(b) *Charter* violation is a stay of proceedings. Delay, under *Jordan,* does not include time before a charge is laid.

recommended the need for greater cooperation between the police and the Crown at the pre-charge stage.[4]

The present report builds on the Steering Committee's 2006 Report entitled *The Final Report on Early Case Consideration of the Steering Committee on Justice Efficiencies and Access to the Justice System* ["the 2006 Report"].[5] One focus of the 2006 Report was "to identify ways to improve processes and relationships in the justice system with the goal of decreasing the number of court appearances necessary to resolve a case". The 2006 Report focused on a number of areas, including police and prosecution linkages, diversion and restorative justice, and case flow management. A number of recommendations were made to improve time to trial and early resolution of cases to address issues that contribute to delay.

The 2006 Report did not consider in depth the issue of Crown pre-charge screening. However, it did identify the need for greater pre-charge consultation between police and prosecutors and made the following recommendation and observations:[6]

> *Recommendation One (2006 Report): Pre-Charge Involvement of Crown Counsel*
>
> *The Steering Committee recommends expanded involvement of Crown counsel during the pre-charge stage of police investigations.*

[4] See, for example, Patrick J. Lesage and Michael Code, *Report Of The Review Of Large And Complex Criminal Case Procedures*, Ministry of the Attorney General of Ontario, Toronto, November 2008, Recommendation 1 on p. 28: "The police and Crown should collaborate much more closely in large and complex cases, at the pre-charge stage, than they have done historically in Ontario. Collaboration does not mean charge approval nor does it mean that the Crown takes over police investigative functions. Rather, it means legal advice on investigative procedures and any substantive issues, assistance with the preparation of disclosure and, finally, advice as to what would be a manageable size and focus for a successful prosecution." In the Report of the Standing Senate Committee on Legal and Constitutional Affairs, *Delaying justice is denying justice : an urgent need to address lengthy court delays in Canada*, [Ottawa] 2016, p. 115, the committee concurred with Tom Stamatakis, the president of the Canadian Police Association, who emphasized the importance of balancing independence and cooperation in policing and prosecution: "[T]he Crown has to remain independent, but there's no reason why they can't play an advisory role in assisting the police to ensure that they've…provided the appropriate evidence to meet the elements of the offence and to assist with making sure they've taken all the appropriate investigative steps to assist with the prosecution. It should remain a collaborative effort."

[5] Department of Justice: The Final Report on Early Case Consideration of the Steering Committee on Justice Efficiencies and Access to the Justice System

[6] Department of Justice: The Final Report on Early Case Consideration of the Steering Committee on Justice Efficiencies and Access to the Justice System at pp. 9-10

- *Crown counsel shall assist the work of the police by providing pre-charge legal advice on such issues as complex or special search warrants, charging decisions, Crown brief preparation, etc.*
- *Crown counsel should also be involved in providing educational opportunities and training to police officers on relevant pre-charge issues, including search and D.N.A. warrants and the essential elements and proof requirements of offences.*

Prior to the proclamation of the *Charter*, issues such as unreasonable delay and failure to make timely and complete disclosure did not have the same significant consequences as they do now. The transformative decision from the Supreme Court of Canada dealing with delay in the criminal justice system, *R. v. Askov*, [1990] 2 S.C.R. 1199, was a wake-up call for many in the justice system. It resulted in the Crown having to withdraw or stay thousands of charges. Yet, in 2016, many of the delay issues that motivated the Supreme Court of Canada in *Askov* were still evident, resulting in the *R v. Jordan,* 2016 SCC 27 decision. Unfortunately, the problems concerning delay in the justice system identified by the Supreme Court in *Jordan* still persist in some jurisdictions seven years later, and, in some, the COVID crisis has exacerbated those delays because of significant court backlog.

Recently, Canada has seen Manitoba and Alberta join Quebec, British Columbia, and New Brunswick in implementing Crown pre-charge screening. This movement toward pre-charge screening is consistent with long-practiced charge screening protocols in other major common law jurisdictions, such as the United Kingdom and the United States, in which prosecutors, not the police, generally decide which charges will be laid and prosecuted following a police investigation and recommendation by the police. Accordingly, as it stands now, half of the provinces of Canada have a system of Crown pre-charge screening, while the other half have a system of Crown post-charge screening. However, even in post-charge screening provinces, pre-charge screening is common in more serious and complex cases.

This report recommends that the post-charge screening jurisdictions in Canada work collaboratively with justice system participants, especially the police, to give serious consideration to implementing some form of Crown pre-charge screening when it is feasible to do so.

In addition, this report recommends that those jurisdictions which presently have a system of Crown pre-charge screening should also review their processes to ensure that they have allocated adequate police and Crown resources to the system and that

public safety and other public interest considerations are not put at risk when Crown screening cannot be completed in a timely fashion.

Finally, this report recommends that jurisdictions that presently apply the “reasonable prospect of conviction” evidentiary threshold should consider adopting the higher “reasonable likelihood of conviction” evidentiary threshold. The adoption of this higher threshold would enhance the administration of justice and would complement any transition to Crown pre-charge screening.

Objectives

The following objectives were significant in formulating the recommendations in this report:

Maximizing efficiencies in the justice system

The increasing complexity of modern criminal investigations and prosecutions requires that scarce resources be used in an efficient and effective manner without, of course, jeopardizing public safety. Generally speaking, it is a waste of precious resources when charges are laid, only to be withdrawn at a later date because of the insufficiency of evidence, overcharging, diversion, or other issues that could have been addressed earlier in the process.

Minimizing the risk of systemic 11(b) issues

Cases must proceed in accordance with the timelines outlined by the Supreme Court of Canada in *Jordan.* It is imperative that charges are investigated and reviewed in an efficient and effective manner so that prosecutions are not delayed, and charges stayed. Time spent during a criminal investigation is not taken into account in assessing 11(b) delay (although, in some limited circumstances, it may be relevant to an allegation of abuse of process).

Ensuring that the public interest, including public safety, is not put at risk

It is important to ensure that delays in completing the Crown screening process (whether pre-charge or post-charge) do not contribute to the delayed arrest and/or processing of an accused person who presents a risk to public safety or to the public interest (*e.g.*, where an individual is about to flee the jurisdiction). Conversely, it is important to ensure that delays in providing disclosure to an accused person do not

contribute to the delay of a prosecution such that a case is stayed, and an accused person is set free.

Acknowledging the distinct yet interrelated roles of police and prosecutors

A core duty of the police is to *investigate* potential criminal conduct and determine which charges should be presented to the Crown for prosecution; a core duty of prosecutors is to decide which cases should be prosecuted and to *prosecute* those cases. It is universally recognized in Canada that the mutual independence of the police and prosecutors is an important safeguard in the criminal justice system by providing a double-check on the exercise of police and prosecutorial discretion.

Encouraging cooperation and communication between police and prosecutors

Given the complexity of many investigations and prosecutions, it is of great value to the justice system that police and prosecutors cooperate and communicate regularly. Notwithstanding their mutually independent roles, in the modern post-*Charter* justice system it is wholly unrealistic for police and prosecutors to work in separate silos. Generally, in all Canadian jurisdictions, police and prosecutors already work cooperatively and communicate regularly prior to the laying of significant or complex charges, whether through a formal or informal Crown charge screening mechanism.

Increasing transparency in the Crown charge screening process

It is important that prosecutors understand that police investigators also have a significant stake in the charge screening process. It benefits the relationship between the police and prosecutors if police are aware of the reasons why charges are prosecuted or not. Victims, too, have a legitimate interest in being advised about charge screening decisions.

Flexibility in adopting all, some or none of the recommendations

Canada's federal system of government recognizes that there can be flexibility in the manner in which the administration of criminal justice is managed within each province and the territories. At present, there is variability in the way prosecution services screen and process criminal charges. For example, Québec employs a Crown pre-charge screening model which requires that the Crown approve a charge prior to it being laid, while Nova Scotia has a post-charge screening model (with some exceptions) in which the Crown reviews a charge only after the charge has been laid; British Columbia applies the "substantial likelihood of conviction" Crown evidentiary threshold, whereas

Alberta applies the “reasonable likelihood of conviction” evidentiary threshold. Any change in the Crown screening regime should recognize that different provinces may have varying financial and administrative challenges that would favour one Crown screening model or one evidentiary threshold over another. The recommendations are aimed at enhancing the present systems under which provinces and the Public Prosecution Service of Canada (“the PPSC”) are now operating and should be considered and implemented, as appropriate.

1. Charge Screening Practices

Recommendation 1: Consider Implementing a Crown-Police Pre-Charge Consultation Process

The jurisdictions that presently do not have a pre-charge screening system should give serious consideration to implementing a Crown-Police pre-charge consultation process when it is feasible to do so. The jurisdictions considering implementing this process should consider the following:

a. The pre-charge consultation process should provide that, unless it is impractical to do so, or contrary to the public interest or the safety of the public, the police should consult with and obtain the advice of the prosecutor before laying a charge.
b. The prosecutor should review the proposed charge by applying the applicable Crown screening evidentiary threshold and by indicating whether it would be in the public interest to lay the charge.
c. The pre-charge consultation process should provide for a review procedure in the event that the police disagree with the advice of the prosecutor, after which the police would be free to lay the charge.
d. The *design and implementation* of the pre-charge consultation process should be a joint police and Crown responsibility.
e. The *pace* at which the pre-charge consultation process is implemented should be agreed upon by the police and the Crown.
f. The *scope* of the pre-charge consultation process (*i.e.,* which class of charges should be subject to the pre-charge consultation process) should be agreed upon by the police and the Crown.
g. The *pace and scope* of the pre-charge consultation process should take into account police and Crown resource and logistical issues and should have due regard for public safety.

Implementing a Pre-charge Consultation Model:

Recommendation 2: Establish Provincial Joint Crown-Police Charge Consultation Coordination Committee

The Committee would coordinate the rollout of the pre-charge consultation model in a manner that ensures a consistent, effective, and efficient process across the province. The Committee should ensure that police and Crown resource and logistical issues are taken into account in the design and pace of the rollout and in the scope of the pre-charge consultation model. Each province would have its own Coordination Committee that could tailor the design of the pre-charge consultation model to the individual needs of the province. The Public Prosecution Service of Canada should also have a representative sitting on each provincial Committee.

Recommendation 3: Creation of a "safety valve"

The pre-charge consultation model should ensure that the police can arrest and lay a charge prior to Crown screening if the Crown is unavailable to screen the charge on a timely basis or if the requirement for pre-charge consultation would cause an imminent risk to the safety of the public or a substantial risk that the individual will flee.

Recommendation 4: Create a Review Process

Jurisdictions should set up a review process when police disagree with the Crown charge screening decision. If the police investigator disagrees with a prosecutor's charge screening decision, a process should be available for that decision to be reviewed in a timely way. At the end of the review process, if the police still disagree, the police should be free to lay the charge.

Best Practices: For Pre- or Post-Charge Screening Jurisdictions

Recommendation 5: Establish local Crown-Police Committees

Greater cooperation and coordination can be accomplished through local Committees. The local Committees would ensure that local issues are being addressed through regular communication between the Crown and police.

Recommendation 6: Disclosure should be substantially complete prior to charges being laid or by no later than the first appearance

A complete or substantially complete disclosure package should be provided to the Crown that permits a proper charge screening assessment and allows early disclosure to be provided to an accused person if the charges proceed. A provision should be made for exceptions to this requirement when evidence may not yet be available for disclosure but will become available within a reasonable period of time.

Recommendation 7: Ensuring Transparency

Whenever possible, the prosecutor should advise the police of the reasons why a charge is not being prosecuted.

Recommendation 8: Increase and Improve Coordination of Pre-Charge Diversion Measures

Prosecutors and police should coordinate and enhance access to appropriate pre-charge diversion/alternative measures programs.

Recommendation 9: Pre-charge Legal Aid funding

Provincial legal aid programs should consider providing funding for legal representation for individuals prior to arrest or charges being laid.

2. Crown Evidentiary Thresholds

Recommendation 10: “Reasonable likelihood of conviction” is the preferred Crown evidentiary threshold

Prosecution services that currently employ a lower evidentiary threshold should consider adopting the higher reasonable likelihood of conviction evidentiary threshold as the primary evidentiary threshold employed by prosecutors.

Recommendation 11: Provide for a lower evidentiary threshold in exceptional circumstances

Prosecution services may consider employing the lower “reasonable prospect of conviction” Crown evidentiary threshold in exceptional circumstances. Exceptional circumstances might include:

(i) when relevant safety and public interest factors weigh heavily in favour of a prosecution; or
(ii) when the accused person presents a substantial bail risk and not all of the evidence is available at the time the charge is presented to the Crown for screening.

Best Practice: Regardless of Crown Evidentiary Threshold Employed

Recommendation 12: Public Interest Factors Reviewed and Modified

Public interest factors should be regularly reviewed and modified, as necessary, taking into consideration issues impacting a community, including public safety and public confidence in the administration of justice. These factors would support a critical review of cases at the charge screening stage on the question of whether it would be in the public interest to proceed with a prosecution.

Recommendation 13: Enhanced Crown and police education and training on charge screening

Regardless of the charge screening practice or the evidentiary threshold applied, each jurisdiction should implement Crown and police education and training on the application of the Crown evidentiary threshold and public interest considerations. In addition to enhancing mutual cooperation and respect, joint education and training would ensure that police and prosecutors have a common understanding of the Crown screening process.

3. Data Collection

Recommendation 14: Improved Data Collection

Where feasible, regardless of the charge screening practice or Crown evidentiary threshold employed, each province should collect data to better assess the effectiveness of different processes, including charge screening, that would support the ongoing improvement of the administration of justice.

C. Overview of Crown Pre-Charge and Post-Charge Screening Models

All criminal cases in Canada are screened by the relevant prosecution service based on an evidentiary threshold and a public interest assessment. One of the most significant

differences is the ***stage*** at which the screening of the case takes place, which varies across Canada:

- *Pre-charge Screening (prior to the laying of charges)* – British Columbia, Quebec, New Brunswick, Alberta, Manitoba, Military Justice
- *Post-charge Screening (after charges are laid)* – Ontario, Saskatchewan, Nova Scotia, Newfoundland and Labrador, Prince Edward Island.[7]

It is important to note that, throughout the course of the prosecution, the Crown has a continuing obligation to ensure that the charge meets the Crown screening threshold, including the public interest considerations. If at any point the charge fails to meet the threshold, the Crown is duty-bound to withdraw or stay the charge.

1. Pre-Charge Screening Model

In a pre-charge screening model, prior to the laying of charges, police are mandated to provide the case to the prosecutor, who then assesses whether a charge should be laid.

Pursuant to section 504 of the *Criminal Code,* the standard for laying any charge before a justice of the peace is whether there are "reasonable grounds" to believe that an offence has been committed.[8] This standard applies to charges laid by the police as well as charges laid by members of the public.

However, when the Crown screens a charge, the prosecutor applies a higher two-part threshold that includes an assessment of whether the evidence meets an evidentiary threshold and, if so, whether it is in the public interest to proceed with a prosecution. If the charge does not meet **both** thresholds, depending on the jurisdiction, the prosecutor either "does not approve", "refuses" or "does not recommend" charges be laid. If both thresholds are met, the prosecutor "approves" or "recommends" that charges be laid. The prosecutor may delay providing an answer until the investigation is complete and disclosure can be provided to the accused person.

Generally, if the police disagree with the prosecutor's assessment of whether the charge should be laid, the police may either lay the charge contrary to the prosecutor's

[7] The PPSC's default charge screening process is to apply the charge screening process used in the province where the charges are laid. The policy does not indicate what process is employed in the Territories. See 2.3 Decision to Prosecute, Public Prosecution Service of Canada Deskbook, at s. 4.1

[8] *Criminal Code*, R.S.C. 1985 c. C-46, s. 504: **"**Any one who, on reasonable grounds, believes that a person has committed an indictable offence may lay an information in writing and under oath before a justice".

assessment or ask that the prosecutor's decision be reviewed by a supervising prosecutor.

2. Post-Charge Screening Model

In a post-charge screening model, police also adhere to s. 504 of the *Criminal Code* and lay charges on a standard of reasonable grounds that an offence has been committed. Only after the charges are laid does the prosecutor determine whether to proceed with the prosecution by applying the higher Crown two-part charge threshold. If the charges do not meet the Crown's threshold, the charges are withdrawn in court. If the threshold is met, the case will proceed. A case can proceed through the court process while the prosecutor awaits the completion of disclosure, which is normally required to properly screen the charges.

In a post-charge screening model, the police are not required to consult or obtain approval of the prosecutor prior to laying charges except where the consent of the Attorney General to lay a charge is required by the *Criminal Code*.[9] However, police may, and, in some cases, do consult with a prosecutor prior to laying charges, most often in large, complex, or high-profile cases.

D. Summary of Evidentiary Thresholds

The *Criminal Code* does not prescribe a standard for the continuation of a prosecution after a charge has been laid.[10] All prosecution services in Canada engage in charge screening. Each prosecution service applies a charge screening standard that involves two components: an evidentiary threshold and public interest considerations.

The applicable evidentiary threshold varies across the country (See Appendix C: Provincial Charge Screening Policies):

- *Substantial likelihood of conviction* – British Columbia

[9] See, for example, *Criminal Code*, ss. 83.24, 119, 174, 318

[10] S. 717 addresses when alternative measures can be used to deal with a person alleged to have committed an offence. A number of conditions must be met including that: "…(f) there is, in the opinion of the Attorney General or the Attorney General's agent, **sufficient evidence to proceed with the prosecution**." Although this does not specifically provide an evidentiary threshold to utilize, it does indicate what at a minimum is required to proceed with a prosecution. S. 715.32 addresses when a prosecutor may enter into negotiations for a remediation agreement with an organization alleged to have committed an offence. A number of conditions must be met including that: "(a) the prosecutor is of the opinion that there is a **reasonable prospect of conviction** with respect to the offence…" Although this does not touch on whether or not the prosecutor could proceed with the prosecution, it does reference a specific evidentiary threshold.

- *Reasonable likelihood of conviction* – Alberta, Manitoba, Newfoundland and Labrador, Prince Edward Island, Saskatchewan
- *Reasonable prospect of conviction* – Ontario, Quebec, New Brunswick, Nova Scotia, Public Prosecution Service of Canada, Military Justice.

This suggests that there are three different evidentiary thresholds in Canada. On closer review, however, it is more complicated. For example, though Ontario and New Brunswick apply the "reasonable prospect of conviction" threshold, they describe the test differently. In New Brunswick, this threshold explicitly requires the prosecutor to conclude that a conviction is more likely than not. In Ontario, this threshold explicitly provides that it is lower than the "more likely than not" threshold.[11]

1. Substantial Likelihood of Conviction

British Columbia is the only province that applies the "substantial likelihood of conviction" evidentiary threshold. This standard has been in place since the early 1980s, although it has been the subject of considerable debate since then.[12]

Currently, British Columbia instructs its prosecutors to apply this evidentiary threshold in the following manner:

> Subject only to the exception described below, the evidentiary test for charge approval is whether there is a substantial likelihood of conviction. The reference to "likelihood" requires, at a minimum, that a conviction according to law is more likely than an acquittal. In this context, "substantial" refers not only to the probability of conviction but also to the objective strength or solidity of the evidence. A substantial likelihood of conviction exists if Crown Counsel is satisfied there is a strong and solid case of substance to present to the court.
>
> In determining whether this test is satisfied, Crown Counsel must consider the following factors:
>
> - what material evidence is likely to be admissible and available at a trial
> - the objective reliability of the admissible evidence

[11] New Brunswick Public Prosecutions Operation Manual, Chapter II: The Decision to Prosecute; Crown Prosecution Manual: D. 3: Charge Screening | Ontario.ca

[12] See: Gary McCuaig, *British Columbia Charge Assessment Review (May 2012)*, Schedule 11 to D. Geoffrey Cowper, *A Criminal Justice System for the 21st Century: Final Report to the Minister of Justice and Attorney General Honourable Shirley Bond* (Victoria, B.C.: Minister of Justice, 2012), at pp. 236-37

- whether there are viable defences, or other legal or constitutional impediments to the prosecution that remove any substantial likelihood of a conviction.

> In assessing the evidence, Crown Counsel should assume that the trial will unfold before an impartial and unbiased judge or jury acting in accordance with the law and should not usurp the role of the judge or jury by substituting their own subjective view of the ultimate weight or credibility of the evidence for those of the judge or jury.[13]

Of note, British Columbia allows prosecutors to apply the lower "reasonable prospect of conviction" standard in exceptional cases. Specifically, they may do so in cases where the public interest in favour of a prosecution is very strong.[14]

2. Reasonable Likelihood of Conviction

The "reasonable likelihood of conviction" evidentiary standard is used in Alberta, Manitoba, Newfoundland and Labrador, Prince Edward Island, and Saskatchewan. Currently, Newfoundland and Labrador instructs its prosecutors to apply this evidentiary threshold in the following manner:

> In the assessment of the evidence, a bare prima facie case is not enough; the evidence must demonstrate that there is a reasonable likelihood of conviction. This decision requires an evaluation of how strong the case is likely to be when presented at trial. This evaluation should be made on the assumption that the trier of fact will act impartially and according to law.
>
> The prosecutor is required to find that a conviction is more than technically or theoretically available. The prospect of displacing the presumption of innocence must be real.
>
> A proper assessment of the evidence will take into account such matters as the availability, competence and credibility of witnesses and their likely impression on the trier of fact, as well as the admissibility of evidence implicating the accused person. Crown Attorneys should also consider any defences that are available to the accused person, as well as any other factors that could affect the prospect of a conviction. This would necessarily include consideration of any *Charter*

[13] British Columbia Charge Assessment Guidelines, at p. 2
[14] British Columbia Charge Assessment Guidelines, at p. 6

violations that would lead to the exclusion of evidence essential to sustain a conviction.[15]

3. Reasonable Prospect of Conviction

Since the mid-1990s, some provinces have applied the "reasonable prospect of conviction" evidentiary threshold.[16] Currently, the Ontario Crown Prosecution Manual instructs prosecutors to apply this evidentiary threshold in the following manner:

> When considering whether to continue the prosecution of a charge, the Prosecutor should determine if there is a reasonable prospect of conviction. This standard must be applied to all cases and at all stages. If at any stage of the proceeding, the Prosecutor determines there is no longer a reasonable prospect of conviction, the prosecution must be discontinued.
>
> The reasonable prospect of conviction standard is higher than a prima facie case that merely requires that there is evidence whereby a jury, properly instructed, could convict. On the other hand, the standard does not require a probability of conviction, that is, a conclusion that a conviction is more likely than not. The term reasonable prospect of conviction denotes a middle ground between these two standards. It requires the exercise of prosecutorial judgment and discretion based on objective indicators found in the case itself.
>
> Applying the reasonable prospect of conviction standard requires a limited assessment of credibility based on objective factors, an assessment of the admissibility of evidence and a consideration of likely defences.
>
> In applying the standard, Prosecutors should consider the following factors:
>
> 1. the availability of evidence
> 2. the admissibility of evidence implicating the accused person

---

[15] Newfoundland and Labrador Guide Book of Policies and Procedures for the Conduct of Criminal Prosecutions

[16] This threshold was adopted in the mid-1990s following its recommendation in *The Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions* (Toronto - Ministry of the Attorney General, 1993), commonly known as the Martin Report. The Committee considered various formulations of the standard, including "reasonable chance of conviction" and "reasonable likelihood of conviction" before deciding on "reasonable prospect of conviction" (at pages 62-65). The Committee felt "chance" suggested luck. It worried "likelihood" would be misapplied to require that conviction be more likely than not. "Prospect" was preferred because, to the Committee, it suggested an appropriate mental outlook for the future.

3. an assessment of the credibility and competence of witnesses, without taking on the role of the trier of fact
4. the availability of any evidence supporting any defences that should be known or that have come to the attention of the Prosecutor.[17]

E. Method

A working group was assembled to conduct the necessary research and consultations required to produce this report. The working group created and provided a comprehensive Discussion Deck (Appendix D) and survey (Appendix E) to a wide cross-section of justice system participants, including prosecution services, police associations, academics, Legal Aid agencies, and several legal interest groups and associations, to solicit their views on the various issues being examined. As a result, 20 virtual consultations took place between December 2022 and March 2023, and written submissions were received from seven organizations (Appendices F to K).

Each consultation was approximately 90 minutes in length, relied on a standard set of questions, and was transcribed with the assistance of two articling students. The representatives of various prosecution services, police associations, and other groups provided their views on the topics discussed in this report. The participating representatives generally had extensive experience within their respective domains of the justice system and expertise in policy and/or case management. However, the views of these representatives are their own and do not necessarily represent the official position of their government, association, or other affiliation.

The representatives' responses should be understood in the context of the justice system participants' jurisdiction and experience. Context-specific factors – such as how charge screening operates in practice or the size of the jurisdiction – largely informed participants' views on the issues discussed. The summaries included in this report are intended to provide a "big-picture" sense of each justice system participant's input.

The police members of the working group did not attend the consultations with the prosecution services; however, one or more attended the consultations with the other justice system participants. They were also of great assistance in facilitating contact with the police associations.

In addition, the working group:

[17] Crown Prosecution Manual: D. 3: Charge Screening | Ontario.ca

- reviewed applicable reports and prosecution service policies (Appendix A and C);
- conducted a comprehensive review of reported 11(b) decisions in Ontario, Quebec, British Columbia, Saskatchewan, Nova Scotia and New Brunswick from 2019 and 2022;
- analyzed the results of the survey provided and data published by Statistics Canada; and,
- conducted research on relevant *Criminal Code* and constitutional law issues.

F. Source Materials

Wherever possible, web links have been provided for any documentation referred to in this report. Copies of all written submissions provided to the working group are included in the Appendices of this report.

PROSECUTION SERVICES

This section summarizes the views expressed by the various prosecution services consulted by the working group.

A. British Columbia (BC)

In BC, police are authorized to lay an Information charging an individual with an offence; however, it is mandatory that, unless it is impracticable to do so, police will lay an Information only after the approval of charges by the prosecution service.[18] In determining whether to approve the charges, the prosecutor may apply one of two evidentiary thresholds. The default threshold is whether there is a substantial likelihood of conviction.[19] In exceptional circumstances, with supervisory approval, the prosecutor may apply the lower evidentiary threshold of reasonable prospect of conviction.[20] If either evidentiary threshold is met, the prosecutor will then assess whether the charges are in the public interest to proceed.

If a prosecutor does not approve charges, the prosecutor is expected to provide an explanation and outline the rationale for the decision. If police disagree with the outcome of a particular charge assessment decision, they are encouraged to discuss their concerns with the prosecutor who made the decision.[21] If there are still outstanding

[18] British Columbia Charge Assessment Guidelines, pp. 1-2
[19] British Columbia Charge Assessment Guidelines, p. 2
[20] British Columbia Charge Assessment Guidelines, p. 6
[21] British Columbia Charge Assessment Decision – Police Appeal, at p. 1

concerns after that discussion, the police may appeal the charge assessment decision.[22] A final review of the decision can proceed all the way to the Assistant Deputy Attorney General.[23] If the police choose to swear an Information without the approval of the prosecution service, the procedure for *Private Prosecutions* (PRI 1) would apply.[24]

In-custody cases are typically screened as part of the bail process. Out-of-custody cases are submitted to the local Crown office and assigned to a prosecutor to review.

1. Charge Screening Practices (BC)

The BC Crown representative voiced a strong preference to maintain the status quo with its pre-charge screening approval model. The current process is well entrenched in BC, and there are notable policy advantages. One of the main benefits of pre-charge screening is that it reduces the number of cases entering the criminal justice system as the Crown screens out non-viable cases. Consequently, the timelines for cases to reach the trial stage are more efficient, and there are fewer looming *Jordan* issues.

The Crown pre-charge screening process is also complemented by a Memorandum of Understanding (MOU) with police services concerning disclosure. Absent any public safety concerns, police are expected to provide disclosure at the time of the charge screening assessment. In practice, police are generally able to meet the disclosure requirements set out in the MOU. These twin policy components work in tandem to minimize 11(b) risks. The BC Crown representative indicated that their most recent data showed that BC had a low rate of stays in 2022: 2 provincial stays, 2 federal stays, and 3 stays in the Superior Court. Moreover, issues with pre-charge screening delays arise very rarely and are almost never attributed to the Crown.

The pre-charge screening approval process in BC has been in place for so long that there are no existing comparable statistics concerning overrepresentation of Indigenous, racialized and marginalized individuals in the criminal justice system. The BC Charge Assessment Guidelines provide policy guidance for considering the circumstances of Indigenous victims and accused persons. It is assumed that Crown screening provides an extra layer of consideration for an Indigenous victim's or accused person's circumstances.[25] These factors are assessed at the public interest stage of the charge assessment process.

---

[22] See British Columbia *Crown Counsel Act,* s. 4(4). "The Attorney General may establish an appeal process under which law enforcement officials may appeal the determination of any Crown counsel or special prosecutor not to approve a prosecution."
[23] British Columbia Charge Assessment Decision – Police Appeal, at p. 1
[24] British Columbia Charge Assessment Decision – Police Appeal, at p. 1; *Private Prosecutions* at p. 1
[25] British Columbia Charge Assessment Guidelines, pp. 4-6

2. Crown Evidentiary Thresholds (BC)

The BC Crown representative believed that, in practice, there may not be a dramatic practical difference in how the various evidentiary thresholds are applied as between the provinces. BC's "substantial likelihood of conviction" evidentiary threshold theoretically implies that it is a higher standard than the "reasonable prospect of conviction" standard of some other provinces; however, there seems to be no overall consensus among BC prosecutors on whether there is any meaningful difference between the two thresholds. Some prosecutors believe that the higher evidentiary threshold assists in reducing the volume of cases within the justice system, while other BC prosecutors are uncertain as to whether it actually makes any significant impact.

In terms of public safety issues, the higher evidentiary threshold does not necessarily address the concerns that are often expressed by victims. If the "substantial likelihood of conviction" standard is not met and the victim is a vulnerable individual, a prosecutor will consider whether a peace bond could provide appropriate protection to the victim.

B. Alberta

Alberta employs the "reasonable likelihood of conviction" evidentiary standard. While the province has historically operated as a post-charge screening jurisdiction, recently, Alberta has gradually implemented a pre-charge screening protocol across the province.[26]

The Pilot Projects: The Gradual Expansion of Pre-charge Screening Assessment (Alberta)

Alberta's pre-charge screening assessment pilot projects began in October 2019 and proceeded until March 2020. The projects originally involved three individual RCMP detachments: Hinton, Canmore, and Strathcona County.[27] The scope of the project included reviewing investigative cases where an arrest was yet to be made, out-of-custody-cases with a police release, and in-custody cases. The two goals of the pilot projects were: (1) having police involved in determining how the initiative could be further implemented; and (2) formalizing a simple way for the police and the Crown to consult with one another regarding the review of charges.

[26] Alberta to have Crown prosecutors pre-screen criminal charges | Calgary Herald; March 6, 2023
[27] The population of each city in brackets: Hinton (9882), Canmore (13992), and Strathcona County (98044).

In 2021, the Royal Canadian Mounted Police (RCMP) and the Crown agreed to a two-year term of continuing and expanding the pre-charge assessment pilot projects to additional detachments. Currently, pre-charge assessment is operative in six RCMP detachments and seven municipal agencies.[28] A small team of senior prosecutors review lodged cases between 8:00am – 8:00pm every day of the week. In January 2023, there was to be a province-wide rollout plan to gradually expand the project to 113 detachments.

In March 2023, Alberta's then Minister of Justice announced that 16 additional prosecutors would be hired to conduct pre-charge screening and that the pre-charge screening model would be completely rolled-out province-wide by early 2024. With the injection of $30 million of new funding into the prosecution service, the Minister estimated that the new pre-charge screening process would reduce the number of cases entering the justice system by 20 per cent.[29]

The Procedural Mechanics of Pre-charge Screening Assessment (Alberta)

Pre-charge screening assessment refers to a standardized procedure whereby the Crown provides legal advice on the front end to police prior to the laying of charges. Police officers are required to submit certain materials in the disclosure package and indicate what charges they believe are appropriate to lay; this happens through an email form. The Crown is mandated to respond with an answer within two hours. The Crown can recommend that the charges be laid, suggest alternative charges, reject the case, recommend diversion, or indicate that further evidence is needed for charges to be laid. The Crown can also provide reasons in writing that explain the rationale as to why the case was rejected.

If any disputes arise between the police and the Crown, there are escalation procedures in place in which issues can be taken up the chain of command to the supervising prosecutor. However, dispute resolution typically occurs organically during timely communications, and escalation is rare. Ultimately, the police are still responsible for laying the Information. If an officer lays a charge that is not recommended by the Crown, they have advance notice of the prosecution's position on the issue once it is in court. Overall, it is exceptionally rare for police to elect to lay a charge against a prosecutor's advice.

In time-sensitive situations, police may lay charges without first consulting with the Crown if the administrative tasks associated with pre-charge assessment would

[28] The largest municipal agency conducting pre-charge assessment is Medicine Hat.
[29] Alberta to have Crown prosecutors pre-screen criminal charges | Calgary Herald; March 6, 2023

interfere with an individual's right to a bail hearing within 24 hours or compromise public safety.

Thus far, the pre-charge screening assessment process does not include classes of offences that are normally handled by specialized units, such as large-scale frauds and homicides.

1. Charge Screening Practices (Alberta)

The Alberta Crown representative advised that there is a growing preference for pre-charge screening, though a larger sample size of statistics and follow-up evaluation is desired as the rollout plan moves forward.

Early data showed a marked reduction in cases entering the justice system. Within the six-month period of the original pilot projects, there was a 21% decrease in commenced cases and a 29% decrease in criminal charges laid as compared to the previous year. From the perspective of the Alberta prosecution service, although the data is limited, it does seem to support the proposition that the pre-charge screening process can have a significant impact on reducing the number of cases entering the criminal justice system.

Upon completion of the first pilot projects, the RCMP detachments in Hinton, Canmore, and Strathcona County unanimously indicated that they wished to continue employing the pre-charge screening assessment process. The RCMP detachments were of the view that this approach saved resources, bolstered procedural efficiencies, and enhanced investigations.

However, the administrative shift to pre-charge screening has not been seamless. According to the Alberta Crown representative, a noted concern from the RCMP and a potential disadvantage of the pre-charge screening process is that it can interfere with the independence of the police and encroach on their overall role in the justice system.

The police in Alberta have voiced their concerns to the Alberta Prosecution Service that the pre-charge screening process may impact their ability to ensure public safety. However, the Crown's position is that the concern is unfounded because there is an "exceptional circumstances" safeguard which permits police to make an arrest and lay a charge if not doing so would affect with public safety. Moreover, if an individual is arrested, if appropriate, the individual can be released on an undertaking or some other form of release. If the individual breaches the undertaking before the first appearance, they would be prosecuted. Accordingly, prosecutors believe that the police have all of the necessary tools to arrest and impose conditions on an individual pending the pre-

charge screening process. Further, the Alberta Crown representative indicated that pre-charge screening strengthens the cases entering the system, leads to more just sanctions, and mitigates the risk of wrongful convictions.

There is a looming concern for resources at the front-end, especially as pre-charge screening is implemented in larger cities. Preliminary consideration has been given to augmenting budgets to add staff, clerks, and administrative assistants because the cornerstone of the project is the timely collection of evidence and submission of the pre-charge package to the prosecutor. The front-end collection of materials for the disclosure package will need to be resourced properly for larger cities like Calgary, Edmonton, and Lethbridge.[30]

2. Crown Evidentiary Thresholds (Alberta)

The Alberta Crown representative indicated that the differences between the evidentiary thresholds across each province are nominal in practice. The criteria for evaluating the sufficiency of evidence are nearly indistinguishable from one another in terms of the factors that are assessed, even when comparing the "substantial likelihood of conviction" standard in British Columbia. Anecdotally speaking, Alberta prosecutors who have prior experience as prosecutors in other Canadian jurisdictions generally echo the sentiment that there is no meaningful difference between each standard in practice.

C. Saskatchewan (Sask)

Saskatchewan is generally a post-charge screening province, with three exceptions. First, Prince Albert has a hybrid system, having pre-charge screening for most cases, with an emphasis on the more serious offences. There is a designated senior prosecutor working at the local police station who determines whether the case is ready to proceed with charges, or, if not, what more is needed. This model has been in place with the local police force since 1997. The same system does not exist with the RCMP, which makes up about 40% of the police in Prince Albert.

Second, in child-related assault cases, police agencies across Saskatchewan submit the case for review in order to obtain the Crown's opinion pre-charge. This is the protocol but is not mandatory. Where there is a highly sensitive case that needs to be dealt with quickly, prosecutors will review on a "rush basis" to provide an expedited opinion.

Third, there is pre-charge screening for allegations against police officers.

[30] Alberta to have Crown prosecutors pre-screen criminal charges | Calgary Herald; March 6, 2023

1. Charge Screening Practices (Sask)

The Saskatchewan Crown representatives generally agreed that, in principle, early pre-charge review of charges by the prosecutor is desirable. The reduction in time to trial would be moderate to significant. Some expressed the view that a similar early review could be achieved through post-charge screening if they were better resourced. In particular, Saskatchewan has experienced a substantial turnover of prosecutors, resulting in most prosecutors having between zero to five years of experience. While pre-charge screening may be aspirational, it could be difficult to find enough experienced prosecutors, particularly in rural and geographically remote locations, to embark on such a change in the system.

2. Crown Evidentiary Thresholds (Sask)

The Crown evidentiary charge threshold applied in Saskatchewan is the “reasonable likelihood of conviction” standard. The Saskatchewan Crown representatives were less certain about what would be the impact of a change in the evidentiary threshold. Some indicated that there would be little or no difference in practice if the evidentiary threshold of reasonable likelihood of conviction were changed. One prosecutor felt that, in theory, the higher the evidentiary threshold applied, the fewer cases would enter the system, resulting in less backlog.

D. Manitoba (Man)

In Winnipeg, pre-charge screening authorization has been the process for all charges since the 1980s, whether the individual is in or out-of-custody. Since April 2020, for in-custody matters, prosecutors are on-call 24/7 to review charges. Senior prosecutors are available to review homicides, but most screening prosecutors are generally junior. The case is reviewed immediately, with an emphasis on considering whether the individual should be detained or released. Prosecutors attend some of the s. 503 hearings.

Recently, Manitoba started employing pre-charge screening authorization for all out-of-custody cases in the province. Police are expected to submit out-of-custody matters four to six weeks ahead of time so that prosecutors can review and consider diversion.

It is very rare that the police seek to escalate a prosecutor’s unfavourable assessment of the case to the Executive Director; there is generally an acceptance that prosecutors make the call on whether charges are laid.

1. Charge Screening Practices (Man)

The pre-charge authorization process is preferred. In Winnipeg, pre-charge authorization has been standard for decades. Despite some initial resistance from police outside of Winnipeg, the Manitoba Crown representatives indicated that the police appreciate the benefits of pre-charge screening. Those benefits include a checklist allowing for better screening and quality control, more diversions resulting in less work for police in creating disclosure and reduced criminal case backlog. Pre-charge authorization has also reduced the proportion of cases being stayed.

2. Crown Evidentiary Thresholds (Man)

Manitoba employs a “reasonable likelihood of conviction” standard – meaning a conviction is more likely than not.

The Manitoba Crown representatives were of the view that the “reasonable likelihood” evidentiary threshold strikes the right balance between avoiding wrongful convictions and ensuring that the right individuals are held accountable. Changing to a “higher” threshold would not likely make a significant difference in determining whether a charge should proceed. However, changing the evidentiary threshold in some types of cases – for example in intimate partner violence cases – could make a difference. The issue of overrepresentation should be properly considered as part of the public interest analysis, not the evidentiary threshold.

E. Ontario (ON)

In Ontario, a prosecution will proceed if there is a “reasonable prospect of conviction”, and it is in the public interest. The province primarily employs post-charge screening.

1. Charge Screening Practices (ON)

The Ontario Crown representatives were unanimous in their view that Ontario should consider a move from a post-charge screening process to a pre-charge screening process. The opportunity for a prosecutor to review cases prior to the laying of charges would decrease the risk of violating *Jordan* timelines and would mitigate the risk of cases being stayed or withdrawn. Cases can proceed to diversion in a more efficient manner benefitting all justice system participants and the public. Pre-charge screening is a viable policy consideration that would save court time.

While pre-charge screening establishes a blueprint for saving precious resources, there is a concern that this type of policy transition would require a heavy upfront investment of resources to guarantee its success. A second concern is whether more serious charges would take precedence over the screening of less serious charges. For example, one representative queried whether the screening of a sexual assault case would be prioritized over a low-level driving case.

The Ontario Crown representatives believed risks to public safety within a pre-charge screening regime are neutral. In some circumstances, public safety may be enhanced because, in the interim, while the prosecutor is determining whether to proceed with charges, the accused person may be incentivized to begin their rehabilitation and address the reasons that led them to commit the offence. For example, an accused person may begin counselling and, in appropriate cases, the prosecutor screening the charge may consider diversion under the public interest consideration.

Pre-charge screening could potentially have a salutary effect on the overrepresentation of racialized groups within the justice system. One representative opined that, while all screening Crowns may be subject to unconscious bias, the screening stage is detached from the interaction with the accused person and more conducive to an objective assessment of the factual scenario. Pre-charge screening would likely have a significant impact on Indigenous individuals because, where appropriate, it has the potential to reduce overcharging and administration of justice charges.

Going forward, the Ontario Crown representatives prefer the prosecution service to work collaboratively with police on multiple small-scale pilot projects that would allow for data-gathering on pre-charge screening. One Crown representative suggested that there should also be further consideration of whether Ontario should opt for more embedded Crowns, beyond detachments in Toronto and Ottawa, in lieu of adopting a pre-charge screening regime. Embedded Crowns are similarly not resource neutral, but a policy that endorses an increase in their use in Ontario could accomplish the overarching policy goals of pre-charge screening while simultaneously accommodating the independence of the police.

2. Crown Evidentiary Thresholds (ON)

The preference of the Ontario Crown representatives is for a policy shift to a more onerous evidentiary threshold. Furthermore, the evidentiary threshold should be consistent across Canada, though a legislative amendment or change within the *Criminal Code* is unnecessary.

The Ontario Crown representatives were of the view that, with proper training, a higher evidentiary threshold could play a significant role in removing cases from the system and could consequently expedite moving cases to the trial stage. There was no consensus on the wording of the higher threshold test, but a higher threshold may allow prosecutors to make “tougher decisions” more definitively and articulate their decision-making in a more comprehensive manner to the individuals impacted by those decisions. For example, “reasonable likelihood of conviction” would seem to be more intuitive for prosecutors and the public. The evidentiary threshold should certainly not be raised too high, but there is room for a higher threshold that would allow the prosecutor to zero in more attentively on the viable cases, which is a powerful benefit for the justice system with respect to adherence to the *Jordan* timelines.

Notwithstanding the overall preference for a higher evidentiary threshold, some Ontario Crown representatives expressed serious concerns on how a higher evidentiary threshold may impact certain classes of offences. For example, raising the threshold to a “substantial likelihood of conviction”, raises the question of how prosecutors would have a basis to proceed for the majority of historical sexual assaults, human trafficking cases, or some intimate partner violence cases. Though the public interest for these cases is high, the fact that 65% of sexual assault cases are withdrawn in Ontario raises a concern about how a higher evidentiary threshold may render these cases virtually non-prosecutable.

A higher evidentiary threshold has the effect of allowing prosecutors to spend more time on viable cases, thereby enhancing public safety. With respect to the issue of overrepresentation of racialized groups in the criminal justice system, a higher evidentiary threshold may have the potential to reduce its systemic occurrence.

Irrespective of whether the evidentiary threshold changes, the Ontario Crown representatives indicated that there is a real need for a culture change in the justice system relating to two issues: (1) the overall quality of police investigations; and (2) the ability of prosecutors to courageously apply whatever evidentiary threshold is in place. The criminal justice system will not improve in Ontario until the police prepare a more comprehensive disclosure package earlier in the process. On the other hand, junior prosecutors are currently far too reluctant to execute “hard calls” during the charge screening process. There is a need for greater Crown and police education on the application of the evidentiary threshold.

F. Quebec (Que)

Quebec has had a pre-charge screening approval system since 1969. This process was reaffirmed by provincial legislation in 2007. Section 13 of *An Act Respecting the Director of Criminal and Penal Prosecutions* states that, in addition to acting as a prosecutor in proceedings, "[the] Director also exercises any other function appropriate to the Director's mission, including authorizing a prosecution…".[31]

Present-day police officers and prosecutors in Quebec have not experienced any other process. Either a victim or a police officer may ask for the charge decision to be reviewed, but it is rare. In-custody and out-of-custody cases follow essentially the same process, although in-custody cases will be fast-tracked to comply with bail requirements. According to the *Rapport annuel de gestion 2020-2021*, released by the Directeur des poursuites criminelles et pénales (DPCP), 64.5% of requests to lay charges in cases involving personal violence were given a decision in less than 34 days. If police arrest and release an individual with a promise to appear or another out-of-custody process, the prosecutor will screen the charges before the first appearance date. Defence counsel can make written submissions to the prosecutor on the charge assessment, but those submissions must focus on the credibility and reliability of the evidence.

1. Charge Screening Practices (Que)

The DPCP Crown representatives were very supportive of their pre-charge screening approval process. Both models have benefits and drawbacks, but pre-charge screening is modestly better at respecting the *Jordan* timelines because disclosure is generally complete at the outset. Pre-charge screening also avoids valuable time being invested in a prosecution which will ultimately be withdrawn or stayed. If there was a clear error in the charge request, the prosecutor can discuss this with the police and can give some reasons why the charge was not approved.

The DPCP Crown representatives indicated that, despite some friction, the process is very collaborative with the police, and the prosecutor agrees with the charges suggested by the police most of the time. Pre-charge approval does not impinge on the independence of the police as the police retain the power to lay a charge under s. 504 of the *Criminal Code.* The collaborative nature of the relationship means that both prosecutor and police focus on ensuring that only charges which can support a conviction are placed before the courts while, at the same time, understanding each other's distinct roles and duties.

[31] R.S.Q., c. D-9.1.1, s. 13

There is no prosecution interference with police detaining an individual for public safety reasons. Prosecutors also sometimes meet with victims to assess what their view of the risk is, and tailor release conditions taking into account the victim's particular situation.

Pre-charge screening could assist in reducing overrepresentation of marginalized groups by allowing for potential charges to be diverted to a relevant program. Pre-charge screening also allows for a second look at the evidence with a view to avoiding unconscious bias and stereotypes before the charge is laid.

2. Crown Evidentiary Thresholds (Que)

Quebec's evidentiary threshold is "perspective raisonnable de la condamnation", which corresponds closely to "reasonable prospect of conviction" in English. While in theory, a higher threshold could mean fewer charges, resulting in less court time being taken up, the DPCP Crown representatives felt the differences between the evidentiary thresholds in Canada were marginal. The thresholds use different words to express the same requirements of attention to detail and case-specific analysis of evidence. As a result, the type of evidentiary threshold likely has minimal impact on issues such as time to trial.

G. New Brunswick (NB)

New Brunswick employs a pre-charge screening approval process for all charges. This process has been in place since the 1960s. Complete disclosure is required prior to the charge being approved. As soon as the case is reviewed, the prosecutor is ready to approve the charge and provide disclosure to the defence.

In-custody cases will be reviewed within a few hours. A more thorough review is done shortly afterwards. For out-of-custody cases, the New Brunswick Crown representatives estimated that police take around two to three months to prepare the case after the date of arrest. Prosecutors would then have about four to six weeks to review the case and request more disclosure if needed. Intimate partner violence cases (out-of-custody) are an exception; police have seven days to investigate, and the prosecutor has thirteen days to review and approve or reject the charge.

Police fill out a Charge Approval Sheet (CAS) for the prosecutor to review.[32] The reviewing prosecutor will approve, not approve, or "hold" when there is a missing piece of evidence or more information is needed to make a charge screening assessment.

[32] New Brunswick Charge Approval Sheet

The prosecutor provides comments explaining why the charge was held or not approved. There is an appeal process that the victim or the police can use to ask for a second charge review from another prosecutor. It is rarely used.

1. Charge Screening Practices (NB)

The New Brunswick Crown representatives are firmly in favour of pre-charge screening. They estimate that they would easily have 20% more cases before the court if they did not perform pre-charge screening.

Many prosecutors will take time to explain to the police why the case was not approved. Public safety is not a concern because police officers can release with conditions, or accused persons can be held, charged, and brought to court for a bail hearing. There were no views on overrepresentation because they felt they do not have the relevant data. However, reviewing for overcharging is a large part of their charge screening assessment which may assist in reducing that practice. Pre-charge diversion, both by police and prosecutors, is encouraged when appropriate.

The New Brunswick Crown representatives also noted that a positive aspect of pre-charge screening is that they do not need to explain to the victim why the accused person went to court only for the charge to later be withdrawn. The accused person also then does not need to spend time and money on defence counsel for all the appearances up to that point.

2. Crown Evidentiary Thresholds (NB)

New Brunswick's evidentiary threshold is a "reasonable prospect of conviction," which it interprets to mean an impartial trier of fact is "more likely than not" to convict. This definition is similar to jurisdictions that use the "reasonable likelihood of conviction" threshold.

The New Brunswick Crown representatives thought that, in theory, a higher threshold would result in fewer cases entering the justice system leading to fewer and shorter delays. However, whatever the threshold, prosecutors will apply the evidentiary threshold as they interpret it, drawing from their own individual experience. Accordingly, changing the evidentiary threshold would not necessarily make a significant difference. They saw no reason to change their current evidentiary threshold.

H. Nova Scotia (NS)

In Nova Scotia, a prosecution will proceed if the evidence presents a "realistic prospect of conviction".[33] The province primarily employs post-charge screening. After the *Jordan* decision, the province responded by creating two intake teams in Halifax and Dartmouth. The purpose of the teams is early case review at the stage before arraignment, with a view to identifying investigative deficiencies and applying restorative justice measures where it is appropriate to do so.

There are some exceptions to the post-charge screening process that, in practice, are informally recognized. For example, there is a longstanding practice in Halifax whereby the laying of homicide charges will generally require Crown approval. Sexual assault units will traditionally seek advice akin to pre-charge approval if officers are faced with a "borderline" case of laying charges. The RCMP also developed a major case protocol with certain classes of offences that encourage early Crown involvement. The specialized units that deal with commercial crime offences and internet child exploitation also generally consult with the Crown on a regular basis throughout investigations.

There is no formalized protocol for disclosure from the police, though there is a general expectation that the disclosure package be substantially complete at the time that a charge is laid. A disclosure checklist is sent to police to address any outstanding items.

1. Charge Screening Practices (NS)

The Nova Scotia Crown representative feels that the current post-charge screening process has suited the province well. While the province is open to change, they are reluctant to move to a formal pre-charge screening process. The main concerns relate to resourcing and maintaining the independence of the police.

The Nova Scotia Crown representative expressed the concern that a transition to pre-charge screening would likely require a massive influx of resources to meet the demands of Nova Scotia's caseload. It is unlikely that pre-charge screening would greatly impact the number of charges entering the system. The offsetting of resources upfront would not outweigh the sheer volume of resources needed to operationalize pre-charge screening. Currently, there is satisfaction with the timeliness of police disclosure,

[33] Nova Scotia Public Prosecution Service, *Decision to Prosecute* at p 2. The Nova Scotia Prosecution Service chose "realistic" for 3 reasons at p. 3. Of particular significance is the third reason: '*The word "realistic" helps to distinguish the Nova Scotia evidential threshold from that utilized in other jurisdictions where, for example, a "reasonable prospect of conviction" may mean a 51% likelihood of conviction (which is arguably lower than the Nova Scotia threshold, but not as high as the "substantial likelihood of conviction" threshold used in BC for routine cases).*

and reviewing a case pre-charge does not necessarily affect the risk that the charge will later have to be withdrawn or stayed.

The Nova Scotia Crown representative also expressed concern that a pre-charge screening process would erode Crown and police independence. Because of the *Royal Commission on the Donald Marshall, Jr., Prosecution,* the Nova Scotia prosecution service is particularly sensitive to preserving the role of the police in investigating and laying charges and the role of the Crown as an independent prosecuting agency. In other words, it is viewed as virtually sacrosanct that the police investigate crime and lay the charges they deem appropriate, while the Crown's formal role is engaged only after a charge is laid. The Crown has also recently stated on the record in the Mass Casualty Commission that the decision to charge was within the sole discretion of the RCMP.

2. Crown Evidentiary Thresholds (NS)

Nova Scotia prefers to maintain the current "realistic prospect of conviction evidentiary threshold. No significant issues have arisen in applying the current standard. There is Crown training on a regular basis, and the "decision to prosecute policy" session is consistently prioritized for new Crowns.

Changing to a higher evidentiary threshold would likely be inconsequential, though it is possible that it could reduce time to trial if it is assumed that there is a surplus of "non-viable" cases in the justice system. It is not clear that there are any material differences between the evidentiary thresholds used in Nova Scotia and those employed in other provinces. While there are semantic variations, each of the differing thresholds would likely result in the same analysis and decision to prosecute on the same set of facts. In other words, the theoretical differences between the thresholds are tantamount to "splitting hairs" and probably negligible in practice. A nationally uniform evidentiary threshold is unnecessary.

I. Newfoundland and Labrador (Nfld)

Newfoundland prosecutors mostly employ post-charge screening. However, there is mandatory, provincially legislated pre-charge screening for the prosecution of police officers (Serious Incident Response Team, or SIRT). The *Guidebook of Policies and Procedures for the Conduct of Criminal Prosecutions in Newfoundland and Labrador* also requires prosecutors to be involved when police want to obtain certain authorizations and special search warrants.[34] There is an unwritten understanding that police will come to the prosecutor for pre-charge advice in serious and sensitive cases,

[34] *Criminal Code*, ss. 186, 462.32, 462.33, 490.81

though there is no formal direction to do so. Police ask the prosecutor for advice in about 80% of homicide cases.

Newfoundland does not have a significant 11(b) problem. There were no long shutdown periods during the COVID-19 pandemic relative to the rest of the country. There has not been a successful *Jordan* application in some time.

1. Charge Screening Practices (Nfld)

The Newfoundland and Labrador Crown representative prefers their post-charge screening system because it maintains the independence of the police. While there are advantages to police having legal advice, police forces should have their own counsel independent of the Crown. Pre-charge screening *consultation* is preferable to pre-charge screening *approval* because it better preserves police independence. Another concern with pre-charge screening approval is that if the prosecuting Crown is not the same as the screening Crown, the prosecuting Crown might feel constrained by the screening Crown's previous decision.

However, like police prosecutions which are subject to pre-charge screening, it may be beneficial to institute pre-charge screening for cases involving Indigenous victims or accused persons. This might assist in addressing the overrepresentation of Inuit and Innu people in correctional institutions.

A potential shift to pre-charge screening would not create a greater burden on police resources because the current explicit expectation is for disclosure to be complete before filing the charge, with an exception for public safety cases.

2. Crown Evidentiary Thresholds (Nfld)

Newfoundland and Labrador prosecutors employ the "reasonable likelihood of conviction" evidentiary threshold. The Newfoundland and Labrador Crown representative thought that changing the standard *would* make a difference, but that such a change would not necessarily be desirable. A higher standard might result in fewer intimate partner violence and sexual assault cases, which already have the lowest rates of convictions.

J. Public Prosecution Service of Canada (PPSC)

The PPSC employs the "reasonable prospect of conviction" evidentiary threshold.[35] The PPSC's default charge screening process is to apply the charge screening process used in the province where the charges are laid. In other words, a case is reviewed following the laying of charges in post-charge jurisdictions, or upon the referral of a case by the police in pre-charge screening jurisdictions.[36] In any case, if there is a request from the police, the Crown may provide a preliminary assessment on whether the evidentiary threshold would be met prior to charges being laid or referred.

There are exceptions for certain categories of regulatory offences that are almost always screened using a pre-charge screening process, irrespective of the province. This policy is not mandated by law, but rather by agreement with the investigative agencies. For instance, prosecutions under the Federal *Competition Act* are subject to pre-charge screening by the Crown. The rationale for these agreements is that the offences are conducive to pre-charge screening because of the disproportionate time and effort required to investigate and prosecute the matters.

Opposition from police with respect to charge screening decisions occurs frequently, although most disagreements are resolved at the lower levels of the appeal process and are rarely escalated.

1. Charge Screening Practices (PPSC)

The PPSC Crown representative was of the view that the criminal justice system would operate more efficiently if more cases were screened post-charge. Pre-charge assessment is not an effective screening policy, apart from its role in assessing "project" cases.

Screening cases pre-charge, specifically with respect to minor cases, is counter-productive because the disclosure package received from police to perform the pre-charge screening is usually too bare-bones to allow the prosecutor to meaningfully exercise any judgement. Essential pieces of information are often missing. The critical issues of overcharging and over-policing only come to light at a later point when the case is being prepared. In essence, pre-charge screening can result in a substantial amount of wasted effort and time.

[35] Public Prosecution Service of Canada Deskbook 2.3 Decision to Prosecute, at s. 4.1
[36] Public Prosecution Service of Canada Deskbook 2.3 Decision to Prosecute, at s. 4.1.1

The PPSC Crown representative opined that adopting more pre-charge screening measures across the country may increase the risk that Court will decide to expand the scope of s. 11(b) to include pre-charge delay in the s. 11(b) calculation, something that is not currently factored into *Jordan* calculations, although pre-charge delay may be considered in an abuse of process analysis.

The PPSC Crown representative indicated that pre-charge screening is advantageous for larger cases, such as “project cases”, for example, those involving complex drug trafficking. Within this context, pre-charge screening and pre-charge advice throughout the investigation are incredibly important for both the police and the prosecutor because they preserve resources and can lead to a more comprehensive disclosure package.

In terms of pre-charge screening’s impact on public safety, the risks are mitigated by completing a basic pre-charge assessment early in the process. The crucial mechanism that protects the victim, such as in intimate partner assault occurrences, is the arrest. Regardless of how the pre-charge screening process is facilitated, there needs to be a safeguard in exceptional circumstances that allows police to lay charges without pre-charge advice or assessment.

Overrepresentation is a multilayered issue that occurs for a myriad of reasons, and its relationship with pre-charge screening versus post-charge screening is neutral. Race-based information about the accused person is not always evident at the time the prosecutor assesses the case. The pre-charge screening process would only ameliorate overrepresentation if there were an aggressive triage procedure.

Creating a uniform screening process across Canada would be fraught with difficulty. Provincial governments will never agree on one screening model. If the *Criminal Code* were to impose a singular screening model, a province may challenge the constitutionality of the law. The notion of codifying Crown discretion could also raise concerns across the country.

2. Crown Evidentiary Thresholds (PPSC)

The PPSC Crown representative believed that shifting to a higher evidentiary threshold for charge screening decisions would almost certainly have no impact. In practice, there is no discernible difference between the evidentiary thresholds in British Columbia and Ontario. Imposing a higher evidentiary threshold would not reduce the number of cases entering the justice system and therefore would have no effect on bringing cases to trial with greater expedition. At best, it would make a minimal difference in risks to public safety. Elevating the evidentiary threshold would not have a notable impact on drug

offences, though it is possible that a higher evidentiary threshold could have an adverse impact on regulatory offences.

The PPSC Crown representative indicated that the problem with the volume of cases in the justice system will not be remedied by recalibrating the evidentiary threshold. The bigger concern is the underlying reality that prosecution services are not equipped to prosecute every case and concurrently perform meaningful triage that would be acceptable to the public. There will be numerous cases that meet the charge screening standard, but the prosecution and courts are not resourced well enough to handle every case that enters the system.

It would be desirable to have a unified evidentiary threshold across Canada. The current system resembles a "patchwork quilt", and it is difficult for prosecution services and law enforcement to explain why there is a theoretically higher evidentiary threshold in British Columbia but a lower threshold in every other province. The implementation of this policy goal is extraordinarily complex, however, and it is doubtful that it is possible to standardize the application of the public interest test across Canada.

K. Canadian Military Prosecution Service (CMPS)

The Canadian military's jurisdiction is subject matter based. Its jurisdiction includes "service offences," which are military-specific, as well as any federal offence, including those in the *Criminal Code*. However, the military has no jurisdiction to prosecute certain offences, such as murder and child exploitation cases occurring in Canada.

Before laying a charge, a military police officer must obtain legal advice in accordance with the *National Defence Act* and regulations.[37] If the officer disagrees with the advice provided, there is an escalation mechanism to review the advice.

The caseload of the military prosecution service is comparable to a smaller province such as Newfoundland and Labrador or Prince Edward Island. There is no widespread issue with time to trial caused by an overloaded justice system.

There are circumstances that are particular to the military, including that there is access to extensive legal aid funding, and cases tend to take longer because every aspect is litigated. Further, public safety is less of an issue because the military already exacts control over its members. As a result, the arrest itself is less common than in the civilian context.

[37] *National Defence Act*, (R.S.C., 1985, c. N-5); and Director of Military Prosecutions Policy Directive # 002-00 – Pre-Charge Screening

In the Military justice representative's view, the overrepresentation of Black, Indigenous, racialized or marginalized individuals is not a particularly pressing issue because there is an underrepresentation of diversity in the Canadian Armed Forces.

1. Charge Screening Practices (CMPS)

Pre-charge screening approval would make police officers consider the case from the prosecutor's perspective – whether the case is objectively strong enough to have a reasonable prospect of conviction.[38]

In the Military justice representative's view, what is more important than the timing of the charge screening is the quality of the investigation and the quality of legal advice. The quality of legal advice is a separate factor, independent of whether the process involves pre-charge advice vs. approval, or pre-charge vs. post-charge screening.

2. Crown Evidentiary Thresholds (CMPS)

The Military justice representative indicated that, at a minimum, the evidentiary threshold must be "reasonable and probable cause". This is the standard prescribed by the Supreme Court of Canada for the initiation and continuation of a prosecution in *Miazga v Kvello Estate*, 2009 SCC 51 – a malicious prosecution case. [39] Where the line is drawn above this minimum requirement is somewhat arbitrary.

The evidentiary threshold should not be increased for the purpose of weeding out cases to address resourcing issues. The purpose of the evidentiary threshold is to make sure only cases with merit are prosecuted. Any additional screening out for resourcing reasons should be dealt with at the public interest stage. What is vital is teaching prosecutors how to apply the evidentiary threshold. For example, there is no common way of assessing victim or witness credibility by applying the evidentiary threshold.

[38] Reasonable prospect of conviction is the standard used by military prosecutors.
[39] *Miazga v Kvello Estate*, 2009 SCC 51

POLICE ASSOCIATIONS

A. Canadian Association of Chiefs of Police (CACP)[40]

The CACP representatives expressed various views.[41] The representatives who did not have experience working in a pre-charge screening jurisdiction remarked that there was a need for clarity on specific details of implementation. Some representatives from Alberta expressed frustration with broken promises. For example, a prosecutor was to be available 24 hours, but in practice, it is closer to 12.5 hours.

1. Charge Screening Practices (CAPC)

The CACP representatives were generally in favour of Crown pre-charge screening for serious, sensitive, or complicated cases. However, there was no consensus on the question of whether pre-charge screening should be mandated for all offences.

All the representatives with experience in pre-charge screening saw much more value in the pre-charge screening process than those who had operated in only a post-charge screening system. They agreed that time to trial decreases, the viability of cases going to trial increases, and fewer cases are stayed. An RCMP representative with experience in both pre- and post-charge jurisdictions was of the view that there is value in pre-charge approval because the consultation with the prosecutor gives the investigation some legal analysis early on, whereas, in post-charge, the prosecutor may not request further disclosure until they have reviewed the case months after charges had been laid.

However, the majority of the CACP representatives opposed a mandatory pre-charge screening process, preferring a more flexible approach. Four reasons were suggested.

First, there were concerns about the resources necessary (both to prosecutors and police) to implement any change. Some expressed concern about the Crowns in Alberta recently threatening to strike because of a lack of resources. Members also expressed a desire for flexibility based on what is possible given the available resources and the nature of the jurisdiction. For example, some officers in Alberta wait for hours for charge approval, with an arrested person sitting in the back of their car. If there are many individuals arrested in one night, the lack of officers available to respond to a call could create a public safety risk. They suggested that police should be given an opt-out choice if the lack of resources would harm public safety on a particular occasion. In

[40] Home - CACP

[41] The representatives who participated in the consultation were comprised mostly of police officers and legal counsel from Alberta.

contrast, out-of-custody cases with limited public safety concerns would work well for pre-charge screening.

Second, several CACP representatives felt that pre-charge screening harms the ability of the police to address less serious crimes. Offenders may commit multiple less serious offences which the Crown does not approve because they are not in the public interest to prosecute due to the lack of resources and the less serious nature of the crime. This can be difficult for the police, as the front-facing organization to the public, to explain to the victim and the community.

Third, the CACP representatives expressed a need for better two-way communication between police and the Crown about the application of the public interest considerations. They suggested that police should have a way of emphasizing the importance of certain cases, notwithstanding that it may be a less serious charge that would normally not be approved for triage purposes. The police may have more familiarity with the particular individual accused person and the local public interest. They also suggested that the reviewing prosecutor should give reasons explaining to the police (and possibly the victim) why the charge was not approved.

Finally, some CACP representatives also expressed concern about whether pre-charge screening would impinge on the independence of the police.

2. Crown Evidentiary Thresholds (CAPC)

There was not much discussion about the evidentiary threshold. One representative opined that a higher evidentiary threshold makes it more likely that viable prosecutions will be screened out, potentially harming public safety.

B. Canadian Police Association (CPA)

The CPA is an advocacy association representing about 200 police associations and unions across Canada, which represent about 60,000 police personnel. The CPA makes submissions to Parliament and engages in research on issues that members identify.[42]

1. Charge Screening Practices (CPA)

The CPA represents members who work in pre-charge screening and post-charge screening jurisdictions. Each side tends to prefer the system in which they are currently

[42] CPA | Canadian Police Association (cpa-acp.ca)

working. Either system could work quite well if it is properly resourced. Importantly, other options beyond incarceration must be funded and available.

Many police members of the CPA believe that there is a lack of consistency in both cooperation and resources. The effectiveness of the pre-charge charge approval system may be person dependent. Processes that are more systematic and less dependent on the specific people involved should be explored. The CPA representative also indicated that there is a poor job of data collection, and there may be benefits for a national framework for collecting data on various aspects of pre-charge screening approval.

The best results in either model seem to be achieved where the police and prosecutor act cooperatively and listen to one another. For example, pre-charge screening approval has been particularly successful where there was a dedicated prosecutor embedded in the local police department providing advice during the course of and upon the completion of an investigation, or when the prosecutor and police worked jointly to respond to a particular type of crime.

The CPA suggested that part of the reason the charge package may be of low-quality is because of a disconnect between police and prosecutors. Police may not get feedback on which charges were ultimately proceeded with and why. Addressing the disconnect could result in better outcomes. A disconnect between prosecutor and police could be harmful to public safety when cases are not approved or are ultimately withdrawn.

Dialogue and consistent communication between police and prosecutor could also assist with overcharging. Without dialogue and with anonymity in the process, some police officers may seek to lay a number of charges because they want at least one to stick. This is obviously not desirable.

The CPA representatives did not believe that pre-charge screening is the solution to the complex issue of overrepresentation. Part of the solution is to have funding for tools and treatment which can divert people suffering from mental health issues away from the criminal justice system and towards appropriate support.

Police must be independent, but there should be a systemic process so prosecutors and police work collaboratively. Police may feel their independence is being respected most when the prosecutor is responsive and willing to engage in dialogue. Police can maintain independence in the pre-charge screening model. At the end of the day, police can live with the prosecutor’s decision as long as someone listens to them. The notion

of independence should not become a barrier to dialogue between prosecutor and police, or else it will become a barrier to effective management of charge approval.

2. Crown Evidentiary Thresholds (CPA)

Setting the evidentiary threshold too high may screen out cases which should be prosecuted. This could result in less effective public safety and undermine public trust in police and the criminal justice system. Furthermore, if charges are not laid because of the higher evidentiary threshold on serious crimes, that adds a resource burden on the police to manage those people in the community.

C. Ontario Association of Chiefs of Police (OACP)[43]

The Ontario Association of Chiefs of Police (OACP) was created in 1951 to be the voice of Ontario's police leaders. Members share ideas and cooperatively create solutions to meet the challenges facing police leadership in Ontario. The association's 1200 members serve with the RCMP, OPP, First Nations, and municipal police services across the province.[44]

1. Charge Screening Practices

The OACP's strong preference is that Ontario should remain a post-charge screening jurisdiction. Moving from a post-charge to a pre-charge screening model is problematic because it will effectively import the delay in the justice system to the front-end rather than create efficiencies within the system. In other words, the inefficiencies and time to trial would be the same in a pre-charge screening model, except that the burden would consequently fall on the police at the outset to expedite the process.

The OACP submitted that there is insufficient data to conclude that pre-charge screening will meaningfully reduce the burden on the criminal justice system. The courts may also perceive the switch to pre-charge screening as a manipulation of s. 11(b) of the *Charter*, and there is reason to believe that the courts will respond to this policy shift by subsuming the length of pre-charge delay within the *Jordan* clock calculation. It may also result in more s. 7 *Charter* litigation around pre-charge delay and abuse of process.

In the OACP's view, Quebec is not a strong standard for comparison on issues of time to trial because their justice system is completely different. For example, search

[43] The OACP provided written submissions in addition to an oral consultation. Those written submissions can be found at Appendix H.
[44] OACP, About OACP. OACP membership is open to law enforcement professionals from the rank of Staff Sergeant and above, as well as organizations associated in law enforcement.

warrants in Quebec can be 1 page in length, whereas Ontario search warrants are generally between 70-80 pages long.

The OACP does not concede that pre-charge screening jurisdictions are more efficient with respect to resource usage for the following reasons:

- Post-COVID-19 statistics are not reliable enough to serve as guidelines for shaping policy.
- The rate of withdrawals and stays in Ontario appears inflated because British Columbia has fewer major municipalities, and there are different levels of crime in smaller jurisdictions.
- The number of stays and withdrawn charges in Ontario also includes discharges at preliminary inquiries, which would not necessarily be reflected in pre-charge screening jurisdictions.
- British Columbia has a different approach to driving offences, opting to treat some driving offences administratively.
- British Columbia facilitates more horizontal file management; files are received earlier, and negotiations occur earlier as well.

There are other factors beyond pre-charge screening to explain the disparities in the data when comparing Ontario to pre-charge screening jurisdictions.

Pre-charge screening may negatively impact public safety and consequently, public confidence in the administration of justice. Pre-charge screening would cause delay in arresting and charging accused persons while the police wait to obtain Crown approval. To address this, the OACP proposed exemptions from the pre-charge screening process where police can proceed without Crown approval where there is an imminent risk to public and victim safety, such as in cases of intimate partner violence. If these exemptions are defined too narrowly, it may impact the ability of the police to ensure public and victim safety.

The OACP is concerned that victims in a pre-charge screening model are disenfranchised and have lost their voice on matters in which they have an interest, weakening the community's relationship with the police and the justice system. The pre-charge screening model lacks transparency surrounding prosecutor decisions and prosecutorial discretion, also undermining public confidence.

In the OACP's view, pre-charge screening may also cause further delay for bail with respect to chronic serious offenders. It is imperative that the justice system equips the police to deal swiftly with violent and serious offenders, and this would mean that the

prosecution service must be properly resourced to accomplish screening quickly. Delays may also impact an ongoing investigation because the act of charging allows police to fingerprint the accused person, and witnesses may be more willing to come forward knowing the accused person is in custody or on conditions of release.

The OACP indicated that pre-charge screening is not a solution for rectifying overrepresentation. The position that pre-charge screening will mitigate the overrepresentation of racialized peoples in the criminal justice system incorrectly presupposes that the police are the primary cause for its ongoing systemic occurrence. This assumption reinforces a problematic narrative to the public that this issue stems from one part of the justice system as opposed to the entire system itself. It is essential for all justice system participants to cooperate and work together on this issue. Furthermore, it is crucial that policymakers consider the empirical data on how unconscious bias and racism impact the charge screening function. While institutional and police bias affects the accused person, to assume that it is exclusively a policing issue oversimplifies the problem.

Enacting a pre-charge screening model in Ontario would require a major infusion of resources for the police and the prosecution service. The OACP understands that, in British Columbia, officers are responsible for having the full – or close to full – disclosure package ready for the first appearance, which creates a major workload burden upfront. This work takes a police officer off their shift rotation and limits the productivity of that officer's unit. Pre-charge screening would thus constitute a major strain on police resources at the front end. In addition, the prosecution service must be sufficiently staffed to pre-screen charges efficiently.

This problem is compounded in smaller jurisdictions where resources can be more limited, particularly in rural or northern communities. If pre-charge screening would involve establishing local agreements across the province in lieu of a standardized operating system, that is an equally complicated endeavour.

The OACP indicated that there were additional problematic issues with a pre-charge screening model:

1. Moving to a pre-charge screening model would require changes to the *Criminal Code* and *Police Services Act*.
2. Front-loading the police with such a burden raises further concern about whether it would be feasible for officers to continue taking the accused person before a

justice of the peace within a period of 24 hours under s. 503, given the massive upfront strain on police resources.[45]

3. Pre-charge approval can foster a culture of cyclical complacency between police and prosecutor. Police may not take as much time crafting an undertaking for an accused person if the officer is aware a that a prosecutor will review it in less than 24 hours. The prosecutors are more likely to gloss over the undertaking very quickly due to their high volume of cases.

Ultimately, the current post-charge system handles complex cases effectively enough, especially if there is ongoing consultation between the police and a prosecutor. Obtaining pre-charge advice on complex matters would accomplish many of the goals of pre-charge screening while maintaining police-Crown independence.

2. Crown Evidentiary Thresholds (OACP)

The OACP submitted that, for all practical purposes, there is a single Crown evidentiary threshold in Canada that is merely articulated differently across the country. There is no difference in how these standards are applied in practice. Therefore, imposing a higher evidentiary threshold would have a negligible impact on the efficiencies of the criminal justice system.

D. Chief Jerel Swamp

Jerel Swamp is the chief of the Rama Police Service (which operates on a post-charge model). In addition, he is the president of the First Nations Chiefs of Police Association. He had about 20 years' experience working in a small police service that dealt with cases with pre-charge screening (Quebec) and post-charge screening (Ontario).

1. Charge Screening Practices (Chief Swamp)

While both systems have their merits, Chief Swamp preferred the pre-charge screening process. Since there is a legal opinion from the prosecutor at the outset, pre-charge screening is better in terms of the rate of convictions. A pre-charge screening process ensures that investigating officers know whether they have enough evidence for the case to proceed. Because the officers know that the case would be reviewed immediately, there would be a flurry of activity ensuring the case was put together more completely. On the post-charge side, it is within the officer's discretion whether to consult the prosecutor and whether there is enough evidence to lay a charge. In post-charge cases, at times, police would conduct just a bare-bones investigation so as to

[45] *Criminal Code* s. 503

lay the charge quickly because they knew they would have time afterwards to attempt to collect more evidence.

A pre-charge screening model in which police have the power to divert from the justice system without having to involve the prosecutor would also be advantageous. Both police and prosecutors should be encouraged to divert in appropriate cases.

Chief Swamp thinks that post-charge screening is still a good model. One disadvantage of the pre-charge screening model is that the process can hold up some of their officers who had to transport and house individuals in-custody while Crown authorization is being reviewed. This becomes less of an issue as the use of remote appearances expands.

Chief Swamp felt he was unable to comment meaningfully on the overrepresentation issue because nearly all the individuals in the communities he policed were First Nations people.

2. Crown Evidentiary Thresholds (Chief Swamp)

Chief Swamp made no comment on the charge screening evidentiary threshold.

COMMUNITY AGENCIES, LEGAL AID AND ACADEMICS

A. Legal Aid Ontario (LAO)[46]

LAO's mandate is to promote access to justice for low-income Ontarians and to identify, assess, and recognize the diverse legal needs of low-income individuals and disadvantaged communities across the province.[47]

1. Charge Screening Practices (LAO)

LAO submitted that pre-charge screening by senior prosecutors with the police retaining final decision-making authority on the laying of charges ought to be adopted throughout Canada. In their view, pre-charge screening has a number of advantages, including:

- Reducing rates of withdrawals and stays
    - Pre-charge screening jurisdictions have substantially lower rates of withdrawals and stays. Pre-charge screening would reduce the number of

[46] Legal Aid Ontario provided written submissions found at Appendix I.
[47] Legal Aid Ontario

cases entering the criminal justice system ultimately destined for withdrawal, thereby redirecting resources to the more serious (and stronger) cases and reducing the impact of charges on presumptively innocent individuals.

- Reducing delays and improving disclosure practices
    - Reducing the number of non-viable cases in the criminal justice system through pre-charge screening would free up court time. There would be less *Jordan* delay and shorter wait times for disclosure. While police do not need to provide the prosecutor with disclosure in advance of charges being laid in a post-charge screening environment, they must nonetheless prepare disclosure thereafter – a process that can last from weeks to months, during which the accused person, who is presumed innocent, must wait for an assessment by the prosecutor of whether the prosecution should continue. Delays stemming from the preparation of disclosure when charges have already been laid also increase the risk of breaching conditions of release, resulting in additional arrests and increases in remand populations.

- Minimizing risks of tunnel vision and "status quo bias"
    - Pre-charge screening would avoid the danger of "status quo bias", *i.e.,* allowing the matter to run its course because the police have laid the charge. Early review of the evidence by a prosecutor can also help address tunnel vision that results in unnecessary charges.

- Ensuring early consideration of the public interest
    - Considerations of public interest ought to be made prior to charges being laid, to avoid the negative consequences of an accused person being unnecessarily charged.

- Combating systemic racism, discrimination, and overrepresentation
    - Allowing public interest to be considered prior to charges being laid, and including considerations of systemic racism and *Gladue* factors, and the availability of alternative measures in the application of the public interest considerations by prosecutors, would allow prosecutors to exercise their roles as Ministers of Justice prior to – and without – additional negative consequences to already marginalized populations.

- Maintaining the independence of police and Crown

    - While the independence of the Crown and police is important to safeguard against abuse of power, such independence can be maintained with the institution of an appropriate pre-charge screening process, which, nonetheless, leaves the final decision of whether to lay charges to the police.

- Honouring the presumption of innocence
    - Unless and until proven otherwise, persons charged with an offence are presumed innocent. As such, it would be more fitting to lay only those charges where proof of guilt is sufficiently likely – that is, basing the very laying of charges on the standard of reasonable prospect/reasonable likelihood/substantial likelihood of conviction, rather than the lower *Criminal Code* standard of belief "on reasonable grounds".

2. Crown Evidentiary Thresholds (LAO)

Ontario currently uses a "reasonable prospect of conviction" evidentiary threshold. LAO submitted that, at a minimum, the evidentiary threshold should be raised to "likelihood of conviction", whereby a prosecutor determines that a conviction is more likely than not.

While the *Martin Report* was of the view that "in matters of prosecutorial discretion, it is not possible to evaluate to a percentage degree of accuracy",[48] LAO submitted that the limited assessment of the evidence that experienced prosecutors must engage would enable a threshold determination of likelihood of conviction. However, "substantial likelihood of conviction" may be difficult to implement for jurisdictions which do not currently employ that threshold because this threshold requires prosecutors to engage in a more detailed weighing of evidence. This may be particularly problematic in cases based entirely on assessments of credibility.

While the consistency of terminology is helpful, what appears more important is the way in which the threshold is interpreted and applied. Nonetheless, a change of terminology may serve a purpose because it can provide a reminder to prosecutors of the significant implications of commencing and continuing criminal prosecutions.

[48] *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions* (1993) ("Martin Report") at pp. 58-59

B. Legal Aid British Columbia (LABC)[49]

1. Charge Screening Practices (LABC)

Pre-charge screening is clearly preferred. It is immediately beneficial and in the public interest to have fewer "garbage charges," which are mostly likely to be withdrawn or lead to a pernicious number of questionable guilty pleas. Timely elimination of charges unfit for prosecution is the beneficial "efficiency" of pre-charge screening. Public safety is not a major issue because police already have powers to release on conditions, for example, in intimate partner violence cases.

Pre-charge screening can assist with an anti-racist approach to charge screening. LABC's experience is that Black, Indigenous and people of colour (BIPOC) accused persons face disproportionate negative scrutiny from police and prosecutors. Unchecked biases, not necessarily explicit racism, may contribute to overrepresentation. British Columbia is rolling out mandatory race-based data collection, and the prosecutor should explicitly consider the race of the accused person and consider its relevance at both the evidentiary threshold and the public interest stage.

The fact that the *Jordan* clock does not run until a charge is laid is only a benefit of pre-charge screening for the prosecution. It is not necessarily beneficial to an accused person, who cannot be expected to understand the distinction between being arrested and being charged.

In a pre-charge screening model, funding for legal aid at the pre-charge stage would be beneficial. The defence bar is asking for the British Columbia government to be open to this proposal. Throughout the pandemic, LABC increased the number of cases where it would cover pre-charge advice to clients, for example, after a search warrant. Pre-charge funding would lead to more diversions, saving resources in the long term.

Inviting defence counsel's input at the pre-charge screening stage also allows a potential accused person to receive reliable legal advice from someone they can trust. This avoids the phenomenon of an accused person agreeing to plead guilty to time served rather than taking classes or community service for a few weeks. Many accused persons will not understand the adverse impact of having a criminal record. Moreover, from the accused person's perspective, the period between arrest and charge may still

[49] Legal Aid British Columbia provided written submissions in addition to an oral consultation. Those written submissions can be found at Appendix J; Legal Aid BC - Free legal help for BC residents.

be impactful. Often the accused person thinks that the charge has been laid and experiences the effects as if the charges have been laid at the point of arrest.

LABC requested a recommendation for pre-charge legal aid funding. If there is any significant change to the system, legal aid should not be a mere afterthought in terms of funding.

2. Crown Evidentiary Thresholds (LABC)

British Columbia employs a “substantial likelihood of conviction” standard. The differences between evidentiary thresholds are fine distinctions. The LABC representatives were of the opinion that it is desirable to have a high evidentiary threshold, but there would be no point in having a higher threshold than their current standard of substantial likelihood of conviction.

C. Canadian Bar Association (CBA)[50]

The consultation with the CBA consisted of a number of Crowns and defence lawyers from across Canada who had worked in both pre-charge and post-charge screening jurisdictions. There were varying views on both the charge screening practice and the evidentiary threshold.

1. Charge Screening Model (CBA)

Generally, the CBA representatives were in favour of early Crown involvement and advice to the police.

Most of the representatives expressed the view that screening out weak cases earlier is better. In such cases, it is preferable to give hard news to a victim earlier. Screening out weak cases also reduces the number of cases in the justice system, reducing the strain on judicial resources and thereby reducing time to trial. The reduction in cases would help with the existing case backlog. One representative noted that the reduction in time to trial would be beneficial for victims so that they do not wait years for a case to be heard.

One defence representative also commented on the detrimental impact on their clients of being charged. Some of their clients had remained in custody for months or years only to be acquitted on a fairly weak case, or the Crown withdrew the charge at a late stage in the prosecution. In charges such as sexual assault, which carry significant

[50] Canadian Bar Association - Home (cba.org)

stigma, the accused person may suffer substantial reputational damage even if the charges are later withdrawn.

None of the representatives were concerned about public safety in pre-charge or post-charge screening models. They noted that police already had the tools needed to keep victims and the public safe, including s. 810 peace bonds, firearms hearings, and forfeiture, and they have 24 hours after arrest in any event. One representative noted that the British Columbia model has a secondary charge screening standard in cases of high public interest, which can be used in exceptional circumstances. However, charge approval should not be warped for the purpose of public protection.

CBA representatives did express two main concerns about pre-charge screening. First, there were concerns about resourcing issues arising out of a change from post-charge to pre-charge screening. For example, such a switch may require hiring more prosecutors. Second, one representative submitted that there should be a strong line of independence between the Crown and police, which could be better maintained in a post-charge screening model.

2. Crown Evidentiary Thresholds (CBA)

One representative submitted that a higher charge screening standard would better reflect the high burden of proof that the Crown bears. Other CBA representatives expressed the view that the aims of a higher evidentiary threshold (e.g., keeping out low-quality, racially motivated cases) would be better addressed at the public interest stage rather than raising the evidentiary threshold. The public interest stage, not the evidentiary threshold, can properly take into account an accused person's mental health, the resources of the justice system or other societal issues.

One representative opined that applying the Crown charge screening standard is less a process of determining whether a charge meets the evidentiary threshold, and more about whether it makes sense to proceed with the charge. Applying the evidentiary threshold in practice requires some experience on the job.

Another representative expressed the view that having more clarity on how to apply the charge screening standard in "he said, she said" credibility cases might be more effective than changing the evidentiary threshold itself.

D. Canadian Muslim Lawyers Association (CMLA)[51]

The CMLA was founded in 1998 by a small group of Toronto-based Canadian Muslim lawyers. It now has several hundred members across Canada, with active chapters in Ontario, Quebec, Alberta, British Columbia, and the Atlantic provinces.[52]

1. Charge Screening Practices (CMLA)

The CMLA recommended a model of pre-charge screening by experienced prosecutors. Pre-charge screening will deliver fundamental improvements to the administration of justice, including in the following areas:

- Reduce the burden on the court system by eliminating the wasteful, inefficient charging processes, thereby improving on delay issues.
- Redirect police, prosecution service and court resources to meritorious and complex cases by removing weak cases and unnecessary counts from the system.
- Alleviate some of the hardship experienced by individuals and their families who are forced to defend against charges that will not result in a conviction.
- Address the growing body of evidence that demonstrates that the criminal justice system discriminates against Indigenous, racialized and vulnerable individuals and, in fact, overcharges these groups for matters that are disproportionately withdrawn or stayed at a later date.

The CMLA submitted that the pre-charge screening process offers the most effective way of dealing with delay and avoids unnecessary hardship for individuals and vulnerable groups while maintaining respect for the institutional roles of the police and prosecution service. A Crown pre-charge screening process does not discount the role of the police. It merely ensures that specialized legal training and the quasi-judicial roles of the Crown are brought to bear on vital charging decisions that have ramifications on the justice system, the individual and public perception. The post-charge screening model risks losing serious cases because of undue delay and allows discriminatory practices to persist, undermining public confidence in the system.

In a pre-charge screening model, police should be trained to ensure that reports on charging requests are sufficiently detailed and delivered to the prosecutor in a timely manner. Prosecutors should be trained to maintain impartiality and boundaries with the police while pre-screening charges. The CMLA recommended studying the feasibility of

[51] The CMLA provided written submissions only. Those submissions can be found at Appendix L.
[52] Canadian Muslim Lawyers Association Canada (cmla-acam.ca)

pre-charge resolution discussions and authorizing Legal Aid to fund defence counsel for this purpose.

2. Crown Evidentiary Thresholds (CMLA)

The CMLA recommended a "substantial likelihood of conviction" standard. This is the most stringent standard used in Canada.

E. Ontario Human Rights Commission (OHRC)[53]

Addressing discrimination in policing has been an important part of the OHRC's work for over 20 years. In addition to making submissions to the government and independent reviewers about how to address systemic discrimination in policing[54] the OHRC has developed a number of resources and reports, including *Under Suspicion*, its 2017 research and consultation report on racial profiling, *Policy on eliminating racial profiling in law enforcement* (Racial Profiling Policy) in 2019, and in 2021, a *Framework for change to address systemic racism in policing*, which highlights some of the benefits of pre-charge screening.

In addition to this work, the OHRC is conducting an inquiry into anti-Black racism by Toronto Police Service (TPS). Arising out of this inquiry, the OHRC has produced two interim reports – *A Collective Impact* (2018)[55] and *A Disparate Impact* (2020).[56] Taken together, these reports found:

- Many instances where there was no authority for the police to stop or detain Black civilians;
- Inappropriate or unjustified searches during encounters;
- Unnecessary arrests; and,
- A greater likelihood that Black civilians would be charged and over-charged.

---

[53] The OHRC provided written submissions only. Those submissions can be found at Appendix G.
[54] Submission of the OHRC to the Independent Review of the use of lethal force by the Toronto Police Service (February 2014); OHRC submission to the Office of the Independent Police Review Director's systemic review of OPP practices for DNA sampling(April 2014); Submission of the OHRC to the Ombudsman's Investigation into the direction provided to police by the Ministry of Community Safety and Correctional Services for de-escalating conflict situations (July 2014); OHRC Submission to the Ministry of Community Safety and Correctional Services on street checks (11 August 2015); OHRC Submission to the Ministry of Community Safety and Correctional Services (29 April 2016); OHRC Independent Review of Police Oversight Bodies (15 November 2016); OHRC Submission to the Independent Street Checks Review(1 May 2018)
[55] A Collective Impact: Interim report on the inquiry into racial profiling and racial discrimination of Black persons by the Toronto Police Service (November 2018)
[56] A Disparate Impact: Second interim report on the inquiry into racial profiling and racial discrimination of Black persons by the Toronto Police Service (August 2020)

1. Charge Screening Practices (OHRC)

The OHRC submitted that pre-charge screening is preferable. Pre-charge screening has the potential to address overcharging in Ontario, a practice which has a disproportionate impact on Indigenous, Black, and other racialized communities. The benefits of the pre-charge screening process can be attributed to the early application of the evidentiary threshold used by prosecutors, which calls for a careful assessment of the evidence before a charge is laid and weighs public interest considerations such as systemic discrimination.

Pre-charge screening provides the justice system with an opportunity to mitigate some of the concerns related to the discriminatory exercise of police powers. Initial research from the United States affirms this position. A project which examined prosecutorial decision-making in one US county also studied the impact of pre-arrest screening for warrantless felony arrests. Over a one-year period, 17.5% of felony cases that police officers presented to prosecutors for charges were declined. Researchers also found that the prosecutors were more likely to "decline the cases of Black (vs. White) suspects based on weak evidence". This suggests that, when the suspect is Black, police may be more likely to favor an arrest despite weak evidence than when the suspect is White."[57]

By filtering out charges which lack merit, pre-charge screening can promote efficiency by reducing the number of charges before the court system and minimizing the deleterious impact of charges on Human Rights Code-protected groups. The deleterious impact of being charged with a criminal offence remains even after a charge is dismissed or withdrawn. As a result, communities that are disproportionately burdened by overcharging are, in some respects, shackled by non-conviction records.

While the OHRC is optimistic about the potential benefits of pre-charge screening, merely shifting the responsibility for laying charges from police to prosecutors is not a panacea. As such, prosecutors and police should build upon existing human rights and anti-racism training, among other measures, to ensure that pre-charge screening processes are an effective tool for addressing discrimination.

[57] Jon Gould, Rachel Bowman and Belen Lowry-Kinberg, "Pre-Arrest Screening by Prosecutors is Financially Prudent and Socially Just" London School of Economics; also see: Deason Centre SUM Dedman School of Law, Screening and Charing Cases in three mid-sized jurisdictions

2. Crown Evidentiary Thresholds (OHRC)

The OHRC submitted that British Columbia's "substantial likelihood of conviction" evidentiary threshold, and the public interest test that weighs the impact of systemic discrimination before charges are filed have the potential to reduce the overall number of charges in Ontario. In addition, these features can increase efficiency and address the over-representation of Indigenous, Black and other racialized groups in charge data. Nonetheless, it is important to couple these features with other measures to combat systemic discrimination.

F. Academics

1. Steven Penney (Professor of Law, University of Alberta)

Steven Penney is a Professor at the Faculty of Law, University of Alberta. He received a Bachelor of Arts and a Bachelor of Laws from the University of Alberta and a Master of Laws from Harvard Law School. He researches, teaches, and consults in the areas of criminal procedure, evidence, substantive criminal law, privacy, and law and technology. He is a co-author of *Criminal Procedure in Canada* and co-editor of *Evidence: A Canadian Casebook*. He is also a member of the advisory boards of the Alberta Law Review and the Canadian Journal of Law & Justice and is the Chair of the Centre for Constitutional Studies advisory board.[58]

a. Charge Screening Practices (Professor Penney)

Professor Penney believes that there needs to be more research and empirical data that compares pre-charge and post-charge screening across similar jurisdictions and their impact on the time periods to trial. Professor Penney was not aware of any data that comprehensively addresses this type of comparative analysis.

Upon assessment of the limited information in the reports and literature that does exist, pre-charge screening could theoretically have a significant positive effect on reducing time to trial; screening cases at the pre-charge stage presumably weeds out the weakest cases that would have been later withdrawn or stayed in court. The notion of screening out cases with little merit earlier in the process would consequently free up resources at every stage thereafter to focus more attention on the remaining cases. Intuitively, such a process would be more efficient and result in fewer delays.

[58] Steven Penney (Professor of Law, University of Alberta)

Professor Penney acknowledged that he is not an expert on public safety, but he suspects that implementing a pre-charge screening process would not constitute a significant difference in terms of any risk to the public. Whether the accused person is arrested in a pre-charge or post-charge screening jurisdiction, that person is going to have a first appearance. In theory, there could be risks to public safety, but if that is the case, it is likely that the prosecutor would move the case forward.

Professor Penney did not believe that a transition from post-charge screening to a pre-charge screening process would disrupt or diminish the independence of the police or the Crown. The safeguard of having multiple independent decision-makers providing separate analyses at different stages is an important aspect of moving forward with a prosecution. Under a pre-charge screening model, however, police would still be the first responders and still retain the discretion to proceed or not to proceed. The prosecutor's role is preserved because the screening of the case would still be a case that the *police* believe ought to be prosecuted.

There is a broad consensus that police agencies must be free from partisan political influence. Even if the Attorney General has some authority to direct police policy, neither the Attorney General nor any political representative can interfere with police decision-making in their day-to-day operations. At any rate, regarding the constitutional implications of pre-charge screening, the police do not have the constitutional authority to independence. The police are accountable to a political actor, and the government dictates police policy as long as it is transparent and not intentionally targeting specific cases and investigations.

Pre-charge screening has the potential to mitigate the total number of racialized offenders in the criminal justice system, though Professor Penny is skeptical that pre-charge screening would result in a proportionate reduction of BIPOC offenders. In other words, the total number of racialized offenders would be less because pre-charge screening would systematically result in fewer cases overall, but the ratio of racialized offenders would still be disproportionately problematic.

The shift from post-charge to pre-charge screening does not intrinsically create a mechanism that reduces the proportionality of Black and Indigenous persons being charged or incarcerated. Professor Penney indicated that proportionality of outcome is a deeper-rooted issue that ought to be prioritized because it is a reflection of the conditions that racialized people endure in everyday life. Pre-charge screening is ultimately still a worthy endeavour because, in total, offenders are being treated with less hardship.

If there is a consensus or a firm conclusion supported by empirical data that pre-charge screening is superior to post-charge screening, then there would not be any policy justification for a province to continue doing post-charge screening. The caveat is that settling upon a consensus would be difficult. Moreover, implementing pre-charge screening may make more sense in one area versus another because of individualized provincial barriers. It is uncertain how a uniform screening model would successfully reconcile the idiosyncrasies of each province.

b. Crown Evidentiary Thresholds (Professor Penney)

Professor Penney prefaced his viewpoints on the evidentiary thresholds by explaining that he has not rigorously analyzed the data and that he is not an insider with respect to the policy-making or day-to-day operations on this topic. In his view, there is not enough literature about how the evidentiary thresholds are interpreted and applied across the various Canadian jurisdictions. Logically, an inference can be drawn that if there is a higher evidentiary threshold, there will be fewer cases entering the criminal justice system. This is a possibility predicated on the assumption that the evidentiary threshold plays a significant role.

Professor Penney suspected that the wording of the evidentiary threshold is less influential than the underlying cultural dynamic and informal norms of an individual Crown office. If a research group were somehow capable of isolating this data point from the other confounding variables and cross-referencing how other provinces are applying the evidentiary thresholds, there would probably not be much of a difference in the way cases are being assessed. In other words, the wording of the evidentiary threshold would not, therefore, result in a significant difference in outcome.

Professor Penney has simulated this exercise with his law students: the university brings in prosecutors, and they present a hypothetical set of facts relating to a sexual assault offence. Students are tasked with assessing the scenario through the lens of the prosecutor's decision to prosecute policy. Prompting questions are put forward to stimulate students' critical thinking: "Is it more likely than not that there is a conviction? Is it a 49% chance of conviction versus a 51% chance of conviction?" Based on conducting these types of exercises in the classroom, Professor Penney believes that this is not necessarily how prosecutors apply the decision to prosecute policy. The evidentiary threshold is a matter of interpretation.

A more onerous standard could positively influence the issue of time to trial. For example, as a response to the *Jordan* decision in Alberta, there was an extension in policy to formalize a triage protocol to prioritize more serious cases. This sent a

message to frontline prosecutors on how they should be applying the "reasonable prospect of conviction" standard and their public interest discretion. These types of policy changes have system-wide effects that happen within the backdrop of resourcing issues where serious offences are prioritized.

While it is not realistic or a massive priority, imposing an evidentiary threshold that is consistent across the country makes logical sense and has the potential to make a small positive difference. There is no obvious reason why local conditions, local culture, or regional preferences should result in fundamentally different versions of the evidentiary thresholds for cases that enter the criminal justice system. There is no reason why there should not be voluntary acceptance of a uniform threshold, as it does not give rise to any constitutional issues in the *Criminal Code*. There are always going to be individual circumstances in a case that are relevant to weighing the public interest factors: the type of crime, its effect on the community, perceptions of public safety, caseloads, and *Jordan* issues will vary. These subjective aspects of the public interest test do not change the fact that prosecutors assess these issues in a similar manner. A uniform standard would still allow for localized concerns to play a role through the application of the public interest analysis.

Concerning the ability of police to arrest on the basis of reasonable grounds, Professor Penney's position is that this standard would likely not be a productive area for change.

2. Kent Roach (Professor of Law, University of Toronto)

Kent Roach is Professor of Law at the University of Toronto Faculty of Law. He is a former law clerk to Justice Bertha Wilson of the Supreme Court of Canada. Professor Roach has been editor-in-chief of the Criminal Law Quarterly since 1998. In 2002, he was elected a Fellow of the Royal Society of Canada. In 2013, he was one of four academics awarded a Trudeau Fellowship in recognition of his research and social contributions. In 2015, he was appointed a Member of the Order of Canada. In 2016, he was named (with Craig Forcese) one of the top 25 influential lawyers in Canada (change-maker category) by *Canadian Lawyer*. He was awarded the Molson Prize for the social sciences and Humanities in 2017.[59]

a. Charge Screening Practices (Professor Roach)

Professor Roach indicated that it is intuitive that pre-charge screening will filter out numerous cases lacking evidentiary merit within the criminal justice system. Slide 15 of the Justice Efficiencies Working Group deck is striking. These statistics demonstrate

[59] Kent Roach | University of Toronto Faculty of Law (utoronto.ca)

that in Ontario, police are laying an alarming number of senseless charges. In order to address this issue, he is in favour of adopting a pre-charge screening regime in Ontario.

A pre-charge screening model presents little risk to public safety if the regime is sufficiently resourced. Retrospective analysis of *R. v. Askov,* [1990] 2 SCR 1199 indicates that the policy response to this decision should have probably been to hire more prosecutors in lieu of more judges. Akin to the *Askov* situation, if the prosecution service is not properly equipped with more staff and resources, a pre-charge screening model will not function expeditiously and could create public safety issues. A peace bond is another tool, but it is not as effective at the arrest stage if the person is released.

Regardless, it is important that the pre-charge screening process provides some sort of safety valve that permits a police officer, albeit not routinely, but in exceptional cases for public safety reasons or a disagreement with the prosecutor, to proceed as if the case were a private prosecution, subject to the prosecutor's ability to stay the proceedings.

The independence of the police, their right to investigate, and their right to arrest need to be taken seriously. There is a plausible legal argument that laying charges is a common law principle or a constitutional principle on the basis of *R. v. Campbell,* [1999] 1 SCR 565 and Lord Denning's comments in *R. v. Metropolitan Police Comr., Ex parte Blackburn*, [1968] 1 All E.R. 763 (C.A.). The Supreme Court's decision in *R. v. Cawthorne*, 2016 SCC 32 also suggests that a police officer's ability to lay charges could be a principle of fundamental justice. Despite this caselaw, no applicant has submitted a successful constitutional challenge on those issues. Professor Roach believes that giving the police the private prosecution option is a strong compromise for both the Crown and the police. This process retains a check and balance system that signals to prosecutors that *Jordan* timelines cannot be manipulated via the court's tolerance towards pre-charge delay.

Professor Roach's hypothesis is that a pre-charge screening model could have a small impact on mitigating overrepresentation but would not be an all-encompassing "magic" solution. There needs to be more research and studies that focus on doing a time-series analysis, such as in Alberta and Manitoba, where statisticians can compare the number of racialized individuals who were charged in the post-charge timeline versus any statistical changes after the pre-charge transition. If Ontario implements pilot projects, law faculties and criminology faculties could be involved in collecting comparative data about the impact on racialized individuals.

Nevertheless, there is an intuitive case to be made that over-charging, over-policing, and the weakest cases in post-charge jurisdictions that result in stays are going to fall on Indigenous and racialized people. Prosecutors do exist in an environment that is more sensitive to *Gladue* and cultural reports than the police. The police also do not have anything quite as transparent as Crown policy manuals, which sometimes contain information about overrepresentation, and it is uncertain whether a police leader who is concerned about police discrimination can profoundly influence the charging habits of their subordinates.

Professor Roach's ultimate position is that there needs to be a policy shift to more rigorous charge assessment, regardless of whether the model is pre-charge or post-charge screening. This concern is informed by his work as the co-founder of the recently launched Canadian Registry of Wrongful Convictions, which revealed that 15/83 wrongful convictions were guilty pleas; pre-charge screening in Canadian jurisdictions preexisted these miscarriages of justice. In light of recent wrongful conviction decisions, there is reason to be skeptical of judges' truth-finding abilities from a wrongful conviction perspective. The Crown is the most important justice actor and has the most power to prevent wrongful convictions.

The Crown also has the responsibility for devising its own procedure for those who wish to have Legal Aid at the pre-charge screening stage. If there is pre-charge screening, it should not matter whether a high-profile defence lawyer or duty counsel represents the individual. Pre-charge screening should not morph into a process that is akin to a mini preliminary inquiry for those who have access to legal representation.

A national pre-charge screening model is unnecessary. Whether imposing a uniform screening model could raise constitutional issues under s. 92(14) or s. 91(27) would be an unproductive debate.

b. Crown Evidentiary Thresholds (Professor Roach)

Professor Roach is a proponent of applying different evidentiary thresholds at distinct stages of the pre-trial process. For example, imposing a reasonable prospect of conviction threshold within a pre-charge screening model could fulfill the policy goal of eliminating the cases that lack merit. However, if an individual goes into remand or if a case is sitting dormant on a prosecutor's desk for a lengthy period of time, the evidentiary threshold could "evolve" into the "substantial likelihood of conviction" test. The caveat is that this approach could require additional resources.

In any event, Professor Roach's position is that the policy decision on an evidentiary threshold does not need to be a binary "either-or" type of inquiry; differing levels of the threshold could be employed at different times. The rationale for this approach is informed by the cases in which an accused person is in custody, has not been convicted, and is eventually acquitted. The longer the case drags on, the better the prosecutor's position should be in terms of disclosure and having sufficient information to apply a more onerous evidentiary threshold.

A national evidentiary threshold is unnecessary. Provincial jurisdiction over the administration of justice is paramount, and provinces should be free to choose their own evidentiary thresholds.

On the topic of whether the *Criminal Code* standard of "reasonable grounds to believe" should be changed to a higher threshold in*,* Professor Roach did not think that police officers are generally in a position to know if there is a reasonable prospect of conviction. Accordingly, Professor Roach does not support changing the *Criminal Code* threshold for laying a charge.

3. Christopher Williams (Researcher and Educator)

Christopher Williams is a criminologist and an author. In 2017, he published, "Crowns or Cops? An Examination of Criminal Charging Powers in Canada," a report that spotlighted the disproportionately elevated rate of withdrawn and stayed criminal charges in Ontario versus jurisdictions where prosecutors pre-screen the charges before being laid. The report was critical of the excessive number of charges laid that consequently waste an inordinate amount of the justice system's resources and urged a policy reform of how charges are procedurally laid in Ontario.

a. Charge Screening Practices (Williams)

During the consultation with Mr. Williams', his views had not changed from the position taken in his 2017 report. He recommended that Ontario adopt a pre-charge screening process to enhance the overall efficiency of the province's justice system.

While his research was originally predicated on statistics from 2014, the most recent data indicates that Ontario stills has the highest rate of stayed and withdrawn criminal charges in Canada. This is a disturbing statistic that is inconsistent with efficiency within Ontario's court system.

Mr. Williams hypothesized that pre-charge screening would attenuate the overrepresentation of racialized groups in the criminal justice system. From a logical perspective, police officers are human beings who operate face-to-face with individuals who can be dangerous and volatile. Police officers are thus more likely to assume that is the case at the charge-laying stage.

By contrast, prosecutors are further removed from the heated tension of the situation and are in a better position to assess the factual situation and the validity of the charges in a dispassionate and objective manner. Moreover, drawing on the data of Scot Wortley and the Ontario Human Rights Commission, Mr. Williams asserted that there is an issue with police overcharging racialized groups on low-level offences. Police have more discretion with respect to administration of justice, drug possession, and obstruction of justice offences, and yet there still seems to be a cultural policing practice in Ontario whereby police unnecessarily charge accused persons with multiple charges.

Mr. Williams emphasized that there needs to be a greater system of oversight and accountability with specific injunctions and disciplinary measures applied to police on the issue of overcharging.

Mr. Williams also commented that, while the introduction of pre-charge screening may not proportionally reduce overrepresentation of racialized and other marginalized groups, it could still result in salutary effects for these groups in the aggregate by filtering out the non-viable cases.

Pre-charge screening is thus not a silver-bullet solution to equalizing the racial disparities in the justice system. Whether it is a pre-charge or post-charge jurisdiction, police are still situated at the front end, and police practices are the common denominator that could contribute to overrepresentation.

Mr. Williams believes that a topic of interest that needs to be examined more carefully is the relationship between unemployment and the propensity to commit crime. In Ontario, where there is an overflow of criminal charges laid on a weekly basis, some of the charges in remand will result in individuals who are employed to become unemployed as a result of their pre-charge incarceration. Mr. Williams asserted that this “charge-induced unemployment” concept is a byproduct of the charge-laying culture and contributes to the very problem that those charging practices purport to address; individuals whose employment is terminated while being in remand does not advance rehabilitation. To the contrary, it can contribute to recidivism. Mr. Williams indicated there is sociological evidence supporting the view that when police excessively stack charges against an individual who is then placed in remand and loses his job, that this

practice perpetuates the criminogenic conditions of society by exacerbating unemployment.

Mr. Williams observed, however, that there is a wide array of variables beyond charge screening policies that inform the ratio of withdrawn and stayed criminal charges. He admits that his “Crown or Cops” report was framed as a dichotomous analysis of pre-charge screening jurisdictions versus Ontario, and his research did not unpack the statistical and idiosyncratic minutiae in British Columbia, Quebec, and New Brunswick. Indeed, there is evidence of other dynamics at play that still need to be teased out when performing a comparative analysis between the provincial statistics. For example, post-charge jurisdictions in the Atlantic provinces yield far fewer instances of overcharging and have lower rates of stayed and withdrawn criminal charges. Mr. Williams suspects that the reason for this lower rate is that there is less anonymity within the interactions between the police and accused persons in smaller jurisdictions; officers are less inclined to overcharge individuals with whom they are familiar. Mr. Williams acknowledges the limitations of his own speculation on this statistical difference.

With respect to the allocation of resources, Mr. Williams fundamentally disagrees with the assertion that Ontario should rectify its overcrowded court system by simply increasing the court capacities and staff. In his discussions with high-ranking police officers on this topic, there is a widespread view that there would be a commensurate reduction in stayed and withdrawn criminal charges if the flow of the caseload was bolstered by a larger court system. Mr. Williams argues that what he terms a “reactionary mindset” is an implicit sanctification of the status quo and an avoidance of the core problems arising out of charge-laying procedures.

The data reveals that Ontario had approximately four times more criminal charges than British Columbia, despite Ontario being only three times larger than British Columbia in population. When comparing the two provincial statistics on a *per capita* basis, the disproportionate volume of charges in Ontario is not commensurate with the scope and scale of criminal activity. Mr. Williams asserts that there are so many charges entering the Ontario justice system that capacity-centered arguments are essentially advocating for better-equipping a conveyer belt with the same flawed point of entry. In other words, a blanket increase in resources across the justice system is a quick-fix solution that fails to resolve the deeper-rooted issue within Ontario’s charge-laying culture.

Another perspective that Mr. Williams disputed is the suggestion that pre-charge screening inhibits the efficiency of prosecuting dangerous offenders and jeopardizes the safety of the public. While he does not purport to be an expert on this issue, Mr. Williams argued that public safety concerns about pre-charge screening is non-

empirical alarmism because there is no evidence of there being a marked increase in reported violent incidents when British Columbia, New Brunswick, and Québec transitioned to pre-charge regimes. Moreover, there is no evidence that the public was less confident in the risks to community safety after these jurisdictions changed to pre-charge screening; the pre-charge provinces also never later transitioned back to post-charge screening models. Defenders of the status quo on this issue are not persuasive because they are unable to empirically show any statistical shift in violent criminal activities after the pre-charge screening provinces adopted their current screening systems.

b. Crown Evidentiary Thresholds (Williams)

Mr. Williams did not comment on the differences in evidentiary thresholds.

G. Other Justice System Participants

1. Aboriginal Legal Services (ALS)[60]

a. Charge Screening Practices (ALS)

ALS submitted that a Crown pre-screening model would reduce Indigenous overrepresentation and wrongful conviction guilty pleas. Police regularly lay charges solely based on a victim's assertion without further investigation or discussion with an accused person.

In the case of intimate partner assault, the prevalence of dual charging has a particularly significant impact on Indigenous women. Given that Indigenous people often present as poor candidates for bail release (due in large part to systemic factors), what are bogus or very weak charges can result in the deprivation of liberty. Given the backlogs in the court system, once bail has been denied, there is a tendency for Indigenous accused persons to plead guilty at a very early stage in the proceedings, often before disclosure has been provided. This contributes to wrongful conviction guilty pleas.

The impact on a person of being charged, even if it is eventually withdrawn by the prosecutor, can be profound. Many social service agencies require vulnerable person checks before hiring, and those checks often include withdrawn charges. A withdrawn assault charge, for example, can make it impossible for an Indigenous person to pursue

[60] Aboriginal Legal Services provided written submissions through the survey, which can be found at Appendix F; ABORIGINAL LEGAL SERVICES - Home.

employment in their chosen profession. If that charge should never have been laid, this is very problematic. Withdrawn charges can also have an impact on the ability of an Indigenous person to care for a child as a foster or customary care parent. Pre-charge screening is not a panacea, but it would be a very good step forward in addressing one of the systemic causes of Indigenous over-representation in the justice system.

b. Evidentiary Thresholds

Aboriginal Legal Services did not comment on the Crown screening evidentiary threshold.

2. John Howard Society (JHS)[61]

a. Charge Screening Practices (JHS)

The John Howard Society of Ontario submitted that Ontario should adopt a pre-charge screening model. Since 2017, Ontario has consistently had the highest percentage of withdrawn/stayed cases in Canada, and consistently almost double the number of withdrawn/stayed cases of jurisdictions with pre-charge screening. Pre-charge screening promotes efficiencies and eases burdens on the court system.

Pre-charge screening would be beneficial for accused persons who are presumed innocent. Pre-charge screening avoids the time and money spent on unnecessary court appearances, as well as the significant costs and harms associated with pre-trial detention, especially for vulnerable populations who are low risk. In addition, pre-charge screening provides an opportunity to connect individuals with pre-charge diversion programs or treatment.

Pre-charge screening also has the potential to reduce the impact of overcharging on Black, Indigenous and other racialized individuals. As noted by the Ontario Human Rights Commission in their report “A Disparate Impact”, Black persons were disproportionately represented in the data looking at arrests and charges laid by police. The data noted that charges were often withdrawn or dismissed. Pre-charge screening would help prevent many of these charges lacking merit from proceeding through the justice system. Pre-charge screening would also allow prosecutors to address systemic discrimination in the justice system by considering bias, racism, and overrepresentation in the public interest stage of the charge screening test.

[61] John Howard Society of Ontario provided written submissions through the survey which can be found at Appendix F; Welcome to the John Howard Society of Ontario - John Howard Society of Ontario.

b. Evidentiary Thresholds (JHS)

There was no comment on the Crown screening evidentiary threshold.

3. Federation of Asian-Canadian Lawyers[62]

The Federation of Asian-Canadian Lawyers submitted that if defence counsel is involved in the pre-charge screening process, thought should be given to extending legal aid coverage to individuals that would benefit from a pre-charge counsel to reduce the number of people needlessly charged.

CONSIDERATIONS AND ANALYSIS

A. Survey Results

To help determine justice system participants' views on various aspects of charge screening practices and the Crown screening evidentiary threshold, participants were asked to respond to a survey.[63] The participants were told that responses would not be attributed to individuals but aggregated based on the organization/group to which they belonged. Not everyone who received the survey responded. They may have taken part in a consultation or provided written submissions instead, whereas other participants only responded to the survey.

Eleven prosecution services were contacted, and 18 responses were received. The Canadian Association of Chiefs of Police, the Canadian Police Association and the Ontario Association of Chiefs of Police were contacted, and 27 police responses were received. Twenty-two other justice system participants were contacted, which included community groups, legal aid organizations and judicial and defence associations. Of those other justice system participants contacted, 10 responses were received and are referred to as “other justice system respondents” in the summary of the results.

[62] FACL provided this short-written submission through the survey; Homepage | FACL Ontario.
[63] Appendix E: Survey Questions

1. Charge Screening Model

a. Survey Results

Table 1: Prosecution Service Respondents					
A Crown Pre-charge screening/ approval model…	**Strongly Disagree**	**Disagree**	**Neutral**	**Agree**	**Strongly Agree**
is inefficient	22%	33%	39%		6%
impedes police independence	27%	39%	17%	17%	
reduces the number of cases entering the justice system			22%	50%	28%
reduces miscarriages of justice		17%	33%	33%	17%
is resource intensive for the police	17%	27%	39%	17%	
assists with offender management		11%	61%	22%	6%
increases *Jordan* risk	39%	44%	11%	6%	
enhances public safety	5%	6%	50%	33%	6%

Table 2: Other Justice System Respondents					
A Crown Pre-charge screening/ approval model…	**Strongly Disagree**	**Disagree**	**Neutral**	**Agree**	**Strongly Agree**
is inefficient	**60%**	**30%**		10%	
impedes police independence	50%	30%	10%		10%
reduces the number of cases entering the justice system				20%	80%
reduces miscarriages of justice			10%	**80%**	**10%**
is resource intensive for the police	10%	60%	30%		
assists with offender management			60%	30%	10%
increases *Jordan* risk	70%	20%	10%		
enhances public safety		10%	30%	40%	20%

Table 3: Police Respondents					
A Crown Pre-charge screening/ approval model…	**Strongly Disagree**	**Disagree**	**Neutral**	**Agree**	**Strongly Agree**
is inefficient		33%	18%	30%	19%
impedes police independence	4%	18%	19%	33%	26%
reduces the number of cases entering the justice system	4%	4%	11%	63%	18%
reduces miscarriages of justice	11%	26%	15%	37%	11%
is resource intensive for the police		15%	15%	**26%**	**44%**
assists with offender management	22%	19%	37%	15%	7%
increases *Jordan* risk	4%	55%	26%	11%	4%
enhances public safety	**33%**	**34%**	26%		7%

b. Assessment of the Pre-charge Screening Model (Table 1, 2 and 3)

The survey results revealed the following:

1. An overwhelming majority of respondents agreed that a pre-charge screening model reduced the number of cases entering the justice system. They **did not** agree with the proposition that a pre-charge screening model "increased *Jordan* risk".

2. Many prosecution services and other justice system respondents disagreed with the proposition that pre-charge screening impeded police independence. Whereas police respondents were more likely to agree that a pre-charge screening model did impede it. Fifty-nine percent of police respondents were of the view that pre-charge screening police independence, while 41% either disagreed (22%) or were neutral (19%).

3. Most prosecution service and other justice system respondents neither agreed nor disagreed with the proposition that a pre-charge screening model would assist with offender management. Police respondents were divided on whether this would assist.

4. A large number of other justice system respondents disagreed with the proposition that a pre-charge screening model was inefficient. Prosecution service respondents either disagreed with this proposition or remained neutral. Police respondents were more divided.

5. Other justice system respondents overwhelmingly (90%) agreed that a pre-charge screening model would reduce miscarriages of justice. On this point, prosecution service and police respondents were less definitive.

6. Most police respondents (70%) agreed that a pre-charge screening model is resource intensive for the police. Most other justice system respondents disagreed, and prosecution service respondents either disagreed with the proposition or were neutral.

7. Most police respondents (67%) disagreed that a pre-charge screening model enhances public safety. Prosecution service and other justice system respondents either agreed or were neutral.

c. Pre-charge Screening Impact on Overrepresentation

None of the respondents believed that pre-charge screening would worsen the overrepresentation of Black, Indigenous, racialized and marginalized individuals in the criminal justice system.

Some prosecution services and other justice system respondents, 50% and 60%, respectively, believed that the pre-charge screening model would significantly or slightly reduce overrepresentation. Many police respondents, 41%, thought a pre-charge screening model would have no impact on overrepresentation.

Several respondents commented that it would depend on the Crown perspective or direction on this issue and that more empirical data would be helpful to properly assess the impact.

d. Uniform Charge Screening Model across Canada

A significant number of police and other justice system respondents, 78% and 80%, respectively, believed that the charge screening model should be uniform across Canada. Whereas only 22% of prosecution service respondents thought that it should be uniform.

2. Crown Evidentiary Thresholds

a. Differences between the Crown evidentiary thresholds

Most police and prosecution service respondents, 67% of each group, agreed that there was a substantial difference between the three Crown evidentiary thresholds. Half of the other justice system respondents believed there was a substantial difference.

b. Ranking the Crown evidentiary threshold from highest to lowest

An overwhelming majority of respondents, 96%, ranked “substantial likelihood of conviction” as the highest Crown evidentiary threshold. Only 4% ranked “reasonable prospect of conviction” as the highest threshold. “Reasonable likelihood of conviction” was ranked as the second choice 88% of the time.

c. The Crown evidentiary threshold that would screen out the MOST cases

An overwhelming majority of respondents, 91%, indicated that screening cases using the “substantial likelihood of conviction” threshold would screen out the most cases.

d. A uniform Crown evidentiary threshold across Canada

Most police and other justice system respondents, 85% and 70%, respectively, thought that the Crown evidentiary threshold should be uniform across Canada. Prosecution service respondents were not so definitive, with only 44% in agreement with this proposition and 33% being unsure.

e. Applying one or more evidentiary threshold

Through inadvertence, this question did not provide an opportunity for the respondent to properly select whether one evidentiary threshold should be applied OR more than one evidentiary threshold should be applied. For that reason, the responses collected from this question were not analyzed or considered.

f. Outlining the Crown evidentiary threshold in the Criminal Code

Most prosecution service respondents (78%) did not believe the Crown evidentiary threshold should be prescribed in the *Criminal Code.* Whereas police and other justice system respondents, 52% and 50% respectively, thought that it should be.

g. Changing the Criminal Code "reasonable grounds to believe" standard

A majority of respondents, 85%, disagreed with the suggestion that the "reasonable grounds to believe" standard for laying an information before a justice of the peace set out in section 504 of the *Criminal Code* should be changed to a higher standard.

B. Statistics Canada

The discussion deck provided to all justice system participants contacted included statistics regarding overall and offence-specific rates of withdrawal/stay and guilty findings from Statistics Canada.[64] It was used to show differences between pre-charge and post-charge screening jurisdictions as well as between the evidentiary thresholds used by different jurisdictions that share the same screening process. For example, British Columbia versus Ontario and British Columbia versus Quebec.

Most justice system participants found the data compelling, especially when it came to comparing pre-charge and post-charge screening jurisdictions. The justice system participants noted the stark differences between the jurisdictions and that those differences were consistent year after year. The OACP suggested that the post-COVID-19 statistics (2020/2021) were not reliable enough to serve as a guideline for shaping policy. However, the post-COVID-19 statistics appear to reflect the same trends as in previous years. For example, British Columbia consistently has a higher rate of guilty findings than Nova Scotia, even when viewing data starting in 2002/2003; the overall trends in the data do not appear to have been impacted by the pandemic.

It should be noted that not all the case data reported to Statistics Canada by the provinces is consistent from province to province. Ontario and Saskatchewan do not report superior court case data. They report only provincial court case data. British Columbia, New Brunswick and Nova Scotia report provincial and superior court case data. Quebec reports provincial court case data but data from municipal courts is not available. In Quebec, some municipal courts hear summary conviction cases which account for approximately 14% of all criminal cases.

This means that comparing British Columbia and New Brunswick as pre-charge screening jurisdictions to Nova Scotia as a post-charge screening jurisdiction may be more appropriate, given that these provinces report the same level of court case data to Statistics Canada. Further, it may be appropriate to compare the application of the evidentiary thresholds between Ontario and Saskatchewan which report only provincial case data, apply two different evidentiary thresholds ("reasonable prospect of

[64] Adult criminal courts, number of cases and charges by type of decision (statcan.gc.ca)

conviction" versus "reasonable likelihood of conviction", respectively) and are both post-charge screening jurisdictions. With respect to pre-charge screening jurisdictions, a comparison between British Columbia and New Brunswick may be most appropriate as they both report provincial and superior court case data and apply two different evidentiary thresholds ("substantial likelihood of conviction" versus "reasonable prospect of conviction"[65], respectively).

However, missing superior court case data from Ontario and Saskatchewan's numbers may not affect the validity of the analysis. To the contrary, it makes the differences between these two post-charge screening jurisdictions and the pre-charge screening jurisdictions of British Columbia and New Brunswick even more stark. For example, in 2017/2018 Ontario and Saskatchewan's overall withdrawal/stay rate was 44% and 33%, respectively. What would that rate have been if superior court case data was included? It may have made the differences between these post-charge screening jurisdictions even more pronounced when compared to the pre-charge screening jurisdictions of British Columbia and New Brunswick which had rates of 27% and 18%, respectively.

It is apparent that the data reported to Statistics Canada by the provinces has its limitations. Yet, it is still a helpful tool to assess the impact of pre-charge versus post-charge screening and the application of the various evidentiary thresholds. This is especially true, given the overall consistency of the data over time.

C. Charge Screening Practices

1. *Criminal Code* and Constitutional Considerations

a. Section 504 of the Criminal Code

Section 504 of the *Criminal Code* provides that:

> Any one who, on reasonable grounds, believes that a person has committed an indictable offence may lay an information in writing and under oath before a justice, and the justice shall receive the information, where it is alleged
> (a) that the person has committed, anywhere, an indictable offence that may be tried in the province in which the justice resides, and that the person
> (i) is or is believed to be, or
> (ii) resides or is believed to reside,
> (b) that the person, wherever he may be, has committed an indictable offence within the territorial jurisdiction of the justice;

[65] Which New Brunswick interprets as meaning that a conviction is more likely than not.

(c) that the person has, anywhere, unlawfully received property that was unlawfully obtained within the territorial jurisdiction of the justice; or
(d) that the person has in his possession stolen property within the territorial jurisdiction of the justice.

There are two important features of s. 504 in the context of charge screening practices.

First, “any one” may lay an Information and the justice “shall” receive it. There is no requirement that only a specific class of person may lay a criminal charge. Anyone, including but not limited to the police, has the authority to lay a charge. Even in pre-charge screening jurisdictions, the police (or anyone else) retain the legal authority to lay a charge pursuant to s. 504, regardless of the advice from the Crown. In this way, police maintain their independence from the Crown, even in pre-charge screening jurisdictions.

Second, the standard to lay a charge is a belief “on reasonable grounds”. Significantly, the standard to lay a charge is markedly lower than any of the Crown screening evidentiary thresholds that prosecutors are obliged to apply.

b. Section 505 of the Criminal Code

Section 505 of the *Criminal Code* provides that:

> If an appearance notice has been issued to an accused under section 497, or if an accused has been released from custody under section 498 or 503, an information relating to the offence alleged to have been committed by the accused or relating to an included or other offence alleged to have been committed by them shall be laid before a justice **as soon as practicable after the issuance or release, and in any event before the time stated in the appearance notice or undertaking for their attendance in court.** [Emphasis added.]

In situations where an accused person has been issued an appearance notice, or has been arrested and then released, s. 505 sets out two time periods within which an Information is to be laid:

(1) as soon as practicable after issuance or release; and
(2) before the time stated on the release document to appear in court.

These time requirements are not to be construed as "stand-alone" requirements.[66] The time periods "are related and, in combination, establish a finite time within which an Information must be laid in order to ensure that an accused person whose attendance in court is required by a promise to appear does not face an indefinite period of jeopardy".[67]

The case law does not clearly define this finite time frame or establish a numerical formula to calculate whether the time requirements have been violated. This determination will depend on the factual scenario of each case. While neither of the s505time requirements are meant to stand alone, some authorities have held that the prosecution failed to lay the Information "as soon as practicable", despite successfully laying the Information before the time stated in the appearance notice.[68]

[66] *R. v. Markovic*, 2005 CanLII 36251 (ON CA) at para 17
[67] *R. v. Markovic*, 2005 CanLII 36251 (ON CA) at para 23
[68] The following cases provide guidance on the meaning of "as soon as practicable":

- In *R. v. Taylor,* 2005 BCSC 1257 (CanLII), the Court stated that "the meaning of 'as soon as practicable' **will be different in every case and will largely turn on the factual scenario of the case at hand**". Indeed, there is no numerical formula that exists to determine the meaning of this time period. Deference should be given to the trial judge's finding of fact on whether the information was laid "as soon as practicable". The standard for appellate interference with the finding is palpable and overriding error.
- In *R. v. Marshall,* a 2003 provincial court decision, the judge noted that "as soon as practicable" does not equate to "as soon as possible" or "as soon as convenient". The wording in s. 505 is not conducive to a "hard and fast numerical formula in that case, the Court found that an **18-day** timespan after the release, including 6 full days after the taking of photographs and fingerprints, and 7 days before the first appearance, was not as soon as practicable.
- In *R. v. Oliveira,* 2009 ONCA 219*,* the accused person was arrested on July 22nd, 2004, on charges of assaulting a police officer. The promise to appear was set for August 26th, 2004. The information was sworn by a police officer on August 23rd, 2004; three days before the scheduled first court appearance. [68] At trial, the Crown accepted that the **32-day** timeframe between the arrest and the laid information had not been "as soon as practicable".
- Recently, *R. v. Toor,* 2022 ONCJ 8 (CanLII) asserted that "a **114-day** delay between the arrest date to the laying of the information… would not normally be said to be 'as soon as practicable". However, the judge made an exception and ruled that the delay in swearing the information did not violate s. 505 because of the temporary closure of case management courts during the COVID-19 pandemic.
- *Markovic* affirmed that the purpose of the "as soon as practicable" time period is to provide an opportunity for judicial intervention to cancel the process if the information should not be issued, whereas the purpose for the "in any event" time period is to ensure there will be an information before the Court when the accused person returns.

Consequences of failing to comply with the time requirements

Failing to comply with these time requirements will render a promise to appear ineffective and provide a defence to a charge of failure to appear as directed by the promise to appear.[69]

While the language "shall" in s. 505 regarding the timing of laying an Information appears mandatory, the case law interpreting this section has held that the failure to follow the procedural time limits does not invalidate the Information nor result in a loss of jurisdiction over the offence.[70] More specifically, the "as soon as practicable" time limit is not mandatory for the purposes of considering the validity of the Information, as "the provision is directory only".[71] To hold otherwise would effectively "treat s. 505 as if it created a statutory limitation period, something which the Courts of Appeal of Ontario, Alberta, and British Columbia have all found not to be the case".[72]

According to authorities in Ontario, Alberta, and Nunavut, if there is no Information laid by the time of the first appearance, the court loses jurisdiction over the person. However, there will be no loss of jurisdiction over the accused person if they appear in court in answer to the charge for trial.[73]

The Crown has 3 months from the time jurisdiction was lost to have an Information sworn and summons/warrant issued to comply with s. 485(2). If the Information is not laid within 3 months, the charges will be deemed dismissed (s. 485(3)), and the Crown's only option is to seek the personal consent of the Attorney General or the Deputy Attorney General to lay a new Information pursuant to s. 485.1.[74]

However, the British Columbia Supreme Court in *R. v. Clark,* [1992] BCJ No 20141 (BCSC) held that:

---

[69] *R. v. Oliveira,* 2009 ONCA 219 at para 4; *Regina v. Naylor*, 1978 CanLII 2371 (ON CA) at p. 19; *R. v. Gougeon*, 1980 CanLII 2842 (ON CA) at pp. 230-231; *R. v. Markovic*, 2005 CanLII 36251 (ON CA) at paras 23-25. The failure to comply with s. 505 of the Code will obviate any charge of failure to appear under s. 145(5) of the *Code*, nor will the court be empowered to issue a warrant under s. 512(2).
[70] *R. v. Oliveira,* 2009 ONCA 219*,* at para 23; *R. v. Markovic*, 2005 CanLII 36251 (ON CA), fn. 59, at para 25; *R. v. Lamacchia*, 2009 ONCJ 13 at para 5
[71] *R. v. Gougeon*, 1980 CanLII 2842 (ON CA) at pp. 230-231
[72] *R. v Perkins,* 2017 BCSC 2498 at para 50; *R. v. Markovic*, 2005 CanLII 36251 (ON CA) at paras 24-27.
[73] *R. v. Markovic*, 2005 CanLII 36251 (ON CA), at paras 24-25
[74] See *R. v. A.S.*, 2021 ONCJ 493 (information not laid until 6 months after first appearance date); *R. v. Ferreira*, 2014 ONCJ 617: information laid 1 year after first appearance; *R. v. Chornawka*, 2009 ABPC 201 (court lost jurisdiction over person because no information at first appearance, but regained it pursuant to s. 485(2) within 3 months); *R. v. Gladue*, 2021 ABPC 50; *R. v. Qaunaq*, 2020 NUCJ 3

> The court has no jurisdiction over the person of the accused until an Information has been laid before the justice under s. 505 and the justice has endorsed the appearance notice pursuant to s. 508. Upon that happening the sections of the *Criminal Code* by which the court exercises its jurisdiction over the person of an accused come into play. Up to that point the court has no jurisdiction over the person of the accused, and s. 485 is not applicable. [75]

Subsequent cases have recently followed this statement of law in BC.[76] The implication is that an Information could be laid after 3 months from the first appearance date without the consent of the Attorney General. However, in both cases following *R. v. Clark*, a fresh process was, in fact, issued within 3 months of the first appearance date.

Overall, existing case law suggests that the "as soon as practicable" requirement in s. 505 of the *Criminal Code* is not a bar to the implementation of a pre-charge screening model. The two time periods are read in combination, and there is no indication that the "as soon as practicable" requirement is an impediment in pre-charge screening jurisdictions. On the contrary, rarely have the courts held that a charge laid before the time stated in the appearance notice is not laid "as soon as practicable".

In any event, the failure to comply with the time limits does not invalidate the Information or lead to loss of jurisdiction over the offence. It is not a barrier to implementing a pre-charge screening model.

Sections 11(b) and 7 of the *Charter*

R. v. Jordan, 2016 SCC 27 mandates that criminal trials must be completed within 18 months in the provincial court and 30 months in the superior court, absent defence-caused delays, discrete events, and/or exceptional circumstances. Trials that are not completed within these ceilings are presumed to have violated the accused person's rights under s. 11(b) of the *Charter of Rights and Freedoms*. The only remedy for a s.11(b) *Charter* violation is a stay of proceedings. The judge has no other choice of remedy.[77]

[75] *R. v. Clark,* [1992] BCJ No 20141 (BCSC)
[76] *R. v. Sicotte*, 2020 BCSC 909; *R. v. Poznikoff*, 2022 BCSC 1667
[77] There can be alternative remedies other than a stay when the court determines that there has been "post-verdict delay" – that is, any delay that arises after the time of a verdict. In *R. v. Charley,* 2019 ONCA 726 (also see *R. v. Hartling,* 2020 ONCA 243), the Court indicates that post-verdict delay should not affect the conviction and it remains open to sentencing courts to determine the "appropriate and just" remedy – including stays of sentencing proceedings, sentence reductions, and other appropriate forms of redress (***e.g.,*** orders to expedite proceedings; releases from custody; further enhanced credit; etc.).

For the purpose of s. 11(b), the time period begins with the laying of the charge by way of an Information. Pre-charge delay is not taken into account in the s. 11(b) calculation. However, pre-charge delay can lead to a stay of proceedings if it amounts to an abuse of process upon a showing of actual prejudice to the accused person or a showing of oppressive state conduct. This will be rare. Courts have been reluctant to grant a stay of proceedings for pre-charge delay.

Pre-charge delay (the time between arrest and the laying of information) does not count towards the Jordan 11(b) clock

The time between arrest and the laying of an Information (sometimes characterized as "pre-charge delay") does not count towards the 11(b) *Jordan* clock. Despite some lower court decisions (particularly in Ontario) suggesting otherwise, appellate court decisions have held that the laying of the Information is the start time for the calculation of 11(b) delay. This is now consistent across all provinces.[78]

Delaying the laying of the charge will not amount to an abuse of process unless it results in actual prejudice to the accused person or there was oppressive state conduct

Pre-charge delay, without more, cannot justify a stay of proceedings as an abuse of process.[79] In *R. v. L. (W.K.)*, the Supreme Court of Canada held that it is the ***effect of the delay***, not the length of the delay, which is relevant to ss. 7 and 11(d) of the *Charter*. Moreover, "the fairness of a trial is not automatically undermined by even a lengthy pre-charge delay which may actually operate to the advantage of an accused person" (*ibid*, page 1100). The impact of the delay can only be assessed through consideration of the

[78] Supreme Court of Canada: *R. v. Kalanj*, [1989] 1 SCR 1594 recently followed in *R. c. J.F.*, 2022 SCC 17; *R. v. Jordan*, 2016 SCC 27, *Mills v. R.*, [1986] 1 SCR 863
British Columbia: *R. v. Kanda*, 2021 BCCA 267; *R. v. DN*, 2018 BCCA 18 at para 41; *R. v. Harris,* 2017 BCSC 1091 at para 76
Manitoba: *R. v S. (M.)*, 2017 MBQB 12 at para 20
New Brunswick: *R. v. Doak*, 2022 NBCA 48, paras 31-36
Quebec: *R. c. Lebel*, 2013 QCCA 403 at paras 77-79. Also *R. v. Vendetti*, 1986 CarswellQue 156, [1986] R.J.Q. 2105, 1 Q.A.C. 241, J.E. 86-809, at para 4
Alberta: *R. v. Penny*, 2021 ABQB 723 at para 38
Newfoundland and Labrador: *R. v. Paul Squires*, 2022 CarswellNfld 192 (Newfoundland and Labrador Prov. Court)
Nova Scotia: *R. v. Clarke,* 2022 NSPC 2 at para 33
Ontario: *R. v. Allison*, 2022 ONCA 329; *R. v. Wookey*, 2021 ONCA 68 at para 55
Saskatchewan: *R. v. TSH*, 2020 SKPC 25 at para 20
The Northwest Territories, Nunavut, Yukon, and Prince Edward Island had no relevant case law on this issue but are bound by the decisions of the Supreme Court of Canada.

[79] The SCC in *R. v. L. (W.K),* [1991] 1 SCR 1091 at p. 1099: "Delay in charging and prosecuting an individual cannot, without more, justify staying the proceedings as an abuse of process at common law."

circumstances. This was re-affirmed recently in *R. v. Hunt*, 2017 SCC 25 (S.C.C.), where the accused person was charged *ten years* after the police opened their investigation.

To establish an abuse of process on the grounds of pre-charge delay, "an accused person must establish either actual prejudice to the accused person's ability to mount a full answer and defence, given that the delay caused some material loss of evidence. Alternatively, the accused person can rely on a residual category of abuse of process that the delay was so egregious, and the state conduct was so offensive, that the proceedings can be characterized as being oppressive or vexatious": *R. v. Lee Valley Tools Ltd.*, 2009 ONCA 387 (Ont. C.A.) at para 22.

Courts have been reluctant to recognize pre-charge delay as a basis for the remedy.[80] A stay of proceedings will only be granted in the clearest of cases where the accused person is unable to put forward a defence or the state conduct is so egregious that it seriously compromises the integrity of the justice system.[81] The dissenting opinion of Hoegg J.A. in *Hunt*, which was approved by the SCC, addresses the issue of staying proceedings on the basis of pre-charge delay:

> [99] The notion that delay, in the absence of jeopardy to fair trial rights, Crown misconduct, or oppressive Crown conduct, can result in the staying of serious criminal charges, is very disturbing to me. It effectively means that charges laid after a lengthy investigation cannot be prosecuted on their merits, regardless of their complexity and volume. Complexity and volume involve time. It follows that the more complicated and voluminous the offence, the more likely that charges arising from it will be stayed. Such a result rewards sophisticated criminal conduct, and effectively imposes a judicially determined limitation period on charges which take a long time to investigate simply because it is too difficult, time consuming, and/or expensive to do so.

c. Independence of police and prosecution services

One of the most frequent concerns expressed by the police representatives relating to the possible adoption of a pre-charge screening model is the suggestion that pre-charge Crown approval erodes the independence of police from the prosecution service. It is important to note, however, that this concern is not universally expressed by all police.

---

[80] *R v N (L.V.),* [1997] OJ No 1294, at para 46. Cited recently with approval in *R. v. Dolinski*, 2014 ONSC 681 at para 30

[81] *R. v. Brideau*, 2021 ONSC 189, at paras 13-15; *R. v. Hunt*, 2016 NLCA 61, at paras 74, 84 (dissent), rev'd 2017 SCC 25; *R. v. O'Connor*, [1995] 4 S.C.R. 411, at para 82; *R. v. Conway,* [1989] 1 S.C.R. 1659, at p.1705

Indeed, in some pre-charge screening jurisdictions, police did not express this concern, noting the very positive Crown-police cooperation that has been generated in those jurisdictions.

The post-charge screening model has been the traditional approach adopted in Canada by the majority of provinces until most recently. The traditional approach was articulated in 1993 by the *Martin Report:*

> As a matter of law, police officers exercise their discretion in conducting investigations and laying charges entirely independently of Crown counsel. The police seek the advice of the Crown only where they think it appropriate. And while it is no doubt prudent to do so in many cases, the police are not bound to follow the advice of Crown counsel, as that advice relates to the conduct of the investigation and the laying of charges. The Crown likewise exercises independent discretion in the conduct of the prosecution before the courts, having no obligation to prosecute simply because a charge is laid by the police…. As stated in the House of Commons by the first Solicitor General of Canada:
>
> > "It seems to me that to vest the authority for the investigative functions of the government in the same person who is going to conduct the criminal process is foreign to the spirit of justice."
>
> The mutual independence of Crown counsel and the police has many advantages... [S]eparating the investigative and prosecutorial powers of the state is an important safeguard against the misuse of both. Such separation of power, by inserting a level of independent review between the investigation and any prosecution that may ensue, also helps to ensure that both investigations and prosecutions are conducted more thoroughly, and thus more fairly. The police and Crown counsel can focus on their particular areas of expertise. [82]

The traditional approach is generally described in the policy manuals and guidelines of the PPSC and the prosecution services of provinces which employ post-charge screening. For example, the *PPSC Deskbook* concerning the Crown-Police relationship states:

> 1.0 Administration of criminal justice is a continuum. At one end, the police investigate criminal offences and arrange for suspected offenders to appear in

[82] *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions* (1993) ("Martin Report"), at pp. 37-39

court. At the other, Crown counsel are responsible for presenting the Crown's case in court. Their roles are interdependent. While both have separate responsibilities in the criminal justice system, they must inevitably work in cooperation to administer and enforce criminal laws effectively. As the Supreme Court of Canada has stated, “the proper functioning of the criminal justice system requires (…) that all actors involved be able to exercise their judgment in performing their respective duties, even though one person's discretion may overlap with that of another person.”

3.1 Crown counsel and investigative agencies play complementary roles in the criminal process. They both have roles to play before and after charges are laid. While the involvement of the Crown is not required at the pre-judicial stage, the practice is increasingly common. The authors Michael Code and Patrick Lesage have noted this phenomenon and explained it as follows:

> There has been a natural evolution towards much closer police and Crown pre-charge collaboration over the past 20 to 30 years. As noted above, criminal procedure had become much more complex than it was in an earlier era. Police investigative procedures are now the subject of pre-trial motions to determine whether there has been a *Charter* violation, whether evidence will be admitted under the new “principled approach” and whether a statutory process, such as a wiretap authorization or search warrant, has been properly followed. The police have increasingly turned to Crown counsel for pre-charge legal advice in order to navigate these difficult waters… It is simply not feasible in the modern era to expect the police and Crown to work in entirely separate silos, as they once did.

Cooperation and consultation between law enforcement agencies and the Crown are essential to the proper administration of justice, since investigators must gather evidence that is both admissible and relevant. Later, when deciding whether to prosecute, consultation becomes useful for assessing the sufficiency of the evidence and the public interest criteria. This cooperation is even more important in complex cases.

Accordingly, Crown counsel should be available for consultation during an investigation and before charges are laid. This will encourage investigators to ask for advice. In complex cases, Crown counsel may be required to work closely with the police to identify and collect cogent and relevant evidence. However, this does not mean that Crown counsel must take on the work of the investigators. At the end of an investigation, the role of Crown counsel is to give the investigators

> a fair and objective assessment of the quality of the evidence and the appropriateness of proceeding. In conducting this assessment, counsel must be vigilant and take care to avoid “tunnel vision”, meaning the loss of the ability to conduct an objective assessment of the case through contact with the investigators.

Even in pre-charge screening jurisdictions, the policy manuals and guidelines of prosecution services recognize the need to ensure that Crowns and police foster their independence from each other while at the same time ensuring that there is appropriate cooperation. For example, in British Columbia (a pre-charge approval jurisdiction), the *Crown Counsel Policy Manual, CA 1*, states:

> The decision to start or continue a prosecution is one of the most important duties of Crown Counsel. The *Crown Counsel Act* authorizes Crown Counsel, under the direction of the Assistant Deputy Attorney General (ADAG), to “examine all relevant information and documents and, following the examination, to approve for prosecution any offence or offences that he or she considers appropriate” (section 4(3)(a)). In carrying out this function Crown Counsel are constitutionally required to act independently of all partisan concerns and improper motives...
>
> The charge assessment function of Crown Counsel is also independent of the investigative responsibility of the police. Reasonable cooperation and effective communication between Crown Counsel and the police are essential to the proper administration of justice. However, Crown Counsel must guard against becoming too closely connected to the police or doing anything else to hamper their ability to conduct objective charge assessments.
>
> The police have authority to lay an Information charging a person with an offence, but Crown Counsel have the ultimate authority to decide whether to continue or terminate the prosecution. The BC Prosecution Service expects that, unless it is impracticable to do so, police will lay an Information only after the approval of charges by Crown Counsel, or, if charges are not approved, after exhausting the review process ...

The Supreme Court of Canada has also emphasized the importance of ensuring that the police and the Crown must retain their independence while at the same time acting cooperatively. Nevertheless, in *R. v. Regan*, 2002 SCC 12*,* at para 64*,* the Court observed that this did not preclude the practice, in some provinces, of pre-charge Crown screening:

> The question before this Court is whether the Crown's objectivity is necessarily compromised if Crown counsel conduct pre-charge interviews of witnesses without the single, express intention of screening out charges before they are laid. In essence, this Court has been asked to consider whether, at law, Crown prosecutors must be prevented from engaging in wide-ranging pre-charge interviews in order to maintain their essential function as "Ministers of Justice". First, it is my view that different provinces have answered this question differently, and that the trial judge erred in his evaluation of the standard practice across the country on this issue. **Furthermore, while the police tasks of investigation and charge-laying must remain distinct and independent from the Crown role of prosecution, I do not think it is the role of this Court to make a pronouncement on the details of the practice of how that separation must be maintained**. [Emphasis added.]

In *Regan*, the Supreme Court gave apparent approval to the Nova Scotia requirement that in major cases the police could not lay a charge without first consulting with the Crown.[83]

Indeed, in recognizing the important distinction between Crown pre-charge *advice* and the requirement for Crown pre-charge *approval*, the OACP also acknowledged the positive effect of pre-charge *consultations* between the police and the Crown:

> A pre-charge Crown screening model that requires police to obtain Crown approval prior to laying charges will impact the standard of reasonable and probable grounds and replace it with a significantly higher Crown evidentiary threshold of reasonable prospect of conviction. This will necessitate changes to the *Criminal Code*, *Police Services Act* and training. Currently, the *Criminal Code* places the responsibility of initiating charges on police. Crown approval on this higher evidentiary standard has the tendency to erode the mutually independent relationship between the Crown and the police. **There is a significant legal and operational distinction between pre-charge Crown advice and pre-charge Crown approval. The former encourages cooperation and consultation between the police and Crown Attorneys, which is essential to the proper administration of justice, while the latter intrudes upon core law enforcement functions and legal duties of the police.** This may have significant consequences for the concept of prosecutorial immunity, which is predicated on police and prosecutorial independence. It will also impact on the law of malicious prosecution. [Emphasis added] See Appendix H.

[83] *R. v. Regan,* 2002 SCC 12, at paras 66-68

Police representatives noted that in major or complex cases, the police will often seek pre-charge Crown advice. For example, the OACP acknowledged that pre-charge Crown advice is sought on complex matters and that it can accomplish many of the goals of a pre-charge Crown screening model while maintaining police independence and discretion to arrest and charge.

It would seem, therefore, on the question of police/Crown independence, the principal police objection to pre-charge screening is a requirement that the police must seek the **approval** of the Crown before laying a charge. In principle, it follows that, at least from the perspective of the police, the fact of pre-charge screening that involves the Crown reviewing the evidence collected and providing advice to the police as to the viability of a proposed prosecution does not, *per se,* inappropriately impinge on the important principle of maintaining police independence from the Crown. This is consistent with the observations of the Supreme Court of Canada in *Regan* in which the Supreme Court gave explicit approval to the practice of Crown pre-charge screening:

> Cromwell J.A. disagreed with the trial judge's finding that collaboration between the Crown and the police in the charging decision is wrong. He found no basis in law for such a conclusion. **Provided that the independence and distinct roles of the police and the Crown are respected and that no improper purpose is being pursued, it is desirable for the Crown and police to avoid unnecessary disagreements about whether charges should proceed.**
> ...
>
> A lesson underscored by the report on the Morin case and the events which led to its tragic outcome is that the appellant's proposed "quick fix" to maintain Crown objectivity, by preventing Crown interviews pre-charge, is both misguided, and potentially harmful – because pre-charge Crown interviews may advance the interests of justice (see below), and because the pre- versus post-charge distinction may distract attention away from the necessary vigilance to maintain objectivity throughout the proceedings
>
> It is quite clear that there are many public policy reasons for which Crown counsel in some jurisdictions conduct witness interviews, pre-charge. **Mr. Abbott and Mr. Gover both testified about efficiencies which are gained by pre-charge screening which protect the repute of the justice system, not only the personal interests of the accused. Complainants also benefit from a single decision to proceed with or avoid laying charges, rather than having to deal with the stress and publicity of a charge and then face the**

> **appearance that they have made a spurious accusation if the charge is later withdrawn.** In addition, all of the expert witnesses with knowledge of the Crown practice of pre-charge interviewing told of the interests it serves in assessing witness credibility, demeanour and resolve, especially in sexual assault cases. Such pre-charge interviews are even more important when charges are "historic" or when complainants are young.[84] [Emphasis added]

It can be argued that even a mandatory Crown **approval** regime is not inconsistent with police independence from the Crown. The following observations would seem relevant to this issue:

- It is arguable that the core function of the police in the administration of justice is the *investigation* of possible criminal conduct. As long as the Crown does not direct the course and outcome of the investigation (as opposed to giving legal advice, when requested by the police), a pre-charge screening model does no more than shift the *timing* of the Crown's decision whether to proceed with a prosecution proposed by the police.
- The *Criminal Code* itself prescribes several offences that require the consent of the Attorney General before the police may lay a charge.[85] None of the justice system participants consulted in the preparation of this report indicated that the requirement of Attorney General consent in these circumstances improperly impinges on the independence of the police.
- It is important to note that there is no constitutional requirement that each province must have the same charge screening model. See *Regan* at para 72:

> > While the separation of police and Crown roles is a well-established principle of our criminal justice system, different provinces have implemented this principle in various ways. This Court has already recognized that some variation in provincial practices in the administration of the criminal law is to be expected and allowed in certain circumstances. In *R. v. S. (S.)*, 1990 CanLII 65 (SCC), [1990] S.C.R. 254, Dickson C.J. observed, at pp. 289-90:
> >
> > > It is necessary to bear in mind that differential application of federal law can be a legitimate means of forwarding the values of a federal system. In fact, in the context of the administration of the criminal law, differential application is constitutionally fostered by ss. 91(27) and 92(14) of the *Constitution Act*, 1867. The area of criminal law

[84] *R. v. Regan,* 2002 SCC 12 at paras. 37, 83-84
[85] See, for example, *Criminal Code*, ss. 119, 174, 477.2, 803

> and its application is one in which the balancing of national interests and local concerns has been accomplished by a constitutional structure that both permits and encourages federal-provincial cooperation. A brief review of Canadian constitutional history clearly demonstrates that diversity in the criminal law, in terms of provincial application, has been recognized consistently as a means of furthering the values of federalism. Differential application arises from a recognition that different approaches to the administration of the criminal law are appropriate in different territorially based communities.

In *Regan,* Lebel J described, with apparent approval, the charge screening models prescribed in New Brunswick, Québec, and British Columbia requiring Crown approval or consultation prior to the laying of charges[86]

It would appear that there is no constitutional prohibition against a system that requires Crown **approval** prior to the laying of a charge, particularly if the pre-charge screening model leaves the final decision as to the laying of charges up to the police. Accordingly, *a fortiori,* a pre-charge screening model which merely requires that police seek the **advice** of the Crown prior to laying charges would pass constitutional muster. A requirement of mandatory Crown **consultation** does not impinge on the important principle of Crown-police independence and, furthermore, fosters the important goal of encouraging Crown-police cooperation.

2. *Jordan* Delay

a. Overview

In order to determine the impact of a pre-charge screening process versus a post-charge screening process on *Jordan* delay, s. 11(b) reported decisions were analyzed from 2019 and 2022.[87]

The analysis revealed the following:

- Late disclosure was a more prevalent factor contributing to delay in post-charge screening jurisdictions than in pre-charge screening jurisdictions.

[86] *R. v. Regan,* 2002 SCC 12 at paras. 72-78

[87] Additional analysis of reported decisions and s. 11(b) related data in each jurisdiction would be helpful but is beyond the scope of this report.

- Crown delay was a major contributing factor to delay that was proportionate across the provinces.
- Insufficient institutional resources in each province had a relatively equal impact on the number of stays in each province.
- The Crown's failure to mitigate delay related to COVID-19 was primarily an issue that was exclusive to Ontario in 2022, contributing to *Jordan* delay in 41% of the judicial stays in that province.

b. Methodology

The reported decisions involving s. 11(b) were assessed and systematically organized into different classifications based on the court's reasons for granting or dismissing the application.

The analysis relied on the taxonomy outlined in Table 4 for cases in which a stay of proceedings was granted because of *Jordan* delay. Since there are often multiple factors contributing to overall delay, the categories were not mutually exclusive. The presence of disclosure-related issues and discrete or exceptional circumstances were tracked for both granted and dismissed s. 11(b) applications.

Table 4: Judicial Stay Decisions Taxonomy	
Reason that contributed to the judicial stay	**Meaning within the analysis below**
Crown delay	• Lack of Appropriate Priority Assigned to Case • Insufficient plan to deal with complexity • Unreasonable/insufficient Efforts by Crown to Mitigate Delay • Late breaking change in evidence or strategy by the Crown
Disclosure	• Late / Delayed Disclosure (Crown) • Late/Delayed Disclosure (Police)
Lack of institutional resources	• Court Capacity / Scheduling (Dates offered) • Judicial (Insufficient resources or accommodation of Judge's schedule) • Non-judicial (Insufficient Court Staff) • Crown (Insufficient resources or Crown Scheduling Conflict) • Language Services (Interpreter Unavailability)
Exceptional Circumstances argument rejected	• Crown's Complex Case Argument Rejected • Crown's Other Exceptional Circumstances Argument Rejected
Miscellaneous	• Co-accused delay • Stay for unreasonable delay below the *Jordan* cap • Insufficient time set for preliminary inquiry • Insufficient time set for trial • Witness Issues – Civilian Witness Issue/Unavailability • Witness Issues – Police Witness Issue/Unavailability • Witness Issues – Expert Witness Issue/Unavailability
Failure to properly mitigate the impact of COVID-19	• Insufficient Institutional Resources Dedicated to Mitigating Effects of Pandemic • Insufficient Crown Resources Dedicated to Mitigating Effects of Pandemic • Lack of Appropriate Priority Assigned to Case by the Crown because of COVID-19 • Unreasonable/Insufficient Efforts by Crown to Mitigate Any Delay Relating to COVID-19 • Time Period Apportioned to Pandemic Insufficient to Justify Delay

c. Limitations of the Analysis

COVID-19 pandemic – 2019 and 2022 data

An analysis of the decisions relating to judicial stays is made more difficult due to the impact of the pandemic on the routine operations of Canadian courts. Post-COVID, there were periods of time where a lateral comparison between the reasons for a judicial stay in one province versus another would be skewed because of the unique ways in which the courts in each of the provinces responded to the public health crisis.

For example, most courtrooms in the Ontario Court of Justice and the Supreme Court of British Columbia suspended regular operations in March 2020 and were only able to resume proceedings on a limited remote basis by the end of 2020. On the other hand, the Provincial Court of Nova Scotia only adjourned a limited number of criminal matters until June 2020.[88] The Prince Edward Island Supreme Court temporarily suspended its regular operations, while the New Brunswick Provincial Court suspended trials for out-of-custody accused persons. The Supreme Court of Newfoundland and Labrador limited its operations and postponed non-urgent out-of-custody cases.[89]

Ontario courtrooms continued to face pandemic-related issues in 2021. When limited live trials resumed "there were courthouses that could not provide sufficient clean air to negate aerosol transmission of COVID-19".[90]

These varying approaches to the pandemic mean that a review of s. 11(b) decisions from 2020 and 2021 would be fraught with potential confounding variables and provincial idiosyncrasies when comparing the rate of judicial stays.

The 2019 and 2022 decisions on s. 11(b) applications provide the least skewed representation of judicial stays. The decisions from 2019 predate the impact of the COVID-19 pandemic, and the decisions from 2022 represent a period where most Canadian courts were able to return to a semblance of normalcy and resume routine court operations, either virtually or in person. For these reasons, the following analysis of the rate of judicial stays will focus on decisions from 2019 and 2022.

Reported Decisions

The analysis categorizes the "reasons" as to why a s. 11(b) application was granted or dismissed. The analysis is limited to publicly available decisions that are reported on Canadian Legal Information Institute (CanLII).[91] Additional analysis of s. 11(b) applications and the reasons why they are granted or dismissed would be helpful but is beyond the scope of this report.

[88] Palma Paciocco, "Trial Delay Caused by Systemwide Events: The Post-Jordan Era Meets the Age of COVID-19", *Osgoode Hall Law Journal*, 3:57 at p. 841; See also Justice Pockele's comments in *R. v. A.A.*, 2022 ONCJ 493
[89] Palma Paciocco, "Trial Delay Caused by Systemwide Events: The Post-Jordan Era Meets the Age of COVID-19", *Osgoode Hall Law Journal*, 3:57 at p. 841
[90] *R. v. A.A.*, 2022 ONCJ 493
[91] Canadian Legal Information Institute | CanLII

d. Pre-charge versus post-charge provinces

Disclosure delay

The reported decisions show that, in totality, the timeliness of disclosure in post-charge screening jurisdictions was a more prevalent factor as to why a case was stayed than in pre-charge screening jurisdictions.

Ontario and Nova Scotia had the highest rates of s. 11(b) cases in which disclosure contributed to the judge's calculation of *Jordan* delay. Delay caused by late disclosure was a factor in all the reported judicial stays in Nova Scotia. More analysis and data-tracking of the role of late disclosure in granted judicial stays would be beneficial.

The reported decisions do not always explicitly reference whether late disclosure was attributed to the Crown or the police.[92] The delay caused by disclosure-related issues is therefore underreported, and an increase in tracking this data would be advantageous for further analysis of this issue in the future.

However, in the decisions in which an explicit attribution was made and a stay was granted, the delay was attributed to the Crown more than the police in every jurisdiction except for the only reported stay in Nova Scotia in 2019, where both the Crown and police were found to have unreasonably caused the delay.[93]

Overall, late disclosure was not attributed to the police in pre-charge screening jurisdictions except for one decision in British Columbia in 2019, where the court found that the Crown was nevertheless primarily at fault for the delay.[94]

In post-charge screening jurisdictions, exceeding *Jordan* ceilings due to late disclosure was more frequently attributed to the police. In Ontario, in 2019, courts ruled that the

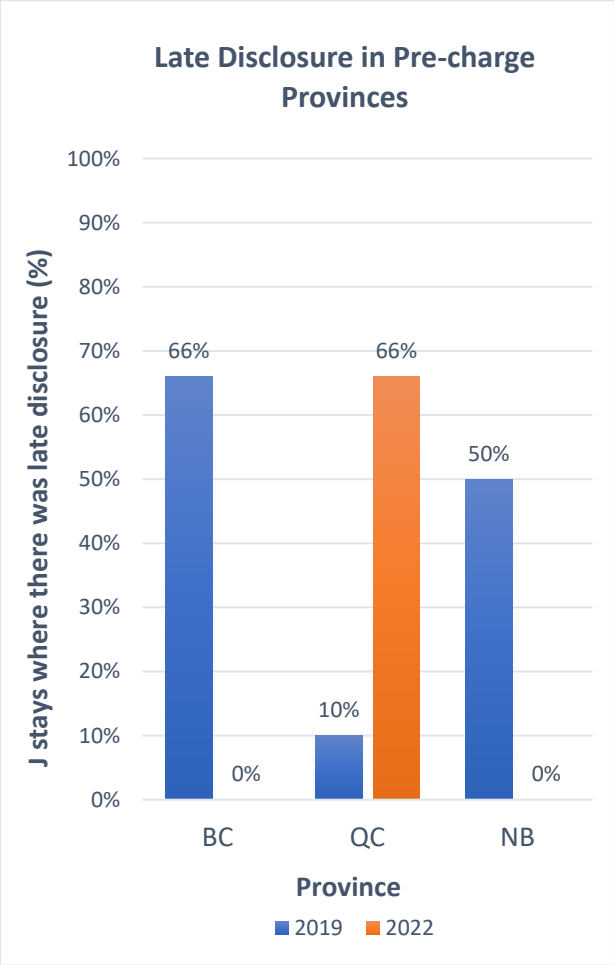
[92] With respect to reported cases where there was a s. 11(b) stay and late disclosure was a factor in calculating *Jordan* delay:

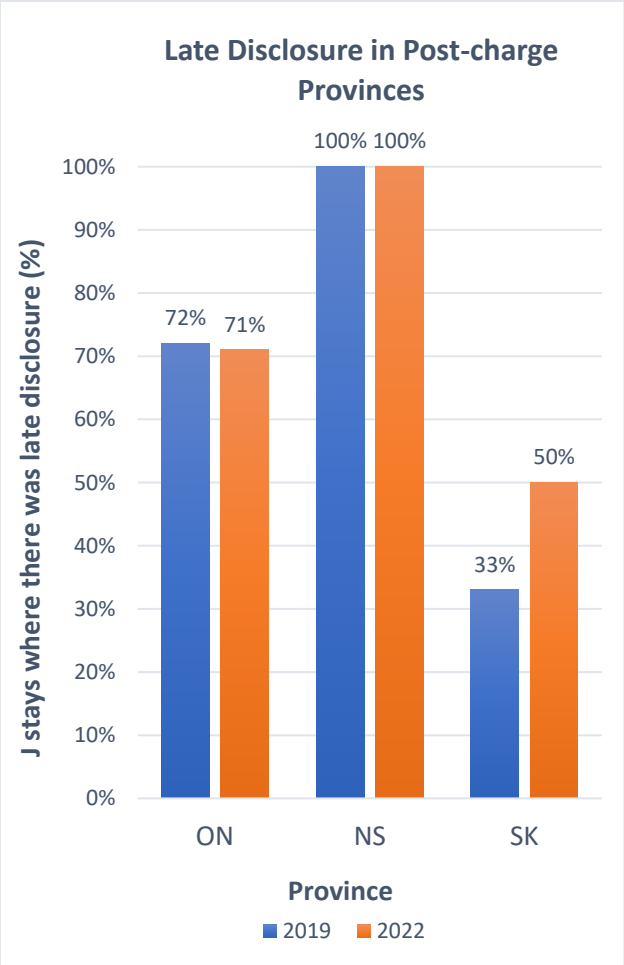
Province	It was unknown whether it was the police, the Crown, or both who caused the delay in:
Ontario	11% of the cases in 2019 and 28% of the cases in 2022
Nova Scotia	50% of the cases in 2022
Saskatchewan	33% of the cases in 2022
British Columbia	33% of the cases in 2019 and the one reported stay in 2022
Quebec	The one reported stay in 2019

[93] See *R v. R. A.*, 2019 NSSC 404; In Nova Scotia, there was only 1 reported case where a stay was granted in 2019; both the RCMP and the Crown were responsible for the late disclosure.
[94] See *R. v Virk*, 2019 BCSC 1271; the Crown was held responsible for the late disclosure, but the police also unnecessarily extended the time to trial.

police were at least partly responsible for the delay in 22% of the cases where a stay was granted; this statistic marginally decreased to 19% in 2022.

Table 5: Late Disclosure in Pre- and Post-Charge Screening Provinces





The total number of cases by province are as follows:

- BC 2019: 3 stays; 2022: 1 stay
- QC 2019: 10 stays; 2022: 3 stays
- NB 2019: 2 stays; 2022: 0 stays

ON 2019: 18 stays; 2022: 32 stays
NS 2019: 1 stay; 2022: 3 stays
SK 2019: 3 stays; 2022: 3 stays

Dismissed s. 11(b) applications

With respect to the reported decisions in which s. 11(b) applications were dismissed, the timeliness of disclosure was an issue raised at a similar rate regardless of when a case was screened (pre- versus post-charge). However, pre-charge screening jurisdictions had significantly fewer 11(b) applications overall.

Ontario had the greatest percentage of cases where untimely disclosure was alleged. In 2022, disclosure was alleged to be an issue in 60% of dismissed s. 11(b) applications. This is up from 36% in 2019. The latter percentage was the same statistic in Quebec in 2019, and only 3% greater than Saskatchewan's percentage in 2022.

In British Columbia, disclosure was alleged to be an issue in 25% of dismissed cases in 2019, and in 50% of dismissed cases in 2022.

Crown Delay

Crown delay was a contributing reason for s. 11(b) stays across all jurisdictions.

In BC and Saskatchewan, Crown delay was a factor in the calculation of *Jordan* delay in 100% of the reported cases where a judicial stay was granted in 2019 and 2022. In Nova Scotia and Quebec, Crown delay was a contributing reason for a stay of proceedings in 100% in 2019; the percentage decreased to 66% in Nova Scotia in 2022, and 33% in Quebec, 2022.

Crown delay in Ontario was also a significant reason for s. 11(b) delay. In 2019, it was a factor in calculating *Jordan* delay in 88% of stays, and in 2022, it was a factor in 53% of stays.

Lack of institutional resources

The justice system's insufficient resources had a relatively consistent impact on the number of stays in each province. In post-charge screening jurisdictions, the mean percentage for delay caused by insufficient institutional resources was 35%, whereas pre-charge screening jurisdictions constituted a 40% mean percentage.

The failure to properly mitigate the impact of COVID-19

The Crown's failure to properly mitigate the delay related to COVID-19 issues was an Ontario-centric issue; it constituted a contributing factor in 41% of s. 11(b) stays in 2022. The only other province where a COVID-19-related issue was improperly managed, caused delay, and resulted in a stay, was a single case in Nova Scotia.[95]

This reason for delay was not referenced in any of the reported decisions in Saskatchewan or any of the pre-charge screening jurisdictions.

[95] *R v Burgess*, 2022 NSSC 335

3. COVID Case Backlog

As noted previously, the COVID-19 pandemic resulted in a significant reduction in court operations. This caused many provinces to experience a significant backlog of criminal cases. In Alberta, there was an increase of 127% in cases beyond the *Jordan* threshold from 2020 to 2021.[96] In Nova Scotia, there was a 187% increase of provincial court cases over the *Jordan* threshold since 2020.[97] In Saskatchewan, a backlog of criminal cases existed in both the provincial and superior courts.[98] In Ontario, there was an increase of 46% in the number of active pending cases in provincial court from December 2019 to December 2020.[99]

By contrast, in British Columbia, Manitoba, and New Brunswick, the backlog of criminal cases was either not significant or had largely been eliminated.[100] This was confirmed in the consultations with these provinces. Each of these provinces operate under a Crown pre-charge screening model which may have assisted them in avoiding a backlog of cases as they were able to limit the number of cases entering the system and thus prevent the system from becoming overburdened.

For example, British Columbia appeared to aggressively review charges the first year of COVID and not permit as many charges to enter the system, with the approval rate for charge decisions decreasing by 6% between 2019/2020 and 2020/2021.[101] Legal Aid British Columbia also advised that police were less likely to charge, and there was a remarkable decline in legal aid contracts/certificates during the COVID period.

Some prosecution service participants did not support the proposition that Crown pre-charge screening would have assisted with backlog. For example, Saskatchewan, a post-charge screening jurisdiction, did not agree that pre-charge screening would have assisted with their backlog especially in the superior courts. Quebec did not believe that its practice of pre-charge screening assisted in preventing them from experiencing a significant backlog.

---

[96] Government of Alberta, *Annual Report: Justice and Solicitor General 2021-2022* , p. 38
[97] Angela MacIvor, CBC News, *N.S. court backlog worsening due to COVID and the 'Jordan ticker',* 28 Oct 2021
[98] Bre McAdam, Saskatoon StarPhoenix, *COVID-19 has caused delays, fueled technology use in Sask.'s justice system*, 05 August 2021
[99] Ontario Court of Justice, Criminal Court Statistics
[100] Keith Fraser, Vancouver Sun, *Top trial court makes 'good progress' to reduce COVID-related backlog*, 03 January 2022
Justice Manitoba, *2020/2021 Annual Report*, p. 93
New Brunswick Justice and Public Safety, *Annual Report 2020-2021*,, p. 33
[101] 80.3% in 2019/2020 to 74.2% in 2020/2021; British Columbia Annual Report 2021/2022 p. 11

It may well be that Crown pre-charge screening played a role in preventing a province from experiencing COVID-related case backlog. However, it is likely that it is but one factor that assisted, as both pre-charge and post-charge screening jurisdictions engaged in other strategies to reduce their backlog. This makes it difficult to assess the impact of Crown charge screening practices alone. Other backlog reduction strategies included:

- Hiring additional judges and prosecution resources (Alberta, BC, Manitoba, Saskatchewan, Ontario)[102]
- Suspending civil jury trials or delaying civil trials (BC, New Brunswick, Saskatchewan)[103]
- Focusing on early resolution of cases (Ontario, Manitoba, Nova Scotia, Saskatchewan).[104]

4. Public / Victim Safety

Some police representatives voiced their unease with pre-charge screening for the reason that it restricts their ability to charge; from their perspective, that prerogative is linked to increased deterrence and public safety. However, prosecution service representatives and other justice system representatives consulted took the position that this concern is easily addressed by ensuring that there is a "safety valve" in place that allows police to lay charges in exceptional circumstances for public safety reasons.

There are no statistics, research, or publications that indicate one way or another that prosecutors assessing charges pre- or post-charges being laid impacts public safety. None of the research or publications that do discuss pre-charge screening raise public safety as a relevant issue. This is likely because the police have tools that they can use to handle individuals upon arrest. If an individual is arrested in a pre-charge screening

[102] Government of Alberta, *Annual Report: Justice and Solicitor General 2021-2022*, p.34
British Columbia, Attorney General, *BC Provincial Court appointments*, accessed 04 August 2022
Manitoba, Budget 2021, p. 57
Saskatchewan, *Strengthening Public Prosecutions in Saskatchewan*, 6 April 2022
Ontario, Ontario Introduces New Measures to Address Court Backlog
[103] British Columbia, Attorney General, *Province considers future of civil jury trials*, 19 August 2021
The Canadian Press, *Civil and family cases delayed as N.B. courts deal with high number of jury trials*, 17 June 2022
Bre McAdam, Saskatoon StarPhoenix, *COVID-19 has caused delays, fueled technology use in Sask.'s justice system*, 05 August 2021
[104] During the consultation, Nova Scotia indicated that COVID backlog was a pressing concern, and that the institutional response has been a province-wide effort to prioritize serious offences and adjourn less serious offences. Similarly, the PPSC indicated that Federal prosecutors were performing more aggressive triage of their decision to prosecute by factoring in the circumstances of the pandemic under the public interest branch of the charge screening test.

jurisdiction, the police can release with conditions, or the individual can be held, charged, and brought to court for a bail hearing. If the individual is released by the police and breaches the conditions, they can be arrested for that offence and prosecuted. Québec's DPCP Crown representatives indicated that the pre-charge screening process does not interfere with the ability of the police to detain an individual for public safety reasons.

It is difficult to say that any increase or decrease in crime rate was dependent on whether a prosecutor reviewed the charges pre or post the charge being laid. For example, in 2018, British Columbia and Quebec had far fewer homicides reported. However, Ontario saw 69 more homicides than in 2017, partly because of three serious incidents that occurred in Toronto that resulted in 20 homicides and 26 attempted murders.[105] It would be problematic to conclude that the decrease in British Columbia's and Quebec's homicide rates and the increase in Ontario's was related to when charges were screened by the prosecutor in each of the jurisdictions.

Some prosecution service representatives expressed the view that public safety is enhanced with pre-charge screening, as better cases come before the court and disclosure being completed prior to charges being laid leads to:

- A higher percentage of guilty findings that hold offenders accountable for their offences; and
- Faster outcomes that ensure victims are kept safe, as offenders are serving their sentences. For example, the New Brunswick Crown representatives indicated that in recognition of victim safety concerns in intimate partner violence cases, the investigative and pre-charge screening time limits are shortened, requiring police to complete their investigation within 7 days and requiring prosecutors to complete the charge screening process within 13 days.

5. Impact on Accused Person

One important consideration is how the timing of charge screening impacts the accused person. It is a fundamental tenet of the justice system that a person charged with an offence is presumed innocent until proven guilty. The best charge screening model is one which balances the presumption of innocence against societal interests in public safety and confidence in the administration of justice.

[105] Police-reported crime statistics in Canada, 2018 (statcan.gc.ca)

a. Direct impact of laying a charge

The impact of laying a charge on an accused person is significant, even if that charge is later withdrawn or stayed. Once a charge is laid, the outstanding charge may be disclosed on Criminal Record and Judicial Matters Checks and Vulnerable Sector Checks. After the charge is withdrawn, the record of the charge remains on the accused person's police file, although not as a conviction. The visibility of these withdrawn charges can make it difficult for someone to gain employment when a vulnerable sector check is done.[106] Withdrawn charges can also impact a person's ability to care for a child as a foster or customary care parent. "...[N]on-conviction records can have the same impact as a record of conviction."[107] Moreover, the process for removing non-conviction records, if possible, lacks clarity and requires legal or financial resources which may be out of reach for certain individuals.

Criminal charges and release conditions can also negatively impact the accused person's housing, income security, employment, education, social and familial ties and mental and physical well-being, among other things. As stated in the *McCuaig Report*:

> If a charge is laid and then stayed because of a lack of evidence, an accused may be exposed to all the negative consequences of being charged – publicity, employment problems, border crossing problems, child access problems if a family violence charge – when he arguably should not have been charged at all. This is particularly so in cases of sexual misconduct, where no amount of explanation after a stay can undo the damage to an accused's reputation.[108]

b. Indirect impact of laying a charge

Pre-charge screening generally requires most, if not all, disclosure to be prepared prior to the charge being laid. Without any such requirement in a post-charge screening system, the process of preparing disclosure after the charge is laid can often take weeks or months.

During this time, an accused person will have to appear in court at administrative set dates or pay to retain a lawyer to appear instead. If the accused person retains a

---

[106] John Howard Society, "On the Record: An Information Guide for People Impacted by Non-Conviction Police Records in Ontario" (2014) at p. 6

[107] *John Howard Society, "On the Record: An Information Guide for People Impacted by Non-Conviction Police Records in Ontario"* (2014) at p. 6

[108] Gary McCuaig, *British Columbia Charge Assessment Review (May 2012)*, Schedule 11 to D. Geoffrey Cowper, *A Criminal Justice System for the 21st Century: Final Report to the Minister of Justice and Attorney General Honourable Shirley Bond* (Victoria, B.C.: Minister of Justice, 2012), at pp. 29-30

lawyer, they will be paying for the lawyer's time spent reviewing disclosure, requesting further disclosure, and working on the case. In a situation where the charge is later withdrawn because a prosecutor has finally screened the charge and decided that there is insufficient evidence to meet the evidentiary threshold or that the charge is not in the public interest, all of that time and money is wasted.

A criminal charge often also comes with restrictions on the accused person's liberty because of pre-trial detention or release conditions. These restrictions can impair the accused person's ability to work and access family and friends. If the accused person is denied bail and is incarcerated pre-trial, this increases the risk of a false guilty plea solely for the purpose of getting out of jail. An accused person may agree to plead guilty to time served rather than take classes or community service for several weeks as part of a diversion program. Many accused persons, if unrepresented, will not understand the adverse impact of having a criminal record.

Therefore, considering both the direct and indirect consequences of laying a charge, pre-charge screening is preferable to post-charge screening because it would avoid all these negative consequences for charges which would ultimately be withdrawn.

c. Early screening reduces tunnel vision and charge inertia

The inertia of a charge being laid should not be underestimated. There can be a tendency for prosecutors in a post-charge screening system to allow an unfit charge to continue in the system because not all the disclosure has been prepared. This causes harm to the accused person because the prosecution cannot do its charge screening function adequately, and the accused person cannot prepare full answer and defence.

Having full disclosure ready and having a prosecutor screen the charge at the very beginning of the process better aligns with the presumption of innocence because it ensures that only those charges which have sufficient evidence for a successful prosecution are laid, while those that do not are kept out of the system.

This also ensures against any "charge first, investigate second" strategy, where a charge is laid with insufficient evidence on the hunch that further investigation may uncover evidence, retroactively justifying the charge. This kind of tactic is contrary to the presumption of innocence.

d. Reducing overcharging

Overcharging refers to the practice of laying multiple charges in a single case, even though there is little chance that all these charges will result in a conviction. In the *Racial Disparity in Arrests and Charges* report commissioned by the Ontario Human Rights Commission, the authors found that about one out of every two charges (53.8%) per arrest leads to a non-conviction.[109] This finding is consistent with the argument that the police may engage in "over-charging". The report suggested potential reasons for overcharging:

> Over-charging may make it easier for the police to justify pre-trial detention or pre-trial conditions. Over-charging may also assist the Crown when it comes to plea bargaining (i.e., civilians may agree to plead guilty to some charges if others are dropped).[110]

Similarly, when asked about the high percentage of charges withdrawn in Ontario, Professor Kent Roach stated, "I would suggest that overcharging by the police is likely a factor … Police will often lay multiple charges, and this may influence decisions to deny bail and perhaps plea bargaining."[111]

Charge screening requires a prosecutor to justify each charge by examining whether there is sufficient evidence for the charge to meet the evidentiary threshold, and by asking whether it is in the public interest to prosecute the charge. While the task is the same in both pre-charge and post-charge screening models, pre-charge screening has the advantage of ensuring the earliest possible review of all the evidence. If over-charges are screened out at the outset, the accused person would not experience the negative consequences of overcharging, such as stricter pre-trial restrictions or increased pressure to plead guilty, potentially leading to false guilty pleas.

e. Impact of pre-charge delay

On the other hand, pre-charge delay has an impact on the accused person because they may not understand the difference between being charged vs. being arrested. The individual may incorrectly believe a charge has been laid. Being arrested and released may affect their social relationships, cause personal distress and reputational damage, and there are calls for the need for legal assistance at this stage as well.

---

[109] Scot Wortley and Maria Jung, "Racial Disparity in Arrests and Charges: An analysis of arrest and charge data from the Toronto Police Service" (2020) at p. 82 [*Racial Disparity in Arrests and Charges*]
[110] *Racial Disparity in Arrests and Charges* at p. 82
[111] David Reevely, "Reevely: Ontario's freakishly high rate of dropped criminal charges makes our jail overcrowding worse", (June 7, 2016) Ottawa Citizen

That being said, during the pre-charge delay period, the individual does not experience prolonged detention, the impact of an outstanding charge on criminal record checks, the requirement to make court appearances, and the pressure to plead guilty in the face of criminal charges. Further, pre-charge delay likely has little effect on an accused person in cases that do not involve an arrest.

Nevertheless, it is desirable that pre-charge delay be minimized. A switch to a pre-charge screening model should not involve simply transferring inefficiencies to the period before the charge is laid.

Pre-charge screening has less deleterious impacts on presumptively innocent accused persons. Pre-charge screening can avoid the situation in which an accused person experiences the negative direct and indirect impacts of a charge laid against them, only for the charge to later be withdrawn. Pre-charge screening reduces low-quality charges and charges which are not in the public interest from ever being laid. Ensuring that this screening happens before an accused person suffers the negative impacts of a criminal charge better accords with the presumption of innocence.

f. Overrepresentation of Black, Indigenous, racialized, and marginalized individuals

A related issue is whether the timing of charge screening has any impact on the overrepresentation of Black, Indigenous, racialized, or otherwise marginalized individuals as accused persons in the criminal justice system. While the reasons described above favouring pre-charge screening remain valid regardless of the race of an accused person, certain features become particularly salient when examining the impact of the timing of charge screening on overrepresentation and systemic discrimination.

Pre-charge screening, of course, is not a panacea. The underlying contributing forces leading to overrepresentation of Black, Indigenous, racialized, and marginalized groups in the criminal justice system will not be fixed by the timing of charge screening. As one of the police respondents noted in their response to Question 11 of the Survey (See Appendix E):

> “Systemic racism exists throughout the criminal justice system, from interactions with police to sentencing and parole. Additional statistical and empirical data is required to understand how screening practices are impacted by implied bias and/or systemic racism.”

Nevertheless, because pre-charge screening would reduce the overall number of charges entering the system, charges involving these groups, perforce, would also be reduced, which would be a benefit.

There are three reasons why pre-charge screening may assist in combatting systemic overrepresentation of these groups.

First, pre-charge screening may somewhat reduce racial disparity in charging:

In July 2020, the OHRC commissioned a report called "Racial Disparity in Arrests and Charges". The report examined how race and gender affect police discretion in arresting and charging people, using arrest and charge data collected by the Toronto Police Service from 2013-2017. The researchers focused on 9 categories of relatively less serious offences which "are more likely to be impacted by either police surveillance practices or police discretion."[112] For example, a simple drug possession charge, or an "out-of-sight" driving offence might reflect police surveillance practices and police discretion on whether to lay a charge or let the person off with a caution.[113]

The report made several findings, including the following:

- Black people are "grossly over-represented" in the 9 charge categories by police.[114] By comparison, Indigenous people are slightly overrepresented in these charges and "Brown" and "Asian" categories were underrepresented compared to their presence in the general population.[115]
- Race had a "small but statistically significant impact on case dispositions". Sixty percent of all charges examined ended in non-conviction. However, cases involving white suspects were slightly more likely to end in conviction (22.4%, compared to 18.1% for Black, 18.3% for other racial minority suspects). The report noted that this is consistent with the suggestion that Black people are more likely than white people to face low-quality charges.[116]
- "The over-representation of Black people in both conviction and non-conviction charges reflects the fact that Black people are much more likely to be charged to begin with. Nonetheless, the data also indicates that Black people are four times

[112] *Racial Disparity in Arrests and Charges* at p. 11. These categories were: (a) driving offences (e.g., driving without a license or insurance, etc.) (b) drug possession, (c) resisting arrest, utter threat (d) loitering, (e) causing a disturbance or disturbing the peace, (f) trespassing, (g) failure to comply with undertaking or recognizance.
[113] *Racial Disparity in Arrests and Charges* at p. 11
[114] *Racial Disparity in Arrests and Charges* at pp. 15, 35
[115] *Racial Disparity in Arrests and Charges* at p. 13
[116] *Racial Disparity in Arrests and Charges* at p. 73

> more likely than White people to face charges that will ultimately be withdrawn or dismissed and result in a non-conviction."[117]

The effect that charge screening can have in mitigating overrepresentation comes from the unique institutional position of the Crown. The standard to lay a charge is having "reasonable grounds to believe" an offence was committed. Even the lowest Crown evidentiary threshold – "reasonable prospect of conviction" – is a much higher standard. As such, the screening prosecutor is required to examine the evidence with scrutiny, legal expertise, and careful deliberation. Furthermore, as part of its charge screening function, the Crown is also required to determine whether it is in the public interest that the charge be initiated or continued, as the case may be. This unique function and position of the Crown is where the benefit of screening can be derived, not from a lack of Crown biases.

The benefit of pre-charge screening is that low-quality charges failing to meet the evidentiary threshold will be immediately screened out. In a post-charge screening model, the accused person may experience negative personal, social, financial, and other consequences even if the charge should never have been laid.

Second, pre-charge screening may reduce overcharging in a given case.

The issue of overcharging may be compounded by racial disparity, particularly for Black individuals. Previous research has identified police overcharging Black individuals compared to white individuals.[118] In Ontario, the *Racial Disparity in Arrests and Charges* report found that "Black individuals face a higher number of charges per arrest than their White counterparts" and that "the level of Black over-representation increases with the number of charges per arrest."[119] For example:

> Black persons represented only 8.8% of the general population, but 28.8% of arrests involving a single charge, 30.5% of arrests involving two to five charges, 33.8% of arrests involving six to nine charges, and 38.9% of arrests involving 10 or more charges.[120]

These additional charges increase the likelihood of bail being denied and "increase the likelihood of pre-trial release conditions, impact plea bargaining decisions and contribute

[117] *Racial Disparity in Arrests and Charges* at p. 78
[118] Commission on System Racism in the Ontario Criminal Justice System, "Report of the Commission on Systemic Racism in the Ontario Criminal Justice System" (1995) at pp. 182-185
[119] *Racial Disparity in Arrests and Charges* at p. 33
[120] *Racial Disparity in Arrests and Charges* at p. 33

to the criminalization of the Black community through the creation of non-conviction police records."[121]

Third, prosecutors can (and sometimes must) consider public interest factors that the police do not consider.

Every prosecutor must consider both whether the evidence is sufficient to meet the evidentiary threshold, and whether the continuation of the prosecution is in the public interest. The public interest component can consider factors related to overrepresentation and systemic discrimination.

For example, in British Columbia's pre-charge screening model, prosecutors are explicitly directed in the Charge Assessment Guidelines to consider the following as part of their public interest analysis:

- the need to reduce overrepresentation of Indigenous persons as accused persons within the criminal justice system, particularly where *R. v. Gladue* factors have played a part in the Indigenous person's coming into contact with the criminal justice system;
- whether bias, racism, or systemic discrimination played a part in the accused person coming into contact with the criminal justice system, with particular attention to the circumstances of Indigenous accused persons; and,
- whether the public interest can be served without a prosecution by the BC Prosecution Service, including through restorative justice methods, alternative measures, Indigenous community justice practices, administrative or civil processes, or a prosecution by another prosecuting authority.[122]

6. Resources

a. Police

The majority of police representatives emphasized that the resources required for a functional pre-charge screening model is one of the principal reasons for rejecting its adoption. This view was consistently reflected across the survey data, consultations with police representatives, and the written submission from the OACP.

[121] *Racial Disparity in Arrests and Charges* at pp. 32-33
[122] British Columbia Charge Assessment Guidelines p. 4

Resource intensive for front-line police officers

Police representatives stressed the need for policy consideration of the resource implications at the front-end of the pre-charge screening process. A significant concern is the responsibility of police officers to have the complete disclosure package prepared for the accused person's first appearance. This requirement places an onerous burden on police officers upfront that will foreseeably constitute a marked strain on resources. Readying the disclosure package is labour intensive and would impinge upon the rotational shiftwork of police units.[123] Importing this responsibility to the forefront of the charge-laying process would precipitate inefficiencies, especially in smaller jurisdictions where resources are scarce and there are fewer personnel.

There is a risk of exhausting resources further if there is delay between the arrest and obtaining Crown approval. Front-line officers would require additional resources to locate, arrest, and lay the charges because there would be a corresponding increase in the "number of interactions between the accused person and the police".[124]

Insufficient data to conclude that pre-charge screening will create efficiencies

Police representatives submitted that there is no reliable evidence that pre-charge screening models are more efficient with respect to resource allocation. The data that supports the proposition is insufficient.

Police representatives indicate that recent statistics that appear favourable to pre-charge screening jurisdictions are skewed due to the COVID-19 pandemic and its unique impact on court operations within each province. Further, they indicate that the statistical disparities between BC and Ontario are subject to numerous external factors that are wholly unrelated to charge screening. The statistics from pre-charge screening jurisdictions also "fail to account for the additional resources and delay occasioned in circumstances where the police appeal the Crown's screening decision."[125]

b. Prosecution Services

The prosecution services' comments relating to the resource implications of pre-charge screening were varied. Some Crown representatives supported the proposition that pre-charge screening is resource neutral for the police. On the other hand, other Crown representatives echoed the concerns of the police: there is the potential looming cost-

[123] OACP consultation, see written submissions at Appendix H.
[124] OACP Written submission at p. 4, at Appendix H.
[125] OACP Written submission at p. 4, at Appendix H.

benefit risk that, in order for the pre-charge screening process to operate smoothly, the result may be an inordinate strain on resources at the front end and during the transition from post-charge to pre-charge screening.

The potential for saving resources

Some prosecution service representatives were of the view that a pre-charge screening model may save judicial resources by filtering out cases with weak evidentiary merit before they reach the court. Freeing up the system from the non-viable cases would consequently allow for more meaningful resource allocation to other matters in the justice system.

The Newfoundland prosecution service representative also supported the hypothesis that shifting to pre-charge screening would be resource neutral for the police because the default expectation in that province is for disclosure to be complete before laying the charge. However, this view was not the consensus. The Nova Scotia Crown representative speculated that the volume of resources necessary to operationalize pre-charge screening would not result in any net gains, even if offset by potential resources saved from screening out non-viable cases.

Resource intensive at the front-end for prosecutors

The pre-charge model demands that prosecution services be sufficiently staffed with experienced counsel who have the expertise to screen charges in a consistent and timely manner. Equipping Crown offices with screening prosecutors, who would potentially need to be available to police on a 24-hour basis, would not be resource neutral.

Transitionary period

Some prosecution service representatives voiced the concern that the structural transition from post-charge to pre-charge screening would require a mass influx of resources to meet the demands of the backlogged caseload and guarantee the system's success. The rollout of pre-charge policies may be a resource-intensive interim period.[126]

[126] Ontario and Nova Scotia Consultations

c. Defence and Community Groups

Legal Aid funding for pre-charge advice

There were various recommendations that legal aid coverage be extended to involve defence counsel's participation in pre-charge discussions with the Crown or police. The defence bar, Legal Aid British Columbia, the Canadian Muslim Lawyers Association and the Federation of Asian Canadian Lawyers each submitted that funding for legal aid at the pre-charge screening stage would be beneficial for accused persons and the saving of judicial resources. Pre-charge defence counsel should be an important consideration because these discussions can reduce the number of meritless charges in the system through more diversions, which saves resources in the long term.[127] If a pre-charge screening model is adopted, legal aid should not be an afterthought with respect to resource allocation.

Pre-charge screening will redirect resources

Legal Aid Ontario and multiple community groups supported the proposition that pre-charge screening reduces the number of cases entering the justice system that would eventually be withdrawn or stayed due to "determinations of not passing the evidentiary threshold for prosecution or lack of public interest".[128] This practice of removing non-viable cases and reducing unnecessary court appearances would thereby "redirect police, Crown and court resources to meritorious and complex cases" and allow funding for alternative programs.[129]

d. Cost-Savings

A pre-charge screening model would be resource neutral after the rollout stage, with the long-term potential of bolstering justice system efficiencies and thereby saving resources.

The police and Crown would need supplemental resources to transition from post-charge to pre-charge screening. It is anticipated that additional resources would be necessary to maintain the ordinary course of the justice system's operations while simultaneously rolling out new guidelines for screening Crowns, police officers, and staff. A report on the Nova Scotia Public Prosecution Service's pilot initiative, which involved pre-charge screening Youth criminal justice matters, stated that "the program's

[127] FACL written submission at Appendix F; LABC Consultation.
[128] LAO written submission at p. 2 at Appendix I.
[129] Canadian Muslim Lawyers Association written submission at p. 3 at Appendix K; John Howard Society written submission at Appendix F; LAO written submission at p. 10 at Appendix I.

chief costs would be for orientation and training sessions with the crown prosecutors, with additional resources required for record maintenance and occasional technical support".[130] A larger-scale pre-charge screening model would have similar upfront resource demands for police and Crown training during the transition period.

Notwithstanding the need for potential additional resources in moving from post-charge to pre-charge screening, pre-charge screening would be, at the very least, resource neutral. The premise for this assertion is twofold: first, Crown prosecutors would not be performing any additional work. They would effectively be screening the same charges that would eventually have to be screened in a post-charge model. Second, the police would still be preparing the disclosure package for every charge, and there would be less follow-up investigative work because a high volume of charges would be diverted immediately. Thus, the Crown and police would effectively be performing the same functions as they would in a post-charge system. The only practical difference would be that the screening is carried out at the front end instead of being delayed to a later stage in the prosecution.

Pre-charge screening could also serve as a springboard for saving the court's time and resources. After the rollout is fully realized, there would be a commensurate reduction in stayed and withdrawn charges, allowing for resources to be accordingly diverted to meritorious cases and serious offences. As the Honourable James Stribopoulos has observed, "pre-charge screening is a really effective way of ferreting out meritless cases early in the process and also noticing deficiencies in cases early on in the process, which translates into tremendous savings in terms of resources."[131]

Moreover, the potential for preserving resources is supported by the data outlined in the Discussion Deck: see Appendix "D". Post-charge screening jurisdictions had a 21% higher average of withdrawn/stayed cases between 2017 and 2020. Removing these non-meritorious cases at the front end could significantly bolster the efficient use of time and resources.

D. Crown Evidentiary Thresholds

As indicated above, the applicable evidentiary thresholds vary across the country (Appendix C: Provincial Charge Screening Policies) and are as follows:

- *Substantial likelihood of conviction* – British Columbia

[130] Don Clairmont, "Crown Cautions and Pre-charge Screening in Nova Scotia: An Evaluation of Pilot Projects in Youth Justice", (2002) at p. 97
[131] Christopher Williams, "Crowns or Cops?: An Examination of Criminal Charging Powers in Canada", (2017) at p. 4

- *Reasonable likelihood of conviction* – Alberta, Manitoba, Newfoundland and Labrador, Prince Edward Island, Saskatchewan
- *Reasonable prospect of conviction* – Ontario, Quebec, New Brunswick,[132] Nova Scotia, Public Prosecution Service of Canada.

Generally, a substantial likelihood of conviction is interpreted to be the highest evidentiary threshold and a reasonable prospect of conviction the lowest, with a reasonable likelihood of conviction falling in between.

From a scan of criminal case law and applicable reports, it does not appear that the impact of the evidentiary threshold applied by a particular prosecution service or the impact of *changing* the evidentiary threshold has been empirically examined.[133] Although changing the evidentiary threshold has been of considerable debate in British Columbia, the impact of changing it has only been analysed anecdotally.[134]

For example, in the *McCuaig Report* from British Columbia*,* police, prosecutors, and judges were asked whether they felt that there would be a difference in the assessment of a case if *reasonable likelihood* of conviction was used as opposed to *substantial likelihood*. Some felt it would make a difference, while others did not. It was surmised that "if there is in fact a practical difference, the cases where there would be a difference in the charging decision would be few."[135]

Similar responses were provided during the consultations. Some justice participants indicated that the differences between the evidentiary thresholds across each province are nominal in practice. While others thought changing to a higher evidentiary threshold would make a difference and reduce the number of cases entering the criminal justice system.

Ultimately, the *McCuaig Report* recommended that the standard of 'substantial likelihood' be retained in British Columbia. The BC Crown representatives consulted for this report also believed it should be retained. In reaching this conclusion, McCuaig

[132] Though purporting to apply a "reasonable prospect of conviction" evidentiary threshold, New Brunswick explicitly requires the prosecutor to conclude that a conviction is more likely than not. This is more in line with the "reasonable likelihood of conviction" evidentiary threshold.
[133] There is no data that can be used to determine what happened to criminal case volume when a province adopted its current evidentiary threshold.
[134] (i) 1987 – Access to Justice: Report of the Justice Reform Committee – Ted Hughes Q.C.; (ii) 1990 – Discretion to Prosecute Inquiry – Stephen Owen Q.C.; (iii) 2010 – Special Prosecutor Review – Stephen Owen Q.C.; (iv) 2011 – The Frank Paul Inquiry – William Davies Q.C.; and (v) 2012 – BC Charge Assessment Review – Gary McCuaig Q.C.
[135] Gary McCuaig, *British Columbia Charge Assessment Review (May 2012)*, Schedule 11 to D. Geoffrey Cowper, *A Criminal Justice System for the 21st Century: Final Report to the Minister of Justice and Attorney General Honourable Shirley Bond* (Victoria, B.C.: Minister of Justice, 2012)

considered that there was no evidence that lowering the standard would bring any tangible benefits. He also considered and suggested the following negative consequences of a change from a "substantial" to a "reasonableness" standard:

- A significant mindset change in all its prosecutors and officials, as all have been working with the 'substantial' standard for almost 30 years;
- Prosecutors may have less confidence in their own decisions, resulting in potential delays in making charge decisions;
- A potential lowering of the evidential bar over time; and,
- A potential reduction in the quality of police investigations/reports, since the bar could be considered as lower, even by a small margin.[136]

It is important to note that these potential negative consequences relate to a contemplated change from a *substantial* to a *reasonableness* threshold. In all other provinces, the change would be the reverse – from a *reasonableness* to a *substantial* standard. Therefore, the concerns regarding a potential **lowering** of the evidentiary bar or reduction in the quality of police investigations would not apply. Indeed, the opposite effect could be anticipated, such as the potential for better-quality investigations in some cases. Moving from a lower to a higher threshold could also encourage the police to exercise their discretion to charge differently, as they are aware that prosecutors have a higher threshold to consider.

Despite Ontario and Nova Scotia using a notionally lower evidentiary threshold (the "reasonable prospect" of conviction threshold), than Saskatchewan, which applies a "reasonable likelihood" threshold, overall Ontario and Nova Scotia withdraw or stay cases at a higher rate.[137] However, the rate of withdrawn/stayed cases appears to vary based on the type of offence. For example, Ontario, Nova Scotia and Saskatchewan withdraw/stay common assault and impaired cases at a similar rate. In the case of sexual assault and theft, Ontario and Saskatchewan withdrawal/stay at a higher rate than Nova Scotia. It is notable that Saskatchewan, with the perceived higher evidentiary threshold, does not withdraw/stay at the highest rate in any of the examples.[138] These provinces are post-charge screening jurisdictions.

---

[136] Gary McCuaig, *British Columbia Charge Assessment Review (May 2012)*, Schedule 11 to D. Geoffrey Cowper, *A Criminal Justice System for the 21st Century: Final Report to the Minister of Justice and Attorney General Honourable Shirley Bond* (Victoria, B.C.: Minister of Justice, 2012), p. 14

[137] Appendix D Discussion Deck slide 15

[138] Appendix D Discussion Deck slides 18-24

Given that, in some instances, the rate of withdrawal/stay is close to 50%, it is difficult to conclude with any certainty that cases in the system in Ontario or Nova Scotia would be further reduced by adopting a higher evidentiary threshold.

When comparing pre-charge screening jurisdictions, British Columbia (where the "substantial likelihood of conviction" test is applied) withdraws/stays cases at a higher rate than Quebec and New Brunswick, which apply the "reasonable prospect of conviction" test. This is consistent across offence types.[139] The data in comparing these three provinces is consistent with the survey results, where 96% of respondents rated "substantial likelihood" as the highest standard and the one that would screen out the most cases from the criminal justice system.

There was no agreement amongst the justice system participants on whether prosecution services that employ a lower evidentiary threshold should adopt a higher threshold or if evidentiary thresholds should be clarified. However, there was agreement that prosecutors and police would benefit from regular training and education on the application of the evidentiary threshold employed in their province. It was indicated that this is particularly important for junior Crowns and new police hires. For prosecution services, it is imperative not only to mandate education on the evidentiary threshold but also on the application of public interest factors. For police, education should ensure that there is an understanding of what is necessary for a successful prosecution and that the police are a necessary part of making that happen.

RECOMMENDATIONS

A. Charge Screening Practices

Recommendation 1: Consider Implementing a Crown-Police Pre-Charge Consultation Process

The jurisdictions that presently do not have a pre-charge screening system should give serious consideration to implementing a Crown-Police pre-charge consultation process when it is feasible to do so. The jurisdictions considering implementing this process should consider the following:

a. **The pre-charge consultation process should provide that, unless it is impractical to do so, or contrary to the public interest or the safety of the public, the police should consult with and obtain the advice of the prosecutor before laying a charge.**

[139] Appendix D Discussion Deck slides 15, 18-24

b. The prosecutor should review the proposed charge by applying the applicable Crown screening evidentiary threshold and by indicating whether it would be in the public interest to lay the charge.
c. The pre-charge consultation process should provide for a review procedure in the event that the police disagree with the advice of the prosecutor, after which the police would be free to lay the charge.
d. The *design and implementation* of the pre-charge consultation process should be a joint police and Crown responsibility.
e. The *pace* at which the pre-charge consultation process is implemented should be agreed upon by the police and the Crown.
f. The *scope* of the pre-charge consultation process (*i.e.,* which class of charges should be subject to the pre-charge consultation process) should be agreed upon by the police and the Crown.
g. The *pace and scope* of the pre-charge consultation process should take into account police and Crown resource and logistical issues and should have due regard for public safety.

Commentary on Recommendation 1:

This recommendation emphasizes that the police and the Crown need to work cooperatively in designing and implementing a pre-charge Crown-Police consultation process. It also recognizes that the ultimate pre-charge consultation process may have different elements from province to province. For example, one province may elect to *exempt* certain low-level offences from the requirement of pre-charge consultation, while another province may require pre-charge consultation for every offence.

The recommendation also takes into account the fact that different provinces may have different resource challenges and priorities. As the Supreme Court of Canada pointed out in *Regan*, under the administration of justice power, it is open to the provinces to apply federal criminal law in a manner that best suits the particular needs of each province.[140]

This recommendation is based on the following considerations:

1. Time to Trial: Section 11(b) of the *Charter of Rights and Freedoms*

The 11(b) clock starts running from the time that charges are laid. Time spent by the police in their investigation prior to the laying of charges does not count against the

[140] *R. v. Regan*, 2002 SCC 12, para. 71

Crown in the 11(b) calculation (although it may be relevant to an allegation of abuse of process).

Similarly, if the police and the Crown identify areas requiring further investigation prior to the laying of charges, that additional time also will not be considered in the 11(b) calculation.

The 11(b) issues addressed by the Supreme Court of Canada in the *Jordan* decision back in 2016 still present significant challenges to the justice system in Canada some seven years later. This was a consistent observation of many of the justice participants consulted for this report, including Crowns and police respondents. *Pre-charge screening obviates many of the 11(b) issues that can often arise out of the investigation and prosecution of offences.*

2. Proactive Elimination of Non-Viable Charges

Early screening of proposed charges arising out of police investigations will ensure that appropriate charges are laid prior to a case entering the justice system. As outlined in the Discussion Deck (see Appendix D), the case data collected by Statistics Canada demonstrates that pre-charge screening can have a significant impact on the number of charges that are withdrawn or stayed by the Crown.

These more recent Statistics Canada figures confirm the observation made back in 2016 in the Macdonald-Laurier Institute Report, *Report Card on the Criminal Justice System: Evaluating Canada's Justice Deficit:*

> ... [W]hether Crown prosecutors have to approve criminal charges, or whether the police can simply lay them on their own, can have a major impact on the proportion of charges subsequently stayed or withdrawn.[141]

Charges that must be withdrawn because of lack of evidence, over-charging, or diversion are an unnecessary burden on valuable justice system resources. Such instances of needless churning also contribute to the overall 11(b) delay. Jurisdictions employing pre-charge screening have a more positive impact on this important metric than post-charge screening jurisdictions.

Of course, there may be other factors that contribute to the withdrawal or staying of charges after they are laid. Nevertheless, there can be no denying that pre-charge

[141] Benjamin Perrin and Richard Audas, Macdonald-Laurier Institute Report, *Report Card on the Criminal Justice System: Evaluating Canada's Justice Deficit*, September 2016, p. 9

screening can have a very positive effect on this important metric. Professor Steven Penney made the following comments on this issue:

> Stays and withdrawals are less common in pre-charge screening jurisdictions, likely because cases destined for dismissal are discontinued at an earlier stage than in post-charge screening provinces…[I]n post-charge jurisdictions such charges often linger for many months before they are stayed or withdrawn. Regrettably, such delays waste scarce resources and disrupt the lives of presumptively innocent people.[142]

In *Regan*, the Supreme Court of Canada also recognized the positive impact that the Crown's participation in pre-charge screening can have on the administration of justice:

> The extensive record of discussion between witnesses, police and Crown ... here shows that, in some cases where police failed to assuage the concerns of some complainants, Crown counsel were successful. **The interests of justice are not only served by screening out fruitless complaints but also served by encouraging proper charges to go forward, and by signaling to the larger society that complainants can bring sexual assault charges to the courts without further undue trauma, and that where charges are properly laid, they will be prosecuted.** [143] [Emphasis added]

Significantly, the majority of justice system participants consulted for this report, including both prosecutors and police, agreed that pre-charge screening reduces the number of cases entering the justice system.

3. A More Efficient Justice System

In 2017, the Final Report of the Senate Standing Committee on Legal and Constitutional Affairs, entitled *An Urgent Need to Address Lengthy Court Delays in Canada*, [Senate Committee] noted the disparity in guilty findings between pre-charge screening jurisdictions and post-charge screening jurisdictions:

> Currently in Canada, pre-charge screening systems are in place in New Brunswick, Québec, and British Columbia. Statistics Canada notes that these provinces have some of the highest rates of guilty findings as compared to not guilty findings. In 2014/2015, the rate of guilty findings was 77 percent in New

[142] *Criminal Procedure in Canada, 3rd Ed.*, Steven Penney, Vincenzo (Enzo) Rondinelli, James Stribopoulos, at para. 8.15
[143] *R. v. Regan,* 2002 SCC 12, at para 86

> Brunswick, 73 percent in Quebec and 72 percent in British Columbia. Ontario, which is not a pre-charge screening jurisdiction, reported the lowest proportion of guilty findings at 54 percent. This significant difference between provinces merits further analysis, though the committee did not hear definitive views on whether these statistics can be interpreted to indicate that a particular province's approach is more efficient. [144]

The Statistics Canada data for the years between 2017 and 2021 show a similar disparity in guilty findings by case between pre-charge and post-charge Crown screening jurisdictions: see Appendix D Discussion Deck.

Notwithstanding that there may be some deficiencies in the Statistics Canada data, given the consistency of this metric over the years (including during the COVID pandemic), the most reasonable interpretation of this data is that pre-charge screening models do a more efficient job than post-charge screening models of screening out non-viable cases that should not be in the system and would not result in guilty findings. Given the ever-increasing pressures on the justice system, it is imperative that the police and the Crown, working collaboratively, make every effort to significantly minimize the number of cases that enter the system, only to be withdrawn at some later point, by which time valuable resources have been wasted. Not to mention the direct and indirect impact that withdrawn charges can have on the accused person.

4. Re-Direction of Valuable Resources

Pre-charge Crown screening eliminates charges that would not have entered the system if they had been screened out prior to being laid. As non-viable prosecutions do not enter the system and more cases can be diverted pre-charge, valuable police, Crown, defence, and judicial resources can be used more productively for serious offences.

The potential for saving resources, however, would need to be reconciled with the costs and reallocation of funding for the model's operation. A functional pre-charge screening regime requires that police and prosecution services have sufficient resources to ensure police and prosecutors are capable of fulfilling their pre-charge duties in a timely manner. For example, the models in Quebec and Winnipeg have prosecutors available to police on a 24-hour basis, whereas Alberta's model has prosecutors available on 12-hour rotations. The decision to replicate one of these existing models or to design a

[144] The Hon. Bob Runciman and The Hon. George Baker, Report of the Standing Senate Committee on Legal and Constitutional Affairs, *Delaying justice is denying justice : an urgent need to address lengthy court delays in Canada*, [Ottawa] 2016, p. 113

novel pre-charge consultation arrangement would be an issue for the proposed Provincial Joint Crown-Police Charge Screening Coordination Committees (see Recommendation 2).

5. Enhanced Cooperation and Communication Between Police and Crowns Results in Better Investigations and Prosecutions

By its very nature, pre-charge Crown-Police consultation encourages greater cooperation and coordination between the police and Crowns. Virtually every study of the relationship between police and Crowns has observed that cooperation between police and Crowns is imperative for a properly functioning justice system.[145] For example, back in 2008, in their *Report of the Review of Large and Complex Criminal Case Procedures,* commissioned by the Ministry of the Attorney General of Ontario, the Honourable Patrick Lesage and Michael Code (as he then was) concluded:

> Police investigative procedures are now the subject of pre-trial motions to determine whether there has been a *Charter* violation, whether evidence will be admitted under the new "principled approach" and whether a statutory process, such as a wiretap authorization or search warrant, has been properly followed. **The police have increasingly turned to Crown counsel for pre-charge legal advice in order to navigate these difficult waters**… **It is simply not feasible in the modern era to expect the police and Crown to work in entirely separate silos, as they once did**. [Emphasis added] [146]

As noted, the Courts have also recognized that police-Crown cooperation is an essential feature of the justice system which does not necessarily detract from the need for the police and prosecutors to remain independent of each other in their respective roles in the administration of justice.

Pre-charge consultation has the significant potential to produce better investigations and stronger prosecutions by front-loading the prosecutor's assessment of the case. Early Crown involvement can assist the police in determining required investigative follow-up, necessary forensic testing, and the most appropriate charge/s to be laid. Increased cooperation and communication between the Crown and the police enhances public confidence in the administration of justice.

---

[145] E.g., *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions* (1993) ("Martin Report"), The Hon. Bob Runciman and The Hon. George Baker, Report of the Standing Senate Committee on Legal and Constitutional Affairs, *Delaying justice is denying justice : an urgent need to address lengthy court delays in Canada*, [Ottawa] 2016, pp. 114-115

[146] Patrick J. Lesage and Michael Code, *Report Of The Review Of Large And Complex Criminal Case Procedures*, Ministry of the Attorney General of Ontario, Toronto, November 2008, p. 25

6. Improved and More Timely Disclosure

One of the most important police duties in every prosecution is to ensure that the Crown has been provided with all relevant aspects of the investigation so that the Crown can fulfill its constitutional duty to provide disclosure to the accused person. The failure of the Crown to make full disclosure in a timely fashion can have a significant effect on the success of a prosecution, resulting in significant delay and, in some cases, the staying of the charges. A requirement that disclosure be substantially ready at the time that charges are laid is an important feature of pre-charge Crown screening models and serves to enhance the quality of the administration of justice. It is important to ensure that police services are given appropriate resources to enable them to provide such timely disclosure. Furthermore, any pre-charge Crown screening model should provide for appropriate exceptions to the need to provide complete disclosure at the time that a charge is laid, for example if it is anticipated that certain evidence is not yet available but will become available withing a reasonable time. (See Recommendation 6 below.)

7. Earlier Consideration of the Public Interest and Minimizing the Impact on and Disruption to Vulnerable Populations

As previously noted, pre-charge Crown screening also has the advantage of enabling the earlier application of public interest considerations as they relate to offenders from marginalized communities.

8. Reducing Miscarriages of Justice

Fifty per cent of Crown respondents to the survey were of the view that pre-charge Crown screening reduced miscarriages of justice; 33% were neutral, while only 17% disagreed. Significantly, a plurality of police respondents (48%) agreed that pre-charge Crown screening reduced miscarriages of justice; 15% were neutral; and 37% disagreed. Of all other respondents to the survey, an overwhelming 90% agreed that pre-charge Crown screening reduced miscarriages of justice; 10% were neutral; and 0% disagreed.

The substantial number of Crown and police respondents who viewed pre-charge Crown screening as a factor that can reduce miscarriages of justice speaks strongly in favour of the pre-charge Crown-Police consultation model.

Implementing the Pre-charge Screening Model

The following recommendations should be considered when implementing a pre-charge screening model:

Recommendation 2: Establish Provincial Joint Crown-Police Charge Consultation Coordination Committees.

The Committees would coordinate the rollout of the pre-charge consultation model in a manner that ensures a consistent, effective, and efficient process across the province. The Committees should ensure that police and Crown resource and logistical issues are taken into account in the design and pace of the rollout and in the scope of the pre-charge consultation model. Each province would have its own Coordination Committee that could tailor the design of the pre-charge consultation model to the individual needs of the province. The Public Prosecution Service of Canada should also have a representative sitting on each provincial Committee.

Commentary on Recommendation 2:

The proposed Committee should be comprised of experienced prosecutors and senior police officers from across the province. Examples of some of the tasks for which the Committee could be responsible include:

- Develop agreed-upon disclosure protocols to ensure timely Crown charge screening assessments.
- Coordinate joint Crown-police education on Crown screening practices.
- Create a review process for resolving any disagreements arising from the Crown screening decision.
- Assess any police and Crown resource impacts and challenges and determine how to address them.
- Set up key performance measures to assess the effectiveness of the process and make recommendations for appropriate adjustments as needed.

Recommendation 3: Creation of a "Safety Valve".

The pre-charge consultation model should ensure that the police can arrest and lay a charge prior to Crown screening if the Crown is unavailable to screen the charge on a timely basis or if the requirement for pre-charge consultation would cause an imminent risk to the safety of the public or a substantial risk that the individual will flee.

Commentary on Recommendation 3:

Virtually all police respondents expressed concerns about the possibility that public safety could be placed at risk if the police do not have the ability in appropriate circumstances to lay a charge prior to Crown screening. This concern is valid and needs to be addressed in any pre-charge consultation model. The proposed exceptions permitting the police to lay a charge if the Crown is unavailable to screen the charge on a timely basis or if the requirement for pre-charge consultation would cause an imminent risk to the safety of the public, appropriately address this concern.

The use of these exceptions should be limited to instances in which the immediate arrest, detention and charging of the accused person is necessary for the safety of the public or for other public interest reasons. This exception will generally not be needed when an accused person is going to be released on their own recognizance or some other non-custodial release.

Jurisdictions that currently employ a pre-charge screening model should assess whether implementing a “safety valve” mechanism would enhance their process to address public safety issues.

Recommendation 4: Create a Review Process

Jurisdictions should set up a review process when police disagree with the Crown charge screening decision. If the police investigator disagrees with the Crown charge screening decision, a process should be available for that decision to be reviewed in a timely way. At the end of the review process, if the police still disagree, the police should be free to lay the charge.

Commentary on Recommendation 4:

A timely review process is essential to ensure that police, victims, and the public have confidence in the integrity of the Crown screening process. Any review process should be mutually agreed upon by the police and the Crown, and the details of the review process should be transparent. If the police disagree with the outcome of the review, the police investigator should be free to lay the charge. Obviously, the Crown will be able to re-screen the case once charges are laid and determine whether the prosecution should proceed. This process ensures that the core independent functions of the police (investigation and law enforcement) and the Crown (prosecuting) are maintained. Ensuring that the police have the ability to lay a charge notwithstanding that the Crown

disagrees bolsters police independence, just as the ability of the Crown to withdraw a charge after it is laid bolsters the independence of the Crown.[147]

It is important to note that all police and Crown representatives who presently operate in a pre-charge screening system indicated that it is extremely rare for the police to lay a charge after an unsuccessful review of the original Crown decision. In these circumstances, it is essential that prosecutors and police should work towards a common understanding about the application of Crown screening standards. Prosecutors should take into account police concerns about how the evidentiary threshold and public interest factors are being considered and assessed. If disagreements between prosecutors and police persist, this would be an area that the provincial or local Crown-Police Committees could discuss and identify solutions.

Best Practices: For Pre- or Post-Charge Screening Jurisdictions

All jurisdictions should consider implementing the following recommendations regardless of the charge consultation/screening practice employed:

Recommendation 5: Establish local Crown-Police Committees

Greater Crown-police cooperation and coordination can be accomplished through local Committees. The local Committees would ensure that local issues are being addressed through regular communication between the Crown and police.

Commentary on Recommendation 5:

The local Committees should be comprised of experienced Crowns and senior police officers. Examples of some of the tasks the Committee could be responsible for include:

- Coordinating joint education sessions on issues that are of local importance.
- Adapting provincial processes to accommodate local needs and recognizing local resource and operational challenges.
- Addressing issues that may be consistently arising in investigations or prosecutions.

Recommendation 6: Disclosure should be substantially complete prior to charges being laid or by no later than the first appearance.

[147] *R. v. Regan*, 2002 SCC 12 at paras 67-68

A complete or substantially complete disclosure package should be provided to the Crown that permits a proper charge screening assessment and allows early disclosure to be provided to an accused person if the charges proceed. A provision should be made for exceptions to this requirement when evidence may not yet be available for disclosure but will become available within a reasonable period of time.

Commentary on Recommendation 6:

Making provision for exceptions to requiring a complete disclosure package at the time of charge screening addresses the reality that certain evidence will not be available at the time that a charge is ready to be laid or soon thereafter. Some examples of disclosure that may take time to obtain include:

- DNA test results
- Other physical forensic testing
- Cell phone analysis
- Forensic accounting
- Other expert witness evidence.

Recommendation 7: Ensuring Transparency

Whenever possible, the prosecutor should advise the police of the reasons why a charge is not being prosecuted.

Commentary on Recommendation 7:

This recommendation addresses the concern expressed by some police respondents that, at times, prosecutors do not adequately communicate the rationale for not approving or withdrawing charges. Direct and comprehensive communication from the Crown to the police is essential to building a relationship of mutual trust and respect. Equally important for the success of the Crown/police relationship is complete transparency in Crown decisions regarding whether to proceed with a prosecution so that the victim can be advised appropriately, irrespective of whether the police or the Crown advises the victim.

Recommendation 8: Increase and Improve Coordination of Pre-Charge Diversion Measures

Prosecutors and police should coordinate and enhance access to appropriate pre-charge diversion/alternative measures programs.

Commentary on Recommendation 8:

To reduce the number of charges entering the justice system, the Crown and police should work together to expand the availability of pre-charge diversion/alternative measures. Pre-charge diversion (as opposed to post-charge diversion) allows for a speedy, efficient, and accountable response to the offending behaviour, without the matter being added to the volume of cases already before the court. Victims receive a rapid resolution of the case, and reparation for harm is addressed in a timely fashion. Court time typically used to address these matters can be used to deal with more serious cases that cannot be diverted from the justice system.

Recommendation 9: Pre-charge Legal Aid funding

Provincial legal aid programs should consider providing funding for legal representation for individuals prior to arrest or charges being laid.

Commentary on Recommendation 9:

In certain circumstances, individuals may benefit from legal representation prior to arrest or charges being laid. This could have a positive effect on the administration of justice by facilitating, where appropriate, more diversions or resolutions without the necessity of charges entering the justice system.

B. Crown Evidentiary Thresholds

Recommendation 10: "Reasonable likelihood of conviction" is the preferred Crown evidentiary threshold

Prosecution services that currently employ a lower evidentiary threshold should consider adopting the higher reasonable likelihood of conviction evidentiary threshold as the primary evidentiary threshold employed by prosecutors.

Commentary on Recommendation 10:

This recommendation is based on the following considerations (see Appendix I: Legal Aid Ontario Written Submissions, pp. 13-16):

1. A standard that incorporates the likelihood of conviction prevents cases from entering the system based on weak evidence, addresses the danger of wrongful convictions, and prevents collateral consequences to presumptively innocent individuals from being unnecessarily charged and thrust into the criminal justice system.
2. The reasonable likelihood of conviction threshold is a middle ground for jurisdictions that employ lower evidentiary thresholds and are concerned about assessing cases that are based entirely on assessments of credibility, such as sexual assaults.
3. The reasonable likelihood of conviction threshold strikes a balance between honouring the presumption of innocence and not forcing presumptively innocent individuals into the criminal justice system on matters unlikely to result in convictions and ensuring that prosecutors are able to proceed with matters for the safety and protection of the public without being required to engage in the very difficult task of overweighing probabilities at the early stages.

Recommendation 11: Provide for a lower evidentiary threshold in exceptional circumstances

Prosecution services may consider employing the lower "reasonable prospect of conviction" Crown evidentiary threshold in exceptional circumstances. Exceptional circumstances might include:

(i) when relevant safety and public interest factors weigh heavily in favour of a prosecution or
(ii) when the accused person presents a substantial bail risk and not all of the evidence is available at the time the charge is presented to the Crown for screening.

Commentary on Recommendation 11:

This recommendation reflects the virtually universal submissions received from Crowns, police, and other respondents that the lowest Crown charge screening threshold should be applied when the nature of the offence or the circumstances of the offender raise significant public safety or public interest concerns. In the case of the unavailability of certain kinds of evidence, the use of the lower standard reflects temporary practical concerns that justify the initial application of a lower threshold.

Best Practice: For All Crown Evidentiary Thresholds

Recommendation 12: Crown Assessment of Public interest factors

Public interest factors should be regularly reviewed and modified, as necessary, taking into consideration issues impacting a community, including public safety and public confidence in the administration of justice. These factors would support a critical review of cases at the charge screening stage on the question of whether it would be in the public interest to proceed with a prosecution.

Commentary on Recommendation 12:

Not all prosecutions that meet a Crown evidentiary threshold will be in the public interest to proceed. The public interest factors give the Crown a wide latitude to assess a case taking into account the particular circumstances of the case and the reasonable public safety concerns of the local community. The latter can change over time and the factors that the Crown considers in its assessment of public interest should reflect the concerns and priorities of a community at any given time.

Recommendation 13: Enhanced Crown and police education and training on charge screening.

Regardless of the charge screening practice or the evidentiary threshold applied, each jurisdiction should implement Crown and police education and training on the application of the Crown evidentiary threshold and public interest considerations. Joint education sessions would ensure that the police and prosecutors have a common understanding of the Crown screening process.

Commentary on Recommendation 13:

A common concern expressed by Crowns and police in both pre-charge and post-charge screening jurisdictions was the need for education and training in the application of the Crown evidentiary threshold. Ideally, each jurisdiction should implement a **joint** program of Crown and police education and training so that there is a common understanding of the correct application of the evidentiary threshold and public interest considerations. A joint program also encourages increased Crown and police direct communication and cooperation.

C. Data Collection

Recommendation 14: Improved Data Collection

Where feasible, regardless of the charge screening practice or Crown evidentiary threshold employed, each province should collect data to better assess the effectiveness of different processes, including charge screening, that would support the ongoing improvement of the administration of justice.

Commentary on Recommendation 14:

Most justice system participants consulted for this report commented on the lack of empirical data that might give a better understanding of the demands being placed on the justice system. Data that reflects these demands would assist in appropriately allocating justice system resources, implementing best practices for the Crown and police, and developing efficient court practices.

APPENDIX A: RELEVANT REPORTS

Law Reform Commission of Canada, Controlling Criminal Prosecutions: *The Attorney General and the Crown Prosecution*, Working Paper 62, 1990

The Martin Committee Report, 1995

Report of the Review of Large and Complex Criminal Case Procedures, The Honourable Patrick J. LeSage and Professor Michael Code, 2008

The Joint Thematic Review of the New Charging Arrangements, United Kingdom November 2008

2012 British Columbia Charge Assessment Review McCuaig Report

Rapport du Comité d'examen sur la gestion des mégaprocès, Présidé par Me Michel Bouchard, Ad. E., 2016

Delaying Justice is Denying Justice: An Urgent Need to Address Lengthy Court Delays in Canada, June 2017

Submission 2020 Pre-Budget Consultations, John Howard Society of Ontario

Name it, Then Change it: Addressing Anti-Black Racism in the Canadian Criminal Justice System, 2020

A Disparate Impact: Second interim report on the inquiry into racial profiling and racial discrimination of Black persons by the Toronto Police Service, August 2020

Framework for Change to address systemic racism in policing, Ontario Human Rights Commission, July 2021

Anti-Black Racism in Canada's Criminal Justice System – CCLA, August 2021

APPENDIX B: RELEVANT CASE LAW

Quebec (Attorney General) v. Lechasseur, [1981] 2 S.C.R. 253

R. v. Kalanj, [1989] 1 S.C.R. 1594

R. v. Regan, [2002] 1 S.C.R. 297

Lacombe c. *André,* 2003 CanLII 47946 (QC CA
R. v. Beaudry, [2007] 1 S.C.R. 190

R. v. Cody, 2017 SCC 31

R. v. Hunt, 2017 SCC 25

R. v. Boima, 2018 BCCA 297, (leave to appeal to the Supreme Court refused, 2019-02-07)

R. v. K.J.M., 2019 SCC 55

Ontario (Attorney General) v. Clark, 2021 SCC 18

APPENDIX C: PROVINCIAL CHARGE SCREENING POLICIES

British Columbia: Charge Assessment Guidelines; Charge Assessment Decision – Police Appeal

Alberta: Decision to prosecute: Alberta Crown Prosecution Service - guideline

Saskatchewan: Proceeding with Charges

Manitoba: Laying and Staying of Charges

Ontario: Charge Screening Directive

Quebec: Decision to commence and continue a prosecution

New Brunswick: Pre-charge Screening

Nova Scotia: Decision to Prosecute

Newfoundland and Labrador: The Decision to Prosecute

Prince Edward Island: The Decision to Prosecute

Public Prosecution Service of Canada (PPSC): Decision to Prosecute

Director of Military Prosecutions: Pre-Charge Screening

APPENDIX D:
DISCUSSION DECK PROVIDED TO JUSTICE PARTICIPANTS

Justice Efficiencies Sub-Committee: Discussion Deck

Crown Evidentiary Thresholds and Charge Screening Practices

October 2022

Confidential

(For Discussion Purposes Only)

Justice Efficiencies Sub-Committee

- The Steering Committee on Justice Efficiencies and Access to the Criminal Justice System is comprised of six Deputy Ministers Responsible for Justice, three representatives from the Canadian Judicial Council, three representatives from the Canadian Council of Chief Judges, one representative from the Canadian Bar Association, one representative from the Barreau du Québec, one representative from the Canadian Council of Criminal Defence Lawyers, and two representatives from the police community, for a total of seventeen members

- The role of the committee is to examine issues related to criminal justice effectiveness and access issues that are systemic, national in scope, and which can significantly affect the justice system. In doing this work, the committee consults with other forums or criminal justice system stakeholders as needed. Some examples include:
  - Report on Disclosure in Criminal Cases 2011
  - Report on Bail Reform 2016
  - Report on Therapeutic Courts in Canada: A Jurisdictional Scan of Mental Health and Drug Treatment Courts 2021

Justice Efficiencies Sub-Committee cont.

- The members of the Justice Efficiencies Sub-Committee are:
  - David Corbett, Deputy Attorney General, Government of Ontario (Chair)
  - Frank Bosscha, Deputy Minister of Justice and Deputy Solicitor General, Government of Alberta
  - Randy Schwartz, Assistant Deputy Attorney General, Criminal Law Division, Government of Ontario
  - Francis Brabant, Conseiller juridique, Sûreté du Québec
  - Lucie Joncas, Private Counsel
  - Bill Trudell, Private Counsel

- **The committee is now set to examine**:
  - the impact and/or benefits of the **Crown screening charges for prosecution at both the pre-charge and post-charge** stages, and considerations related to the *Jordan* (delay) risk, public or victim safety, overrepresentation of Black, Indigenous, racialized or marginalized individuals in the criminal justice system, and pandemic backlog recovery; and
  - the impact and/or benefits of the various **evidentiary standards** employed by each prosecution service; e.g., reasonable prospect of conviction vs. reasonable likelihood of conviction vs. substantial likelihood of conviction

Objectives of Discussion Deck

- The content of the Discussion Deck was prepared solely for discussions purposes and is confidential and should not be distributed further

- The deck provides general information regarding the Crown evidentiary threshold and charge screening practices (pre-charge and post-charge) for the purpose of facilitating discussion and feedback. It does not advocate for one threshold or practice over another; nor does it comment on the funding/resources that may be necessary to support one practice over another

- The deck was put together by the working group of the sub-committee, which includes:
  - Paul Lindsay, co-lead, former Assistant Deputy Attorney General – Criminal Law Division, Ministry of the Attorney General of Ontario
  - Carmen Elmasry, co-lead, Crown Counsel, Criminal Law Division, Ministry of the Attorney General of Ontario
  - Deputy Chief Howard Chow, Vancouver Police Department, British Columbia
  - Inspector Brent Duguay, Sault Ste Marie Police Service, Ontario
  - Francis Brabant, M.O.M., Avocat, Sûreté du Québec, Quebec
  - Eunwoo Lee, Articling Student, Criminal Law Division, Ministry of the Attorney of the Attorney General of Ontario
  - DJ Tokiwa, Articling Student, Criminal Law Division, Ministry of the Attorney General of Ontario
  - Anousheh Showleh, Senior Divisional Coordinator, Ministry of the Attorney General of Ontario

Overview: Evidentiary Thresholds

- The *Criminal* Code standard for laying a charge is a belief, "on reasonable grounds", that a person committed an offence (section 504)
- The *Criminal Code* does not prescribe a standard for the continuation of a prosecution after a charge has been laid

- All prosecution services in Canada engage in **charge screening**. Each prosecution service applies a charge screening standard that involves two components: an evidentiary threshold and a public interest threshold

- The **applicable evidentiary threshold** varies across the country:
  - *Reasonable prospect of conviction* – Ontario, Quebec, New Brunswick, Nova Scotia, Public Prosecution Service of Canada
  - *Reasonable likelihood of conviction* – Alberta, Manitoba, Newfoundland and Labrador, Prince Edward Island, Saskatchewan
  - *Substantial likelihood of conviction* – British Columbia

- Other jurisdictions apply similar evidentiary thresholds while, others apply unique evidentiary thresholds:
  - *"Reasonable belief that charges are supported by probable cause"* – United States
  - *Reasonable prospect of conviction* – New Zealand, Australia
  - *"Full Code Test" and in limited circumstances the "Threshold Test"* – England and Wales

Evidentiary Threshold – Canadian Jurisdictions

Reasonable Prospect of Conviction	Reasonable likelihood of Conviction	Substantial likelihood of Conviction
The reasonable prospect of conviction standard is higher than a prima facie case that merely requires that there is evidence whereby a jury, properly instructed, could convict. On the other hand, the standard does not require a probability of conviction, that is, a conclusion that a conviction is more likely than not. The term reasonable prospect of conviction denotes a middle ground between these two standards. It requires the exercise of prosecutorial judgment and discretion based on objective indicators found in the case itself. Applying the reasonable prospect of conviction standard requires a limited assessment of credibility based on objective factors, an assessment of the admissibility of evidence and a consideration of likely defences. In applying the standard, Prosecutors should consider the following factors: • the availability of evidence • the admissibility of evidence implicating the accused • an assessment of the credibility and competence of witnesses, without taking on the role of the trier of fact • the availability of any evidence supporting any defences that should be known or that have come to the attention of the Prosecutor. * Source: Ontario Prosecution Manual	In the assessment of the evidence, a bare prima facie case is not enough; the evidence must demonstrate that there is a reasonable likelihood of conviction. This decision requires an evaluation of how strong the case is likely to be when presented at trial. This evaluation should be made on the assumption that the trier of fact will act impartially and according to law. The prosecutor is required to find that a conviction is more than technically or theoretically available. The prospect of displacing the presumption of innocence must be real. A proper assessment of the evidence will take into account such matters as the availability, competence and credibility of witnesses and their likely impression on the trier of fact, as well as the admissibility of evidence implicating the accused. Crown Attorneys should also consider any defences that are available to the accused, as well as any other factors that could affect the prospect of a conviction. This would necessarily include consideration of any Charter violations that would lead to the exclusion of evidence essential to sustain a conviction. * Source: Newfoundland and Labrador Prosecution Manual	The general evidentiary test for charge approval is whether there is a substantial likelihood of conviction. The reference to "likelihood" requires, at a minimum, that a conviction according to law is more likely than an acquittal. In this context, "substantial" refers not only to the probability of conviction but also to the objective strength or solidity of the evidence. A substantial likelihood of conviction exists if Crown Counsel is satisfied there is a strong and solid case of substance to present to the court. In determining whether this test is satisfied, Crown Counsel must consider the following factors: • what material evidence is likely to be admissible and available at a trial • the objective reliability of the admissible evidence • whether there are viable defences, or other legal or constitutional impediments to the prosecution, that remove any substantial likelihood of a conviction. In assessing the evidence, Crown Counsel should assume that the trial will unfold before an impartial and unbiased judge or jury acting in accordance with the law and should not usurp the role of the judge or jury by substituting their own subjective view of the ultimate weight or credibility of evidence for those of the judge or jury. * Source: British Columbia Prosecution Manual

Evidentiary Threshold – Other Jurisdictions

United States, generally	Australia, Federal Prosecution Service	England/Wales
Standard 3-4.3 Minimum Requirements for Filing and Maintaining Criminal Charges a) A prosecutor should seek or file criminal charges only if the prosecutor reasonably believes that the charges are supported by probable cause, that admissible evidence will be sufficient to support conviction beyond a reasonable doubt, and that the decision to charge is in the interests of justice. b) After criminal charges are filed, a prosecutor should maintain them only if the prosecutor continues to reasonably believe that probable cause exists and that admissible evidence will be sufficient to support conviction beyond a reasonable doubt. c) If a prosecutor has significant doubt about the guilt of the accused or the quality, truthfulness, or sufficiency of the evidence in any criminal case assigned to the prosecutor, the prosecutor should disclose those doubts to supervisory staff. The prosecutor's office should then determine whether it is appropriate to proceed with the case. d) A prosecutor's office should not file or maintain charges if it believes the defendant is innocent, no matter what the state of the evidence. *Source: Standards for the Prosecution Function (americanbar.org)	1. Once it is established that there is a prima facie case, it is then necessary to give consideration to the prospects of conviction. **A prosecution should not proceed if there is no reasonable prospect of a conviction being secured**. In indictable matters, this test presupposes that the jury will act in an impartial manner in accordance with its instructions. This test will not be satisfied if it is considered to be clearly more likely than not that an acquittal will result. 2. Having satisfied himself or herself that the evidence is sufficient to justify the institution or continuation of a prosecution, **the prosecutor must then consider whether, in the light of the provable facts and the whole of the surrounding circumstances, the public interest requires a prosecution to be pursued.** It is not the rule that all offences brought to the attention of the authorities must be prosecuted. *Source: Prosecution Policy of the Commonwealth as updated 19 July 2021	The **"Full Code Test":** Realistic prospect of conviction + public interest. • Realistic prospect means "an objective, impartial and reasonable jury, bench of magistrates or a judge hearing a case alone, properly directed and acting in accordance with the law, is **more likely than not** to convict the defendant of the charge alleged" In limited circumstances, the prosecutor can apply the "**Threshold Test**": 1. Reasonable grounds to suspect the person has committed the offence 2. Further evidence can be obtained to provide a realistic prospect of conviction (within a reasonable period of time). The likely further evidence must be identifiable, not speculative. 3. The seriousness/ circumstances of the case justify an immediate charging decision. 4. There are continuing substantial grounds to object to bail; and 5. Public interest. *Source: The Code for Crown Prosecutors | The Crown Prosecution Service (cps.gov.uk)

Overview: Post-charge and Pre-charge Screening

- All criminal cases in Canada are screened by the relevant prosecution service. The most significant difference is **at what stage** the screening of the case takes place which varies across Canada:
  - *Pre-charge (prior to the laying of charges)* – British Columbia, Quebec, New Brunswick, Alberta with cases from the RCMP, Manitoba
  - *Post-charge (after charges are laid)* – Ontario, Saskatchewan, Nova Scotia, Newfoundland and Labrador, Prince Edward Island

- Prosecution services in other jurisdictions also screen criminal cases at varying stages of the process:
  - United Kingdom - *The Prosecutor reviews all cases prior to first appearance. In some instances it is after the police have laid the charge and in other cases it is prior to the charges being laid*
  - Unites States - *Prosecutors decide whether to file formal charges*

Post-charge and Pre-charge Screening Process – Other Jurisdictions

United Kingdom	United States

POLICE CHARGES
• Police have authority to lay charges on limited, less serious, offences. For example any summary only offence or retail theft
• Police would consider the charge screening test
• The Prosecutor reviews all police-charged cases prior to first appearance. If the Prosecutor finds the charge does not meet the screening test, the Prosecutor must make inquiries with police to determine whether there is other material which would satisfy the test. If not, the prosecution should be discontinued.
 	
PROSECUTOR CHARGES
• In all other cases, the police must refer the case to a Prosecutor. If there are several charges, one of which must be referred, all related offences must be referred. Police should only refer if they think the screening test is met. Police send a request for a charging decision to the Prosecutor, setting out required material/information.
 	
• The Prosecutor decides whether to lay a charge when:
  • all outstanding reasonable lines of inquiry have been pursued; or
  • prior to the investigation being completed, if the prosecutor is satisfied that any further evidence or material is unlikely to affect the application of the Full Code Test, whether in favour of or against a prosecution.
 	
• The Prosecutor would make a decision under the charge screening test. Police can appeal the decision of the Prosecutor.
 	
• In emergencies, when the Prosecutor's authority cannot be obtained, the police can charge an offence that would normally be referred to a Prosecutor, subject to certain conditions.
 	
*Charging (The Director's Guidance) - sixth edition, December 2020 | The Crown Prosecution Service (cps.gov.uk)
	• Police officers arrest suspects, but prosecutors decide whether to file formal charges. Police officers usually make arrests based only on whether they have good reason (probable cause) to believe a crime has been committed.
	
	• Criminal charges are brought against a person in one of three ways:
	  1. Through an indictment voted by a grand jury
	  2. Through the filing of an information by the prosecuting attorney (also called the county, district, or state's attorney) alleging that a crime was committed. Sometimes charges are pressed through the filing of a criminal complaint by another individual, which is essentially a petition to the district attorney asking him/her to initiate charges
	  3. Through a citation by a police officer for minor traffic offenses and the like. This procedure is usually used for certain petty misdemeanors and other minor criminal matters
	
	Criminal Law Handbook, Bergman & Bergman

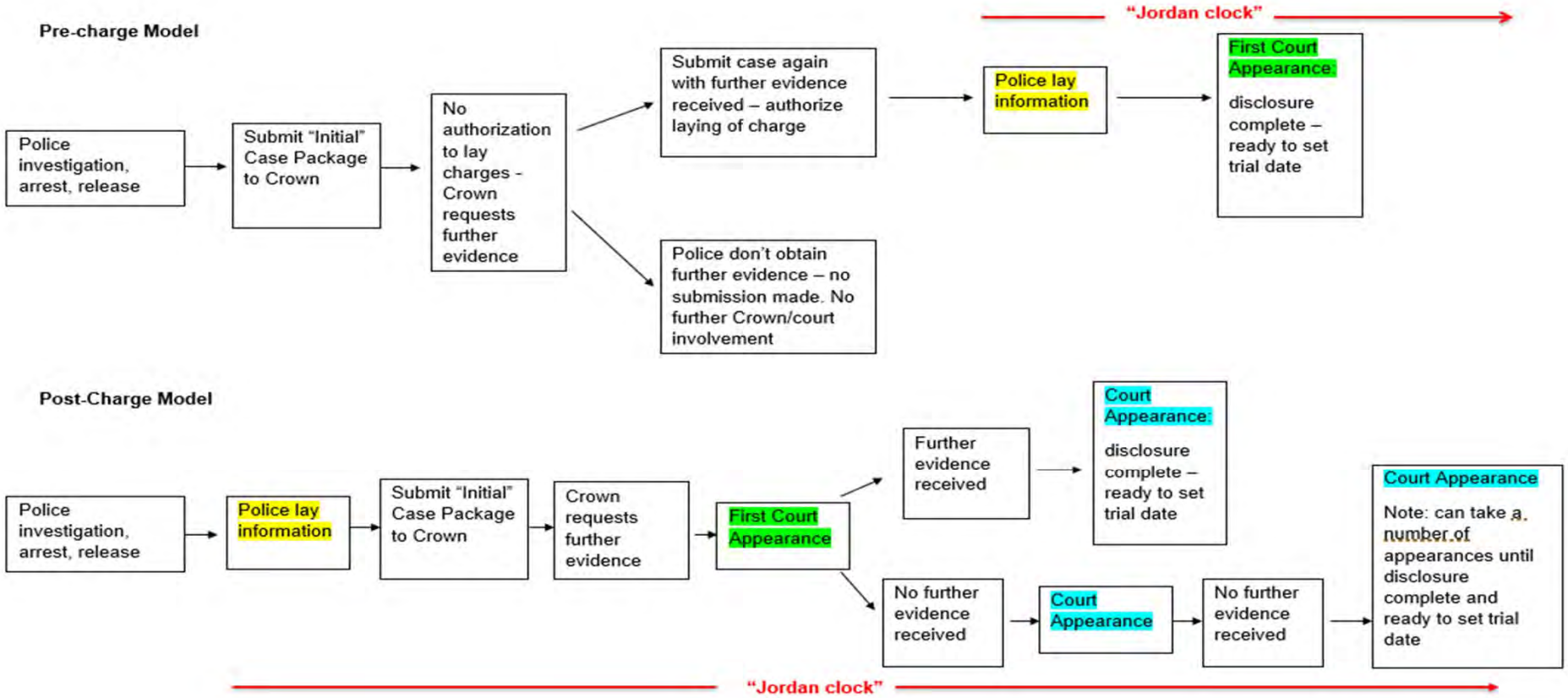
Post-charge vs Pre-charge Screening Process – Canadian Jurisdictions

Post-Charge Screening	Pre-charge Approval
• Police lay charges on a standard of reasonable grounds. Only after charges are laid does the Crown determine whether to proceed with the prosecution by applying the higher Crown standard (*e.g.,* reasonable prospect of conviction) and considering if it is in the public interest to proceed with the prosecution • Police are not required to consult or obtain approval of the Crown prior to laying charges except where the consent of the Attorney General is required by the *Criminal Code*. However, police may, and do in some cases, consult with Crowns prior to laying charges • If the charges do not meet the Crown's threshold, the charges are withdrawn in court • If the threshold is met, the case will proceed • While the Crown awaits the completion of disclosure, a case proceeds through the court process • The Crown has an ongoing obligation to apply the applicable charge screening standard throughout the criminal proceeding	• Prior to the laying of charges, police are mandated to consult with the Crown who determines whether a charge should be laid by applying the higher Crown standard (*e.g.,* reasonable prospect of conviction) and considering if it is in the public interest for a charge to be laid • If the charges do not meet this threshold, the Crown does not approve the charges being laid by police • If the threshold is met, the Crown approves the charges being laid • The Crown may decide not to approve charges until such time as full disclosure can be made to the accused person • If the police disagree with the Crown's decision not to approve the laying of a charge, there is an appeal process for reviewing the decision

R v. Jordan, 2016 SCC 27

- Section **11(b)** of the *Canadian Charter of Rights and Freedoms* guarantees an accused person's right to be tried within a reasonable time
- The criteria that the court considers to determine if the rights of an accused person have been infringed under section 11(b) were recently re-visited in *R. v. Jordan*
- The Supreme Court of Canada established timelines that trials must be heard by:
  - 18 months *after* charges are laid in the provincial court
  - 30 months *after* charges are laid in the Superior court
- Trials not completed within these timelines are presumed to have violated the accused person's rights under s.11(b), unless exceptional circumstances justify the delay, the only remedy is a stay of proceedings

Overview: Pre-charge vs. Post-Charge Process for Disclosure



Potential Advantages of Pre-charge Screening -and- Disadvantages of Post-charge Screening

- The **"Jordan" clock starts running from the laying of charges and not from the beginning of an investigation**. Any time spent compiling disclosure or compiling additional evidence *prior to laying charges* does not count towards any delay argument

- **The number of unnecessary charges entering the system can be decreased** by early application of the charge screening threshold, and ensuring that appropriate charges are laid prior to a case entering the criminal justice system

- **Enhanced investigations and stronger prosecutions** by having Crown assistance early in the process to determine required investigative follow-up, necessary forensic testing or the most appropriate charges

- **Re-direction of resources** to investigate and prosecute serious offences. Cases that do not meet the higher charge screening threshold would be identified earlier and would not enter the system to be prosecuted, saving valuable court resources

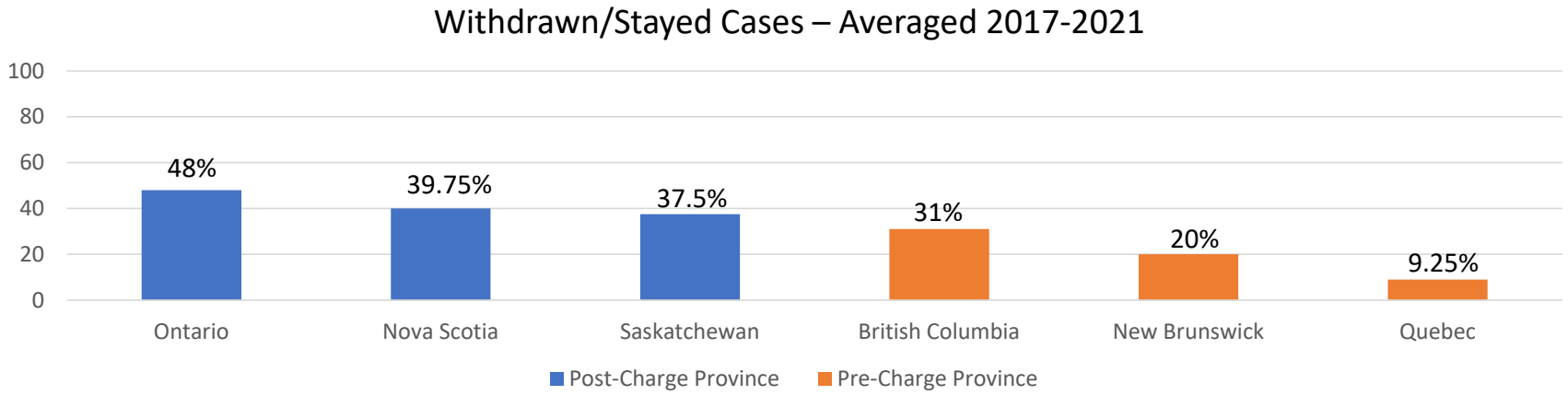
- **Minimizing the impact and disruption on vulnerable populations** by referring them to diversion programs prior to charges being laid

Potential Advantages of Post-charge Screening -and- Disadvantages of Pre-charge Screening

- Maintains **historical independence of the police** and encourages police to exercise their discretion to determine if charges should be laid (Section 504 *Criminal Code)*
- A repeat offender charged, brought before the court and released, would be subject to release conditions. This can **facilitate offender management** in the community. If the offender is not charged pending the completion of a review of a prosecution, the offender may re-offend pending approval
- The accused person is brought before the courts and the victim gets their "**day in court**"
- **A decrease in disclosure obligations and follow-up investigations** in cases involving low level offences because accused persons are diverted or plead guilty almost immediately and less disclosure is necessary
- Some **investigations are advanced by charges**, even if the investigation is not complete. For example, in a gang case, if an accused person is charged and in custody, witnesses may feel more comfortable coming forward to the police

Canadian Jurisdictions – Post-charge vs Pre-charge Screening Generally*

Withdrawn/Stayed Cases**						
Year	Post-Charge Screening			Pre-Charge Screening		
	Ontario	Nova Scotia	Saskatchewan	British Columbia	New Brunswick	Quebec
2017/2018	44%	36%	33%	27%	18%	10%
2018/2019	45%	40%	35%	29%	18%	8%
2019/2020	46%	40%	36%	30%	21%	8%
2020/2021***	57%	43%	46%	38%	23%	11%



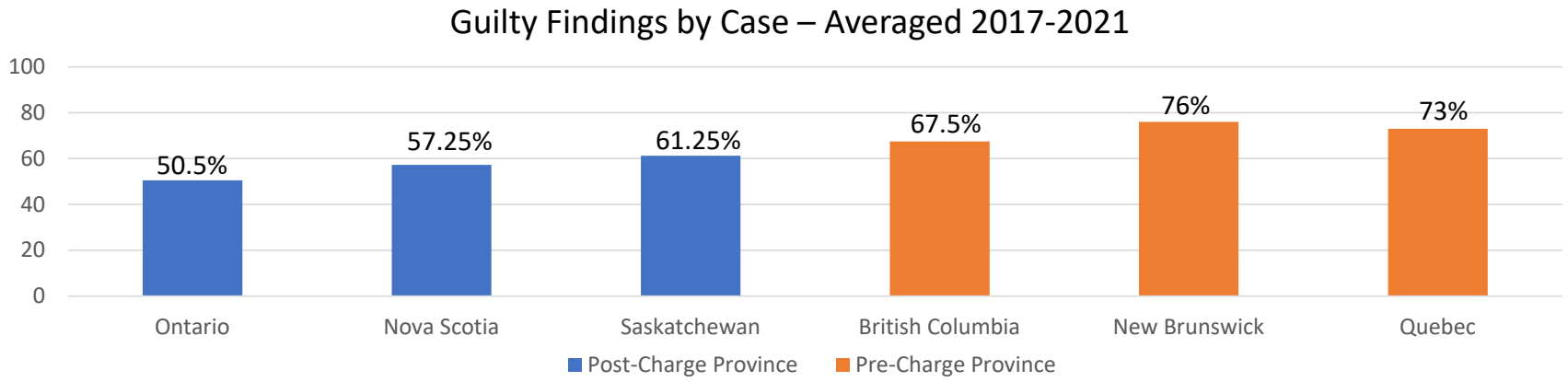
*Statistics Canada: Total Criminal Code: Adult criminal courts, number of cases and charges by type of decision

**This category includes stays (by the Crown or court), withdrawals by the Crown, dismissals and discharges at preliminary inquiry. It also includes court referrals to alternative or extrajudicial measures and restorative justice programs. A case is one or more charges against an accused person, which were processed by the courts at the same time and received a final decision.

***The COVID-19 pandemic may have impacted these statistics

Canadian Jurisdictions – Post-charge vs Pre-charge Screening Generally*

Guilty Findings by Case**						
Year	Post-Charge Screening			Pre-Charge Screening		
	Ontario	Nova Scotia	Saskatchewan	British Columbia	New Brunswick	Quebec
2017/2018	54%	60%	65%	71%	78%	71%
2018/2019	53%	57%	64%	70%	78%	73%
2019/2020	53%	57%	63%	68%	76%	77%
2020/2021***	42%	55%	53%	61%	72%	71%



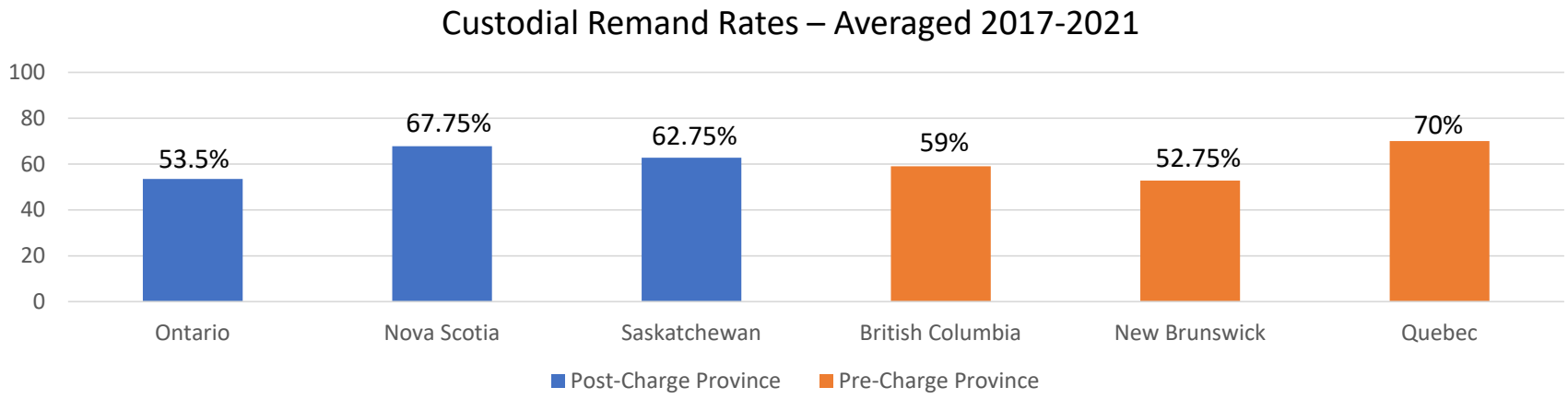
*Statistics Canada: Total Criminal Code: Adult criminal courts, number of cases and charges by type of decision

**Guilty findings include guilty of the charged offence, of an included offence, of an attempt of the charged offence, or of an attempt of an included offence. This category also includes guilty pleas, and cases where an absolute or conditional discharge has been imposed. A case is one or more charges against an accused person, which were processed by the courts at the same time and received a final decision

***The COVID-19 pandemic may have impacted these statistics

Canadian Jurisdictions – Post-charge vs Pre-charge Screening Generally cont.*

Custodial Remand Rates**						
Year	Post-Charge Screening			Pre-Charge Screening		
	Ontario	Nova Scotia	Saskatchewan	British Columbia	New Brunswick	Quebec
2017/2018	63%	70%	64%	55%	44%	65%
2018/2019	53%	70%	65%	58%	44%	66%
2019/2020	56%	76%	69%	62%	51%	78%
2020/2021***	42%	55%	53%	61%	72%	71%



*Statistics Canada: Adult admissions to correctional services

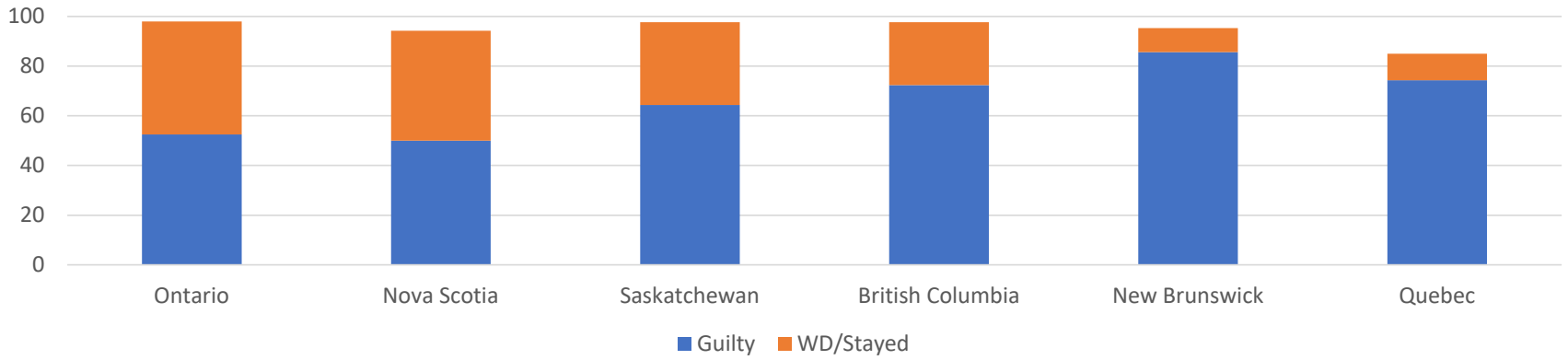
**Remand is the detention of a person in custody while awaiting a further court appearance. These persons have not been sentenced and can be held for a number of reasons (e.g., risk that they won't appear for their court date, danger to themselves and/or others, risk to re-offend

***The COVID-19 pandemic may have impacted these statistics

Canadian Jurisdictions - Post-charge vs Pre-charge Screening Robbery Cases*

Robbery Cases**												
Year	Post-Charge Screening						Pre-Charge Screening					
	Ontario		Nova Scotia		Saskatchewan		British Columbia		New Brunswick		Quebec	
	Guilty	WD/ Stayed***	Guilty	WD/ Stayed	Guilty	WD/ Stayed	Guilty	WD/ Stayed	Guilty	WD/ Stayed	Guilty	WD/ Stayed
2017/2018	53%	45%	56%	35%	59%	39%	75%	24%	83%	11%	70%	15%
2018/2019	53%	45%	51%	44%	67%	30%	74%	24%	88%	8%	71%	11%
2019/2020	54%	44%	48%	48%	68%	30%	71%	26%	87%	9%	82%	6%
2020/2021****	50%	48%	45%	50%	52%	47%	64%	35%	75%	22%	69%	14%

Robbery Case Disposition – Averaged 2017-2021



*Statistics Canada: Adult criminal courts, number of cases and charges by type of decision

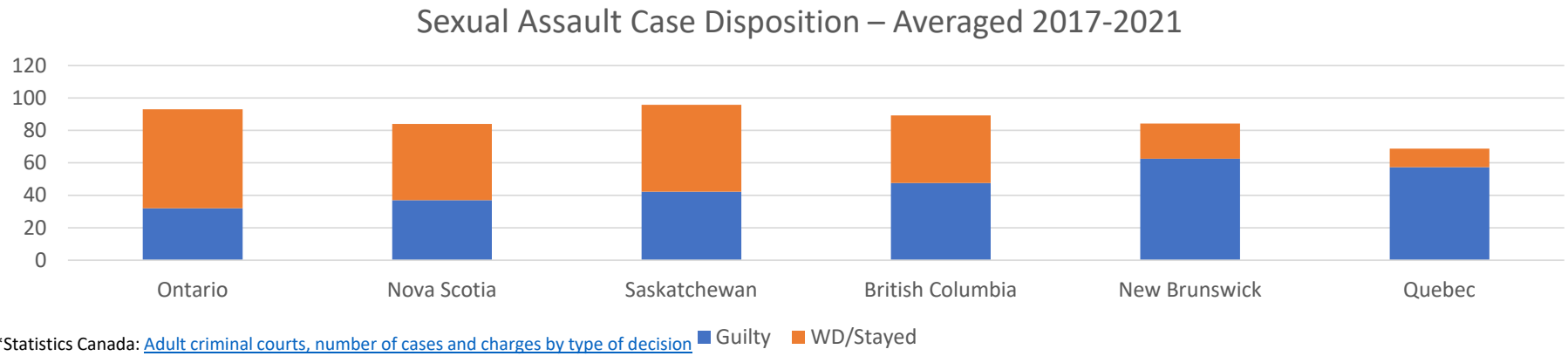
**A case is one or more charges against an accused person, which were processed by the courts at the same time and received a final decision.

***WD/Stayed = Withdrawn or Stayed

****The COVID-19 pandemic may have impacted these statistics

Canadian Jurisdictions - Post-charge vs Pre-charge Screening Sexual Assault Cases*

Sexual Assault Cases**												
Year	Post-Charge Screening						Pre-Charge Screening					
	Ontario		Nova Scotia		Saskatchewan		British Columbia		New Brunswick		Quebec	
	Guilty	WD/ Stayed***	Guilty	WD/ Stayed	Guilty	WD/ Stayed	Guilty	WD/ Stayed	Guilty	WD/ Stayed	Guilty	WD/ Stayed
2017/2018	34%	60%	45%	42%	45%	52%	51%	40%	70%	22%	51%	14%
2018/2019	33%	59%	29%	57%	39%	56%	47%	41%	59%	19%	61%	11%
2019/2020	32%	60%	39%	46%	44%	51%	50%	39%	55%	29%	69%	9%
2020/2021****	29%	65%	35%	43%	41%	55%	42%	47%	66%	17%	48%	12%



*Statistics Canada: Adult criminal courts, number of cases and charges by type of decision

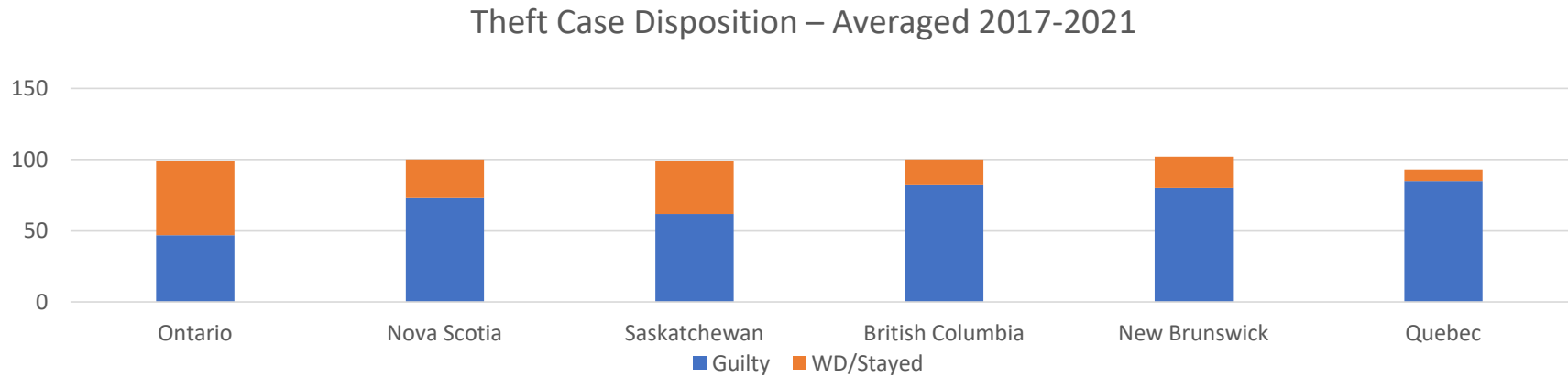
**A case is one or more charges against an accused person, which were processed by the courts at the same time and received a final decision.

***WD/Stayed = Withdrawn or Stayed

****The COVID-19 pandemic may have impacted these statistics

Canadian Jurisdictions - Post-charge vs Pre-charge Screening Theft Cases*

Theft Cases**												
Year	Post-Charge Screening						Pre-Charge Screening					
	Ontario		Nova Scotia		Saskatchewan		British Columbia		New Brunswick		Quebec	
	Guilty	WD/ Stayed***	Guilty	WD/ Stayed	Guilty	WD/ Stayed	Guilty	WD/ Stayed	Guilty	WD/ Stayed	Guilty	WD/ Stayed
2017/2018	47%	52%	74%	25%	66%	33%	82%	17%	82%	17%	82%	9%
2018/2019	47%	52%	72%	27%	62%	37%	82%	18%	83%	26%	85%	7%
2019/2020	46%	53%	72%	27%	59%	40%	82%	18%	76%	22%	87%	7%
2020/2021****	28%	71%	69%	31%	43%	57%	65%	35%	75%	22%	77%	14%



*Statistics Canada: Adult criminal courts, number of cases and charges by type of decision

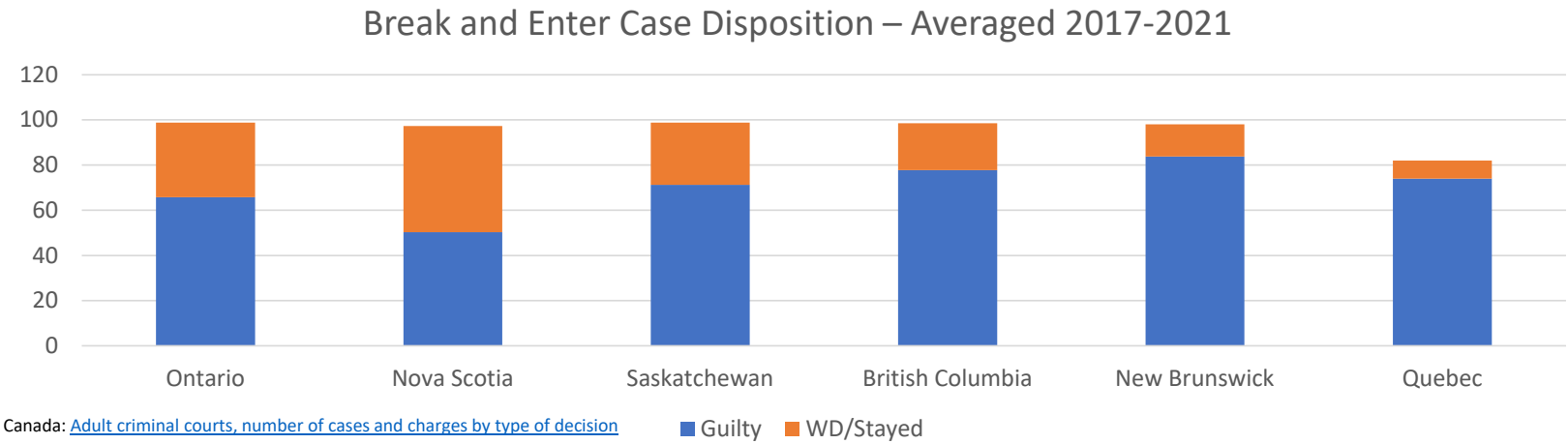
**A case is one or more charges against an accused person, which were processed by the courts at the same time and received a final decision.

***WD/Stayed = Withdrawn or Stayed

***The COVID-19 pandemic may have impacted these statistics

Canadian Jurisdictions - Post-charge vs Pre-charge Screening Break and Enter Cases*

Break and Enter Cases**												
Year	Post-Charge Screening						Pre-Charge Screening					
	Ontario		Nova Scotia		Saskatchewan		British Columbia		New Brunswick		Quebec	
	Guilty	WD/ Stayed***	Guilty	WD/ Stayed	Guilty	WD/ Stayed	Guilty	WD/ Stayed	Guilty	WD/ Stayed	Guilty	WD/ Stayed
2017/2018	65%	34%	50%	45%	68%	30%	79%	20%	85%	13%	71%	10%
2018/2019	67%	31%	51%	48%	72%	26%	79%	20%	84%	12%	73%	8%
2019/2020	67%	32%	49%	48%	72%	27%	79%	19%	86%	13%	79%	6%
2020/2021****	64%	35%	51%	47%	73%	27%	74%	24%	80%	19%	73%	8%



*Statistics Canada: Adult criminal courts, number of cases and charges by type of decision

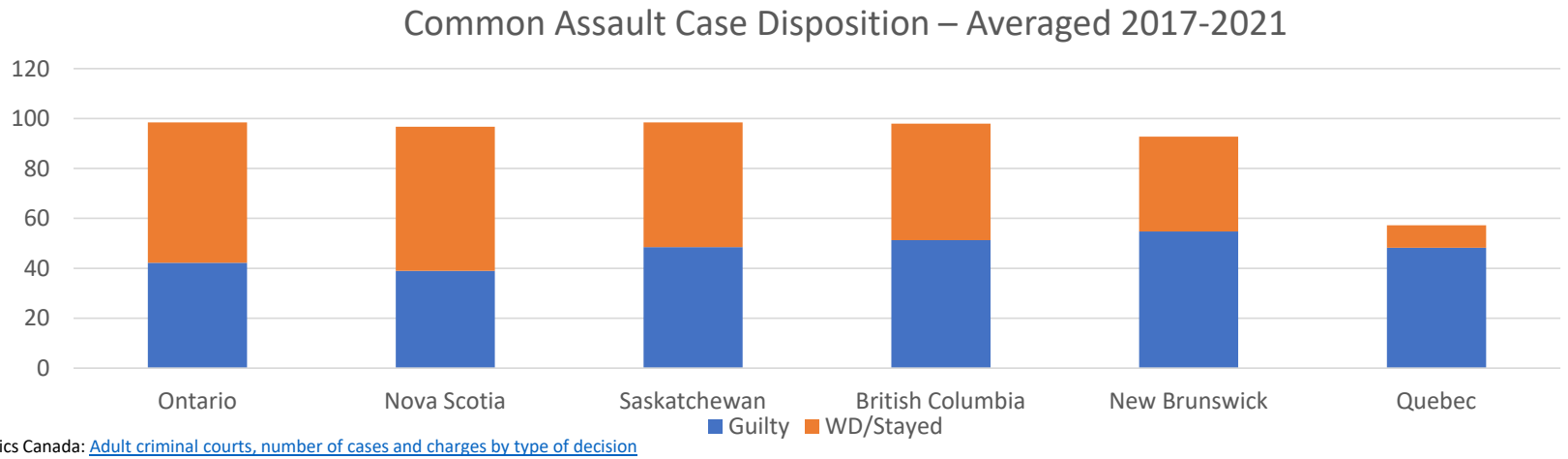
**A case is one or more charges against an accused person, which were processed by the courts at the same time and received a final decision.

***WD/Stayed = Withdrawn or Stayed

****The COVID-19 pandemic may have impacted these statistics

Canadian Jurisdictions - Post-charge vs Pre-charge Screening Common Assault Cases*

Common Assault Cases**												
Year	Post-Charge Screening						Pre-Charge Screening					
	Ontario		Nova Scotia		Saskatchewan		British Columbia		New Brunswick		Quebec	
	Guilty	WD/ Stayed***	Guilty	WD/ Stayed	Guilty	WD/ Stayed	Guilty	WD/ Stayed	Guilty	WD/ Stayed	Guilty	WD/ Stayed
2017/2018	46%	52%	40%	58%	53%	45%	51%	47%	55%	35%	49%	10%
2018/2019	43%	55%	36%	60%	51%	48%	51%	47%	57%	35%	47%	10%
2019/2020	43%	56%	40%	56%	48%	50%	52%	46%	56%	39%	50%	12%
2020/2021****	37%	62%	40%	57%	42%	57%	51%	47%	51%	43%	47%	14%



*Statistics Canada: Adult criminal courts, number of cases and charges by type of decision

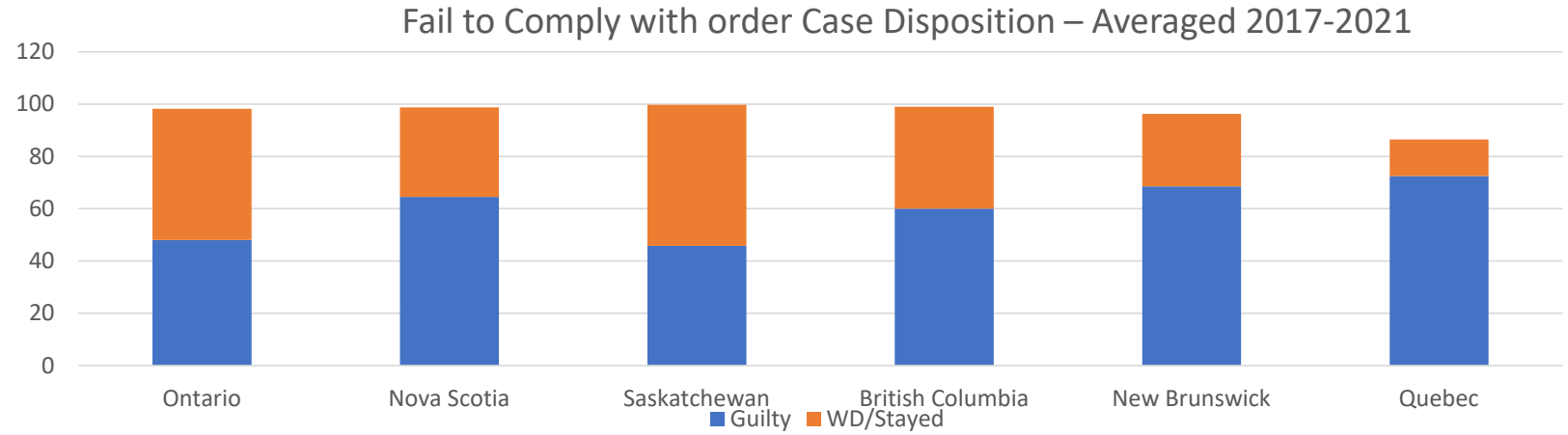
**A case is one or more charges against an accused person, which were processed by the courts at the same time and received a final decision.

***WD/Stayed = Withdrawn or Stayed

****The COVID-19 pandemic may have impacted these statistics

Canadian Jurisdictions - Post-charge vs Pre-charge Screening Fail to Comply with order Cases*

Fail to Comply with Order Cases**												
Year	Post-Charge Screening						Pre-Charge Screening					
	Ontario		Nova Scotia		Saskatchewan		British Columbia		New Brunswick		Quebec	
	Guilty	WD/ Stayed***	Guilty	WD/ Stayed	Guilty	WD/ Stayed	Guilty	WD/ Stayed	Guilty	WD/ Stayed	Guilty	WD/ Stayed
2017/2018	53%	45%	72%	26%	52%	47%	69%	30%	74%	24%	68%	16%
2018/2019	51%	47%	66%	33%	52%	48%	66%	33%	71%	25%	68%	15%
2019/2020	52%	46%	61%	38%	51%	49%	59%	40%	66%	30%	76%	14%
2020/2021****	36%	63%	59%	40%	28%	72%	46%	53%	63%	32%	78%	11%



*Statistics Canada: Adult criminal courts, number of cases and charges by type of decision

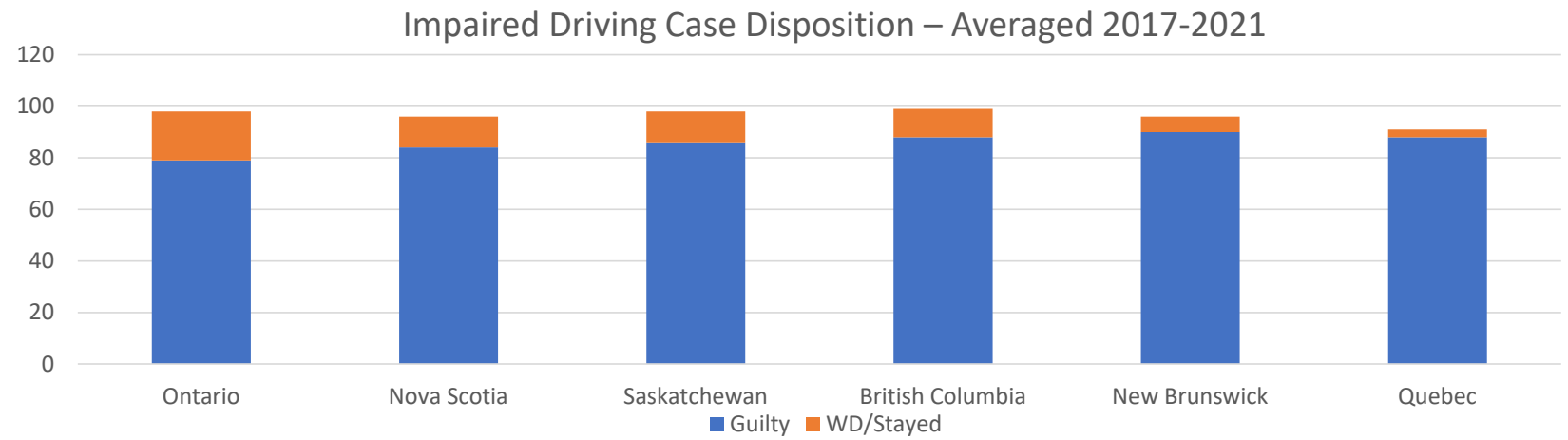
**A case is one or more charges against an accused person, which were processed by the courts at the same time and received a final decision.

***WD/Stayed = Withdrawn or Stayed

****The COVID-19 pandemic may have impacted these statistics

Canadian Jurisdictions - Post-charge vs Pre-charge Screening Impaired Driving Cases*

Impaired Driving Cases**												
Year	Post-Charge Screening						Pre-Charge Screening					
	Ontario		Nova Scotia		Saskatchewan		British Columbia		New Brunswick		Quebec	
	Guilty	WD/ Stayed***	Guilty	WD/ Stayed	Guilty	WD/ Stayed	Guilty	WD/ Stayed	Guilty	WD/ Stayed	Guilty	WD/ Stayed
2017/2018	79%	19%	83%	13%	86%	12%	88%	11%	89%	7%	85%	5%
2018/2019	79%	19%	85%	11%	87%	11%	88%	10%	90%	7%	88%	3%
2019/2020	80%	18%	84%	12%	86%	12%	87%	11%	91%	5%	91%	2%
2020/2021****	62%	37%	82%	14%	85%	14%	85%	14%	88%	7%	87%	3%



*Statistics Canada: Adult criminal courts, number of cases and charges by type of decision

**A case is one or more charges against an accused person, which were processed by the courts at the same time and received a final decision.

***WD/Stayed = Withdrawn or Stayed

****The COVID-19 pandemic may have impacted these statistics

Relevant Reports

1. The Martin Committee Report, 1995
2. *Report of the Review of Large and Complex Criminal Case Procedures*, The Honourable Patrick J. LeSage and Professor Michael Code, 2008
3. The Joint Thematic Review of the New Charging Arrangements, United Kingdom November 2008
4. 2012 British Columbia Charge Assessment Review McCuaig Report
5. Rapport du Comité d'examen sur la gestion des mégaprocès, Présidé par Me Michel Bouchard, Ad. E., 2016
6. Delaying Justice is Denying Justice: An Urgent Need to Address Lengthy Court Delays in Canada, June 2017
7. Submission 2020 Pre-Budget Consultations, John Howard Society of Ontario
8. Framework for Change to address systemic racism in policing, Ontario Human Rights Commission, 2021

Relevant Case Law

1. *Quebec (Attorney General) v. Lechasseur*, [1981] 2 S.C.R. 253
2. *R. v. Kalanj*, [1989] 1 S.C.R. 1594
3. *R. v. Regan*, [2002] 1 S.C.R. 297
4. *Lacombe c. André*, 2003 CanLII 47946 (QC CA
5. *R. v. Beaudry*, [2007] 1 S.C.R. 190
6. *R. v. Cody*, 2017 SCC 31
7. *R. v. Hunt*, 2017 SCC 25
8. *R. v. Boima*, 2018 BCCA 297, (leave to appeal to the Supreme Court refused, 2019-02-07)
9. *R. v. K.J.M.*, 2019 SCC 55
10. *Ontario (Attorney General) v. Clark*, 2021 SCC 18

APPENDIX E: SURVEY QUESTIONS

Justice Efficiencies Survey - Crown Evidentiary Thresholds and Charge Screening Practices

A sub-committee of the Steering Committee on Justice Efficiencies is studying the impacts of pre-charge vs post-charge Crown screening and the differing Crown evidentiary thresholds on the criminal justice system such as time to trial, police operations and resources, public/victim safety, and the overrepresentation of Black, Indigenous, racialized or marginalized individuals in the justice system.

1.Individual and/or Organization Name *
This information is being collected to document who completes the survey. None of the responses will be attributable to an individual and/or organization.

2.Please indicate whether the survey is being filled out by a prosecution service, police service, a representative of the judiciary, defence counsel or community group. *

3.Do you believe there is a substantial difference between the three Crown evidentiary thresholds used in Canada that include (i) substantial likelihood of conviction, (ii) reasonable likelihood of conviction; and (iii) reasonable prospect of conviction?

- o Yes
- o No
- o Not sure
- o Other

4.Please rank the Crown evidentiary threshold from highest to lowest.

- o Reasonable Likelihood of Conviction
- o Reasonable Prospect of Conviction
- o Substantial Likelihood of Conviction

5.Which Crown evidentiary threshold would screen out the MOST cases?

- o Substantial Likelihood of Conviction
- o Reasonable Prospect of Conviction
- o Reasonable Likelihood of Conviction

6.Should the Crown evidentiary threshold be uniform across Canada?

- Yes
- No
- Not Sure
- Other

7.Should a prosecution service apply one or more evidentiary thresholds?

- Yes
- No
- Not sure
- Other

8.Should the Crown evidentiary threshold be outlined in the *Criminal Code?*

- Yes
- No
- Not sure
- Other

9.Should the standard of "reasonable grounds to believe" be changed to a higher standard in the *Criminal Code*?

- Yes
- No
- Not sure
- Other

10.Please specify your agreement level from strongly disagree to strongly agree regarding the following statements.

A Crown pre-charge screening/approval model…

	Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
is inefficient	○	○	○	○	○
impedes police independence	○	○	○	○	○
reduces the number of cases entering the justice system	○	○	○	○	○
reduces miscarriages of justice	○	○	○	○	○
is resource intensive for the police	○	○	○	○	○
assists with offender management	○	○	○	○	○
increases *Jordan* risk	○	○	○	○	○
enhances public safety	○	○	○	○	○

11.Black, indigenous, racialized, and marginalized individuals are over-represented in the criminal justice system. This is not an issue that can be corrected solely by the justice system. It requires the efforts of all participants in the justice system, along with public institutions and community partners, to address the many factors that contribute to these groups entering the justice system in the first place.

How would a Crown pre-charge screening/approval model impact overrepresentation in the justice system?

- Significantly Worsen Overrepresentation
- Slightly Worsen Overrepresentation
- Significantly Reduce Overrepresentation
- Slightly Reduce Overrepresentation
- No impact
- Not Sure Other

12.Should the Crown charge screening model (pre-charge or post-charge) be uniform across Canada?

- Yes
- No
- Not sure
- Other

13.You may submit separate written submissions to JEReport@ontario.ca or provide comments here.

APPENDIX F: WRITTEN SUBMISSIONS VIA SURVEY

Community Groups/Defence Counsel Input

Aboriginal Legal Services	There is no question that a Crown pre-screening regime would reduce Indigenous over-representation and wrongful conviction guilty pleas. The background paper at slide 10 says that “Police lay charges on a standard of reasonable grounds” but the reality is that is often not the case. Police regularly lay charges solely on the basis of a bald assertion by a complainant without any further investigation or discussion with the accused person. In the case of domestic assault, the prevalence of dual charging has a particularly significant impact on Indigenous women. Given that Indigenous people often present as poor candidates for bail release (due in large part to systemic factors) what are bogus or very weak charges can result in the deprivation of liberty. Given the backlogs in the court system, once bail has been denied, there is a tendency for Indigenous accused people to plead guilty at a very early stage in the proceedings, often before disclosure has been provided. This then leads to wrongful conviction guilty pleas. The impact on a person of a charge, even if it is eventually withdrawn by the Crown, can be profound. Many social service agencies require vulnerable persons checks before hiring and those checks often include withdrawn charges. A withdrawn assault charge, for example, can make it impossible for an Indigenous person to pursue employment in their chosen profession. Where that charge should never have been laid, this is very problematic. Withdrawn charges can also have an impact on the ability of an Indigenous person to care for a child as a foster or customary care parent. Pre-charge screening is not a panacea, but it would be a very good step forward tin addressing one of the systemic causes of Indigenous over-representation.
John Howard Society	John Howard Society of Ontario believes that Ontario should adopt a pre-charge screening model. As is shown in the discussion deck, since 2017, Ontario has consistently had the highest percentage of withdrawn/stayed cases in Canada, and consistently almost double the withdrawn/stayed cases of jurisdictions with pre-charge screening. Pre-charge screening promotes efficiencies and eases burdens on the court system. There is not just the time and money spent on unnecessary court appearances to consider, but also the significant costs and harms associated with pre-trial detention that could be prevented, especially for vulnerable populations who are low-risk. In addition, pre-charge screening provides an opportunity to connect individuals with pre-charge diversion programs or treatment. Crown pre-charge screening also has the potential to reduce the impact of overcharging on Black, Indigenous and other racialized individuals. As

	noted by the Ontario Human Rights Commission in their report “A Disparate Impact”, Black persons were disproportionately represented in the data looking at arrests and charges laid by police. The data noted that charges were often withdrawn or dismissed. Pre-charge screening would help prevent many of these charges lacking merit from proceeding through the justice system. Crown pre-charging models also present other opportunities to address systemic discrimination in the justice system. For example, a two part test to determine whether charges should proceed looks first at the prospect/likelihood of conviction. If the Crown is satisfied that the first test is satisfied, there is a public interest test applied. At this stage, factors like bias, racism and system discrimination could be considered. This would allow considerations about overrepresentation of Indigenous Peoples in the criminal justice system, for example. We appreciate the opportunity to provide feedback and comments in these consultations. We would be pleased to discuss our feedback in greater detail and would welcome the opportunity to participate further.
Federation of Asian Canadian Lawyers	If defence counsel are involved in the pre-charge screening process (ie. in BC), thought should be given to extending legal aid coverage to individuals that would benefit from a pre-charge counsel pretrial to reduce the the number of people needlessly charged.

APPENDIX G: ONTARIO HUMAN RIGHTS COMMISSION

Ontario
Human Rights Commission
Commission ontarienne des
droits de la personne

February 3, 2023

Paul Lindsay and Carmen Elmasry
Co-Leads
Sub-Committee of the Steering Committee on Justice Efficiencies and Access to Criminal Justice
Ministry of the Attorney General - Criminal Law Division
McMurtry-Scott Building
720 Bay Street, 6th Floor
Toronto ON M7A 2S9
Tel: 416-326-2615
JEReport@ontario.ca

Re: Pre-charge vs. post-charge Crown screening and the differing Crown evidentiary thresholds in Canada

Dear Ms. Elmasry and Mr. Lindsay,

Thank you for your invitation to provide submissions on charge screening to the Sub-Committee of the Steering Committee on Justice Efficiencies and Access to Criminal Justice. The OHRC is focused on examining the impact of police practices on *Code*-protected groups and this is the basis for our submissions on pre-charge screening. As noted in *Framework for Change to address systemic discrimination in policing* (*Framework*) pre-charge screening[1] has the potential to address overcharging in Ontario, a practice which has a disproportionate impact on Indigenous, Black and other racialized communities.

The benefits of the pre-charge screening process can be attributed to the evidentiary standard used by Crown Prosecutors which calls for a careful assessment of the evidence before a charge is laid and weighs public interest considerations such as systemic discrimination. By filtering out charges which lack merit, pre-charge screening can promote efficiency by reducing the number of charges before the court system and minimizing the deleterious impact of charges on *Code*-protected groups.

While the OHRC is optimistic about the potential benefits of a pre-charge screening, we acknowledge that merely shifting the responsibility for laying charges from police services to Crown Prosecutors is not a panacea. As such, Crown Prosecutors and police services should build upon existing human rights and anti-racism training among other measures to ensure that pre-charge screening processes are effective as a tool for addressing discrimination.

[1] Pre-charge screening as also referred to a pre-charge approval in some settings. When the OHRC uses the term pre-charge screening, it is in reference systems where a Crown Prosecutor exercises prosecutorial discretion to determine whether a charge should be laid.

The Ontario Human Rights Commission (OHRC)

The OHRC is a statutory human rights body established under the *Human Rights Code* and is responsible for promoting and advancing human rights and addressing systemic discrimination in Ontario.

Addressing discrimination in policing has been an important part of the OHRC's work for over 20 years. In addition to making submissions to the government and independent reviewers about how to address systemic discrimination in policing[2] the OHRC has produced a number of resources and reports including *Under Suspicion*, its 2017 research and consultation report on racial profiling, *Policy on eliminating racial profiling in law enforcement* (Racial Profiling Policy) in 2019 and in 2021, a *Framework for change to address systemic racism in policing*, which highlights some of the benefits of pre-charge screening.

In addition to this work, the OHRC is conducting an inquiry into anti-Black racism by Toronto Police Service (TPS). Under this inquiry, the OHRC has produced two reports – *A Collective Impact* (2018) and *A Disparate Impact* (2020). Taken together, these reports found:

- Many instances where there was no authority for the police to stop or detain Black civilians
- Inappropriate or unjustified searches during encounters
- Unnecessary arrests; and
- A greater likelihood that Black civilians would be charged and over-charged.

- [2] Ontario Human Rights Commission, "OHRC Submission to the Independent Street Checks Review" (1 May 2018), online: ***Ontario Human Rights Commission*** www.ohrc.on.ca/en/ohrc-submission-independent-street-checks-review.
- Ontario Human Rights Commission, "OHRC Independent Review of Police Oversight Bodies" (15 November 2016), online: ***Ontario Human Rights Commission*** www.ohrc.on.ca/en/ohrc-submission-independent-review-police-oversight-bodies.
- Ontario Human Rights Commission, "OHRC Submission to the Ministry of Community Safety and Correctional Services" (29 April 2016), online: ***Ontario Human Rights Commission*** www.ohrc.on.ca/en/strategy-safer-ontario-%E2%80%93-ohrc-submission-mcscs.
- Ontario Human Rights Commission, "OHRC Submission to the Ministry of Community Safety and Correctional Services on street checks" (11 August 2015), online: ***Ontario Human Rights Commission*** www.ohrc.on.ca/en/ohrc-submission-ministry-community-safety-and-correctional-services-street-checks.
- Ontario Human Rights Commission, "OHRC submission to the Office of the Independent Police Review Director's systemic review of OPP practices for DNA sampling" (April 2014), online: ***Ontario Human Rights Commission*** www.ohrc.on.ca/en/ohrc-submission-office-independent-police-review-director%E2%80%99s-systemic-review-opp-practices-dna.
- Ontario Human Rights Commission, "Submission of the Ontario Human Rights Commission to the Independent Review of the use of lethal force by the Toronto Police Service" (February 2014), online: ***Ontario Human Rights Commission*** www.ohrc.on.ca/en/submission-ontario-human-rights-commission-independent-review-use-lethal-force-toronto-police.
- Ontario Human Rights Commission, "Submission of the OHRC to the Ombudsman's Investigation into the direction provided to police by the Ministry of Community Safety and Correctional Services for de-escalating conflict situations" (July 2014), online: Ontario Human Rights Commission www.ohrc.on.ca/en/submission-ohrc-ombudsman%E2%80%99s-investigation-direction-provided-police-ministry-community-safety-and.

Considering these findings, and other research which document the disparate outcomes faced by Black and Indigenous persons in the criminal justice system, the OHRC has serious concerns about systemic anti-Black racism in Ontario's charge processes which do not include pre-charge screening for all offences.

Pre-charge screening can address police over-charging

By employing a more stringent evidentiary standard that Crown Prosecutors to consider public interest, pre-charge screening has the strong potential to address over-charging which has a disproportionate impact on *Code*-protected groups.

Concerns about police over-charging have been documented in several reports. For example, *A Racial Disparity in Arrests and Charges*, included an expert analysis of charge data from TPS between 2013 and 2017 for select discretionary offences.[3] The analysis found that TPS engaged in the practice of over-charging for all racial groups. To this end the report states, "Regardless of race, most charges documented by the TPS data were either withdrawn or dismissed by the prosecution or court."[4] In addition, concerns regarding the over-charging of Black persons in Toronto were underscored as the non-conviction rate for Black persons was four times larger than the non-conviction rate for white persons.[5] The analysis concludes that Black persons were more like to be brought before the court to face "unnecessary" or "low quality charges."[6]

Other racial groups were also more likely to face low quality charges. The analysis of charge disposition showed that charges laid against white persons were also more likely to result in conviction when compared to charges laid against "other racial groups", a category which includes Indigenous persons.[7][8]

Data from Statistics Canada presented by the Sub-Committee of the Steering Committee on Justice Efficiencies and Access to Criminal Justice, show that between 2017 and 2021, provinces that used pre-charge screening had a lower percentage of their charges withdrawn. For example, between 2019-2020, 46% of charges laid in Ontario were withdrawn or stayed. In British Columbia, where pre-charge screening is used, 30% of charges were stayed or withdrawn. The John Howard Society found that

---

[3] The charges examined include: 1. Failure to comply with a condition, undertaking or recognizance 2. Obstruct justice 3. Assault police 4. Uttering threats against the police 5. Cannabis possession 6. Other (non-cannabis) illegal drug possession 7. Out-of-sight driving offences (including driving without a valid licence, driving without valid insurance, driving while suspended, etc.) 8. Disturbing the peace 9. Trespassing. See: Racial Disparity in Arrests and Charges An Analysis of arrest and Charge data from the Toronto Police Service

[4] Racial Disparity in Arrests and Charges An Analysis of arrest and Charge data from the Toronto Police Service at pg. 108 [*Racial Disparity in Arrests*].

[5] Ibid.

[6] Ibid.

[7] The Other racial groups include Indigenous, and Brown persons. These racial categories are a direct reflection of the categories used by TPS.

[8] "..Race, overall, has a small but statistically significant impact on case dispositions (see Table E1). Regardless of suspect race, almost 60% of all charges end in a non-conviction. However, cases involving White suspects are slightly more likely to end in conviction (22.4%) than cases involving Black (18.1%) or other racial minority suspects (18.3%). See: *Racial Disparity in Arrests* at pg. 73

in Ontario, the number of charges withdrawn by Crown Counsel has increased since 2014 along with the number of court appearances before the charges are withdrawn.[9]

While the reasons for withdrawing a charge may vary[10] experts have not ruled out the impact of police inappropriately overcharging. When asked about the high percentage of charges withdrawn in Ontario, professor Kent Roach stated, "I would suggest that overcharging by the police is likely a factor,"… "Police will often lay multiple charges and this may influence decisions to deny bail and perhaps plea bargaining."[11] In 2021, the House of Commons Standing Committee on Public Safety and National Security heard from witnesses about the discriminatory exercise of police discretion when deciding whether to stop, arrest, or criminally charge an individual.[12] Professor Samuels-Wortley noted that police are less likely to offer Black youth alternative measures to the court system to address crimes.[13] Moreover, the over-representation of Indigenous persons and persons with mental health issues in the criminal justice system can be linked to greater police contact with those groups, and the exercise of discretion during those encounters.[14]

Research from the United States supports pre-charge screening's potential to address disparities

Pre-charge screening provides the justice system with an opportunity to mitigate some of the concerns related the discriminatory exercise of police powers. Initial research from the United States affirms this position. A project which examined prosecutorial decision-making in one US county, also studied the impact of pre-arrest screening for warrantless felony arrests. Over a one-year period, 17.5% of felony cases that police

---

[9] John Howard Society, 2020 Pre-Budget Consultations at pg 5 (online: https://johnhoward.on.ca/wp-content/uploads/2020/01/Final-JHSO-2020-Pre-Budget-submission-to-Minister-of-Finance.pdf)

[10] In 2019, The auditor general recommended further research on the reasons cases are withdrawn, "To help reduce the costs that result from delaying the withdrawal of charges when there is no reasonable prospect of conviction, and to promote timely disposition of criminal cases, we recommend that the Ministry of the Attorney General (Criminal Law Division) collect complete data that includes the breakdown of all reasons for withdrawal before trial, the average number of days from charge to withdrawal for each reason, and the average number of appearances required by the accused in court for each reason, covering all court locations." See: Office of the Auditor General of Ontario, Annual Report 2019 at pg 166.

[11] David Reevely: Reevely: Ontario's freakishly high rate of dropped criminal charges makes our jail overcrowding worse, Ottawa Citizen June 7, 2016, Online: https://ottawacitizen.com/opinion/columnists/reevely-ontarios-freakishly-high-rate-of-dropped-criminal-charges-makes-our-jail-overcrowding-worse.

[12] Hon. John McKay, Systemic Racism in Policing in Canada Report of the Standing committee on Public Safety and National Security, June 2021 43 Parliament, 2nd session Online: https://www.ourcommons.ca/Content/Committee/432/SECU/Reports/RP11434998/securp06/securp06-e.pdf

[13] Hon. John McKay, Systemic Racism in Policing in Canada Report of the Standing committee on Public Safety and National Security, June 2021 43 Parliament, 2nd session Online: https://www.ourcommons.ca/Content/Committee/432/SECU/Reports/RP11434998/securp06/securp06-e.pdf at pg 56.

[14] David, Jean-Denis and Megan Mitchell 2021. Contacts with the police and the over-representation of indigenous peoples in the Canadian criminal justice system. Canadian Journal of Criminology and Criminal Justice 63(2): 23–45. https://doi.org/10.3138/cjccj.2020-0004 Link, Google Scholar; Also see: Hon. John McKay, Systemic Racism in Policing in Canada Report of the Standing committee on Public Safety and National Security, June 2021 43 Parliament, 2nd session Online: https://www.ourcommons.ca/Content/Committee/432/SECU/Reports/RP11434998/securp06/securp06-e.pdf at pg 50.

officers presented to prosecutors for charges, were declined. Researchers also found that the prosecutors were more likely to, "decline the cases of Black (vs. White) suspects based on weak evidence. This suggests that, when the suspect is Black, police may be more likely to favor an arrest despite weak evidence than when the suspect is White."[15]

Evidentiary Standard used by Crown mitigates discrimination in the charge process

I. Crown two-part test compared to police charge standard

The evidentiary standard used by Crown Prosecutors can help address the disproportionate number of *Code*-protected groups facing charges. This benefit flows from the more stringent evidentiary standard applied by Crown Prosecutors when compared to the standard used by police. In addition, Crown Prosecutors' apply a public interest test before they decide to proceed with a charge which can address systemic discrimination.

For example, B.C.'s Crown prosecution manual directs Crown Prosecutors to apply a two-part test before a charge is laid. At the first stage an evidentiary test is applied, which asks, "whether there is a substantial likelihood of conviction."[16] At the second stage they consider "whether the public interest requires a prosecution".[17]

To satisfy the first branch of the test there must be at minimum evidence to support the conclusion that "a conviction according to law is more likely than an acquittal."[18] In carrying out this test Crown Prosecutors are directed to consider the admissibility and reliability of the evidence and any viable defences. In contrast, police officers who have the power to lay charges in jurisdictions like Ontario, need only establish that they have a belief, on reasonable grounds, that a person committed an offence. Given the large volume of charges that have been laid and dismissed against racialized communities in Toronto, there is reason to believe that the application of a more stringent evidentiary test has the strong potential to mitigate the over-charging.

---

[15] Jon Gould, Rachel Bowman and Belen Lowry-Kinberg "Pre-Arrest Screening by Prosecutors is Financially Prudent and Socially Just" London School of Economics Online: https://blogs.lse.ac.uk/usappblog/2022/09/21/pre-arrest-screening-by-prosecutors-is-financially-prudent-and-socially-just/; also see: Deason Centre SUM Dedman School of Law, Screening and Charing Cases in three mid-sized jurisdictions Online: https://scholar.smu.edu/cgi/viewcontent.cgi?article=1001&context=deasoncenter

[16] British Columbia Prosecution Service, Crown Counsel Policy Manual, Online: www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/prosecution-service/crown-counsel-policy-manual/cha-1.pdf at pg 2-3

[17] British Columbia Prosecution Service, Crown Counsel Policy Manual, Online: www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/prosecution-service/crown-counsel-policy-manual/cha-1.pdf at pg 2-3

[18] Ibid; Note: In New Brunswick, where pre-charge screening is used, the evidentiary test requires crown prosecutor to establish as reasonable prospect of conviction. According to this standard, a Crown Prosecutor must be satisfied "considering whether an impartial trier of fact properly directed in accordance with the law, is more likely than not to convict the accused on the offence charged based on the evidence available" this is a lower standard than the test in B.C., but higher than the reasonable grounds standard used by officers.

In addition to the more stringent evidentiary test, Crown Prosecutors apply a public interest test *if* the evidentiary test is satisfied. In B.C., factors that weigh in favour of not prosecuting an individual under the second stage include the over-representation of Indigenous persons as accused within the criminal justice system, and the role that bias, racism or systemic discrimination played in bringing the person in contact with the criminal justice system. This test explicitly calls on Crown Prosecutors to consider human rights-related factors before a charge is laid. In contrast, police officers are not routinely required to consider this factor before laying a charge.

II. **The application of the two-part test in Ontario and B.C.**

In Ontario, and in other jurisdictions[19] Crown Prosecutors typically[20] screen charges after they have been filed by police. Similar to B.C., Ontario uses a two-part test to assess whether charges should proceed. However, there are important distinctions between the application of the two-part test used in these provinces. In order to satisfy the evidentiary test in Ontario, the charge must demonstrate a "reasonable prospect of conviction."[21] This standard does not require a "probability of conviction".[22] In other words, an assessment of the availability and admissibility of evidence and any defences need not lead to "a conclusion that a conviction is more likely than not". This is a less rigorous standard compared to the "substantial likelihood of conviction" test used in B.C.

If the evidentiary test is satisfied, Crown Prosecutor's in Ontario apply a public interest test. At this stage, Ontario's Crown Prosecution Manual guides Crown Prosecutors to consider the negative impact of stereotypes related to *Code*-protected grounds such as race, religion and gender identity when assessing charges. Unlike B.C., Ontario's Crown Prosecution manual does not include an explicit requirement to consider whether bias, racism, or systemic discrimination played a role in the accused coming in contact with the criminal justice system.[23]

The "substantial likelihood of conviction" standard, and the public interest test that weighs the impact of systemic discrimination before charges are filed are features of the B.C.'s model that have potential to reduce the overall number of charges in Ontario. In addition, these features can increase efficiency, and address the over-representation of Indigenous, Black and other racialized groups in charge data. Nonetheless, it is important to couple these features with other measures to combat systemic discrimination.

---

[19] For example, Nova Scotia and Saskatchewan use post charge screening.

[20] Pre-charge screen/Pre-charge approval has been used in limited pilot projects in Ontario. In addition, it is not uncommon for the police services and Crown Prosecutors to work in collaboratively, typically in cases that involve serious charges, or complex investigations.

[21] Ministry of the Attorney General, Crown Prosecution Manual, Charge Screening
Online: www.ontario.ca/document/crown-prosecution-manual/d-3-charge-screening

[22] *Ibid*.

[23] Ontario's Crown Prosecution manual includes a "non-exhaustive" list of factors which include the gravity of the incident, and the criminal history of the accused, and the special vulnerability of an accused victim or witness. See: Ontario Crown Prosecution Manuel.

Charge screening is not a panacea

While the OHRC is optimistic about the potential for pre-charge screening to address systemic discrimination in the justice system, additional measures should be adopted to promote equitable outcomes. The OHRC is aware that provinces that use pre-charge screening are not immune to systemic discrimination or disparities in their charge data.[24] As such, the public interest test should explicitly direct Crown Prosecutors to consider the impact of charges on *Code*-protected groups that are disproportionately represented in charge, arrest, and incarceration data. These groups include Indigenous, Black and other racialized communities, and persons with mental health issues. In addition, Crown Prosecutors and the police should receive regular training on how to appropriately identify individuals from *Code*-protected groups who face relevant barriers[25] and apply mitigating principles during the charge screening process.

In addition, both Crown Prosecutors and the police officers should be encouraged to offer extrajudicial measures and diversion programs at the pre-charge stage in appropriate circumstances. Crown Prosecutors and officers should remain appraised of the culturally appropriate diversion programs that are available at the pre-charge stage for adult and youth offenders in their jurisdiction. Programs of this nature help to promote accountability, lower rates of recidivism, and reduce the number of cases before the criminal justice system.

Where pre-charge screening is implemented, policies or directives should require officers to reduce the number offences that are presented to Crown Prosecutors. Officers should exercise their discretion to address potential charges through use of alternative measures, cautions and other forms of diversion when possible.

Pre-charge vs post-charge screening

Concerns about the impact of non-conviction records make pre-charge screening preferrable to post-charge screening. The deleterious impact of being charged with a criminal offence remains even after a charge is dismissed or withdrawn. As a result, communities that are disproportionately burdened by overcharging are in some respects, shackled by non-conviction records.

Criminologist Scot Wortley describes the long-standing impact of a criminal charge as follows:

> Criminal charges can also result in the curtailment of freedom prior to trial – with respect to pre-trial detention and the application of pre-trial release conditions. Finally, charges can result in conviction and related punishments including fines,

[24] British Columbia's Office of the Human Rights Commissioner, Equity is Safer: Human Rights consideration for Policing reform in British Columbia, November 2021 Online: https://bchumanrights.ca/wp-content/uploads/BCOHRC_Nov2021_SCORPA_Equity-is-safer.pdf
[25] Systemic trends, such as the over-representation of *Code*-protected groups in charge data should be monitored by supervisors.

probation and incarceration. It is also important to note that charges – even those that do not involve a conviction – result in a criminal record.[26]

These concerns are aggravated by the fact that the process for removing non-conviction records, if possible, lacks clarity and requires legal or financial resources which may be out of reach for individuals facing socio-economic barriers, or a disadvantage in the job market due to a non-conviction record.

Where charges are diverted from the court system, every effort should be made to minimize the impact of an individual's prior involvement with the justice system. Policies that govern the charge process should require the timely destruction of non-conviction records, including but not limited fingerprints and photographs.[27]

Conclusion

A fair, just and efficient system for processing charges requires an equitable approach and outcomes which do not produce disparities. There must be a human rights-based approach taken in any decision to improve the efficiency of charge processes and reduce case backlogs. This approach must consider the well-being of racialized communities and other *Code*-protected groups. With appropriate safeguards in place, pre-charge screening can help address disparities in the criminal justice system.

[26] *Racial Disparities in Arrests* at pg 3.

[27] For example, a Fingerprint Section (FPS) number is generated when a charge is laid. The (FPS) number is stored within the RCMP.

APPENDIX H:
ONTARIO ASSOCIATION OF CHIEFS OF POLICE

40 College Street
Suite 605
Toronto ON
M5G 2J3
Tel: (416) 926-0424
Fax: (416) 926-0436
www.oacp.ca

January 26, 2023

Ministry of the Attorney General
Criminal Law Division
McMurtry-Scott Building
720 Bay Street, 6th floor
Toronto, Ontario M7A 2S9

To the attention of the Steering Committee on Justice Efficiencies and Access to Criminal Justice

By email only to: JEReport@Ontario.ca

RE: Pre-charge vs. post-charge Crown screening & the differing Crown evidentiary thresholds in Canada.

On behalf of the Board of Directors of the Ontario Association of Chiefs of Police (OACP) and our membership I want to thank the members of this committee and the sub-committees who are conducting research into these important topics.

I also thank the sub-committee for providing the OACP the opportunity to participate in a virtual meeting on January 26th, 2023, to engage in a meaningful discussion with the sub-committee. Additionally, the OACP will always be available to answer any further questions or participate in future discussion on these topics.

As promised, I have attached for your review a copy of both the OACP written submission and the survey which was prepared by members of our Police Legal Advisors (PLA) Committee.

I want to offer my sincere thanks to the members of our PLA Committee for their attention to this with particular thanks to Ms. Carley Valente (York regional Police Service) Ms. Sharon Wilmot (Peel Regional Police Service) and Mr. Gary Melanson (Waterloo Regional Police Service).

Respectfully,

Jeff McGuire, O.O.M.,
Executive Director
Ontario Association of Chiefs of Police
JeffMcGuire@OACP.ca
Cell: 289-968-4518

cc: OACP Police Legal Advisors Committee
OACP Board of Directors

Submission of the OACP Police Legal Advisors on
Differing Crown Evidentiary Thresholds in Canada and Pre-Charge Crown Screening

Thank you for the opportunity to comment on the impact of differing Crown evidentiary thresholds across Canada and the impact of adopting a pre-charge Crown screening model. It is our position that there is a single Crown evidentiary threshold in Canada that is merely articulated differently across the country. Accordingly, we will focus on the pre-charge screening issue. As we have not received specific details regarding how a pre-charge Crown screening model would be implemented in Ontario, the following comments address high level issues and concerns. We would appreciate the opportunity to continue a dialogue on these important issues.

1. A pre-charge Crown screening model that requires police to obtain Crown approval prior to laying charges will impact the standard of reasonable and probable grounds and replace it with a significantly higher Crown evidentiary threshold of reasonable prospect of conviction. This will necessitate changes to the *Criminal Code*, *Police Services Act* and training. Currently, the *Criminal Code* places the responsibility of initiating charges on police. Crown *approval* on this higher evidentiary standard has the tendency to erode the mutually independent relationship between the Crown and the police. There is a significant legal and operational distinction between pre-charge Crown *advice* and pre-charge Crown *approval*. The former encourages cooperation and consultation between the police and Crown Attorneys, which is essential to the proper administration of justice, while the latter intrudes upon core law enforcement functions and legal duties of the police. This may have significant consequences for the concept of prosecutorial immunity, which is predicated on police and prosecutorial independence. It will also impact on the law of malicious prosecution.

2. Delays in arresting and charging accused persons may negatively impact public safety and, consequently, public confidence in the police and the broader administration of justice. While the materials provided seem to leave room for the more immediate laying of charges in certain, undefined victim or public safety matters, if that authority is too narrowly defined it may result in delays in laying charges and impact the ability of police to ensure victim and public safety by either detaining the accused person or imposing appropriate release conditions. These delays may result in individuals being detained in police custody for longer periods of time prior to their release, potentially increasing s. 9 *Charter* litigation in criminal and civil matters, and causing additional strain on limited judicial resources.

3. Delays in laying charges may adversely impact an ongoing investigation. In some circumstances, the act of charging can facilitate further investigative steps and advance the investigation. For example, the authority to fingerprint accused persons pursuant to the *Identification of Criminals Act* derives from laying charges. Witnesses and victims may be more willing to participate in the investigation knowing the accused person is arrested and in custody or on conditions of release. Delays in arresting and charging accused persons may also affect the development and cultivation of Confidential Informants.

4. Pre-charge Crown screening replaces a public process whereby the decision to withdraw charges is articulated on the record in open court in a manner consistent with victims' rights, with a private approval process that excludes the public in whose name the prosecutorial discretion is exercised. In this way, pre-charge Crown screening undermines transparency, accountability

and perceived access to justice, thereby diminishing victim and public confidence in the administration of justice.

5. When an investigation does not result in charges it leads to public and victim disenchantment with the system. If the pre-charge Crown screening decision is protected by solicitor-client privilege, the police will be in the untenable position of being unable to explain why they will not be laying charges. This is contrary to victims' rights legislation and may further exacerbate relationships between the police and the communities they serve. This may be particularly true when the victim is a member of a vulnerable group. This may also lead to an increase in civil claims against the police for negligent investigation, which may require police services in Ontario to explore waiving solicitor-client privilege to increase transparency and accountability, and to consider new means of cost-recovery.

6. Implementing pre-charge Crown screening will require significant additional Crown and police resources. Sufficiency in Crown staffing and expertise will be required to perform the pre-charge screening function consistently and efficiently, as well as to ensure a differentiation between the screening Crown and the advisory Crown who provides advice during the investigation. Pre-charge screening may also require additional police resources to locate, arrest and charge an accused after delays in obtaining Crown approval, thereby increasing the operational demands on front-line officers and the number of interactions between the accused and the police.

7. There is currently insufficient data to support the conclusion that pre-charge Crown screening will meaningfully reduce the burden on the criminal justice system through increased efficiency. The statistics presented in support of pre-charge Crown screening should be approached with caution as they may have been impacted by the COVID-19 pandemic, include cases that proceeded to a preliminary inquiry in the definition of "withdrawn/stayed", and fail to account for the additional resources and delay occasioned in circumstances where the police appeal the Crown's screening decision. Implementing pre-charge Crown screening will significantly increase pre-charge delay and may result in increased s. 7 *Charter* litigation, counteracting any potential *Jordan* efficiencies. More research and statistical data are required to determine the efficacy of this approach and its impact on other aspects of the criminal justice system, including public safety, victims' rights, and public confidence in the administration of justice.

8. The current practice in Ontario of seeking pre-charge Crown advice on complex matters is well understood and increases collaboration between the Crown and police, accomplishing many of the goals of a pre-charge Crown screening model while maintaining police independence and discretion to arrest and charge.

APPENDIX I: LEGAL AID ONTARIO

LEGAL AID ONTARIO
AIDE JURIDIQUE ONTARIO

LAO submissions to the Sub-Committee of the Steering Committee on Justice Efficiencies and Access to Criminal Justice on the issues of pre-charge vs. post-charge Crown screening and evidentiary thresholds for prosecution

Legal Aid Ontario (LAO) appreciates the opportunity to provide submissions on pre-charge vs. post-charge Crown screening and the differing Crown evidentiary thresholds in Canada. The two issues are distinct in that one can be addressed without the other; however, the evidentiary threshold applied by prosecutors in screening matters has a potential impact on pre-charge screening practices and, as such, the two issues are related.

LAO's statutory mandate is to promote access to justice for low-income Ontarians and to identify, assess and recognize the diverse legal needs of low-income individuals and disadvantaged communities across the province. LAO's submissions on both issues are thus informed by an understanding of the experiences of marginalized communities and of the overrepresentation of Indigenous, Black and racialized individuals in the criminal justice system and in custody, as well as the growing recognition of racial discrimination in the justice system generally and in policing in particular. The significant impacts of criminal charges on individuals and, by extension, on society at large, are also considered.

I. Pre-Charge vs. Post-Charge Screening

On the issue of pre- and post-charge screening, it is submitted that a mechanism of pre-charge screening by senior Crowns, with the police nonetheless retaining final decision-making authority on the laying of charges, ought to be adopted throughout Canada. Considerations in support of this position are as follows:

Reducing rates of withdrawals and stays

- As outlined in materials provided for discussion, statistics clearly indicate that jurisdictions with pre-charge screening practices have substantially lower rates of withdrawals and stays of charges than those with post-charge screening regimes. In Ontario, for example, withdrawals and stays of charges averaged 48% between 2017 and 2021 – compared to 31% in British Columbia, 20% in New Brunswick and 9.25% in Quebec (all pre-charge screening jurisdictions) in the same timeframe.

- While a number of factors may contribute to high numbers of withdrawals and stays, the significantly lower numbers of withdrawals and stays in pre-charge

screening jurisdictions nonetheless suggest a link to pre-charge screening practices: “Stays and withdrawals are less common in pre-charge screening jurisdictions, likely because cases destined for dismissal are discontinued at an earlier stage than in post-charge screening provinces.... [I]n post-charge jurisdictions such charges often linger for many months before they are stayed or withdrawn. Regrettably, such delays waste scarce resources and disrupt the lives of presumptively innocent people.”[1] Fewer withdrawals may also result from lower rates of ‘overcharging’ by police, as Crowns in pre-charge screening jurisdictions can not only determine whether charges ought to be laid, but also indicate, on the basis of available evidence, what charges are appropriate.

- Withdrawal rates in Ontario are even higher for certain types of offences – most notably sexual assaults. On average, between 2017 and 2021, 61% of sexual assault cases in Ontario were withdrawn or stayed, while 32% resulted in a finding of guilt. These numbers are particularly troubling when one considers the stigma and other collateral consequences resulting from the mere fact of being charged with a sexual offence. As stated in the *McCuaig Report*:

  > If a charge is laid and then stayed because of a lack of evidence, an accused may be exposed to all the negative consequences of being charged – publicity, employment problems, border crossing problems, child access problems if a family violence charge – when he arguably should not have been charged at all. This is particularly so in cases of sexual misconduct, where no amount of explanation after a stay can undo the damage to an accused’s reputation.[2]

  By way of contrast, in pre-charge screening jurisdictions, between 12% and 42% of sexual assault matters were withdrawn/stayed in the same timeframe.[3]

- The practice of pre-charge screening would reduce the number of matters entering the criminal justice system ultimately destined for withdrawal due to determinations of not passing the evidentiary threshold for prosecution or lack of public interest, thereby both redirecting resources to the more serious (and stronger) cases, and reducing the impact of charges on presumptively innocent individuals.

Reducing delays & improving disclosure practices

- By reducing the number of ‘weak’ matters entering into and lingering in criminal courts, pre-charge screening would free up some much-needed court time to

---

[1] *Criminal Procedure in Canada, 3rd Ed*., Steven Penney, Vincenzo (Enzo) Rondinelli, James Stribopoulos, at ¶8.15

[2] *British Columbia Charge Assessment Review* (*McCuaig Report*), 2012, at p 29

[3] 42% withdrawn/stayed in BC; 22% withdrawn/stayed in New Brunswick; 12% withdrawn/stayed in Quebec. See materials provided for discussion.

deal with more serious charges.[4] Furthermore, as outlined in discussion materials, since the Jordan clock does not start running until charges are laid, pre-charge jurisdictions can expect less delay in bringing matters to conclusion within the Jordan timelines. Many disclosure issues would also be resolved, as police would be required to provide the Crown with disclosure at the pre-charge screening stage, thereby shortening wait times for disclosure once (and if) charges are laid. More data will need to be examined, however, for a more fulsome comparison of delay in pre- and post-charge screening jurisdictions.[5]

- The practice of preparing disclosure after laying charges shifts a heavy burden from the state to the individual accused. While police do not need to provide the Crown with disclosure in advance of charges being laid in a post-charge screening environment, they must nonetheless prepare disclosure thereafter – a process that can last from weeks to months, during which the accused, who is presumed innocent, must wait for an assessment by the Crown of whether the prosecution should continue. Delays stemming from the preparation of disclosure when charges have already been laid also increase the risk of breaching conditions of release, resulting in additional arrests and increases in remand populations.

- The laying of charges and subsequent release on conditions – whether by police or by the court – can cause a 'spiral' of administrative charges, such that, even if the substantive charges are later withdrawn as either not in the public interest or as not meeting the evidentiary threshold for proceeding with prosecution, the accused may end up with a criminal record for administrative offences only. Such

---

[4] A pilot project in RCMP detachments and Crown offices in three communities in Alberta resulted in a "decrease of 21 per cent in commenced cases and 29 per cent in criminal charges laid." <https://www.cbc.ca/news/canada/edmonton/alberta-government-expands-criminal-charge-pre-screening-pilot-project-1.5708710>

[5] By way of example, while OCJ statistics in Ontario include *average* number of days to case disposition, British Columbia reports *median* days to case conclusion (note that numbers since 2020 were impacted by the Covid-19 pandemic):

Year	ONTARIO – Average days to disposition (excluding bench warrants)	BC – Median days to conclusion
2016 (ON) / 2016-17 (BC)	142	87
2017 (ON) / 2017-18 (BC)	148	88
2018 (ON) / 2018-19 (BC)	145	92
2019 (ON) / 2019-20 (BC)	150	105
2020 (ON) / 2020-21 (BC)	156	171
2021 (ON)	142	
Jul 2021 – Jun 2022 (ON)	161	

Ontario: https://www.ontariocourts.ca/ocj/stats-crim/
BC:https://app.powerbi.com/view?r=eyJrIjoiN2ZlMmFiMTUtNDU3MS00OTcwLTgyYWQtYmIwMTRiMGYxNjAxIiwidCI6IjZmZGI1MjAwLTNkMGQtNGE4YS1iMDM2LWQzNjg1ZTM1OWFkYyJ9
There are older reports available from Statistics Canada (such as https://www.justice.gc.ca/eng/rp-pr/jr/jf-pf/2017/dec01.html); however, more detailed examination of time to completion in different jurisdictions as the criminal justice system deals with post-Covid backlog is needed.

administrative charges both contribute to delay in the justice system ('clog the courts'), and result in negative consequences for the individual accused.

Minimizing risks of tunnel vision and bias

- Pre-charge screening has the additional advantage of avoiding the dangers of status quo bias. Once charges are laid, it is much easier to uphold the status quo and let a matter run its course – at least until the Jordan ceilings start looming in the distance. The mere presence of charges also feeds the culture of complacency and risk aversion in bail courts. The feeling that 'the police charged him, so he must have done something wrong,' while not generally spoken out loud, is often apparent in bail decisions. This is just as true in cases where the evidence is weak and, upon review by the Crown, would lead to a withdrawal for lack of a prospect of conviction.

- Pre-charge screening by prosecutors would also help address tunnel vision – a contributing factor to wrongful convictions. Tunnel vision is described as "a tendency of participants in the system, such as police or prosecutors, to focus on a particular theory of a case and to dismiss or undervalue evidence which contradicts that theory."[6] A review of available evidence by a Crown attorney at the pre-charge screening stage would help address tunnel vision by police resulting in unnecessary charges. Furthermore, as recommended by the FPT Heads of Prosecutions Subcommittee on the Prevention of Wrongful Convictions, a practice whereby a different prosecutor reviews mattes post-charge would assist in preventing tunnel vision errors by prosecutors.[7]

Ensuring early consideration of public interest

- Pre-charge screening would also enable more appropriate application of the public interest test. While the evidentiary threshold for prosecution differs among jurisdictions (reasonable prospect of conviction, substantial likelihood of conviction, etc., discussed below), all jurisdictions apply a public interest criterion in the prosecution screening test. The formulation of that criterion in Ontario is as follows:

> If there is a reasonable prospect of conviction, the Prosecutor must then consider whether it is in the public interest to continue the prosecution. The public interest factors must only be considered after it is determined there is a reasonable prospect of conviction. No public interest, however

[6] *Innocence at Stake: The Need for Continued Vigilance to Prevent Wrongful Convictions in Canada,* Report of the Federal/Provincial/Territorial Heads of Prosecutions Subcommittee on the Prevention of Wrongful Convictions 2018, at p.7 <https://www.ppsc-sppc.gc.ca/eng/pub/is-ip/is-ip-eng.pdf>
[7] *Ibid*., at p.9

> compelling, can warrant the prosecution of an individual if there is no reasonable prospect of conviction.[8]

While public interest is considered by all jurisdictions, the test is employed too late in post-charge screening regimes. Where an individual is charged with a criminal offence, damage is done by virtue of the charges and the accused's involvement in the criminal justice system alone, even if charges are later withdrawn. Outstanding charges are disclosable on Criminal Record and Judicial Matters Checks and Vulnerable Sector Checks.[9] Criminal charges and release conditions can also negatively impact the accused's housing, income security, employment, education, social and familial ties and mental and physical well-being, among other things. Furthermore, "[m]arginalized populations such as those with mental health issues, homeless populations, racialized populations, and those with developmental disabilities come into disproportionate contact with police and are therefore more likely to have a police record."[10]

- Thus, considerations of public interest ought to be made prior to charges being laid, so as to avoid the negative consequences of being unnecessarily charged. If a determination is made that prosecuting the individual is not in the public interest, alternatives to criminal prosecution can also be considered, including culturally-appropriate programming, alternative measures and diversion options. As Kevin Fenwick, then Deputy Minister and Deputy Attorney General, Saskatchewan Ministry of Justice, after noting that 90% of cases that are diverted in Saskatchewan are diverted post-charge, stated: "If you think you are going to recommend alternative measures, why do we lay the charge in almost every case? We could significantly reduce the number of cases before the courts if we were to divert pre-charge…."[11]

Combating systemic racism, discrimination and overrepresentation

- Early evaluation of the public interest in proceeding with a criminal prosecution would also enable consideration of factors unique to the treatment of Indigenous, Black and racialized individuals in Canadian society. The vast overrepresentation of Indigenous individuals in the criminal justice system is well known.[12] Black individuals, too, are grossly over-represented in the justice system, and are more likely than White people to face low-level charges and "low-quality charges with a

---

[8] *Crown Prosecution Manual*, D.3: Charge Screening < https://www.ontario.ca/document/crown-prosecution-manual/d-3-charge-screening>
[9] *Police Record Checks Reform Act*, 2015
[10] *On the Record: An Information Guide for People Impacted by Non-Conviction Police Records in Ontario*, John Howard Society, at p.6 <http://www.johnhoward.on.ca/wp-content/uploads/2014/11/On-the-Record-1-FINAL.pdf>
[11] *Delaying Justice is Denying Justice: An Urgent Need to Address Lengthy Court Delays in Canada* <https://sencanada.ca/content/sen/committee/421/LCJC/reports/Court_Delays_Final_Report_e.pdf>
[12] https://www.justice.gc.ca/eng/rp-pr/jr/jf-pf/2019/may01.html; see also *Overrepresentation of Indigenous People in the Canadian Criminal Justice System*, < https://www.justice.gc.ca/eng/rp-pr/jr/oip-cjs/oip-cjs-en.pdf>

low probability of conviction."[13] Indigenous and Black individuals are often subject to racial profiling and over-policing.[14]

- Allowing public interest to be considered prior to charges being laid, and including considerations of systemic racism, colonialism, Gladue factors and the availability of alternative measures in the application of the public interest criterion by Crowns, would allow Crowns to exercise their roles as Ministers of Justice prior to – and without – additional negative consequences to already marginalized populations. Thus, for example, the British Columbia Crown Counsel Policy Manual directs Crowns to consider, among other things:

    - the need to reduce overrepresentation of Indigenous persons as accused within the criminal justice system, particularly where *R. v. Gladue* factors have played a part in the Indigenous person's coming into contact with the criminal justice system;

    - bias, racism, or systemic discrimination played a part in the accused coming into contact with the criminal justice system, with particular attention to the circumstances of Indigenous accused;

      and whether

    - the public interest has been or can be served without a prosecution by the BC Prosecution Service, including through restorative justice methods, alternative measures, Indigenous community justice practices, administrative or civil processes, or a prosecution by another prosecuting authority.[15]

  It is submitted that this practice ought to be adopted by other jurisdictions as well, including in Ontario.[16]

- Calls for pre-charge screening mechanism to combat anti-Indigenous racism have been made for some time, including in submissions by Aboriginal Legal Services of Toronto and Nishnawbe Aski Nation at the Goudge inquiry:

---

[13] *A Disparate Impact,* Ontario Human Rights Commission <www.ohrc.on.ca/en/disparate-impact-second-interim-report-inquiry-racial-profiling-and-racial-discrimination-black>

[14] Scot Wortley and Julian Tanner, "Data, denials, and confusion: The racial profiling debate in Toronto" (2003) 45(3) Canadian J. Criminology and Crim. Just. 367. Akwasi Owusu-Bempah "The usual suspects: police stop and search practices in Canada" (2011) 21(4) Policing and Society 395. Scot Wortley and Julian Tanner "Inflammatory rhetoric? Baseless accusations? A response to Gabor's critique of racial profiling research in Canada" (2005) 47(3) Canadian J. Criminology and Crim. Just. 581. Jim Rankin, Sandro Contenta, and Andrew Bailey "Toronto marijuana arrests reveal 'startling' racial divide" The Toronto Star (6 July 2017) < https://www.thestar.com/news/insight/2017/07/06/toronto-marijuana-arrests-reveal-startling-racial-divide.html>

[15] https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/prosecution-service/crown-counsel-policy-manual/cha-1-charge-assessment-guidelines.pdf

[16] The Ontario Crown Prosecution Manual does not specifically refer to the overrepresentation of Indigenous persons in its list of public interest criteria to be considered by Crowns

"Addressing the over-representation of Aboriginal peoples in the justice system will require early interventions, such as pre-charge screening, to identify cases in which charges are being improperly laid against Aboriginal persons."[17]

- There exist some parallels between recent Supreme Court decisions and *Criminal Code* amendments on issues of bail and the considerations that underlie pre-charge screening practices. Section 493.2 of the *Criminal Code* requires peace officers, justices and judges to "give particular attention to the circumstances of (a) Aboriginal accused; and (b) accused who belong to a vulnerable population that is overrepresented in the criminal justice system and is disadvantaged in obtaining release…." While these considerations are crucial at the bail stage, they are no less important in determining whether a charge should be laid – especially where evidence is weak and there may be alternatives to commencing a criminal prosecution. It is therefore submitted that the aim of addressing these concerns is best achieved by pre-charge screening by Crowns, due to:

    - The role of the Crown as 'Minister of Justice,' separate and independent from the police, and separate from the investigation;

    - The ability of the Crown (and, it is submitted, the need for the Crown) to apply the public interest test at the screening stage; and

    - The ability of the Crown to foresee strengths and weaknesses in the Crown's case and apply the higher evidentiary threshold for continuing a prosecution (while the police apply the lower standard of belief on reasonable grounds alone to lay charges – section 504 of the *Criminal Code*)

Maintaining independence of police and Crown

- The above considerations raise one of the most common objections to pre-charge screening – namely, that it interferes with the independence of police and prosecution. The need for separation between police and Crown functions is well-known.[18] As stated in the *Martin Report*:

    > As a matter of law, police officers exercise their discretion in conducting investigations and laying charges entirely independently of Crown counsel. The police seek the advice of the Crown only where they think it appropriate. And while it is no doubt prudent to do so in many cases, the police are not bound to follow the advice of Crown counsel, as that advice relates to the conduct of the investigation and the laying of charges. The

[17] *Final Submissions on behalf of Aboriginal Legal Services of Toronto and Nishnawbe Aski Nation*, at para 172 <http://www.archives.gov.on.ca/en/e_records/goudge/submissions/pdf/Submission_ALST-NAN.pdf>

[18] *R v Regan*, 2002 SCC 12 at para 66

> Crown likewise exercises independent discretion in the conduct of the prosecution before the courts, having no obligation to prosecute simply because a charge is laid by the police….
>
> The mutual independence of Crown counsel and the police has many advantages... [S]eparating the investigative and prosecutorial powers of the state is an important safeguard against the misuse of both. Such separation of power, by inserting a level of independent review between the investigation and any prosecution that may ensue, also helps to ensure that both investigations and prosecutions are conducted more thoroughly, and thus more fairly. The police and Crown counsel can focus on their particular areas of expertise.[19]

- While the *Martin Report* ultimately did not recommend that a pre-charge screening system be adopted in Ontario, the rationale behind this recommendation has, arguably, changed overtime.

    - The *Martin Report* was written in 1993, before the Supreme Court decisions in *Gladue* and *Ipeelee*, and before the widespread recognition of the need to address the overrepresentation of marginalized groups in the criminal justice system. Thus, the importance of applying the public interest test as early as possible is much clearer today.

    - Despite the assertion in the *Martin Report* that pre-charge screening as opposed to post-charge screening has "minimal efficiency-oriented advantages," current data suggest that differences in withdrawals and guilty pleas between pre- and post-charge screening jurisdictions are far from being minimal.[20]

    - Concerns about the suspect constitutionality of pre-charge screening can easily be addressed by putting a system in place that would maintain the independence of Crown and police, while at the same time allowing for pre-charge screening by senior Crown counsel to take place. In order for police and prosecution to retain their independence and continue to act as essential checks on each other's power, it is submitted that Crowns should engage in pre-charge screening and provide recommendations to the police regarding the laying of charges (whether to lay charges and, if so, what charges to lay). It should remain up to the police whether or not to follow the Crown's advice and lay charges. It is likely, however, that police will follow Crown advice on the laying of charges, as it remains up to the Crown whether or not to proceed with prosecution, and laying charges which would result in withdrawal would create unnecessary work for police. In fact, while British Columbia has a system in place for police to

[19] *Martin Report*, p 37-39
[20] *Martin Report* at p 114

review decisions by the Crown to not lay charges,[21] at the time of the *McCuaig Report* the system had never been used:

> By all reports, it has never needed to be carried through to its ultimate end where the police have laid an Information against all advice from the Crown. Where there have been disagreements, they have been resolved through discussion between the police and Crown Counsel. [22]

- Thus, while the independence of Crown and police are important to safeguards against abuse of power, such independence can be maintained with the institution of an appropriate pre-charge screening mechanism which, nonetheless, leaves the final decision of whether or not to lay charges to the police.

- Reports from other jurisdictions indicate that pre-charge screening in fact leads to greater cooperation and improved working relationships between police and prosecutors.[23] Furthermore, an initial review of the Embedded Crown Project in Ontario, where Crown counsel were place at two police divisions (one in Ottawa, another in Toronto) to provide real-time advice on bail decisions to police,[24] and have since began assisting with charging decisions and investigative advice, revealed that the initiative has been well-received by the Toronto and Ottawa Police Services. The evaluation of the project showed that, in Ottawa, without this initiative, the number of cases starting in bail court would have been approximately 16% higher. In Toronto's 51 Division, that number would have been approximately 5% higher.[25]

Honouring the presumption of innocence

- Pre-charge screening is also better aligned with the basic tenets of the Canadian criminal justice system. Our system is based on the ability of the state to prove the guilt of the accused beyond a reasonable doubt. Unless and until proved otherwise, individuals are presumed innocent. As such, it would be more fitting to only lay those charges where proof of guilt is sufficiently likely – that is, basing the very laying of charges on the standard of prospect/reasonable

---

[21] *British Columbia Crown Counsel Policy Manual*, Charge Assessment Decision – Police Appeal < https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/prosecution-service/crown-counsel-policy-manual/cha-1-1.pdf>

[22] *British Columbia Charge Assessment Review (McCuaig Report*), 2012, at p 25

[23] See, for example, the UK *Joint Thematic Review of the New Charging Arrangements* referred to in discussion materials < https://www.justiceinspectorates.gov.uk/cjji/inspections/joint-thematic-review-of-the-new-charging-arrangements/>

[24] < https://news.ontario.ca/en/backgrounder/46817/progress-on-ontarios-plan-for-faster-fairer-criminal-justice>

[25] *Criminal Court System: Follow-Up Report*, Office of the Auditor General of Ontario, at p. 9 <https://www.auditor.on.ca/en/content/annualreports/arreports/en21/1-16CriminalCourts_en21.pdf>

likelihood/substantial likelihood of conviction,[26] rather than the lower standard of belief "on reasonable grounds" (the test for laying an Information in section 504 of the *Criminal Code*).

- Ultimately, pre-charge screening would benefit society at large, as it would: Combat systemic racism; reduce delay and cost in the criminal justice system, allowing for resources to be directed towards the more serious offences and funding for alternative programs; ensure that individuals who are presumed innocent and the evidence against whom is weak do not suffer the consequences of facing criminal charges which would ultimately not proceed – consequences which may lead to loss of housing, income, etc., putting the individual at an even greater risk of coming into future contact with the criminal justice system.

- Finally, it is submitted that now is the perfect time to change to a pre-charge screening system given the findings in the recent *State of the Criminal Justice System: Impact of COVID-19 on the Criminal Justice System* report. Two findings in particular would be directly impacted by a transition to pre-charge screening:

> *The time required to complete a court case increased for both adults and youth over the first two years of the pandemic (2020/2021, 2021/2022). Consequently, the proportion of court cases that exceed the Jordan limit once completed has also increased.*
>
> *There was a decrease in the use of diversion and restorative justice programs and processes in 2020, which coincided with reduced capacity for these programs.*

A transition to pre-charge screening in Ontario would also be consistent with the province's plan of establishing "an experienced team of prosecutors to conduct an intensive case review and resolution blitz to target offences from region to region."[27] Ontario could use these same experienced Crowns to begin pre-charge pilot screening projects in a number of locations throughout the province.[28]

---

[26] See below for a further discussion of evidentiary thresholds.
[27] https://news.ontario.ca/en/release/1001076/ontario-introduces-new-measures-to-address-court-backlog
[28] In its 2020 pre-budget submissions, the John Howard Society recommended choosing three mid-sized jurisdictions as pilot locations for the pre-charge screening model <https://johnhoward.on.ca/wp-content/uploads/2020/01/Final-JHSO-2020-Pre-Budget-submission-to-Minister-of-Finance.pdf>

II. Evidentiary Thresholds

In Ontario, the evidentiary threshold Crowns apply in determining whether or not to proceed with charges is that of a *reasonable prospect of conviction*, which requires a determination by the Crown that there exists more than a *prima facie* case against the accused, but does not require an assessment that a conviction is more likely than not.[29]

As outlined in discussion materials, the definition of the evidentiary threshold for prosecution varies among jurisdiction, with some applying a standard defined as *reasonable prospect of conviction*, while others require that there be a *reasonable likelihood of conviction* or, in the case of British Columbia, a *substantial likelihood of conviction*. New Brunswick, like Ontario, uses the language of *reasonable prospect of conviction*; however, unlike Ontario, it defines this standard as requiring a determination that "an impartial trier of fact properly directed in accordance with the law, **is more likely than not** to convict the accused on the offence charged based on the evidence available" [emphasis added].[30]

The standard of *reasonable likelihood of conviction* used in Alberta, Manitoba, Newfoundland and Labrador, Prince Edward Island and Saskatchewan, too, is not uniformly defined. While some jurisdictions using this standard require that a conviction only be "more than technically or theoretically available" and that the "prospect of displacing the presumption of innocence" be real,[31] other provinces employing the same language of *reasonable likelihood* require that a conviction be more likely than not.[32]

British Columbia is the only jurisdiction that uses an evidentiary threshold of *substantial likelihood of conviction* for commencing and proceeding with a prosecution. Despite the recommendation in 1990 that the province change its standard to one of *reasonable likelihood*, British Columbia decided against such a change. The standard was, however, refined over the years, permitting a lower evidentiary threshold to be relied on for "exceptional cases."[33]

---

[29] *Crown Prosecution Manual*, D.3: Charge Screening < https://www.ontario.ca/document/crown-prosecution-manual/d-3-charge-screening>

[30] New Brunswick *Public Prosecutions Operational Manual*, Chapter II: Decision to Prosecute <https://www2.gnb.ca/content/dam/gnb/Departments/ag-pg/PDF/en/PublicProsecutionOperationalManual/Policies/Pre-chargeScreening.pdf>

[31] *Guide Book of Policies and Procedures for the Conduct of Criminal Prosecutions in Prince Edward Island* <https://www.princeedwardisland.ca/sites/default/files/publications/guide_book_of_policies_and_procedures_for_the_conduct_of_criminal_prosecutions.pdf>

[32] Alberta – *Prosecution Service Guideline: Decision to Prosecute* <https://open.alberta.ca/dataset/8fa0bd3b-2bbe-400d-85d2-3ba8101d83e2/resource/70bbab1d-9c31-4649-8b9a-dc9d2c3f73b8/download/guid-decision-to-prosecute-2006-11-28.pdf>; Manitoba – *Department of Justice Prosecution Policy Directive*: Laying, Staying and Proceeding on Charges <https://www.gov.mb.ca/justice/crown/prosecutions/pubs/laying_and_staying_of_charges.pdf>

[33] *British Columbia Charge Assessment Review (McCuaig Report*), 2012, at p. 11

In its discussion of the evidentiary threshold, the *McCuaig Report* revealed that many justice system participants were of the view that the precise terminology used in defining the evidentiary threshold may not make a difference in its practical application:[34]

> In practice, the views again diverge. A number of police, Crown Counsel, and judges were asked whether they saw any real difference in the application of the different standards. There was far from any consensus. Some felt that there would be no difference in assessing a file; others felt that there would be. This is consistent with the divergent opinions expressed in the Decision to Prosecute Inquiry back in 1990.
>
> It is difficult to envision a situation in which the assessment of the case – whether to charge or not charge – would be different using the different standards. To rephrase in another way: what a prosecutor asks himself/herself in making an assessment decision is: "Is the admissible evidence such that I believe that I can prove this case beyond a reasonable doubt?" If there is in fact a practical difference, the cases where there would be a difference in the charging decision would be few.

The *McCuaig Report* recommended maintaining the standard of *substantial likelihood* in British Columbia for the following reasons:[35]

> Firstly, it is useful to consider that to change to a reasonableness standard could have several negative consequences:
>
> - A significant mindset change in all of its Crown prosecutors and officials, as all have been working with the 'substantial' standard for almost 30 years.
>
> - Crown Counsel may have less confidence in their own decisions with resulting potential delays in making charge decisions.
>
> - A potential lowering of the evidential bar over time.
>
> - A potential reduction in the quality of police investigations/reports, since the bar could be considered as lowered, even by a small margin.
>
> As well, its long history in BC and the fact that the Ministry made a considered, principled decision to retain it previously.
>
> As noted earlier, a change in the standard or process must be justified by a real probability of positive change. This is not so when we talk of the actual charging standard. BC may be alone in its choice of the standard but that does not mean

[34] *Ibid.* at p. 14
[35] *Ibid*.

> that the choice is wrong. There is no evidence that changing it would bring tangible benefits. Whatever issues there may be with the process do not arise from the standard.
>
> This would be change for the sake of change.

These potential negative consequences of a lowering of the evidentiary threshold in British Columbia do not, however, apply to other jurisdictions, all of which already use lower standards.

It is submitted that, generally, a standard that incorporates likelihood of conviction (that is, where a Crown determines that, in light of all available evidence, it is more likely than not that the individual would be convicted) would be more fitting to prevent matters based on weak evidence from entering the justice system, address the danger or wrongful convictions, and prevent collateral consequences to presumptively innocent individuals of being unnecessarily charged and thrust into the criminal justice system. While an evidentiary threshold of *substantial* likelihood of conviction is more in keeping with the presumption of innocence, such a standard may be difficult to implement for a number of reasons. It is therefore submitted that, <u>at a minimum</u>, the evidentiary threshold ought to incorporate considerations of *likelihood*, where a conviction is deemed to be more likely than not. The following considerations support this submission:

- In 1993, the *Martin Report*, in recommending that the *reasonable prospect of conviction* test be adopted, outlined a number of criticism of evidentiary thresholds requiring an assessment that a conviction is more likely than not ("the 51 percent rule"). The two main criticism of the "51 percent rule" were that it "imposes too high a burden on Crown counsel in deciding whether to recommend the institution of criminal proceedings against a person or whether to withdraw a criminal charge if laid," and that "in matters of prosecutorial discretion, it is not possible to evaluate to a percentage degree of accuracy."[36]

- Notwithstanding these criticisms, the *Martin Report* Committee was of the view that, in applying the evidentiary threshold, Crowns must engage in "some assessment of the credibility of witnesses, the admissibility of evidence, and a consideration of likely defences is both desirable and necessary," and that the experience of Crown attorneys should play a role in charge screening.[37]

- It is submitted that such limited assessment of available evidence at the screening stage, viewed through the lens of experienced Crown counsel, would enable a threshold determination of the likelihood of conviction, thereby striking the right balance between protection of the public and restraint in the use of criminal law powers against presumptively innocent individuals.

---

[36] *Martin Report* at p. 58-59
[37] *Ibid*., at p. 61

- An evidentiary threshold that permits prosecution only where there appears to be, on a limited weighing of evidence, a substantial likelihood of conviction would be most consistent with the basic principles of Canada's criminal justice system, as it would ensure that proper consideration is given to the presumption of innocence enshrined in section 11(d) of the *Charter*. A threshold of substantial likelihood would also be instrumental in addressing the danger of tunnel vision, which has been found to be a leading cause of wrongful convictions.[38]

- Notwithstanding the above, it is recognized that an evidentiary threshold of substantial likelihood may be difficult to implement for those jurisdiction that do not currently employ such a standard. As indicated in the *Martin Report*, the precise percentage of the likelihood of obtaining a conviction is impossible to determine at the screening stage. It is submitted that the concern is more applicable to determining where there is a *significant likelihood*, rather than a *reasonable likelihood* of proof of guilt beyond a reasonable doubt. Though an assessment of likelihood is necessary under both standards, it is determining where a *substantial* likelihood of conviction exists that requires prosecutors to engage in more detailed weighing of the evidence, and may be impossible to do without findings that can only be made at trial, such as credibility assessments. On the other hand, determinations of likelihood do not require engaging with the evidence to the same degree.

- A change to requiring a substantial likelihood of conviction in jurisdictions that currently employ lower evidentiary thresholds may raise some concerns for complainants and witnesses, including in domestic assault and sexual assault cases, where many matters are based entirely on assessments of credibility. It is here, in fact, where the burden on Crowns of determining whether, on the evidence, a conviction is substantially likely is arguably most high, and could present barriers to the protection of victims of crime. If, however, a Crown determines that a conviction is less likely than an acquittal, it is submitted that prosecution ought not to be commenced, or should be halted, unless public interest is so high as to justify continued prosecution on the lower evidentiary threshold of reasonable prospect of conviction. As British Columbia Crowns have been applying a substantial likelihood evidentiary threshold for many years and a system has been developed to address exceptional cases, however, that standard should remain in place in that jurisdiction, even if other jurisdictions differ in their evidentiary thresholds for prosecution.

- As discussed above, Canadian jurisdictions differ in their applications of evidentiary thresholds, even when the same terminology is used. Another useful example is the definition and explanation of the evidentiary threshold used in the

[38] *Innocence at Stake: The Need for Continued Vigilance to Prevent Wrongful Convictions in Canada,* Report of the Federal/Provincial/Territorial Heads of Prosecutions Subcommittee on the Prevention of Wrongful Convictions 2018, at p.8 <https://www.ppsc-sppc.gc.ca/eng/pub/is-ip/is-ip-eng.pdf>

UK. In its explanation of the Full Code Test, the UK *Director's Guidance on Charging*, 6th Ed., reads as follows:[39]

> 5.2 They must be satisfied that there is sufficient evidence to provide a **realistic prospect of conviction** against each suspect on each charge, based on an objective assessment of the evidence, including the impact of any defence and any other information that the suspect has put forward or on which they might rely. They should consider whether the evidence is admissible, credible, and reliable. They must also consider whether there is any other material or information that might affect the sufficiency of evidence.
>
> 5.3 The Code clarifies that a realistic prospect of conviction means "an objective, impartial and reasonable jury, bench of magistrates or a judge hearing a case alone, properly directed and acting in accordance with the law**, is more likely than not to convict the defendant of the charge alleged**." Prosecutors and police decision makers must therefore be in a position to explain why it "is more likely than not" that the court will convict. [Emphasis added; citation omitted]

- Thus, while consistency of terminology is helpful, what appears more important is the way in which the standard is interpreted and applied. Appropriate training and consistency of application are, therefore, of utmost importance in ensuring that cases based on evidence too weak to result in a conviction do not enter the criminal justice system.

- Would a change of terminology, then, serve a purpose? It is submitted that it may, not least because it can provide a reminder to prosecutors of the significant implications of commencing and continuing criminal prosecutions. Recent statistics from the Ontario Court of Justice seem to support the need for such a reminder: Between July 2021 and June 2022, at the Ontario Court of Justice, 107,990 cases were withdrawn or stayed before a trial date, while 5,913 cases were withdrawn on the trial date.[40]

- Similar 'reminders' to courts and counsel had been given by Parliament and the Supreme Court of Canada in the context of bail. While the law of bail had been clear for many years, it did not stop the overreliance on sureties and the culture of risk aversion in bail decisions, especially in Ontario. Only now, following the Supreme Court of Canada decisions in *R v Antic*[41] and *R v Zora*,[42] as well as the amendments to the bail provisions in Bill C-75, is Ontario seeing a change in its use of sureties, especially for more minor allegations.

---

[39] https://www.cps.gov.uk/legal-guidance/charging-directors-guidance-sixth-edition-december-2020
[40] https://www.ontariocourts.ca/ocj/stats-crim/
[41] 2017 SCC 27
[42] 2020 SCC 14

- In light of discussion above, it is submitted that a requirement that there be, at a minimum, a likelihood of conviction, would strike a balance between honouring the presumption of innocence and not forcing innocent individuals into the criminal justice system on matters unlikely to result in convictions, and ensuring that prosecutors are able to proceed with matters for the safety and protection of the public without being required to engage in the very difficult task of overweighing probabilities at the early stages.

- It is recommended that provinces that do not currently use an evidentiary threshold requiring that a conviction be substantially likely or 'more likely than not' engage in pilot projects and data collection to ascertain the impact of changing the standard on the numbers of prosecutions and of matters withdrawn for not meeting the evidentiary threshold.

In conclusion it is submitted that, whatever evidentiary threshold is chosen, in keeping with the recognition of the need to correct the overrepresentation of Indigenous, Black and marginalized individuals in the justice system, determinations of whether a charge is in the public interest must be made as early as possible in the process. As such, it is submitted that the move to pre-charge screening across Canada should be given priority, whether or not changes are made to the evidentiary threshold for prosecution.

December 7, 2022

APPENDIX J: LEGAL AID BRITISH COLUMBIA

Chief Executive Officer | Executive Office
p. 604-601-6137 **e.** Michael.Bryant@legalaid.bc.ca

MEMO

Date: 2023-01-06
From: MJ Bryant, CEO, Legal Aid BC
To: Co-Leads, Subcommittee of Steering Committee, *infra*
Subject: **Steering Committee on Justice Efficiencies 2022**

This memo provides my written comments on the two relevant issues (pre-charge vs post-charge Crown screening and the differing Crown evidentiary thresholds from across Canada), further to the invitation to comment by the Co-Leads of the Sub-Committee of the Steering Committee on Justice Efficiencies and Access to Criminal Justice Seeking Information.

My overall comment is that the written materials provided, and the Committee's mandate and makeup, is imbalanced, to the detriment of the presumption of innocence and the Crown's quasi-judicial obligations. This comment may seem misdirected, but it can be addressed by the Co-Leads. Although the mandate and makeup of the committee may have been determined by parliamentarians or those in high executive office, that does not mean its co-leads cannot seek perspectives to re-balance the general orientation of the Steering Committee. Again, I realize that this was not the doing of the Co-Leads; and only praise can I offer for your private bar representatives, whose participation was no doubt intended to achieve some balance. But they are grossly outnumbered. (Further, the ethnocultural diversity of the Steering Committee may also be imbalanced, subject to your confirmation). Lastly, the jurisdiction or orientation of its mandate, reflected in the written materials, reads as if the presumed audience are prosecutors and police. To me, it reads like a how-to manual for convictions.

Or at least the discussion of pro's and con's of pre-/post charge screening, found in Slides 13 and 14, is imbalanced. The "advantages/disadvantages" are all to the prosecution. *Prima facie*, they do not pay heed to the presumption of innocence, the rights to reasonable bail and a fair trial. For example, an "advantage" of pre-charge screening is a manipulation of the *Jordan* test, without regard to its impact on the accused:[1]

> The "Jordan" clock starts running from the laying of charges and not from the beginning of an investigation. Any time spent compiling disclosure or compiling additional evidence prior to laying charges does not count towards any delay argument.

[1] There are other examples in these two slides (eg., "Enhanced investigations and stronger prosecutions"; "A decrease in disclosure obligations and follow-up investigations") evincing the Crown bias. And since when is having one's 'day in court' afforded only to the "victim"? The token after-thoughts to fair trial rights or the public interest (eg., reference to divergence) are small consolation.

That is in fact a disadvantage to an accused seeking to avoid unnecessary delay. An accused cannot be expected to understand the distinction between being arrested and being charged. The Crown's sword of Damocles arrives in the defendant's life from the moment of arrest. An underfunded or under-performing prosecution system in a pre-charge Crown screening jurisdiction is therefore enabled by this permissible 'bonus' delay arriving in the current interpretation of *Jordan*.

Further, there are tacit endorsements of tactics that risk abuse of process. 'Charge first, investigate second' exploits defendants and witnesses contrary to the presumption of innocence. Yet this ploy is listed as an "advantage' of post-charge screening, permitting the unconstitutional tactic of "investigations [being] advanced by charges." It is a charge based not on a reasonable prosect of conviction, but *ipso facto* on the hunch that an investigation may uncover evidence justifying a charge, retroactively, post-charge, pre-trial. In fact, this ought to be listed as a disadvantage of a post-charge system, because of the risk that is being encouraged.

The "efficiency" (your Committee's title) to be found in your materials presumes that the goal of the administration of justice is conviction proficiency. Your materials appear more interested in convictions than the quasi-judicial. The materials themselves may be inconsistent with the Crown Policy Manuals of most jurisdictions. The Steering Committee's work is not supposed to be a proxy for Crown Attorney associations, presumably. The Steering Committee is rather to reflect the perspective of the state; the Departments of Justice, or an adjunct of parliament's executive.[2] The Steering Committee may include the perspective of a prosecutor, but it ought to be a quasi-judicial perspective, and that ought to be one of various perspectives, which I do not see reflected in these materials, at present.

Lastly, the various tables and graphs could be more helpful if they included not just proportions but also the quantum of charges, withdrawals, and convictions; and some per capita reference (eg., X per 100,000 population). Are there more or less charges laid, per capita, in pre-charge jurisdictions? The same applies to conviction rates, withdrawal of charges and divergence.

Besides the polemic herein against conviction proficiency, I would add LABC's observations regarding over-charging and over-policing. Our experience is indeed that BIPOC defendants face disproportionate, negative scrutiny from police in Canada today, compared to privileged

---

[2] See Marshall, G. (1980). The State, The Crown, and The Executive. In *Constitutional Theory*. Oxford University Press. https://doi.org/10.1093/acprof:oso/9780198761211.003.0003

Chief Executive Officer | Executive Office
p. 604-601-6137 **e.** Michael.Bryant@legalaid.bc.ca

Caucasians like me. The same applies to laying and prosecution of charges. There is nothing in your materials on that subject. Moreover, there is too often a rush to charge, and not enough discretion exercised when it comes to a quasi-judicial assessment of the evidence. The bias of the materials you provided seems to encourage as much, and certainly does not address this odious fact.

Also lacking in the materials is any reference to the "public interest" – oft cited in some criteria for laying a charge. This reference may be better subsumed into the analysis of 'reasonable prospect of conviction,' but either way, there is a factor that ought to be addressed by this Committee: the overcharging of Canadians, particularly when it comes to administration of justice offences (breaches) and what I will call garbage charges. Of the half million charges laid per year in Canada's largest jurisdiction, and proportions thereto in all the others, the garbage charges rarely go to trial, are most likely to be withdrawn, and lead to a pernicious number of questionable guilty pleas. They do not belong in any efficient or effective legal system. They are a by-product of over-policing and perpetual budget increases to police budgets of all jurisdictions. They are not in the public interest. There are less garbage charges in pre-charge screening jurisdictions than their counterparts. That conclusion is part observation, part hypothesis; and ought to be researched by this committee.

Much of the BC Virtual Bail work undertaken during COVID through to the end of 2022 – work done collaboratively by Crowns and LABC – was the identification and disposal of garbage charges, prior to any consideration about bail. Police informations that should not have been laid, or that upon reflection did not warrant the Crown laying a charge, were identified and eliminated, as a preliminary step. By contrast, at least pre-COVID, the police-charging jurisdictions like Ontario would not see Crown post-charge screening at the bail stage, or at least not necessarily, and not in my own experience with hundreds (thousands?) of charges in the GTA in 2013-18.

If "efficiency" is ever an appropriate value of the administration of justice, it surely applies to the timely elimination of charges unfit for prosecution. To be sure, in all Canadian jurisdictions, it is the case that there are natural inflection points for Crowns to polish their quasi-judicial boots and decide whether an information ought to be withdrawn, for lack of evidence. But then there are the multitude of informations that, in hindsight, ought never have been laid. In fact, the risk of premature screening out of charges has never been borne out in LABC's experience. It often becomes apparent that the charge dropped after its first pre-trial hearing ought never have been laid. The inertia of a charge being laid ought not be underestimated. Too many unfit charges linger too long in these police-charging jurisdictions, and efforts to rectify this by Canadian prosecution services have failed for being too indeterminate.

Almost twenty years ago, the FPT Heads of Prosecutions Committee Working Group recommended that "[i]n jurisdictions without pre-charge screening, charges should be scrutinized by Crowns as soon as practicable."[3] Such imprecision enables superficial or artificial "scrutiny," permitting too many garbage charges to persist well beyond bail vetting by Crowns. 'As soon as practicable' was never intended to add up to months of inaction, but we all know that happens for hundreds of thousands of charges every year in Canada.

I said at the outset that the orientation and representation of the Steering Committee can be addressed by the Co-Leads, primarily because of my unqualified confidence in Paul Lindsay and other notable members of the Committee. I am sure this early draft I received will be improved upon with an eye to the quasi-judicial and presumption of innocence. Additional improvements could be found in showing how a lessening of garbage charges affects the prosecution of serious offences with a solid prospect of conviction.

Some intersectional analysis would also be beneficial. LABC would be happy to assist the Committee in hearing from some select social scientists on these subjects, or we could incorporate as much into subsequent analysis by LABC.

Conclusion

In closing, I would return to my opening comments about the jurisdiction and purpose of your Committee. Practically speaking, I realize that the chief function of the committee may be to collaborate, without more. But this collaboration needs a purpose. Either the federal Minister of Justice ought to define its purpose, or one ought to be articulated by the Steering Committee. If its purpose is conviction proficiency, then I would take issue with its *raison d'etre*. If not 'public safety,' then what is its purpose?

It is trite but necessary to say that our criminal legal system, unlike the health care system, was never designed to improve mortality rates or prevent or treat injury to person and property. Or at least that became irrefutable after 1982. The purpose of the criminal legal system in Canada is firmly and clearly set forth in our Constitution, which has nothing to say about "public safety" or conviction proficiency. The purpose of the criminal legal system is to prevent miscarriages of justice – to avoid wrongful convictions. To lower that risk, work is done on wrongful detentions, arrests, wrongful charges and wrongful prosecutions. During and preceding the trial, the due process rights are engaged. But most miscarriages of justice are upstream from the trial. We all know this to be true. The *Charter of Rights and Freedoms* is not a

[3] https://www.justice.gc.ca/eng/rp-pr/cj-jp/ccr-rc/pmj-pej/pmj-pej.pdf

Chief Executive Officer | Executive Office
p. 604-601-6137 **e.** Michael.Bryant@legalaid.bc.ca

constitutional instrument designed to aid the state in fulfilling its electoral mandates regarding individual culpability or community welfare. It's not about broken windows. It's about preventing a broken state. The *Charter's* focus is protecting individuals from the juggernaut of the Crown. And it is a juggernaut, in my own experience, as an Attorney General, defence counsel, defendant and legal aid CEO.

Accordingly, this Steering Committee ought to be focussing its energies on protecting individual Canadians not from other Canadians, but from yourselves, and, in particular from your principals. As the steward of that constitutional mandate, the Attorneys General of this country ought to be less focussed on public safety populism, and more focussed on the quasi-judicial. But the constitutional function of the Attorney General *in personae* has been muted, with exceptions, in the last half century, for political reasons.[4] The quasi-judicial function of this constitutional office, therefore, falls primarily to yourselves – the agents of the Attorneys. This is an executive function. As the *de facto* quasi-judicial executive officers in Canada, your work ought to be explicitly measuring and reporting upon your constitutional duty to prevent miscarriages of justice. I see none of that in the materials you provided.

[4] Out of self-deprecation, I offer myself as an example for an Attorney's public safety populism. See my testimony to the federal Standing Committee on Justice, 11/23/06, R34, 1st Session, 39th Parliament: https://www.ourcommons.ca/DocumentViewer/en/39-1/JUST/meeting-34/evidence.

APPENDIX K: CANADIAN MUSLIM LAWYERS ASSOCIATION

CANADIAN MUSLIM LAWYERS ASSOCIATION

SUBMISSION ON Justice Efficiencies and Access to Criminal Justice Regarding Crown Screen Processes and Evidentiary Thresholds

December 9, 2022

ABOUT THE CMLA

The Canadian Muslim Lawyers Association (CMLA) was founded in 1998 by a small group of Toronto-based Canadian Muslim lawyers. It now has several hundred members across Canada, with active chapters in Ontario, Quebec, Alberta, British Columbia, and the Atlantic provinces.

The CMLA focuses on four key areas of engagement. First, the CMLA helps build professional relationships among Canadian Muslim lawyers and between Canadian Muslim lawyers and members of other legal organizations. Second, the CMLA educates its members and the broader Canadian Muslim community on legal topics of interest. Third, the CMLA provides peer support by providing law students and junior lawyers with mentorship and professional development seminars. Fourth, the CMLA serves as an advocate on select issues of importance to Canadian Muslim lawyers and the broader Canadian Muslim community.

With respect to advocacy, the CMLA has appeared as a public interest intervenor before the Supreme Court of Canada. In addition, the CMLA actively participates in the discourse on national security law and policy. In this regard, the CMLA has made submissions to and testified before, Parliamentary committees examining national security, human rights and civil liberties on numerous occasions since 2001, including testimony before the House and Senate committees reviewing the previous round of amendments to the *Pre-Clearance Act*, in 2017. We are pleased to contribute to the study of Bill S-7 presently, as it engages important matters for all Canadians, but which stand to have a disproportionate impact on racialized individuals.

Several core values drive the work of the CMLA: promoting the human rights and dignity of all people, including Canadian Muslims and Muslims in Canada; the rule of law and holding our elected officials accountable to the necessity and effectiveness of the legislation it proposes and implements; and analyzing government conduct and proposed legislation through the lens of rights and values enshrined in the *Charter of Rights and Freedoms* and Canadian human rights legislation. We not only speak when Muslims in Canada are adversely affected by proposed legislation, but also recognize that the post-9/11 era of national security means that the wide range of racialized and equity-seeking populations are caught by the vast net cast in the efforts to spot and deter terrorism.

EXECUTIVE SUMMARY

The CMLA welcomes the opportunity to address the question of the charge screening mechanism in the Ontario criminal justice system. This examination of charging models is timely, given the tremendous burdens on the criminal justice system. The CMLA recommends that this Committee adopts the following two recommendations (1) a Crown pre-charge screening model with (2) an evidential threshold of "substantial likelihood" for obtaining a conviction. This is a model similar to the one employed in British Columbia. Pre-charge screening will deliver fundamental improvements to the administration of justice, including in the following areas:

- Reduce the burden on the court system by eliminating the wasteful, inefficient charging processes, thereby improving on delay issues.
- Redirect police, Crown and court resources to meritorious and complex cases by removing weak matters and counts from the system.
- Alleviate some of the hardship experienced by individuals and their families who are forced to defend against charges that will not reach a conviction.
- Address the growing body of evidence that demonstrates that the criminal justice system discriminates against Indigenous, racialized and vulnerable individuals and, in fact, overcharges these groups for matters that are disproportionately withdrawn or stayed.

The CMLA submits that the pre-charge screening process offers the most cogent method to deal with delay and avoid unnecessary hardship for individuals and vulnerable groups while maintaining respect for the institutional roles of the police and Crown. Continuing under the current model would risk losing serious cases for delay and allow discriminatory practices to persist. This would undermine public confidence in the system.

Scope of the Problem: Institutional Delay Factors

The Canadian criminal justice system is under tremendous pressure. While systemic delay has been a chronic problem, delay has now reached a crisis level. Recently, former Supreme Court Justice Moldaver described the criminal justice system as "bursting at the seams." He suggested that to save itself from future collapse, it must remove less serious cases from the criminal court caseload. He also noted that drastically reducing the number of criminal prosecutions would enable the system to work efficiently and effectively on serious cases.[1] Although he did not address screening models directly, the basic premise is that the number of cases processed by the system should be reduced.

R. v. Jordan signaled the Supreme Court of Canada's present-day intolerance to the delay. In *Jordan*, the Court found that a delay of eighteen months in cases tried in the provincial court and 30 months for those in the Superior Court was presumptively unreasonable. The Crown must then show exceptional circumstances to justify the delay. [2] The failure to adhere to *Jordan* timelines will result in a stay of proceedings. In a subsequent case of *R. v. Cody*, the Court affirmed *Jordan's* strict timelines to complete criminal cases.

The Court has underscored that the individual's right to be tried within a reasonable time is a constitutional right that must be safeguarded. However, delay harms more than individual rights. Delay reduces public confidence in the justice system for all individuals involved, including victims. Delay also harms the public perception of the justice system when charges are stayed for delay or when cases take years to conclude.

Many factors contribute to the delay in the criminal justice system. Notwithstanding the CMLA's recommendations within the parameters of this submission, the issue of delay cannot be fully addressed by implementing a single change. The CMLA intends for its submissions on pre-charge screenings and legal thresholds to be one tool in a multi-faceted approach to addressing delays, backlogs, and issues of equity.

---

[1] The Lawyer's Daily: Cull of "huge mass" of less-serious criminal cases could unclog Canada's justice system: Moldaver September 19, 2022

[2] *R. v. Jordan*, [2016] 1 S.C.R. 631 ; *R. v. Cody*; [2017] 1 S.C.R. 659.

Part I: Pre-Screening Model

a) Impact of Non-viable Charges on the Individuals and their Families

Screening out cases that cannot survive to a guilty plea or trial before a charge is entered increases fairness to the individual. Individuals facing charges are often separated from the community unless or until they achieve bail. This disrupts their personal and work lives. Furthermore, there is no understating the harmful effects on individuals who needlessly experience the stress and stigma of a criminal matter. In addition, charges often remain visible on the accused person's criminal record check/background check, even where they are withdrawn or stayed. These factors adversely affect the individual's employment and travel capacity.

> Beyond financial considerations, it is also important to note the personal hardship endured by individuals and their families upon being charged with a criminal offence when the cases collapses before a trial or guilty plea. The process of being arrested and charged, has dramatic consequences regardless of the outcome of the case. Employment or health care may be interrupted. Accused persons may be forced to endure onerous bail conditions including ones requiring them to have no contact with family and friends, not attend certain locations, or respect a curfew or house arrest. In many cases where charges are ultimately stayed or withdrawn, many individuals and families rightly feel that these incursions to their liberty were unjustified and improper.[3]

As the John Howard Society noted, in competitive employment positions, the improper visibility of withdrawn or stayed charges will harm an individual's prospects.

b) Indigenous, African-Canadian and Other Vulnerable Groups- Issues Relevant to Equity-seeking groups

Crown pre-charge screening would assist in addressing the stain of systemic discrimination within the criminal justice system. Courts have recognized that the coercive powers of the criminal justice system disproportionately impact Indigenous and African Canadians and other equity-seeking groups. For example, in 2001, the Supreme Court of Canada stated as follows:

[3] B.C. Civil Liberties Association Justice Denied: The Causes of B.C.'s Criminal Justice System Crisis, Kevin Tilley, 2012.

> …African Canadians and Aboriginal people are overrepresented in the criminal justice system and are therefore likely to represent a disproportionate number of those who are arrested by police and subjected to personal searches, including strip searches. [4]

The Courts continue to incorporate these conclusions into the jurisprudence as the empirical evidence in this area builds.[5]

In the Ontario Human Rights Commission's Report for change to address systemic racism in the police, the Commission summarized evidence that demonstrated that systemic racial discrimination, and anti-Black and anti-Indigenous racism, lies at the core of many of our institutions, including in our police and criminal justice system.[6] The Commission's work on racial discrimination and racial profiling within the criminal justice system has been cited with approval by the courts.[7]

One of the Report's major findings is directly relevant to the issues before this Committee. The Report found that while Black people in Ontario are more likely to be charged than their non-racialized peers, their charges are often more likely to be withdrawn or stayed. As the Report stated:

> Despite being charged at a disproportionately higher rate (Black people in Ontario were 3.9 times more likely to be charged by police than White people), Black people were over-represented in cases that resulted in a withdrawal of charges; and their cases were also less likely to result in a conviction compared to cases involving White people.[8]

What is evident is that where the police are solely responsible for charging decisions, weaker cases are being brought against Black people. In many instances, these individuals would have spent time in custody awaiting bail or experienced restrictive bail conditions. Black individuals are also

---

[4] *R. v. Golden*, [2001] 3 S.C.R. 679 at para. 83; *Peart v. Peel Regional Police Services Board* (2006), 2006 CanLII 37566 (ON CA), 43 C.R. (6th) 175 (Ont. C.A.), at para. 94.

[5] *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, [2015] 2 S.C.R. 789 cited in *R. v. Le,* [2019] 2 S.C.R. 692 at para. 77; *R v Morris*, 2021 ONCA 680.

[6] "Framework for change to address systemic racism in policing". Ontario Human Rights Commission. 29 July 2021.

[7] *R. v. Le,* 2019 SCC 34 (CanLII); *R. v. Sitladeen,*2021 ONCA 303 at para 4.

[8] A Disparate Impact: Second interim report on the inquiry into racial profiling and racial discrimination of Black persons by the Toronto Police Service.

the most likely to be denied bail and serve lengthier periods of pre-trial custody.[9] Significantly, the withdrawn or stayed charges may remain on their records, harming their prospects of meaningful engagement in society and overall prospects of success in life.

c) Charge Screening Models Across Canada

When comparing statistics in the charging models across Canada, it becomes clear that involving the Crown at the earlier stages of the decision-making concerning the laying of charges reduces the number of weak charges that arrive on the trial docket. Provinces where police officers are solely responsible for initial charge approval have greater withdrawn or stayed charges. The provinces that utilize a Crown pre-charge screening have the least percentage of withdrawals and stays. This data suggests that post-charge screening models allow weak charges to languish and take up space in the system.

Ontario, Nova Scotia and Saskatchewan maintain the post-charge screening model. In the post-charge model, the police have sole jurisdiction to lay the charge. Afterwards, the Crown can withdraw or stay charges that it sees fit. In Ontario, approximately 50 % of charges result in a stay or a withdrawal.

By contrast, British Columbia, Quebec and New Brunswick maintain a pre-charge screening model. Pre-charge screening jurisdictions result in fewer stayed or withdrawn charges. For example, the average withdrawn and stayed charges in Quebec between 2017-2021 is 9.25% and for British Columbia is 31 %.

d) Pre-charge Screening Can Improve on the Issues of Weak Charges; Overcharging; Complexity of Proceedings; and Delayed Disclosure

Several factors explain why the Crown pre-charge screening model reaches more efficacious results. Prosecutorial input at the early stages addresses the concern of weak charges, overcharging and increasing complexity of criminal prosecutions. In the post-charge screening setting, the

[9] Expert Report on Crime, Criminal Justice and the Experience of Black Canadians in Toronto, Ontario" prepared by Owusu-Bempah, Sibblis, and James.

Crown often does not rigorously assess the viability of the charge until the judicial pre-trial and sometimes just before trial. Pre-charge screening ensures that the Crown has an early review of the case with the aim of filtering out unviable cases. It also will encourage early disclosure preparation.

i. ***Weak Charges and Overcharging***

Weak charges are charges that have a low chance of successful prosecution. These likely arise because police lack the legal knowledge to assess whether a charge could lead to a successful prosecution. In addition, Crown counsel can view the facts surrounding the arrest objectively with the benefit of the time and distance to reflect.

Overcharging refers to a situation where the police charge an individual with several counts for the same criminal conduct in order to achieve a guilty plea on a count. Multi-charge cases are less frequent in provinces that employ Crown pre-charge screening.

In the Final Report of the Senate in Court delays, the Committee heard from witnesses and referenced several studies on the overcharging issue. The evidence provided to the Senate included the following:

- *Criminal Code* amendments have created very specific offences for conduct that are caught by more general provisions. Police who do not possess legal knowledge will charge numerous counts under general provisions, leading to over-charging and cumbersome prosecutions.

- The high number of cases stayed or withdrawn may indicate that police are overcharging to encourage a plea bargain. This could contribute to delays.

- Whether Crown prosecutors must approve criminal charges or whether police can simply lay them on their own can have a major impact on the proportion of charges subsequently stayed or withdrawn.[10]

[10] Runciman, Bob; Baker, George (June 2017). "Delaying Justice is Denying Justice: An Urgent Need to Address Lengthy Court Delays in Canada (Final Report)" (PDF). Standing Senate Committee on Legal and Constitutional Affairs. pp. 111–112.

Overcharging raises severe problems for bail. For example, an accused facing a multi-count information experiences greater hurdles in achieving bail and may be subject to stricter bail conditions even when the charges are not viable. Crown counsel possesses the legal training to refine the counts on the information to accord with statutory and jurisprudential rules.

ii. ***Complexity of Criminal Proceeds***

The pressures on the criminal justice system have led to numerous formal examinations of the causes and potential solutions to delay concerns. In the Lesage - Code Report on Law and Complex Criminal Procedures, the authors raised concerns over the increase in the complexity of criminal matters. The Watt-Durno Report outlined how complexity has resulted from the introduction of *Charter* defences, wiretap evidence, and expert evidence.[11] Crown involvement at the pre-charge stage can help minimize the complexity of the cases. Furthermore, the increase in complexity has led to a natural evolution where the Crown and police consult before laying a charge. The Lesage – Code report found that the increased complexity requires greater collaboration between the police and the Crown:

> The police have increasingly turned to Crown counsel for pre-charge legal advice in order to navigate these difficult waters… It is simply not feasible in the modern era to expect the police and Crown to work in entirely separate silos, as they once did.[12]

With this model, however, it is important that collaboration must be defined clearly as it must be limited in that the Crown Attorn are not acting as a "lawyers to the police."

iii. Earlier Crown Review of A File and Disclosure

Organizational factors limit the Crown's ability to remove weak matters before they reach a judicial pre-trial or trial. Before trial, the typical criminal file appears in the remand court several times. Ordinarily, the Crown in the remand court is not familiar with the brief. It is often just before the

---

[11] Watt, David; Durno, Bruce; *et al*. (May 2006). "New Approaches to Criminal Trials". Superior Court of Justice.

[12] Patrick J. Lesage and Michael Code, Report Of The Review Of Large And Complex Criminal Case Procedures, Ministry of the Attorney General of Ontario, Toronto, November 2008, p. 25.

trial that the Crown reviews the file. This is over a year after the brief has been in the system. Crown pre-charge screening will ensure that attention to the brief is made earlier in the process.

Earlier Crown attention to the brief may also encourage more timely preparation of disclosure. Accused persons have a constitutional right to disclosure. Disclosure must be prepared in every criminal prosecution. Delayed disclosure contributes to delays in the system. Crown pre-charge screening will frontload disclosure obligations, ensuring that the Crown and the defence understand the case early in the process. This will not only prevent weak cases from entering the system but will facilitate early resolution of the case.

R. v. McNeil underscored that the Crown and the police share disclosure obligations.[13] This shared responsibility means that providing reports to the Crowns for pre-charge screening does not add to the work of the police. It merely shifts the task of giving disclosure to the Crown earlier in the process.

The Crown pre-charge screening process has flexibility to deal with urgent cases. In cases where an arrest requires immediate attention, officers may detain an individual, complete a report to the Crown for charge approval, and prepare an information to be sworn for a bail hearing. The Crown may consent to a release or hold for bail. In less urgent cases, police may release an arrested individual on a promise to appear or an undertaking. Before the individual's first appearance, the Crown may request missing disclosure, refine counts and analyze whether to proceed to a charge. In two jurisdictions in British Columbia, Surrey and Victoria, defence counsel are able to engage in resolution discussions with the charge reviewing Crown to avoid a charge. An important consideration is allowing for Legal Aid funding for pre-charge advocacy.

e) Experience in Alberta on a Pilot Program on Pre-Charge Screening

In a recent successful six-month pilot testing Crown pre-charge screening, Alberta Justice and Solicitor General found a reduction of 21% in commenced cases and 29% in criminal charges laid compared to the previous year.[14] The pilot, which ran in three Alberta communities, found that the

[13] *R. v. McNeil*, [2009] 1 S.C.R. 66

[14] https://www.cbc.ca/news/canada/edmonton/alberta-government-expands-criminal-charge-pre-screening-pilot-project-1.5708710

shift to the prosecutorial standard for laying a charge had "little to no impact on the timeliness of laying charges." The main organizations involved in the Alberta criminal justice system supported the continuation of the project, including the Alberta Crown Attorneys' Association, the Alberta Association of Chiefs of Police and the Criminal Trial Lawyers' Association.

f) **Recommendation of the Commission**

In the OHRC's Report, the Commission's number one recommendation to address systemic racial discrimination in policing is to amend the *Police Services Act* and/or the *Community Safety and Policing Act, 2019, and make changes to the Crown Prosecution Manual* to implement a Crown pre-charge screening process to address over-charging and racial profiling. In the Commission's view, Crown pre-charge screening has the potential to reduce the impact of over-charging on Black and other racialized persons.[15]

RECOMMENDATIONS:

The CMLA recommends that this Committee adopt a pre-charge screening process in Ontario

The CMLA recommends that training and instruction be provided to police to ensure that the reports to the Crown on charging requests are sufficiently detailed and delivered to the Crown in a timely manner.

The CMLA recommends that the Committee study the feasibility of allowing for pre-charge resolution discussions and the ability for Legal Aid to fund defence counsel for such purposes.

The CMLA recommends that experienced Crown Attorneys with training in the quasi-judicial role assume the role of a Crown pre-charge screening.

The CMLA recommends that Crown Attorneys involved in pre-charge screening are trained to maintain impartiality and ethical boundaries between the Crown and the police.

Part II: Evidentiary Standards

The evidential standards employed across the country in the charging process include:

[15] "Framework for change to address systemic racism in policing"

- reasonable prospect of conviction
- reasonable likelihood of conviction
- substantial likelihood of conviction

The different standards are lower than proof beyond a reasonable doubt which is the standard for a criminal conviction. The evidential standard is the first branch of a two-part test. The second branch under each standard involves an examination of the public interest.

i. Reasonable Prospect of Conviction

Ontario employs the reasonable prospect of conviction in the post-charge context. This standard is greater than the reasonable grounds that the police are required to have to arrest an individual. This standard is higher than a *prima facie* case that merely requires that there is evidence upon which a properly instructed jury could convict. However, it is lower than a standard of a "probability of conviction." The term reasonable prospect of conviction denotes a middle ground between these two standards.[16]

ii. *Reasonable Likelihood of Conviction*

The standard of "a reasonable likelihood of conviction" employed in provinces such as Manitoba requires examination of whether a conviction to the criminal law standard of proof beyond a reasonable is the more likely outcome if the matter were to proceed to trial.[17]

iii. Substantial Likelihood of Conviction

British Columbia employs the substantial likelihood of conviction test. The use of the term "likelihood" suggests that, at a minimum, the Crown must be satisfied that a conviction is more likely than an acquittal. In addition, the term "substantial: means that the Crown must be satisfied that there is a strong and solid case of substance to present to the Court.

Analysis of the Evidential Standard

The evidential standards connote different levels of stringency. The lowest level is the reasonable prospect of conviction. As a "prospect" of conviction is lower than the "likelihood" of conviction.

---

[16] Ontario Crown Prosecution Manual, Charge Screening, Prosecution Directive, November 14, 2017

[17] Manitoba Department of Justice Prosecutions, Policy Directive, Laying, Staying and Proceeding on Charges Guideline No.2:INI:1.1 June 2017

Simply stated, a prospect is lower than a likelihood. The substantial likelihood test of conviction is the most stringent standard. The use of the term "substantial" supports this conclusion.

Recommendation: The CMLA recommends that the Committee adopts a standard of substantial likelihood as the evidential standard for Crown pre-charge decision-making.

Part III Concluding Remarks: Police and the Crown Differing Institutional Roles

The police ensure public safety, investigate crimes and arrest individuals. The courts determine the question of criminal responsibility by applying a complex of substantive law and evidentiary rules. The Crown prosecutors' legal training equips them to address these questions.

Furthermore, Crown prosecutors are responsible for ensuring that prosecutions are fair and conform to the public interest. They must carry out their tasks impartially and objectively without sight of winning. To that end, Crown prosecutors are considered ministers of justice. As noted in *Boucher v. The Queen*.

> It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of prosecutor excludes any notion 'of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.[18]

A Crown pre-charge screening process does not discount the role of the police. It merely ensures that specialized legal training and the quasi-judicial roles of the Crown are brought to bear on vital charging decisions that have ramifications on the system, the individual and public perception.

[18] *Boucher v. The Queen,* [1955] S.C.R. 16 at p

We urge the Committee to commit to adopt the Crown pre-charge screening with a substantial likelihood of conviction as the legal standard. We would be pleased to answer any questions that you may have about our recommendations.

Thank you for your consideration,

Husein Panju
Chair, Canadian Muslim Lawyers Association

APPENDIX L:
OVERVIEW: ENGLAND AND WALES PROSECUTION SERVICE

In England and Wales, there are two fundamental charge screening standards: (1) the Full Code test; and (2) the Threshold test.

Full Code test

The Full Code test consists of an evidential stage and a public interest stage. Prosecutors and police decision makers must be familiar with the full terms of both of these stages as set out in the Code.[148]

The evidentiary threshold determines whether there is sufficient evidence to provide a realistic prospect of conviction against each suspect on each charge. This assessment is based on the sufficiency of the evidence, including the impact of any defence and other information the suspect has put forward or on which they might rely.[149] The Code defines "realistic prospect of conviction" as "an objective, impartial and reasonable jury, bench of magistrates or a judge hearing a case alone, properly directed and acting in accordance with the law, is more likely than not to convict the accused person of the charge alleged."[150] Cases that do not pass the evidential threshold must not proceed, no matter how serious or sensitive the matter may be.[151]

Where the evidential stage is met, the public interest must be considered for a prosecution to continue. A prosecution will take place unless the prosecutor, or where appropriate the police decision maker, is satisfied that there are public interest factors tending against prosecution which outweigh those in favour.[152]

The Full Code Test is applied when all outstanding reasonable lines of inquiry have been pursued, or prior to the investigation being completed, if the prosecutor is satisfied that any further evidence is unlikely to affect the application of the test.[153]

Threshold test

Where an immediate charging decision cannot be made on the Full Code Test because of the potential impact of outstanding inquiries, in limited circumstances, the Threshold

[148] Director's Guidance on Charging, s. 5.1 at p. 13; The Code for Crown Prosecutors
[149] Director's Guidance on Charging, s. 5.2-5.3
[150] The Code for Crown Prosecutors s. 4.7, Director's Guidance on Charging, s. 5.3 at p. 13
[151] Director's Guidance on Charging, s. 5.4 at p. 13
[152] Director's Guidance on Charging, s. 5.5 at p. 13
[153] Director's Guidance on Charging, s. 5.9 at p. 14

Test may be applied to charge a suspect.[154] There are five prerequisite conditions to applying the Threshold Test, and the request for a charging decision from police must provide sufficient information to enable the prosecutor to be satisfied that each of them is met:

1. There are reasonable grounds to suspect the person has committed the offence.
2. Further evidence can be obtained to provide a realistic prospect of conviction. The further evidence must be identifiable, not speculative.
3. The seriousness and the circumstances of the case justify an immediate charging decision.
4. There are continuing substantial grounds to object to bail; and
5. It is in the public interest to charge the suspect.

If any one of these conditions is not met, the Threshold Test cannot be applied, and the suspect cannot be charged.[155] Regardless, the police are always restricted from applying the Threshold test for summary-only offences and "either way offences".[156]

The Crown prosecutor must also establish clear lines of inquiry for the police to operate within a strict time frame. For serious charges in-custody, the time frame is six months. If the suspect is not brought to trial within that period, the Crown is responsible for showing that it reasonably exercised due diligence and expedition. For complex cases, if the Crown can show good and sufficient cause, it is not uncommon for the court to grant extensions. If the Crown is unable to show their due diligence and expedition, the accused person is released on bail.

The Process

In England and Wales, the charging process begins with a police decision maker reviewing the available evidence, disclosable materials, and any other relevant information in their assessment of the Full Code Test. If the police decision maker considers that there is sufficient evidence to pass the evidential stage, and the prosecution is within the public interest, the case can proceed to a charging decision.[157] The police are responsible for assessing whether cases meet the relevant criteria for referral to the Crown Prosecution Service (CPS) for a charging decision.[158]

[154] Director's Guidance on Charging, s. 513 at pages 14-15
[155] Director's Guidance on Charging, s. 6.11 at p. 17
[156] Director's Guidance on Charging, s. 6.13, at p. 18 "Either way offences" are comparable to hybrid offences in the *Criminal Code of Canada.*
[157] Director's Guidance on Charging,s. 4.1-.4.2, at p. 6
[158] Director's Guidance on Charging, s. 3.1 at p. 4

The police are authorized to lay charges on limited, low-tier offences such as summary-only offences, sentences suitable for magistrates' court, and "either way offences."[159] For all other offences, where the Full Code Test has been met, such cases are referred to a prosecutor to determine whether a suspect should be charged.[160]

The request for a charging decision must provide the required material and information on first submission to enable prosecutors to make decisions promptly.[161] The expectation from Crown prosecutors is full evidence, unless there are outstanding lines of inquiry that would not impact their charging decision. The request must set out the rationale for the assessment that either (a) both the evidential and public interest stages of the Full Code Test are met; or (b) all five conditions of the Threshold Test are satisfied. Crown prosecutors are available 24 hours per day when police need emergency charging decisions to be made. It is extremely rare for police to lay a charge because they could not contact a Crown prosecutor.

The CPS will review all police charges, evidential material, and other relevant information of all cases prior to the first hearing. Prosecutors must be proactive in identifying and seeking to rectify evidential weaknesses and in bringing early conclusions to the cases that cannot be strengthened by further investigation or where the public interest does not require a prosecution.[162] After an initial hearing in Magistrates Court, there is a first hearing set down 28 days later in Crown Court. The expectation from Crown prosecutors is that evidence and disclosure would be served in that time period, on an ongoing basis, up until and during the trial.

An inspector or an officer of a higher rank can appeal any decision made by a prosecutor. The appeal is made to the District Crown prosecutor. The grounds for the appeal are recorded and must respect the procedural timelines set out in the CPS Directors Guidance.[163] If there are still outstanding issues after the initial review, the appeal can be escalated to a Senior District Crown Prosecutor.

[159] See DG6. DG6 sets out the offences police can lay a charge on. Summary only offences, retail shoplifting, property damage under $5000, assault by beating (not significant injury).
[160] Director's Guidance on Charging, s. 4.3 at 6
[161] S. 4.16. 4.18 The request must include information as to the state of the investigation, including • the reasonable lines of inquiry that have already been conducted and the results of those inquiries; • the reasonable lines of inquiry which remain outstanding33 together with an objective assessment of the likely impact of those inquiries on the decision to charge. This should include a timescale for the completion of each inquiry; and • any lines of inquiry which will not be pursued and a rationale for the decision. See also CPS Directors Guidance at Annex 3, and annex 4 for the materials and information required by police.
[162] Director's Guidance on Charging,s. 4.25 at p. 10
[163] See Director's Guidance on Charging, s. 4.31 at pages 10 -11