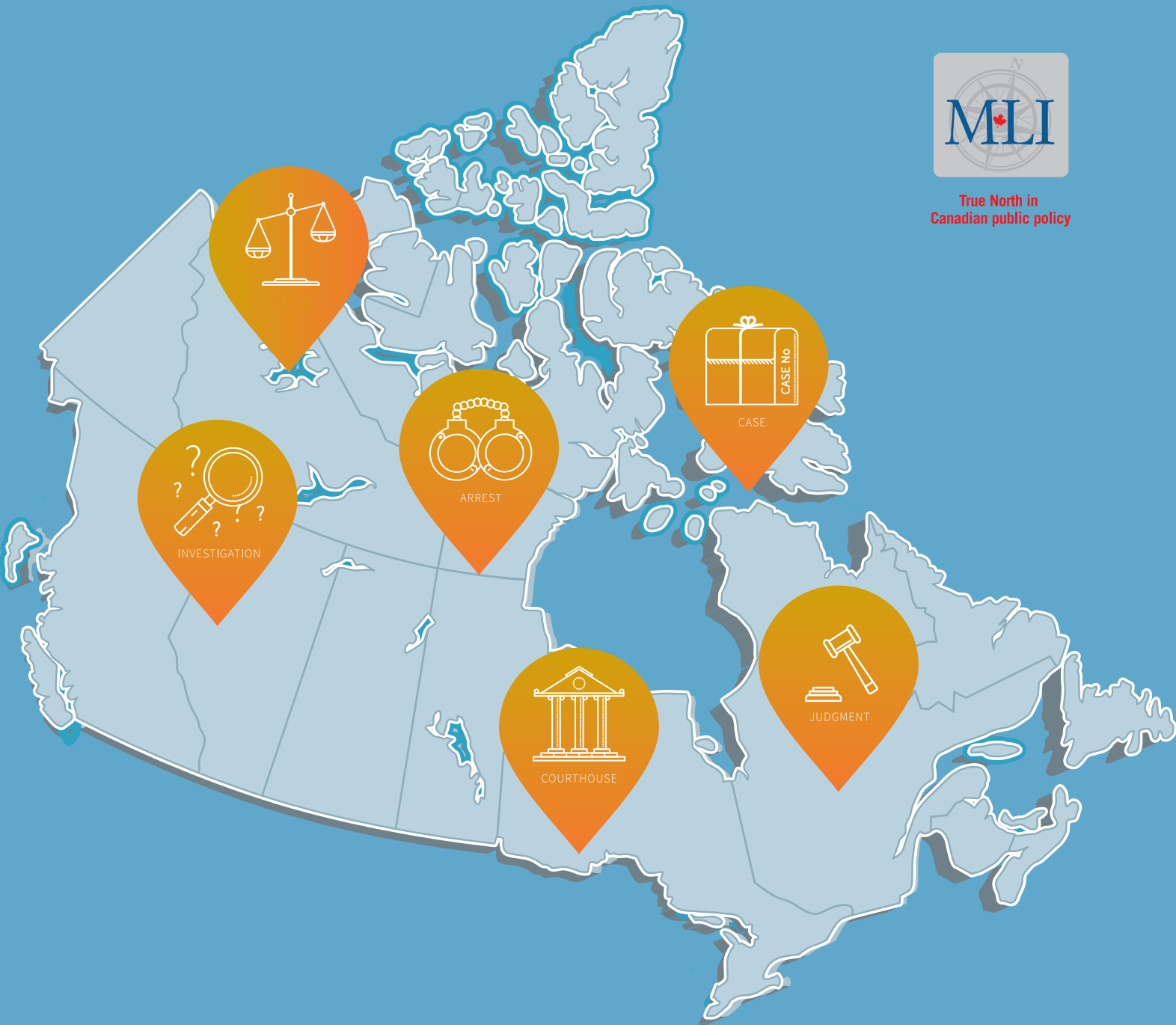




True North in
Canadian public policy



Justice on Trial:

Inefficiencies and ineffectiveness in the Canadian criminal justice system

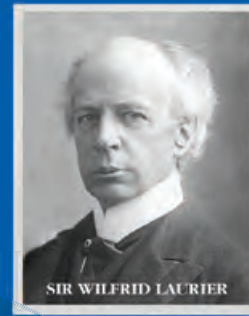
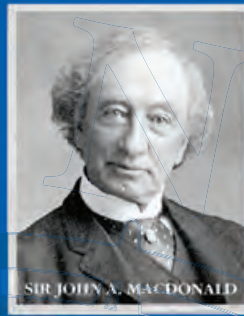
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SEPTEMBER 2016





True North in
Canadian public policy



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The author of this document has worked independently and is solely responsible for the views presented here. The opinions are not necessarily those of the Macdonald-Laurier Institute, its Directors or Supporters.

Executive Summary

Canada's criminal justice system is a vast and complex machine with numerous players whose actions or inactions impact each other: the courts, the police, corrections, and legal professionals. For those Canadians who are exposed to it, whether as victims or accused, delay and inefficiency can cause real hardship. For taxpayers and those who care about effective public policy and public safety, inefficient and ineffective courts create excessive costs and stand in the way of the proper administration of justice.

Good justice policy can only be informed by gathering and analysing the right data, but this has rarely been undertaken in Canada. This paper examines the data on crime rates, length of trials, administration of justice offences, and other measures to get a clear picture of a system that is too often beset with delay and inefficiency.

Good justice policy can only be informed by gathering and analysing the right data.

The issues could not be timelier, with the Supreme Court of Canada's July 2016 ruling in the case of *R. v. Jordan* establishing time frames for reasonable lengths of trial. The accused in the case waited more than 49 months from the time of his arrest to his conviction on a drug offence, which the court found was reflective of a "culture of complacency towards delay".

The data show that the police-reported adult crime rate is down 25 percent and youth crime is down 47 percent between 2004 and 2014 (although there was a marked increase in violent crime in 2015). Even so, in 2013/14, the median amount of time from an individual's first court appearance to the completion of their case was 123 days (around 4 months), a slight increase from the years prior. So the system overall has been facing fewer cases but taking longer to complete them.

Also of note, offences against the "administration of justice" (violating court orders or bail conditions for example) decreased by 7 percent between 2004 and 2014, much less than the 34 percent decline in the overall crime rate, suggesting that the system is dealing with a smaller core of repeat offenders.

Additionally, rates of those in jail awaiting trial (or on "remand") have been exacerbated by the practice of the Courts using judicial discretion to award extra credit due to the perceived less pleasant conditions for offenders. Ironically, a result of this approach is to actually reward repeat offenders at sentencing who are properly and lawfully denied bail, and it also creates an incentive for the accused to stay in jail, adding costs to the system.

This paper recommends a *Criminal Code* amendment that permits pre-trial credit at sentencing but expressly precludes it where bail has been denied because of the past criminal conduct of the person charged.

In 1990 the Supreme Court of Canada released its decision in the *R. v. Askov* case, ruling that unjustified delay could constitute a breach of *Charter* rights. Since then, some defence counsel insist on strict procedural compliance to delay proceedings in an effort to get charges dismissed. What was intended as a shield against abuse has now become a sword to avoid responsibility, and systemic delay is but one of the results.

Exacerbating matters, the 1991 *Stinchcombe* case now mandates disclosure *before* a preliminary inquiry, which has led to significant delays and calls for its abolition, although this is not feasible because a preliminary inquiry is required by the *Charter* if the potential punishment is five years or more. But this applies to a wide range of less serious offenses, which have long maximum sentences that are never imposed, including residential break and entry, which has a maximum sentence of life imprisonment.

This paper recommends that the *Criminal Code* should be amended to create select hybrid offences with an option for a sentence of five years less one day, to reduce significantly the number of cases requiring preliminary inquiry. In addition, part XVIII.1 of the *Criminal Code* regarding mandatory case resolution procedures should be reviewed by the provinces to ensure it is practically achieving the intended result of expediting case processing and resolution.

Other promising measures for increasing justice system efficiency include: increasing the jurisdiction of Provincial Courts, simplifying judicial authorizations for evidence gathering and admissibility, changing Legal Aid service delivery models to increase full time salaried counsel and reduce private counsel who bill based on time spent, and more. There is no shortage of reforms to consider.

Finally, this paper makes a series of recommendations intended to deal with repeat offenders and administration of justice offences:

- Creation of the *Criminal Code* offence (s. 145) of breach of a condition of conditional release under the *Corrections and Conditional Release Act (CCRA)*;
- authorize the Parole Board of Canada to order electronic monitoring of offenders on conditional release;
- amend the *CCRA* to restrict statutory release eligibility to first time federal offenders and require earned parole for repeat federal custody offenders; and
- amend the *CCRA* to expressly restrict parole for convicted non-citizens serving a federal sentence for the purpose of immediate removal from Canada.

While the data collected for this report reveal a great deal, there is a wide range of potentially extremely useful data points that should be collected by Statcan or the relevant institutions. Because of the multiple players and processes in the Canadian criminal justice system it is extremely important to identify and track information.

The *Jordan* ruling has articulated the importance of improving justice system efficiency and this paper offers some specific suggestions to achieve that goal. While there will no doubt be institutional resistance to this kind of analysis, the best way to design and implement effective public safety reforms is to gather the relevant information, ask the right questions, and make the appropriate choices. Canadians deserve nothing less.

Sommaire

Vaste et complexe, le système de justice pénale du Canada réunit de nombreux acteurs dont les actions ou les inactions influent les unes sur les autres : tribunaux, corps policiers, services correctionnels et professionnels du droit. Pour les Canadiens qui côtoient ce système, qu'ils soient victimes ou accusés, les délais et les inefficacités sont susceptibles de provoquer des difficultés bien réelles. Pour les contribuables et tous ceux qui veillent à l'efficacité des politiques et de la sécurité publiques, des tribunaux qui ne sont ni efficaces ni efficients sont exagérément coûteux et nuisent à la bonne administration de la justice.

Seules la cueillette et l'analyse des données appropriées – chose rare au Canada – peuvent mener à la conception d'une bonne politique en matière de justice. Afin de mieux comprendre un système trop souvent aux prises avec des problèmes de délai et d'inefficacité, on examine dans la présente étude les taux de criminalité, la longueur des procès, les infractions contre l'administration de la justice et certaines autres mesures.

Seules la cueillette et l'analyse des données appropriées – chose rare au Canada – peuvent mener à la conception d'une bonne politique en matière de justice.

Ces questions sont des plus actuelles. En effet, la Cour suprême du Canada vient d'énoncer les règles de détermination du délai raisonnable pour la tenue d'un procès dans son jugement rendu en juillet 2016 relativement à l'affaire *R. c. Jordan*. Dans cette cause, il s'était écoulé plus de 49 mois entre l'arrestation et la condamnation de l'accusé pour une infraction en matière de drogues, délai que la Cour a attribué à une « culture de complaisance vis-à-vis les délais ».

Les données montrent qu'entre 2004 et 2014, le taux de crimes déclarés par la police a diminué de 25 pour cent chez les adultes et de 47 pour cent chez les jeunes (bien que le nombre de crimes violents ait considérablement augmenté en 2015). Malgré tout, en 2013-2014, le laps de temps médian entre la première comparution d'un prévenu et la conclusion de sa cause a été de 123 jours (environ 4 mois), un chiffre

légèrement en hausse par rapport aux années antérieures. Le système dans son ensemble a donc traité moins de dossiers, mais le temps consacré à chacun d'eux a été plus long.

Il faut aussi signaler qu'entre 2004 et 2014, le taux des affaires d'infractions contre l'« administration de la justice » (violation des ordonnances judiciaires ou des conditions de mise en liberté sous caution par exemple) a diminué de 7 pour cent, soit beaucoup moins que le taux global de criminalité – en baisse de 34 pour cent –, ce qui suggère que le système traite un groupe plus petit de récidivistes.

En outre, les taux de personnes détenues en attente d'un procès (ou en « détention préventive ») ont été gonflés par les cours, qui ont coutume d'exercer leur discrétion judiciaire pour octroyer un crédit supplémentaire en raison des conditions de vie vraisemblablement désagréables des délinquants placés en détention préventive. Paradoxalement, cette pratique a pour effet de récompenser, au moment du prononcé de la peine, les récidivistes à qui on refuse, à bon escient et en toute légalité, une possibilité de cautionnement et incite les accusés à demeurer derrière les barreaux, ce qui accroît les coûts pour le système.

Dans cette étude, on recommande l'adoption d'un amendement au *Code criminel* qui permettrait, au moment du prononcé de la peine, l'octroi d'un crédit pour le temps passé sous garde avant un procès, mais qui interdirait expressément l'octroi de ce crédit en raison de la conduite criminelle passée de l'inculpé.

Dans son jugement rendu en 1990 relativement à l'affaire *R. c. Askov*, la Cour suprême a établi qu'un délai injustifié pouvait constituer une violation des droits garantis par la *Charte*. Depuis, certains avocats de la défense insistent sur le strict respect des procédures dans le but d'entraîner des délais susceptibles de me-

ner aux retraits d'accusations. Ce qui a été conçu pour protéger contre les abus est devenu un moyen de se soustraire à ses responsabilités, et les délais systémiques n'en sont qu'un des résultats.

Pour empirer les choses, en conséquence de l'affaire *Stinchcombe* en 1991, tous les renseignements pertinents doivent maintenant être divulgués avant la tenue d'une enquête préliminaire, procédure qui entraîne d'importants délais et qui devrait donc être abolie. La *Charte* stipule qu'une enquête préliminaire est requise si la peine risque d'atteindre cinq ans ou plus. Or, cette règle s'applique à un large éventail d'infractions moins graves comportant de longues peines maximales qui ne sont jamais imposées, notamment dans le cas d'une introduction par effraction dans un domicile, pour laquelle la peine maximale est l'emprisonnement à vie.

On recommande dans cette étude que le *Code criminel* soit amendé pour introduire quelques nouvelles infractions mixtes pouvant comporter des peines allant jusqu'à cinq ans moins un jour, afin de réduire sensiblement le nombre de causes exigeant une enquête préliminaire. En outre, la partie XVIII.1 du *Code criminel* devrait être examinée par les provinces en ce qui concerne les procédures obligatoires liées au règlement des causes pour assurer que le résultat escompté, qui est d'accélérer le traitement et la conclusion des causes, soit réellement atteint.

Diverses autres mesures prometteuses pour accroître l'efficacité du système de justice comprennent les suivantes : l'élargissement de l'autorité des tribunaux provinciaux, la simplification des autorisations judiciaires portant sur la collecte et à la recevabilité des preuves, l'introduction de changements en matière de modèle de prestation des services d'aide juridique en vue de substituer des avocats salariés à temps plein aux avocats du secteur privé, sur la base des heures travaillées, et d'autres mesures. Il ne manque pas de réformes à envisager.

Enfin, on présente un ensemble de recommandations à l'égard du traitement des récidivistes et des infractions contre l'administration de la justice qui sont les suivantes :

- introduire une nouvelle infraction au Code criminel (art. 145) pour la violation des conditions de mises en liberté en vertu de la *Loi sur le système correctionnel et la mise en liberté sous condition* (LSCMLC);
- autoriser la Commission des libérations conditionnelles du Canada à ordonner la surveillance électronique des délinquants en liberté sous condition;
- modifier la LSCMLC pour restreindre l'admissibilité à la libération d'office dont peuvent se prévaloir les détenus sous garde fédérale qui en sont à leur première offense et instaurer le mode de libération au mérite pour les détenus sous garde fédérale;
- et modifier la LSCMLC pour interdire expressément l'octroi d'une libération conditionnelle dans le cas de criminels étrangers purgeant une peine du ressort fédéral, en vue de leur expulsion immédiate du Canada.

Bien que les données présentées dans le présent rapport soient particulièrement révélatrices, Statistique Canada ou les institutions concernées devraient recueillir un large éventail de données additionnelles à riche potentiel. À cause du nombre très important d'acteurs et de processus à l'œuvre dans le système de justice pénale du Canada, il est extrêmement important de repérer ces renseignements et d'en assurer le suivi.

L'arrêt *Jordan* a démontré qu'il était important de renforcer l'efficacité du système de justice, et cette étude propose quelques solutions concrètes pour atteindre cet objectif. Bien que ce genre d'analyse se heurtera sans doute à une résistance institutionnelle, il reste que la meilleure façon de concevoir et de mettre en œuvre des réformes de la sécurité publique consiste à recueillir les informations pertinentes, poser les bonnes questions et faire de bons choix. Les Canadiens ne méritent rien de moins.

Introduction

Canada's criminal justice system is a vast and complex machine with numerous players whose actions or inactions impact on each other: the courts, the police, corrections, and legal professionals. For those Canadians who are exposed to it, whether as victims or accused, delay and inefficiency can cause real hardship. For taxpayers and those who care about effective public policy and public safety, inefficient and ineffective courts create excessive costs and stand in the way of the proper administration of justice.

Good justice policy can only be informed by gathering and analysing the right data, but this has rarely been undertaken in Canada.

This paper will provide a data-based analysis of relevant issues concerning inefficiencies and performance in the Canadian criminal justice system. In addition, the paper will also explore related criminal justice system issues and offer a number of recommendations to enhance systemic performance and public safety.

Statistical analysis of justice issues is hindered by the failure of Juristat to report relevant data, even though it is available from policing agencies.

This paper is intended as a companion piece to the Macdonald-Laurier Institute *Justice System Report Card*, which assigns letter grades to the performance of provincial criminal justice systems over a wide range of metrics relating to efficiency and fairness, and finds many of the provinces to be wanting.

As has been noted previously in various studies by MLI, statistical analysis of justice issues is hindered in some areas by the failure of Statistics Canada and its Juristat program to report relevant data, even though it is gathered by and available from policing agencies. Juristat has made improvements in its analysis and reporting of crime statistics in Canada over the past years and this paper will seek to contribute to that ongoing enhancement by identifying issues that merit such analysis and reporting.

This situation is compounded by the dual jurisdiction of the Canadian criminal justice system with the provinces having jurisdiction over the “administration justice” (s. 92(14) of *The Constitution Act, 1867*), which directly relates to several areas relevant to case processing and systemic performance. Fortunately, many of the issues relevant to this

analysis are reported on by provincial authorities or third party groups. This analysis has also been aided by the submissions made by witnesses to the ongoing study of delays in Canada's criminal justice system being conducted by the Standing Senate Committee on Legal and Constitutional Affairs (Parliament of Canada 2016).

The Supreme Court of Canada released a decision in July 2016 directly related to the question of delay in the criminal justice system when it threw out the conviction of a man who had been charged with dealing heroin because 49 months had passed from the time of his arrest. The majority decision in *R. v. Jordan* imposes an arbitrary timeline for cases in the provincial and superior court systems with a presumptive 11(b) *Charter* breach for cases that take longer than what has been decreed.

As the minority decision points out, this policy choice approach is arguably an inappropriate intrusion on the legislative role. The majority decision references what has accurately been described as a prevailing “culture of delay” and specifically seeks to address it by creating presumed charge dismissal consequences if change is not forthcoming when it notes:

It is also clear from this case law review that the ceiling will not permit the parties or the courts to operate business-as-usual. The ceiling is designed to encourage conduct and the allocation of resources that promote timely trials. The jurisprudence from the past decade demonstrates that the current approach to s. 11(b) does not encourage good behaviour. Finger pointing is more common than problem solving. (*R. v. Jordan*, para. 107)

The ruling could result in cases currently before the courts being dismissed based on the new rules, which should be monitored. Not surprisingly, the decision does not examine the specifics of why delay has become the norm in the Canadian criminal justice system, although many of the delays are the direct results of *Charter*-based Court rulings.

This ruling will likely result in cases being dismissed from courts due to delays, but it is unclear whether it will result in the necessary systemic analysis to discover what contributes to delays, and reform. This paper attempts to address that by examining not only system efficiency but also its effectiveness in achieving the goals of public safety through reduced crime.

In providing related systemic performance recommendations, the report will also reference and analyse statistical data in the following areas:

- total police-reported crime statistics (by volume),
- total police-reported crime statistics (by volume) by offence type (violent, non-violent, administration of justice, drugs, driving offences, and youth crime) with a previous year-by-year comparison where possible,
- number of charges/cases before criminal courts with a previous year-by-year comparison where possible,
- case completion timelines with previous year-by-year comparison,
- number of court appearances with previous comparison where possible,
- disposition result (guilty plea, charge withdrawal/stay, acquittal after trial, conviction after trial) with previous comparison where possible,
- number of offences diverted (adult and youth) with previous year-by-year comparative data, and
- legal aid funding with a year-by-year comparison.

In providing related systemic performance recommendations, the report will also reference and analyse statistical data in the following areas:

- volume of persons in custody (federal and provincial, including remand) with a previous year-by-year comparison,
- conditional release performance (breach and re-offending),
- offender profile (past custody, previous convictions) where possible, and
- time of federal conditional release (day parole, full parole, statutory release, detention) with a previous year-by-year comparison where possible.

If we ask the right questions, we can understand what causes delay and inefficiency, and so begin to understand the right policy responses.

If we ask the right questions we can begin to understand some of the underlying issues that are causing delay and inefficiency in the criminal justice system, and so begin to understand the right policy responses. Parts 1 and 2 of this paper explore the key statistics that reveal the efficiency and effectiveness of the justice system, and parts 3 and 4 offer conclusions based on the data and offer recommendations for each issue raised in turn.¹

Additionally, this report is focused on the numbers of cases before the system rather than the crime rate, which is often cited to support a claimed reduction in crime. Different data will be provided regarding increases or decreases that reflect on rates but the focus is on the volume of cases and, to a certain extent, the case types.

Finally, the report will identify subject areas that are not included in Statistics Canada Juristat annual reporting or other publicly accessible sources. These data are important both for systemic performance analysis and for informed policy decision-making.

Part 1. Crime Rates and Case Processing

An appropriate starting point for a criminal justice system performance analysis is to examine the police-reported adult crime statistics, which Juristat does on an annual basis. Statcan's report (Boyce 2015) details total crime, crime rate, and crime type on a comparative basis from 2004/05 to 2014.

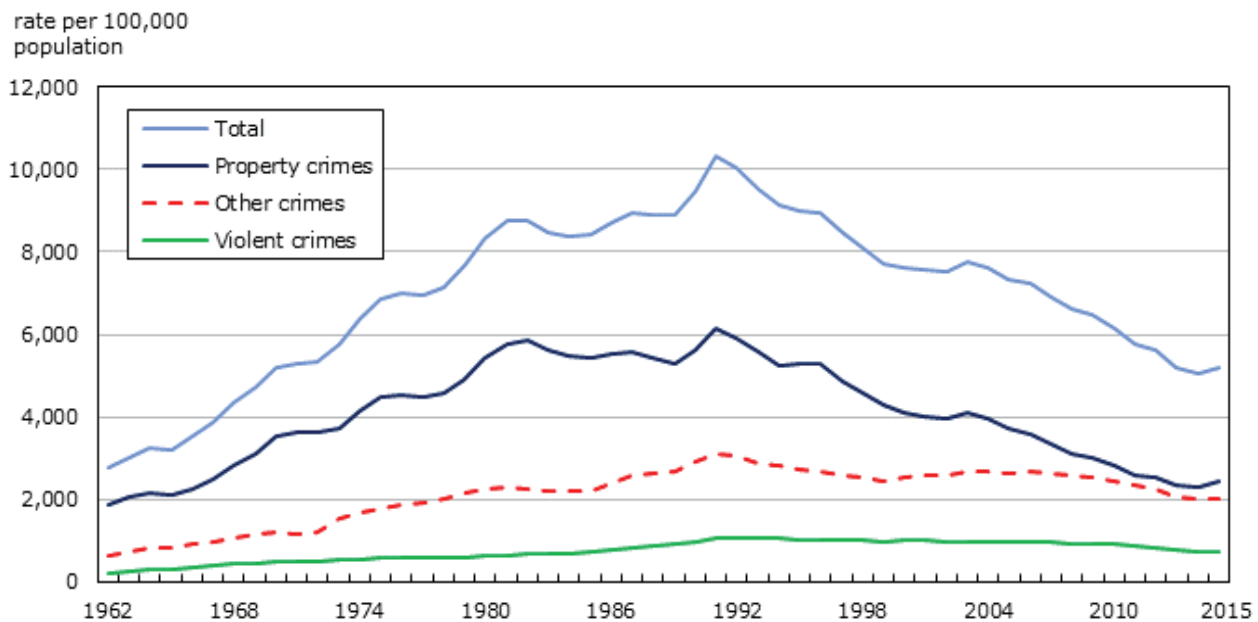
The data show a significant *decrease* in the volume of crime reported to police over the 10-year period to 2014 as follows (see table 1).

Table 1 Police-reported adult crime in Canada, 2004–2014

	Total Crime	Violent Crime	Property Crime	Other Crime
# change from 2004–14	-633,836 (-25%)	-79,155 (17%)	-535,960 (-35%)	-28,721 (8%)

The recently released 2015 data show an uptick in that year which will require further examination. A brief analysis is included as a postscript to this report, (Allen 2016). Chart 1 below shows the longer-term trends.

Chart 1 Police-reported crime rates, Canada, 1962–2015



Note: Information presented in this chart represents data from the UCR Aggregate (UCR1) Survey, and permits historical comparisons back to 1962. New definitions of crime categories were introduced in 2009 and are only available in the new format back to 1998. As a result, numbers in this chart will not match data released in the new UCR2 format. Specifically, the definition of violent crime has been expanded. In addition, UCR1 includes some different offences in the 'Other' crimes category. Populations are based upon July 1st estimates from Statistics Canada, Demography Division.

Source: Statistics Canada, Canadian Centre for Justice Statistics, Uniform Crime Reporting Survey.

Source: Allen 2016, chart 3. Data from Statistics Canada, Canadian Centre for Justice Statistics, Uniform Crime Reporting Survey.

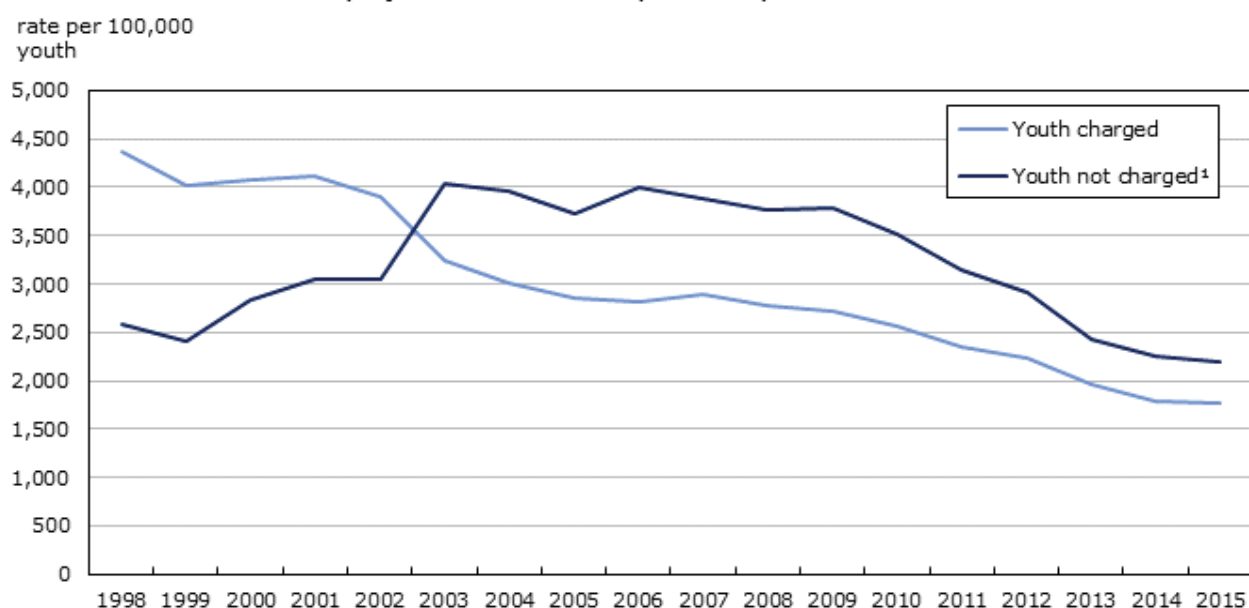
Juristat also provides a similar 10-year comparison for youth crime (Boyce 2015), which reveals a decrease in the volume of such crime reported to police in the decade from 2004 to 2014 (see table 2).

Table 2 Police-reported youth crime in Canada, 2004–2014

	Total Crime	Violent Crime	Property Crime	Other Crime
# change from 2004–14	-85,525 (-47%)	-19,816 (39%)	-54,970 (-54%)	-10,970 (33%)

Again, chart 2 below shows the longer-term trends to 2015.

Chart 2 Youth accused of crime, by clearance status, in Canada 1998–2015



1. Includes youth diverted from the formal criminal justice system through the use of extrajudicial measures, such as warnings, cautions or referrals to community programs.

Note: Additional data are available on CANSIM (Table 252-0051). Refers to the number of youth aged 12 to 17 years who were either charged (or recommended for charging) by police or diverted from the formal criminal justice system through the use of warnings, cautions, referrals to community programs, etc. Rates are calculated on the basis of 100,000 youth population. Populations are based on July 1st estimates from Statistics Canada, Demography Division.

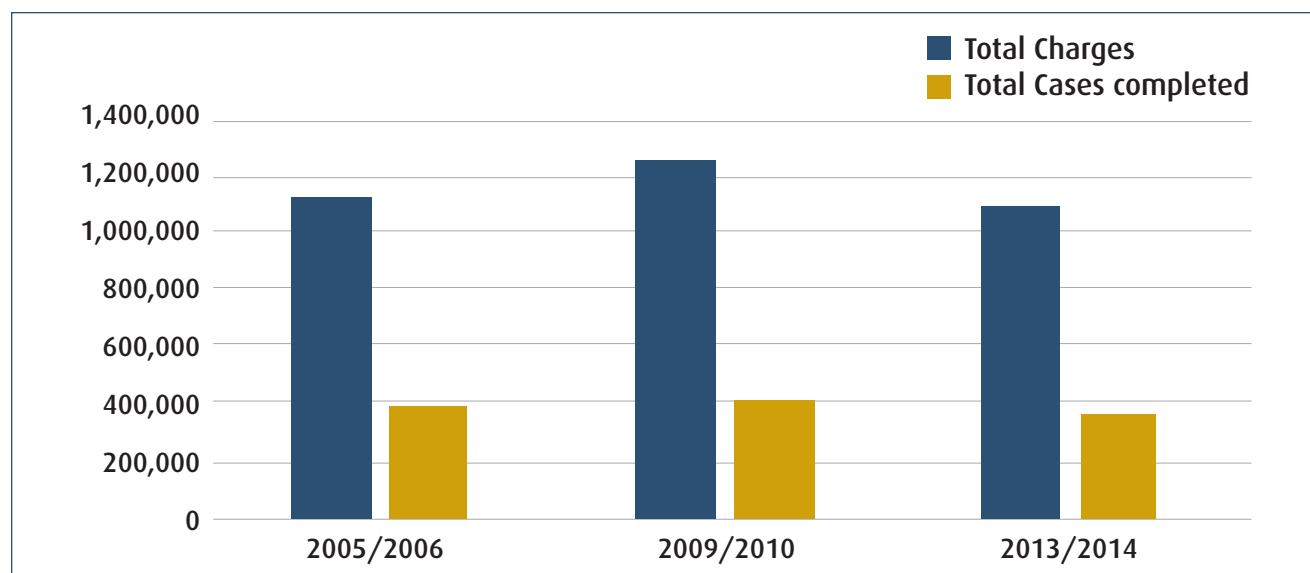
Source: Statistics Canada, Canadian Centre for Justice Statistics, Uniform Crime Reporting Survey.

Source: Allen 2016, chart 17. Data from Statistics Canada, Canadian Centre for Justice Statistics, Uniform Crime Reporting Survey.

As will be detailed in this paper, these numbers are significantly and positively affected in the youth court justice system by the practice of diversion from the criminal courts, which results in fewer cases being processed before the Courts.

It should be noted that for the Juristat analysis, a *charge* refers to a formal accusation against an accused person or company involving a federal statute offence that has been processed by the courts and received a final decision. A *case* is one or more charges against an accused person or company that were processed by the courts at the same time and received a final decision. See chart 3 for charges and cases completed in adult criminal court between 2005/2006 and 2013/2014.

Chart 3 Charges and cases completed in adult criminal court in Canada, 2005/2006–2013/2014



Note: Data exclude information from superior courts in Prince Edward Island, Quebec, Ontario, Manitoba, and Saskatchewan as well as municipal courts in Quebec due to the unavailability of data.

Source: Maxwell 2015, table 1. Data from Statistics Canada, Canadian Centre for Justice Statistics, Integrated Criminal Court Survey.

Despite an earlier increase in the number of completed charges and cases from 2005–2010, since that time there has been a steady *decrease* with an overall decrease of 23,117 charges and 21,682 cases completed from 2005–2014. This means the justice system is facing fewer cases but somehow also completing fewer of them, as we will see from the statistics on case processing times below. This seeming contradiction is an insight into an increasingly process-focused system, which merits close analysis and explanation, including the activities and productivity of the current players in the justice system, and will figure prominently in the conclusions and recommendations in this paper.

To assess the performance of the criminal justice system case processing it is also useful to consider the nature of the decisions being made, by case type, which is also a matter that Juristat reports on. For the Juristat report, cases that involve more than one charge are represented by the most serious offence (see table 3).

Table 3 Cases completed in adult criminal court, by type of offence and decision in Canada, 2013/2014

Type	#	Guilty	Stayed/WD	Acquitted	Other
Criminal Code	312,771	63%	32%	4%	1%
Drug possession	14,925	46%	53%	<1%	<1%
Other drug offences	10,100	53%	45%	1%	1%
Other federal offences	47,869	65%	31%	3%	1%

Source: Maxwell 2015, table 5.

“Guilty” findings include guilty of the offence, of an included offence, of an attempt of the offence, or of an attempt of an included offence. It also includes guilty pleas, and cases where an absolute or conditional discharge has been imposed.

“Stayed/withdrawn” includes stays, withdrawals, dismissals, and discharges at preliminary inquiry as well as court referrals to alternative or extrajudicial measures. “Other” reported dispositions includes final decisions of not criminally responsible and those waived out of province or territory.

These data reveal the clear reality that a very small percentage of cases actually result in a trial and acquittal but that there are a significant percentage of cases that the Crown ultimately decides not to proceed with. The 32 percent stayed/withdrawn numbers are potentially a reflection of overcharging by the police as well as the increased use of diversionary measures, which should reduce case volumes and expedite case processing overall. This issue merits further analysis by Juristat in its future reports.

Administration of Justice Offences

Administration of justice offences include actions that breach court orders or commitments made by persons to the justice system. Because of the nature of these offences, there is a significantly greater likelihood that the person charged is a repeat offender and that the justice system has less trust that such persons can safely be released on pre-trial bail, which is expressly articulated in s. 515 of the *Criminal Code*.

A person charged with an administration of justice offence is likely a repeat offender.

One of the results of this crime reality is an increase in the remand (pre-trial custody) population, which is further exacerbated by the recent practice of the Courts to use their judicial discretion in s. 719 to award not only credit for pre-trial custody at sentencing but to award extra credit due to the perceived less pleasant conditions for offenders in remand custody. Ironically, a result of this approach is to reward repeat offenders at sentencing who are properly and lawfully denied bail.

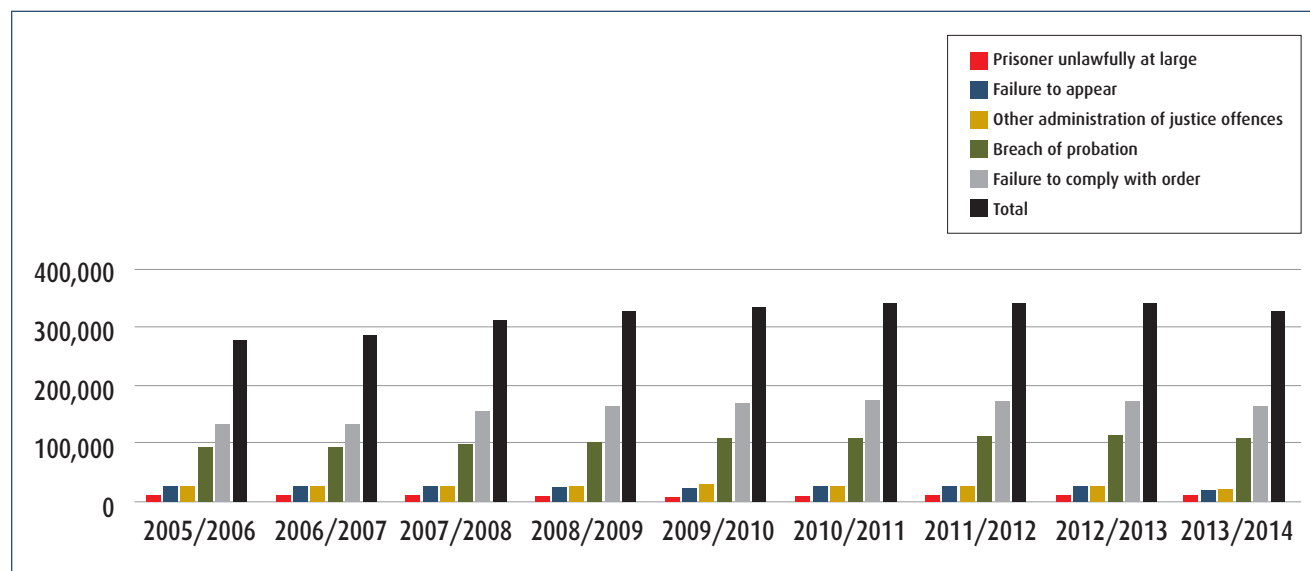
It also must not be forgotten that while administration of justice offences are increasing, crime overall is decreasing and that the latter is likely a consequence of the former. Conversely, if policy decisions result in reducing these

kinds of charges, the result may very likely be an increase in crime overall, which means more Canadians victimized by crime.

This issue has been the subject of increased public debate and Juristat has contributed to that debate by providing significant substantive data and analysis on the subject in its latest report from October 15, 2015 (Burczycka and Munch).

Relevant extracts of that material are provided below. Chart 4 contains a summary of administration of justice offences in recent years.

Chart 4 Completed adult criminal court cases, including at least one offence against the administration of justice, by type of charge in Canada, 2006/2006–2013/2014 (number of completed cases)



Note 1- Counts represent individual charges of offences against the administration of justice, even where multiple charges of the same offence type were included in a single case.

Note 2-Other offences against the administration of justice (part IV of the Criminal Code) include, for example: bribery of judicial officers, breach of trust by a public officer, and personating a peace officer.

Source: Burczycka and Munch 2015.

- In 2014, about one in ten *Criminal Code* offences reported by police was an offence against the administration of justice. In adult criminal courts, over one-third of all completed cases involved at least one administration of justice charge.
- The rate of police-reported incidents of offences against the administration of justice decreased by 7 percent between 2004 and 2014, much less than the 34 percent decline in the overall crime rate.
- Despite the overall decline in police-reported incidents of administration of justice offences over the past decade, the most common police-reported administration of justice offence – failure to comply with conditions – increased in 2014. The proportion of completed adult criminal court cases that included administration of justice offences increased from 2005/2006 to 2013/2014.
- In 2013/2014, 39 percent of cases completed in adult criminal courts included at least one offence against the administration of justice among the charges. Findings of guilt were more common in these cases than in cases that did not include administration of justice charges.

FINDINGS OF GUILT COMMON IN COMPLETED CASES WITH ADMINISTRATION OF JUSTICE OFFENCES

More than three quarters (76 percent) of completed court cases that included at least one administration of justice offence resulted in a guilty verdict in 2013/2014. This compared to the 55 percent of completed cases that did not include any administration of justice offences where decisions of guilt were handed down.

Second to decisions of guilt, most other completed cases that included offences against the administration of justice in 2013/2014 resulted in charges being stayed or withdrawn (21 percent). Acquittals were comparatively rare, recorded in just 2 percent of completed cases where an administration of justice offence was among the charges. By comparison, 5 percent of completed adult criminal court cases that did not include any administration of justice charges resulted in acquittals.

These data suggest that administration of justice charges are evidence based but are also likely used as part of plea bargain arrangements and may also, ironically, reflect the reality of longer periods of bail supervision resulting from justice system delay.

CUSTODY MOST FREQUENTLY IMPOSED SENTENCE IN CASES WITH ADMINISTRATION OF JUSTICE OFFENCES

The high number of cases stayed/withdrawn may indicate over charging by police to encourage a plea bargain, which could contribute to delays.

In 2013/2014, custody was the most common sentence handed down in completed adult criminal court cases involving administration of justice offences that resulted in findings of guilt (53 percent). This was in contrast to guilty cases that did not include offences against the administration of justice, for which custody was imposed 22 percent of the time.

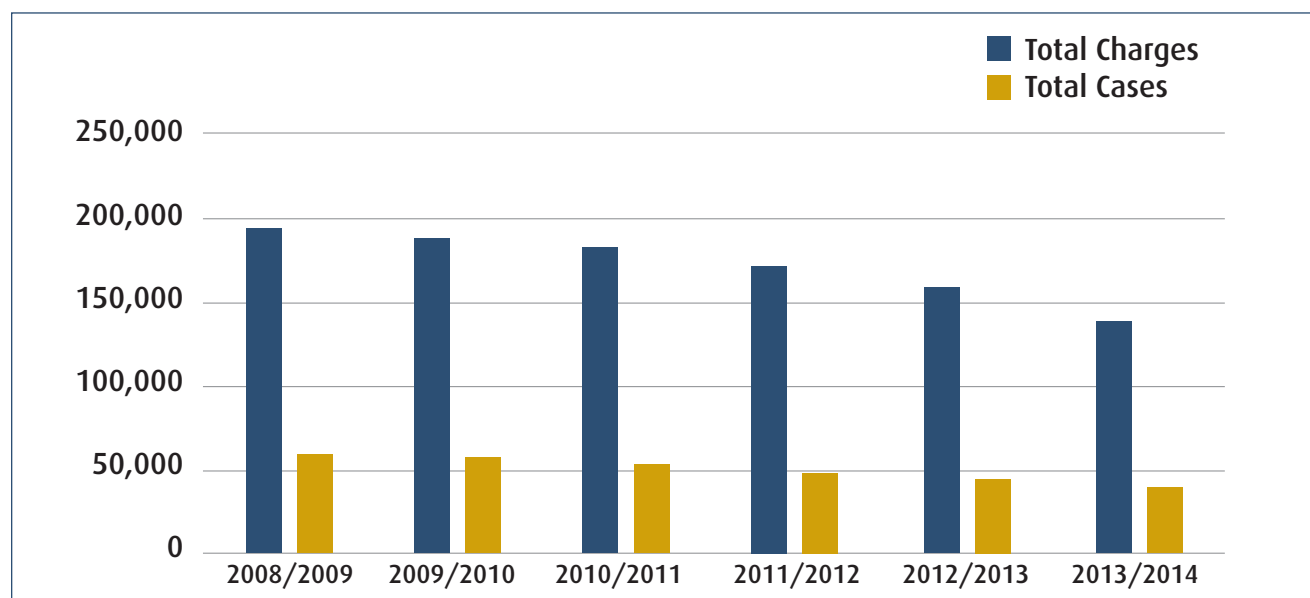
For completed adult criminal court cases that involved an offence against the administration of justice in 2013/2014, the median length of time it took to process the case was 108 days. This compares to the median 133 days it took to complete a case that did not include an administration of justice charge.

The high number of cases stayed/withdrawn is noteworthy as it may indicate over charging by police so as to encourage a plea bargain, all of which could contribute to delay. Juristat should identify how many cases had all charges stayed/withdrawn, which is likely very few.

Youth court cases

Juristat data from Alam 2015 show a significant decrease in both the number of youth court (offender under 18) charges and number of cases overall (see chart 5).

Chart 5 Youth court cases, 2008/2009–2013/2014



Note 1. A charge refers to a formal accusation against an accused person or company involving a federal statute offence that has been processed by the courts and received a final decision.

Note 2. A case is one or more charges against an accused person or company that were processed by the courts at the same time and received a final decision.

Source: Alam 2015. Data from Statistics Canada, Canadian Centre for Justice Statistics, Integrated Court Survey.

Despite this reported decline, the time to process a case actually increased from 114 days in 2012/13 to 120 days in 2013/14. This demonstrates an approximate 12 percent decrease in the volume of completed youth court cases, yet a 5 percent increase in the time required to complete the cases. For reasons that have not been explained, this means that the criminal justice system is taking more time to process fewer cases. This apparent anomaly merits further analysis and explanation.

One of the most significant features of the Canadian youth court justice system is its deliberate use of *diversion programs*, which move an accused offender who acknowledges responsibility away from the formal court system and into community-based rehabilitative activities. The goal of diversion is to address personal offender issues that contribute to criminality such as drug or alcohol addiction and education or job skills deficiencies. Inasmuch as the ultimate goal of the criminal justice system is to enhance public safety by reducing crime, diversion makes sense when applied to the right people and when properly resourced. This practice is generally regarded favourably and indeed it is now increasingly being used in the adult criminal justice system in what are known as *alternative measures* (s. 717-CC).

Once again, Juristat's most recent data analysis of this from 2014 is of assistance (see table 4) (Burczycka and Munch).

Table 4 Proportion of youth accused, charged, or cleared by other means, by most serious violation, Canada, 2014

	Charged	Diverted
Total accused of <i>Criminal Code</i> offences (excluding traffic)	48%	52%
Violent offences	51%	49%
Property offences	38%	62%
Administration of justice offences	85%	15%
Drug offences	32%	68%

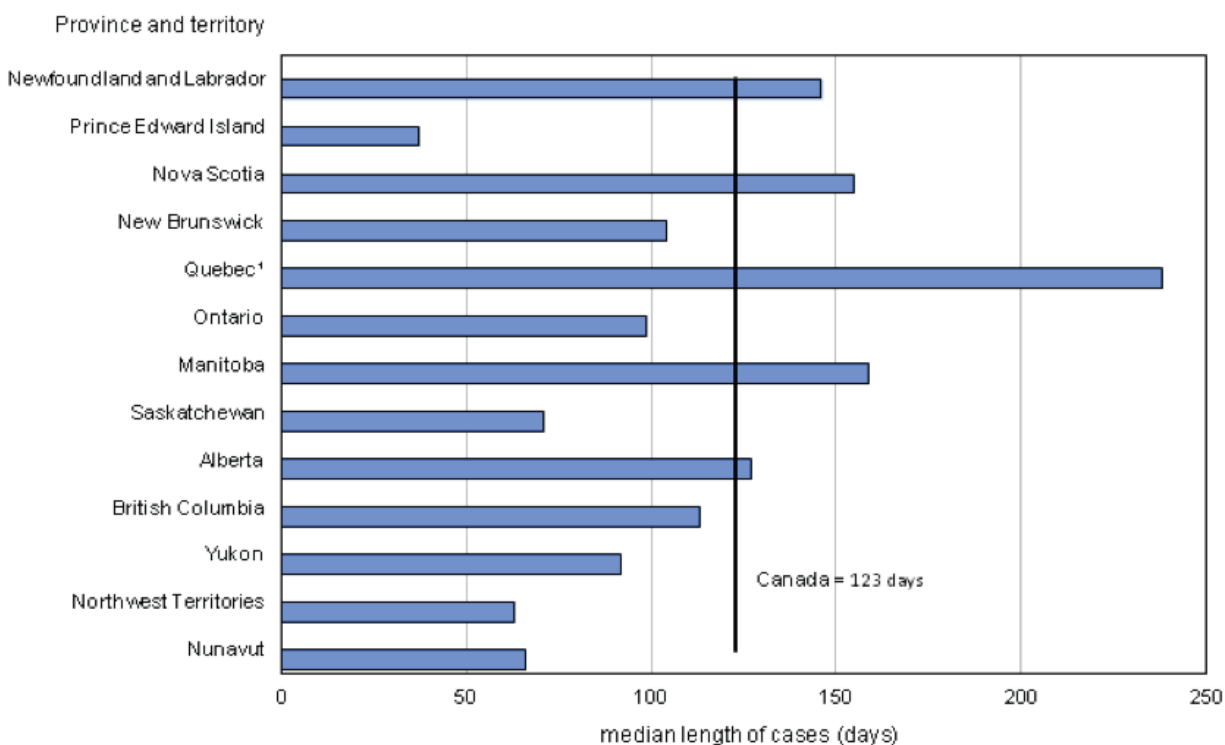
It is interesting to note that diversion continues to be used in the majority of cases overall and in every category of offence except administration of justice offences, which likely reflects a perceived need to keep a formal record of non-compliance with a court order.

Case processing

This important subject is complicated by differences in data reporting among provincial jurisdictions. As such, it is of value to consider not only the annual Juristat reports on this subject but also data provided by specific provinces. For instance, Ontario has a “Justice On Target” initiative (Ministry of the Attorney General, Ontario 2015a; 2015b) and its different programs, extracts of which are provided in appendix A. Juristat’s annual report on case processing in Canada provides valuable data, including comparative data, which can be used to assess productivity in this critical area which can, and should, identify best practices that should be implemented. The converse is also true.

Relevant extracts regarding 2013/14 case processing performance are produced below (Maxwell 2015). See chart 6 for a summary.

Chart 6 Median length of cases completed in adult criminal court, by province and territory, 2013/2014



1. The median length of case completion in Quebec may be over-estimated given that data from municipal courts, which tend to handle the least serious matters, are unavailable.

Note: Case lengths are calculated based on the number of days it takes to complete a case, from first appearance to final decision. The median is the point at which half of all cases had longer case lengths and half had shorter case lengths. A case is one or more charges against an accused person or company that were processed by the courts at the same time and received a final decision. Data excludes information from superior courts in Prince Edward Island, Quebec, Ontario, Manitoba and Saskatchewan as well as municipal courts in Quebec due to the unavailability of data. There are many factors that may influence variations between jurisdictions, therefore, comparisons should be made with caution.

Source: Statistics Canada, Canadian Centre for Justice Statistics, Integrated Criminal Court Survey.

In 2013/14, the median amount of time from an individual's first court appearance to the completion of their case was 123 days (around four months), a slight increase from the years prior. It took a median number of five court appearances to complete a case.

Similar to previous years, Prince Edward Island had the shortest median case elapsed time at 37 days, and Quebec had the longest, at 238 days. The Northwest Territories had the shortest median number of appearances in a case, at 2 appearances, while Manitoba and British Columbia had the longest, at 7 appearances.

Cases involving more serious offences or multiple charges often take longer than others to complete. In 2013/14, homicide cases took the longest to complete and were the only offence type with a median length longer than one year (451 days). This was followed by sexual assault cases (321 days), and attempted murder cases (314 days). Similarly, cases that involved multiple charges took much longer to complete than those that involved single charges (155 days and 87 days, respectively).

Juristat also specifically reports on the length of elapsed time for case completion including on a comparative basis over the preceding five years. The most recent report (Statistics Canada 2016b) reveals a continuing decrease in the amount of elapsed time in adult criminal cases by specified periods since 2009, especially in 2013/14. Significantly fewer cases, however, are being completed in the shortest reported time periods which merits further examination and explanation.

Legal aid

In a rules- and process-based system like the Canadian criminal justice system, one of the potential, and often claimed, causes of delay are persons who appear before the courts without legal counsel. This makes the availability of publicly funded legal aid counsel an issue of relevance in assessing ways to improve case processing productivity. While legal aid does include full-time counsel often acting as “duty counsel” on non-trial appearances, it is also worth noting that a major part of legal aid programs in Canada are the use of private defence counsel that are paid by the legal aid program.

Legal aid issues involve not only the sufficiency of funding amounts but also the different mechanisms for the delivery of legal services. Would there be greater productivity if full time counsel services were expanded to increase duty counsel for case processing and to include trial work rather than using private counsel fees, the calculation of which includes time spent on the case?

This is an issue that has not been explored in depth but, as is often the case in public service delivery, increased funding of the existing system is not always the best solution. Statcan/Juristat does provide useful data in relation to legal aid; its most recent report describes legal aid plan revenues both in amounts and funding sources.

From this report it can be noted that Government contributions to legal aid have increased by approximately 34 percent since 2005, while contributions from the legal profession have decreased by approximately 24 percent and from client repayment by approximately 36 percent.

Juristat also provides separate reporting of operational details of legal aid programs nationally, the most recent of which was for 2013/14 (Statistics Canada 2015a).

As noted above, while these data are useful, it would be helpful to conduct a specific analysis of how the different legal aid programs are run, including comparative case processing productivity consequences between a full time legal aid counsel model and the traditional private counsel retainer model. This kind of analysis would also directly support the recommendations of the Supreme Court in its recent *Jordan* decision.

Part 2. Correctional Issues

As noted above, a defining feature of our criminal justice system is that a disproportionately small number of offenders are responsible for a disproportionately large volume of crime. In non-academic terms these people are known as *repeat offenders* or *career criminals*. The corrections system plays a key role in dealing with such offenders, as the way in which a court-imposed sentence is administered includes what happens to an offender while serving a sentence and when and if the offender is released early and allowed to return to the community.

Comparative analysis of correctional programming is also of value because it offers insights into which programs are most/least effective as measured in the metric that counts the most for public safety: reduced rates of re-offending. Put differently, while we don't expect bank robbers to become bank presidents we do expect them to stop robbing banks. This focus on offender rehabilitation rather than punishment became the core principle of the Canadian corrections system in the 1970s and while it rightly attracts controversy from time to time, its core logic is public safety through changing offenders' behaviour.

A disproportionately small number of offenders are responsible for a disproportionately large volume of crime.

Accordingly, analysing correctional data in relation to repeat offenders can help shape targeted and effective crime reduction policies. Equally, comparatively reviewing correctional programs can inform correctional policies to help achieve the best public safety results.

There is a wealth of statistical data available on correctional issues although, as is frequently the case, Statistics Canada (and Juristat), Public Safety Canada, and the Correctional Services of Canada (CSC) would benefit from targeted analysis and reporting in the areas described herein.

The most recent Statcan (2016a) report on federal offenders provides important base data (see table 5).

Table 5 Adult correctional services, average counts of offenders in federal programs

Custodial and community supervision	2009/2010	2010/2011	2011/2012	2012/2013	2013/2014
Actual-in count (persons)	13,209.3	13,760.7	14,265.8	14,470.6	15,140.8
Incarceration rates per 100,000 adults (rate)	49.51	50.85	52.06	52.01	53.63
Total community supervision count (persons)	7565.8	8818.8	8834.6	8746.4	7754.3
Day parole, community supervision (persons)	1138.5	1279.6	1213.5	1346.3	1249.7
Full parole, community supervision (persons)	3720.8	4115.8	3942.9	3603.4	3146.4
Statutory release, community supervision (persons)	2475.8	3141.2	3353.4	3446.8	3008.0

These data show the numbers of persons in federal custody has increased by approximately 14 percent over the five-year period analysed. Both day parole and statutory release (presumptive early release after completion of two-thirds of the court imposed sentence) grants have increased while full parole releases have been reduced. The increase in statutory release numbers suggests a growing inmate unreadiness for conditional release, which may be a negative reflection on correctional programs.

Although no longer reported, a 1996 story the author wrote for the Canadian Police Association's *Express* magazine cites CSC data showing:

- 80 percent of federal inmates had previously served a custodial sentence and been released early;
- 20 percent of federal offenders had one previous federal sentence;
- 12 percent of offenders had two previous federal sentences; and
- 18 percent of offenders had three or more previous federal sentences.

It would be extremely useful if CSC were to conduct a like analysis of the current offender population and continue to do so in the future.

StatCan (2015b) has also produced recent analysis revealing that the number of persons in federal custody has increased by 3 percent from 2012/13 to 2013/14 while provincial sentenced custody decreased by 2 percent, remand decreased by 4 percent, and persons on probation decreased by 4 percent in the same time period.²

(Since completing this report, new correctional data has been released by StatsCan [Reitano 2016] that is consistent with trends noted.)

Public Safety Canada also now publishes corrections- and court-related data, which is extremely helpful in gaining insights into the Canadian justice system and the cases and offenders before it. Extracts from the *2012 Statistical Overview* (Public Safety Canada 2012) are provided in appendix B.

Other spending and funding data

Funding allocations and potential funding sources are also issues that potentially impact the criminal justice system performance. Broad sectoral spending data was provided by the Parliamentary Budget Office in its 2013 *Expenditure Analysis of Criminal Justice in Canada* (Story and Yalkin).

Also of interest is the 2011 report from the Ontario Association of Police Service Boards entitled *A Billion Dollar Problem: Provincial Offences Act – Unpaid Fines*. This report builds on previous research to detail uncollected fines (only provincial and municipal offences) in Ontario, which it estimates at \$1 billion. This issue is explored in greater detail, including remedial recommendations, in part 4 of this paper.

Part 3. Summary of data analysis

The following observations from the cited data merit special notice and consideration for any subsequent policy reforms.

1. There has been a continuing decline in the number of adult and youth crimes reported to the police in the preceding decade. (This trend has been reversed as noted in Juristat's recent Police-Reported Crime Statistics, 2015 (Allen 2016), which is referenced in the postscript to this paper.)
2. There has been a corresponding decline in the number of charges and cases over the past decade in both adult and youth cases.
3. Guilty plea remains the most frequent case disposition.
4. There has been an increase in the number of administration of justice offences that result in charges, especially breaching conditions of release.
5. There continues to be a high percentage of youth cases (>50 percent) that are diverted from court proceedings.
6. There has been a continuing increase in the number of court appearances and case processing times although this trend appears to be reversing in at least some jurisdictions.
7. There has been an increase in the numbers of persons in federal custody over the past decade.
8. There has been a decrease in the number of offenders granted full parole but a corresponding increase in the number of offenders granted statutory release.
9. There has been a significant decrease in the number of detention hearings held (process for detaining until full sentence is completed).
10. There is a continuing high failure rate for offenders on statutory release.
11. Federal correctional custody costs have increased significantly over the past decade.
12. While remand populations have increased over the past decade, that trend may be changing.

The information and insights provided from the data cited (and recommended) above is valuable both for systemic accountability and to support evidence-based, substantive reforms to achieve desired outcomes. As has been noted in previous MLI analyses of crime statistics, instead of being tough on crime, it's better to be *honest* about crime so we can be *smart* about crime. The policy analysis and recommendations that follow are based on that premise.

Part 4. Policy Analysis and Recommendations

Criminal justice in Canada is a complex process with mixed federal and provincial jurisdictions as well as multiple institutional components whose actions, or inactions, impact other players as well as the system itself. Accordingly, in considering operational or policy reforms, it is always advisable to target specific issues and to base such actions on demonstrable systemic performance, or non-performance. Put differently, it is useful to identify specific inefficiencies to understand why they exist and the most effective way to address them.

This section will follow this approach by focusing on issues relevant to data cited above and which are of relevance currently. The analysis will also include recommendations either for specific legislative and policy reforms or for areas that merit closer examination in order to determine what the appropriate remedies are.

It is also important to recognize that most of the processes of our criminal justice system were designed prior to the implementation of the *Charter of Rights* in 1982. There have been dozens of Supreme Court rulings since that impacted the criminal justice process and directly affected how cases are processed in our Courts.

As such, it is imperative to ensure that our criminal procedural rules are both *Charter* compliant and *Charter* relevant. Continuing practices because “we’ve always done it that way” is not an acceptable standard or rationale in this important public system. This policy analysis will include this consideration.

Reducing delay in the processing of criminal cases is a topic that has gained particular attention recently, including through an ongoing study by the Senate Standing Committee on Legal and Constitutional Affairs, whose evidentiary proceedings are posted online (Parliament of Canada 2016). The Committee has done an excellent job of providing witnesses with specific areas of relevant expertise a platform to express their insights and offer their recommendations on justice system reform issues and improvements. It is expected that the Committee’s report will be of real value on this important subject.

It is imperative to ensure that our criminal procedural rules are both Charter compliant and Charter relevant.

Because of the multiple institutions that are involved in our criminal justice system, it is clear that the actions, or inactions, of one player impact on others and overall system performance. This includes the police, prosecution, courts, defence counsel, corrections, and other community-based sectors that deal with offenders. Complicating matters further is the divided constitutional jurisdiction between the federal government that enacts criminal law and the provinces that administer it. Suffice to say that this issue will require both individual institutional improvements as well as coordinated systemic reform. This process will likely start with small steps that can be the catalyst for change to the larger system, where delay has been institutionalized.

In considering potential areas of improvement, it is important to emphasize fundamental principles that should govern the criminal justice process. These include:

- Process is supposed to serve purpose not the other way around;
- a traditional principle of our criminal justice system is the exercise of discretion by its officials (police, prosecutors, judges, corrections, and so forth) and a culture of risk aversion that impedes decision-making is inconsistent with that system;
- changes in one area of the system frequently impact other areas, so maintaining the status quo because “we’ve always done it that way” is not an advisable strategy (this issue is well-explored in the evidence of Professor Ian Greene on “Delays in Criminal Proceedings” provided to the Senate Standing Committee on Legal and Constitutional Affairs on March 9, 2016; see Parliament of Canada 2016);
- effective change should be based on empirical evidence that illustrates the problem that needs to be addressed; and
- independence and accountability should not be irreconcilable concepts.

With these principles in mind, several actions should be considered as detailed in the sections below.

Reduce preliminary inquiries and increase provincial court jurisdiction

The concept and purpose of the preliminary inquiry was, for defined, serious indictable offences, to ensure that the accused had an awareness of the evidence against them and thus, theoretically, facilitate the ultimate trial process. Even prior to the Supreme Court of Canada *Stinchcombe* ruling, it was increasingly recognized that the preliminary was little more than a dry run of the Crown's evidence and, indeed, most Crowns provided substantive disclosure without the guidance of the SCC.

Because the *Stinchcombe* case now mandates disclosure *before* the preliminary inquiry, its necessity and value are even more suspect, which has led to calls for significant legislative reforms, including its abolition, to reflect the reality of the modern justice system. This position is also reflected in a 2013 report by Alberta Assistant Deputy Minister (ADM) of Justice Greg Lepp entitled *Injecting a Sense of Urgency*, which was prepared following a high profile, *Charter*-based dismissal of a criminal case due to delays. ADM Lepp speaks bluntly:

There is a cultural acceptance of delay that has permeated the system. The courts are so congested, the process so convoluted, and court participants so busy, that delays are readily accepted. Often justice system participants are juggling too many balls in the air, and insufficient attention is paid to moving serious and violent cases with dispatch. (17)

Simply eliminating preliminary inquiries is not feasible because s. 11(f) of the *Charter* affords an accused person the right to a jury trial and consequentially, a preliminary inquiry if the potential punishment is five years or more. The *Criminal Code* of Canada has historically featured a broad sentencing range, which means most indictable offences have a potential penalty in excess of five years imprisonment even though maximum sentences are virtually never imposed.

The *Criminal Code* does feature *hybrid* offences, in that they can be proceeded with by indictment (greater penalty) or summarily although, with some exceptions, pursuant to s. 787, the maximum penalty is six months imprisonment. Break and enter (B&E) of a dwelling house is a good example. Reflecting a historical principle, the maximum penalty available is life imprisonment even though virtually no one ever receives such a sentence. Commercial B&E is a hybrid offence with an indictable penalty of 10 years (and right to preliminary inquiry) or a summary prosecution penalty of six months.

*"There is a cultural acceptance of delay that has permeated the system."
-ADM Lepp*

Section 553 of the *Criminal Code* is also relevant to this discussion because it creates an absolute jurisdiction for provincial Court judges to hear the trial of specified indictable offences without a compulsory preliminary inquiry. If amendments were made to penalty sections (like all B&E) to create an indictable offence option of five years less one day (to avoid the s. 11(f) *Charter* issue) and that offence was then added to the list of provincial Court absolute jurisdiction offences pursuant to s. 553(c), appropriate penalties would be available without the current requirement to create the potential delay in a preliminary inquiry. This issue has potentially significant application given the current offence and penalty definitions and the consequential *Charter* compliant systemic efficiencies and cost savings could be substantial.

RECOMMENDATION:

The *Criminal Code* should be amended to create select hybrid offences with a five years less one day sentence option and s. 553 amendments to ensure absolute jurisdiction of provincial Courts.

Review mandatory case resolution procedures

These now formalized meetings, which previously occurred informally, were codified in amendments to the *Criminal Code* in 2002 through the creation of sections 536.3–536.5 in part XVIII.1.

The intent was to ensure identification and resolution of relevant issues and witnesses, which was one of the main purposes of the Preliminary Inquiry itself, so as to expedite the trial process. In a system that is process focused and where counsel for the accused is compensated based on the time spent on the file, the result appears to have been to potentially delay case processing rather than expedite it.

It must also be candidly noted that while delay was previously something that both the Crown and the accused wanted to avoid (justice delayed is justice denied), that all changed in 1990 when the Supreme Court of Canada released its decision in the *R. v. Askov* case, which ruled that unjustified delay could constitute a breach of s. 11(b) *Charter* rights with an appropriate remedy being a stay of all criminal charges. As a result, some defence counsel created a new offensive strategy of insisting on strict procedural compliance to delay proceedings so as to create a s. 11(b) breach and the basis for an application to dismiss all charges without determination of criminal responsibility.

The Crown is in a very difficult position because procedural non-compliance that may constitute non-disclosure is also a SCC-ordained *Charter* breach (with stay of proceedings as the remedy) pursuant to its 1991 ruling in the *Stinchcombe* case

These cases in combination have created a situation where procedural compliance or process all too frequently trumps the original purpose of the justice system, which was to determine an individual's criminal responsibility in a particular case. What was intended as a shield against abuse has now become a sword to avoid responsibility, and systemic delay is but one the results. A recent Ontario Court of Appeal ruling in *R. v. Jackson* confirms this is not mere speculation.

RECOMMENDATION:

Part XVIII.1 of the *Criminal Code* should be reviewed by the provinces to ensure it is practically achieving the intended result of expediting case processing and resolution and not simply adding additional steps to the process.

Standardizing procedural requirements

There is no question that a consequence of the *Charter of Rights and Freedoms* has been an increased focus on the process in which evidence has been obtained rather than its relevance to the charges against an accused. In light of this, it would be desirable to examine the means by which police obtain judicial authorizations to obtain evidence to determine if there is a way to clarify and standardize what the police must provide to the judicial authority and thus increase the clarity of what is necessary to ensure admissibility. Such a review could include current “Forms” used in the *Criminal Code* as well the variety of applications for different court orders. The goal of such a review would be to attempt to create an expedited procedure for police to obtain judicial authorizations with a presumptive admissibility for evidence obtained in compliance with the defined format.

RECOMMENDATION:

A review of judicial authorizations for evidence admissibility should be undertaken jointly by justice system officials as well as defence counsel to try to achieve greater clarity and expedited determination of evidence admissibility.

Eliminate pre-trial custody credit in defined circumstances

The data cited earlier in this report confirm that there has been an increase in the prosecution of bail or probation conditions violation offences and this likely also reflects an increase in the remand population. In effect, the criminal justice system is using existing legal tools to target the repeat offenders who are responsible for a disproportionately large volume of crime. It would be helpful to know how many persons denied bail are ultimately acquitted, as the data now available suggests that the number would be quite small.

One way to expedite case resolution in these circumstances would be to clarify that while persons who are denied bail solely because of the offence they are charged with should get pre-trial custody credit at sentencing, persons denied bail because of their continuing record or history of breaching court orders should not. Denial of bail on those grounds is expressly authorized by s. 515(10)(b) of the *Criminal Code*.

Until recently, courts were awarding extra credit for pre-trial custody (at 2 or 3 to 1 ratio), which ended up creating an incentive for people denied bail for past criminality to stay in remand and then have their lawyer complain about over-crowding as justification for extra credit.

The Government partially addressed this situation in C-25, which amended s. 719 by stipulating that the maximum pre-trial credit allowable was on a 1 to 1 basis although a 1.5 to 1 credit was made available if the court felt the circumstances “justified” it. Pursuant to new s. 515(9.1), this exception was not available to persons denied bail “primarily because of past conviction” although whether this means a single offence or a criminal history including those that trigger non-attendance concerns is unclear.

A close review of the wording of s. 719(3) brings into question whether such credit is even legally permissible when the person was denied bail because of past convictions:

In determining the sentence to be imposed on a person convicted of an offence, a court may take into account any time spent in custody by the person as a result of the offence but the court shall limit any credit for that time to a maximum of one day for each day spent in custody.

Persons denied bail because of their past record would arguably not qualify for this discretionary pre-trial credit because their detention was *not* because of the offence with which they were charged but that *and* their criminal history. The legal doctrine in support of this argument is *Expressio unius est exclusio alterius*, or “expression of one thing is the exclusion of another” (as defined by *Black’s Law Dictionary*, 4th Edition).

What is required is a clear amendment that permits pre-trial credit at sentencing but expressly precludes it where bail has been denied because of the past criminal conduct of the person charged. The section should also be amended to deny pre-trial credit to persons who were unlawfully in Canada at the time they committed the offence and subsequently denied bail.

It must be noted that the recent Supreme Court decision in *R. v. Safarzadeh-Markbali* delivered on April 15, 2016 struck down the C-25 amendments through the invocation of theoretical “what if” scenarios unrelated to the facts of the case before the Court. In doing so, the Court also referenced the imprecise purpose of the Bill, which should have been addressed in a detailed Preamble that the Court is obliged to consider. Once again, the Supreme Court stressed the priority of judicial discretion over policy choice made by a democratically elected institution. These issues will need to be addressed in any new legislation on this subject.

How many persons denied bail are ultimately acquitted? Data now available suggests the number would be quite small.

RECOMMENDATION:

Section 719 of the *Criminal Code* should be amended to 1) deny pre-trial custody credit to persons denied bail because of their past criminal record, including breaches of court orders, and 2) such legislation should include a detailed preamble specifying the rationale of not rewarding repeat offenders at sentencing and enhancing public safety through bail denial of repeat offenders. Any residual discretion to avoid the provisions should be restricted to narrowly and precisely defined “unjust, unfair, and egregious” circumstances with an annual public reporting requirement for its use by judges.

Diversion programs

The data cited earlier in this report appears to confirm a continuing and likely expanding use of diversion programs for both adult and youth offenders, which should reduce the volume of cases before the criminal courts. Two points merit consideration with respect to current diversion practices. The first is to ensure that diversion decisions and implementation are made as quickly as possible so as to avoid unnecessary and unproductive court appearances. This will likely require additional administrative personnel.

The second is to appreciate that, in some instances, diversion is actually decriminalization of conduct that is defined as a criminal offence. This appears to be the case in BC, where amendments to its *Motor Vehicle Act* now permit police to use that legislation rather than proceed with criminal drinking and driving cases. This appears to have significantly reduced criminal court caseloads in BC but the public interest in decriminalizing this conduct should be monitored, especially in terms of the number of such incidents in the future.

Justice system administrative and operational issues

As this report illustrates, the available data shows an increase in funding for legal aid but a less complete picture of the staffing adequacy for judges and prosecutors. Clearly these positions need to be fully staffed to properly handle the caseloads. Given the aforementioned process focus of our courts and the reality of time-based compensation for defence counsel, it would also be helpful to analyse whether a full-time, salaried legal aid program contributes to expedited and appropriate case resolution.

There also does not appear to be a coordinated national data collection with respect to services to and funding for victims of crime.

There also does not appear to be any Juristat or local data available with regard to the specific purposes of adjournments made by the courts. Knowing this would be of assistance especially if there are unnecessary or inappropriate delays like adjourning to set a date for a future action. This kind of delay may also be addressed through local Court rules, which could be modernized to articulate and prevent specific unnecessary adjournments.

There also does not appear to be any coordinated national data collection with respect to issues involving services to and funding for victims of crime. This could be done by Juristat or by creating a statutory mandate for the federal Victims' Ombudsman that includes reporting to the minister on the actions and best practices taken by provincial governments in these areas as well as how the enhancements enacted by the *Victims' Bill of Rights* (C-32) are being implemented.

Collection of unpaid fines and forfeitures

As a result of changes to the *Criminal Code* in the mid 90s (C-41), collecting unpaid fines owed by persons convicted of criminal offences became significantly more difficult. There are also ongoing procedural defects in collecting unpaid provincial offences and municipal bylaw offences. The result of all of this is the accumulation of an estimated outstanding \$2 billion owing by persons convicted of offences. Most of the money outstanding is owed to the provincial Crown or municipalities although some is owed to the federal Crown for unpaid fines resulting from non-criminal federal offence convictions. Provinces also have been less than effective in collecting moneys owing to the provincial Crown as a result of persons who have breached their conditions of bail. Estimates of amounts outstanding in this area are in the tens of millions.

In November 2011(b) the Ontario Association of Police Services Boards released a report that confirms that there is approximately \$1 billion in outstanding fines in Ontario alone. The report correctly notes that while different actions can be taken, the key to this issue is modernizing the integration of different databases, which is technologically and legally achievable today.

Acting collectively, the three levels of government can dramatically increase the ability to collect these outstanding debts, and moneys recovered by provinces, for example, can be used to offset the need for requested transfers, grants, or subsidies from the federal government. Such a cooperative effort would also mean that law enforcement and public safety measures would increasingly be funded by offenders, not taxpayers, and that government was demonstrating that unlawful action would have enforced consequences. Ideally, funds realized from these collective efforts would be placed into a statutory provincial dedicated revenue fund (the Law Enforcement Fund) with specified approved law enforcement spending purposes. The Ontario Victims' Justice Fund is an example of this (*Victim's Bill of Rights, 1995*).

The Alberta (2013) *Justice and Solicitor General Annual Report, 2012-2013* appears to confirm the reality of unpaid fines as it indicates approximately \$118 million owing to the province (76). No mention is made of uncollected bail forfeitures. It should also be noted that the Federal Department of Justice undertook an as-of-yet unreleased study of uncollected fines owing to it and appears to have launched an initiative to recover these debts.

Section 734.5 of the *Criminal Code* authorizes withholding or suspending a licence, permit, or similar instrument if a debt is outstanding. It would be extremely helpful if this discretion were extended to withholding payments from the Crown to the debtor in like circumstances because there are definitely people who have outstanding fines or bail forfeitures receiving public funding. Such a change would also permit staggered repayment, which could address concerns of the impacts of mandatory victim fine surcharges imposed on persons on welfare.

This is also an ideal initiative in that it creates public revenue by collecting debts owing from persons who break the law rather than increasing taxes on people that obey them.

RECOMMENDATIONS:

All levels of government should work together to design database integration technology solutions to identify and collect unpaid fines and bail forfeitures to be paid into special statutory Law Enforcement Funds with designated law enforcement spending purposes.

Section 734.5 of the *Criminal Code* should be amended to authorize withholding of payments, including on a staggered partial payment basis, from government to persons with outstanding fines or bail forfeiture debts.

Corrections issues

The statistical data noted this paper was useful in demonstrating the concurrent realities of increased targeted enforcement of repeat offenders and a decrease in the overall volume and rates of crime generally. This would appear to confirm the assertion that targeted enforcement enhances crime reduction.

This reality should be kept in mind with regards to complaints made about the increase of persons denied bail due to past criminal records and breaching court orders. A logical result of the argument that such repeat offenders should not be denied bail is the increased likelihood of more crime which, apparently, Canadians are supposed to just accept without complaint.

A second area of interest is revealed in the reduced full parole releases and statutory release revocations (not all breaches result in revocation), which suggests a federal inmate population that has a previous custodial history. It would be very helpful if that inmate profile data was provided by either CSC or Juristat.

Finally, the data did not provide any information with respect to the success of offender programming measured by comparative re-offending rates. Given the ultimate, and sensible, public safety objective of offender rehabilitation, such information would be extremely useful in prioritizing CSC funding.

These corrections issues have been the subject of substantive debate in Canada and, as always, effective policy is guided by accurate information and targeted application.

RECOMMENDATIONS:

- Creation of the *Criminal Code* offence (s. 145) of breach of a condition of conditional release under the *Corrections and Conditional Release Act (CCRA)*.

Although it is currently a criminal offence to breach the conditions of bail, probation, or a peace bond, it is inexplicably *not* a crime to breach the conditions of an early release order from a jail sentence even though the specific actions may be identical. This dichotomy should be corrected so there are equal disincentives to breach release orders and a formalized record kept of such breaches to inform future decision-making.

- Authorize the Parole Board of Canada (PBC) to order electronic monitoring of offenders on conditional release without a Correctional Service Canada request as a pre-condition and amend the *CCRA* to require both CSC and PBC to consider the existence of post-warrant expiry supervision orders and previous breaches of release when making their decisions.

The current law requires CSC to request electronic monitoring, which is an unjustified interference with the discretion of the parole board to impose this newly authorized, enhanced offender-monitoring tool. Also, expressly requiring consideration of these highly relevant issues means that they cannot be ignored, which appears to be the case especially for repeat offenders who are not detained for their full sentence even though post-warrant expiry supervision orders that are functionally identical to early-release orders now exist.

- Amend the *CCRA* to restrict statutory-release eligibility to first time federal offenders and require earned parole for repeat federal custody offenders as well as create future parole eligibility consequences for offenders who commit new crimes while on parole.

While presumptive early release (statutory release) may make rehabilitative sense for a first offender it makes less sense for someone who has chosen to re-offend in so serious a way as to return to federal custody. Such offenders should not enjoy the presumption of early-release entitlement. Further, while all early release comes with risk, it makes sense to create future parole ineligibility consequences for offenders who violate the implicit trust of early release by committing new

crimes. Creating such known consequences will create an incentive for compliance and a deterrent for re-offending.

- Amend the *CCRA* to expressly restrict parole for convicted non-citizens serving a federal sentence for the purpose of immediate removal from Canada.

Parole is intended to help persons reintegrate into Canadian society whereas deportation is a decision that an individual is no longer welcome in Canadian society. There is, therefore, an inherent inconsistency in the two decisions. Restricting parole for removal purposes will also likely speed up the removal process as it will create an incentive for non-citizen offender cooperation.

Systemic accountability – information reporting

Because of the multiple players and processes in the Canadian criminal justice system it is extremely important to identify and track information that is relevant to the issues under examination. Properly targeted, this data can be used to help shape policy and operational reforms and to provide accurate and improved accountability for the institutions responsible for the problems rather than “the system”. As always, such targeted analysis will be met by internal resistance but informed analysis is the best catalyst for effective reform.

RECOMMENDATIONS

The following items should be the subject of detailed reporting either by Juristat/StatsCan or the institution involved:

- Number of crimes committed by persons on bail, probation, conditional sentence, conditional release (federal and provincial), or while awaiting deportation for criminality or having been removed previously from Canada for criminality;
- number of crimes committed by persons with more than 3 previous convictions or who have previously served a custodial (by type) sentence;
- numbers of cases diverted from court including offence type and offender criminal history including past diversion, number of court appearances, and average time to make diversion decision;
- number of non-citizens serving custodial sentences (federal and provincial);
- number of non-citizen removals (by year) following criminal conviction;
- court decision (by numbers and type) for persons denied bail because of previous record, including breach of court ordered conditions;
- amount of uncollected fines (broken down by offence type – CC, other federal, provincial, and municipal bylaw) and bail forfeitures;
- average number of appearances on criminal cases including specified reasons for adjournment;
- number of judges (all levels), prosecutors, and courtrooms by province;
- average legal aid billing for private counsel and number of full-time lawyers as part of legal aid program by province;
- number of unpaid restitution orders, annual spending on victim services (by province), and average time for processing victim compensation; and
- re-offending rate based on different correctional program participation.

Part 5. Conclusion

The targeted recommendations offered in this paper are directly relevant to improving justice system performance in Canada. It is especially important that they include designated entities responsible for recommended actions and suggested report-back mechanisms. These recommendations are intended as concrete steps toward a more efficient and effective system but will not on their own eliminate the “culture of delay” in the system. A sustained effort will be required by all actors.

The recent *Jordan* decision from the Supreme Court of Canada has created a presumptive s. 11(b) *Charter* breach of the rights of the accused if specific standards for a timely trial are not met. The majority of the Court (5 to 4) is clear in its view that this approach will encourage systemic reform:

[137] Real change will require the efforts and coordination of all participants in the criminal justice system.

[138] For Crown counsel, this means making reasonable and responsible decisions regarding who to prosecute and for what, delivering on their disclosure obligations promptly with the cooperation of police, creating plans for complex prosecutions, and using court time efficiently. It may also require enhanced Crown discretion for resolving individual cases. For defence counsel, this means actively advancing their clients’ right to a trial within a reasonable time, collaborating with Crown counsel when appropriate and, like Crown counsel, using court time efficiently. Both parties should focus on making reasonable admissions, streamlining the evidence, and anticipating issues that need to be resolved in advance.

[139] For the courts, this means implementing more efficient procedures, including scheduling practices. Trial courts may wish to review their case management regimes to ensure that they provide the tools for parties to collaborate and conduct cases efficiently. Trial judges should make reasonable efforts to control and manage the conduct of trials. Appellate courts must support these efforts by affording deference to case management choices made by courts below. All courts, including this Court, must be mindful of the impact of their decisions on the conduct of trials.

[140] For provincial legislatures and Parliament, this may mean taking a fresh look at rules, procedures, and other areas of the criminal law to ensure that they are more conducive to timely justice and that the criminal process focusses on what is truly necessary to a fair trial. Legal Aid has a role to play in securing the participation of experienced defence counsel, particularly for long, complex trials. And Parliament may wish to consider the value of preliminary inquiries in light of expanded disclosure obligations. Government will also need to consider whether the criminal justice system (and any initiatives aimed at reducing delay) is adequately resourced. (*R. v. Jordan* [2016] SCC 27)

The Court ruling has articulated the importance of improving justice system efficiency and this paper has offered some specific suggestions to achieve that goal. While there will no doubt be institutional resistance to this kind of analysis, the best way to design and implement effective public safety reforms is to gather the relevant information, ask the right questions, and make the appropriate choices. Canadians deserve nothing less.

Postscript

The following are extracts from the 2015 report by Mary Allen, *Police-Reported Crime Statistics in Canada, 2015*, that detail increases in reported crime, which is a change in trends from the previous decade.

Table 6 Police-reported crime statistics, 2015

Offence	#	Volume increase from 2014	Rate increase from 2014
Homicide	604	+83	+15%
Attempt murder	774	+144	+22%
Sex Assault (Level 2)	377	+45	+13%
Assault (Level 2)	47,119	+2023	+4%
Assault police	9835	+278	+2%
Discharge/pointing firearms	2295	+433	+22%
Robbery	20,932	+1148	+5%
Offence	#	Volume increase from 2014	Rate increase from 2014
Confinement/Kidnapping	3555	+265	+7%
Extortion	3057	+330	+11%
Total violent crime	380,795	+10,745	+2%
B&E	159,338	+7,131	+4%
Weapons offences	14,560	+630	+4%
Terrorism offences	173	+97	+126%
Administration of justice offences	175,341	+1774	+1%
Heroin possession	1602	+353	+27%
Meth trafficking	1849	+314	+19%

As noted above, Juristat Canada released *Police-Reported Crime Statistics in Canada, 2015* in July 2016 (Allen), which has received deserved attention because of a significant increase in the volumes and rates of most serious crime since 2014. Unfortunately, as this paper points out, Juristat Canada still does not provide any offender-specific data for crimes committed, such as whether the offender was on bail, probation, parole, statutory release, already subject to criminal deportation, or with a defined previous criminal record at the time of the commission of the offence.

This data could greatly assist in assessing systemic performance and informing substantive policy changes if the offender characteristics are relevant to the increase in crime. It should be noted that this increase in crime may not be attributable to such issues or could simply be the result of the release from custody of chronic offenders who have returned to their criminality.

One thing is however certain; if we don't ask the relevant questions and provide the relevant answers we'll never know the truth and Canadians will potentially be worse off as a result.

About the Author



Scott Newark

Scott Newark has a 35-year criminal justice career beginning as an Alberta Crown Prosecutor with subsequent roles as Executive Officer of the Canadian Police Association, Vice Chair and Special Counsel for the Ontario Office for Victims of Crime, and as a security and policy adviser to both the Ontario and federal Ministers of Public Safety.

From the outset his work has involved unravelling systemic complexities to identify how the justice system is working – or isn't – and in preparing fact-based operational, policy, or legislative solutions to fix deficiencies and improve public safety. He began analysing and reporting on the Annual Crime Statistics in 2000 and this latest contribution is an affirmation of his career developed belief that instead of being “tough” on crime, it's better to be honest about crime so as to be smart about crime.

He is a founding member of the National Security Group and currently works in public policy analysis and development in the areas of criminal justice reform, domestic security, immigration screening and enforcement and border security.

Appendix A Ontario – Justice On Target (JOT)

In 2013 more than half of all sites (31) increased the percentage of less complex cases completed within 5 appearances and 90 days. This category represents 80 percent of the caseload in the system.

Low-risk offenders are being held accountable for their actions within their own communities through the Youth Justice Committee (Ministry of the Attorney General, Ontario 2015d) and Direct Accountability Programs (Ministry of the Attorney General, Ontario 2015c). In 2013, Direct Accountability resulted in:

- \$1,151,980 in restitution to victims and
- 104,143 hours of community service performed.

June 2008 – June 2012

In 1992, it took an average of 4.3 court appearances to bring a charge to completion. By 2007, this figure had more than doubled to 9.2 appearances. By June 2012, as a result of JOT the provincial average number of court appearances dropped to 8.5 (down 8.1 percent).

In 2007 it took an average 205 days to complete a criminal charge. By June 2012, as a result of JOT that figure dropped to 192 (down 6.6 percent).

On-site legal aid application offices or legal aid staff are now available at 57 courthouse locations, compared with only eight in 2008.

Appendix B Data from Public Safety Canada, Corrections and Conditional Release: Statistical overview, 2012

Court data

- Administration of justice cases (offences related to case proceedings such as failure to appear in court, failure to comply with a court order, breach of probation, and unlawfully at large) account for more than one fifth of cases completed in adult criminal courts.
- Apart from administration of justice cases, impaired driving is the most frequent federal statute case in adult courts (9).
- Consistent with the objectives of the *Youth Criminal Justice Act (YCJA)*, fewer youth are sentenced to custody. In 2010/11, about 16 percent of all guilty cases resulted in the youth being sentenced to custody. This compares to 17 percent of all guilty cases in 2006/07.
- In 2010/11, 48 percent of youth found guilty were given probation as the most serious sentence. This rate has remained relatively stable since the implementation of the *YCJA* in April 2003.
- Of the new *YCJA* sentences, deferred custody and supervision orders were handed down most frequently. In 2010/11, almost 5 percent of all guilty cases received such an order as the most serious sentence (19).

Correctional Costs

- The federal average daily inmate cost has increased from \$255 in 2006/07 to \$313 in 2010/11.
- In 2010/11, the annual average cost of keeping an inmate incarcerated was \$114,364 per year, up from \$93,030 per year in 2006/07. In 2010/11, the annual average cost of keeping a male inmate incarcerated was \$111,042 per year, whereas the annual average cost for incarcerating a female inmate was \$214,614.
- It costs substantially less to maintain an offender in the community than to keep that individual incarcerated (\$31,148 per year versus \$114,364 per year) (25).

Corrections data

- Approximately 27 percent of all admissions to federal custody in 2011/12 were for revocations of conditional release (38).
- In 2011/12, the average proportion of sentence served before the first parole release for offenders serving determinate sentences increased to 37.8 percent for day parole and 41.5 percent for full parole, as compared to 31.6 percent and 37.8 percent a year before. The change is in part due to Bill C-59, which eliminated day parole eligibility at one-sixth of the sentence for first-time federal offenders serving sentences for schedule II and non-scheduled offences. As a result, these offenders remained incarcerated longer prior to their first parole release (83).

Conditional Release Data

- Since 2002/03, over 80 percent of federal day paroles have been successfully completed.
- Based on the year of completion of the supervision period, the total number of federal day paroles completed was 2595 in 2011/12.
- In 2011/12, 1.6 percent of federal day paroles ended with a non-violent offence and 0.2 percent with a violent offence.
- In 2011/12, the successful completion rate was higher for male offenders than for female offenders (87.9 percent versus 86.1 percent, respectively).
- Revocation for Breach of Conditions includes revocation with outstanding charges. A day parole is considered successful if it was completed without a return to prison for a breach of conditions or for a new offence (89).
- The successful completion rate of federal full paroles increased for the last 5 years.
- In 2011/12, 5.0 percent of federal full paroles ended with a non-violent offence and 0.5 percent with a violent offence. That represents a decrease of 3.0 percent and 0.7 percent compared to 2007/08.
- In 2011/12, the successful completion rate of federal full paroles was higher for female offenders than for male offenders (82.7 percent versus 78.2 percent, respectively).
- Based on the year of completion of the supervision period, the number of federal full paroles completed was 1279 in 2011/12 (91).
- Over the past 10 years, the successful completion rate of statutory releases has fluctuated, ranging from 56.1 percent to 61.7 percent.
- In 2011/12, 8.1 percent of statutory releases ended with a non-violent offence and 1.9 percent with a violent offence. That represents a decrease of 2.5 percent and 1.7 percent compared to 2007/08.
- In 2011/12, the successful completion rate of statutory releases was higher for female offenders than for male offenders (70.3 percent versus 61.3 percent respectively) (93).
- The number of offenders receiving escorted and unescorted temporary absences increased in 2011/12.
- The number of offenders receiving work releases has decreased by 39.0 percent, from 595 in 2002/03 to 363 in 2011/12.
- The successful completion rates for work releases, escorted, and unescorted temporary absences are consistently over 99 percent (97).
- The number of detention reviews has declined from 335 in 1997/98 to 214 in 2011-12 (99).

Dangerous and Long Term Offender Data

- As of April 15, 2012, there have been 579 offenders designated as dangerous offenders (DOs) since 1978. Seventy-five percent have at least one current conviction for a sexual offence.
- There are 486 DOs currently active, and all of them have indeterminate sentences.
- Of the 486 active DOs, 466 were incarcerated (representing approximately 3 percent of the total federal inmate population), one has been deported, one has escaped, and 18 were being supervised in the community.
- There are currently two female offenders with a dangerous offender designation.
- Aboriginal offenders account for 26.7 percent of DOs and 19.3 percent of the total federal offender population (103).
- As of April 15, 2012, the courts have imposed 768 long-term supervision orders. Of these, 71.0 percent were for a period of 10 years.
- There are currently 680 offenders with long-term supervision orders, and of these, 463 (68.1 percent) have at least one current conviction for a sexual offence.
- There are currently 10 women with long-term supervision orders.
- There are currently 339 offenders being supervised on their long-term supervision order. This includes 305 offenders supervised in the community, 26 offenders temporarily detained, three offenders who have been deported, and five offenders unlawfully at large (105).

Victim Data

- Since 2006/07, there has been a 48.5 percent increase in the number of victims registered with the Correctional Service of Canada and the Parole Board of Canada combined, from 4979 to 7395.
- Of the 23,156 offenders under federal jurisdiction in 2011/12, 17.3 percent (4006) have registered victims.
- Since 2006/07, the number of notifications made to registered victims has more than tripled. In 2011/12, the Correctional Service of Canada provided 46,678 notifications to registered victims (115).

This data is relevant for the assessment of the various components of the Canadian criminal justice system and with the targeted adjustments detailed in part 6 of this paper, statistical analysis and reporting will play an important role in the development of effective policy reforms.

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Endnotes

- 1 It should also be stressed that the data provided are cited for relevance to the specific subject of criminal justice system court efficiency and effectiveness. As such, previously identified deficiencies, such as police-reported crime statistics only capturing an estimated one-third of actual crime, are not relevant as unreported crime doesn't result in charges before the criminal justice system (Perrault 2015).
- 2 For the provinces and territories, the total rate excludes Alberta for sentenced, remand, and total custody; and Nova Scotia, New Brunswick, and Alberta for probation and total community supervision. As of 2013/2014, federal offenders on temporary absences are counted in custody counts rather than in community counts. Comparisons to previous years should be made with caution.

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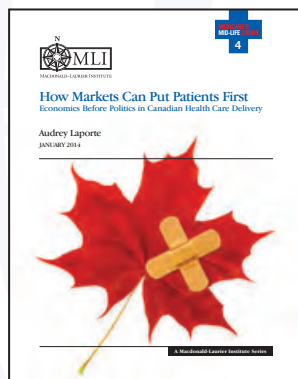
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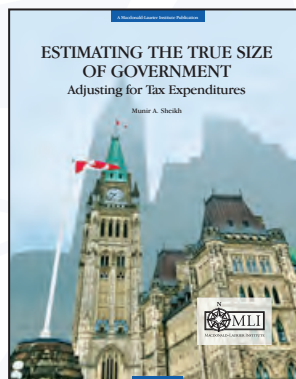
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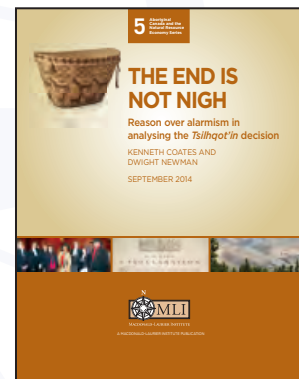
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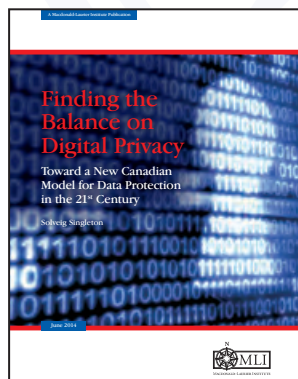
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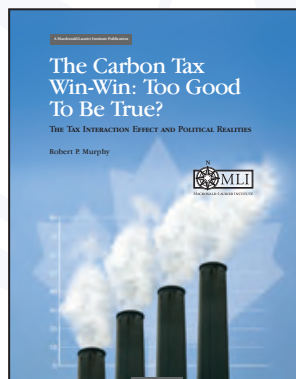
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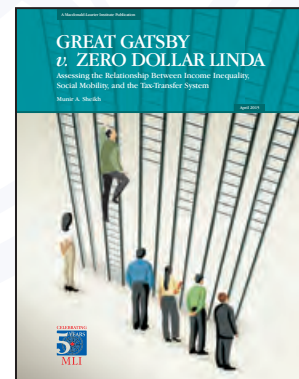
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