



LEGAL AID
RESEARCH SERIES

COURT SITE STUDY OF
ADULT UNREPRESENTED
ACCUSED IN THE
PROVINCIAL CRIMINAL
COURTS

Part 1: Overview Report



COURT SITE STUDY OF ADULT UNREPRESENTED ACCUSED IN THE PROVINCIAL CRIMINAL COURTS

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The views expressed in this report are those of the authors and do not necessarily reflect the views of the Department of Justice Canada.

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EXECUTIVE SUMMARY

Report

Robert G. Hann, Colin Meredith, Joan Nuffield and Mira Svoboda, "Court Site Study of Adult Unrepresented Accused in the Provincial Criminal Courts," Robert Hann & Associates Limited and ARC Applied Research Consultants, prepared for the Department of Justice Canada (2002).

Methodology

A study of representation among adult criminal accused in nine selected provincial courts across Canada. Methodology involved analysis of a sample of disposed cases (or, at one site, court dockets), direct court observation, and interviews with local key informants.

Findings: Extent of Self-Representation

- Access to justice concerns are raised by the significant numbers of unrepresented accused who were found at many of the nine court sites studied:
 - at first appearancefrom 5% to 61% above 36% in 4 courts;
 - at second appearancefrom 2% to 38% above 30% in 4 courts;
 - at third appearancefrom 1% to 32% above 19% in 4 courts;
 - at bailfrom 3% to 72% above 12% in 4 courts;
 - at pleafrom 6% to 41% above 18% in 4 courts;
 - at final appearancefrom 6% to 46% above 23% in 4 courts.
- Even where accused are represented, there are often significant problems of accused being *under-represented* as a result of resource and other restrictions on legal aid staff lawyers, duty counsel, and tariffs paid to the private bar. Under-representation is reflected in limitations on the quality and quantum of the legal assistance available.
- Equality in access to justice concerns are raised in the wide variance seen across the nine sites, not just in the representation figures, but in related service delivery strategies, personnel, and court management.
- Understanding the legal representation problem and developing solutions cannot be done in isolation. It must be done in the full context of court case management, policies and attitudes towards duty counsel and unrepresented accused, and the availability of resources. One site was exemplary for its court case management and the quality of legal aid service, illustrating that good legal representation will help expedite court case-

flow. Sound court case management will, in turn, reduce the number of unproductive appearances, thus freeing up legal aid services to assist with more matters.

- Despite the traditional emphasis on the criminal trial in defence work, previous research, as well as the key informants interviewed for this study, suggest that the earlier stages of the criminal justice process are of key importance. The manner in which representation is approached at earlier stages will affect not only the outcome for the accused, but also the functioning of the court, both at early and later stages.
- Key informants believed the typical criminal defendant would and does have difficulty understanding the criminal process, let alone defending him/herself. Criminal accused tend to be poorly educated, have low levels of literacy, and lead disordered lives. At some sites, many are immigrants or others (such as Aboriginal defendants) who face language and cultural barriers. In some courts, there are also significant numbers of mentally disordered accused.

Findings: Impacts on the Accused

- The study did not permit the drawing of *causal* connections between representation and the impacts on accused.
- However, unrepresented accused do experience serious consequences with respect to the final disposition of their case in court:
 - In some situations, depending on the jurisdiction and the stage at which plea was entered, well in excess of 50 percent of accused are convicted without the benefit of legal representation.
 - In some situations, depending on the jurisdiction and the type of offence, up to 30 percent of those convicted receive custodial sentences, again without benefit of legal representation.
- Most key informants believed that the representation deficits of unrepresented and under-represented accused lead them to suffer negative impacts due to in serious mistakes they make during the court process, e.g.:
 - At most sites, significant numbers of accused plead guilty “just to get it over with” – without understanding the strength of the crown’s case, the options regarding dispositions (e.g., discharges vs. convictions) and/or the likely and possible sentences.
 - Unrepresented accused (and, at some sites, accused represented by duty counsel) may proceed without having seen the disclosure.
 - Crowns generally will not plea bargain with unrepresented accused, who thus do not benefit from reduced or dropped charges.

- Accused often do not present relevant information that would influence decisions made during the court process (e.g., regarding bail) and at trial and sentencing.
 - Unrepresented accused often have no idea how to introduce evidence, examine witnesses or speak to sentence in an appropriate manner – let alone how to do so to their own advantage.
 - Key informants suggested a large number of other serious errors made by unrepresented accused at each stage of the criminal process.
- Key informants indicated that there are serious *social and economic* consequences of the lack of representation, apart from the criminal justice system consequences noted above:
 - Accused who plead guilty do not understand the social and economic consequences of carrying a criminal record, e.g., job prospects, deportation, entering foreign countries, entering military service, driving prohibitions.
 - Accused may plead guilty – even when they have a legal defence – because they are ashamed or embarrassed and want to minimize the shame and publicity.
 - Key informants often related incidents in which accused plead guilty because they could not live with their bail restrictions or afford the time for numerous court appearances and a trial – because of the impact on their ability to fulfill family responsibilities (e.g., obligations to take their children to school) or on their ability to retain jobs.
 - At the same time, it was reported that accused often go through the criminal justice process to disposition and sentencing without understanding what is happening to them (for instance, accused agreeing to – or at least not arguing against – bail or sentencing conditions without understanding their legal and/or socio-economic impact).

Findings: Impacts on the Courts and on Court Officers

- The justice system is based on the principle that the accused should have a fair hearing. Where the accused does not have legal representation the following may occur:
 - Judges and other officers of the court must “bend over backwards” to avoid improper situations, and compensate for the accused’s lack of counsel.
 - Contrary to expectations, in most sites, individual appearances in non-trial courtrooms by unrepresented accused are typically shorter in duration than appearances involving duty counsel or private counsel.
 - Contrary to expectations, in most courts, unrepresented accused typically make fewer, rather than more appearances than accused with legal representation.
 - Cases involving unrepresented accused typically take less time overall to resolve than do cases involving private counsel, but more time than cases assisted by duty counsel.

- Most key informants believed that trials of unrepresented accused take much longer than other trials, and are stressful on all court parties.
- Court administrative personnel report significant numbers of requests for information and advice from unrepresented accused.

Solutions Frequently Suggested by Key Informants

The main report lists a large number of solutions offered by those interviewed. A few examples follow:

Enhancements to the Eligibility Guidelines for Legal Aid

- Relaxation of financial eligibility criteria to assist more of the working poor.
- Relaxation of coverage provisions, particularly to provide service for first-time offenders, to prevent people acquiring a criminal record.

Enhancements to the Role of Duty Counsel

- An expansion of the availability of duty counsel.
- Access to duty counsel, with no consideration of financial eligibility, for all accused, both in-custody and out-of-custody.
- Use of expanded duty counsel, whereby the duty counsel lawyer retains clients from first appearance to disposition, within the limits of workload.
- Legal aid offices or “advice duty counsel” in court buildings, to provide “information, advice, and assistance” to accused.

Enhancing Resources Available to Legal Aid

- Increased funding for legal aid.
- Increasing the tariff provided to private lawyers accepting legal aid work.
- Use of paralegals to assist legal aid staff lawyers and duty counsel, by arranging sureties for bail, researching diversion or sentencing options, etc.

Improving Awareness of, and Application Procedures for, Legal Aid Services

- Information and advice regarding legal aid should be provided to unrepresented accused at the earliest possible opportunity. Methods should recognise the significant literacy handicaps of many accused.
- Provision of legal aid application officers in the court to speed up matters being stood down pending the assignment of legal counsel, among other things.

Enhancement and Better Co-ordination with Other Court Services and Functions

- In sites with Native Court Workers, a better co-ordination of services offered by duty counsel and Native Court Workers.

- Improved access to disclosure.
- Better court case and case-flow management procedures that would, *inter alia*, emphasize earlier resolution of cases and reduce the number of “unproductive” court appearances.

1.0 INTRODUCTION

1.1 Background and Project Objectives

After a period of significant growth in legal aid, jurisdictions in Canada have seen a decade or so of either zero growth or reductions in funding and services in criminal legal aid. This trend has culminated in what has been referred to as a “crisis” by the Canadian Bar Association.¹ Following a period of strong growth in legal aid cases and expenditures during the 1980s and early 1990s, there has been a steady national trend of decreasing numbers of cases approved for legal aid, and decreasing total and per capita expenditures (constant dollars) on legal aid in Canada.

The principle behind legal aid is that access to legal representation in serious matters should not be dependent on the accused person’s ability to pay. The importance of this principle is underscored by convincing evidence that the poor experience a different quality of justice than the well-off.² In criminal cases, the poor are more likely to be detained in custody prior to trial, more likely to be convicted, and more likely to receive a harsher sentence.

Debates over the extent to which reductions in expenditures and services were actually affecting the numbers of unrepresented accused in criminal courts across Canada culminated in a decision by the Department of Justice and the Federal-Provincial-Territorial Permanent Working Group on Legal Aid to measure:

- The frequency with which accused persons are appearing before the court without representation at different stages of the court process.
- The impacts of self-representation on the accused themselves, on other groups involved in the court process, and on the courts in total.

The current document provides an overview of the key findings of a study undertaken to address both questions with respect to adult accused charged with *Criminal Code* and drug offences³ whose cases are heard in the provincial courts.^{4, 5}

¹ Melina Buckley, *The Legal Aid Crisis: Time for Action*. Toronto: Canadian Bar Association, 2000.

² See, e.g., Jeffrey Reiman, *The Rich get Richer and the Poor get Prison: Ideology, Class and Criminal Justice* (New York: Wiley, 1979); Edward Renner and Alan Warner, “The Standard of Social Justice Applied to an Evaluation of Criminal Cases appearing before the Halifax Courts,” *Windsor Yearbook of Access to Justice* 1 (1981), pp.72-73.

³ For certain courts, a small number of cases with offences against other Federal Statutes were also included.

⁴ Although a small proportion of cases will have appearances first in the provincial courts and later in the superior courts, the current study investigated appearances in the provincial courts only.

⁵ Other research being undertaken concurrently covers related aspects of legal aid, including Brydges’ “emergency” legal advice.

1.2 Format of the Report

This overview report is divided into five chapters. Chapter 2 describes the methodology of the study. Chapter 3 presents our findings with respect to the key contextual factors which must be recognized in examining the frequency and impacts of a lack of legal representation in adult criminal courts. Chapter 4 focuses on the prevalence of self-representation at the nine court sites. Chapter 5 reports on the impacts of self-representation on the accused and the courts. This overview report concludes in Chapter 6 with a discussion of a range of solutions that were suggested (by those interviewed) to the problem of unrepresented accused.

More detailed reports of our findings from the individual sites are bound separately.⁶

⁶ Robert G. Hann, Colin Meredith, Joan Nuffield and Mira Svoboda, "Court Site Study of Adult Unrepresented Accused in the Provincial Criminal Courts: Part 2: Detailed Site Reports." Report to the Department of Justice Canada, September 2002 (220 pages).

2.0 METHODOLOGY

2.1 Site Selection

A key initial task of this project was to select nine court sites that would, taken together, provide an understanding of the range of issues – and the range of data collection opportunities and challenges – that one would confront in researching the current situation with respect to legal representation in Canada. The rationale followed in selecting sites for this project was to provide a wide spectrum of communities where criminal cases are adjudicated, from large urban centres, to major areas within large urban centres, to medium-sized cities, to towns. Rural and isolated areas, and areas served by circuit courts were not part of this study, being the subject of a separate inquiry.

The first step was to develop a set of criteria to guide the selection process. These criteria are shown in Figure 2.1 below.

Figure 2.1 Site Selection Criteria
<ul style="list-style-type: none">• Sites with different levels of resourcing of legal aid (i.e., from more restrictive to less restrictive eligibility criteria).• Sites with different delivery mechanisms for legal aid (staff, private bar, expanded duty counsel).• Clustered sites that would allow for controlled comparisons on related issues (e.g., mix of service approaches).• Sites that operate both a base court and one or more circuit courts that operate from that base, particularly those which serve particular groups of clientele (e.g., rural, Aboriginal).• Sites that offer economies of scale, including opportunities to use data or findings from related studies.• Sites where other related studies have been done or are currently underway (e.g., the DOJ detention project in B.C. or the recent Commissions and Task Forces in Ontario).• Large volume sites with a variety of visible minorities• Sites that reflect a range of economic well-being in the community (city or province).• Sites that have expressed particular interest in the issue.• Sites that have identified particular problems with unrepresented accused.• Sites that, together, represent all of Canada's main regions.• Sites with sufficient numbers of special groups of interest.• Sites within which data collection is feasible.

Application of these criteria led Department of Justice officials, in concert with members of the Federal-Provincial-Territorial Permanent Working Group on Legal Aid, to select the following nine court locations, one in each of nine of the ten provinces of Canada:⁷

- Kelowna, British Columbia
- Edmonton, Alberta
- Regina, Saskatchewan
- Brandon, Manitoba

⁷ Prince Edward Island was the only province without a court in the study.

- Scarborough (in eastern Greater Toronto), Ontario
- Sherbrooke, Quebec
- Bathurst, New Brunswick
- Halifax, Nova Scotia
- St. John's, Newfoundland

Figure 2.2 illustrates the variation captured within the selected sites. Other important dimensions on which sites exhibit further variations – and similarities – are discussed in the chapters that follow (e.g., with respect to the organizational and operational structures through which the duty counsel function is provided).

2.2 Data Collection Methodology

The methodology of the study consisted of three major independent quantitative and qualitative data collection techniques and sources of information – which in turn allowed us to triangulate and cross-check findings on specific issues in each court. Specifically, in each site we collected and analyzed data from:

- **A disposed cases sample:** Extraction of empirical data from court records on a sample of cases recently disposed in the court.
- **A direct court observation sample:** Systematic observation of case appearances in up to 10 full court dockets during the study period.
- **Structured interviews** with key informants.

2.2.1 Disposed Cases Sample

The initial research design called for data to be collected on a sample of roughly 500 recently disposed cases in each site. Implementation of the research design varied according to local circumstances. The actual approach followed was developed with the advice and considerable co-operation and assistance of justice officials in each province.

For each of the disposed cases in the samples, data was extracted into an electronic file for separate analysis by the researchers. The databases consisted of separate data for each appearance of each case in the sample – with that data covering key characteristics of the accused and the case, the key events that occurred at each appearance (e.g., show cause hearings, pleas, elections), the status of the case at each appearance (including legal representation, custody status, and plea) and key outcomes at each appearance (e.g., verdicts and sentences).

A common core set of general protocols was used to select the samples of cases and the types of data from each case. However, the specific rules used were necessarily adapted to fit the unique characteristics of the data capture and storage systems of each province and site. In two provinces, there was an automated data system which was suited for the purpose, while in two other provinces the automated data system had to be supplemented

by manually captured data on key factors (such as representation at each appearance), and in the remaining five provinces an entirely manual data capture method proved to be the most cost-effective and timely approach.

The quality of the data obtained was significantly enhanced by ensuring that all manual data collection and all extraction of data from automated systems was undertaken by persons with extensive knowledge of local court processes and local and provincial manual and court automated information systems.

Figure 2.2
Key Characteristics of Sites Selected for Inclusion in Study

	Kelowna	Edmonton	Regina	Brandon	Scarborough	Sherbrooke	Bathurst	Halifax	St. John's
1. Region/Province	Pacific/ British Columbia	Prairies/ Alberta	Prairies/ Saskatchewan	Prairies/ Manitoba	Central/ Ontario	Central/ Quebec	Atlantic/ New Brunswick	Atlantic/ Nova Scotia	Atlantic/ Newfoundland
2. Main mechanism for delivery of legal representation	Judicare	Judicare	Staff	Mixed	Judicare	Judicare	Judicare	Staff	Staff
3. Size of Surrounding Population Served	96,288	937,845	178,225	39,716	612,581	75,916	12,924	359,111	99,182
4. Economic Conditions									
a. Average per capita income	\$19,300	\$26,196	\$22,300	\$19,500	\$19,460	\$20,931	\$17,900	\$21,329	\$23,409
b. Unemployment rate	6.6	4.9%	5.5%	4.4%	M = 7.1% F = 9.0%	7.8%	13.6%	7%	9.1%
c. % of dwellings owner-occupied	73%	60%	65%	61%	60%	36%	72%	30% city 61% CMA	60%
5. Cultural, Ethnic and Language Mix	Inc. First Nations	Inc. First Nations	Inc. First Nations		Multi-cultural	Bicultural	Bicultural		
b. % with English as language spoken at home	96%	85%	96%	98%	66%	5%	50%	94%	99%

Figure 2.3 shows the variation in methods used to collect data for this part of the study in each site.

Figure 2.3 Disposed Cases Sample: Description of Court Case Data Used for Each Site			
Site	Data Collected and Collection Strategy		
	Sample Description	Using Manual Records	Using Automated System
Kelowna, BC	All 1020 cases disposed in 2001		All data extracted electronically from JUSTIN
Edmonton, AB	623 cases disposed in late 2000 and 2001	All data coded from court manual records	
Regina, SK	All (roughly 10,000) cases disposed in 2001		All data extracted electronically from JAIN
Brandon, MB ⁸	All (2,761) court appearances on all first appearance/set date court dockets for the last 3 months of 2001	Representation data coded manually from annotated court dockets	Other key data on those case appearances extracted electronically from CCAIN
Scarborough, ON	A random sample of 495 cases disposed in September through November 2001	All data coded manually from Informations and other manual court records	
Sherbrooke, QB	397 cases disposed in late 2001	All data coded from court manual records	
Bathurst, NB	250 cases disposed in late 2001	All data coded from court manual records	
Halifax, NS	A random sample of 509 cases disposed in September or October 2001	Data on representation at each appearance manually coded from Informations, court reporters' notes and annotated dockets	Other key data on each appearance for each case extracted electronically from JOIS
St. John's, NF	A random sample of 501 cases disposed in late 2001	Data on representation at first and last appearance coded from Informations, court reporters' notes and annotated dockets	Other key data on each appearance for each case extracted electronically from PCIS

⁸ Given the recent introduction of the automated information system in Brandon, it was not possible to obtain data on all appearances for a sample of disposed cases. Instead, we opted for collecting data on representation, and on events and decisions that occurred, in a very large sample of court appearances.

Finally, readers should note that, throughout this report, references to ‘private counsel’ encompass both privately retained counsel and private counsel paid through a legal aid referral or certificate. Since it is inappropriate to make this distinction known during the court process, the distinction is typically not captured in court manual or automated systems in *judicare* jurisdictions. We were, therefore, not able to make this distinction in our collection or analysis of either the disposed cases data or the court observation data.

2.2.2 Court Observation

Local persons with experience working in or around the court were also hired and trained to observe and record data on individual case appearances during a sample of (usually 10) court days. Again the observations were based on a core template that was modified slightly to reflect the unique characteristics of each site. The court observation was focused on first appearance/set date/arraignment/bail (i.e., non-trial) courts. (The time required for each trial would reduce the sample captured in court observation, and the disposed case sample would accurately capture factors at trials.)

Data was recorded separately for each appearance of each case on the docket. As with the disposed cases sample, data was collected on the characteristics of the case, the events that occurred at the appearance, and the outcomes of those events. However, a special focus of the court observations was to capture the comments made with respect to the accused’s representation status – by the accused, the judge, duty counsel, or the Crown.

2.2.3 Key Informant Interviews

Study team members visited each site for about a week, talking to judges, Crown attorneys, legal aid line and management staff, private defence counsel, court administration personnel and court clerks, sheriffs and other court security staff, and local service agencies who may have contact with accused adults in the criminal court system. The interviews, which lasted up to one hour, followed a common structured interview guide and provided extremely valuable information regarding perceptions related to a wide range of issues, including: the numbers of unrepresented persons, the reasons for lack of representation, issues affecting representation – and impacts of lack of representation. Some 10 to 30 persons were interviewed at each site – the majority jointly conducted by two interviewers. Interviewees were assured of anonymity, so the names of the individuals interviewed are not reported herein.

2.3 Lessons Learned Regarding Methodology

A number of important methodological lessons were learned in the conduct of this research:

- For the extraction of data from local court automated information systems it was essential to rely on local computer programmers with extensive experience with those systems.
- Use of local persons with extensive expertise in court processes – in the specific courts studied – was a major advantage in terms of the efficiency and reliability of the data collection (all of our coders and court observers had previous experience in their courts, with a number being current or former managers in those courts).
- It was important to give serious consideration to the use of manual data collection methods – even where partial information was available from automated systems. In a number of situations the automated systems were not designed to support the type of analysis we required, and we found it more cost-effective and timely to rely on manual data collection methods.
- Consultation with local court administrators on the design of the project greatly enhanced the quality and reliability of the data. Those with local expertise often suggested methods that were superior to those originally envisaged.
- It was important to follow common core protocols across the nine sites, but essential that the project consider local resources and capabilities – and change the research design to accommodate local circumstances.
- Timing of data collection tasks had to accommodate local protocols and circumstances. Courts operate in a very time-sensitive and event-sensitive environment. The research had to be extremely flexible with respect to method and timing in order to be minimally intrusive on day-to-day operations.

The researchers were fortunate that both local court officials and the federal and provincial clients for the research understood the importance of each of the above principles.

3.0 FINDINGS – CONTEXT

Both previous research and the interviews and data findings from this study suggest that there are seven key contextual factors that are important to a full understanding of questions related to access to legal representation in criminal cases. Any problem assessment or planning of improvements must be undertaken within a broad framework that recognizes that the extent and impact of legal representation cannot be measured by simply counting whether or not an accused has a lawyer. Instead, there are many, wide-ranging factors that will determine the *impact* of an accused having or not having representation.

This chapter presents our findings with respect to these important contextual factors and their relationship to the impacts of a lack of representation. For the most part, these findings are drawn from the results of our interviews with a range of key informants in each study site.

3.1 Availability and Quality of Representation

Although the study was originally conceived as a study purely of *whether or not* adult accused had some legal assistance in criminal court, it quickly became apparent that it would be necessary to look also at questions of the quality and nature of that representation – *how well* the accused was represented. For example, one of the sites in the study had among the highest rates of representation, but key informants consistently characterized the situation as one of *under-representation*. Both the availability and quality of representation are related to a host of factors, but perhaps key among these are resources, workload, structural limits on service, training, and the experience at the bar of the lawyers involved.

3.2 Client Population

The extent to which the presence or absence of a lawyer will matter is also linked to the characteristics of the client. Many criminal defendants are poor, have limited education, lead relatively disordered lives, and function at low reading levels. At some sites, many were from racial or cultural minorities; some were immigrants facing language and cultural barriers. Some sites also have significant numbers of mentally disordered accused.

With the exception of the criminally sophisticated, most accused have only the faintest understanding of what is happening around them in court. These factors are relevant because they will affect individuals' willingness to stand on their rights, their ability to avail themselves of legal assistance and work effectively with counsel, and (should it become necessary) their ability to read relevant documents and represent themselves in a criminal proceeding. As one judge in a western city said, "So many of the people we deal with don't have a sense of entitlement; the only chance of getting people to stand on the rights they have is to get them a lawyer."

3.3 Court Management and Operations Context

The experience of un-represented accused – and of legal aid – cannot be understood without considering the context of court management and operations within which it occurs. Conversely, the management and operations of the court are also influenced by the self-represented accused and legal aid.

For instance, a backlogged and delay-ridden court will cause extra appearances – and workloads – for all court parties, thus further stretching the resources of all court parties, including legal aid. On the other hand, a legal aid system that enjoys the trust and respect of court parties and clients, and is able to assist in a flexible way with the needs of clients and courts, will immensely assist the court to function efficiently, expeditiously, and in a manner which preserves the rights of clients and the public and, in turn, reduce the workloads of not only legal aid staff, but of all other court parties.

Specific contextual court management factors that have a significant impact on (and which are significantly impacted by) the unrepresented accused include: court backlogs; the manner in which cases are scheduled and assigned to judges; the manner in which Crown attorneys and duty counsel are assigned to cases; court practices regarding standing a case down and/or the granting of remands; and the extent to which officers of the court advise the unrepresented accused of his or her legal rights and of the availability of – and advisability of obtaining – legal assistance.

These operational practices are varied and potentially very significant, and are related not only to practices of court officials. For example, in some sites, the degree to which the police provide disclosure in a timely and accessible manner to the Crown (for subsequent distribution to the defence) has a major effect on the impact of legal representation. How the Crown makes disclosure available to the unrepresented accused clearly also has a significant impact.

3.4 Stages in the Criminal Process

Despite the traditional emphasis on the criminal trial in defence work, the earlier stages of the criminal process are of key importance to the outcome of other stages for the accused. The manner in which representation is approached at earlier stages will affect not only the outcome, but also the functioning of the court at early and later stages. Although the criminal trial is often seen as the centrepiece of the criminal process, in practice the trial is a relatively rare event, most matters being settled by way of either a guilty plea or withdrawal of the charges. This fact alone would lead one to extend the inquiry into the state of legal aid beyond those issues related to representation at trial. But, in addition, previous research suggests there are certain critical stages in the criminal process where decisions are made that can significantly affect the outcome of later stages, as well as the ultimate outcome of the case. Previous research has found, for example, that:

- The prosecutor's decision to dismiss cases initially accepted for prosecution is related to the successful completion of diversion programs. Other relevant factors are related to witness, evidence and due process problems.⁹
- Prior record, offence, nighttime offence, and the type of counsel (private or state-appointed) affect the pre-trial release decision.¹⁰
- Sentence severity is related to whether the defendant had been released or detained prior to trial.¹¹
- Subsequent decisions in the justice system may be affected by earlier decisions in ways that heavily influence the final outcome. For an excellent discussion of these interaction effects, see Holmes et al. (1987).

This study therefore undertook to examine legal representation over the full spectrum of the criminal court process after charging (other research currently being funded by the Department of Justice is examining *Brydges* and pre-court stages), including the stages of pre-trial release, diversion, plea, plea negotiation, disposition and sentencing.

3.5 Service Delivery Models

There is a wide variation across the sites in the types of delivery models used in legal aid, including certificates for private bar service, staff lawyer systems, and a mix of both. In addition, variants in the delivery of duty counsel service are widespread across the provinces and within each province. Each model has its advocates. What is key here is that the strengths and weaknesses of each model will have impacts of various kinds on the unrepresented accused and on the courts in which they appear.

3.6 The Availability of Assistance from Other Sources

Organizational and operational mechanisms may be available to mitigate the negative impacts of being unrepresented – for example, the presence of court workers, social service agencies and other forms of special assistance, and the degree to which assistance is provided to the unrepresented accused by judges, Crown attorneys, court administration staff, court security and commissionaires, etc.

⁹ B. Forst, J. Lucianovic and S. Cox, and the Institute for Law and Social Research, *What Happens after Arrest?* (Washington: GPO 1977).

¹⁰ Michael Holmes, Howard Daudistel and Ronald Farrell, "Determinants of Charge Reductions and Final Dispositions in Cases of Burglary and Robbery," *J. Res. Crime and Del.* 24(3) (1987): 233.

¹¹ Julian Roberts and Tony Doob, "Race, Ethnicity and Criminal Justice in Canada," in Michael Tonry, ed., *Crime and Justice: An Annual Review of Research* (Chicago: University of Chicago Press, 1997); Jayne Marshall and Mike Reynolds, *Remand in Custody: A Statistical Overview of Custodial Remand in South Australia* (Adelaide: South Australia Office of Crime Statistics, 1998).

3.7 Variance Across Sites and Within Provinces

It is perhaps self-evident to court experts, but worth stating, that enormous variations were found across the nine sites. This applies not only to variation in the numbers and proportions of unrepresented and under-represented accused at the various sites, but also to the organization of services, the experience and workload of key players, the operations of the courts, the availability of supports for accused persons, and other key factors which affect the impacts from representation. The research team was also told by many key informants that there were relevant variances *within* the province also – that the nine courts in the study were not necessarily typical of the province as a whole.

3.8 Summary: Importance of a Systems or Holistic Perspective

The factors listed above in 3.7 must be considered in any analysis that seeks to understand the frequency of and impacts upon unrepresented and under-represented accused, and the consequences of under representation or lack of representation.

Further, our criminal justice system is built on the premise that Crown and defense function as equals, with equal legal expertise. It is not built to operate with major gaps in either access to representation or legal expertise, and does not function efficiently or well with such gaps or imbalances. Thus, the question of unrepresented and under-represented accused is not just one of preventing injustices to the individual accused – it affects the entire court and everyone who functions in it, as well as other parts of the justice system.

It is, then, almost axiomatic to conclude that formulating solutions to problems must also be seen in a holistic way. In understanding the problems and developing solutions, one must consider the roles of all groups involved in the court process, and the wide range of functions performed by those groups. This conclusion, in turn, implies that developing and implementing solutions will often require the active participation of those same groups.

A final reason for taking a holistic approach is that it takes into account the costs and benefits to all parts of the court system and will permit a better setting of priorities regarding potential solutions to problems. For instance, many of those interviewed felt strongly that increasing resources for activities that occur earlier in the court process (including broader duty counsel and other types of representation at early court appearances) would result in significant downstream cost savings to the courts, and positive impacts on the accused.

4.0 FINDINGS – PREVALENCE OF LEGAL REPRESENTATION

4.1 Likelihood of an Accused Having Legal Representation

Figure 4.1 summarizes a number of indicators of the prevalence of various types of legal representation across the nine sites. Examination of Figure 4.1 reveals the following ranges of findings across sites:

The proportion of accused **unrepresented**:

- at first appearance rangesfrom a low of 5% to a high of 61% above 36% in 4 courts;
- at second appearance rangesfrom a low of 2% to a high of 38% above 30% in 4 courts;
- at third appearance rangesfrom a low of 1% to a high of 32% above 19% in 4 courts;
- at their bail appearance ranges ..from a low of 3% to a high of 72% above 12% in 4 courts;
- at plea rangesfrom a low of 6% to a high of 41% above 18% in 4 courts;
- at their final appearance ranges .from a low of 6% to a high of 46% above 23% in 4 courts;
- at at least one appearance ranges from a low of 10% to a high of 63% above 52% in 4 courts;
- at all appearances ranges.....from a low of 1% to a high of 37%. above 11% in 4 courts.

The proportion of accused represented by **duty counsel**:

- at all appearances rangesfrom a low of 2% to a high of 16% above 5% in 4 courts.

The proportion of accused represented by **private counsel**:

- at all appearances rangesfrom a low of 10% to a high of 90% above 12% in 4 courts;
- for at least one appearance ranges from a low of 38% to a high of 94% above 45% in 4 courts.

On the basis of these data, we conclude that:

- There is **wide variance across the sites in the proportions of unrepresented accused**.
- There are **significant numbers of unrepresented accused** at key stages (especially early stages) in many of the courts studied.
- On the other hand, for some courts in the study (e.g., Brandon, Toronto and Sherbrooke), one is considerably less likely to find unrepresented accused during the early stages of the court process.

(Readers are reminded that, throughout this report, references to ‘private counsel’ encompass both privately retained counsel and private counsel paid through a legal aid referral or certificate.)

Figure 4.1 Prevalence of Legal Representation Disposed Cases: Percentage with Specific Types of Representation at different Times and Stages of the Court Process by Site									
Time or Stage in Court Process	St. John's	Halifax	Bathurst	Sherbrooke	Scarborough	Brandon	Edmonton	Regina	Kelowna
Unrepresented at 1st 3 appearances									
• 1st appearance	14 ¹	37	54	9	5	n/a	50	61	35
• 2nd appearance (if any)	n/a	31	38	2	9	9 ²	25	32	29
• 3rd appearance (if any)	n/a	20	32	1	9	n/a	18	25	24
Unrepresented at Key Stages									
• at bail	4 ¹	37	*	*	3	n/a	34	72	13
• at plea	17 ¹	19	41	6	14	n/a	18	22	28
• at final appearance	35	23	46	6	16	14 ³	24	21	28
Representation at all appearances									
• unrepresented at at least one	n/a	57	63	10	31		62	49-53	53
• unrepresented at all	n/a	12	37	6	1	n/a	14	7-13*	17
• duty counsel at all	n/a	6	8	n/a	16	n/a	2	n/a	15
• legal aid at all	n/a	11 ⁵		n/a	n/a	n/a	n/a	at least 4.3*	n/a
• private counsel at all	n/a	10	17	90	12	n/a	15	at least 5*	13
Some Representation by Private Counsel									
• for at least one appearance	n/a	38	46	94	72	n/a	64	at least 32*	45
* Because of missing data, it is not possible to specify this value more precisely.									
1. For St. John's, this statistic is based on data from the Direct Court Observation file.									
2. For Brandon, estimate is for non-final case/appearances (from Direct Court Observation data).									
3. For Brandon, estimate is for final case/appearances in docket courts (from Direct Court Observation data).									
4. For Brandon, statistics refer (not to cases but) to case/appearances on a sample of three months of court dockets.									
5. Some denoted as legal aid could also be as duty counsel.									

4.2 Lynchpin Role of Duty Counsel

Increasingly, legal aid systems across Canada are relying on duty counsel to assist accused in the criminal court process, especially at early stages and prior to the appointment of other counsel. Duty counsel is, therefore, playing an increasingly important role in the court system. Many different approaches to duty counsel were observed at the study sites. The remainder of this section provides an overview of these approaches in terms of organizational models and service delivery.

4.2.1 Organizational Models

Figure 4.2 provides an overview of the range of organizational models of duty counsel services in the study sites. Clearly, across the nine sites, there is considerable variation in terms of:

- the organizational mechanisms through which duty counsel services are offered;
- the experience of the duty counsel staff; and
- their rates of pay.

	Delivered by/Rotation	Seniority	Pay vs. Crowns
Kelowna	<ul style="list-style-type: none"> • Mixed delivery by staff lawyer and private bar on per diem basis • No rotation 	Senior members of the bar	Staff DC paid \$15K less than Crowns
Edmonton	<ul style="list-style-type: none"> • Two staff lawyers • No rotation. 	Senior members of the bar	No relevant comparison
Regina	<ul style="list-style-type: none"> • Two staff lawyers assisted by a paralegal • Rotation annually 	Senior members of the bar	Comparable to that of Crowns
Brandon	<ul style="list-style-type: none"> • All staff lawyers (extended duty counsel) • No rotation 	Senior members of the bar	Paid the same as Crowns
Scarborough	<ul style="list-style-type: none"> • Delivered by lawyers on 3-year fixed term contracts (renewable) with Legal Aid Ontario • No rotation 	Junior members of the bar except for supervisor	Paid \$40K less than Crowns
Sherbrooke	<ul style="list-style-type: none"> • DC role handled by locally – contracted private law firm 	Variable	No relevant comparison
Bathurst	<ul style="list-style-type: none"> • Fourteen private bar members on fixed-term contract • No rotation 	Mostly senior members of the bar	No relevant comparison
Halifax	<ul style="list-style-type: none"> • One staff lawyer • No rotation 	Senior member of the bar	Paid the same as Crowns
St. John's	<ul style="list-style-type: none"> • One staff lawyer • No rotation 	Senior member of the bar	Paid the same as Crowns

4.2.2 Service Delivery: Scope and Strategies

Figure 4.3 next provides an overview of the range of services offered by duty counsel in the nine study sites, and to whom they are offered. Again there is considerable variation from one site to another.

In some courts, duty counsel is available only to assist with bail hearings for those in custody, or may also assist with the occasional guilty plea and sentencing for custodial cases where the matter can be resolved quickly. At one site, duty counsel is available only at first appearance. This is in contrast to a site like Brandon, where duty counsel is available to nearly all persons at first appearance, whether they are in or out of custody.

Duty counsel services may be organized on a courtroom basis, to catch cases as they arrive, or may be organized to ensure that the accused gets the same counsel every time he or she appears, to ensure continuity. In the latter model (extended duty counsel), all staff lawyers are, in effect, duty counsel at pre-set times during any given court week, catching new arrivals at their first appearance during some court days, and assisting with subsequent stages in the accused's case during other parts of the week. The extended duty counsel model is in effect at the Brandon site, and is believed by all court parties to contribute significantly to the efficient running of the court, whose backlogs are insignificant.

Site	Functions Duty Counsel available to cover / and for which accused	Whether Eligibility and Coverage Tests are Applied	Other Restrictions on Functions/ Service provided
Kelowna	<ul style="list-style-type: none"> • All functions except trial 	No, except for trial	No
Edmonton	<ul style="list-style-type: none"> • All functions except trial 	No	<ul style="list-style-type: none"> • DC does not review disclosure with unrepresented accused • Limited presence in federal docket court • Limited role in trials, not always available to assist with sentencing
Regina	<ul style="list-style-type: none"> • Bail hearings • Plea and sentencing for bail cases that are easily resolved 	No	No
Brandon	<ul style="list-style-type: none"> • All functions except trial 	No except for trial	No
Scarborough	<ul style="list-style-type: none"> • All functions except trial and entering of plea 	Yes except for in-custody cases	<ul style="list-style-type: none"> • Not normally available to assist with plea negotiations on day of trial
Sherbrooke	<ul style="list-style-type: none"> • First appearance only 	No	No
Bathurst	<ul style="list-style-type: none"> • First appearance, plea, bail and sentencing 	No	No
Halifax	<ul style="list-style-type: none"> • First appearance only • Plea and sentencing for cases which are easily resolved 	No	No
St. John's	<ul style="list-style-type: none"> • In-custody cases only • Plea and sentencing for bail cases which are easily resolved 	No	No

The data gathered in the course of this study included information on the extent to which duty counsel are providing assistance to otherwise unrepresented adult accused in the nine study sites. Figure 4.4 summarizes these data for selected appearances. Examination of Figure 4.4 shows **wide variance across sites in the presence of duty counsel at various stages in the criminal process.**

The proportion of accused assisted by duty counsel:

- at first appearance rangesfrom a low of 17% to a high of 74% above 31% in 4 courts;
- at second appearance rangesfrom a low of 10% to a high of 57% above 26% in 4 courts;
- at third appearance rangesfrom a low of 6% to a high of 49% above 18% in 4 courts;
- at their bail appearance rangesfrom a low of 16% to a high of 89% above 48% in 4 courts;
- at plea rangesfrom a low of 14% to a high of 49% above 23% in 4 courts;
- at their final appearance rangesfrom a low of 11% to a high of 50% above 23% in 4 courts;
- at some but not all appearance ranges from a low of 27% to a high of 70% .. above 40% in 4 courts;
- at all appearances rangesfrom a low of 2% to a high of 16% above 7% in 4 courts.

These data highlight the significant role played by duty counsel in providing legal assistance to otherwise unrepresented accused. **There are significant numbers of accused assisted by duty counsel at key stages in the court process in many of the courts studied.**

Figure 4.4 Prevalence of Representation by Duty Counsel Percentage of Cases Represented by Duty Counsel at different Times and Stages of the Court Process by Site									
Time or Stage in Court Process	St. John's	Halifax	Bathurst	Sherbrooke	Scarborough	Brandon	Edmonton	Regina	Kelowna
At 1st 3 appearances									
• 1st appearance	74 ¹	32	29	n/a	71	n/a	26	17 ²	42
• 2nd appearance (if any)	n/a	24	10	n/a	57	31 ³	24	43 ²	27
• 3rd appearance (if any)	n/a	19	6	n/a	49	n/a	10	46 ²	20
At Key Stages									
• at bail	89 ¹	49	n/a	n/a	77	n/a	16	19 ²	62
• plea	34 ¹	14	16	n/a	24	n/a	14	49 ²	26
• defence elections	n/a	13	28	n/a		n/a	39	56 ²	9
• final appearance	30 ²	13	11	n/a	22	41 ⁴	11	50 ²	24
At None, Some or All Appearances									
• at none	n/a	47	66	n/a	14	n/a	54	63 ²	36
• at some but not all	n/a	47	27	n/a	70	n/a	41	37 ²	50
• at all	n/a	6	8	n/a	16	n/a	5	10 ²	15
Notes									
* Because of missing data, it is not possible to specify this value more precisely.									
¹ For St. John's, this statistic is based on data from the Direct Court Observation file.									
² Regina and St. John's data do not distinguish between duty counsel and legal aid staff acting in another capacity. Percentage shown includes both.									
³ For Brandon, estimate is for non-final case/appearances (from Direct Court Observation data).									
⁴ For Brandon, estimate is for final case/appearances in docket/hon-trial court (from Direct Court Observation data).									

4.3 The Question of Under-Representation

Although it was not within the original formal terms of reference for this study, we are bound professionally to report that **concerns were raised by a number of those interviewed that one should look not only at whether or not an accused is represented, but also at whether or not those with representation have adequate representation – i.e., at the issue of under-representation.**

To paraphrase one interviewee, “it’s not just legal advice needed, but someone who knows the ‘going rate’ for certain offences, knows which arguments will work for you (or against you!) with which judges, etc.”

4.3.1 Legal Aid Stretched Everywhere

For instance, even if the statistics show that the accused is assisted by duty counsel, it is important to note that in most courts duty counsel “is run off its feet.” None of the courts in the study had a luxury of resources available for duty counsel.

Indicators of stretched legal aid – especially duty counsel – resources seen in many of the court sites included:

- Duty counsel having available very limited time before court to interview accused (especially accused in custody) before the court appearance.
- Delays in being able to obtain approval for legal aid, or appointments with legal aid lawyers after approval.
- Cases held down in court because the duty counsel has not had time to adequately review the case with the accused (or with sureties or witnesses).
- The limited experience of some duty counsel puts them at a distinct disadvantage when put up against more experienced Crowns.

4.3.2 Restricted Representation by Private Bar Members Under Legal Aid

Although an accused may have a counsel of record provided under legal aid, interviewees in a number of sites gave examples of indications that accused represented by private lawyers were not receiving the level of service that would be expected from a privately funded, “cash” lawyer.

Examples included:

- Tariff systems that do not provide for sufficient hours to give “the full nine yards” to cases. In addition, we were frequently told that it might be “ruinous” for a lawyer to take a complex case, given the limited funds available under the legal aid tariff.
- Private lawyers funded under legal aid not representing their clients at bail appearances.
- Private lawyers asking duty counsel (or Court Workers) to represent their clients at initial appearances.
- Cases being stood down or remanded because lawyers were not in court.
- In jurisdictions in which legal aid staff lawyers handle most cases, it is difficult for junior private lawyers to obtain sufficient experience in the criminal courts.

5.0 FINDINGS – IMPACTS OF UNREPRESENTED AND UNDER-REPRESENTED ACCUSED

5.1 Key General Impacts

This chapter focuses on the impacts of a lack of representation identified by this study. For the purposes of this report, these impacts are grouped under three headings: key general impacts; impacts on the accused (including both legal and socio-economic impacts); and impacts on the courts and court officers.

Four **key general impacts of accused being unrepresented and under-represented** suggested by some interviewees were that:

- Charter arguments are not raised because matters are pled out or not properly tried.
- The “audit function” that trials serve over police conduct is weakened.
- The entire system is premised on the assumption and principle that both sides (Crown and defence) are equally matched. When they are not, everything (and everyone) suffers.
- The general public is left with the impression that there is one system for the rich and another for the poor.

5.2 Impacts on the Accused

Our interviews revealed that **most key informants felt that unrepresented and under-represented accused typically suffer significant negative impacts**. Those who were of the view that they did not (with a few mentioning that, occasionally, there may in the end be a positive impact) were definitely in the minority.

Further, most interviewees agreed representation was important at all stages of the criminal court process, and that it was important to be clear about the types of impacts to be considered at each of the different stages.

5.2.1 From Preparing for First Appearance to Trial

(a) Pre-trial: Process

Our site visits revealed that the **majority of those interviewed felt that it was important to have representation at the very early stages of the process**. Given the importance of information collected – especially admissions – from the accused soon after arrest – “very early” was often defined as considerably before the first court appearance.

The earlier stages of the court process are especially important because (as noted before) it is at those appearances that the court or the accused make decisions that will have significant impacts on the outcome of the case (e.g., from failing to obtain bail, to failing to obtain legal representation, to pleading guilty).

On a more general level it is difficult to believe that unrepresented accused are capable of formulating an appropriate defence strategy, given that many of our interviewees explicitly noted that:

- Unrepresented accused (except for repeaters/professionals) do not understand what is happening to them at many stages of the court process – or what was decided at verdict and sentencing.
- Unrepresented accused do not understand how being unrepresented precludes certain activities during the court process. For instance, it is rare to find a Crown who will plea bargain with an unrepresented accused (because of fear of censure, becoming a witness to a damaging statement or admission of guilt, etc), so unrepresented accused do not benefit from reduced or dropped charges, or recommendations at sentencing.
- Further – as will be shown in the following sections – unrepresented accused (again, except perhaps for repeaters/professionals) are not aware of the many legal options available to them, nor of the procedural and strategic mistakes counsel would likely prevent them from making.

(b) Socio-Economic Impacts on the Accused

Those interviewed also noted that unrepresented accused are also less likely to formulate the most appropriate *overall* defence strategy – especially regarding pleading guilty or not guilty. This is because they do not understand the socio-economic consequences of a criminal conviction and record – or tend only to think in terms of whether/how much jail time they will get. They may plead out without being aware of socio- economic consequences such as:

- the outcomes of future encounters with the criminal justice system being significantly affected by the presence of the cumulative record – (including the likelihood of pre-trial release, dropping of some charges, etc);
- being excluded from entering certain university streams;
- being shut out of future job prospects, getting bonded for certain jobs, retaining other jobs;
- incurring driving prohibitions, which can affect their and their family's livelihood;
- being unable to cross the U.S. border;
- being unable to serve in the military;
- being barred from immigrating or emigrating – or being deported; and/or
- severe problems in continuing important familial relationships and responsibilities.

Informants also provided numerous examples of unrepresented accused agreeing to – or at least not raising arguments against – specific court decisions, because the accused had not

considered the specific socio-economic implications of those decisions. The most frequent examples related to:

- Unrepresented accused quietly acquiescing to certain bail or sentencing conditions – without considering how those conditions might impact on the accused’s ability to fulfill family obligations (e.g., a driving prohibition or peace bond preventing him or her from driving the children to school), or maintain a current job under, for example, certain driving prohibitions or time and/or location curfews.

In contrast, those interviewed also noted a number of ways in which the knowledge of socio-economic factors affected – often inappropriately – specific decisions made by unrepresented accused. For instance:

- Accused may plead guilty – even when they have a legal defence – because they are ashamed or embarrassed and want to minimize the shame and publicity.
- Accused often plead guilty because they cannot live with their bail restrictions or afford the time for numerous court appearances and a trial – and their impact on the accused’s family and/or economic responsibilities.

(c) Pre-trial: Errors Made by Unrepresented Accused

Key informants were also asked to indicate the **most serious specific errors made by unrepresented accused**. The most frequently mentioned errors are listed in Figure 5.1 below.

Figure 5.1 Most Frequently Cited Errors Made by Unrepresented Accused Prior to Trial	
Stage	Error or Omission
Arrest and Earliest Stages	<ul style="list-style-type: none"> • Not calling <i>Brydges</i> emergency legal advice number. • Failing to show up for fingerprinting, resulting in a new charge. • Believing that if they are innocent, they do not need a lawyer. • Not understanding their Charter rights or when they have been breached, the law of search and seizure, etc.
First Appearance	<ul style="list-style-type: none"> • Not knowing when to plead guilty. • Failing to appear, and not understanding that a failure to appear will affect, e.g., the likelihood of bail the next time. • Testing the tolerance levels of judges by seeking multiple postponements. • Not being aware of their entitlement to disclosure.
Pretrial Release	<ul style="list-style-type: none"> • Not availing themselves of counsel because they “cannot wait” to argue for their release. • Conducting the bail hearing without disclosure. • Not understanding, or agreeing to release conditions that are unworkable, e.g., no-contact clauses with spouses with whom they have some legitimate contact or with whom they have joint responsibilities (e.g., transport of children to school).
Diversion	<ul style="list-style-type: none"> • Not knowing of the existence of diversion opportunities. • Not asking to be considered for diversion.

Figure 5.1	
Most Frequently Cited Errors Made by Unrepresented Accused Prior to Trial	
Stage	Error or Omission
Plea	<ul style="list-style-type: none"> • Pleading guilty “just to get it over with.” • Pleading guilty as soon as they are denied bail, in order to get out of jail. • Pleading guilty when they have a viable defence. • Pleading guilty before seeing the disclosure. • Not knowing how to assess the strength of the Crown’s case. • Pleading guilty to offences they did not commit. • Pleading guilty to all the original charges (not knowing that Crowns may have a practice of withdrawing certain charges). • Not pleading to charges more in keeping with the actual behaviour. • Not asking that certain charges be dropped. • Not knowing the usual sentence for the offence. • Not understanding the consequences of a conviction, e.g.: <ul style="list-style-type: none"> - Next time the charges will be higher and the failure to appear charge will not be dropped. - Impacts on getting or keeping certain jobs, driving prohibitions, crossing international borders, entering the military, etc. • Considering only whether or not they will be sent to jail or deported.

The Direct Court Observation found that, overall, a quarter of the appearances in the non-trial courts in different sites typically took one or two minutes, or even less. Within the context of this type of time pressure, it is not difficult to understand why many of those interviewed noted that an accused lacking a developed understanding of court procedures would make specific mistakes – and would be disoriented generally throughout the court process.

(d) Timing of Pleas

As noted above, one of the concerns raised by interviewees was that unrepresented accused were more likely to plead guilty early – “to get it over with,” as they frequently put it themselves.

The empirical data gathered for this study on disposed cases allows us to test whether this perception reflects reality. The data available included information on the appearance number at which pleas were entered, broken down by representation type (self, duty counsel or private counsel) at that appearance. Figure 5.2 summarizes these data for the nine study sites.

As shown in Figure 5.2, **in most sites, self-represented accused do indeed typically plead earlier than represented accused – at least compared to accused represented by private counsel.** Unrepresented accused typically plead at their first or second appearance. On the other hand, accused assisted by private counsel typically did not enter

pleas until later – with at least 50 percent not entering pleas until their third to sixth (or later) appearances.

However, as with other findings of this study, there are exceptions to the general rule. The exception here is Scarborough, where pleas were typically entered by self-represented accused at later appearances than in other courts in the study – and after roughly the same number of appearances as for accused represented by private counsel.

Figure 5.2 Timing of Plea Disposed Cases in which a Plea was Entered: Median/ 75th Percentile Appearance Number at Which Plea Entered by Type of Representation at Appearance by Site									
Representation at Appearance Plea Entered	St. John's	Halifax	Bathurst	Sherbrooke	Scarborough	Brandon	Edmonton	Regina	Kelowna
Self-represented	1/3 ³	2/3	1/2	1/1	7/13	n/a	2/3	2/5	2/3
Duty Counsel	4/6 ³	3/4	1/1	n/a	2/4	n/a	2/2	6/9 ²	2/3
Private Counsel (including duty counsel, agent or paralegal for private counsel)	3/6 ³	5/7 ¹ 3/5	3/4	3/6	7/10	n/a	4/5	6/9 ^{1,2} 6/9	4/7
<p><u>Notes</u> * Because of missing data, it is not possible to specify this value more precisely. ¹ Legal aid staff (other than duty counsel). ² Regina data does not distinguish between duty counsel and legal aid staff acting in another capacity. Percentage shown includes both. ³ Numbers relate to representation at last appearance.</p>									

One also finds differences among the courts when one compares the appearance numbers at which pleas are entered by self-represented accused with the appearance numbers at which pleas are entered by accused assisted by duty counsel. Three groupings of courts are found:

- Courts in which pleas are entered *earlier* by unrepresented accused (St. John's, Halifax, Regina).
- Courts in which pleas are entered after roughly the same number of appearances for unrepresented accused and accused assisted by duty counsel (Bathurst, Edmonton and Kelowna).
- Courts in which pleas are entered *later* by unrepresented accused (Scarborough).

(e) Pre-trial: Impact on Outcomes

Another key concern raised was whether unrepresented accused are more likely to plead guilty. In fact, the data suggest that **unrepresented accused are more likely to plead guilty in some courts – but less likely to plead guilty in other courts**. Figure 5.3 uses data from the disposed cases sample to calculate the proportion of accused pleading guilty,

broken down by representation type (self, duty counsel or private counsel) at that appearance.

We first compare the likelihoods of unrepresented accused pleading guilty with analogous likelihoods for accused represented by private counsel. Three groupings of courts are found:

- Courts in which guilty pleas are *more* likely to be entered by unrepresented accused (St. John's, Bathurst, Edmonton).
- Courts in which guilty pleas are entered with roughly the same probabilities for unrepresented accused and accused represented by private counsel (Halifax, Sherbrooke, Regina and Kelowna).
- Courts in which guilty pleas are *less* likely to be entered by unrepresented accused (Scarborough).

Representation at Appearance Plea Entered	St. John's	Halifax	Bathurst	Sherbrooke	Scarborough	Brandon	Edmonton	Regina	Kelowna
Self-represented	91 ³	56	87	87	69	n/a	73	86	88
Duty Counsel	81 ³	91	90	n/a	98	n/a	72	85 ²	96
Private Counsel (including duty counsel, agent or paralegal for private counsel)	74 ³	56 ¹ /52	63	87	86	n/a	50	85 ^{1,2} /62	82
<i>Notes</i>									
* Because of missing data, it is not possible to specify this value more precisely.									
¹ Legal aid staff (other than duty counsel).									
² Regina data does not distinguish between duty counsel and legal aid staff acting in another capacity. Percentage shown includes both.									
³ By Type of Representation at Final Appearance.									

However, different results apply when we compare the likelihoods of unrepresented accused pleading guilty with analogous likelihoods for accused represented by duty counsel. Again, three groupings of courts are found, but the courts were grouped differently:

- Courts in which guilty pleas are *more* likely to be entered by unrepresented accused than by accused represented by duty counsel (St. John's).
- Courts in which guilty pleas are entered with roughly the same probabilities for unrepresented accused and accused represented by duty counsel (Bathurst, Edmonton, Regina and Kelowna).
- Courts in which guilty pleas are *less* likely to be entered by unrepresented accused than by accused represented by duty counsel (Halifax and Scarborough).

It is, however, important to make it clear that this information is not presented to draw causal inferences, but simply to describe the events at various stages in the process. For instance, the evidence is not presented to suggest that the lack of representation *caused* an unrepresented accused person to plead guilty, but rather to simply describe whether or not, and how frequently, significant decisions are made and certain outcomes occurred with or without the presence of counsel.

5.2.2 At Trial and Sentencing

(a) Trial and Sentencing: Process

Given the special legal procedures that apply and the types of issues that are raised at trial, it is not surprising that many of those interviewed in all sites highlighted the need for representation at trial.

The following are among the most serious errors that interviewees suggested would be made by unrepresented accused *at trial*:

Figure 5.4	
Most Frequently Cited Errors Made by Unrepresented Accused at Trial	
Stage	Error or Omission
Trial	<ul style="list-style-type: none"> • Not demanding a trial or a dismissal on trial days when the Crown witnesses have failed to show up. • Not reading the disclosure or learning the Crown's case against them. • Going to trial where there are no real triable issues. • Deciding to testify when they should not, or thinking that they "are supposed to" testify. • Making accidental and damaging admissions, e.g., "Yes, I hit her but she hit me too." • Not calling the witnesses they need. • Not availing themselves of processes which can help them, such as a hearing on the confession. • Not asking for a directed verdict when the Crown has not proved its case. • Not understanding the available defences. • Not seeing the relevance of evidence. • Not being able to effectively scrutinize witness testimony without a lawyer. • Poor cross-examination, including that which makes them look bullying or abusive.
Sentencing	<ul style="list-style-type: none"> • Not knowing what arguments to make at sentencing. • Not knowing the best arguments to use (or not use) with particular judges. • Not knowing the mandatory sentences for certain offences. • Not mentioning improvements they have made in their lives since the offence, e.g., getting a job or taking treatment. • Not being aware of or asking for a certain type of sentence, e.g., conditional discharge or intermittent sentence. • Not speaking up to argue against the imposition of unworkable conditions of sentence when they are discussed or read out in court, conditions which must then be altered – or will be violated.

(b) Trial and Sentencing: Impacts on Outcomes

Our data allowed us to look at two key indicators of the outcomes of trial and sentencing: conviction rates and rates of receiving custodial sentences.

Conviction Rates. Our data suggest that, in most courts, unrepresented accused are convicted in from 50 percent to 96 percent of the cases. But, **are unrepresented accused more likely to be convicted than those who are represented? Our data suggest they are not, but this may reflect other factors – for instance, the possibility that diverted (and therefore not convicted) cases are more likely to be unrepresented.**¹²

Figure 5.5 uses data from the disposed cases sample to provide, for each of the nine courts in the study, estimates of the proportion of accused convicted on one or more of the charges they faced, broken down by representation type (self, duty counsel or private counsel) at that appearance.

As shown in Figure 5.5, in all but one site, the conviction rates for unrepresented accused did not vary greatly from those for accused represented by private counsel.

One finds – for the majority of sites – similar results (i.e., similar conviction rates) when one compares conviction rates for unrepresented accused with those for accused assisted by duty counsel. However, for three of the sites, one finds conviction rates for self-represented accused to be considerably below those for accused assisted by duty counsel.

One should, however, note that in comparing conviction rates for unrepresented accused with those for represented accused, one should take into account the likely impact of post-charge and pre-court process “diversion” on these conviction statistics. Accused who are diverted are extremely likely to not have a lawyer. Given that successful completion of the diversion program will result in non-conviction, the existence of a diversion program would be expected to result in lower overall conviction rates for self-represented cases (with little if any impact on conviction rates for represented cases). Unfortunately, data were not available on which cases were diverted or even the percentage of cases that were diverted in each of the sites in the study. Therefore, we cannot say what the conviction rate would be for unrepresented accused in each site who were not diverted. However, it is safe to say that the rate for non-diverted, unrepresented accused would be higher than the percentages shown in Figure 5.5.

Earlier, we cautioned against using these data to imply a causal connection between type of representation and conviction rates. However, given the impact of having a criminal record (on employment opportunities and the likelihood of being charged with further offences, etc) **the data can definitely be used to show that many unrepresented accused will experience serious negative impacts as a result of the court process.** Whether or not

¹² Data were not available on which cases in our samples were or were not diverted. However, since diverted cases are much more likely to be unrepresented than represented, it is safe to conclude that conviction rates of unrepresented accused who were not diverted would be above those shown for all (i.e., diverted plus not diverted) unrepresented cases in Figure 5.5.

that possibility alone is sufficient to call for greater availability of legal representation is a matter of public policy.

Representation at Last Appearance	St. John's	Halifax	Bathurst	Sherbrooke	Scarborough ^h	Brandon	Edmonton	Regina	Kelowna
Self-represented	87	60	96	92	50	25 – 43 ³	53	70	71
Duty Counsel	85	92	96	n/a	52	60 – 64 ² ₃	79	70 ²	78
Private Counsel (including legal aid staff, agent or paralegal for private counsel)	80	63 ¹ /6 2	94	90	55	70 – 63 ³	58	70 ² /62	70

Note.
 * Because of missing data, it is not possible to specify this value more precisely.
¹ Legal aid staff (other than duty counsel).
² Regina and Manitoba data do not distinguish between duty counsel and legal aid staff acting in another capacity. Percentage shown includes both.
³ For Brandon the first estimate is from the Direct court Observation file (for docket courts) and the second estimate is based on data from the Three-Month Docket Sample. Both are based on case/appearances.

Rates of imposition of custodial sentences. Our data can be used to address two questions regarding how many unrepresented accused suffer deprivation of liberty.

First, do significant proportions of unrepresented accused receive custodial sentences? Our data suggest that the answer is yes. Although less than 10 percent of unrepresented accused received custodial sentences in two sites, over 10 percent received custodial sentences in the other seven sites – with more than 15 percent receiving custodial sentences in three of those sites.

The second question is, **are unrepresented accused more likely than represented accused to go to jail? Our data suggest that they are not.**

Figure 5.6 summarizes data from the disposed cases samples to show the proportion of accused given custodial sentences, broken down by representation type (self, duty counsel or private counsel) at that appearance.

In all but one site, custodial sentences were least likely for accused who were unrepresented – as opposed to accused represented by either duty counsel or by private counsel.

When one compares imprisonment rates for accused represented by duty counsel with those for private counsel:

- For three courts, imprisonment rates were higher for cases represented by duty counsel;
- For four courts, imprisonment rates were similar for cases represented by duty counsel and those represented by private counsel; and
- For one court, the imprisonment rate was higher for cases represented by private counsel.

Again we caution against using these data to imply a causal connection between type of representation and likelihood of receiving a custodial sentence. However, the results are directly relevant from another important perspective. Specifically, it is accepted that eligibility for legal aid should depend (in part) on the likelihood of a case receiving a custodial sentence. Although one cannot expect to predict with total accuracy whether a case will get a custodial sentence, it is relevant that custodial sentences are received by at least one in ten self-represented accused in seven of the courts considered.

Figure 5.6 Variation in Probability of Accused Receiving a Custodial Sentence by Type of Representation Disposed Cases: Percentage of Accused Receiving a Custodial Sentence (if convicted on at least one charge) by Type of Representation at Last Appearance by Site									
Representation at Last Appearance	St. John's	Halifax	Bathurst	Sherbrooke	Scarborough ^h	Brandon	Edmonton	Regina	Kelowna
Self-represented	18	10	9	4	13	19	27	16	11
Duty Counsel	42	76	21	n/a	26	16 ²	49	27 ²	42
Private Counsel (including legal aid staff, agent or paralegal for private counsel)	31	39 ¹ / ₂ 6	32	40	23	16 ² / ₂₃	33	27 ² / ₁₈	37
<i>Notes</i>									
* Because of missing data, it is not possible to specify this value more precisely.									
¹ Legal aid staff (other than duty counsel).									
² Regina and Manitoba data do not distinguish between duty counsel and legal aid staff acting in another capacity. Percentage shown includes both.									
³ Manitoba data is based on case/appearances in docket/non-trial courts (from the Three Month Docket Sample).									

5.3 Impacts on Officers of the Court and Others

Our interviews also suggested that the **effects of accused being unrepresented extend to increasing the level of workloads and the stresses on and complexities of the work done by key court officers and others.**

(a) Victims and Witnesses

A serious problem arises during a trial when the self-represented accused must question a witness – or worse, the alleged victim. This can be a difficult experience for many witnesses. In addition, the unrepresented accused can jeopardize his or her defence in

such instances, because there is often a fine line between questioning and badgering or harassment when an inexperienced accused is trying to examine or cross-examine a person with whom he or she has a personal and tense relationship.

(b) Defence Counsel

Defence counsel of all types feel the pressure from the constant stream of accused persons requiring legal advice and representation.

Private bar. The private bar's strong tradition of public service is reflected in *pro bono* work and work taken at tariff rates which are a constant source of friction. A number of those interviewed raised concerns that the current tariff rates resulted in lawyers feeling they could not provide the same level of service that would be provided to full-fee-paying clients. A particular concern was raised regarding the financial difficulties that would be incurred by a lawyer taking on very complex, serious and time-consuming cases, given the upset limits of current tariff structures.

Legal aid staff lawyers. In staff lawyer systems, many felt that staff lawyers do not have enough time – sometimes only “moments” to prepare a case. Some interviewees stated that legal aid staff were “run off their feet.” Duty counsel schedules were variously described by Crowns as “hairy,” “a frenzy,” and “nuts.” Clients were reported to experience the pressure on legal aid systems in the form of:

- delays in getting a first appointment, including lineups outside legal aid offices in the morning before offices open, and hours spent waiting;
- messages machines that are frequently full;
- messages returned days later or “too late”;
- alleged pressure to plead guilty; and
- the inevitable diminution of respect for a service which is “free.”

(c) Crown Attorneys

At stages before trial, interviewees in a number of sites indicated Crown Attorneys are put in an awkward position when unrepresented accused wish to discuss their case with Crowns. Although Crowns were not unanimous in their assessment of the magnitude of these problems, among the difficulties they noted were the following:

- A higher number of remands ordered by the judge to enable the unrepresented accused to get a lawyer (more remands than in represented cases) – with more court appearances, meaning greater workloads for all those connected with the court.
- Having to review the disclosure packet before giving it to an unrepresented accused – in order to ensure victims and witnesses are not placed in any danger.
- Being unable to agree with unrepresented accused on narrowing the issues by settling on which evidence can be stipulated.

- Attempting (where time is available) to suggest defences, Charter arguments, and arguments to be used at sentencing (although most Crowns do not do this).
- Trying to resolve a case quickly – more difficult to do when the accused has no counsel and Crown is barred from giving advice to the accused.
- Ensuring that unrepresented accused do not inadvertently reveal to the Crown something that can be used against them.

In most sites, generally, Crowns will not talk to unrepresented accused or negotiate a plea with them – they will only do so if they cannot avoid it. However, it is a personal choice of the Crown whether to talk to an unrepresented accused – and some do.

(d) Judges

Judges, too, indicated that they are often put in the awkward position of assisting unrepresented accused, as best they can. Judges must point out possible defences, often “bend over backwards” to protect the unrepresented accused’s rights, and run the risk of leaving the impression with the victim and the police that they are “on the defendant’s side.” Judges must exercise care before accepting pleas of guilty from unrepresented accused. When in doubt, the judge will be required to refuse a guilty plea and set the matter down for trial, but at trial – and especially at sentencing – those interviewed indicated that the unrepresented accused generally do a poor job of presenting a defence.

(e) Native Court Workers

In sites in which they are present, Native Court Workers are troubled by the inadequacies they see in the system, and the eagerness of too many Aboriginal defendants to plead guilty “to get it over with.” They may advise unrepresented accused not to plead guilty if they do not “feel guilty” or if a defence seems available, but subsequently, many unrepresented accused will fail to appear at trial or just plead guilty on the day of trial.

(f) Court Administrative Personnel

Clerks at the counter, in most sites, indicated that they must handle inquiries from accused who need questions answered. Many felt that most of these are either unrepresented impaired driving cases or represented accused who may be unable to remember who their counsel is or what date they are to appear. Clerks also spend time with accused persons explaining to them the conditions of their bail and/or sentences, although duty counsel also assist in some sites.

Clerks find, from the questions asked of them by unrepresented accused, that they are often still seeking legal advice or are given conditions of bail or probation which they cannot follow, e.g., restrictions on seeing children they are partly responsible for, or curfews which affect their ability to perform or keep their job.

(g) Court Security

Sheriffs and other custodial staff at the different courthouses rarely reported security problems related to unrepresented accused.

(h) The Justice System Overall

Some of the people interviewed suggested that unrepresented accused ultimately increase the workload of the criminal justice system, not just because of the perception that they make additional appearances, causing postponements and delays, but also because unrepresented accused are more likely to be convicted, to re-appear in court, and to be sent to jail, all of which slows down and provides more work for the police, corrections and all other parts of the justice system. The quantitative data did not confirm this perception.

5.4 Impacts on Court Operations

The data gathered for this study included several indicators of court resource use (and delay) that might be affected by the presence of self-represented accused in the courts. This section summarizes the study findings with respect to these indicators.

5.4.1 Duration of Individual Appearances

A common concern raised is that cases involving unrepresented accused require more time per appearance – for the court to explain matters to the accused, and for the accused to conduct elements of his or her defence. **The data do not suggest that appearances by unrepresented accused take longer**, at least those in the first appearance/set date/arraignment (i.e., non-trial) courts.¹³

To create the Direct Court Observation files for each court, the court observer sat in bail, first appearance and set date courts, and captured the time taken by each case/appearance. The results speak directly to the issue of whether appearances of self-represented accused (in the appearances prior to trial) are *actually* longer or shorter than those of accused with other types of representation.

¹³ The current study did not collect data on the length of trial appearances, and does not, therefore, address concerns regarding the length of such appearances for unrepresented accused.

Figure 5.7 summarizes these data for the nine sites,¹⁴ broken down by the type of representation at these appearances.

Figure 5.7 Variation in Time Per Case/Appearance by Type of Representation Case Appearances Directly Observed in Non-trial Courtrooms: Median/ 75th Percentile Time (minutes) per Case/Appearance by Type of Representation at Appearance: by Site									
Representation at Appearance	St. John's	Halifax	Bathurst	Sherbrooke	Scarborough ^h	Brandon	Edmonton	Regina	Kelowna
Self-represented	2/4 ³ 4/8	2/3	4/7	½	1.5/2	n/a	1/1	2/4	2/4
Duty Counsel	4/12 ³ n/a	6/7	1/2	n/a	2/4	n/a	1/3	2/6 ²	3/6
Private Counsel (including duty counsel, agent or paralegal for private counsel)	n/a ^{3,4} 3/6 3/10 ^{3,4} 3/7	2/3 ⁵	3/6	5/10	2/4	n/a	1/2	2/6 ^{1,2} 2/3	2/5
Notes									
* Because of missing data, it is not possible to specify this value more precisely.									
¹ Legal aid staff (other than duty counsel).									
² Regina data does not distinguish between duty counsel and legal aid staff acting in another capacity. Percentage shown includes both.									
³ For St. John's, first pair of numbers relates to 1st appearance court, second pair to 9:30 a.m. non-trial appearances in trial courts.									
⁴ For St. John's, 1 st two pairs of numbers are provided for legal aid staff, and 2nd two pairs for non-legal aid private lawyers.									

As shown in that Figure, comparing the length of appearances for unrepresented accused with that of accused represented by **private counsel**:

- In five of the courts (Halifax, Scarborough, Edmonton, Halifax and Kelowna), the time per appearance was very similar for unrepresented accused and accused represented by private counsel; but
- In two of the courts (St. John's and Sherbrooke), the time per appearance for unrepresented accused was shorter; and
- For one court only (Bathurst), the time per appearance for unrepresented accused was longer.

However, comparing the length of appearances for unrepresented accused with that of accused represented by **duty counsel**:

- In two of the courts, the time per appearance was very similar for unrepresented accused and accused represented by duty counsel; but

¹⁴ Actually, most statistics are provided for only eight courts. The type of data required to calculate these types of statistics was, unfortunately, not readily available for Brandon.

- In four of the other five courts, the time per appearance for unrepresented accused was shorter than for accused represented by duty counsel, while in one the opposite was true.

5.4.2 Number of Appearances per Disposed Case

Some interviewees also expressed the **concern that unrepresented accused place a heavier demand on court resources by requiring more court appearances to resolve their cases. The data gathered for this study, however, suggest that they do not**, at least in comparison to cases represented by private lawyers at last appearance. The results are mixed when cases with unrepresented accused are compared to cases represented by duty counsel at the last appearance.

The disposed case data gathered for this study allowed the calculation of the total number of appearances made for individual cases. Figure 5.8 summarizes these data for the nine study sites, broken down by the type of representation at the final appearance for each case.

As shown in that Figure, in a comparison of cases with unrepresented accused and accused represented with **private counsel**:

- In all seven of the sites for which these data were available, self-represented accused typically made fewer appearances than cases with private counsel.

However, in a comparison of cases with unrepresented accused and accused represented by **duty counsel**, the results are inconclusive, since:

- In three of the seven sites for which comparable data were available (Halifax, St. John's and Regina), self-represented accused typically made fewer appearances than accused represented by duty counsel.
- In one of the sites (Edmonton), there was little difference in number of appearances between self-represented accused and accused represented by duty counsel; and
- In three of the sites (Kelowna, Scarborough and Bathurst), self-represented accused typically made more appearances than accused represented by duty counsel.

Figure 5.8 Variation in Number of Court Appearances Per Case by Type of Representation Median/ 75th Percentile Number of Appearances Per Case: by Type of Representation at Last Appearance by Site									
Representation at Last Appearance	St. John's	Halifax	Bathurst	Sherbrooke	Scarborough	Brandon	Edmonton	Regina	Kelowna
Self-represented	2/3	2/4	2/3	1/1	6/11	n/a	2/3	2/5	4/9
Duty Counsel	5/8	3/5	1/2	n/a	3/5	n/a	2/2	5/9 ²	3/6
Private Counsel (including duty counsel, agent or paralegal for private counsel)	5/7	5/8 ¹ 4/7	4/5	4/7	7/10	n/a	4/6	5/9 ^{1,2} 5/9	7/16
Notes									
* Because of missing data, it is not possible to specify this value more precisely.									
¹ Legal aid staff (other than duty counsel).									
² Regina data does not distinguish between duty counsel and legal aid staff acting in another capacity. Percentage shown includes both.									

5.4.3 Elapsed Times to Complete Cases

Finally, the data collected for the study allowed us to determine whether cases involving unrepresented accused took longer to resolve. Overall, our data suggest that, **in the majority of courts, cases involving unrepresented accused *did* require a longer elapsed time to resolve in comparison to cases represented by duty counsel, but *not* in comparison to cases represented by private lawyers.**

The disposed case data included information on the elapsed time, in weeks, between the first appearance in a case and the final appearance (with the time counted as 0 days where only one appearance was made). Figure 5.9 summarizes these data for the nine study sites, broken down by the type of representation at the final appearance for each case.

Figure 5.9									
Variation in Time to Dispose of Cases by Type of Representation									
Disposed Cases: Median/75th Percentile Time (Weeks) from 1st to Last Appearances Per Case:									
by Type of Representation at Last Appearance by Site									
Representation at Last Appearance	St. John's	Halifax	Bathurst	Sherbrooke	Scarborough	Brandon	Edmonton	Regina	Kelowna
Self-represented	.1/ 8	14/29	7/12	13/23	24/39	n/a	8/18	4/24	1/7
Duty Counsel	21/ 43 ²	5/21	2/9	n/a	5/14	n/a	2/12	15/40 ²	0/3
Private Counsel (including duty counsel, agent or paralegal for private counsel)	18/ 41	29/54 ¹ 25/47	13/18	19/37	24/42	n/a	13/21	15/40 ^{1,2} 25/46	4/11
Notes									
* Because of missing data, it is not possible to specify this value more precisely.									
¹ Legal aid staff (other than duty counsel).									
² Regina and St. John's data do not distinguish between duty counsel and legal aid staff acting in another capacity. Percentage shown includes both.									

As shown in that Figure:

- In five of seven sites, cases in which the accused was unrepresented took longer to be disposed of than did cases in which the accused was represented by duty counsel (St. John's and Regina were the exceptions).
- In seven of the eight sites for which these data were available, however, cases in which the accused was unrepresented were disposed of more quickly than cases in which the accused was represented by private counsel. The length of time was the same for the two groups in Scarborough.

6.0 SOLUTIONS SUGGESTED

A wide variety of solutions were offered to address the problems associated with unrepresented accused in the nine study sites. Many of them enjoyed something of a consensus among key informants, especially at sites where there were perceived to be significant numbers of unrepresented and under-represented accused. It is probably fair to say that there was no disagreement that, in an ideal world, all criminal defendants would be represented by counsel. Even thinking within more practical and realistic boundaries, virtually all key informants wished to see more accused persons with representation. This was supported not just for the benefit of the accused, but because representation for accused makes the entire court system function more effectively and efficiently. In the words of a Crown in a Maritime province, “Lack of representation is an expensive option.”

The following were the solutions suggested. No attempt has been made to edit or comment on them. Not all were suggested or agreed to by all, and certain suggestions obviously do not apply to certain sites. However, as just noted, the basic notion of expansion of the availability of counsel was an ideal held by virtually all.

6.1 Legal Aid Eligibility Criteria

The following suggestions were offered with respect to the legal aid eligibility criteria:

- Relaxation of the financial eligibility criteria to assist more of the “working poor.”
- A contribution system (where none was available) to help defray the cost of private counsel or to make more accused eligible.
- Relaxation of the “likelihood of jail” criterion for legal aid, in favour of a more flexible criterion regarding seriousness, such as to include:
 - all first offenders – to prevent more of them than necessary from acquiring a criminal record, which “can be devastating”
 - all accused who are charged with an indictable offence
 - all accused who state that they are not guilty of the charges
 - all accused who have a viable defence
 - all accused who have a mental impairment
 - all cases where there is the possibility of jail
 - all cases where there is the possibility of loss of livelihood
 - all cases where there is the possibility of significant prohibitions, such as driving prohibitions

6.2 Duty Counsel

The following suggestions were offered with respect to duty counsel:

- Expansion of the duty counsel system to remove the various structural limitations found in various sites, e.g., where duty counsel is available only to those in custody, or only at first appearance, or where duty counsel cannot review disclosures for those out of custody, or are only available on weekdays, etc.
- Removal of financial eligibility and coverage limitations on the provision of duty counsel services (where applicable).
- Offering “extended duty counsel,” wherein the same lawyer takes the case from start to finish (continuity), without the application of eligibility tests (except perhaps for trial).
- Having present in the courtroom a lawyer who would be available to give timely advice to unrepresented accused while the case is held down for a few minutes.
- Introducing “advice duty counsel” – a lawyer who is available in the courthouse, but not burdened with significant courtroom duties, to ensure that all accused have information about the process, and informed advice as to, e.g., the likely consequences (including penalty) upon conviction for the offence.
- Expansion of the scope of duty counsel to include conducting trials.
- Better telephone and in-person access for duty counsel and other lawyers to those accused in custody.
- Use of paralegals or administrative support staff to assist duty counsel by providing supports to accused in filling out legal aid applications in the courthouse, arranging sureties for bail, etc.
- Acceptance of duty counsel as an essential and integral part of the system, and treatment of the function and the lawyers who perform it accordingly. This would require:
 - Generally, practices that reflect the DC function as a valued career track, and demonstrate that lawyers who perform the DC function well are welcome to remain in the position for long periods, the better to improve their skills and experience.
 - The use of staff positions instead of fixed-term contracts for DC work.
 - Compensation levels that are on a par with Crowns, and which will attract and keep senior, top-notch, experienced lawyers who are suited to the unique demands and critical importance of the job.
 - Salary increments that recognize years of experience in the position.

6.3 Other Aspects Principally Related to Staff Lawyer Systems

The following suggestions were offered with respect to staff lawyer systems:

- Expansion in legal aid resources in order to increase the numbers of staff lawyers; to reduce waiting periods for the application and service delivery processes; to give staff lawyers more time for each case; and to resolve cases earlier, thereby reducing backlogs.
- Stronger quality control and mentoring over legal aid work and more effective caseload management for legal aid.
- Higher salaries for legal aid staff lawyers, in order to attract and retain the best candidates.

6.4 Tariffs for Certificate Service by the Private Bar

The following suggestions were offered with respect to judicare tariffs:

- Increase the legal aid tariff levels (called by a legal aid official in one Maritime province, “more of an honorarium for public service”).
- Introduce incentives for early resolution into the tariff.

6.5 Court Case Management

The following suggestions were offered with respect to court case management:

- Introduce better court case and case-flow management procedures, including agreement by all upon the following:
 - The principle of early resolution of matters whenever possible.
 - Requiring Crowns to familiarize themselves with the case early in the process.
 - Requiring Crowns to indicate in advance the cases for which prison time will be sought upon conviction.
 - Requiring Crowns to present their best offer in the case at the first opportunity.
 - (For some key informants) requiring the same judge to stay with a case after first appearance.

6.6 Information, Advice and Support to Accused

The following suggestions were offered with respect to information, advice and support to accused:

- Have a legal aid office in the courthouse to take applications.

- Ensure that all accused have informed advice as to the likely consequences (including penalty) upon conviction for the offence.
- Ensure that police and Crown policies and procedures provide for full and timely disclosure to the defence counsel and/or unrepresented accused.
- Expand public legal education programs aimed at informing persons facing criminal charges, as well as the general public, about legal aid and the consequences of convictions. (It should be noted that many key informants cautioned that such programs are no substitute for one-on-one legal advice and representation in a criminal case.)

6.7 General

- Expansion of diversion opportunities.
- More networking between duty counsel and community organizations, which can assist in formulating a plan for managing the accused in the community.
- More vigorous screening (triage) of cases for legal aid in order to determine which cases require a defence.
- Placing a legal aid application officer in the court in order to allow the matter to be held down and returned with a set date the same day.
- Use of paralegals or administrative support staff to assist legal aid staff with providing supports to accused in filling out legal aid applications in the courthouse, arranging sureties for bail, etc.
- Use of “opinion letters” about whether there is an arguable defence, and granting legal aid if there is.
- Better integration of the work of legal aid staff and Native Court Workers.
- Easier (e.g., more legible, electronic) access to disclosure for defence lawyers.
- Education for judges on how to deal with unrepresented accused.
- Encouraging judges to show less tolerance for deliberate efforts to delay the process by “trifling with” the legal aid approval process.

6.8 In Conclusion

One overall conclusion that is clear from these suggestions – and from the findings reported throughout this report – is that identifying solutions and implementing them is best done in a systems/holistic approach – one that explores the potential influence of all court participants at all stages of the process. The development of solutions therefore requires a co-operative effort involving all key participants – including the judiciary, Crown Attorneys, legal aid, court administration, the criminal bar, law enforcement officers, and others playing a significant role in cases proceeding through the courts.