

LEGAL AID  
RESEARCH SERIES

COURT SITE STUDY OF  
ADULT UNREPRESENTED  
ACCUSED IN THE  
PROVINCIAL CRIMINAL  
COURTS  
Part 1: Overview Report



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

## Part 1: Overview Report

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

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## EXECUTIVE SUMMARY

### Report

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

### Methodology

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

### Findings: Extent of Self-Representation

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

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

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

### **Findings: Impacts on the Accused**

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

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

### **Findings: Impacts on the Courts and on Court Officers**

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

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

### **Solutions Frequently Suggested by Key Informants**

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

#### **Enhancements to the Eligibility Guidelines for Legal Aid**

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

#### **Enhancements to the Role of Duty Counsel**

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

#### **Enhancing Resources Available to Legal Aid**

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

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

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

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

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



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

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## 1.0 INTRODUCTION

### 1.1 Background and Project Objectives

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

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

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

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

The current document provides an overview of the key findings of a study undertaken to address both questions with respect to adult accused charged with *Criminal Code* and drug offences<sup>3</sup> whose cases are heard in the provincial courts.<sup>4, 5</sup>

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

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

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

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

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

## **1.2 Format of the Report**

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

More detailed reports of our findings from the individual sites are bound separately.<sup>6</sup>

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

## 2.0 METHODOLOGY

### 2.1 Site Selection

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

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

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

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

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

<sup>7</sup> Prince Edward Island was the only province without a court in the study.

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

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

## 2.2 Data Collection Methodology

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

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

### 2.2.1 Disposed Cases Sample

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

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

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

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

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

**Figure 2.2**  
**Key Characteristics of Sites Selected for Inclusion in Study**

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

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

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

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

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

### **2.2.2 Court Observation**

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

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

### **2.2.3 Key Informant Interviews**

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



## **2.3 Lessons Learned Regarding Methodology**

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

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

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

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## 3.0 FINDINGS – CONTEXT

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

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

### 3.1 Availability and Quality of Representation

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

### 3.2 Client Population

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

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

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### **3.3 Court Management and Operations Context**

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

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

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

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

### **3.4 Stages in the Criminal Process**

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

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

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

### 3.5 Service Delivery Models

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

### 3.6 The Availability of Assistance from Other Sources

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

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

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

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

### **3.7 Variance Across Sites and Within Provinces**

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

### **3.8 Summary: Importance of a Systems or Holistic Perspective**

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

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

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

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

## 4.0 FINDINGS – PREVALENCE OF LEGAL REPRESENTATION

### 4.1 Likelihood of an Accused Having Legal Representation

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

The proportion of accused **unrepresented**:

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

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

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

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

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

On the basis of these data, we conclude that:

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

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

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

## 4.2 Lynchpin Role of Duty Counsel

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

### 4.2.1 Organizational Models

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

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

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



#### 4.2.2 Service Delivery: Scope and Strategies

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

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

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

Figure 4.3 Duty Counsel Functions and Restrictions			
Site	Functions Duty Counsel available to cover / and for which accused	Whether Eligibility and Coverage Tests are Applied	Other Restrictions on Functions/ Service provided
Kelowna	<ul style="list-style-type: none"> <li>All functions except trial</li> </ul>	No, except for trial	No
Edmonton	<ul style="list-style-type: none"> <li>All functions except trial</li> </ul>	No	<ul style="list-style-type: none"> <li>DC does not review disclosure with unrepresented accused</li> <li>Limited presence in federal docket court</li> <li>Limited role in trials, not always available to assist with sentencing</li> </ul>
Regina	<ul style="list-style-type: none"> <li>Bail hearings</li> <li>Plea and sentencing for bail cases that are easily resolved</li> </ul>	No	No
Brandon	<ul style="list-style-type: none"> <li>All functions except trial</li> </ul>	No except for trial	No
Scarborough	<ul style="list-style-type: none"> <li>All functions except trial and entering of plea</li> </ul>	Yes except for in-custody cases	<ul style="list-style-type: none"> <li>Not normally available to assist with plea negotiations on day of trial</li> </ul>
Sherbrooke	<ul style="list-style-type: none"> <li>First appearance only</li> </ul>	No	No
Bathurst	<ul style="list-style-type: none"> <li>First appearance, plea, bail and sentencing</li> </ul>	No	No
Halifax	<ul style="list-style-type: none"> <li>First appearance only</li> <li>Plea and sentencing for cases which are easily resolved</li> </ul>	No	No
St. John's	<ul style="list-style-type: none"> <li>In-custody cases only</li> <li>Plea and sentencing for bail cases which are easily resolved</li> </ul>	No	No

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

The proportion of accused assisted by duty counsel:

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

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

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

### 4.3 The Question of Under-Representation

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

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

#### 4.3.1 Legal Aid Stretched Everywhere

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

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

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

#### **4.3.2 Restricted Representation by Private Bar Members Under Legal Aid**

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

Examples included:

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



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## 5.0 FINDINGS – IMPACTS OF UNREPRESENTED AND UNDER-REPRESENTED ACCUSED

### 5.1 Key General Impacts

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

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

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

### 5.2 Impacts on the Accused

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

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

#### 5.2.1 From Preparing for First Appearance to Trial

##### (a) Pre-trial: Process

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

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

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

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

#### (b) Socio-Economic Impacts on the Accused

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

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

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

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

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

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

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

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

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

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



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

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

(d) Timing of Pleas

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

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

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

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

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

Representation at Appearance Plea Entered	St. John's	Halifax	Bathurst	Sherbrooke	Scarborough	Brandon	Edmonton	Regina	Kelowna
Self-represented	1/3 <sup>3</sup>	2/3	1/2	1/1	7/13	n/a	2/3	2/5	2/3
Duty Counsel	4/6 <sup>3</sup>	3/4	1/1	n/a	2/4	n/a	2/2	6/9 <sup>2</sup>	2/3
Private Counsel (including duty counsel, agent or paralegal for private counsel)	3/6 <sup>3</sup>	5/7 <sup>1</sup> 3/5	3/4	3/6	7/10	n/a	4/5	6/9 <sup>1,2</sup> 6/9	4/7
<p><i>Notes</i></p> <p>* Because of missing data, it is not possible to specify this value more precisely.</p> <p><sup>1</sup> Legal aid staff (other than duty counsel).</p> <p><sup>2</sup> Regina data does not distinguish between duty counsel and legal aid staff acting in another capacity. Percentage shown includes both.</p> <p><sup>3</sup> Numbers relate to representation at last appearance.</p>									

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

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

(e) Pre-trial: Impact on Outcomes

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

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

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

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

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

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

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

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

## 5.2.2 At Trial and Sentencing

### (a) Trial and Sentencing: Process

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

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

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

## (b) Trial and Sentencing: Impacts on Outcomes

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

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

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

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

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

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

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

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

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

Figure 5.5 Disposed Cases: Percentage of Accused Convicted (on at least one charge) by Type of Representation at Last Appearance by Site									
Representation at Last Appearance	St. John's	Halifax	Bathurst	Sherbrooke	Scarborough <sup>h</sup>	Brandon	Edmonton	Regina	Kelowna
Self-represented	87	60	96	92	50	25 – 43 <sup>3</sup>	53	70	71
Duty Counsel	85	92	96	n/a	52	60 – 64 <sup>2</sup> <sub>3</sub>	79	70 <sup>2</sup>	78
Private Counsel (including legal aid staff, agent or paralegal for private counsel)	80	63 <sup>1</sup> /6 2	94	90	55	70 – 63 <sup>3</sup>	58	70 <sup>2</sup> /62	70
<p><i>Note.</i>                      * Because of missing data, it is not possible to specify this value more precisely.  <sup>1</sup> Legal aid staff (other than duty counsel).  <sup>2</sup> Regina and Manitoba data do not distinguish between duty counsel and legal aid staff acting in another capacity. Percentage shown includes both.  <sup>3</sup> For Brandon the first estimate is from the Direct court Observation file (for docket courts) and the second estimate is based on data from the Three-Month Docket Sample. Both are based on case/appearances.</p>									

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

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

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

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

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

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

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

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

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

### 5.3 Impacts on Officers of the Court and Others

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

#### (a) Victims and Witnesses

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

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

(b) Defence Counsel

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

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

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

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

(c) Crown Attorneys

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

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



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

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

#### (d) Judges

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

#### (e) Native Court Workers

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

#### (f) Court Administrative Personnel

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

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

### (g) Court Security

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

### (h) The Justice System Overall

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

## 5.4 Impacts on Court Operations

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

### 5.4.1 Duration of Individual Appearances

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

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

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

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

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

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

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

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

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

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

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

#### 5.4.2 Number of Appearances per Disposed Case

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

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

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

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

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

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

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

### 5.4.3 Elapsed Times to Complete Cases

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

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

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

As shown in that Figure:

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



## 6.0 SOLUTIONS SUGGESTED

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

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

### 6.1 Legal Aid Eligibility Criteria

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

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



## 6.2 Duty Counsel

The following suggestions were offered with respect to duty counsel:

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

---

### **6.3 Other Aspects Principally Related to Staff Lawyer Systems**

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

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

### **6.4 Tariffs for Certificate Service by the Private Bar**

The following suggestions were offered with respect to judicare tariffs:

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

### **6.5 Court Case Management**

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

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

### **6.6 Information, Advice and Support to Accused**

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

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

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

## 6.7 General

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

## 6.8 In Conclusion

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

LEGAL AID  
RESEARCH SERIES

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

Part 2: Site Reports



Department of Justice  
Canada

Ministère de la Justice  
Canada

Canada

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COURTS

Part 2: Site Reports

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rr03LARS-3e

Department of Justice Canada



Programs Branch



Research and  
Statistics Division

September 2002

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

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## Part 2: **Site Reports**

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# **Chapter 1: The National Court Site Study of Unrepresented Accused**

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## **1.1 Background and objectives**

The costs of providing legal aid in criminal matters to eligible persons in Canada are shared by the federal Department of Justice and the governments of the provinces and territories. In general terms, the agreements that govern this cost-sharing seek to establish and support a national “system” (loosely-defined) of criminal legal aid that is both accessible and reasonably consistent across jurisdictions. In recent years, however, the accessibility of legal aid to adults facing criminal charges has come into question. These concerns have escalated as many jurisdictions restricted eligibility for criminal legal aid to only those accused facing the most serious charges and whose financial circumstances are the most dire.

One indicator of this restricted access has been the increasing number of reports of “unrepresented accused” appearing before the adult criminal courts. This has prompted the Department of Justice, in consultation with the Federal/Provincial/Territorial Permanent Working Group on Legal Aid, to develop a strategic research plan to examine the level of unmet legal need in Canada, as part of a broader program of research on access to legal aid.

Accordingly, the Department of Justice, after a competitive tendering process, entered into a contract with Robert Hann & Associates Limited, with ARC Applied Research Consultants, for the conduct of a national study of legal representation in adult criminal court cases. In general terms, the objectives of the study have been:

- To gain a clear sense of the quantity and nature of adult criminal cases that move through the justice system without legal representation.
- To examine the possible effects of a lack of representation both on accused persons and the justice system, more generally.

## **1.2 Overview of methodology**

### **Nine court sites**

The data collection took place in nine provincial court sites across Canada. The sites – selected to be representative of the existing range of court structures – were St. John’s, Halifax, Bathurst, Sherbrooke, Scarborough (Toronto), Brandon, Regina, Edmonton, and Kelowna.

### **Common core activities tailored to each site**

The specific approach and activities for each court site were tailored to the local situation in each site. Nonetheless, a core set of activities has been undertaken in each site.

#### *1. Site study initiation*

The proposed approach was sent to each site. The next step was an extensive set of telephone interviews with court and legal aid officials in each site to tailor the approach, protocols and schedule to that site. Special attention was paid to the capabilities of different local manual and automated information systems to provide the types of data required by the project. A local Project Advisory Committee (PAC) was also set up.

#### *2. Site visit*

Intensive in-person interviews were conducted with individuals from all key groups involved in the court process (e.g., judges, Crowns, legal aid officials, duty counsel, court administration staff, officials responsible for transportation of remanded prisoners, and defence bar).

#### *3. Empirical data collection*

Depending on the site, empirical information was collected using a variety of techniques and sources, including:

- the extraction of data from individual case records in manual record systems;
- the extraction of data on disposed cases electronically from court automated information systems; and
- direct observation of court proceedings.

#### *4. Analysis and documentation of results*

Draft self-contained individual site reports were prepared.

#### *5. Review of report with provincial and site officials*

Earlier drafts of the individual site reports were distributed for review by e-mail to a group of government and non-governmental persons in each site (including local Project Advisory Committee members).

#### *6. Preparation of the final report*

Comments received were then incorporated into the revised versions of the site reports that comprise the remainder of this document.

#### *7. Workshops at sites*

The lead consultants have also offered to facilitate a meeting to review the results with local officials in those sites requesting such a review.

### **Project staff**

The research team has included four senior consultants.

One of these consultants led the work in each of the nine court sites. Bob Hann led the work in St. John's, Halifax and Toronto. Colin Meredith led the work in Kelowna and Edmonton. Mira Svoboda, under Colin's direction, led the work in Sherbrooke and Bathurst. Joan Nuffield led the work in Brandon and Regina.

Bob Hann is the principal in charge of the project.

**Local staff and consultant support**

Throughout the project, every reasonable effort was made to minimize the impact on court administration staff in the study sites. In support of this goal, extensive discussions were held with local court officials to plan and co-ordinate the work. A portion of the budget for the study was also set aside to hire local persons with extensive experience in the courts – to provide research assistance for coding data from manual court records and for recording data from direct observation of court appearances. Resources were also provided to local computer programmers with extensive experience in working with the various automated court information systems. We were extremely fortunate to have assembled this highly qualified group of people to assist the project.

**Overall schedule**

The project was begun in February 2002. The nine site visits and primary and secondary data collection were completed by June. Analysis was completed and draft reports were forwarded for review to the sites in August. The review was completed and the current report was prepared by the end of September. The local workshops to review the findings will take place after the individual site reports and the overall report are published.

**Format of the final report(s)**

The final report is presented in two parts:

- Part 1: An Overview and Comparison of Key Findings (bound separately).
- Part 2: The detailed Site Reports (the current document).
  - A compilation of the nine individual stand-alone reports provided for the sites.





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## Chapter 2: Regina

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### 2.1 Objectives and methodology

The Department of Justice and the Federal/Provincial/Territorial Permanent Working Group on Legal Aid retained the research team to engage in a national study to measure:

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

A brief overview of the full national study – covering nine court sites – has been presented in Chapter 1. The methodology for the Regina part of the national study followed a strategy for data collection and site visits similar to that followed in the other sites.

#### 2.1.1 Report format

The findings for Regina are presented in seven sections.

- Section 1* outlines the objectives of the study, describes the format of the report, and discusses the methodology used to collect information.
- Section 2* provides important contextual information for interpreting the findings of the report. Special attention is given to key characteristics of the community, the court, legal aid, duty counsel and disclosure.
- Section 3* describes how frequently self-represented accused appear at different stages of the court process.
- Section 4* explores the frequency with which accused persons have other types of representation, and how those frequencies vary at different stages of the court process.
- Section 5* focuses on the important impacts of self-representation on the accused. The section discusses both perceptions provided from our interviews and empirical evidence from data especially collected for the project.
- Section 6* then describes other significant impacts – due to the presence of unrepresented accused – on the key groups involved in the courts (e.g., legal aid, duty counsel, Crown attorneys, judges and court personnel), and on court operations (including court workloads and time to deal with and dispose of cases).
- Section 7* completes the report with key overall findings, and solutions that have been suggested by those interviewed in Regina.

## 2.1.2 Methodology

The methodology involved data collection and site visits. Information was available on the question of unrepresented accused from three sources:

- **A Disposed Cases sample.** This special electronic file was created for the project by Saskatchewan Justice from the JAIN court automated information system. The file consisted of data on all court appearances for all criminal cases disposed in Regina Provincial Court in 2001 (over 45,000 appearances for roughly 10,000 cases). Data was provided on characteristics of each case (e.g., offence type), on events, and on decisions that were taken at each appearance (e.g., plea, elections, remands, verdicts and sentences).
- **A Direct Court Observation sample.** A local person with extensive experience in the Regina court was hired to sit in court and directly observe and record information on the events and decisions that occurred in 300 case court appearances during five days in Courtroom 1 (docket court) and five days in Courtroom 2 (remand – bail court) during April and May of 2002.<sup>1</sup>
- **Key Person Interviews.** These were conducted with over 20 key informants (judges, Crowns, legal aid staff and management, court administration and court clerks, private bar members, local service agencies, etc.). Interviews were from 30 minutes to one hour, covered all aspects of the study, and most were conducted by two interviewers. The anonymity of those interviewed was ensured.

In all parts of the project, we received excellent co-operation and assistance from all those we asked to participate in the study. We also gratefully acknowledge the very able assistance and expertise of the two Regina-based persons who assisted in observing in court and in preparing the electronic file of data from the JAIN automated information system.

## 2.2 Context of the court and legal aid

One of the major conclusions – supported from data from all sites – was that data on the extent of legal representation in a particular court cannot be interpreted out of context of (at least):

- The type of community served (including the nature of accused persons brought before the court).
- The resources and management and operations practices in place in the courts.
- Legal aid policies and practices – especially the duty counsel system in place.
- The policies and practices of all of the other key participants in the court process – including the judiciary, the police, the Crown attorneys, court workers, court administrative officials, the private bar, and other supporting agencies.

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<sup>1</sup> Trial courts were not included in this part of the data collection.

All of these factors, policies and practices can have significant mitigating or exacerbating influences on the impacts of self-representation. This contextual information is thus essential to understanding the problems and potential solutions to challenges related to the unrepresented accused. This section will specifically address the first three of the above areas. Information on the fourth is contained throughout the report.

### 2.2.1 The community

Regina, the capital of Saskatchewan, is at the commercial and financial centre of the province, and the hub of a multi-billion dollar agricultural economy. Recent industrial developments have included a major steel plant and Canada's first heavy-oil upgrader. Regina has the head office of the Saskatchewan Wheat Pool – the largest grain-handling co-operative in the world.

In the 2001 Census, the city of Regina reported a population of 178,225, a decrease of 1.2 percent from the population reported in the 1996 Census. Approximately 23 percent of males and 22 percent of females in Regina were in the 15-to-29 age range associated with the highest rates of crime. The population density of Regina was 1,501.9 per square kilometre, and 96 percent of residents indicated English was the language they spoke at home.

Regina's estimated average income per capita in 2001 was \$22,300, similar to the provincial average of \$22,541. The average household income in Regina in 2001 was reported to be \$54,600, somewhat higher than the provincial average of \$48,300.

In 2001, Regina reported an unemployment rate of 5.5 percent, marginally higher than the provincial rate of 5.3 percent.

Of the population of Regina aged 25 and over, 9.3 percent (9.7 percent of females and 8.9 percent of males) were reported to have less than a Grade 9 education. This was significantly lower than the provincial rate of 15.4 percent. Regina's population included a comparatively high proportion of persons with a high school certificate or higher level of education (69.3 percent, compared to the provincial average of 59.2 percent).

In 2001, the number of single-parent families in Regina was reported to be 8,235, or 17 percent of the approximately 51,200 families in private households in the city. This was somewhat higher than the provincial rate of 13 percent.

In Regina in 2001, it was estimated that, of the approximately 75,919 occupied private dwellings, 49,092 or 65 percent were owner-occupied. This was similar to the provincial rate of 68 percent owner-occupied private dwellings.

The rate of violent crime in Regina decreased by 6.6 percent from 1999 to 2000. The rate of violent crime for 2000 was 1,590 per 100,000 population. Property crime rates also decreased from 1999 to 2000, but by a smaller margin. The year-over-year decrease in the property crime rate was reported to be 1.0 percent. For 2000, the property crime rate was 8,414 per 100,000 population. Regina's total crime rate decreased by 2.4 percent from 1999 to 2000, and was reported as 14,769 per 100,000. These rates were higher than the provincial rates, however. The total number of offences against the *Criminal Code* and other federal statutes in Regina (excluding traffic offences) for 2000 was 29,606.

## 2.2.2 The court

### *a Scheduling of cases*

Figure R-1 on the following page highlights the key features of the courthouse and the case scheduling practices. In general, cases originating in Regina are scheduled for their first appearance in Provincial Court either in Courtroom number 1 or 2, depending on whether or not accused are being detained in custody. Those courtrooms hear first appearances and other appearances that occur prior to being set for trial in a trial court. It was in those courtrooms that we directly observed court appearances of cases.

<b>Figure R-1. Highlights of Scheduling of Cases in Regina: Provincial Court (six adult criminal courtrooms)</b>		
Two docket courtrooms	<ul style="list-style-type: none"> <li>• Cases called for 9:30 a.m. and 2 p.m.</li> <li>• One for non-custody first appearances, adjournments, guilty pleas and special applications</li> <li>• One for custodial</li> </ul>	<ul style="list-style-type: none"> <li>• Do not split drugs and CCC</li> </ul>
Four trial courtrooms	<ul style="list-style-type: none"> <li>• One for lengthy trials</li> <li>• Three for regular trials</li> <li>• (preliminary inquiries mixed with trials)</li> </ul>	
Special courts	None	
Six Circuit Courts	<ul style="list-style-type: none"> <li>• Fort Qu' Appelle</li> <li>• Okanese (First Nations)</li> <li>• Southey</li> <li>• Indian Head</li> <li>• Carry the Kettle (First Nations)</li> <li>• Milestone</li> </ul>	<ul style="list-style-type: none"> <li>• One-day trips, 2 days per week,</li> <li>• Records kept at Regina courthouse</li> </ul>

### *b Special case/case-flow management concerns*

The Regina court is facing serious backlogs, which have grown in the past year. At the time of the site visit, trials for accused who were not in custody were being set for eight months in the future, six-to-eight weeks ahead for those in custody. The court was in the early stages of examining new models for case management, including bringing all concerned parties together to agree on certain possible approaches.

### *c An overview of case volumes and mix of cases*

Figure R-2 provides an overview description of the numbers of cases heard in the Regina court in a recent 12-month period.<sup>2</sup> The Figure shows that roughly half of the workload of the Regina court was accounted for by four categories of offences – common assault (13 percent), theft (10 percent), administration of justice (13 percent) and impaired driving (13 percent).

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<sup>2</sup> Please note that, for this table, a “case” is defined as a group of charges against one accused that have a common date for their last court appearance. This definition of a case is useful for discussing groups of charges that are finally disposed on the same day. However, this is *not* the definition of a case that is used in other sections of this report that present analysis of data from the Direct Court Observation sample or from the Disposed Cases sample.

Instead, analysis of the Disposed Cases file usually defines a “case” as a group of charges against one accused that have been disposed and that have had their *first* court appearance on the same court day. This definition of a case is more suited to discussing court appearances of groups of charges during the earlier stages of their court processing – since groups of charges against an accused that start their court litigation process on different court days may be combined (by the court) after one or more of the groups has had a number of court appearances. It is especially worth noting that defining cases in terms of the date of their first court appearance produces a greater number of cases than when one defines cases in terms of the date of their last court appearance.

Figure R-2 also shows that the total caseload of the Regina court accounted for 23 percent of Saskatchewan's Provincial Court caseload. However, compared to the province as a whole, the Regina court caseload had relatively more cases involving homicide, attempted murder, robbery and/or morals-sexual charges – but relatively fewer arson cases.

<b>Figure R-2: Disposed Cases by Type of Most Serious Offence (Comparison of Regina and Saskatchewan – 2000/2001 )</b>					
<b>Most Serious Offence</b>	<b>Regina</b>			<b>Saskatchewan</b>	
	<b>#</b>	<b>as % of Regina Total</b>	<b>as % of SK</b>	<b>#</b>	<b>as % of SK Total</b>
<b>Total</b>	6,192	100	23	26,429	100
<b>Homicide</b>	15	0	45	33	0
<b>Attempted Murder</b>	9	0	47	19	0
<b>Robbery</b>	96	2	42	231	1
<b>Kidnapping</b>	6	0	23	26	0
<b>Sexual Assault</b>	68	1	19	351	1
<b>Sexual Abuse</b>	9	0	15	59	0
<b>Major Assault</b>	428	7	29	1,477	6
<b>Abduction</b>	0	0	0	4	0
<b>Common Assault</b>	821	13	26	3,111	12
<b>Break &amp; Enter</b>	220	4	24	923	3
<b>Arson</b>	2	0	9	22	0
<b>Fraud</b>	218	4	21	1,025	4
<b>Possession Stolen Property</b>	203	3	24	834	3
<b>Theft</b>	620	10	29	2,130	8
<b>Property Damage/Mischief</b>	216	3	20	1,096	4
<b>Weapons</b>	99	2	27	367	1
<b>Administration of Justice</b>	813	13	22	3,664	14
<b>Public Order Offences</b>	121	2	13	919	3
<b>Morals – Sexual</b>	153	2	58	266	1
<b>Morals – Gaming/Betting</b>	0	0	0	1	0
<b>Other Criminal Code</b>	690	11	24	2,886	11
<b>Criminal Code Traffic</b>	232	4	24	947	4
<b>Impaired Driving</b>	808	13	19	4,313	16
<b>Traffic/Import Drugs</b>	1	0	33	3	0
<b>Possession Drugs</b>	0	0	0	5	0
<b>Other Federal Statute</b>	344	6	20	1,717	6

*Source: Canadian Centre for Justice Statistics, Statistics Canada.*

### 2.2.3 The legal aid system

Legal aid in Saskatchewan is overwhelmingly a service delivered by staff lawyers. Figures produced by the Saskatchewan Legal Aid Commission show that, of 22,057 adult and youth cases (of all kinds) granted full service in 2000/01, all but 734 were handled by staff lawyers, not members of the private

bar. The most common reason for issuing a certificate to a private bar member was conflict of interest (co-accused or victim-accused conflicts), although, even in conflict of interest cases, the actions may be divided among staff lawyers at different Commission offices within the province.

In 2000/01, about 83 percent of all legal aid clients in the province were on social assistance, and 71 percent identified themselves as being of Aboriginal descent. The Regina City office of the Commission handled 1,938 applications for service in adult criminal cases in that year.<sup>3</sup>

Staff lawyers are a mix of junior and senior members of the bar. Turnover is frequent among the junior lawyers, with some junior staff lawyers being lost regularly to Crown positions, but the senior staff lawyers tend to stay on. At the time of our site visit, in the spring of this year, staff salary levels were \$10,000 lower than those of Crown attorneys with similar experience. However, with the implementation of pay equity in March 2002, the salary gap with Crown prosecutors was closed significantly.

At any given time, nine lawyers (in eight full-time positions) in the Regina City office are handling criminal matters for adults, including through duty counsel.<sup>4</sup>

At the time of the site visit, Legal Aid staff indicated that there was a one-week delay to get an appointment to complete the legal aid application form and a 10-day delay for a decision as to eligibility, if all of the accused's documentation was available. Once the accused was judged eligible for legal aid, there was a three-month delay before the accused's first intake interview with a lawyer. This latter delay had recently been reduced from six months. Applications for legal aid were made in person, by appointment at the Legal Aid Commission office, approximately a five-minute walk from the provincial courthouse. Some interviewees were of the view that delays in the legal aid application and delivery process were "driving" the court schedules.

#### 2.2.4 Duty counsel

Knowledge of the resources, scope of activity, and policies and practices of the duty counsel system is especially important to understanding the implications of self-representation on the accused, and on the costs and efficiency of the court system.

Since the inception of a pilot project in 2001, duty counsel (two staff lawyers assisted by a paralegal) have been available to help custody cases with pre-trial release applications, and do so without first applying financial eligibility tests or coverage criteria.

In cases where the Crown is not opposed to the accused's release prior to trial (amounting to perhaps half the custody docket), the duty counsel will not see the accused. In a significant proportion of the remaining cases – some interviewees suggested it is as high as 50 percent of cases where the Crown is seeking continued detention – accused do not invoke the assistance of duty counsel to argue their bail application. This appears to be the case for two inter-related reasons:

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<sup>3</sup> It should be noted that later in this report, we use a different definition of a "case" than is used by Legal Aid to count applications for service. As noted in the footnote following, the definition we use will result in a larger number of "cases." For instance, our definition results in 3,443 of our "cases" being represented by Legal Aid at final appearance (as shown in Figure R4-14 later).

<sup>4</sup> Two of the nine lawyers are involved in a job-sharing arrangement.

- Even the Crown receives the file only 15-20 minutes before the first appearance, and, without the file and disclosure, the duty counsel does not try to speak to bail. (Additionally, there are apparently chronic problems with bringing detainees to court in time for interviews, and with lawyers' access to prisoners at the Correctional Centre, so detainees are not seen before first appearance.)
- Many accused are unwilling to wait for the day or two it will take for the duty counsel to prepare and argue for their release, and so choose to argue for their own release right away (or to plead guilty).

If the case is uncomplicated and can probably be resolved in 7-10 days, duty counsel may retain the case until completion. Otherwise, the accused will be required to apply for legal aid in the usual course of business, and duty counsel will cease to be the attorney of record. Staff lawyers are rotated out of the duty counsel position once a year. More rapid rotation is considered to cause too much additional work with regular caseloads in the transition period, and tends to cause more matters simply to be adjourned..

### 2.2.5 Other sources of assistance

During our visit to Regina, we interviewed representatives of two programs that also provide services that assist unrepresented accused; the Regina Alternative Measures Program (RAMP), and the Native Courtworkers Program.

#### *a RAMP*

Although RAMP is primarily a program to assist in the provision of diversion services,<sup>5</sup> RAMP representatives do meet with adult accused (most of whom are unrepresented), usually before their first court appearance.<sup>6</sup> During those meetings, RAMP representatives may assist self-represented accused: by informing them of the legal aid program and/or by referring them to the Native Courtworkers. The RAMP personnel have very little contact with Legal Aid or duty counsel lawyers.

RAMP workers were asked whether having a lawyer at the early diversion stage would be a positive move. The answer was quite interesting, in that it was felt that diversion works best without the accused having a lawyer. One of the essential requirements for entering the RAMP program is for the accused to admit responsibility for the action and to assume responsibility for dealing with the consequences. It was felt that, if the accused had a lawyer, a significant proportion of that responsibility would be shifted over to that lawyer. As well, the focus of RAMP alternative programs is not on legal issues, but on changing one's life, getting help and building bridges to the community.

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<sup>5</sup> If the accused opts for and is accepted for a diversion program (and approved by the Crown), the case is adjourned for about five months. If the alternative measures program is completed successfully, the charges are withdrawn.

<sup>6</sup> RAMP also provides services to youth.



### *b Native Courtworkers*

The Regina court has three Native Courtworkers who are available (from their office in the courthouse) to provide a number of services to unrepresented accused. The Courtworkers indicated that they get 10-to-15 people “coming in off the street” every morning. Although the Native Courtworkers program was established to deal with Natives, Courtworkers will also assist non-Natives.

Examples of services offered include:

- Going into court with the accused and asking for an adjournment to give the Courtworker time to help the accused understand his or her case and the disclosure before making a plea.
- Making the accused less anxious by explaining the roles of judges, clerks, Crowns, etc.
- Going to the Crown on behalf of the unrepresented accused and asking if the Crown will likely be looking for a custodial sentence – and, if so, referring the accused to Legal Aid.
- Encouraging accused who are intimidated, and want to plead guilty “to get it over with,” to get an adjournment to consider options more fully.
- Helping the accused with a guilty plea.
- Helping speak to sentence (otherwise, naturally reticent people will “clam up”).<sup>7</sup>

The Native Courtworkers seem to work well with the duty counsel, who refer people to them. In fact, duty counsel have increased the work of the Courtworkers – partly by sending accused who are suspected of being not guilty, but are not likely to get legal aid assistance.

On the other hand, there is considerable variation from one judge to another with respect to the role Native Courtworkers are allowed to play in their courts.

## **2.3 Frequency of accused appearing without representation**

### **2.3.1 Self-representation over the life of the case**

Given the general perception that not having representation has significant implications for the accused, it is important to understand how frequently self-represented accused appear at different stages of the court process.

It is apparent from the Disposed Cases file that it is not possible to characterize representation over the life of a case in any simple manner. An accused’s representation status will often change from one appearance to the next, as, for example, when an accused may be represented by duty counsel at the bail hearing, but be self-represented afterwards – and represented by privately retained counsel later.<sup>8</sup>

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<sup>7</sup> There is also an expectation on the part of some lawyers that the Native Courtworkers will act as their agents in requesting remands. This is not seen as being within the functions of the Courtworker program.

<sup>8</sup> A second problem specifically related to the JAIN automated information system is that data on representation at particular appearances is missing from a not-insignificant number of appearances. We did not feel that this problem was prevalent enough (as in other sites in the study) to ask researchers to obtain such information from manual court records (e.g., informations or dockets or court reporters’ notes). However, considerable extra work was involved in ensuring that the problem of unspecified representation data was not sufficiently strong to impact the results presented herein.

Looking at the pattern of representation over all appearances:

- The Disposed Cases file demonstrated various combinations of representation by self, Legal Aid, private or appointed counsel for the appearances made in all but 3.4 percent of the cases.<sup>9</sup>
- In 46 percent of the cases, there was no information on representation for at least one of the appearances in the case.
- In 6.3 percent of the cases, complete information on representation was found for all appearances and, at all of those appearances, the accused was self-represented.
- In another 6.6 percent of the cases, the file indicated self-representation at some appearances, but information was missing on the others.
- In another 36.3 percent of the cases, the file indicated a mix of self-representation at some appearances and representation by counsel of some sort on the others.

Therefore, the Disposed Cases file indicates that the accused was unrepresented on at least one appearance in at least 49.2 percent of the cases, and possibly up to 52.6 percent of the cases (if one counts all of the 3.4 percent for which no representation information was available at all as containing at least one unrepresented appearance).

Independent support for this conclusion also comes from analysis of the separate Court Observation data. For the 300 appearances observed:

- 51 percent involved an accused who was unrepresented (although almost half of these appearances resulted simply in an adjournment);
- 31 percent involved a private bar member;
- 11 percent involved legal aid; and
- 8 percent involved either an agent, a Native Courtworker, a clinic worker, or someone whose affiliation could not be discerned.

### 2.3.2 Self-representation by category of offence

During the site visit, interviewees suggested that, because of the coverage criterion (likelihood of imprisonment), the criminal charges most likely to be faced by unrepresented accused were minor property offences (shoplifting, theft of minor services, etc.), minor assaults (except where a long prior record would lead to a likelihood of jail and, therefore, representation), and offences related to alcohol or drug abuse (impaired driving, public disturbances, etc.).

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<sup>9</sup> In 3.4 percent of the cases in the Disposed Cases file, there was no information on representation at any appearance.

Figure R-3 uses the Disposed Cases sample to present estimates of the proportions of accused who were unrepresented, according to the offence category of the most serious charge in the case.

<b>Figure R-3. Proportion of Accused who were Unrepresented At Various Appearances, by Most Serious Charge Category, Regina*</b>						
Most Serious Charge Category	Proportion of Unrepresented Accused at					Total Number of Cases (all accused)
	First (%)	Bail (%)	Plea (%)	Defence Election (%)	Final (%)	
Homicide	19	75	0	0	0	21
Sexual Assault	46	45	3	5	4	115
Assaults excl. Common	59	71	14	3	14	1291
Robbery	58	59	4	8	6	166
Break and Enter	63	75	6	12	10	621
Impaired Driving	57	75	35	11	32	1084
Common Assault	61	77	24	6	23	906
Drugs excl. Simple Possession	41	45	9	11	11	126
Weapons Offences	56	57	20	6	16	133
Thefts and Frauds	63	71	22	14	20	2232
Simple Possession of Drugs	68	73	34	***	33	134
Offences against Administration of Justice	67	75	23	8	23	2549
Public Order	39	76	25	***	26	256
Miscellaneous <i>Criminal Code</i>	64	78	37	7	34	316
Other Federal Statutes	58	54	17	***	14	321
Proportion of unrepresented accused at this appearance	<b>61</b>	<b>72</b>	<b>22</b>	<b>9</b>	<b>21</b>	
<i>Notes</i>						
* Excludes cases for which representation was unspecified in the file.						
*** The cell contains too few cases to report a percentage.						

The Disposed Cases data largely bear out the perceptions of key informants – it was the offences with a lower probability of imprisonment on conviction (impaired driving, drug possession, public order offences, and miscellaneous criminal offences) that showed the highest rates of unrepresented accused at plea and final appearance. It was the most serious offences – homicide, sexual offences, robbery, break and enter, and drug offences other than simple possession – that had the lowest rates of unrepresented accused at plea and final appearance.

However, there is little variance seen in the rates of unrepresented accused at first appearance and bail, and perhaps surprisingly high rates of unrepresented accused for the most serious offences at these stages.

### 2.3.3 Self-representation by stage in the process

Many (but again, not all) of those interviewed indicated that representation was important not only at the trial stage. A few suggested trial was the most important, and most suggested sentencing was very important.

However, most interviewees suggested the earlier stages – initially at arrest, after charging, pre-trial release, and at plea – were the most important. Many cited the evidence and simple logic that strongly suggested that decisions made from the point of arrest and charging had significant impacts on the outcome of a case. For some decisions (e.g., bail and plea negotiations) the impact was indirect. For other decisions (e.g., plea) the impact was very direct.

It was interesting that many interviewees found themselves unable to venture an estimate of the proportions of unrepresented accused at various stages in the process, and those who did differed widely:

- At first appearance: Estimates of unrepresented accused varied from 40 to 90 percent. Most interviewees agreed that a majority of accused who were not in custody made their first – and often subsequent – court appearances without counsel.
- At bail: Interviewees noted that duty counsel was available at the bail stage for those in custody, but a few ventured that 20 to 50 percent did not avail themselves of duty counsel.<sup>10</sup>
- At plea: Estimates of unrepresented accused varied from 20 to 60 percent
- At trial: Estimates of unrepresented accused varied from 20 to over 60 percent

Figure R-3 shows that it was, in fact, at the earlier stages of first appearance and bail that accused were most likely to be unrepresented:

- Overall, over half of the accused had no representation at the first appearance and nearly three quarters had no representation at the appearance at which bail was first considered.
- The likelihood of representation (including legal aid and private counsel) increased dramatically at appearances at which a plea or election occurs – and at final appearance.
- This pattern is observed for each of the offence categories considered in Figure R-3.

These results contrast with the earlier reporting that most interviewees felt that it was at these earlier stages in the criminal process that the accused required counsel.

### 2.3.4 Socio-demographic characteristics of unrepresented accused

Unfortunately, empirical data is not collected or available to allow us to get a better understanding of the characteristics of accused who are self-represented. However, most interviewees suggested that, because so many accused did not get representation, unrepresented accused essentially reflected the overall profile of the Provincial Court’s criminal caseload – mostly male, Aboriginal, the working poor or unemployed, often with low or very low literacy levels (one interviewee suggested perhaps half of all accused were effectively illiterate; another estimated average reading levels at Grade 4 or 5), and with disordered lifestyles. Some interviewees speculated that such persons would be, variously:

- people who did not wish to disclose their finances;
- people who did not wish to pay for their own lawyer but wished to go to trial;
- people who wished to represent themselves, out of lack of trust in the criminal justice system generally;

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<sup>10</sup> Trends over 2001 in the proportions of cases represented by Legal Aid at the bail stage were analyzed in order to determine whether the duty counsel pilot project, which began in 2001, had shown “growing pains” in the earlier stages. However, no discernible pattern of differences over time was found in custodial cases represented by Legal Aid at the bail stage.

- people who wished to use their case in order to advocate a cause, such as Aboriginal hunting rights;
- people who wanted to appear in their own defence; and
- people who raised so many barriers to obtaining legal aid help that they were refused.

## 2.4 Other types of representation

### 2.4.1 Prevalence of other types of representation

Figure R-4 uses data from the Disposed Cases sample to calculate the type of representation provided by various types of counsel at each stage of the criminal process.

<b>Figure R-4. Disposed Cases: By Type of Representation by Appearance Type, Regina</b>					
<b>Appearance</b>	<b>Represented by</b>				<b>Total: All Types of Representation (including self)</b>
	<b>Self (%)</b>	<b>Legal Aid (%)</b>	<b>Private Counsel (%)</b>	<b>Appointed Counsel (%)</b>	
<b>Representation at First Three Appearances</b>					
First appearance	61	17	17	5	5322 (100%)
Second Appearance (if any)	32	43	20	6	6097 (101%)
Third Appearance (if any)	25	46	22	6	5108 (99%)
<b>Representation at Key Stages</b>					
Bail	72	19	8	1	1288 (100%)
Plea	22	49	22	8	5125 (100%)
Defence Election	9	56	34	2	815 (100%)
Final Appearance	21	50	22	7	6829 (100%)
<i>Notes</i>					
* Excludes cases for which representation information is not available.					
** Percentages may not total 100 due to rounding.					

The Figure suggests that:

- Legal Aid assisted a little under a fifth of all accused at first appearance and the appearance at which bail is considered.
- Legal Aid assisted approximately half of all accused at plea, defence elections, and final appearance.
- Private counsel assisted a significant proportion of accused at all stages other than bail – from almost a fifth of all accused at first appearance to over a third of accused at defence elections. Given the small number of legal aid certificates issued (less than 1,000 annually for the entire province), it seems apparent that most of the private bar members appearing in criminal court in Regina were privately retained and reimbursed. The relatively low incidence of private counsel appearing at bail hearings may suggest something about the economic circumstances of those who are initially detained by police.

- There was found a surprising number of cases of counsel appointed by the court, fully 7 percent of all cases at final appearance, or 479 cases. This suggests that the courts were reluctant to see as many accused unrepresented as would otherwise have occurred; and perhaps also that significant numbers of accused were so unco-operative with Legal Aid that they were ultimately turned away.

Next, Figure R-5 shows different types of representation at the final appearance, in cases where the most serious offences were charged.<sup>11</sup> It suggests that:

- The offences that had a higher frequency of Legal Aid representation were homicide, break and enter, robbery, and “other federal statutes.”
- The offences that had a lower frequency of Legal Aid representation were public order offences (such as public disturbances, prostitution and gaming), impaired driving, and simple drug possession.
- The offences that had a higher frequency of private counsel representation were homicide, sexual assaults, impaired driving, drug offences, and public order offences.
- The offences that had a higher frequency of appointed counsel representation were impaired driving, weapons offences, thefts and frauds, and “other federal statutes.”

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<sup>11</sup> The Appendix at the end of this chapter lists the types of individual offences included within each of the offence categories.

<b>Figure R-5. Percentage Distribution of Disposed Cases: Representation Status at Final Appearance by Most Serious Charge Category, Regina*</b>					
<b>Most Serious Charge Category</b>	<b>Proportion of Cases represented by</b>				<b>Number of Cases</b>
	<b>Self</b>	<b>Legal Aid</b>	<b>Private Counsel</b>	<b>Appointed Counsel</b>	
Homicide	0	69	31	0	16 (100%)
Sexual Assault	4	56	37	2	91 (99%)
Assaults excl. Common	14	51	30	5	940 (100%)
Robbery	6	66	23	5	128 (100%)
Break and Enter	10	67	20	3	437 (100%)
Impaired Driving	32	24	36	8	756 (100%)
Common Assault	23	46	24	7	572 (100%)
Drugs excl. Simple Possession	11	42	44	2	88 (100%)
Weapons Offences	17	47	27	9	97 (100%)
Thefts and Frauds	20	56	15	8	1293 (99%)
Simple Possession of Drugs	33	29	35	3	75 (100%)
Offences against Administration of Justice	23	55	15	7	1737 (100%)
Public Order	26	37	34	3	165 (100%)
Miscellaneous <i>Criminal Code</i>	34	42	17	6	221 (99%)
Other Federal Statutes	14	62	16	8	213 (100%)
<b>Total</b>	<b>21</b>	<b>50</b>	<b>22</b>	<b>7</b>	<b>6829 (100%)</b>
<i>Notes</i>					
* Excludes cases for which representation at final appearance was unspecified in the file.					

## 2.5 Impact of self-representation on the accused

### 2.5.1 Overall impact

The site visit interviews provided interesting insights and perceptions on the subject of general impacts of lack of representation on accused persons. Some interviewees were of the view that unrepresented accused suffered significant impacts from the lack of representation. However, others were of the view that unrepresented accused cases, and cases assisted through duty counsel, were resolved just as fairly as any other case, because of the efforts of judges to compensate for the disadvantages.

Among the general types of situations and impacts cited by the former, were the following:

- The fear, anxiety and confusion experienced by unrepresented accused before, during and after the court process.
- A lack of understanding of the criminal process and the consequent inability to influence it in a productive way (almost universally acknowledged as a serious problem).
- Throughout the process, accused not standing on their rights. In the words of one judge, “So many of the people we deal with don’t have a sense of entitlement, so they just accept things; OK, so you want me to plead guilty to this. ... Our only chance of getting people to stand on the rights they have is to get them a lawyer.”

- A lack of understanding of what it means to have a criminal record – which many suggested can be “devastating” in ways not anticipated; for example, with respect to immigration matters, to job applications, to rights to drive a vehicle – led to inappropriate court decisions by the unrepresented accused.
- The imposition of unworkable conditions of bail or sentence – that must then be altered, or will be violated. For instance, the accused may not understand that bail conditions apply throughout the court process, and not solely until the next appearance – or that sentence conditions may prevent the accused from performing duties required as a parent (e.g., the accused cannot take children to school if limits are placed on his or her mobility, even if a sentence is being served in the community).
- More severe sentences.

### 2.5.2 Specific strategic and tactical mistakes by the accused

As noted earlier, in the site interviews, most key informants suggested the earlier stages of the criminal process – initially at arrest, after charging, pre-trial release, and at plea – were the most important for representation. A few suggested trial was the most important stage, and most suggested sentencing was very important.

The following were among the most serious specific errors that interviewees suggested would be made by unrepresented accused *at pre-trial stages*:

- Not availing themselves of duty counsel, who could argue for their pre-trial release more effectively, obtain sureties, point out the likely outcome of the case, etc.
- Not asking for mediation or other diversion.
- Failing to understand the significance of failing to appear for court, or of adherence to conditions.
- Making damaging admissions during the early arraignment, bail, set date, and plea negotiation stages.
- “Giving up” and pleading guilty too soon to all of the original charges, and without a full understanding of the consequences – with the resultant conviction for unrepresented accused who might have had a viable defence to at least some of the charges.
- Assuming that any conditions imposed on them by the court only applied until their next appearance, resulting in violations.

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

- Making damaging admissions just before (e.g., pleading guilty at the last instant even though the Crown is missing key evidence), and at trial.
- Not learning the Crown’s case against them or preparing for it.
- Not knowing what defences were available to them.
- Not questioning witnesses and other evidence. (One judge suggested that witness statements should always be subjected to scrutiny, and that they will not be, without a lawyer.)
- Not bringing witnesses of their own.
- Not being able to fathom complex defences.



- “Raising useless arguments.”
- Not explaining the circumstances of the offence in a way that could mitigate the consequences (e.g., “the car belonged to my cousin”).
- Not mentioning mitigating circumstances in their lives (e.g., “Since the offence I have gotten a job and taken 10 hours of counseling.”).
- Not knowing the best arguments to present at sentencing.

The court observations found that, overall, the average amount of time taken per appearance was two minutes and 45 seconds. On different court days, this varied from an average of one and a half minutes to an average of just over six minutes.<sup>12</sup> Within the context of this type of time pressure, it is not difficult to understand why many of those interviewed noted that an accused without a developed understanding of court procedures would make specific mistakes – and would be disoriented generally throughout the court process.

### 2.5.3 Type of plea entered by type of representation

The previous discussion focused on the perceptions of those interviewed regarding the impacts of accused appearing before the court without representation. In this and following sections, we provide empirical evidence on what actually happened to unrepresented accused, using data on cases in the Disposed Cases file and from the appearances directly observed in court.

It is, however, important to make it clear at the outset that the information is not presented to draw causal inferences, but simply to describe the events at various stages in the process. The evidence is not presented to suggest that the lack of representation *caused*, for example, a higher (or lower) likelihood that an unrepresented accused would be convicted. Rather, it simply describes whether or not, and how frequently, significant decisions were made and certain outcomes occurred with or without the presence of counsel.

### 2.5.4 Type of plea entered by type of representation

As noted earlier, a number of interviewees raised the issue of whether or not unrepresented accused were more likely to plead guilty – for instance, to “get it over with,” or because they had neither the knowledge nor resources to contest the charges.

Figure R-6 displays the plea entered by the type of representation available to the accused.

- Eighty-one percent of all pleas were guilty pleas.
- A slightly higher percentage (86 percent) of unrepresented accused were likely to plead guilty.
- However, accused assisted by legal aid pled guilty with virtually the same frequency (85 percent) as unrepresented accused.
- Unrepresented accused pled guilty far more frequently than accused who were represented by private counsel (62 percent).

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<sup>12</sup> This included appearances by accused with private bar lawyers who simply appeared to ask for a set date for the next appearance.

- Accused with appointed counsel were more likely to plead guilty (96 percent) than unrepresented accused.

<b>Figure R-6. Disposed Cases in Which a Plea was Entered: by Type of Plea Entered by Type of Representation at Plea Appearance, Regina</b>						
<b>Plea</b>	<b>Proportion of all Pleas by or on behalf of Accused Represented by</b>				<b>Number of Cases</b>	<b>Proportion of Cases %</b>
	<b>Self %</b>	<b>Legal Aid %</b>	<b>Private Counsel %</b>	<b>Appointed Counsel %</b>		
Guilty	86	85	62	96	4130	81
Not guilty	14	15	38	4	995	19
Total Cases	100	100	100	100	5125	100
<i>Notes</i> * Excludes cases for which representation at plea was unspecified in the file.						

This overall pattern held true across most individual offence categories. However, for sexual offences and robbery, the guilty plea rate for unrepresented accused was considerably lower than that for accused who were represented by Legal Aid staff lawyers. For impaired driving, the reverse was true.

### 2.5.5 Conviction or not by type of representation

Conviction rates are examined in terms of representation at two stages of the court process – at appearances at which the plea was entered (containing more dispositions by way of guilty plea) and at final appearances (containing a higher proportion of cases that went to trial).

Figure R-7 shows the conviction rates for cases by the type of representation at plea. The data suggest that:

- Overall, 86 percent of cases in which a plea is entered were convicted.
- Cases represented by appointed counsel at plea had the highest conviction rates, 96 percent.
- Rates of conviction for cases unrepresented or represented by Legal Aid at plea were virtually identical (at 88 percent and 89 percent, respectively).
- Rates of conviction for accused represented by private counsel at plea (other than appointed counsel) were significantly lower (73 percent) than those for accused with other types of representation at plea.

An analysis of conviction rates by representation at plea appearance – separately for different offence categories – showed that this overall pattern held across offence groupings, with the exception that accused who were self-represented at plea, and who were charged with offences against the administration of justice, had a slightly lower conviction rate than did accused who were represented by Legal Aid staff lawyers (88 percent versus 93 percent).

<b>Figure R-7. Disposed Cases by Type of Disposition by Type of Representation at Plea Appearance, Regina</b>						
<b>Disposition</b>	<b>Proportion of Dispositions for Accused Represented by</b>				<b>Number of Cases</b>	<b>Proportion of Cases %</b>
	<b>Self %</b>	<b>Legal Aid %</b>	<b>Private Counsel %</b>	<b>Appointed Counsel %</b>		
Convicted*	88	89	73	94	4399	86
Not Convicted**	12	11	27	6	726	14
Total Cases	100	100	100	100	5125	100
<i>Notes</i>						
<i>Pleas are not entered in cases in which all charges are withdrawn or stayed.</i>						
<i>* Includes guilty verdict and peace bond ordered.</i>						
<i>** Includes not guilty and discharges.</i>						

Figure R-8 shows similar information, but, instead, analysis is done using representation at final appearance. Different results are possible for a number of reasons. First, accused who were unrepresented at plea may have retained private counsel or had Legal Aid assist them later in the court process. To the extent that those with weaker cases would retain counsel, the conviction rates of unrepresented cases would go down, and the conviction rates of cases with counsel would be higher. However, an even more important reason for lower conviction rates showing in Figure R-8 – in cases with all types of representation – was that pleas were not likely to be entered in cases stayed or withdrawn by the Crown – a not insignificant proportion of cases. The inclusion of such cases in Figure R-8, but not in Figure R-7, would be expected to have a significant impact on the percentages shown in the Figures.

In fact, when all disposed cases are considered (i.e., not only those in which a plea was entered), overall, 69 percent of cases resulted in convictions:

- Cases represented by appointed counsel at last appearance again had the highest conviction rates, 78 percent.
- Rates of conviction for unrepresented accused and accused represented by Legal Aid were identical (at 70 percent).
- Rates of conviction for accused represented by private counsel (other than appointed counsel) were, again, lower (62 percent) than those for cases with other types of representation.

One should, however, note that, in comparing conviction rates for self-represented accused with those for represented accused, one should take into account the likely impact of post-charge and pre-court process “diversion” on these conviction statistics. Accused who were diverted (e.g., to the RAMP program in Regina) were extremely likely to not have a lawyer. Given that successful completion of the diversion program would result in non-conviction, the existence of a diversion program would be expected to result in lower overall conviction rates for self-represented cases (with little if any impact on conviction rates for represented case). Unfortunately, data were not available on which cases were diverted or even the percentage of cases that were diverted, and, therefore, we cannot say what the conviction rate would be for unrepresented accused who were not diverted. However, it is safe to say that the rate for non-diverted, non-represented accused would be higher than the 70 percent shown in Figure R-8.

Next, further analysis of conviction rates by representation at final appearance, according to individual offence categories, shows that, for many offence groupings, the above overall pattern did not hold. The following exceptions were seen:

- Rates of conviction for unrepresented accused were higher than for accused represented by Legal Aid at last appearance, where the accused was charged with public order offences (86 percent vs. 74 percent).
- Rates of conviction for unrepresented accused were considerably lower than for accused represented by Legal Aid at last appearance, where the accused was charged with break and enter and assaults other than common assault (55 percent vs. 81 percent, and 55 percent vs. 69 percent, respectively).

**Figure R-8. Disposed Cases:  
 By Type of Disposition by Type of Representation at Final Appearance, Regina**

Disposition	Proportion of Dispositions for Accused Represented by				Number of Cases	Proportion of Cases %
	Self %	Legal Aid %	Private Counsel %	Appointed Counsel %		
Convicted*	70	70	62	78	4706	69
Not Convicted**	30	30	38	22	2123	31
Total Cases	100	100	100	100	6829	100

*Notes*  
 \* Includes guilty verdict and peace bond ordered.  
 \*\* Includes not guilty, withdrawn, dismissed, stayed, and discharges.

Earlier, we cautioned against using these data to imply a causal connection between type of representation and conviction rates. However, given the impact of having a criminal record (on employment opportunities, and the likelihood of being charged with further offences, etc.), the data can definitely be used to show that unrepresented accused are very likely to experience serious negative impacts as a result of the court process. Whether or not that possibility alone is sufficient to call for greater availability of legal representation is a matter of public policy.

### 2.5.6 Custodial sentence and type of representation

Figure R-9 extends the analysis by showing the proportions of cases receiving a custodial sentence, according to the type of representation available to the accused at the plea appearance.<sup>13</sup>

From that Figure, one sees that:

- Overall, 28 percent of cases in which a plea was entered resulted in a custodial sentence.
- Cases represented at plea by Legal Aid were (as the seriousness criterion would suggest) more likely to result in a custodial sentence (36 percent).
- Slightly more cases represented by private counsel resulted in a custodial sentence (23 percent) than did unrepresented cases (21 percent).

<sup>13</sup> The percentages shown in this and the next table are based on the total numbers of cases – whether or not the cases resulted in a conviction. This choice was made to address the question of risk to a person entering the court system. If one were, instead, interested in the risks of receiving a custodial conviction after being convicted, then one should recalculate the percentages using the number of persons convicted as the base for the percentages.

- Cases represented by appointed counsel were least likely to result in a custodial sentence (10 percent).

An analysis of the likelihood of receiving custodial sentences by representation at plea – according to individual offence category – shows that this overall pattern held across offence groupings, with the exception that accused who were self-represented at plea, and who were charged with break and enter, were more likely to receive a jail term than those represented by Legal Aid (57 percent vs. 35 percent); and self-represented accused who were charged with assaults fared moderately better than those represented by private counsel (18 percent vs. 24 percent); while those charged with offences against the administration of justice fared worse (29 percent vs. 21 percent).

<b>Figure R-9. Percentage Distribution of Disposed Cases by Whether or not Custodial Sentence Received by Type of Representation at Plea Appearance, Regina</b>						
Sentence	Represented by				Number of Cases	Proportion of Cases %
	Self %	Legal Aid %	Private Counsel %	Appointed Counsel %		
Custodial Sentence	21	36	23	10	1431	28
No Custodial Sentence	79	64	87	90	3694	72
Total Cases	100	100	100	100	5125	100
<i>Notes</i>						
<i>Source: Disposed Cases Sample</i>						

Figure R-10 shows the distribution of custodial sentences for cases by representation at final appearance (which contains additional cases in which a plea was not entered):

- Overall, 22 percent of disposed cases resulted in a custodial sentence.
- Legal Aid cases were (as the seriousness criterion would suggest) more likely to result in a custodial sentence (27 percent).
- Unrepresented accused and accused represented by private counsel had very similar rates of custodial sentences (16 percent and 18 percent, respectively).<sup>14</sup>
- Cases with appointed counsel were least likely of all to result in a custodial sentence (8 percent).

An analysis of custodial sentences by representation at final appearance, according to individual offence category, shows that this overall pattern held across offence groupings – with the exception that self-represented accused who were charged with impaired driving, or assaults other than common assault, were less likely to receive a jail term than those represented by private counsel. The imprisonment rates for thefts and frauds and break and enter were virtually identical across all types of representation at last appearance.

<sup>14</sup> The differences in these results and those based on cases in which a plea was entered can be found in differences – by type of representation – in the likelihoods of having all charges in a case withdrawn or stayed (the latter cases would appear in tables considering all last appearances, while they would not appear in tables considering only cases in which a plea was taken).

<b>Figure R-10. Percentage Distribution of Disposed Cases by Whether or Not Custodial Sentence Received by Type of Representation at Last Appearance, Regina</b>						
<b>Sentence</b>	<b>Represented by</b>				<b>Number of Cases</b>	<b>Proportion of Cases %</b>
	<b>Self %</b>	<b>Legal Aid %</b>	<b>Private Counsel %</b>	<b>Appointed Counsel %</b>		
Custodial Sentence	16	27	18	8	1472	22
No Custodial Sentence	84	73	82	92	5357	78
Total Cases	100	100	100	100	6829	100
<i>Notes</i>						
<i>Source: Disposed Cases sample.</i>						

Again we caution against using these data to imply a causal connection between type of representation and likelihood of receiving a custodial sentence. However, the results are directly relevant from another important perspective. Specifically, it might be accepted that eligibility for legal aid should depend (in part) on the likelihood of a case receiving a custodial sentence. Although one cannot expect to predict with total accuracy whether a case will result in a custodial sentence, it is relevant that custodial sentences are received by more than one in 10 self-represented accused – and by more than one in five accused who are self-represented at plea.

## 2.6 Further impacts of lack of representation

### 2.6.1 Impacts on court officers and others

#### *a Legal Aid staff – and, especially, duty counsel*

Interviewees were unanimous in stating that the representation provided by Legal Aid staff was of good quality, because of the experience of staff lawyers and their dedication to the work. However, virtually all interviewees agreed that staff lawyers did not have enough time – sometimes only “moments” – to prepare a case. Some interviewees stated that Legal Aid staff were “run off their feet” – literally, as one service agency worker described running beside staff lawyers while discussing a case. Duty counsel schedules were variously described by Crowns as “hairy,” “a frenzy,” and “nuts.”

Several interviewees suggested that Legal Aid clientele did not share the same high opinion of Legal Aid as did professionals. Clientele had cited, to these persons, numerous complaints about service, including:

- Delays in getting a first appointment, including lineups outside Legal Aid offices in the morning before offices open, and hours spent waiting.
- Messages machines that were frequently full.
- Messages returned days later or “too late.”
- Alleged pressure to plead guilty.
- The inevitable diminution of respect for a service that was “free.”

#### *b Crown attorneys*

At stages before trial, a number of groups interviewed indicated Crowns would be put in an awkward position when unrepresented accused wished to discuss their case with Crowns. Although Crowns

were not unanimous in their assessment of the magnitude of the problems, among the difficulties which they noted were:

- A higher number of remands ordered by the judge to enable the unrepresented accused to get a lawyer (more remands than in represented cases) – with more court appearances meaning greater workloads for all those connected with the court.
- Reviewing the disclosure packet in order to ensure victims and witnesses were not placed in any danger.
- Being unable to agree with unrepresented accused on narrowing the issues by settling on which evidence can be stipulated.
- Attempting (where time was available) to suggest defences, Charter arguments, and arguments to be used at sentencing.
- Trying to resolve a case quickly – more difficult to do when the accused had no counsel and Crown was barred from giving advice to the accused.
- Ensuring that unrepresented accused did not inadvertently reveal to the Crown something that could be used against them.

### *c Judges*

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

### *d Courtworkers*

Native Courtworkers were troubled by the inadequacies they saw in the system, and the eagerness of too many Aboriginal defendants to plead guilty “to get it over with.” They may advise unrepresented accused not to plead guilty if they did not “feel guilty,” or if a defence seemed available, but, subsequently, many unrepresented accused would fail to appear at trial or just plead guilty on the day of trial.

### *e Court administrative personnel*

Clerks at the registrar’s counter indicated that each of them handled perhaps 10-to-15 inquiries per day from accused who needed questions answered. “Most” of these were either unrepresented impaired driving cases or represented accused who couldn’t remember who their counsel was or what date they were to appear. Clerks also spent time with accused persons explaining to them the conditions of their bail, although duty counsel also assisted in this.

### *f Court security*

Sheriff's staff at the courthouse reported that problems related to unrepresented accused were very rare. Legal Aid staff normally arrived to speak to persons who were brought into custody within one or two hours of being contacted. The bigger problem faced by security staff was with cases that were represented, where the defence lawyer did not communicate effectively with security staff as to whether, and when, the accused in custody needed to be brought into court from the court cells.

### *g The justice system overall*

Some of the people interviewed suggested that unrepresented accused ultimately increased the workload of the criminal justice system, not just because of additional appearances, postponements and delays – but also because unrepresented accused were more likely to be convicted, to re-appear in court, and to be sent to jail – all of which slowed down processes and provided more work for the police, corrections and all other parts of the justice system.

## 2.6.2 Overall impacts on court operations

### *a Court workloads: Length and nature of individual appearances*

#### *Length of appearances*

In most provincial criminal courts in Canada, only 4-to-10 percent of cases go to trial. The overwhelming majority of appearances for cases are therefore not trials – and, as noted earlier, in Regina (as in other courts), these appearances are typically in the order of one or two minutes per case. What would, in other situations, seem a very minor increase in the time taken to perform a function at a case appearance, can therefore represent a major increase in judicial, Crown, legal aid, defence counsel and court administration workloads – proportionally and in total.

Our Court Observation data did indicate concern that the unrepresented accused be aware of the opportunities and benefits of having a lawyer – and the expression of that concern did extend the time taken for individual court appearances.

In nearly one third (32 percent) of the appearances, a comment concerning representation was made by either the judge, the accused, the Crown, or duty counsel. In 28 percent of the appearances, the judge asked the accused about his or her representation status or instructed the accused to get a lawyer or apply for legal aid. If asked about his or her representation status, the accused would typically say that s/he wished to have a lawyer, or was in the midst of applying for or getting one, whereupon the judge might ask the Crown what kind of sentence would be sought in the event of a conviction. If the Crown indicated that a jail term would not be sought, the judge might then have informed the accused that s/he was unlikely to receive legal aid for that reason. The accused might have indicated s/he would still like to apply, and the matter was put over for six weeks to allow that process to unfold. In three percent of appearances observed, the judge asked duty counsel to assist the accused and, in one percent, the judge asked a Native Courtworker to assist the accused.

Not all interviewees agreed that trials involving unrepresented accused took longer than those of represented persons. Those who did not, said that unrepresented accused had no idea what questions to ask and did not think to call witnesses or present important arguments in their defence. Virtually all seemed to agree, however, that trials with unrepresented accused were “painful,” “a nightmare.”



Those who believed that unrepresented accused trials took longer, suggested that unrepresented accused would, at trial, delay the proceedings by:

- failing to understand the lengthy explanations that must be made at each stage, often winding up more confused than before the explanation;
- refusing to make admissions of evidence that an experienced lawyer would make; and/or
- “droning on forever.”

*With respect to appearances prior to trial*

To create our Direct Court Observation file, the court observer sat in Courtroom 1 or 2 (non-trial courts) and captured the time taken by each case/appearance. The results speak directly to the issue of whether appearances of self-represented accused (in the appearances prior to trial) were longer or shorter than those with other types of representation.

As shown in Figure R-11, in the first-appearance/docket courts – overall, using the typical or median case as the measure – there were no differences in the length of appearances, according to whether the accused was unrepresented or represented by Legal Aid staff or private counsel. For the quarter of cases that took the longest, cases represented by duty counsel were longer, followed by self-represented cases and, then, by those represented by private counsel. (Differences were in the order of one minute.)

An attempt was also made to differentiate between case/appearances that resulted in a remand or a final disposition. Unfortunately, too few case/appearances were present in the database to consider the latter. However, as shown in Figure R-11, of case/appearances that resulted in a remand, those in which the accused was self-represented and those represented by Legal Aid staff lawyers were of the same length (median time, 120 seconds), and appearances by those represented by private counsel were shorter (90 seconds).

<b>Figure R-11. Case/Appearances: Distribution of Time (seconds) for different types of Case/Appearances by Type of Representation , Regina</b>				
<b>Appearance Number at which Plea was Entered</b>	<b>25th/ median/ 75th percentile times for case/appearances represented by</b>			
	<b>Self</b>	<b>Legal Aid Staff</b>	<b>Private Counsel</b>	<b>All Types of Represent- ation*</b>
<ul style="list-style-type: none"> <li><b>All appearances in first-appearance/ docket courts</b></li> </ul>	25th = 60 50th = 120 75th = 240 (n= 141)	60 120 300 (n=31)	60 120 180 (n=12)	60 120 240 (n=201)
<b>By Result of Appearance</b>				
<ul style="list-style-type: none"> <li>Remanded or Stood Down</li> </ul>	25th = 60 50th = 120 75th = 240 (n= 125)	60 120 300 (n= 28)	60 90 180 (n=10)	60 120 240 (n=177)
<ul style="list-style-type: none"> <li>Final</li> </ul>	25th = 75 50th = 210 75th = 465 (n=16)	***   (n=3)	***   (n=2)	135 330 525 (n=24)
<i>Source: Direct Court Observation file.</i> * Totals for all types of representation includes agents, Courtworkers and clinics. *** Less than 10 case/appearances.				

Another factor that would add to the time taken by a case on a court docket would be the process of “standing down” a case to later in the day to complete consideration of any matters that day. In fact, our court observer only rarely saw a case being stood down (only 13 in 297 case appearances). Comparisons among cases with different types of representation would therefore be irrelevant.

*Events occurring at individual court appearances*

The court observation data also yielded some information about how many appearances were “productive,” in the sense that they resulted in decisions on (or, at least, consideration of) one or more of three matters: namely bail, plea, and elections. Figure R-12 shows the breakdown of courtroom events (or non-events) according to representation status at last appearance. The columns in the left half of the table show data for “interim” (i.e., non-final) appearances. The columns in the right half of the table show data for final appearances.<sup>15</sup>

With respect to interim appearances, one of the most striking observations is that, overall, interim appearances in a case were most likely *not* to involve consideration of bail, elections, or the entering of a plea (see column 2 – “no decision”) if the accused was represented by a private lawyer (90 percent), and least likely not to involve such a decision if the accused was represented by duty counsel (24 percent).<sup>16</sup>

<sup>15</sup> The Figure omits three cases in which the accused’s representation status was unclear to the court observer.

<sup>16</sup> These figures may reflect the high number of cases in which duty counsel represent in-custody cases at their bail hearing.

**Figure R-12. Court Observation Data: Percentage Distribution of Cases/ Appearances:  
 by Accused’s Representation Status by Type of Decision Made  
 and Case Status (Interim or Final Appearance), Regina**

Representa- tion Status	Type of Decisions at Interim Appearance (Remanded or Stood Down)					Type of Decisions at Final Appearance			
	*No deci- sion  %	Bail decision consid- ered  %	Plea entered and/or election made  %	Bail, election and plea enter- ed  %	Total number of cases	Guilty verdict or peace bond  %	Order varied or commit- ted for trial  %	With- drawn, dis- missed, not guilty, discharge  %	Total number of cases
Self	45	30	24	1	138 (100%)	69	0	31	16 (100%)
Duty counsel	24	55	3	17	29 (100%)	50	50	0	4 (100%)
Private lawyer	90	10	0	0	80 (100%)	31	8	62	13 (100%)
Other**	50	7	43	0	14 (100%)	33	66	0	3 (100%)
<b>Total</b>	<b>57</b>	<b>25</b>	<b>15</b>	<b>3</b>	<b>261 (100%)</b>	<b>50</b>	<b>14</b>	<b>36</b>	<b>36 (100%)</b>

*Notes:*  
 \* Bail was not considered, no elections were made by either Crown or defence, and no plea was entered.  
 \*\* Agent, clinic, or Native Courtworker assistance.

Almost half (45 percent) of the interim appearances by self-represented accused also resulted in “no decision:” (i.e., no plea, election or bail decision, or consideration for bail). Another quarter (24 percent) resulted in a plea being entered or an election made. In cases in which duty counsel was in assistance, only 3 percent of appearances resulted in a plea being entered or an election being made, but in another 17 percent, all three decisions were made at once (bail, election and plea), suggesting that duty counsel tended to expedite matters.

With respect to final appearances (i.e., the right-most columns in Figure R-12), the number of such appearances observed was small – only 36 in total. No conclusions can be drawn from these scant data, but they suggest an interesting line of future inquiry regarding the value of having counsel to try to obtain a dismissal, a not guilty or other favourable verdict.

*b Workloads: Number of appearances per case*

Some interviewees suggested that court schedules appeared, at earlier stages at least, to be driven by time delays built into the legal aid application, approval and access system. Some interviewees were also of the view that there was a certain segment of the accused population who were aware of the delays inherent in the legal aid process, and who took advantage of these delays in order to obtain successive postponements of their cases. (The reverse phenomenon was also seen – of accused who “just wanted to get it over with,” and pled guilty with or without the assistance of counsel.) Multiple postponements for accused who were unrepresented were common, as some judges postponed the proceedings in hopes the accused would obtain counsel. Such appearances were costly for the courts and its officers. After a number of unproductive appearances, some judges attempted to move the process forward by decreasing the length of remands to get counsel.

*Reasons for remands at early appearances*

The Direct Court Observation file provided information to at least initiate an exploration of the reasons for remands – and the results showed that in one sixth of the cases (16 percent), the reasons for granting remands were related to obtaining counsel.

*Appearances before a plea is entered*

A second direct indicator of the workloads caused by – and resources required to deal with – self-represented cases is the appearance number at which key activities take place. Figure R-13 begins by showing the appearance number at which the plea was entered for accused who had various types of representation.

The data suggest that self-represented accused, in general, *did not* generate more appearances before entering a plea:

- There was a significant group of unrepresented accused who pled guilty early in the process. – these data suggest half the self-represented accused entered a plea at the first or second appearance, and at least one quarter entered a plea at the first appearance. (This may be because – as suggested by interviewees – many unrepresented accused pled early “just to get it over with.” However, there may be other explanations for this phenomenon.)
- Self-represented accused entered their plea at an earlier appearance than accused who had counsel of any type at the plea appearance. Half the accused represented by Legal Aid or private counsel at plea did not enter a plea until the fifth appearance or later.
- A quarter of the accused represented by Legal Aid or private counsel at plea did not enter a plea until the ninth appearance or later.

<b>Figure R-13. Disposed Cases: Distribution of Appearance Number at Which Plea was Entered by Type of Representation at Plea Appearance, Regina</b>					
<b>Appearance Number at which Plea was Entered</b>	<b>Represented by</b>				<b>All Types of Representation</b>
	<b>Self</b>	<b>Legal Aid</b>	<b>Private Counsel</b>	<b>Appointed Counsel</b>	
25th Percentile	1	3	4	3	3
Median	2	6	6	4	5
75th Percentile	5	9	9	7	8
95th Percentile	11	16	15	14	15
Total Cases	1101	2500	1142	382	5125
<i>Notes</i> * If plea was entered at more than one appearance, last appearance at which plea was entered is shown.					

*Total number of appearances before disposition*

Figure R-14 shows the total number of appearances in the case – according to representation type at last appearance. The data suggest that self-represented cases *did not* require more court appearances overall. More specifically:

- Accused self-represented at the last appearance made fewer appearances in total than did accused with representation at last appearance.
- Half the accused unrepresented at last appearance made only one or two appearances, as compared to five or fewer by accused represented at last appearance by Legal Aid or private counsel.

- A small minority of cases resulted in an extraordinary number of appearances – five percent of the accused unrepresented at last appearance appeared 10 or more times in the case, and five percent of the accused represented by Legal Aid and private counsel at last appearance made 15 or more appearances.

**Figure R-14. Disposed Cases: Distribution of Number of Appearances in Case by Type of Representation at Last Appearance, Regina**

Number of Appearances	Represented by				Total: All Types of Representation
	Self	Legal Aid	Private Counsel	Appointed Counsel	
25th Percentile	1	3	3	3	3
Median	2	5	5	4	5
75th Percentile	5	9	9	7	8
95th Percentile	10	15	15	14	15
Maximum	25	41	36	32	41
Total Cases	1423	3443	1514	449	6829
<i>Notes</i>					
<i>Source: Disposed Cases sample.</i>					

*c Elapsed time for cases to resolve*

The Disposed Cases sample also yielded information about the time elapsed between the first and last appearance. This information is important from a due process perspective – however, that perspective yields two potential hypotheses: first, “Justice delayed is justice denied,” and second, “Justice rushed is justice crushed.”<sup>17</sup> The first concern is relevant to those who feel that delays in obtaining legal representation adversely affect the fairness of the court process and the final outcome. The second concern is especially relevant to those concerned that unrepresented accused may plead out the case early “to get it over with,” or because they are not aware of viable legal defences.

As shown in Figure R-15:

- As noted above, cases self-represented at last appearance made fewer appearances, and this was reflected in such cases taking less time between first and last appearance (75 percent of cases completed within 24 weeks) – as compared to cases represented at last appearance by Legal Aid (75 percent of cases not completed until 40 weeks have elapsed).
- Cases represented by private counsel at last appearance took more time to be resolved (75 percent of cases not completed until 46 weeks have elapsed) than did unrepresented cases, Legal Aid cases, or appointed-counsel cases.
- A quarter of all cases took nine months or more to be resolved.

<sup>17</sup> The latter phrase was first suggested to one of the authors by a widely respected colleague, Carl Baar.

<b>Figure R-15. Distribution of Time (in weeks) Between First and Final Appearance by Type of Representation at Final Appearance, Regina</b>					
	<b>Time (in weeks) between First and Last Appearance when Represented by</b>				<b>All Types of Representation</b>
	<b>Self</b>	<b>Legal Aid</b>	<b>Private Counsel</b>	<b>Appointed Counsel</b>	
25th Percentile	0	4	9	3	3
Median	4	15	25	8	14
75th Percentile	24	40	46	20	37
95th Percentile	89	105	91	82	99
Maximum	412	621	454	443	621
Total Cases	1423	3443	1514	459	6829
<i>Notes</i>					
<i>Source: Disposed Cases sample.</i>					

## 2.7 Overall conclusions

### 2.7.1 Key overall findings

Our key findings with respect to the key questions raised by the study include:

*With respect to frequency of self-representation*

- There is a significant number of accused who proceed through key parts of the criminal court process without the benefit of legal representation.

*With respect to impact*

- Interviews with key officials strongly suggest that the unrepresented accused (especially those with little prior experience in the court system) are less likely to be aware of the legal remedies available at key stages in the process – and are unlikely to understand many key decisions and events in the process.
- The evidence is insufficient to conclude whether or not self-represented accused are more likely to be convicted or to receive harsher sentences.
- A significant number of unrepresented accused suffer serious penalties or deprivations of liberty as a result of their court case. Some 70 percent receive a criminal record, and a smaller, but still significant number (one unrepresented accused in every six) receive a custodial sentence.<sup>18</sup>

<sup>18</sup> Granted, percentages of similar magnitudes (also) apply to cases with different types of representation. However, this does not detract from the importance of the sizeable percentages that apply to unrepresented accused.

## 2.7.2 General reasons for current unrepresented accused situation.

Interviewees who were able to speculate on the subject suggested the following key reasons for the unrepresented accused situation in Regina (not all were mentioned or agreed to by all):

- The financial eligibility and coverage restrictions on legal aid, which are applied strictly and effectively, exclude the working poor and those who are not likely to receive a jail term.
- Resource restrictions on legal aid, which led most interviewees to suggest Legal Aid staff were either “overburdened” or “overwhelmed.” Other terms used were “swamped,” “out of this world,” “basic service,” and “very minimal service.”
- Some factors are perceived to be related to the accused, or the interaction between the accused and the system, e.g.:
  - The lack of trust of the legal aid system as a whole among some potential clients – whether based in rumour, or experience, or perceived racism within the justice system, generally – leads some accused to “go it alone,” especially at the bail stage.
  - Delays in the legal aid approval process prompt some accused to seek multiple postponements, in hopes that the case against them will deteriorate in the weeks and months before they are forced to obtain a lawyer or enter a plea.
  - Other accused react to the experience by choosing simply “to get it over with” by pleading guilty, with or without legal advice.
  - The disordered lifestyles of many potential Legal Aid clients work against their ability to make and keep appointments, or produce the documentation they need to qualify for legal aid, or work co-operatively with their counsel.

## 2.7.3 Solutions suggested by those interviewed in Saskatchewan

Among the solutions offered by individual interviewees were the following (not suggested by or agreed to by all):

- Expansion of the duty counsel system. Most interviewees who spoke to the issue suggested that a more “complete” or better resourced duty counsel system was needed – to include all first appearances, to allow more time for each case, to see prisoners who are brought into custody on weekends, etc.
- Expansion in legal aid resources. Some said an “enormous expansion” was needed – in order to increase the numbers of staff lawyers, reduce waiting periods for the application and service delivery processes, give staff lawyers more time for each case, and resolve cases earlier, thereby reducing backlogs
- Expansion of legal aid resources would also reduce the pressure on duty counsel – and on other participants in the court system – to get guilty pleas to reduce workloads and backlogs.
- More use of certificates and the private bar. A few suggested a wholesale shift to a certificate system, while others suggested a mixed system like Manitoba’s. That was considered, by those who suggested it, to hold promise for increasing the number of cases that would be defended more vigorously; reducing the number of unwarranted guilty pleas; and expanding the number of members of the bar with experience in criminal law.

- Relaxation of the legal aid financial eligibility criteria, to assist more of the “working poor.”
- A contribution system for helping to defray the cost of private counsel, or to make more accused eligible.
- Broadening of the coverage criteria to assist cases that are not “jail-bound.” Some suggested legal aid should be granted to all accused who are charged with an indictable offence; who state that they are not guilty of the charges; who have a mental impairment, etc.
- More vigorous screening (triage) of cases for legal aid in order to determine which cases require a defence.
- Better telephone and in-person access for duty counsel and other lawyers to prisoners at the Correctional Centre.
- Easier (e.g., more legible, electronic) access to disclosure for Legal Aid staff. Concurrent disclosure to both Crown and duty counsel was also suggested to move the case forward.
- Expansion of diversion opportunities.
- Better court management procedures, including agreement by all upon the following:
  - Requiring Crowns to familiarize themselves with the case earlier in the process and present their best offer in the case at the first opportunity.
  - Requiring the same judge to stay with a case after first appearance.
  - Emphasizing the critical importance and pivotal role of duty counsel and legal aid service at early stages, more so than at the trial stage.
- More training for judges in how to deal with unrepresented accused.
- Merger or, at the least, better co-ordination of the work of Legal Aid staff and Native Courtworkers.



**APPENDIX A**  
**Supporting Materials**

**OFFENCE CATEGORIES AND INCLUDED OFFENCES**

<b>Code</b>	<b>Grouping Name</b>	<b>Includes</b>
1	Homicide	Any event resulting in death – includes murder (including attempts and conspiracies to commit murder), manslaughter, infanticide, criminal negligence causing death, dangerous operation of a motor vehicle causing death, impaired driving causing death, explosive causing death, etc.
2	Sexual Offences	Sexual assaults, sexual interference, sexual exploitation, incest, invitation to sexual touching, procurement of minor for sexual purpose, child pornography.
3	Assaults excluding common assault	Non-sexual assaults excluding common assault: causing bodily harm, discharge firearm with intent, criminal negligence causing bodily harm, utter threats, hit and run, dangerous driving, kidnapping, abduction, forcible confinement, hostage-taking, criminal harassment, abandoning child, failure to provide necessities of life, arson, explosives.
4	Robbery	Robbery, robbery with violence, robbery with weapon, extortion, forcible entry, hijacking.
5	Break and Enter	Break and enter, unlawfully in dwelling-house, trespass, possess housebreaking instruments.
6	Impaired Driving	Impaired driving, driving with more than 80 mg. blood-alcohol, refusing to provide breathalyzer sample.
7	Common Assault	Common assault – summary offence.
8	Drugs excluding simple possession	Trafficking, importing, production, sale, laundering of drug proceeds.
9	Weapons	All weapons offences except s.244 (discharge firearm with intent). Includes possession of prohibited or unregistered restricted weapon or in place elsewhere than registered, concealed weapon, pointing a firearm, careless use, unsafe storage, altering a weapon, use of weapon in offence, etc.
10	Thefts and Frauds	Theft, fraud, mischief, possession of stolen property, forgery, uttering forged document, taking motor vehicle without consent, counterfeiting, laundering of proceeds of crime.
11	Simple possession of drugs	Possession of restricted, controlled or prohibited drugs.
12	Administration of Justice	Resist arrest, failure to appear/attend, failure to comply, breach of recognizance or other court order, escape custody, obstruct justice, public mischief.
13	Public Order	Cause a disturbance, bawdy house, living off avails of prostitution, soliciting, gaming, bookmaking, disorderly house, indecent act, vagrancy, common nuisance.
14	Miscellaneous <i>Criminal Code</i>	Undifferentiated attempts, conspiracies, aiding and abetting.
15	Other Federal Statutes	Other federal statutes.
16	Provincial or Municipal Laws	Provincial statutes, municipal by-laws, <i>Liquor Act</i> , traffic (except those traffic offences in Homicide and Assault).



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## Chapter 3: Halifax, Nova Scotia

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### 3.1 Objectives, format and methodology

#### 3.1.1 Objectives

The Department of Justice and the Federal/Provincial/Territorial Permanent Working Group on Legal Aid engaged the research team to measure:

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

A brief overview of the full national study – covering nine court sites – has been presented in Chapter 1. The methodology for the Halifax part of the national study followed a strategy for data collection and site visits similar to that followed in the other sites.

#### 3.1.2 Report format

The findings for Halifax are presented in seven sections.

- Section 1* outlines the objectives of the study, describes the format of the report, and discusses the methodology used to collect information.
- Section 2* provides important contextual information for interpreting the findings of the report. Special attention is given to key characteristics of the community, the court, legal aid, duty counsel and disclosure.
- Section 3* describes how frequently self-represented accused appear at different stages of the court process.
- Section 4* explores the frequency with which accused persons have other types of representation, and how those frequencies vary at different stages of the court process.
- Section 5* focuses on the important impacts of self-representation on the accused. The section discusses both perceptions provided from our interviews and empirical evidence from data especially collected for the project.
- Section 6* then describes other significant impacts due to the presence of unrepresented accused – on the key groups involved in the courts (e.g., legal aid, duty counsel,

Crown attorneys, judges and court personnel) and on court operations (including: court workloads and time to deal with and dispose of cases).

*Section 7* completes the report with key overall findings and solutions that have been suggested by those interviewed in Halifax.

### 3.1.3 Methodology

The methodology involved data collection and site visits. Information was available on the question of unrepresented accused from three sources:

- **Key Person Interviews.** These were conducted with over 20 key informants (judges, Crowns, Legal Aid staff and management, court administration and court clerks, private bar members, local service agencies, etc). Interviews were from 30 minutes to one hour, covered all aspects of the study, and most were conducted by two interviewees. The anonymity of those interviewed was ensured.
- **Direct Court Observation sample.** A local person with extensive experience in the Halifax court was hired to sit in court and directly observe and record information on the events and decisions that occurred in 223 case court appearances over a period of ten days. Those observations took place in first appearance/arraignment/docket court (Courtroom number 1) in May of 2002.<sup>19</sup>
- **A Disposed Cases sample,** a file consisting of data on each of the 8,266 count/defendant/appearances involved in the 2,323 appearances associated a sample of 509 disposed cases<sup>20</sup> that involved a *Criminal Code* offence or violation of another federal statute, and were disposed in the period September 2001 through May 2002.
  - The file was constructed by combining data manually coded from court records (informations and reporters' notes) and data especially extracted from the court automated information system (JOIS).
    - Since, in the past, the court in Halifax had not systematically recorded the type of legal representation at each case/appearance into the automated information system (JOIS), it was necessary to hire a local person knowledgeable in court administrative procedures to perform a manual search of court records, and to record – for each of the 8,266 count/appearances associated with the 509 disposed cases – the type of representation data that was available from those manual records.
    - The original data from JOIS was provided in three separate tables. One contained data on events and decisions that were taken at each of the 8,266 individual count/defendant appearances (e.g., date of appearance, plea, bail, reason for appearance). The second contained data on each of the 509 case/defendants (e.g., date of birth and number of prior convictions). The last contained data on each of the 1,761 separate offences charged in the 509 cases (e.g., offence type, disposition and sentence). Information from these three data files was combined for specific cases

<sup>19</sup> Trials were not included in this part of the data collection.

<sup>20</sup> For the Disposed Cases sample, a “case” is defined as the collection of all counts on all charges for which a particular offender had his or her first court appearance in the same courtroom on the same day. Note that this definition of a “case” may or may not be identical to that used by other reports from the courts in Halifax or from other sources such as the Canadian Centre for Justice Statistics.

by the researchers, using common identifiers that were contained in each file (e.g., the case identifier and the defendant's name).

- The manual and automated data were then combined into the Disposed Cases sample.

In all parts of the project, we received excellent co-operation and assistance from all those we asked to participate in the study. We also gratefully acknowledge the very able assistance and expertise of the two Haligonians who assisted in observing in court and in creating the Disposed Cases file from manual and automated court records.

### **3.2 Context of the court and legal aid**

One of the major conclusions – supported from data from all sites – was that data on the extent of legal representation in a particular court cannot be interpreted out of context of (at least):

- The type of community served (including the nature of accused persons brought before the court).
- The resources and management and operations practices in place in the courts.
- Legal aid policies and practices, and especially those relating to duty counsel.
- The policies and practices of all of the other key participants in the court process – including the judiciary, the police, the Crown attorneys, court workers, court administrative officials, the private bar and other supporting agencies.

All of these factors, policies and practices can have significant mitigating or exacerbating influences on the impacts of self-representation. This contextual information is thus essential to understanding the problems and potential solutions to challenges related to the unrepresented accused.

This section will specifically address the first three of the above areas. Information on the fourth is contained throughout the report.

#### **3.2.1 The community**

The city of Halifax was founded in the mid-18th century and, as a major eastern port, had strong military significance to Canada until after WW2. It amalgamated with the adjacent municipalities of Dartmouth, Bedford and Halifax County in 1996. (However, the work of the court covered by the current study is restricted to Halifax proper.)

It remains the largest and most culturally and economically diverse centre in the Maritimes. Trade and fisheries are major historical industries. In the 2001 Census, the majority of residents (94 percent) reported speaking English at home, with Arabic, French and Chinese being the next most commonly spoken.

While the population of the province of Nova Scotia decreased by 0.1 percent from 1996 to 2001, the population of the regional municipality of Halifax increased by 4.7 percent during the same period, to 359,111. However, the population increase for the city of Halifax itself during the same period was 1.98 percent. The population density per square kilometre was 65.4. Approximately 21 percent of

males and 20 percent of females in Halifax were aged 15-to-29, the age range associated with the highest rates of crime.

In the Halifax Census Metropolitan Area (CMA), the total estimated average household income in 2001 was \$53,473 and the average income per capita was \$21,329. The average household income for the city of Halifax alone in 2001 was estimated to be \$47,700, and the average income per capita was \$22,300, somewhat higher than the provincial rates of \$46,200 and \$18,100 respectively.

The overall unemployment rate for the city of Halifax was reported in 2001 to be 7.0 percent. This was somewhat lower than the provincial rate for that same year. The province of Nova Scotia reported an unemployment rate of 9.4 percent in 2001.

Of the population of Halifax aged 25 years and over, 7.7 percent reported having less than a Grade 9 education. This was lower than the provincial average of 12.6 percent. Overall, 75.6 percent of Halifax residents had a high school certificate or higher level of education, compared to 62.9 percent for the province of Nova Scotia as a whole.

The number of single-parent families in the city of Halifax was estimated to be 6,257, 20 percent of the total 31,266 families, and in the CMA the rate was 16 percent – higher than the provincial rate of 15 percent.

In the city of Halifax more privately occupied dwellings were rented (60 percent) than owner-occupied, while the reverse was true of Halifax CMA (39 percent rented). The provincial rate was 29 percent rented.

The rate of violent crime in Halifax increased in 2000 from the previous year by 12 percent. In 2000, the violent crime rate was 1,164 per 100,000 population. However, the property crime rate for Halifax decreased by 6.7 percent from 1999 to 2000. The property crime rate for 2000 was 5,402 per 100,000 population. The crime rate for all *Criminal Code* offences decreased in 2000 by 3.7 percent to a rate of 9,249 per 100,000 population.

### 3.2.2 The court

#### *a Scheduling of cases*

Figure H-1 highlights the key features of the courthouse and the case scheduling practices. In general, all cases originating in Halifax during a particular month are scheduled to the same courtroom for their first appearance and other appearances that occur prior to being set for trial in a trial court. The “first appearance” courtroom is rotated every month, but was Courtroom 1 during the month of our data collection in Halifax. It was in that courtroom that we directly observed court appearances of cases.

<b>Figure H-1 Highlights of Scheduling of Cases in Halifax</b>		
One arraignment/first-appearance courtroom (Provincial Court only)	Sits every day (courtroom changes every month)	<ul style="list-style-type: none"> <li>• Courtrooms handle both adult and youth</li> <li>• Do not split drugs and CCC, although federal Crown cases handled first</li> </ul>
Five trial courtrooms for other criminal matters (e.g., preliminary hearings and trials)	Sit every day	
Special courts	None	
Circuit Courts	None	

*b Special case/case-flow management concerns*

The Halifax court is facing serious backlogs. At the time of the site visit, trials for accused who were not in custody were being double- and triple-booked ten months into the future. The courts also insisted that Legal Aid staff lawyers double-book themselves into trial schedules. On April 1, 2001, the court introduced a “weekend bail court” run by a justice of the peace in order to reduce the number of cases held in custody over the weekend.

Concerns regarding self-represented accused have resulted in the establishment of a special project, the Self-Represented Litigants Project. Through the project, members of the judiciary, the legal profession, court staff and others have been asked to join with Department of Justice staff in a focused effort to develop responses to concerns related to unrepresented accused.

*c An overview of case volumes and mix of cases*

Figure H-2 provides an overview description of the numbers of cases heard in the Halifax court in a recent 12-month period. The Figure shows that two offences – common assault (11 percent) and theft (14 percent) – made up a quarter (25 percent) of the caseload of the court. Adding impaired driving cases (8 percent) and “other federal statutes” (17 percent) would bring the subtotal to 50 percent of the total caseload.

<b>Figure H 2: Disposed Cases by Type of Offence (Comparison of Halifax and Nova Scotia – 2000/2001)</b>					
<b>Most Serious Offence</b>	<b>Halifax</b>			<b>Nova Scotia</b>	
	<b>#</b>	<b>as % of Halifax Total</b>	<b>as % of NS</b>	<b>#</b>	<b>as % of NS Total</b>
<b>Total</b>	3,163	100	21	15,313	100
<b>Homicide</b>	8	0	62	13	0
<b>Attempted Murder</b>	3	0	27	11	0
<b>Robbery</b>	40	1	37	107	1
<b>Kidnapping</b>	3	0	30	10	0
<b>Sexual Assault</b>	35	1	18	200	1
<b>Sexual Abuse</b>	4	0	11	35	0
<b>Major Assault</b>	188	6	28	679	4
<b>Abduction</b>	0	0	0	4	0
<b>Common Assault</b>	362	11	18	2,012	13
<b>Break &amp; Enter</b>	100	3	21	476	3
<b>Arson</b>	3	0	12	26	0
<b>Fraud</b>	107	3	19	573	4
<b>Posses Stolen Property</b>	136	4	30	459	3
<b>Theft</b>	449	14	29	1,529	10
<b>Property Damage/Mischief</b>	65	2	13	502	3
<b>Weapons</b>	51	2	18	287	2
<b>Administration of Justice</b>	172	5	18	933	6
<b>Public Order Offences</b>	39	1	12	314	2
<b>Morals – Sexual</b>	72	2	56	129	1
<b>Morals – Gaming/Betting</b>	1	0	33	3	0
<b>Other Criminal Code</b>	287	9	11	2,701	18
<b>Criminal Code Traffic</b>	31	1	14	223	1
<b>Impaired Driving</b>	263	8	14	1,867	12
<b>Traffic/Import Drugs</b>	90	3	27	335	2
<b>Possession Drugs</b>	114	4	17	683	4
<b>Other Federal Statute</b>	540	17	45	1,202	8
<i>Source: Canadian Centre for Justice Statistics: Statistics Canada.</i>					

In total, the Halifax court represents 21 percent of the Provincial Court caseload for all of Nova Scotia. There are also some obvious differences between the mix of cases for Halifax and for the rest of the province – with Halifax having certain offences more prominent in its caseload – in particular, those shaded in Figure H-2 (Homicide, Robbery, Morals-Sexual and Other Federal Statutes).<sup>21</sup>

<sup>21</sup> Only offences with 10 or more cases are noted.



### 3.2.3 Legal aid

Legal aid in Nova Scotia is overwhelmingly a service delivered by Legal Aid staff lawyers. Figures produced by the Nova Scotia Legal Aid Commission show that out of 11,699 adult criminal matters handled by Legal Aid in 1999/2000, all but 889 were handled by staff lawyers. The most common reason for issuing a certificate to a private bar member is conflict of interest (co-accused or victim-accused conflicts). The Halifax Legal Aid office has seven staff lawyers, most of them relatively junior members of the bar, handling criminal matters. Reportedly, the stressful nature of the work makes it difficult to retain staff lawyers, who gain more experience in legal aid work. Salary levels are on a par with those of Crown attorneys with similar experience.

Applications for legal aid are made in person, by appointment with a staff lawyer, at the offices of Legal Aid Nova Scotia, approximately a two-minute walk from the provincial courthouse. At the time of the site visit, Legal Aid managers had just issued a directive that staff lawyers must see the accused within two-to-three weeks of arraignment. This directive was issued in response to concern about the four-to-eight-week delays that had been plaguing the legal aid process, causing many court officers to suggest that delays in the legal aid application and delivery process had been “driving” the court schedules.

There was the perception among some of those interviewed that the Halifax office in the past had been more flexible in applying the legal aid criteria than had the Dartmouth office. However, as the budget has been progressively cut, this flexibility has decreased considerably.

### 3.2.4 Duty counsel

Knowledge of the resources, scope of activity and policies and practices of the duty counsel system is especially important to understanding the implications of self-representation on both the accused and on the costs and efficiency of the court system.

Duty counsel is available to help custody cases with pre-trial release applications, and does so without first applying financial eligibility tests or coverage criteria. For these cases, sufficient disclosure is available immediately from the Crown to allow the bail process to be handled expeditiously. Duty counsel normally has time to talk to most custody cases and the Crown before first appearance. However, there is considerable variation in the time spent with each accused – for instance, there might be 30 accused in custody after a long weekend. One of the most difficult aspects of the job of duty counsel is to allocate time among files in a manner that safeguards the rights of the accused.

Currently, Legal Aid does not supply staff lawyers to provide duty counsel/bail services to the weekend Justice of the Peace court.<sup>22</sup> Through a contract with the province, a private firm also provides advice to unrepresented accused via telephone during the weekend. However, the terms of the contract specifically exclude representation on bail hearings through the new JP bail system. There is an attempt to give the accused some basic advice on how the weekend bail system works, but they are “basically on their own.”

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<sup>22</sup> A “1-800” phone call service is, however, available.

In contrast, the Crown Attorney's office provides counsel to assist the police and justices of the peace by phone. Informants noted that this puts the accused at a distinct disadvantage when they face attempts by the police to have them remanded in custody for several days. However, there has been discussion recently (i.e., after the time of our interviews) of the benefits of having Legal Aid staff duty counsel available during Saturday and Sunday morning Justice of the Peace courts – especially since a significant percentage of accused who are arrested on the weekend are released on agreement in court on Mondays.

Few accused are unwilling to wait for the day or two it will take for the duty counsel to prepare and argue for their release. Duty counsel also gives out legal aid application forms to accused, and instructs them as to the information needed to complete an application.

If there is a complication in obtaining sureties or other questions relating to bail, duty counsel will stay with the case until the pre-trial release issue is settled. If the case is uncomplicated and can be resolved quickly, the duty counsel may also occasionally retain the case through the plea process. Otherwise, the accused will be required to apply for legal aid in the usual course of business, and duty counsel will cease to be the attorney of record.

The same staff lawyer has been handling duty counsel duties for the past five years, appears to thrive on it, and there are no plans to rotate the duty. Both clients and court officers seem to agree that the success of the duty counsel function is connected to the experience, competence and calm demeanor of the existing duty counsel, and to the trust in which he is held by court officers. Two interviewees offered the further view that it would be “a big mistake” to rotate duty counsel duty frequently (this leads to more matters simply being adjourned), or to assign duty counsel functions to a junior lawyer. If a junior lawyer or paralegal were assigned to assist with obtaining sureties, etc., this person would need to work under the direct one-on-one supervision of the experienced duty counsel.

### 3.2.5 Disclosure

As noted above, duty counsel seem to have adequate access to the Crown files pertaining to cases that are seen in the cells before court.

On the other hand, considerable difficulties were reported for the defence in obtaining disclosure in cases handled by the Halifax City Police and provincial Crown office.<sup>23</sup> Halifax Police make only one copy of the disclosure, for the Crown, and the provincial Crown does not make copies of the disclosure to give to the accused in court, nor for the defence. Rather, the accused must make an appointment to come to the Crown office to pick up a copy of the disclosure, and defence attorneys must arrange to send someone to the provincial Crown office to make a copy on the office photocopier. In addition, Legal Aid staff report that a significant number of files for which disclosure has been requested cannot be located at the time staff come to photocopy them. Delays in obtaining disclosure may now, with the new directive on first meetings between Legal Aid staff and clients, replace legal aid as the process that drives court schedules in the first instance.<sup>24</sup>

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<sup>23</sup> Those interviewed indicated that disclosure was far more accessible from the federal Crowns and the RCMP, who routinely make copies of the disclosure for the accused.

<sup>24</sup> Although we did not specifically try to collect empirical data on the influence on court operations of the availability of disclosure, it is worthwhile noting that only one of the 173 requests for remand directly observed in court were “for disclosure or particulars.”

The above police and Crown practices regarding disclosure are not typical of practices in the rest of the province.

### 3.2.6 Other sources of assistance

A lawyer referral service exists whereby, for \$23, an accused person can have a 30-minute discussion with a lawyer. Lawyers pay \$75 to be on a referral list, from which three names are provided to an accused seeking help. One firm also offers a special rate, of \$100 for an hour's consultation, for military personnel.

With the exception of Coverdale, the researchers were made aware of no other groups with a significant role in assisting accused persons appearing before the court – other than for diversion or post-sentencing.

Coverdale is a non-profit agency established in 1980, *inter alia*, “to contact women and youth experiencing the justice system,” and “to provide information and emotional support during the court process,”<sup>25</sup> Coverdale provides a number of services to assist the unrepresented female accused – assisting the accused by: explaining how to get legal assistance; explaining the court process (e.g., disclosure); assisting at the diversion stage; explaining the charges to the accused; and speaking to the court at sentencing. Coverdale has also collected a valuable longitudinal body of empirical data on women before the Halifax courts. Although a major report using this data was produced in 1991,<sup>26</sup> funds have not been available to analyze the data for the last 11 years.

## 3.3 Frequency of accused appearing without representation

### 3.3.1 Self-representation over the life of the case

Given the general perception that not having representation has significant implications for the accused, it is important to understand how frequently self-represented accused appear at different stages of the court process.

It is apparent from the Disposed Cases file that it is not possible to characterize representation over the life of a case in any simple manner; an accused's representation status will often change from one appearance to the next, as, for example, when an accused may be represented by duty counsel at the bail hearing, but be self-represented afterwards.

Looking at the pattern of representation over all appearances:

- In 12 percent of the cases, the accused was self-represented at all appearances.
- In another 45 percent of the cases, the file indicated a mix of self-representation at some appearances and representation by counsel of some sort at the others.
- Therefore, the accused was unrepresented on at least one appearance in 57 percent of the cases.

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<sup>25</sup> “Strength of Spirit: Supporting Women Through the Justice System,” brochure from Coverdale Centre.

<sup>26</sup> R.J. Skibbens, “Women in Halifax Courts: A Statistical Profile,” produced for Coverdale Court Work Services, funding provided by the Law Foundation of Nova Scotia (Nov. 1991).

- In 6 percent of the cases, the accused was represented by duty counsel at all appearances.
- In 11 percent of the cases, the accused was represented by a Legal Aid staff lawyer at all appearances, some of which might have included duty counsel representation.
- In 9 percent of the cases, the accused was represented by a mix of Legal Aid and private counsel.
- In 10 percent of the cases, the accused was represented by private counsel at all stages.
- In 38 percent of cases, the accused was represented by private counsel for at least one appearance.

The Court Observation captured 223 appearances in Courtroom number 1, where all matters except trials are heard (during the period in which we collected such data). In 12 percent of these appearances, the accused did not in fact “appear,” and, in 5 percent of cases, the representation status of the accused was not discernible. Among the remaining cases:

- 27 percent involved an accused who was unrepresented (although slightly over half of these appearances resulted simply in an adjournment);
- 36 percent involved duty counsel;
- 21 percent involved another legal aid staff lawyer; and
- 14 percent involved a private member of the bar.

### 3.3.2 Self-representation by category of offence

Most interviewees suggested that, because of the coverage criteria (likelihood of imprisonment), the criminal charges most likely to be faced by unrepresented accused were summary and minor property offences (shoplifting, fraud, theft of minor services, etc.), minor assaults, domestic violence, breathalyzer refusals and impaired driving.

Figure H-3 uses the Disposed Cases sample to present estimates of the proportions of accused who were unrepresented, according to the offence category of the most serious charge in the case.

In fact, Figure H-3 supports the perceptions of those interviewed. At last appearance, a relatively high percentage (compared to an average 23 percent for all offences combined) of self-represented accused were found among those charged with impaired driving (36 percent), administration of justice (32 percent), and other federal offences (58 percent).

Accused charged with robbery (9 percent), break and enter (13 percent), common assault (11 percent), and drugs excluding simple possession (5 percent) showed the lowest rates of self-representation at last appearance.<sup>27</sup>

### 3.3.3 Self-representation by stage in process

As noted in later sections, those interviewed felt that it was important to have legal representation not only at trial, but at all stages – and especially the earliest stages – of the court process.

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<sup>27</sup> Unfortunately, the small numbers for many offence categories do not permit much additional analysis.

Many interviewees found themselves unable to venture a numeric estimate of the proportions of unrepresented accused at various stages in the process, and those who did differed widely:

- At first appearance: Estimates of unrepresented accused varied from 10 percent to 95 percent.
- At bail: Interviewees noted that duty counsel was available at the bail stage for those in custody, but some suggested that perhaps 10-to-30 percent did not avail themselves of duty counsel.
- At plea: Estimates of unrepresented accused varied from “few” to 85 percent.
- At trial: Estimates of unrepresented accused varied from “very few” to 50 percent.

Separate estimates were offered with respect to women appearing before the court. Perceptions offered included:

- At first appearance, 40 percent at most had a lawyer.
- Seventy percent of those with lawyers had lawyers provided through Legal Aid.
- At later appearances, 60 percent at most had a lawyer.

All interviewees suggested it would be preferable if Legal Aid could accept more cases. Most believed that the duty counsel function should be expanded to cover all first appearances.

Figure H-3 also shows – by offence type – the percentages of accused that were without representation at key stages in the court process, namely first appearance, bail, plea, elections and final (disposition) appearance.

Figure H-3 suggests some significant findings with respect to unrepresented accused. For example:

- It was at the earlier stages, of first appearance and bail, that accused were most likely to be unrepresented – over a third of all accused .
- At plea appearance and at final disposition, there were fewer unrepresented – only one-fifth.
- This pattern was exhibited for all offence types shown – except for offences against the administration of justice and other federal statutes.

<b>Figure H-3. Disposed Cases: Proportion of Accused who were Unrepresented At Various types of Appearance, by Most Serious Charge Category, Halifax*</b>						
Most Serious Charge Category	Proportion of Disposed Cases with Unrepresented Accused at					Total Number of Cases (all accused)
	First (%)	Bail (%)	Plea (%)	Defence Election (%)	Final (%)	
Homicide	***	***	***	***	***	4
Sexual Assault	***	***	***	***	***	4
Assaults excl. Common	37	50	26	0	19	97
Robbery	0	0	0	***	9	11
Break and Enter	17	23	17	20	13	24
Impaired Driving	57	***	10	***	36	14
Common Assault	31	41	12	***	11	35
Drugs excl. Simple Possession	37	***	0	***	5	19
Weapons Offences	***	***	***	***	***	7
Thefts and Frauds	38	23	17	0	20	174
Simple Possession of Drugs	***	***	***	***	***	9
Offences against Administration of Justice	32	13	23	***	32	66
Public Order	***	***	***	***	***	8
Miscellaneous <i>Criminal Code</i>	55	***	38	***	27	11
Other Federal Statutes	42	***	33	***	58	26
Total number of all accused at this appearance	<b>508</b>	<b>144</b>	<b>334</b>	<b>63</b>	<b>508</b>	<b>509</b>
Proportion of unrepresented accused at this appearance (all offence categories)	<b>37</b>	<b>35</b>	<b>16</b>	<b>6</b>	<b>23</b>	
<i>Notes</i>						
* Excludes cases for which representation was unspecified in the file.						
*** The cell contains too few cases (i.e., less than 10) to report a percentage.						

### 3.3.4 Socio-demographic characteristics of unrepresented accused

Most interviewees agreed that the only demographic differences between unrepresented accused and other accused lay in income, with unrepresented accused most likely to be among the working poor. First-time and relatively inexperienced offenders were more likely to be unrepresented. Many unrepresented accused functioned at low reading levels – one lawyer estimated a quarter of his clientele could not read, and others simply said “a lot” could not read well enough to assist themselves in a criminal process. Another interviewee suggested that many accused had little education and had learning disabilities. Many accused (represented or not) had a “legal literacy” problem. Yet another mentioned that Halifax had a significant refugee population, for many of whom language issues were a barrier. Accused with mental disorders were, however, if anything, more likely to be represented because of their low economic status.

With particular reference to all (including represented) women before the court, data collected by Coverdale suggest that roughly 80 percent of the women before the court were there for their first offence – “over half of first-time offences are for shoplifting (and) 82 percent of all offences by women are non-violent property offences.”<sup>28</sup> Major factors cited by interviewees included: drugs, poverty issues and family violence. It was suggested that many would never be seen in court again.

<sup>28</sup> Coverdale Centre Brochure, op cit.

### 3.4 Other types of representation

#### 3.4.1 Prevalence of other types of representation

Figure H-4 displays the representation provided by counsel of various types at each stage of the criminal process.

Figure H-4. Disposed Cases: By Representation Type by Appearance Type, Halifax						
Appearance	Represented by				Accused No Show (%)	Number of Cases
	Self (%)	Duty Counsel (%)	Other Legal Aid (%)	Private Counsel (%)		
<b>Representation at First Three Appearances</b>						
First Appearance	37	32	5	15	13	508 (101%)
Second Appearance (if any)	31	24	16	21	8	433 (100%)
Third Appearance (if any)	20	19	28	23	10	348 (100%)
<b>Representation at Key Stages</b>						
Bail	35	49	2	13	n/a	144 (101%)
Plea	19	14	38	29	0	336 (101%)
Defence Election	6	13	38	43	0	63 (100%)
Final Appearance	23	13	37	25	3	508 (101%)
<i>Notes</i>						
* Excludes cases for which representation information is not available.						
** Percentages may not total to 100% due to rounding.						

The Figure suggests that:

- Legal Aid assisted a little over a third of all accused at first appearance and bail, the vast majority of these cases being handled by duty counsel.
- Duty counsel was able to take a significant number of cases to plea (14 percent) and final resolution (13 percent).
- Duty counsel handled roughly half (49 percent) of the cases at bail.
- Legal Aid (including duty counsel) assisted approximately half of all accused at plea, defence elections, and final appearance.
- Private counsel assisted a significant proportion of accused at all stages – 14 percent and 13 percent of all accused at first appearance and at bail; almost a third of all accused at plea; almost half of all accused at defence elections; and a quarter of all accused at final appearance. Given the small number of legal aid certificates issued (less than 1,000 annually for the entire province), it seems apparent that most of the private bar members appearing in criminal court in Halifax are privately retained and reimbursed.

Figure H-5 shows the most serious offence charged in cases with different types of representation at the final appearance.

<b>Figure H-5. Disposed Cases: Representation Status at Final Appearance by Most Serious Charge Category, Halifax*</b>					
Most Serious Charge Category	Proportion of Cases represented by				Number of Cases
	Self (%)	Duty Counsel (%)	Other Legal Aid (%)	Private Counsel (%)	
Homicide	***	0	***	***	4 (100%)
Sexual Assault	***	0	***	***	4 (100%)
Assaults excl. Common	19	6	44	29	97 (100%)
Robbery	9	18	46	27	11 (100%)
Break and Enter	13	0	50	33	24 (100%)
Impaired Driving	36	0	21	43	14 (100%)
Common Assault	11	14	40	34	35 (100%)
Drugs excl. Simple Possession	5	0	32	63	19 (100%)
Weapons Offences	***	0	***	***	6 (100%)
Thefts and Frauds	20	24	42	12	174 (100%)
Simple Possession of Drugs	***	***	***	***	9 (100%)
Offences against Administration of Justice	32	12	23	32	66 (100%)
Public Order	***	0	***	***	8 (100%)
Miscellaneous <i>Criminal Code</i>	27	18	18	27	11 (100%)
Other Federal Statutes	58	4	12	23	26 (100%)
<b>Total</b>	<b>23</b>	<b>13</b>	<b>37</b>	<b>25</b>	<b>508 (100%)</b>
<i>Notes</i>					
* Excludes cases for which representation at final appearance was unspecified in the file.					
** Not enough cases to present percentages..					

The Figure suggests that:

- The offences that had a higher frequency of Legal Aid representation (including duty counsel) at final appearance were thefts and frauds, robbery, assaults and break and enter.
- The offences that had a lower frequency of Legal Aid representation were drug offences, offences against the administration of justice, miscellaneous *Criminal Code* offences, and offences against other federal statutes. With the exception of drug crimes, all these offences tend to be less serious – with Legal Aid officials suggesting that drug offenders had difficulty establishing their financial eligibility for legal aid.
- The offences that had a higher frequency of private counsel representation were break and enter (33 percent), impaired driving (43 percent), common assault (32 percent), drug offences excluding simple possession (63 percent), and offences against the administration of justice (32 percent).



## 3.5 Impact of self-representation on the accused

### 3.5.1 Overall impact

The site visit interviews provided some interesting insights on the subject of impacts on accused persons. Some interviewees were of the view that unrepresented accused suffered significant impacts from the lack of representation. Other interviewees tended to the view that, if a case reached the sentencing stage, the sentence might (or might not) be just as fair, or even less harsh – but more unrepresented accused cases reached the conviction and sentencing stage than did represented cases.

Among the impacts cited by the former were the following:

- A greater likelihood of conviction.
- Pleas of guilty by – and the resultant conviction and criminal record for – unrepresented accused who might have had a viable defence.
- Imposition of unworkable conditions of sentence or bail – that must then be altered, or will be violated.
- More severe sentences, since unrepresented accused would tend to plead guilty quickly and not take the time to muster the positive arguments that should be considered at sentence, e.g., things the accused had done to turn his or her life around. At the same time, some felt that unrepresented accused would get the same penalty or result (as represented accused) in at least half the cases.

Although it would not be measured by statistics, a number of those interviewed cited the anxiety felt by accused from their lack of understanding of the court process, and the uncertainty surrounding their case.<sup>29</sup>

### 3.5.2 Specific strategic and tactical mistakes by the accused

As noted earlier, in the site interviews, most key informants suggested the earlier stages of the criminal process – initially at arrest, after charging, pre-trial release, and at plea – were the most important for representation. A few suggested trial was the most important, and most suggested sentencing was very important. The words of one interviewee represented the views of many of those interviewed:

“I can’t think of any time when having legal representation is not important.”

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

- Not contacting the court if they couldn’t attend court, and not understanding the consequences of failing to appear for court. (Failure to appear was directly correlated with lack of representation, according to Crowns.)
- Not understanding the differences between moral guilt and legal guilt.

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<sup>29</sup> It was not rare to find such anxiety resulting in missed court appearances – sometimes as a result of anxiety causing recourse to alcohol.

- Basing their case on misinformation – or information that was biased towards one perspective (given that it often came mainly from the police).
- Agreeing to release conditions that were unworkable, e.g., no-contact clauses with spouses with whom they needed to have some legitimate contact (e.g., to help care for children).
- Contacting Crown witnesses and making damaging statements at that time.
- Not understanding what they were charged with.
- Pleading guilty too soon to all (as opposed to only some of) the original charges, and without a full understanding of the charges or consequences.
- Not picking up their disclosure packet, not learning the Crown’s case against them or preparing for it.
- Not understanding the concept of, the availability of, or importance of disclosure.
- Not knowing that it was possible to change their plea.

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

- Not knowing what defences were available to them.
- Not knowing how to cross-examine witnesses.
- Arguing with witnesses and trying to give testimony while cross-examining witnesses.
- Calling witnesses who damaged their defence. (Conversely, lawyers would litigate things that could be litigated, and leave the rest.)
- Taking the stand themselves (when doing so would not help their case).
- Making damaging admissions (“skewering themselves”) at trial because they did not know the law of, e.g., assault or fraud.
- Not availing themselves of processes that could help them, such as a hearing on the confession.
- Not being able to fathom complex defences.
- Making irrelevant statements and not making mitigating statements.
- Not knowing the best arguments to present at sentencing.

The Court Observations in first-appearance/docket courts found that, overall, a quarter of the appearances took one minute or less. The median amount of time taken per appearance was two minutes – meaning that half the cases took more than two minutes, but half took less. Another quarter took four minutes or longer. Only 10 percent took more than ten minutes.<sup>30</sup> Within the context of this type of time pressure, it is not difficult to understand why many of those interviewed noted that an accused without a developed understanding of court procedures would make specific mistakes – and would be disoriented generally throughout the court process.

However, this problem of disorientation was present even with accused who had lawyers. In the words of one person interviewed, “Accused do not want the lawyer to think they are stupid.”

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<sup>30</sup> This included appearances by accused with private bar lawyers who simply appeared to ask for a set date for the next appearance.

### 3.5.3 Type of plea entered by type of representation

The previous discussion focused on the perceptions of those interviewed regarding the impacts of accused appearing before the court without representation. In this and following sections we provide empirical evidence on what actually happened to unrepresented accused, using data on cases in the Disposed Cases file and from the appearances directly observed in court.

It is, however, important to make it clear at the outset that the information is not presented to draw causal inferences, but simply to describe the events at various stages in the process. For instance, the evidence is not presented to suggest that the lack of representation *caused*, for example, a higher (or lower) likelihood that an unrepresented accused would be convicted. Rather, it simply describes whether or not, and how frequently, significant decisions were made and certain outcomes occurred with or without the presence of counsel.

As noted earlier, a number of interviewees raised the issue of whether or not unrepresented accused were more likely to plead guilty – for instance, to “get it over with,” or because they had neither the knowledge nor resources to contest the charges.

Figure H-6 displays the plea entered by the type of representation available to the accused.

- Sixty percent of all pleas were guilty pleas.
- Guilty pleas were entered in 91 percent of duty counsel cases – a rate considerably higher than for other types of representation.
- Guilty pleas were entered in 56 percent of cases assisted by other legal aid counsel, exactly the same proportion as for unrepresented accused.
- Cases represented by the private bar were least likely to result in a guilty plea, but this rate (52 percent) did not differ a great deal from that of accused who were unrepresented or those who were represented by Legal Aid other than duty counsel.

Plea	Proportion of all Pleas by or on behalf of Accused Represented by				Number of Cases	Proportion of Cases %
	Self %	Duty Counsel %	Other Legal Aid %	Private Counsel %		
Guilty	56	91	56	52	200	60
Not guilty	44	9	44	48	134	40
Total Cases	100	100	100	100	334	100
<i>Notes</i>						
* Excludes cases for which representation at plea was unspecified in the file.						

### 3.5.4 Conviction or not by type of representation

Conviction rates are examined in terms of representation at two stages in the court process – at appearances at which the plea was entered (containing more dispositions by way of guilty plea) and final appearances (containing a higher proportion of cases that went to trial).

Figure H-7 shows the conviction rates for cases by the type of representation at plea. The data suggest that:

- Overall, 75 percent of cases in which a plea was entered result in conviction.
- Rates of conviction for unrepresented accused (78 percent) were higher than those for accused represented by Legal Aid other than duty counsel (69 percent).
- The conviction rate for accused represented by duty counsel was the highest of all, at 98 percent.
- Rates of conviction for accused represented by private counsel were identical to those for accused represented by Legal Aid other than duty counsel.

An analysis of conviction rates at plea appearance, according to individual offence category, was able to make comparisons only for three offence groupings, because of the small numbers of cases in other offence groupings. The same relative pattern as seen above, for all cases, was observed, with the exceptions that:

- For assault, excluding common assault, unrepresented cases did *considerably* worse (67 percent conviction rate) than did legal aid cases (52 percent) and somewhat worse than privately represented cases (56 percent).
- For offences against the administration of justice, private counsel cases had higher rates of conviction (94 percent) than did legal aid cases (85 percent).
- For thefts and frauds, the conviction rate for private bar cases (63 percent) was lower than that for unrepresented and Legal Aid-represented cases (each 79 percent).

Disposition	Proportion of Dispositions for Accused Represented by				Number of Cases	Proportion of Cases %
	Self %	Duty Counsel %	Other Legal Aid %	Private Counsel %		
Convicted*	78	98	69	69	250	75
Not Convicted**	22	2	31	31	64	25
Total Cases	100	100	100	100	334	100

*Notes*  
 \* Includes guilty verdict and peace bond ordered.  
 \*\* Includes not guilty, withdrawn, dismissed, stayed, and discharges.

Figure H-8 shows similar information but, instead, is done using representation at final appearance (containing more cases that went to trial). The data suggest that:

- Overall, 66 percent of all disposed cases were convicted.
- The conviction rates were almost identical for accused who were self-represented (60 percent), represented by Legal Aid (63 percent) and represented by private counsel (62 percent).
- Conviction rates for duty counsel cases were the highest of all, at 92 percent.

One should, however, note that, in comparing conviction rates for self-represented accused with those for represented accused, one should take into account the likely impact of post-charge and pre-court process “diversion” on these conviction statistics. Accused who were diverted were extremely likely to not have a lawyer. Given that successful completion of the diversion program would result in non-

conviction, the existence of a diversion program would be expected to result in lower overall conviction rates for self-represented cases (with little if any impact on conviction rates for represented case). Unfortunately, data were not available on which cases were diverted, or even the percentage of cases that were diverted, and therefore we cannot say what the conviction rate would be for unrepresented accused who were not diverted. However, it is safe to say that the rate for non-diverted non-represented accused would be higher than the 60 percent shown in Figure H-8.

An analysis of conviction rates at final appearance, according to individual offence category, was able to make comparisons only for three offence groupings, because of the small numbers of cases in other offence groupings. A different pattern emerges:

- In assault, excluding common assault, cases, unrepresented accused did *moderately* worse (57 percent conviction rate) than did legal aid cases (47 percent), and somewhat worse than privately represented cases (50 percent).
- For offences against the administration of justice, unrepresented accused and accused assisted by private counsel did worse (95 percent conviction rate) than did duty counsel and other legal aid cases (87 percent).
- For thefts and frauds, unrepresented accused did considerably better (47 percent conviction rate) than did duty counsel (93 percent), other legal aid (71 percent) or private lawyer cases (60 percent).

**Figure H-8. Disposed Cases**  
**By Type of Disposition by Type of Representation at Final Appearance, Halifax**

Disposition	Proportion of Dispositions for Accused Represented by				Number of Cases	Proportion of Cases %
	Self %	Duty Counsel %	Other Legal Aid %	Private Counsel %		
Convicted*	60	92	63	62	333	66
Not Convicted**	40	8	37	38	175	34
Total Cases	100	100	100	100	508	100

*Notes*  
 \* Includes guilty verdict and peace bond ordered.  
 \*\* Includes not guilty, withdrawn, dismissed, stayed, and discharges.

Earlier we cautioned against using these data to imply a causal connection between type of representation and conviction rates. However, given the impact of having a criminal record (on employment opportunities and the likelihood of being charged with further offences, etc.), the data can definitely be used to show that unrepresented accused are very likely to experience serious negative impacts as a result of the court process. Whether or not that possibility alone is sufficient to call for greater availability of legal representation is a matter of public policy.

### 3.5.5 Custodial sentence and type of representation

Again, custodial sentences are examined in terms of two sets of data – by representation at the plea appearance (containing more dispositions by way of guilty plea) and by representation at the final appearance (containing a higher proportion of cases that went to trial).

Figure H-9 shows the proportions of cases receiving a custodial sentence, according to the type of representation available to the accused at the plea appearance.<sup>31</sup>

- Overall, 38 percent of cases in which a plea was entered resulted in a custodial sentence.
- Unrepresented cases fared best of all (19 percent imprisonment rate), suggesting that the legal aid seriousness criterion and the accused’s decision whether to hire private counsel combine to make the charges faced by unrepresented accused less serious or less deserving of a custodial sentence.
- The highest imprisonment rate was in cases handled by duty counsel (77 percent). Since all of these accused would have been initially detained by police rather than released on their own recognizance, this suggests something of the predictive power of police detention decisions.
- Cases handled by other legal aid counsel at the plea appearance had a higher imprisonment rate (43 percent) than did private counsel cases (26 percent).

An analysis of imprisonment rates by representation at plea appearance, according to individual offence category, was able to make comparisons only for three offence groupings, because of the small numbers of cases in other offence groupings (see Appendix figures). For thefts and frauds, and offences against the administration of justice, the same relative pattern as seen above, for all cases, was observed, but a different pattern was seen for:

- assaults, excluding common assault, in which private bar cases did best of all (17 percent imprisonment rate), but unrepresented accused and other legal aid cases still fared better (33 percent and 36 percent, respectively) than did accused who were represented by duty counsel (100 percent imprisonment rate).

<b>Figure H-9. Disposed Cases By Whether or Not Custodial Sentence Received by Type of Representation at Plea Appearance, Halifax</b>						
<b>Sentence</b>	<b>Represented by</b>				<b>Number of Cases</b>	<b>Proportion of Cases %</b>
	<b>Self %</b>	<b>Duty Counsel %</b>	<b>Other Legal Aid %</b>	<b>Private Counsel %</b>		
Custodial Sentence	19	77	43	26	127	38
No Custodial Sentence	81	23	57	74	207	62
Total Cases	100	100	100	100		100
<i>Notes</i> Source: Disposed Cases Sample.						

<sup>31</sup> The percentages shown in this and the next table are based on the total numbers of cases – whether or not the cases resulted in a conviction. This choice was made to address the question of risk to a person entering the court system. If one were, instead, interested in the risks of receiving a custodial conviction after being convicted, then one should recalculate the percentages using the number of persons convicted as the base for the percentages.

Figure H-10 shows the distribution of custodial sentences for cases disposed by type of representation at final appearance (which contains a higher proportion of cases that went to trial).

<b>Figure H-10. Disposed Cases By Whether or Not Custodial Sentence Received by Type of Representation at Last Appearance, Halifax</b>						
<b>Sentence</b>	<b>Represented by</b>				<b>Number of Cases</b>	<b>Proportion of Cases %</b>
	<b>Self %</b>	<b>Duty Counsel %</b>	<b>Other Legal Aid %</b>	<b>Private Counsel %</b>		
Custodial Sentence	10	76	39	26	166	33
No Custodial Sentence	90	24	61	74	342	67
Total Cases	100	100	100	100	508	100
<i>Notes</i> Source: Disposed Cases sample.						

The Figure shows that:

- Overall, 33 percent of all disposed cases received a custodial sentence.
- Unrepresented accused fared best of all (10 percent custodial rate); cases finalized with duty counsel had the highest imprisonment rate (76 percent), followed by cases with other legal aid representation (39 percent) and accused represented by private counsel (26 percent).

An analysis of imprisonment rates by representation at last appearance, according to individual offence category, was able to make comparisons only for three offence groupings, because of the small numbers of cases in other offence groupings. The same general relative pattern as seen above, for all offences, was found.

Again we caution against using these data to imply a causal connection between type of representation and likelihood of receiving a custodial sentence. However, the results are directly relevant from another important perspective. Specifically, it is accepted that eligibility for legal aid should depend (in part) on the likelihood of a case receiving a custodial sentence. Although one cannot expect to predict with total accuracy whether an accused will get a custodial sentence, it is relevant that custodial sentences are received by more than one in 10 accused who are self-represented at disposition – and by more than one in five accused who are self-represented at plea.

### 3.6 Further impacts of lack of representation

#### 3.6.1 Impacts on court officers and others

##### *a Legal Aid staff*

Interviewees were nearly unanimous in stating that the representation provided by Legal Aid staff was of good quality. However, virtually all interviewees agreed that staff lawyers did not have enough time – often “shooting from the hip” – and there was never time for discretionary work. Some interviewees alleged that trials by staff lawyers might be done “on the fly.” Some interviewees suggested that the

staff lawyer system was not conducive to putting in the extra time or effort that, for example, a private bar member would put in simply to maintain his reputation. Some interviewees suggested that legal aid clientele had negative experiences to report, including:

- having difficulty getting in touch with staff lawyers;
- being transferred from one staff lawyer to another;
- being encouraged to plead guilty; and
- not being able to meet with their staff lawyer before trial.

### *b Crown attorneys*

Crowns generally would not talk to unrepresented accused or negotiate a plea with them – they would only do so if they couldn't avoid it. However, it was a personal choice of the Crown whether to talk to an unrepresented accused – and some did.

In Halifax, plea negotiation generally took place relatively late in the criminal court process. As noted earlier, there did not seem to be a policy in place to provide the Crown's best offer at a very early stage in the process (as part of a progressive overall case management system).

Among the difficulties noted by Crowns were:

- The necessity of Crown review of the disclosure packet in order to ensure victims and witnesses were not placed in any danger.
- Ensuring that unrepresented accused did not inadvertently reveal to the Crown something that can be used against them – and which might result in the Crown being called as a witness against (or, in some circumstances, for) the accused.
- Trying to resolve a case quickly – more difficult to do when the accused had no counsel and Crown was barred from giving advice to the accused.

### *c Judges*

Most interviewees agreed that trials involving unrepresented accused took longer than those of represented persons. Those who did not agree said that unrepresented accused had no idea what questions to ask, and did not think to call witnesses or present important arguments in their defence. Virtually all seemed to agree, however, that trials with unrepresented accused were a difficult process for all.

Those who believed that unrepresented accused trials took longer – many said at least twice as long – suggested that unrepresented accused would, at trial, delay the proceedings by:

- requiring lengthy explanations;
- not stipulating evidence, or waiving processes where a lawyer would;
- becoming emotional, being “on the ceiling,” and requiring a break; and
- asking irrelevant questions.

Among the difficulties noted for judges were:

- A higher number of remands ordered by the judge to enable unrepresented accused to get a lawyer (more remands than in represented cases).



- Unrepresented accuseds failing to appear for court. Some Crowns stated that failure to appear was directly correlated with lack of representation.
- Attempting (where time was available) to suggest defences, Charter arguments and arguments to be used at sentencing.

Judges, too, were put in the awkward position of assisting unrepresented accused as best they could. Judges “bent over backwards” to protect the unrepresented accused’s rights, and had to take care to respect both the Crown and the unrepresented accused, and not appear biased. Judges had to ensure that, for a unrepresented accused’s plea of guilty, the charge was based in evidence. When in doubt, the judge would be required to refuse a guilty plea and set the matter down for trial, but at trial the unrepresented accused generally did a poor job of presenting a defence.

#### *d Court workers*

Clerks at the registrar’s counter indicated that they received a lot of questions from accused who couldn’t follow what was happening to them. Unrepresented accused expected clerks to spend more time with them. Clerks found, from the questions asked of them, that unrepresented accused were often still seeking legal advice, or had been given conditions of bail or probation that they couldn’t follow (e.g., restrictions on seeing children they were partly responsible for, or curfews that affected their ability to perform or keep their jobs).

#### *e Court security*

Court staff reported occasional problems with unrepresented accused who were upset. Sheriff’s staff at the courthouse reported that they did have security problems with persons in custody who were having problems getting legal assistance – “nine out of ten get pretty pissed off.”

### 3.6.2 Overall impacts on court operations

#### *a Court workloads: Length and nature of individual appearances*

##### *Length of appearances*

In most provincial criminal courts in Canada, only 4-to-10 percent of cases go to trial. The overwhelming majority of appearances for cases are, therefore, not trials – and, as noted earlier, in Halifax (as in other courts), these appearances are typically in the order of one or two minutes per case. What would, in other situations, seem a very minor increase in the time taken to perform a function at a case appearance can, therefore, represent a major increase in judicial, Crown, legal aid, defence counsel and court administration workloads – proportionally and in total.

Our Court Observation data did indicate that concern was present that the unrepresented accused be made aware of the opportunities and benefits of having a lawyer – and the expression of that concern did extend the time taken for individual court appearances.

In one sixth (17 percent) of the appearances, a comment concerning representation was made by either the judge, the accused, the Crown, or duty counsel. In 15 percent of the appearances, the judge asked the accused about his or her representation status or instructed the accused to get a lawyer or apply for legal aid. If asked about his or her representation status, the accused would typically say that s/he wished to have a lawyer, or was in the midst of applying for or getting one. In a handful of appearances observed, the judge refused to accept the accused’s guilty plea until s/he had spoken with counsel.

Some interviewees suggested that unrepresented accused generally “tied up the system” and caused lost court time. Virtually all agreed that the system moved more efficiently when the accused was represented. Adjournments for and failures to appear by unrepresented accused wasted a great deal of court time. Cases that “collapsed” and result in a plea of guilty on the day of trial were very costly also.

*With respect to appearances prior to trial*

To create our Direct Court Observation file, court observers sat in Courtroom 1 (first-appearance/docket court) and captured the time taken by each case/appearance. The results speak directly to the issue of whether appearances of self-represented accused (in the appearances prior to trial) were *in fact* longer or shorter than those with other types of representation.

As shown in Figure H-11, in the first-appearance/docket court – overall, using the typical or median case as the measure – appearances seemed to be over most quickly when the accused was represented by an agent (median length of appearance, 60 seconds) – and lasted longest for cases represented by duty counsel (median, 300 seconds). In between those extremes were cases in which the accused was unrepresented, or represented by Legal Aid staff lawyers other than duty counsel (median, 120 seconds).

From a court resources perspective, it is perhaps a positive result to have unrepresented cases over more quickly than those being represented by duty counsel. However, from an access to justice perspective, there may be reason to be concerned that, when a duty counsel is involved in a first appearance, more time is spent dealing with the case.

Paraphrasing one of those interviewed, “Unrepresented accused tend to do things more quickly than they should. Lawyers add time for good reason.”

<b>Figure H-11. Case/Apearances: Distribution of Time (seconds) for different types of Case/Apearances By Type of Representation , Halifax</b>					
<b>Appearance Number at which Plea was Entered</b>	<b>25th/ median/ 75th percentile times for case/appearances represented by</b>				<b>All Types of Represent- ation*</b>
	<b>Self</b>	<b>Duty Counsel</b>	<b>Staff Legal Aid</b>	<b>Paralegal</b>	
<ul style="list-style-type: none"> <li><b>All appearances in First- appearance/ docket court</b></li> </ul>	25th = 60 50th = 120 75th = 180 (n= 50)	120 300 420 (n=65)	60 120 180 (n=40)	60 60 120 (n= 27 )	60 120 240 (n=210)
<b>By Result of Appearance</b>					
<ul style="list-style-type: none"> <li>Remand or Stood Down</li> </ul>	25th = 60 50th = 120 75th = 1800 (n= 40)	120 240 360 (n= 51)	60 120 120 (n= 32)	60 90 120 (n= 22)	60 120 180 (n=172)
<ul style="list-style-type: none"> <li>Final</li> </ul>	25th = 165 50th = 180 75th = 300 (n=10)	300 420 825 (n=12)	**	**	180 240 420 (n=33)
<i>Source: Direct Court Observation file.</i> * Totals for all types of representation includes agents and accused no-shows. ** Less than 10 case/appearances.					

An attempt was also made to differentiate between case/appearances that resulted in a remand or a final disposition. Unfortunately, too few case/appearances were present in the database to consider the latter. Nonetheless, as shown in Figure H-11, case/appearances that resulted in a remand, and in which the accused was self-represented (together with cases represented by non-duty counsel staff lawyers), were again between the extremes of cases represented by duty counsel (longest) and cases represented by paralegals (medians of 120, 240 and 90 seconds, respectively).

Another factor that would add to the time taken by a case on a court docket would be the process of “standing down” a case to later in the day to complete consideration of any matters that day. In fact, our court observer only rarely saw a case being stood down (only seven in 213 case appearances). Comparisons among cases with different types of representation would therefore be irrelevant. On the other hand, the low probabilities of a case being stood down were consistent with parties (including duty counsel) being prepared to deal with a case when it came before the court.

*Events occurring at individual court appearances*

Interviewees noted that the efficiency of the entire system was much greater when the accused was represented – “wasted” appearances were reduced, useless discussions and arguments were largely eliminated, and work was concentrated on what was relevant.

The court observation data also yielded some information about how many appearances (in first-appearance/docket courts) were “productive,” in the sense that they resulted in decisions on (or, at least, consideration of) one or more of three matters: namely bail, plea, and elections. Figure H-12 shows the

breakdown of courtroom events (or non-events) according to representation status at last appearance. The columns in the left half of the table show data for “interim” (i.e., non-final) appearances. The columns in the right half of the table show data for final appearances.<sup>32</sup>

**Figure H-12. Court Observation Data: Percentage Distribution of Case/Apearances: by Accused’s Representation Status by Type of Decision Made and Case Status (Interim or Final Appearance), Halifax\***

Representa- tion Status	Type of Decisions at Interim Appearance (Remanded or Stood Down)					Type of Decisions at Final Appearance			
	**No deci- sion  %	Bail decision consid- ered  %	Plea entered and/or election made  %	Bail, election and plea enter- ed  %	Total number of Cases	Guilty verdict or peace bond  %	Order varied or commit- ted for trial  %	With- drawn, dis- missed, not guilty, discharge  %	Total number of cases
Self	60	0	40	0	40 (100%)	50	10	40	10 (100%)
Duty Counsel	55	26	15	4	62 (100%)	42	8	50	12 (100%)
Other Staff Lawyer	53	0	44	3	32 (100%)	***	***	***	7 (100%)
Private lawyer	36	5	59	0	22 (100%)	***	***	***	3 (100%)
Total	52	12	33	3	157 (100%)	39	6	55	33 (100%)

*Notes:*  
 \* Appearances for which accused did not show or for which data were unavailable or unclear are not included.  
 \*\* Bail was not considered, no elections were made by either Crown or defence, and no plea was entered.  
 \*\*\* Number of cases too small (less than 10) to show percentages.

With respect to interim appearances, one of the most striking observations is that, overall, appearances in a case were most likely *not* to involve consideration of bail, elections, or the entering of a plea (see column 2 – “no decision”) if the accused was unrepresented (probability, 52 percent). However, appearances that were, in that sense, “unproductive,” were almost as frequent when the accused was represented by duty counsel (55 percent) or other Legal Aid staff lawyer (53 percent). The proportion of such appearances was much lower for appearances involving a private lawyer (36 percent).<sup>33</sup>

The numbers of final appearances observed (i.e., the right-most columns in Figure R-12) were small – only 33 in total. No conclusions can be made from these scant data, but they suggest an interesting line of future inquiry regarding the value of having duty counsel for obtaining a dismissal, not guilty or other favourable verdict.

<sup>32</sup> The figure omits three cases in which the accused’s representation status was unclear to the court observer.

<sup>33</sup> These figures may reflect the high number of cases in which duty counsel represent in-custody cases at their bail hearing.

*b Workloads: Number of appearances per case*

Court schedules appeared, at the time of the site visit, to be driven by time delays built into the legal aid application, approval and access system, although, as noted above, new directives may address this problem. Some interviewees were also of the view that there was a certain segment of the accused population who were aware of the delays inherent in the legal aid process, and took advantage of these delays in order to obtain successive postponements of their case. In the words of one interviewee, “The judges are being held hostage by unrepresented accused.” (The reverse phenomenon was also seen – of accused who “just wanted to get it over with,” and pled guilty with or without the assistance of counsel.)

Most interviewees appeared to agree that unrepresented accused slowed down the court process, since they did not benefit from the skill that an experienced lawyer would apply to move the process along expeditiously. For example, lawyers would usually waive reading of the charges, while unrepresented accused would not. Multiple postponements before a trial date is set were common for accused who were unrepresented; some judges would grant two or three adjournments in hopes the accused would obtain counsel, while others would grant more. Such appearances were costly for the courts and its officers. After a number of unproductive appearances, some judges attempted to move the process forward by decreasing the length of remands to get counsel.

*Reasons for remands at early appearances*

The Direct Court Observation file provided information to at least initiate an exploration of the reasons for remands – and the results showed that a very small percentage (one percent) of the reasons for granting remands were related to obtaining counsel.<sup>34</sup>

If these results were to apply when data from a larger sample of case/appearances were obtained, then they would certainly indicate that remands to obtain legal assistance were *not* a significant source of delays.

*Appearances before a plea is entered*

A second direct indicator of the workloads caused by – and resources required to deal with – cases is the appearance numbers at which key activities take place.

Figure H-13 shows the appearance number at which the plea was entered for accused who had various types of representation. The data suggest that self-represented cases in general *did not* generate more appearances before entering a plea:

- There was a significant group of unrepresented accused who pled guilty early in the process. – these data suggest half the self-represented accused entered a plea at the first or second appearance, and at least one quarter entered a plea at the first appearance. (This may be – as suggested by interviewees – “just to get it over with.” However, there may be other explanations for this phenomenon.)
- Self-represented accused entered their plea at an earlier appearance than accused who had counsel of any type. Half the accused represented by legal aid other than duty counsel did not enter a plea until at or after the fifth appearance.

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<sup>34</sup> The largest percentage of remands was to plea (45 percent). It is, however, noteworthy that 16 percent of the remands were because the accused did not show for his or her appearance in court.

- Half the cases represented by duty counsel or private bar members took three or more appearances before entering a plea – one more appearance than self-represented accused (two), but less than the number of appearances for cases with other legal aid lawyers (five).
- A quarter of the accused represented by legal aid (other than duty counsel) did not enter a plea until at or after the seventh appearance, and a quarter of the accused represented by private counsel did not enter a plea until at or after the fifth appearance.

<b>Figure H-13. Disposed Cases: Distribution of Appearance Number at Which Plea was Entered by Type of Representation at Plea Appearance, Halifax</b>					
<b>Appearance Number at which Plea was Entered</b>	<b>Represented by</b>				<b>All Types of Representation</b>
	<b>Self</b>	<b>Duty Counsel</b>	<b>Other Legal Aid</b>	<b>Private Counsel</b>	
25th Percentile	1	2	3	2	2
Median	2	3	5	3	3
75th Percentile	3	4	7	5	6
95th Percentile	10	8	11	12	10
Total Cases	64	47	126	97	334
<i>Notes</i>					
* If plea was entered at more than one appearance, last appearance at which plea was entered is shown.					

*Total number of appearances before disposition*

Figure H-14 shows the total number of appearances in the case – according to representation type at last appearance.

<b>Figure H-14. Disposed Cases: Distribution of Number of Appearances in Case by Type of Representation at Final Appearance, Halifax</b>						
<b>Number of Appearances</b>	<b>Represented by</b>					<b>All Types of Representation</b>
	<b>Self</b>	<b>Duty Counsel</b>	<b>Other Legal Aid</b>	<b>Private Counsel</b>	<b>No Appearance*</b>	
25th Percentile	2	2	4	2	2	2
Median	2	3	5	4	4	4
75th Percentile	4	5	8	7	8	7
95th Percentile	8	14	14	13	n/a	13
Maximum	23	20	21	26	10	26
Total Cases	116	66	186	127	13	508
<i>Notes</i>						
* This group would include cases where the charges were stayed, withdrawn or dismissed.						

The data suggest that self-represented cases *did not* take more court appearances overall – in fact, they took fewer appearances. More specifically:

- Half the accused unrepresented at last appearance were disposed after only one or two appearances, as compared to three, four or five by accused represented at last appearance by duty counsel, by private counsel and by legal aid other than duty counsel (respectively).
- A small minority of cases resulted in an extraordinary number of appearances – five percent of all accused appeared 13 or more times in the case, and five percent of unrepresented accused made eight or more appearances.

*c Elapsed time for cases to resolve*

The disposed cases sample also yielded information about the time elapsed between the first and last appearance. This information is important from a due process perspective – however, that perspective yields two potential hypotheses: first, “Justice delayed is justice denied,” and second, “Justice rushed is justice crushed.”<sup>35</sup> The first concern is relevant to those who feel that delays in obtaining legal representation adversely affect the fairness of the court process and the final outcome. The second concern is especially relevant to those concerned that an unrepresented accused may plead out the case early “to get it over with,” or because they are not aware of viable legal defences.

As shown in Figure H-15:

- Cases represented by duty counsel took the least time to resolve – a quarter were settled in a day, and half were settled within five weeks.
- As noted above, cases self-represented at last appearance made fewer appearances, and this was reflected in the fact that, apart from duty counsel cases, cases of unrepresented accused took less time to resolve than others. A quarter took one week or less, and half took 14 weeks or less.

<sup>35</sup> The latter phrase was first suggested to one of the authors by a widely respected colleague, Carl Baar.

- Cases represented at last appearance by legal aid took considerably longer. A quarter took 17 weeks or less and half took 29 weeks or more to resolve.
- Cases represented by private counsel at last appearance took more time to be resolved than did unrepresented cases, but less time than legal aid cases other than duty counsel.
- A quarter of all cases took eleven months or more to be resolved.

**Figure H-15. Distribution of Time (in weeks) Between First and Final Appearance  
 By Type of Representation at Final Appearance, Halifax**

	Time (in weeks) between First and Final Appearance when Represented by				All Types of Representation
	Self	Duty Counsel	Other Legal Aid	Private Counsel	
25th Percentile	1	0.1	17	5	7
Median	14	5	29	25	22
75th Percentile	29	21	54	47	46
95th Percentile	100	81	121	105	103
Maximum	400	567	254	179	567
Total Cases	116	66	186	127	508
<i>Notes</i>					
<i>Source: Disposed Cases Sample.</i>					

### 3.7 Overall conclusions

#### 3.7.1 Key overall findings

Our key findings with respect to the key questions raised by the study include:

*With respect to frequency of self-representation*

- There is a significant number of accused who proceed through key parts of the criminal court process without the benefit of legal representation.

*With respect to impact*

- Interviews with key officials strongly suggest that the unrepresented accused (especially those with little prior experience in the court system) are less likely to be aware of the legal remedies available at key stages in the process – and are unlikely to understand many key decisions and events in the process.
- The evidence is insufficient to conclude whether or not self-represented accused are more likely to be convicted or to receive harsher sentences.



- A significant number of unrepresented accused receive court dispositions that represent serious penalties or deprivations of liberty. Some 60 percent receive a criminal record and a smaller, but still significant number (in the order of 10 percent) receive custodial sentences.<sup>36</sup>
- Unrepresented accused tend to have relatively shorter pre-trial appearances – and fewer appearances in total – than do accused represented by different types of counsel.

### 3.7.2 General reasons for current unrepresented accused situation

Interviewees who were able to speculate on the subject suggested the following key reasons for the unrepresented accused situation in Halifax (not all were mentioned or agreed to by all):

- The financial eligibility and coverage restrictions on legal aid, which leave little room to maneuver and effectively exclude the working poor and those who are not likely to receive a jail term:  
“There are a lot of hard working people of modest incomes who can’t afford a lawyer.”
- Some accused are embarrassed enough to “just want to get it over with,” and plead guilty as soon as possible; conversely, for some the result of being embarrassed results in their delaying dealing with issues related to the charges (including getting a lawyer).
- Some accused who are facing continued pre-trial custody plead guilty in order to get out of jail to retain their job, conceal the matter from their family, etc.
- In the case of female accused, it was suggested that many do not know about legal aid and/or how and where to get a lawyer – with a significant proportion thinking that the court will appoint them one.
- Finally, a number of those interviewed noted that there is a (relatively small) percentage of accused who appear unrepresented for strategic reasons (e.g., delay) – a tactic more common among those charged with conspiracy or drug charges. In such cases, it is not infrequently the case that a lawyer will have been consulted, but is only available for informal advice.

### 3.7.3 Solutions suggested by those interviewed in Halifax

Among the solutions offered by individual interviewees were the following (not suggested by or agreed to by all):

- Having judges ensure that the defence and/or unrepresented accused receive full and timely disclosure.
- Expansion of the duty counsel system to include all first appearances and to give more assistance to the existing duty counsel staff lawyer. It was felt this would accelerate the

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<sup>36</sup> Granted, percentages of similar or even higher magnitudes – especially for custodial sentences – apply to cases with different types of representation. However, this does not detract from the importance of the sizeable percentages that apply to unrepresented accused.

process for those accused who need more information and advice before entering a plea or electing.

- Provision of duty counsel resources at the weekend Justice of the Peace courts.
- Provision of duty counsel resources to allow duty counsel to act as a “go-between” – between the unrepresented accused and the Crown for purposes of conveying factual information (e.g., whether the Crown is likely to be seeking a custodial sentence). This recommendation would overcome the difficulties of the Crown talking directly to the accused.
- “Extended duty counsel,” wherein the duty counsel takes the case from start to finish; this model had at one time been in use in Halifax, and was considered by many staff lawyers to be too stressful on them, but it was supported by other interviewees.
- Having present in the courtroom a lawyer who would be available to give timely advice to unrepresented accused, while the case is held down for a few minutes.
- Ensuring that all accused have informed advice as to the likely consequences (including penalty) upon conviction for the offence.
- Recognizing the potential role in providing (non-legal) assistance to unrepresented accused of groups such as Coverdale, court administrative staff and court sheriffs.
- Expansion of legal aid resources in order to increase the numbers of staff lawyers; reduce waiting periods for the application and service delivery processes; give staff lawyers more time for each case; and resolve cases earlier, thereby reducing backlogs.
- Relaxation of the legal aid financial eligibility criteria, to assist more of the “working poor.”
- Elimination of the “likelihood of jail” criterion for legal aid in favour of a more flexible criterion regarding seriousness.
- Expand the legal aid eligibility criteria to include likelihood of losing the means of earning a living (e.g., losing driver’s license).
- Special consideration for legal aid for first-time offenders – if only to prevent more of them than necessary from acquiring a criminal record.
- Use of paralegals.
- Having judges show less tolerance for deliberate efforts to delay the process by “trifling with” the legal aid approval process.
- Increases to the tariff system (called by one official “more of an honorarium for public service”) for those cases done on certificate.
- Assisting judges and other court officers to understand that unrepresented accused will always be “inarticulate and hostile,” and to deal with them accordingly.
- Expansion of diversion opportunities.
- Better court management procedures, including agreement by all upon the following – requiring Crowns to familiarize themselves with the case earlier in the process and present their best offer in the case at the first opportunity; requiring the same judge to stay with a case after first appearance; emphasizing the critical importance and pivotal role of duty counsel and legal aid service at early stages, more so than at the trial stage.
- More training for judges in how to deal with unrepresented accused.
- A more “mixed” system in which more cases are handled on certificate by the private bar (under a more generous tariff system).

It was also suggested that better information of the type collected by the current project would be of assistance. For instance:

- The data that has been collected by Coverdale on women accused before the Halifax courts over the past 11 years remains unanalyzed. A modest amount of money invested would yield

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valuable insights into the experience of this part of the defendant population (including insights regarding representation).

- Before this project, it was not mandatory for court clerks to enter the type of representation for cases into the court automated information system. During the project, filling out the representation field became mandatory.<sup>37</sup> Analysis of this information (after sufficient time has passed to capture an adequate amount of data) would be very useful.

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<sup>37</sup> Presumably due to efforts of the Nova Scotia Department of Justice's Self Represented Litigants Project.



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## Chapter 4: Brandon, Manitoba

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### 4.1 Objectives, report format and methodology

#### 4.1.1 Objectives

The Department of Justice and the Federal/Provincial/Territorial Permanent Working Group on Legal Aid retained the research team to engage in a national study to measure:

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

#### 4.1.2 Report format

The findings for Brandon are presented in seven sections.

- Section 1* outlines the objectives of the study, describes the format of the report, and discusses the methodology used to collect information.
- Section 2* provides important contextual information for interpreting the findings of the report. Special attention is given to key characteristics of the community, the court, legal aid, duty counsel and disclosure.
- Section 3* describes how frequently self-represented accused appear at different stages of the court process.
- Section 4* explores the frequency with which accused persons have other types of representation, and how those frequencies vary at different stages of the court process.
- Section 5* focuses on the important impacts of self-representation on the accused. The section discusses both perceptions provided from our interviews and empirical evidence from data especially collected for the project.
- Section 6* then describes other significant impacts due to the presence of unrepresented accused – on the key groups involved in the courts (e.g. legal aid, duty counsel, Crown attorneys, judges and court personnel) and on court operations (including: court workloads and time to deal with and dispose of cases).
- Section 7* completes the report with key overall findings and solutions that have been suggested by those interviewed in Brandon.

### 4.1.3 Methodology

A brief overview of the full national study – covering nine court sites – has been presented in Chapter 1. The methodology for the Brandon part of the national study followed a strategy for data collection and site visits similar to that followed in the other sites, with one important difference.

For Brandon, information was available on the question of unrepresented accused from three sources:

- **The Three Months Docket sample.** Data on all court appearances on all first appearance/set date court dockets – i.e., excluding trial courts – for the last three months of 2001.
  - Data were provided from CCAIN (the recently implemented automated court information system) on each count in each appearance during the period. For each of these 5,144 count/appearances, data was provided on the characteristics of the count (e.g., offence type) and on events and decisions at the appearance (e.g., plea, elections, remands, verdicts and sentences).
  - Unfortunately the type of representation at each appearance is not entered into CCAIN. It was therefore necessary to hire a local worker with experience in the Brandon court to separately collect data on representation from the manual versions of the three months of dockets that had been kept by the court.
  - The original data from CCAIN and this manually collected data on representation at each count/appearance were then combined.
  - The final step was to combine data from all count/appearances for a particular offender on a particular day to create a file with one record for each of 2,761 “case/appearances.” This file became the “Three Months Docket” data set used for this report.<sup>38</sup>
- **A Direct Court Observation sample.** A local person with extensive experience in the Brandon court was hired to sit in court and directly observe and record information on the events and decisions that occurred in 522 case/appearances that took place over ten days in Courtroom 1 (a non-trial court) during April and May of 2001.
- **Interviews** were conducted with over 20 key informants (judges, Crowns, legal aid staff and management, court administration and court clerks, private bar members, local service agencies, etc.). Most interviews lasted from 30 minutes to an hour and were conducted by two interviewees. The anonymity of those interviewed was ensured.

In all parts of the project, we received excellent co-operation and assistance from all those we asked to participate in the study. We also gratefully acknowledge the very able assistance and expertise of the Winnipeg-based officials who assisted in preparing the electronic file of data from the CCAIN automated information system, as well as the invaluable work of the local worker who did the court observation and supplemented the CCAIN file with representation data.

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<sup>38</sup> This data set is unique among the nine courts in the study in that it was not composed of all appearances for a sample of “disposed cases.” Because of the newness of the CCAIN system, production of such a data set based on disposed cases was not possible. This caused certain limitations in the analysis, but also provided opportunities not present in the other sites.

#### 4.1.4 An important caveat

We were fortunate to have designed the study to ensure that wherever possible we would have multiple sources of data to address particular issues. This design strategy was especially important in Brandon.

As in most other courts in the current study, court manual and automated systems had not been designed to collect accurate and comprehensive data on either the frequency or impact of legal representation. Before reporting the results of the data analysis, we therefore conducted a number of checks to assess the extent to which we should rely on different sources of data for different parts of the analysis.

In particular, we have concluded that the analysis for Brandon – especially analysis directly addressing the prevalence of different types of legal representation – should place **more emphasis on the Direct Court Observation** as opposed to on the Three Month Docket data. The court observations were carried out by a very knowledgeable person specially trained by the researchers to observe matters related to legal representation. Thus, when we noticed that statistics based on data from the Three Month Docket file gave estimates of self-representation that, at first appearance, were considerably higher than estimates based on the direct court observation, on our interviews, and on the researcher's own observations, we felt it reasonable to discount the statistics from the Three Month Docket file and place more emphasis on statistics from the Direct Court Observation file.<sup>39</sup>

The following sections will make it clear when these inconsistencies in the different sources of Brandon data should be explicitly taken into account.<sup>40</sup>

## 4.2 Context of the court and legal aid

One of the major conclusions – supported from data from all sites – was that data on the extent of legal representation in a particular court cannot be interpreted out of context of (at least):

- The type of community served (including the nature of accused persons brought before the court).
- The resources, management and operational practices in place in the courts.
- Legal aid policies and practices – and especially the duty counsel system in place.
- The policies and practices of all of the other key participants in the court process – including the judiciary, the police, the Crown attorneys, court workers, court administrative officials, the private bar and other supporting agencies.

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<sup>39</sup> The accuracy of representation data in the Three Month Docket file is directly dependent on the accuracy and completeness with which court staff record representation data on manual court records. Although further research is required to determine with complete certainty the source of the discrepancy, it is expected that court staff in the past may have often failed to record representation by duty counsel – thus resulting in over-estimates of self-representation.

<sup>40</sup> In addition, there may be differences in sample sizes for specific tables. This is because, in a number of instances (including representation), data on particular variables was not available on a proportion of cases. Any table will include data on only those cases for which data is available on all variables needed for the table.

All of these factors, policies and practices can have significant mitigating or exacerbating influences on the impacts of self-representation. This contextual information is thus essential to understanding the problems and potential solutions to challenges related to the unrepresented accused.

This section will specifically address the first three of the above areas. Information on the fourth is contained throughout the report.

#### 4.2.1 The community

Brandon has been nicknamed the "Wheat City" for its agricultural heritage and reputation as a prosperous farming community. Approximately two thirds of Manitoba's farmland is located within a 130-km radius of the city. It is situated in the southwest corner of the province, is two hours' drive from Winnipeg on the Trans-Canada Highway, and is the province's second largest city. Brandon was twice voted by *Chatelaine* magazine one of the top ten cities in Canada in which to live.

In 2001, the population of the city of Brandon was reported to be 39,716, representing only a slight increase (1.4 percent) compared to the 1996 population of 39,175. This small increase, however, exceeded the provincial population increase of 0.5 percent. Its population density was 532.9 per square kilometre, and just over 98 percent of its population reported English as the language used at home. The population of Brandon included a comparatively high proportion of females over the age of 65 (17 percent). Approximately 23 percent of males and 21 percent of females in Brandon were aged 15-to-29, the age range associated with the highest rates of crime.

Of the population 15 years and older in Brandon, the average total income was reported in 1996 to have been \$22,504. This is similar to the provincial average income of \$22,667. The 2001 estimated average household income of the Brandon Census agglomeration area was \$46,300, lower than the provincial average of \$51,000, and the per capita income in Brandon was \$19,500, comparable to the provincial estimated per capita average income of \$19,700.

The unemployment rate for the city of Brandon in 2001 was reported as 4.4 percent, somewhat lower than that year's provincial unemployment rate of 4.9 percent. The province of Manitoba recorded the lowest unemployment rate of all provinces in 2001.

Of the total population 25 years and over in Brandon, 10 percent reported less than a Grade 9 education. For the province of Manitoba, the percentage of those 25 years and over who had less than a Grade 9 education was slightly higher (14.5 percent). The city of Brandon reported a higher percentage of people with at least a high school certificate than was the case for Manitoba overall (64.7 percent vs. 60.8 percent). The number of single-parent families in Brandon in 2001 was estimated at 1,771 (15 percent of the total 11,512 families). The comparable provincial rate was 14 percent.

In Brandon, there were more owner-occupied dwellings (61 percent of an estimated 17,520) than rented dwellings. This was slightly lower than the provincial rate of 66 percent.

For the year 2000, the city of Brandon reported a total of 4,750 violent, property, and other *Criminal Code* offences. This was a decrease in reported crimes from the previous year. In 1999, the city of Brandon reported a total of 5,309 *Criminal Code* offences. While the number of violent crimes and other crimes against the *Criminal Code* increased from 1999 to 2000, the total number of property



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crimes decreased from 3,786 to 3,332, accounting for the decrease in reported incidents from 1999 to 2000.

#### 4.2.2 The court

##### *a Special case/case-flow management issues*

One of the researchers who conducted the Brandon interviews had considerable experience of addressing issues related to the management of the flow of cases through various courts. One of the most striking observations regarding the Brandon court is the degree to which all key groups – especially the judiciary, the Crown, legal aid and the court administration – have for some years been effectively using case management practices to keep backlogs and delays to a minimum, while promoting early, fair resolution of cases.

These case management practices have many very important implications for understanding legal representation in Brandon. As a simple example, since the case management practices in Brandon keep to a minimum the number of court appearances required to resolve a case, there is a concomitant reduction in the workload of all groups to deal with each case. In the case of legal aid (and duty counsel in particular), the time freed up can then be used to either expand the types of cases considered or to provide more intensive attention to existing cases.

It is also important to note that the relationship between effective case management and legal representation is a two-way street – in Brandon and other courts. For instance, three of the key principles of effective case management in a criminal court are that court intervention in the case should happen as early as possible, that “justice delayed is justice denied,” and that accused should not be rewarded for unnecessary and inappropriate delay in their case. Clearly, if an accused has effective representation from duty counsel (or from privately retained counsel) at the very beginning of the court process, the accused will be in a position to respond to early court and Crown initiatives – such as the Crown providing its best (plea negotiation) offer “up front.”<sup>41</sup>

It was also relevant that virtually all groups interviewed indicated a certain pride in the fairness and efficiency with which the courts operated in Brandon – and a recognition of the work that had been done by all groups to bring the court to the point it was at.

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<sup>41</sup> Clearly, this strategy also requires other elements of an effective case management strategy, e.g., early disclosure to be available from the police, and having the Crown prepared to put their best offer up front and having it known that they will not enhance the offer later as the case gets closer to trial.

*b Scheduling of cases*

On a more specific level, the Brandon courthouse has six courtrooms in total, with federal cases scheduled in the manner shown in the following Figure.

<b>Figure BR-1: Highlights of Scheduling Cases in Brandon</b>		
Six courtrooms in total in the courthouse	<ul style="list-style-type: none"> <li>Typically 2 or 3 courtrooms in use for criminal work each day</li> </ul>	
One courtroom (No. 1) used as docket court on certain days	<ul style="list-style-type: none"> <li>Sits Monday and Thursday for Adult</li> <li>Sits on Tuesday for Juvenile</li> </ul>	<ul style="list-style-type: none"> <li>Courtrooms handle both adult and youth</li> <li>Shared by Provincial Court and Queen’s Bench</li> </ul>
One courtroom used mainly for custodial cases	<ul style="list-style-type: none"> <li>Usually sits every day</li> </ul>	
One courtroom used mainly for mediations and pre-trials	Usually sits every day	
Special courts	<ul style="list-style-type: none"> <li>Drug court (i.e., handled by federal Crown) sits twice a month</li> </ul>	
Circuit Courts	<ul style="list-style-type: none"> <li>None</li> </ul>	

Roughly 4,000 criminal (CCC and drug) cases are disposed in Brandon each year.

4.2.3 Legal aid

In Brandon, as in the rest of Manitoba, legal aid is delivered through a mixed system of both staff lawyers and certificates issued to the private bar. In fact, from the earliest stages, an accused person has the option of retaining private bar counsel and continuing with that counsel throughout the court process. The accused can either pay the counsel privately or – after application to Legal Aid Manitoba and being granted a Legal Aid Certificate – from funds provided by Legal Aid. However, if private counsel is not obtained in the early stages, Legal Aid staff duty counsel will assist the accused person until it becomes clear that a certificate decision must be made. Once a certificate is issued, the accused then has the choice of using a staff lawyer or a member of the private bar for further work. (The criteria for issuing a certificate are the same whether the accused chooses a private bar member or a Legal Aid staff lawyer.)

Legal Aid Manitoba officials in Brandon indicated in interviews that they believe the mixed system has the advantage of allowing the accused his/her choice of counsel throughout the court process, and, in addition, creates a healthy “competition” between staff lawyers and the private bar, which promotes the best service from all.

Three staff lawyers handle criminal legal aid cases in Brandon. Two of them have more than 20 years’ experience in criminal law, and the third has been in practice for eight years.

The Legal Aid staff lawyers were held in considerable respect and confidence by all groups whom we interviewed in this project. This respect extended to both their qualifications and the amount of work they were willing to take on.

#### 4.2.4 Duty counsel

Knowledge of the resources, scope of activity and policies and practices of the duty counsel system is especially important to understanding the implications of self-representation on both the accused and on the costs and efficiency of the court system.

Brandon uses an “expanded duty counsel” system. There are no restrictions on who may be assisted or the type of services that may be offered under the duty counsel system. A legal aid file will be opened and staff will treat the client as an “expanded duty counsel” client (or a “certificate equivalent” for the purposes of their own internal evaluations). Under this system a staff lawyer is available at all times in docket court to assist accused, and will try to speak to accused before court to advise them. Without regard to financial eligibility or coverage tests, duty counsel will act in a flexible manner to provide whatever assistance is required with pre-trial release, disclosure, plea, sentencing, etc. Duty counsel also speak to accused persons who have been screened by Crown attorneys for diversion, in order to explain to them the meaning and legal implications of diversion.<sup>42</sup>

Judges will frequently refuse to accept an accused’s plea until s/he has spoken to duty counsel. Once duty counsel is seized of a case, s/he will follow it to the end – unless there is a conflict of interest or unless the accused chooses a private bar member to do the trial on certificate – ensuring continuity in the handling of the case. All staff lawyers conduct the duty counsel function at set times during the court week. Staff lawyers handle all functions, including trials if the accused choose them for this part of their defence.

Duty counsel were described as “running off their feet.” Despite that, even if a self-represented accused were not looking for legal aid, duty counsel would offer and provide help.

#### 4.2.5 Disclosure

In a number of sites participating in this study, issues were raised regarding the access the unrepresented accused had to the disclosure documents from the Crown. Such issues were rarely raised in Brandon – where it is Crown policy to provide all accused with disclosure (the particulars of the Crown’s case) before plea.

On the other hand, although we did not specifically try to collect empirical data on the influence on court operations of the availability of disclosure, it is worthwhile noting that 20 percent of the requests for remand directly observed in court were “for disclosure or particulars.”<sup>43, 44</sup>

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<sup>42</sup> However, when a case goes to trial, an actual legal aid application has to be taken and the financial information is looked at somewhat more critically before a certificate is issued, whether to staff or a member of the private bar.

<sup>43</sup> I.e., 71 of the 352 directly observed case/appearances that resulted in remands.

<sup>44</sup> A reviewer of an earlier draft of this report, indicated these requests could arise a) when counsel gets the particulars the morning of the appearance, and has not had sufficient time to explain the contents to the client, or b) when counsel has had the particulars, but has asked the Crown for clarification that has not yet been obtained from the investigating officer.

### **4.3 Frequency of accused appearing without representation**

#### **4.3.1 Self-representation over the life of the case**

As shown later, the interviews and the analysis of the data specially collected for the project indicate that not having representation has significant implications for the accused – and for other groups involved in the court process. It is therefore important to start by describing how frequently self-represented accused appear at different stages of the court process.

It is not a simple matter to categorize cases with respect to representation received. An accused's representation status will often change from one appearance to the next, as, for example, when an accused may be represented by duty counsel at the bail hearing, but be represented by a private bar member afterwards.

For Brandon, given the nature of both the Court Observation file and the Three Month Docket data file, we were not able to track the patterns of representation over the life of each case. Instead, both files focus on whether specific individual case/appearances (or perhaps several in a case) were associated with certain events – and the type of representation at each of those case/appearances.

However, once the CCAIN automated system has been operational for a longer period of time, it will contain the full past appearance history of a sufficient number of disposed cases. It will then be possible to create an accurate picture of how representation develops and changes between the first and last appearance of a case.

#### **4.3.2 Self-representation at selected stages in the court process**

Key informants suggested that, ironically, under the “extended duty counsel system,” since duty counsel provided whatever help was required by the unrepresented accused at the early stages of the court process, unrepresented accused were least likely to be found at those stages. Conversely, unrepresented accused were most likely to be found at the trial stage, for which Legal Aid officials had to verify the accused's financial eligibility and qualifications under the coverage criteria before issuing a Legal Aid Certificate. Only then would Legal Aid staff – or a member of the private bar, if chosen by the accused – commit the time required to conduct a trial. All in all, interviewees were unanimous in believing that very few unrepresented accused would be found in Brandon, other than at the trial stage.

As noted earlier, the Direct Court Observation data are considered to be a more accurate reflection of the numbers and proportions of unrepresented accused in the Brandon court.

For the 522 case/appearances observed:<sup>45</sup>

- Overall, 10 percent involved an accused who was unrepresented:
  - Nine percent of case/appearances not resulting in a final disposition were without representation. Almost half of the case/appearances observed resulted in an adjournment.
  - Fourteen percent of case/appearances resulting in a final disposition were without representation.

Analogous estimates can also be developed from the Three Months Docket sample. However, as noted earlier, the local coder who added the representation data by examining court clerks' manual notes on the dockets indicated that the representation notes appeared to be incomplete in many instances – and her recollection of specific cases and their progress was that many cases that she knew had been represented were noted as not having been represented. In addition, our interviews with key informants were unanimous in suggesting that unrepresented accused were a rarity in the Brandon court, except at trial for certain types of offences. When unrepresented accused did appear at the beginning of an appearance, they were referred to duty counsel by either the judge or the Crown. A number of persons indicated that unrepresented accused were “not an issue” in Brandon.

Nonetheless, for completeness, estimates derived from that second data source are shown here (and are compared to the preferred estimates).

<b>Figure BR-2: Comparisons of Estimates of Self-Representation from Different Sources*</b>		
	<b>Data Source</b>	
	<b>Direct Court Observation</b>	<b>Three Month Dockets</b>
First Appearances	n/a	31%
Non-final Appearances	9% (including first appearances)	22 % (excluding first appearances)
Final Appearances	14%	26%
Total	10%	24%

*\* All data related to case/appearances in docket courts.*

Clearly the differences are considerable. Before using the data on representation in the manual court records for similar studies, further investigation is indicated to understand the conventions for recording such data.

Even with the lower levels of self-representation shown by the Direct Court Observation sample, if one accepts the opinion of many of those interviewed – in Brandon and in other sites in the study – that having representation at all stages of the court process is important to the fair and efficient disposition of cases, the existence of lack of representation (at some point in the criminal process) is relevant from both a policy and operational perspective. The remainder of this report will both question this assumption and explore the prevalence and impact of self-representation in more detail.

<sup>45</sup> Court observation data were directly coded onto a form that captured – as one record – all data on all counts observed in a case/appearance.

### 4.3.3 Self-representation by category of offence

According to interviewees, the criminal charges most likely to be faced by unrepresented accused are shoplifting and first-offence impaired driving, since a custodial sentence is unlikely in these cases. (Shoplifting cases are, in fact, usually diverted, but, as noted earlier, duty counsel will explain the implications of diversion to persons charged with shoplifting.) Persons appearing in “peace bond” (s. 810) applications or violations are also generally unrepresented. Other, non-criminal cases where representation is unlikely involve Highway Traffic and Wildlife, Fish and Game offences.

Using data from the Direct Court Observation file, Figure BR-1 shows the proportions of unrepresented accused, according to the most serious charge in the case and the type of appearance (interim or final).

<b>Figure BR-3. Proportion of Case/Apearances Involving Unrepresented Accused by Most Serious Charge Category, Brandon*</b>				
<b>&gt;&gt;Preferred Source of Statistics&lt;&lt;</b>				
<b>Most Serious Charge Category</b>	<b>Type of Case Appearance</b>			
	<b>Not-final (%)</b>	<b>Final (%)</b>	<b>Total</b>	
			<b>%</b>	<b>(Number)</b>
Homicide	***	***	***	(5)
Sexual Assault	0		0	(28)
Assaults excl. Common	11	8	10	(108)
Robbery	***	***	***	(4)
Break and Enter	5	***	8	(23)
Impaired Driving	***	***	***	(7)
Common Assault	8	10	8	(60)
Drugs excl. Simple Possession	***	***	***	
Weapons Offences	***	***	***	(2)
Thefts and Frauds	8	18	10	(83)
Simple Possession of Drugs	***	***	***	(1)
Offences against Administration of Justice	11	10	11	(99)
Public Order	***	***	***	3
Miscellaneous Criminal Code				
Other Federal Statutes & Provincial or Municipal Laws	12	3	23	(34)
<b>Total: All Offence Types %</b>	<b>9</b>	<b>14</b>	<b>10</b>	
<b>Number</b>	<b>(406)</b>	<b>(113)</b>		<b>(519)</b>
* Data Source: Direct Court Observation Sample.				
*** The cell contains too few cases to report a percentage.				

The information in Figure BR-3 suggests that:

- for all offences, the likelihood of an offender being unrepresented seldom rose above one or two in 10; but
- offence categories that were less likely to result in imprisonment were also more likely to be associated with lack of representation (provincial or municipal statute violations, and thefts and frauds, for example).

Again, caution must be exercised in using the analogous numbers (in Figure BR-4) from the Three Month Docket sample – which, according to the court observation data and the key informant interviews, may overstate the proportions of unrepresented accused by as much as 150 percent. The implications of the statistics in Figure BR-4 are consistent with those in Figure BR-3:

- Offence categories that are less likely to result in imprisonment – impaired driving, provincial or municipal statute violations, and miscellaneous *Criminal Code* offences – are also more likely to be associated with lack of representation.
- More serious offences, like homicide and robbery, are associated with a lesser prevalence of unrepresented accused, as are weapons offences.

<b>Figure BR-4. Proportion of Case/Appearances involving Unrepresented Accused by Most Serious Charge Category, Brandon *<sup>1</sup></b>					
>>>>N.B. Because of Data Problems, only relative values among cells from one row to another should be considered <<<<<					
Most Serious Charge Category	Proportion of Appearances with Unrepresented Accused			Unrepresented Appearances as Proportion of All (%)	Total Number of Case/Appearances
	First (%)	Interim (%)	Final (%)		
Homicide	N/a	8	n/a	6	31
Sexual Assault	33	23	0	23	105
Assaults excl. Common	35	22	25	25	400
Robbery	N/a	13	n/a	11	18
Break and Enter	35	23	17	24	98
Impaired Driving	43	34	22	33	180
Common Assault	20	25	24	24	253
Drugs excl. Simple Possession	32	27	33	28	81
Weapons Offences	27	13	14	15	73
Thefts and Frauds	27	19	31	22	636
Simple Possession of Drugs	48	24	17	29	75
Offences against Administration of Justice	30	20	21	23	724
Public Order	n/a	***	***	n/a	5
Miscellaneous <i>Criminal Code</i>	33	23	60	46	52
Other Federal Statutes	n/a	***	n/a	***	9
Provincial or municipal laws	100	55	20	57	21
<b>All Offence types – cases</b>	<b>504</b>	<b>1699</b>	<b>558</b>		<b>2761</b>
<b>Notes</b>					
<sup>1</sup> Source: Three Month Docket file – All percentages may overstate the proportions of unrepresented accused by as much as 150 percent.					
* Excludes cases for which representation was unspecified in the file.					
*** The cell contains too few cases to report a percentage.					

#### 4.3.4 Socio-demographic characteristics of unrepresented accused

Interviewees said there were no other characteristics that appeared to all respondents to be common to unrepresented cases. Some interviewees speculated that such persons would be, variously:

- people who did not wish to disclose their finances; persons who did not wish to pay for their own lawyer but wished to go to trial;
- people who wished to represent themselves out of lack of trust in the criminal justice system, generally;
- people who wished to use their case in order to advocate a cause, such as Aboriginal hunting rights;
- people who wanted to appear in their own defence; and
- people who raised so many barriers to obtaining Legal Aid help that they were refused.

#### 4.4 Other types of representation

Information on the frequency with which accused have various types of legal representation is important for understanding the frequency of self-representation.

The information in Figure BR-5 provides such information, using data from the Direct Court Observations.

Appearance Type	Represented by				Total Number of Case/Apearances
	Self %	Duty Counsel/ Legal Aid %	Private Counsel %	Agent** %	
Non-Final	9	31	40	19	(406)
Final	14	41	44	1	(113)
Total %	10	34	41	15	(519)
Number of Case/Apearances	(52)	(147)	(214)	(79)	(519)

\* Data Source: Direct Court Observation Sample.  
 \*\* Persons represented by an "agent" usually have a lawyer who was unable to be in court at this appearance; typically duty counsel will fill in at this stage..



The table shows the important role of Legal Aid duty counsel in the non-trial/docket courts. For the 519 case/appearances covered in the Figure:

- 10 percent involved an accused who was unrepresented (although almost half of these appearances resulted simply in an adjournment);
- 41 percent involved a private bar member;
- 34 percent involved duty counsel or other Legal Aid staff lawyers; and
- 15 percent involved an agent.<sup>46</sup>

Although the data from the Three Month Docket sample overestimate the proportion of self-represented accused, data from that sample is consistent with the relative preponderance of cases with Legal Aid counsel, private counsel and agents.

## 4.5 Impact of self-representation on the accused

### 4.5.1 Overall impact

The site visit interviews provided interesting insights and perceptions on the subject of general impacts of lack of representation on accused persons. Without exception, interviewees attached strong importance to representation in criminal proceedings. Unanimously, however, they believed that, because of the duty counsel system, unrepresented accused were to be found principally at trial, since it is at the stage of obtaining a certificate for trial assistance that all financial eligibility and coverage rules come into play.

Some interviewees were of the view that unrepresented accused suffered significant impacts from the lack of representation at trial. Others felt that the results tended to be as fair as in any other case, with the possible exception of unrepresented accused who do a poor job at their own trial and sentencing, because Crowns and judges compensate for the accused's lack of representation by assisting them wherever possible.

Interviewees were generally of the view that unrepresented accused cases and cases assisted through duty counsel received a result that was just as fair as any other case. This sanguine view was reinforced by the availability of and judges' virtual insistence on legal aid assistance to persons who appeared without counsel.

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<sup>46</sup> Agents could be used in a number of instances, including:

- Where a private lawyer was unavailable for this appearance and asked duty counsel to step in, or one Legal Aid lawyer acted for another.
- Where the lawyer appears as "solicitor and agent," so that the client does not have to personally appear on a summary conviction matter, or on an indictable matter with the consent of and prior arrangement with the Crown. As noted by a reviewer of an earlier draft of this document, "Usually, in these cases, Crown and defence have already spoken, know what the next step is, and the remand has been productive in that regard. In fact, where there has been a diversion or stay arranged, (counsel) take particular care that ... clients (do) not have to attend for what is the formality of having a disposition put on the record, which does not require the attendance of the client if we know ahead of time. This is encouraged by the judges as being less disruptive for the client, and ... less consuming of court time."

Interviewees were, however, unanimous in believing that very few accused appeared in criminal court without having spoken to counsel. Perhaps one in ten have not seen counsel when they first appear, according to two respondents who were willing to estimate the numbers, but these persons would be advised to speak to counsel, and the case would be stood down until they did. Legal Aid officials confirmed that they are encouraged by senior management in Legal Aid Manitoba to fill the need wherever they can, in a flexible and responsive fashion.

- Crowns stated that, when they encounter unrepresented accused, they would ask them to speak to duty counsel.
- Judges in the Brandon court reportedly took a very firm stance in virtually insisting that unrepresented accused speak to duty counsel, according to all sources. The research team actually observed two instances, during the initial site visit, of judges refusing to accept a guilty plea from an accused who had not conferred with counsel, insisting that the accused first speak to duty counsel, while the case was stood down.

#### 4.5.2 Specific strategic and tactical mistakes by the accused

Most of those interviewed indicated that representation was important not only at the trial stage. Most interviewees suggested the earlier stages – initially at arrest, after charging, pre-trial release, and at plea – were the most important. A few suggested trial was the most important, and most suggested sentencing was very important. Many cited the evidence and simple logic that strongly suggested that decisions made from the point of arrest and charging have significant impacts on the outcome of a case. For some decisions (e.g., bail and plea negotiations) the impact was indirect. For other decisions (e.g., plea) the impact was very direct.

Interviewees suggested that among the most frequent errors made in Brandon by unrepresented accused were the following:

- They did not understand concept of disclosure – or did not use disclosure to try to find weaknesses in Crown’s case.
- “Giving up” and pleading guilty too soon. This was reportedly far more common in Brandon than insisting on trial.
- However, those who did not plead guilty early might be less likely to enter a guilty plea later, when it might be in their interest.
- Not understanding the defences available to them (especially in breathalyzer situations).
- Not being able to fathom complex defences.
- “Raising useless arguments,” belabouring points, not knowing when to give something up.
- Arguing with witnesses. Judges gave unrepresented accused more leeway, but had to prevent accused from badgering witnesses.
- Not knowing the best arguments to present at sentencing.

The court observations found that, overall, the average amount of time taken per appearance was two minutes and three seconds. On different court days, this varied from an average of one minute and 45 seconds to an average of four and a half minutes.<sup>47</sup> Within the context of this type of time pressure, it is not difficult to understand why many of those interviewed noted that an accused without a developed

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<sup>47</sup> This included appearances by accused with private bar lawyers who simply appeared to ask for a set date for the next appearance.

understanding of court procedures would make specific mistakes – and would be disoriented generally throughout the court process.

To paraphrase one interviewee, “It is terrible to see an unrepresented accused walking away without understanding what has happened.”

#### 4.5.3 Type of plea entered by type of representation

Earlier sections described the perceptions of those interviewed regarding the impacts of accused appearing before the court without representation. The study also has available empirical evidence on what actually happened to unrepresented accused (i.e., using data from the Direct Court Observation file and from the Three Month Docket file).

It is, however, important to make it clear at the outset that the information is not presented to draw causal inferences, but simply to describe the events at various stages in the process. For instance, the evidence is not presented to suggest that the lack of representation *caused*, for example, a higher (or lower) likelihood that an unrepresented accused would be convicted. Rather, it simply describes whether or not, and how frequently, significant decisions were made and certain outcomes occurred with or without the presence of counsel.

As noted earlier, a number of interviewees suggested that one of the most common errors that unrepresented accused made was to “give up” and plead guilty too soon. However, at the same time, interviewees did suggest that, if an accused were likely to be entering a guilty plea, the judge or Crown would refer the accused to duty counsel.

A plea was entered in 19 percent of the appearances in the supplemented CCAIN file. In Brandon, if the accused wished to plead not guilty, the case would be transferred to a trial courtroom and the plea entered there. For that reason, and because of the nature of the file (case/appearances in non-trial courtrooms rather than disposed cases from all courtrooms), it is not possible to trace differences in the type of plea entered according to the type of representation.

#### 4.5.4 Conviction or not by type of representation

In examining dispositions, it is important to remember that both the Direct Court Observation file and the Three Month Docket file cover only cases heard in the non-trial courts – usually Courtroom 1. Therefore, neither file includes data on dispositions reached after the case has been scheduled to a trial court.

With that caveat in mind, Figure BR-6 presents data from both data sources.

<b>Figure BR-6. Distribution of Disposed Cases: By type of Final Disposition by Type of Representation: Brandon Comparison of Estimates from Direct Court Observation and [Three Month Docket] Data Sources*</b>					
Disposition	Proportion of all Dispositions by or on behalf of Accused Represented by			Number of Case/ Appear- ances	Proportion of Case/ Appear- ances %
	Self %	Legal Aid %	Private Counsel %		
Guilty, peace bond,	25 [43]	60 [64]	70 [63]	66 / 251	58 [58]
Varied order or Committed for Trial** only	25 [12]	26 [6]	6 [5]	19 / 32	17 [7]
Not guilty, Discharge Dismissed, stayed, withdrawn	50 [45]	15 [30]	24 [32]	28 / 150	25 [35]
<b>Total Number of Case/Appearances</b>	<b>16 / 114</b>	<b>46 / 167</b>	<b>50 / 149</b>	<b>113 / 433</b>	
<i>Notes</i>					
<i>The first percentages or numbers shown in a cell are based on data from the Direct Court Observation File; the second percentages shown (in square brackets "[ ]") or numbers are based on the Three Month Docket file.</i>					
<i>* Excludes six cases for which representation was unspecified in the file, and 178 cases for which final disposition information was unavailable in the file.</i>					

Although there are differences in the results from the two files, some general observations can be made.<sup>48</sup>

- There seemed to be little difference, regarding the likelihood of receiving a guilty verdict, between cases with legal aid staff lawyers and cases with private counsel.
- Fully a quarter of all dispositions were a stay, withdrawal, or dismissal of charges.
- Unrepresented accused were more likely to receive such a disposition, reflecting the fact that diversion rarely calls for legal representation, although counsel may be available to explain the consequences of diversion to the accused.

One should, however, note that, in comparing conviction rates for self-represented accused with those for represented accused, one should take into account the likely impact of post-charge and pre-court process “diversion” on these conviction statistics. Accused who were diverted were extremely likely to not have a lawyer. Given that successful completion of the diversion program would result in non-conviction, the existence of a diversion program would be expected to result in lower overall conviction rates for self-represented cases (with little if any impact on conviction rates for represented case). Unfortunately, data were not available on which cases were diverted or even the percentage of cases that were diverted, and therefore we cannot say what the conviction rate would be for unrepresented accused who were not diverted. However, it is safe to say that the rate for non-diverted non-represented accused would be higher than the 25 percent shown in Figure BR-6.

Earlier, we cautioned against using these data to imply a causal connection between type of representation and conviction rates. However, given the impact of having a criminal record (on employment opportunities and the likelihood of being charged with further offences, etc.), the data can

<sup>48</sup> As well, in 22 percent of the appearances in the Three Month Docket file, a final disposition was entered. In almost a third of these appearances, the final disposition was not clear from the file.

definitely be used to show that unrepresented accused will often experience serious negative impacts as a result of the court process. Whether or not that possibility alone is sufficient to call for greater availability of legal representation is a matter of public policy.

#### 4.5.5 Custodial sentence and type of representation

The case/appearance file contains 392 appearances in which at least one guilty verdict was entered and a final disposition made. Figure BR-7 shows that there were only relatively minor differences, among the different types of representation, in the likelihood of an accused receiving a custodial sentence – with the likelihood ranging from:<sup>49</sup>

- 16 percent at appearances involving a legal aid staff lawyer; to
- 19 percent at appearances at which the accused was self-represented; to
- 23 percent for appearances involving a private lawyer.

<b>Figure BR-7. Distribution of Appearances in which a Conviction was Entered by Whether or not a Custodial Sentence was received by Type of Representation - Brandon*</b>						
Sentence	Represented by				Number of Cases	Proportion of Cases
	Self (%)	Legal Aid (%)	Private Counsel (%)	Agent (%)		
Custodial Sentence	19	16	23	0	74	19%
No Custodial Sentence	81	84	77	100	318	79%
Number of Case/Appearances	77	161	150	4	392	
Total Cases	100%	100%	100%	100%	100%	100%
<i>Notes</i>						
<i>Source: Three Month Docket file.</i>						
<i>* Excludes four cases for which representation was unspecified.</i>						

#### 4.6 Further impacts of lack of representation

An earlier section described the impacts *on the accused* of their appearing before the court without representation. In this section we discuss the impact of self-representation on the key groups involved in the courts – and on court operations.

Information is presented from both the interviews and the data specially collected for the project. It is, however, important to repeat that, where empirical information is presented, it is not presented to draw causal inferences, but simply to describe the events at various stages in the process.

<sup>49</sup> The percentages shown in this table are based on the total numbers of cases – whether or not the cases resulted in a conviction. This choice was made to address the question of risk to a person entering the court system. If one were, instead, interested in the risks of receiving a custodial conviction after being convicted, then one should recalculate the percentages using the number of persons convicted as the base for the percentages.

#### 4.6.1 Impacts on court officers and others

##### *a Victims and witnesses*

A serious problem arises during a trial when the self-represented accused must question a witness – or worse, the alleged victim. There is often a fine line between questioning and badgering or harassment when an inexperienced accused is trying to examine or cross-examine a person with whom he or she has a personal and tense relationship.

##### *b Legal Aid staff and duty counsel*

Interviewees were unanimous in stating that the representation provided by Legal Aid staff was of excellent quality, although fears were expressed by some that the tariffs paid to the private bar for certificate work were eroding the access to and quantum of service offered by the private bar in Brandon.

The high quality of legal aid representation was attributed to the aforementioned factors of: extensive legal experience and skills of staff lawyers, who are senior members of the bar and highly respected; staffing levels that are challenging but not unmanageable; the “competitive” structure of the legal aid plan, in which certificate work by both staff lawyers and members of the private bar promotes efficient, quality work; and the relatively equal footing of Crowns and staff lawyers. In addition, in most cases, Legal Aid officials have adequate – although not generous – lead time to study case files prior to court. Usually the responsible Crown attorney communicates with Legal Aid staff the day before appearances to indicate how the Crown will proceed, and Legal Aid staff can usually reach the Crown to discuss the matter in advance, or can meet with Crowns in the early morning on the day of court.

Some court personnel stated that Legal Aid staff were “run off their feet” (in the words of one clerk), and court was sometimes delayed while staff lawyers put in double or triple duty in trials, docket court, and interviewing accused in the cells or elsewhere. One Crown speculated whether duty counsel had adequate time to work with cases. One Legal Aid staff lawyer indicated this was not a problem – while all admitted that they put in very long hours. Despite the hours, job satisfaction among Legal Aid staff lawyers appeared to be high.

##### *c Crown attorneys*

At stages before trial, Crowns could be put in an awkward position when unrepresented accused wished to discuss their case with the Crown. Some Crowns would speak to unrepresented accused, but all tried to avoid it when possible. Although Crowns were not unanimous in their assessment of the magnitude of the problems, among the difficulties they noted were:

- A higher number of remands ordered by the judge to enable the unrepresented accused to get a lawyer (more remands than in represented cases).
- Reviewing the disclosure packet in order to ensure victims and witnesses were not placed in any danger.
- Being unable to agree with unrepresented accused on narrowing the issues by settling on which evidence can be stipulated.
- Trying to resolve a case quickly – more difficult to do when the accused had no counsel and Crown was barred from giving advice to the accused.
- Ensuring that unrepresented accused did not inadvertently reveal to the Crown something that could be used against them.

### *d Judges*

Crowns and judges agreed that trials involving unrepresented accused took considerably longer than trials of represented persons. Two interviewees said such trials took at least “twice as long,” and one said, “Add a day.” Crowns will alert the Trial Co-ordinator when the accused will be unrepresented, and suggest that a lengthier period be scheduled for the trial. Judges were put in an awkward and time-consuming position at such trials, “getting in the middle of it when they are supposed to be independent.” They found themselves having to:

- explain to unrepresented accused what would be happening as the process unfolded;
- outline the options that the unrepresented accused had in presenting evidence and calling witnesses;
- coach unrepresented accused in how to formulate questions during cross-examination;
- protect the rights of unrepresented accused;
- guard against unrepresented accused attempting to manipulate the case in order to delay it;
- call recesses in order to give the unrepresented accused time to calm down or prepare; and
- suggest defences and arguments that were available to the unrepresented accused.

It is rare to see an unrepresented accused cross-examining his or her victim in court. In assault and sexual assault cases, the judge will step in and appoint counsel to prevent such cross-examination, and/or appoint a lawyer to assist the victim. The Women’s Advocate at the Brandon court could recall only one instance in the past eight years of an unrepresented accused cross-examining his victim in a domestic assault case.

### *e Court administration staff*

Clerks at the registrar’s counter indicated that each of them handled perhaps 10-to-15 inquiries per day from accused who needed questions answered. “Most” of these were either unrepresented impaired driving cases or represented accused who couldn’t remember who their counsel was or what date they were to appear. Clerks also spent time with accused persons explaining to them the conditions of their bail, although duty counsel also assisted in this.

### *f Court security*

Sheriff’s staff at the courthouse reported that problems related to unrepresented accused were very rare. Legal Aid staff normally arrived to speak to persons who were brought into custody within one or two hours of being contacted. The biggest problem faced by security staff was with accused who were represented, where the defence lawyer did not communicate effectively with security staff as to whether and when the accused needed to be brought into court.

## 4.6.2 Overall impacts on court operations

### *a Court workloads: Length and nature of individual appearances*

#### *Length of appearances*

In most provincial criminal courts in Canada, only 4-to-10 percent of cases go to trial. The overwhelming majority of appearances for cases are therefore not trials – and, as noted earlier, in Brandon (as in other courts) these appearances are typically in the order of one or two minutes per case. What would, in other situations, seem a very minor increase in the time taken to perform a function at a

case appearance, can therefore represent a major increase in judicial, Crown, legal aid, defence counsel and court administration workloads – proportionally and in total.

Our court observation data contain information about comments made by court officers and the accused about representation. Only 19 (four percent) of the appearances featured such a comment. Virtually all of these appearances involved the judge asking the accused if s/he had spoken to a lawyer yet, and urging the accused to speak to a lawyer or apply for legal aid. In some of these appearances, the Crown also indicated that the accused should get a lawyer.

While creating our Direct Court Observation file, court observers sat in the non-trial courts and captured the time taken by each case/appearance. The results speak directly to the issue of whether appearances of self-represented accused (in the appearances prior to trial) are longer or shorter than those with other types of representation.

As shown in Figure BR-8, in these courts, similar times were taken for the 50 percent of cases with the shortest appearances – 60 seconds for cases in which the accused was self-represented and 60 seconds for cases in which the accused was represented by Legal Aid staff lawyers (by far the majority of whom were duty counsel) or by private lawyers. On the other hand, when one looks at the length of the shortest 75 percent of cases, one finds that — one has to include cases taking up to 120 seconds to get 75 percent of the cases that were either self-represented or were handled by private lawyers. From a court resources perspective, this result implies that Legal Aid staff lawyers (usually duty counsel for the case/ appearances observed) handle cases in a more expeditious manner than do self-represented accused. From an access to justice perspective, it might be seen as positive that the courts spend more time on cases when the case is self-represented.

An attempt was also made to differentiate between case/appearances that resulted in a remand or a final disposition. Doing so provides important clarifications to the results just cited.

As shown in Figure BR-8, when one looks at the 50 percent of case/appearances that were disposed of most quickly – and which resulted in a remand – there seems to be no difference in the amount of time taken per case for self-represented cases, compared to cases represented by Legal Aid staff lawyers or private lawyers. However, at least 25 percent of self-represented cases took 120 seconds or more – compared to 75 percent of cases represented by Legal Aid staff lawyers or private lawyers being dealt with in 60 seconds or less. In other words, type of representation does not seem to make much of a difference for the shortest case/appearances, but there are differences for longer case/appearances.



<b>Figure BR-8. Case/Apearances: Distribution of Time (seconds) for different types of Case/Apearances by Type of Representation, Brandon</b>					
<b>Appearance Number at which Plea was Entered</b>	<b>25th/ median/ 75th percentiles times for case/appearances represented by</b>				<b>All Types of Represent- ation*</b>
	<b>Self</b>	<b>Staff Legal Aid/ Duty Counsel</b>	<b>Private Counsel</b>	<b>Agent</b>	
<b>All Case Appearances</b>	25th = *** 50th = 60 75th = 120 (n= 52)	*** 60 60 (n= 170)	*** 60 120 (n=214)	*** *** 60 (n=79)	*** 60 60 (n= 518)
<b>By Result of Appearance</b>					
• Remand or Stood Down	25th = 45 50th = 60 75th = 120 (n= 30)	*** 60 60 (n= 116)	*** 60 60 (n= 148)	*** 30 60 (n=70)	*** 60 60 (n=366)
• Final	25th = 60 50th = 120 75th = 240 (n=15)	60 120 450 (n=45)	60 270 660 (n=54)	**	60 120 480 (n=117)
<i>Source: Direct Court Observation file.</i>					
<i>** Less than 10 case/appearances.</i>					
<i>*** Less than 60 seconds.</i>					

Opposite results are obtained when one looks at appearances that resulted in a final disposition. Although 50 percent of such case/appearances for both self-represented cases and cases represented by Legal Aid staff lawyers were finished within 120 seconds, 50 percent or more of cases represented by private counsel required at least 270 seconds. However, a comparison of 75th percentile statistics (i.e., expanding the analysis to include longer case/appearances), shows that case/appearances resulting in a final disposition seemed to be shorter for self-represented cases (75th percentile of 240 seconds) than for case/appearances represented by Legal Aid staff lawyers (450 seconds) or private lawyers (660 seconds). From a court resources perspective, this is perhaps a positive result. However, from an access to justice perspective, there may be reason to be concerned that less time is spent dealing with a self-represented case/appearance that results in a final disposition – than one where a duty counsel or private counsel is involved.

Another factor that would add to the time taken by a case on a court docket would be the process of “standing down” a case to later in the day to complete consideration of any matters that day. In fact, cases that were self-represented had a small likelihood of being stood down – and were less likely to require being stood down than were cases with different types of representation. The relevant likelihoods of having a case stood down were:

- 4 percent for self-represented accused ( $n = 52$ );
- 9 percent for cases represented by Legal Aid staff (mainly duty counsel) lawyers ( $n = 171$ );
- 8 percent for cases represented by private counsel ( $n = 214$ ); and
- 3 percent for cases represented by agents ( $n=79$ ).

*Workloads: Nature of individual court appearances*

As noted earlier, Crowns suggested that unrepresented accused made more appearances as judges tried to ensure they find counsel. Our docket-based data file was unable to speak to this phenomenon, but the Court Observation information did speak to the question of what goes on at appearances involving unrepresented and represented accused.

The Court Observation data yielded information about how many appearances were “productive,” in the sense that they resulted in decisions on (or, at least, consideration of) one or more of three matters: namely bail, plea, and elections. Figure BR-9 shows the breakdown of courtroom events (or non-events), according to representation status at last appearance. The columns in the left half of the table show data for “interim” (i.e., non-final) appearances. The columns in the right half of the table show data for final appearances.

<b>Figure BR-9. Percentage Distribution of Case/Apearances: By Type of Decision Made and Case Status (Interim or Final Appearance) by Accused’s Representation Status, Brandon</b>									
<b>Representa- tion Status</b>	<b>Type of Decisions at Interim Appearance (Remanded or Stood Down)</b>					<b>Type of Decisions at Final Appearance</b>			
	<b>*No decisi- on  %</b>	<b>Bail decision consid- ered  %</b>	<b>Plea entere d and/or electio n made %</b>	<b>Bail, electio n and plea enter- ed %</b>	<b>Total numbe r of Cases</b>	<b>Guilty verdic t or peace bond %</b>	<b>Order varied or commit- ted for trial %</b>	<b>With- drawn, dis- missed, not guilty, discharg e %</b>	<b>Total numbe r of cases</b>
Self	97	0	3	0	39 (100%)	26	26	48	15 (100%)
Staff Lawyer	90	6	4	0	135 (100%)	57	28	15	46 (100%)
Private lawyer	85	4	10	1	161 (100%)	51	33	47	54 (100%)
Agent	90	0	10	0	78 (100%)	0	50	50	2 (100%)
<b>Total</b>	<b>89</b>	<b>3</b>	<b>8</b>	<b>0</b>	<b>413 (100%)</b>	<b>52</b>	<b>23</b>	<b>25</b>	<b>117 (100%)</b>
<i>Notes:</i> Data Source: Direct Court Observation file. * Bail was not considered, no elections were made by either Crown or defence, and no plea was entered.									

With respect to interim appearances, one of the most striking observations is that, overall, appearances in a case were most likely *not* to involve consideration of bail, elections, or the entering of a plea (see column 2 – “no decision”) if the accused was unrepresented.

In fact, almost all (97 percent) of the interim appearances by accused self-represented at interim appearances resulted in no plea, election or bail decision (or consideration for bail). This may tend to reinforce the perceptions of key informants that judges were reluctant to allow cases to proceed before the accused had spoken to duty counsel or another lawyer. Appearances involving private counsel were least likely (85 percent) to result in no bail, election or plea decision.

At final appearances (i.e., the right-most columns in Figure R-12, almost half the appearances by unrepresented accused (48 percent) resulted in a dismissal, stay, or other such outcome, reinforcing the suggestion that many of these cases were diverted, after nothing more than perhaps a little advice and information from counsel. Again, only small differences are observed between Legal Aid staff lawyer cases and private counsel cases.

*b Workloads: Number of appearances per case*

At the time of the site visit, court schedules were essentially free from significant backlogs and delays. However, some court personnel expressed concern that the impending departure of certain key personnel would soon create a backlog problem that would jeopardize the court's efficient functioning.

The Direct Court Observation file does provide information to at least initiate an exploration of the reasons for remands – at least in the pre-trial courts – and the results show that only a small percentage (less than 3 percent) of the reasons for granting remands were related to obtaining counsel, or to remand to a day that counsel could be present. For instance, of remands granted in the 30 case/appearances involving self-represented accused:

- zero percent were “to get a Legal Aid certificate,”
- 10 percent were “to get a lawyer,” and
- 1 percent were “to a date at which a missing lawyer was available.”<sup>50</sup>

Even for those cases represented by Legal Aid staff/duty counsel only two percent were remanded for reasons related to getting legal aid or a lawyer.

If these results were to apply when data from a larger sample of case/appearances were obtained, then they would certainly indicate that remands to obtain legal assistance were not a significant source of delays.

*c Elapsed time for cases to resolve*

Given the nature of the database, it was not possible to address the question of how many weeks or months it takes to resolve cases.

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<sup>50</sup> Although not a focus of the study, it is worth noting that 15 of the 30 remands given to self-represented accused were because the accused had not been in attendance for the court appearance. As noted earlier, for cases represented by Legal Aid staff duty counsel and by private counsel, a significant percentage of remands (24 percent and 25 percent, respectively) were to get disclosure.

## 4.7 Overall conclusions

### 4.7.1 Key overall findings

Our key findings with respect to the key questions raised by the study include:

*With respect to frequency of self-representation*

- There are very few accused who proceed through key parts of the criminal court process in Brandon without the benefit of legal representation.
- This number is perhaps smaller than it would otherwise be as a result of the extended duty counsel system for legal aid, the court case management system in place, and other factors.

*With respect to impact*

- Interviews with key officials strongly suggest that unrepresented accused (especially those with little prior experience in the court system) are less likely to be aware of the legal remedies available to them at key stages in the process – and are unlikely to understand many key decisions and events in the process.
- The evidence is insufficient to conclude whether or not self-represented accused are more likely to be convicted or to receive harsher sentences.
- A significant number of unrepresented accused suffer serious penalties or deprivations of liberty as a result of their court case. Over 40 percent receive a criminal record and a smaller, but still significant number (almost 20 percent) receive custodial sentences.

### 4.7.2 General reasons for current unrepresented accused situation

As noted earlier, key informants were of the view that unrepresented accused were a rare phenomenon in Brandon, except at trial. Interviewees who were able to speculate on the subject agreed that the following were the key reasons for the infrequency of unrepresented accused in Brandon:

- Flexibility of the Legal Aid and duty counsel system to provide needed assistance without undue restrictions.
- Leadership by judges, Crowns and Legal Aid officials in ensuring that accused persons will have access to legal advice, especially at early stages in the criminal process.
- Extensive experience in criminal litigation among staff lawyers of the Legal Aid Plan in Brandon.
- Salary levels and benefits for staff lawyers of the Plan, which are adequate and roughly in line with Crown salaries.

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- “Competition” for criminal case certificates between Legal Aid staff lawyers and members of the private bar.
  - Staffing levels that are challenging, while allowing staff lawyers to spend enough time on cases.
  - *Pro bono* work done by the private bar.
  - Sound case management practices at the Brandon court, which keep backlogs and delays (and therefore the work required) to a minimum by promoting early, fair resolution of cases by the Crown and defence lawyers who will make decisions on them.
  - Shared understandings about following sound case management principles, and their value to all parties.
  - An atmosphere of mutual respect and co-operation.
  - The time to review cases before court, made possible by all of the above.

#### 4.7.3 Solutions suggested by those interviewed in Brandon

It has been noted earlier that all key groups in the Brandon Court seem to support continuing efforts to improve the operations of their court. Given the steps already taken in the Brandon court, and the relatively low number of unrepresented accused in the court (compared to other sites in the study), those interviewed had difficulty identifying steps to be taken to improve the situation further – other than to suggest an increase in resources to continue similar policies and practices.

However, concerns were raised that the gains that had been made might be threatened by the possibility of the court losing certain key personnel – and the possibility that their positions might not be filled quickly.



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## Chapter 5: Edmonton, Alberta

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### 5.1 Objectives and methodology

The Department of Justice and the Federal/Provincial/Territorial Permanent Working Group on Legal Aid engaged the research team to measure:

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

A brief overview of the full national study – covering nine court sites – was presented in Chapter 1. The methodology for the Edmonton part of the national study followed a strategy for data collection and site visits similar to that followed in the other sites.

The methodology involved data collection and site visits. Information was available on the question of unrepresented accused from three sources:

- **A Disposed Cases sample**, created for the project, containing key data, including representation, on all appearances for a total of 620 cases.
- **Direct Observation** of 916 appearances in first appearance and summary disposition courts over ten days during March of 2002; trials were rarely observed.
- **Interviews with key informants** (judges, Crowns, Legal Aid staff duty counsel, court administration, private bar members, local service agencies, etc.), whose anonymity was assured.

Throughout this project, we have received excellent co-operation and assistance from all those we asked to participate in the study. We also readily acknowledge the very able assistance and expertise of the Edmonton-based researcher who conducted the court observations and created the disposed cases file.

## **5.2 Context of the court and legal aid**

One of the major conclusions of this research – supported by the data from all sites – was that data on the extent of legal representation in a particular court cannot be interpreted out of the context of (at least):

- The type of community served (including the nature of accused persons brought before the court).
- The resources and management and operations practices in place in the courts.
- Legal aid policies and practices.
- The duty counsel system in place.
- The policies and practices of all of the other key participants in the court process – including the judiciary, the police, the Crown attorneys, court administrators, the private bar and other supporting agencies.

All of these factors, policies and practices can have significant mitigating or exacerbating influences on the impacts of self-representation. This contextual information is thus essential to understanding the problems and potential solutions to challenges related to the unrepresented accused.

This section will specifically address the first four of the above areas. Information on the fifth is contained throughout the report.

### **5.2.1 The community**

Located near the geographic center of Alberta, Edmonton is the province's capital city. Edmonton is a thriving centre for business, and enjoys a diverse economy. The population density of 974 per square kilometre is one of the lowest of major Canadian cities. About 85 percent of Edmonton residents have indicated English is the language spoken at home, with the next most common language reported being Chinese, at four percent. French is spoken by 0.62 percent of residents.

The population of the city of Edmonton was 666,104 in 2001. Compared to the previous Census (1996) the city population showed an 8.1 percent increase, slightly less than the increase the province as a whole experienced (10.3 percent). The population of the Edmonton Census Metropolitan Area (CMA) was 937,845 in 2001, an increase of 8.7 percent. Approximately 22 percent of males and 21 percent of females in Edmonton were in the 15-to-29 age range associated with the highest rates of crime.

The average income of those in the labour force aged 15 years and older was reported as \$24,783. The overall average income for Edmonton residents was slightly below the provincial average of \$26,196. Both women and men from Edmonton reported average income levels below the provincial average for their gender.

The unemployment rate for the city of Edmonton, as reported in 2001, was 4.9 percent, lower than the rate for the province as a whole (5.6 percent).

Overall, the population of Edmonton reported higher average education levels than the provincial population. The proportion of population of Edmonton over age 25 reported to have completed



university was 19.9 percent, compared to 17.4 percent for the province of Alberta. At the same time, Edmonton had a slightly higher proportion of people over 25 years of age reporting less than Grade 9, compared to provincial levels.

The estimated number of single-parent families in Edmonton in 2001 was 30,941 or 17 percent out of 182,986 families. The provincial rate for single-parent families was estimated to be 12.5 percent in that same year.

Of the estimated 271,239 occupied private dwellings in Edmonton in 2001, close to 60 percent (157,487) were owner-occupied, and 113,752 were rented. In the province of Alberta as a whole for the same year, the estimate was 68 percent for owner-occupied private dwellings.

Rates of violent crime in Edmonton increased from 1999 to 2000 by 8.2 percent, compared to the provincial decline in violent crime of 0.1 percent. The rate of violent crime in Edmonton in 2000 was 941 per 100,000 population. Property crime rates in Edmonton decreased from 1999 to 2000 by 2.6 percent, compared to a provincial decrease of 7.0 percent. The rate of property crime in Edmonton was reported as 4,680 per 100,000 population. Total overall crime in Edmonton decreased by 1.9 percent from 1999 to 2000. The rate of overall crime in Edmonton was reported as 8,377 per 100,000, about the same as the provincial rate (8,822). The total number of crimes committed in Edmonton (excluding traffic offences) was 79,095 for the year 2000

## 5.2.2 The court

The Edmonton courthouse comprises:

- Twelve Queen’s Bench criminal courtrooms
- Fifteen Provincial Court criminal courtrooms

One Queen’s Bench bail courtroom		<ul style="list-style-type: none"> <li>• Courtrooms handle both adult and youth</li> <li>• Do not split drugs and CCC</li> </ul>
Twelve Queen’s Bench trial courtrooms		
Three Provincial Court docket courtrooms	<ul style="list-style-type: none"> <li>• One federal and drug, then federal trials</li> <li>• Two CCC</li> </ul>	
Twelve Provincial Court trial courtrooms		
Edmonton Hearing Office open 24/7 for bail hearings or other warrants needing hearings before a JP (remanded next day to docket court)		
One Special court	One super-large courtroom	Shared between Queen’s Bench and Provincial Court

There are no Circuit Courts operating from the Edmonton courthouse.

The Edmonton courthouse is covered by the Adult Criminal Court Survey (ACCS) conducted by Statistics Canada. Based on data from the ACCS, the breakdown of cases for 2000/01 for Edmonton and for all of Alberta is presented in the table below.

**Disposed Cases by Type of Offence: Comparison of Edmonton and Alberta for 2000/2001** (Source: Adult Criminal Court Survey, Statistics Canada)

	Edmonton	Percentage Edmonton	Alberta	Percentage – Alberta
<b>Total Cases Disposed</b>	18,551		65,228	
<b>Homicide</b>	22	0.1	65	0.1
<b>Attempted Murder</b>	4	0.0	21	0.0
<b>Robbery</b>	241	1.3	555	0.9
<b>Kidnapping</b>	13	0.1	69	0.1
<b>Sexual Assault</b>	166	0.9	638	1.0
<b>Sexual Abuse</b>	51	0.3	180	0.3
<b>Major Assault</b>	1,049	5.7	2,954	4.7
<b>Abduction</b>	13	0.1	32	0.1
<b>Common Assault</b>	1,910	10.3	7,154	11.5
<b>Break &amp; Enter</b>	419	2.3	1,586	2.5
<b>Arson</b>	20	0.1	66	0.1
<b>Fraud</b>	1,213	6.5	3,432	5.5
<b>Possess Stolen Property</b>	816	4.4	2,542	4.1
<b>Theft</b>	2,435	13.1	7,079	11.4
<b>Property Damage/Mischief</b>	668	3.6	2,294	3.7
<b>Weapons</b>	375	2.0	1,140	1.8
<b>Administration of Justice</b>	2,728	14.7	7,716	12.4
<b>Public Order Offences</b>	626	3.4	2,083	3.3
<b>Morals – Sexual</b>	360	1.9	560	0.9
<b>Morals – Gaming/Betting</b>	23	0.1	76	0.1
<b>Other Criminal Code</b>	1,571	8.5	5,988	9.6
<b>Criminal Code Traffic</b>	384	2.1	1,442	2.3
<b>Impaired Driving</b>	1,987	10.7	9,162	14.7
<b>Traffic/Import Drugs</b>	778	4.2	1,774	2.8
<b>Possession Drugs</b>	496	2.7	2,334	3.7
<b>Other Federal Statute</b>	183	1.0	1,346	2.2

Examination of the ACCS data above suggests that the profile of offence types handled by the Edmonton courthouse does not differ greatly from the profile for Alberta as a whole.

### 5.2.3 Legal aid

Criminal legal aid in Alberta is administered by the Legal Aid Society of Alberta. With the exception of duty counsel, provided by Society staff lawyers in certain locations (including Edmonton), representation of persons eligible for criminal legal aid is provided by members of the private bar on certificates. Payment for these services is made in accordance with the legal aid tariff, or schedule of fees.

In criminal matters, financially eligible adults may be covered by legal aid certificates if they have been charged with an indictable offence; or if they have been charged with a summary conviction offence where there is a likelihood, on conviction, of incarceration or loss of the means to earn a livelihood; or where there are other circumstances, such as mental health or language issues.

Applications for legal aid in Edmonton are taken at the courthouse (in an office located directly outside the first-appearance courtroom), at the main Legal Aid office, and at the Remand Centre. The current average waiting period for certificates to be issued for approved applicants is approximately five calendar (not working) days. Very few of the informants interviewed in Edmonton believe that an accused with a certificate is likely to experience any real difficulty finding a private lawyer willing to take his or her case.

Individuals who are ineligible for legal aid because of the minor nature of the charges they face, but who meet a financial eligibility test, may qualify for assistance from Student Legal Services, provided by the Law School at the University of Alberta. The Elizabeth Fry Society and Native Counselling Services of Alberta provide non-legal assistance to any accused who approaches them in the Edmonton courthouse.

#### **5.2.4 Duty counsel**

Virtually all duty counsel services in Edmonton are provided by two lawyers on the staff of Legal Aid Alberta. These individuals are both experienced counsel who enjoy an excellent reputation within the courthouse (particularly among the judges). They have both been with the duty counsel service since its inception eight years ago. Duty counsel used to be paid approximately the same salaries as Crowns, but have lately fallen behind by about \$30K.

Duty counsel in Edmonton always push unrepresented accused to get counsel one way or another. They attend at the Remand Centre every weekday before the courts open. There, they interview any accused in custody who wish to speak to them. No assessment of eligibility for legal aid is made at this point in time. In essence, their policy is to "take all comers."

During their interviews with unrepresented accused, duty counsel will make them aware of legal aid and how to make an application. They will also give the Legal Aid office a "heads-up" when they want to ensure that an individual accused pursues an application. Duty counsel also attend at docket court, where they are available to all to assist in having their cases remanded, and to assist unrepresented accused who wish to plead guilty at this time. They speak to the Crown about these cases only at that point, and not before. They will also alert the judge when an accused wants to plead guilty to "get it over with," even when he or she is in fact, not guilty.

Because there is only two-duty counsel, when an accused has more than one contact with them, they can provide an element of continuity of service.

### **5.3 Frequency of unrepresented accused**

There was general agreement among the key informants in Edmonton that trials involving unrepresented accused were rare. Otherwise, our informants were unsure as to the actual numbers of unrepresented accused one might encounter in the Edmonton courthouse. It was noted that

unrepresented accused would sometimes appear at docket court to set a trial date, indicate that they would be seeking legal aid or hiring a lawyer privately, then appear on the date set for trial without counsel and plead guilty. Unrepresented accused were most often observed in docket court, where duty counsel was available to assist them. It was estimated that about 50 percent of bail hearings were held in docket court, where duty counsel was available. The remainder were held in the Edmonton Hearing Office during evenings and weekends, where accused were "on their own," unless they had retained private counsel. In such cases, justices of the peace would allow accused persons to retain counsel before the hearing proceeded. In any event, bail could later be re-opened in Provincial Court by consent of both the Crown and defence. It is also possible to reverse an earlier decision to deny bail through an appearance in Court of Queen's Bench.

### 5.3.1 Overview of representation

It is apparent from the Disposed Cases file that it is not possible to characterize representation over the life of a case in any simple manner. An accused's representation status will often change from one appearance to the next, as, for example, when an accused may be represented by duty counsel at the bail hearing, but be self-represented afterwards.

Readers should note that throughout this report, **references to "private counsel" encompass both privately retained counsel and private counsel paid through legal aid.** For purposes of this study, we were not able to make this distinction in our collection or analysis of either the Disposed Cases data or the Court Observation data.

Looking at the pattern of representation over all appearances, our analysis of data from complete records of 620 randomly selected cases completed in late 2000 and 2001 indicates the following:

- At first appearance, 49.7 percent of criminally accused adults in Edmonton Provincial Court were unrepresented. An additional 26.3 percent used the services of duty counsel, and 19.3 percent had private counsel.
- At second appearance (if any), the proportion of criminally accused adults in Edmonton Provincial Court who were unrepresented declined sharply to 24.9 percent. An additional 23.7 percent used the services of duty counsel, and 43.3 percent had private counsel.
- At third appearance (if any), only 17.5 percent of criminally accused adults in Edmonton Provincial Court were unrepresented. An additional 9.7 percent used the services of duty counsel, and 60.3 percent had private counsel.
- At final appearance (for accused making multiple appearances only), 17.3 percent of criminally accused adults in Edmonton Provincial Court were unrepresented. An additional 7.0 percent used the services of duty counsel, and 71.0 percent had private counsel.
- For at least one appearance, 64.4 percent of criminally accused adults in Edmonton Provincial Court had private counsel.
- Fifteen percent of criminally accused adults in Edmonton Provincial Court had private counsel for all of their appearances.
- At all of their appearances, 14.2 percent of criminally accused adults in Edmonton Provincial Court were unrepresented by any counsel.
- Duty counsel represented 2.3 percent of criminally accused adults in Edmonton Provincial Court at all of their appearances.

### 5.3.2 Self-representation by category of offence and stage of process

The general view among our key informants was that accused facing serious charges would, with few exceptions, have a lawyer “one way or another.” Most unrepresented accused were believed to face relatively minor charges, the most frequently mentioned being impaired driving, shoplifting, communicating for prostitution, mischief, obstruction and breaches.

The disposed cases sample indicates the proportions of accused at each appearance who were unrepresented. Figure E-1 displays this information according to the category<sup>51</sup> of the most serious charge in the case.

<b>Figure E-1. Proportion of Accused who were Unrepresented At Key Appearances, by Most Serious Charge Category, Edmonton</b>						
<b>Most Serious Charge Category</b>	<b>Proportion of Unrepresented Accused at</b>					<b>Total Number of Cases (all accused)</b>
	<b>First (%)</b>	<b>Bail (%)</b>	<b>Plea (%)</b>	<b>Defence Election (%)</b>	<b>Final (%)</b>	
Homicide	***	***	***	***	***	0
Sexual Assault	***	***	***	***	***	8
Assaults excl. Common	52	29	11	21	10	48
Robbery	***	***	***	***	***	3
Break and Enter	53	27	13	12	21	19
Impaired Driving	23	33	21	14	14	35
Common Assault	50	42	4	22	8	62
Drugs excl. Simple Possession	80	20	9	43	20	15
Weapons Offences	54	0	0	23	0	13
Thefts and Frauds	49	38	24	31	26	108
Simple Possession of Drugs	80	67	31	56	55	20
Offences against Administration of Justice	46	33	22	31	30	265
Public Order	70	67	30	50	30	20
<b>Total</b>	<b>50</b>	<b>34</b>	<b>18</b>	<b>29</b>	<b>24</b>	<b>620</b>

*Notes \*\*\* The cell contains too few cases to report a percentage.*

The data in Figure E-1 indicate that:

- Unrepresented accused were most often encountered at first appearance.
- The proportions of unrepresented accused generally declined across appearances.
- Accused persons charged with drug offences were relatively more likely to be unrepresented at first appearance than were persons charged with other types of offences.
- Accused persons charged with simple possession of drugs were more likely than persons charged with other types of offences to be unrepresented across all appearances, followed by persons charged with public order offences.
- Accused persons facing charges of impaired driving were least likely to be unrepresented at first appearance

<sup>51</sup> See Appendix A for a listing of the offences contained in each of the “offence categories.”

### 5.3.3 Socio-demographic characteristics of unrepresented accused

Most respondents did not identify any specific characteristics of accused they would associate with a lack of representation. Those who did made reference to the working poor, meaning those who fell outside the financial eligibility guidelines for legal aid. Mention was also made of accused with the mistaken belief that the victim would not pursue the charges (for example, in domestic violence cases and cases of employee theft), and persons who were simply disorganized, meaning that they did not get to Legal Aid or complete an application. Some unrepresented accused were also individuals who were denied legal aid for coverage reasons (i.e., no prospect of incarceration or loss of livelihood on conviction for a summary offence).

### 5.3.4 Other types of representation

Figure E-2 displays the representation provided by counsel of various types at key stages of the criminal process. These data indicate that:

- Duty counsel took only a limited proportion of cases to plea (14 percent) and final resolution (11 percent).
- Private counsel assisted a significant proportion of accused at some, but not all stages: 19 percent of all accused at first appearance; 46 percent of all accused at bail; 61 percent at plea; 26 percent at defence elections; and 62 percent of all accused at final appearance.

Appearance	Represented by			Number of Cases
	Self (%)	Duty Counsel (%)	Private Counsel (%)	
First appearance	49	26	19	616
Bail	34	16	46	250
Plea	18	14	61	470
Defence Election	29	39	26	586
Final Appearance	24	11	62	620

*Note. Percentages may not total to 100 due to rounding.*

Figure E-3 shows the most serious offence charged in cases with different types of representation at the final appearance. These data indicate that:

- The offences that had a comparatively higher frequency of self-representation at final appearance were the relatively minor offences, categorized as simple possession of drugs, and, to a lesser degree, administration of justice and public order offences.
- The offences that had a lower frequency of representation by duty counsel at final appearance were the relatively serious offences, categorized as assaults (excluding common assault), break and enter, and drugs (excluding simple possession).
- The offences that had a relatively higher frequency of private counsel representation at final appearance were the more serious offences, categorized as assaults, break and enter, impaired driving, drug offences (excluding simple possession) and weapons offences.

<b>Figure E-3. Distribution of Representation Status at Final Appearance By Most Serious Charge Category, Edmonton*</b>				
<b>Most Serious Charge Category</b>	<b>Proportion of Cases represented by</b>			<b>Number of Cases</b>
	<b>Self %</b>	<b>Duty Counsel %</b>	<b>Private Counsel %</b>	
Homicide	***	***	***	0
Sexual Assault	***	***	***	8
Assaults excl. Common	10	4	79	48
Robbery	***	***	***	3
Break and Enter	21	0	74	19
Impaired Driving	14	9	71	35
Common Assault	8	8	76	62
Drugs excl. Simple Possession	20	0	80	15
Weapons Offences	0	8	92	13
Thefts and Frauds	26	11	56	108
Simple Possession of Drugs	55	10	30	20
Offences against Administration of Justice	30	14	55	265
Public Order	30	15	45	20
<b>All Offences</b>	<b>24</b>	<b>11</b>	<b>62</b>	<b>620</b>

## 5.4 Evidence on the impacts of lack of representation

### 5.4.1 Perceived impacts of a lack of representation

#### *a Impacts on the accused*

The site visit interviews provided some interesting insights on the perceived impacts of a lack of representation on accused persons in Edmonton Provincial Court. Some key informants in Edmonton were of the view that unrepresented accused suffered significant impacts from their lack of representation. Other interviewees tended to the view that, if a case reached the sentencing stage, the sentence might (or might not) be just as fair, or even less harsh, but more unrepresented accused cases reached the conviction and sentencing stage than did represented cases.

Among the impacts cited by the former were the following:

**At trials:** Opinion was quite varied as to the impact of a lack of representation at trial on an accused. These comments were offered in the context of a general perception that unrepresented accused at trial were quite rare, especially if the charges were serious.

Negative impacts that were suggested included:

- Being found guilty on more charges.
- Receiving a harsher sentence.
- Facing a higher risk of conviction.

These negative impacts were seen as arising from a number of factors, including:

- The inability of unrepresented accused to plea-bargain.
- Their lack of knowledge of the typical range of sentences for the charges on which they were convicted.
- Their inability to objectively assess which options were in their best interests.
- When unrepresented accused testified, they might convict themselves, when they might have been found not guilty if they had stayed silent (which counsel might have strongly advised).

On the other hand, some of our interviewees believed that sentences may be lower for unrepresented accused because:

- Judges may try harder to find mitigating factors when unrepresented accused plead guilty.
- Judges may impose lighter sentences when an accused self-represents.

**At stages before trial:** Opinion was quite uniform as to the impact of a lack of representation at stages before trial. Bail court (Edmonton Hearing Office) was generally seen as the stage at which representation levels were the lowest. It was recognized by some respondents that being denied bail and held in custody could provoke some unrepresented accused to plead guilty to “get it over with.” Some unrepresented accused were described as making important decisions about bail, without assistance. It was suggested that they would be better off waiving their bail hearings at EHO on the weekend or overnight, and waiting for the next docket court so that duty counsel would be available to assist with their bail hearings.

More generally, representation at the earliest stages was seen by our key informants in Edmonton as very important, and not completely covered by the services of duty counsel. Opinions along this line included:

- It is most important to have representation at the initial stage, even before docket, so that the accused understands both the charges and the choices to be made.
- Crowns will not plea-bargain with unrepresented accused. As a result, they may be convicted on more charges. However, these negative impacts may be offset by the judge during sentencing.
- Unrepresented accused miss opportunities for alternative measures and diversion.
- They don’t know how to bargain with the Crown or properly present their defence.
- Unrepresented accused don’t know that they need to obtain and read their disclosure packages.
- Bail seems the most obvious gap in the services provided by duty counsel. A great need is seen for representation at bail hearings (although adverse decisions can be reversed later at Queen’s Bench).



- Unrepresented accused have to make repeated appearances (to get counsel, to get disclosure, to make elections) so the process is slower, and more drawn out than it might be with counsel.

The key informants were also asked to identify the types of errors made most often by self-represented accused. Included on this list were:

- Unrepresented accused couldn't objectively assess the facts of the cases against them – did not know when to cut bait, deal.
- Unrepresented accused didn't know how to bargain, or properly present their defence.
- Unrepresented accused didn't know the “going rate” for sentences.
- Unrepresented accused didn't know the “best” judges.
- Unrepresented accused admitted to things that were not helpful to their cases.
- Unrepresented accused asked witnesses questions that were unhelpful.
- Unrepresented accused tried to explain their behaviour, including where the explanation made it clear that a defence existed, negating a prior guilty plea and leading to a trial – that although it may yield a better outcome.
- Unrepresented accused made poor tactical decisions, and couldn't objectively assess prospective risks.

#### *b Impacts on court officers and others*

Judges in Edmonton typically make considerable efforts to explain the process to unrepresented accused, and to try to guide them through their points of choice. This is both time-consuming and places the judges in the uncomfortable position of seeming to “bend over backwards” or “become the guardian of the accused's interests,” when their function is to independently try the facts of the case. Crowns may also assist in ways that have the effect of leveling the field. Defence counsel may also volunteer to assist unrepresented accused when in the courtroom on another matter.

More specific points raised on the impacts of unrepresented accused on the duration of court proceedings included:

- Unrepresented accused didn't know to admit evidence so more witnesses and evidence were called than would have been the case if a lawyer was involved.
- Unrepresented accused wouldn't know to narrow issues, so trials took longer.
- There would be wasted appearances for witnesses if unrepresented accused asked for adjournments on trial dates.

#### 5.4.2 Empirical findings regarding a lack of representation

The preceding section described the perceptions of those interviewed regarding the impacts of accused appearing before the court without representation. In this section we provide empirical evidence on what actually happened to unrepresented accused, using data on cases in the Disposed Cases file and from the appearances directly observed in court.

It is, however, important to make it clear at the outset that the information in this section is not presented to draw causal inferences, but simply to describe the events at various stages in the process. For instance, the evidence is not presented to suggest that the lack of representation *caused*, for

example, a higher (or lower) likelihood that an unrepresented accused would be convicted. Rather, it simply describes whether or not, and how frequently, significant decisions were made and certain outcomes occurred with or without the presence of counsel.

*a Type of plea entered by type of representation*

A number of our key informants in Edmonton expressed the view that unrepresented accused might be more likely to plead guilty – for instance, to “get it over with,” or because they had neither the knowledge nor resources to contest the charges.

Figure E-4 displays the plea entered by the type of representation available to the accused at that appearance. These data indicate that:

- Overall, 55 percent of all pleas were guilty pleas.
- Guilty pleas were entered in 72 percent of cases assisted at that appearance by duty counsel. This was almost exactly the same proportion as the guilty plea rate of unrepresented accused.
- Accused represented by the private bar were much less likely to enter a guilty plea (50 percent).

Plea	Proportion of all Pleas by or on behalf of Accused Represented by			Number of Cases	Proportion of Cases
	Self	Duty Counsel	Private Counsel		
Guilty	73%	72%	50%	333	55%
Not guilty	27%	28%	50%	272	45%
Total Cases	100%	100%	100%	605	100%

*b Conviction rate by type of representation*

Conviction rates (including those resulting from guilty pleas) were also examined in terms of representation at final appearances.

Figure E-5 shows conviction rates by representation at final appearance. These data suggest that:

- Overall, 58 percent of all disposed cases resulted in convictions on at least one charge.
- The conviction rates were lowest (53 percent) for accused who were self-represented, followed by those for accused represented by private counsel (58 percent) and accused assisted by duty counsel (79 percent).

<b>Figure E-5. Distribution of Disposition by Type of Representation at Final Appearance, Edmonton</b>					
<b>Disposition</b>	<b>Proportion of Dispositions For Accused Represented by</b>			<b>Number of Charges</b>	<b>Proportion of Charges</b>
	<b>Self</b>	<b>Duty Counsel</b>	<b>Private Counsel</b>		
Convicted*	53%	79%	58%	360	58%
Not Convicted**	47%	22%	42%	259	42%
Total Cases	100%	100%	100%	619	100%
<i>Notes * Includes guilty pleas, guilty verdicts and peace bonds ordered. ** Includes not guilty, withdrawn, dismissed, stayed, and discharges.</i>					

Earlier, we cautioned against using these data to imply a causal connection between type of representation and conviction rates. Factors associated with individual cases, such as the number and seriousness of the charges, and the accused’s criminal record, are likely to affect both the type of legal representation provided to the accused and the likelihood of conviction. However, given the impact of having a criminal record (on employment opportunities and the likelihood of being charged with further offences, etc.), the data can definitely be used to show that unrepresented accused are very likely to experience serious negative impacts as a result of the court process.

*c Custodial sentence and type of representation*

The proportion of cases that resulted in custodial sentences was examined in terms of representation at final appearance.

Figure E-6 shows the distribution of custodial sentences for cases disposed at final appearance by type of representation. The Figure suggests that:

- Overall, 32 percent of all disposed cases resulted in a custodial sentence.
- Unrepresented accused fared best of all (27 percent custodial rate); followed by cases with private counsel (33 percent). Cases finalized with duty counsel had the highest imprisonment rate (49 percent).

<b>Figure E-6. Distribution of Custodial Sentence by Type of Representation at Final Appearance, Edmonton</b>					
<b>Sentence</b>	<b>Represented by</b>			<b>Number of Cases</b>	<b>Proportion of Cases</b>
	<b>Self</b>	<b>Duty Counsel</b>	<b>Private Counsel</b>		
Custodial Sentence	27%	49%	33%	199	32%
No Custodial Sentence	73%	51%	67%	421	68%
Total Cases	100%	100%	100%	620	100%

Again, we caution against using these data to imply a causal connection between type of representation and likelihood of receiving a custodial sentence. Factors associated with individual cases, such as the number and seriousness of the charges, and the accused’s criminal record, were likely to affect both the type of legal representation provided to the accused and the likelihood of a custodial sentence. However, the results are directly relevant from another important perspective. Specifically, it is accepted that eligibility for legal aid should depend (in part) on the likelihood of a case receiving a

custodial sentence. Although one cannot expect to predict with total accuracy whether a case will result in a custodial sentence, it is relevant that custodial sentences were received by about one in four self-represented accused in Edmonton.

### 5.4.3 Overall impacts on court operations

#### *a General*

In most provincial criminal courts in Canada, only 4-to-10 percent of cases go to trial. The overwhelming majority of appearances for cases are therefore not trials – and, as noted earlier, in Edmonton (as in other courts) these appearances are typically in the order of one or two minutes per case. What would in other situations seem a very minor increase in the time taken to perform a function at a case appearance, can therefore represent a major increase in judicial, Crown, legal aid, defence counsel and court administration workloads – proportionally and in total.

Our court observation data confirm that efforts were made in the courtroom to make unrepresented accused aware of the opportunities and benefits of having a lawyer. In 12 percent of appearances by unrepresented accused, and 23 percent of appearances assisted by duty counsel, comments were made, mostly by judges, concerning representation. In these appearances, the judges asked the accused about his or her representation status or instructed the accused to get a lawyer or apply for legal aid. In a handful of appearances observed, the judge informed the accused that if s/he failed to retain counsel for his or her next appearance, the trial would proceed regardless.

Some of our key informants in Edmonton expressed the view that unrepresented accused often caused court time to be spent unproductively. Virtually all agreed that the system moved more efficiently when the accused was represented. Adjournments for, and failures to appear by, unrepresented accused wasted a great deal of court time. Cases that “collapsed” and resulted in a plea of guilty on the day of trial were very costly also.

#### *b Nature and length of individual court appearances*

Interviewees noted that the efficiency of the entire system was much greater when the accused was represented – “wasted” appearances were reduced, useless discussions and arguments were largely eliminated, and work was concentrated on what is relevant.

The Court Observation data yielded some information about how many appearances were “productive,” in the sense that they resulted in decisions on (or, at least, consideration of) one or more of three matters: namely bail, plea, and elections. Figure E-7 shows the breakdown of courtroom events (or non-events) at interim (meaning other than final) appearances according to representation status at last appearance.

<b>Figure E-7. Court Observation Data: Percentage Distribution of Cases: Type of Decision Made by Representation Status At Interim (not Final) Appearances, Edmonton*</b>			
<b>Represented by</b>	<b>Type of Decisions at Interim Appearances (Remanded or Stood Down)</b>		
	<b>**No decision</b>	<b>Bail considered, plea entered and/or election made</b>	<b>Total number of Appearances</b>
Self	86%	14%	190
Duty counsel	42%	58%	191
Private lawyer	66%	34%	299
Total Appearances	65	35	680

*Notes: \* Appearances for which data were unavailable or unclear are not included.  
 \*\* Bail not considered, no elections made by either Crown or defence, and no plea entered.*

One of the most striking observations is that, overall, almost two thirds of interim appearances (440 of 680 observed) did *not* involve consideration of bail, elections, or the entering of a plea, making them, in a sense, unproductive. However, appearances that were, in that sense, “unproductive” were most frequent when the accused was unrepresented (86 percent) or represented by private counsel (66 percent). The lowest proportion of such appearances (42 percent) occurred with appearances involving duty counsel.<sup>52</sup>

The court observation also yielded data on the length or duration of individual court appearances. Figure E-8 summarizes these data by representation type. The general conclusion supported by these data is that appearances by self-represented accused were typically somewhat shorter in duration than were appearances for accused assisted by duty counsel or private counsel.

<b>Figure E-8. Distribution of Appearance Durations (in minutes) by Type of Representation at Final Appearance, Edmonton</b>			
	<b>Appearance Duration (in minutes) when Represented by</b>		
	<b>Self</b>	<b>Duty Counsel</b>	<b>Private Counsel</b>
25th Percentile	0.0	1.0	1.0
Median	1.0	1.0	1.0
75th Percentile	1.0	3.0	2.0
95th Percentile	4.0	7.7	9.6
Total Appearances	203	245	347

*c Number of appearances per case*

Most of our key informants in Edmonton were of the view that unrepresented accused slowed down the court process, since they did not benefit from the skill that an experienced lawyer would be able to apply to move the process along expeditiously. For example, lawyers would often waive reading of the charges, while unrepresented accused would not. Multiple postponements before a trial date is set were

<sup>52</sup> These figures may reflect the high number of cases in which duty counsel represent in-custody cases at their bail hearing.

common for accused who were unrepresented; some judges might repeatedly grant adjournments in hopes the accused would obtain counsel. Such appearances were costly for the court and its officers. After a number of unproductive appearances, some judges attempted to move the process forward by decreasing the length of remands to get counsel.

A direct indicator of the workloads caused by – and resources required to deal with – cases is the number of court appearances required to complete a case.

A related indicator is the appearance number at which key activities take place.

The Disposed Cases sample yielded information on these measures for appearances made by accused who were or were not represented.

*Appearances before a plea is entered*

Figure E-9 shows the appearance number at which the plea was entered for accused who had various types of representation. The data suggest that self-represented cases in general, as well as those involving duty counsel, *did not* generate more appearances before a plea was entered, especially in comparison to cases handled by private counsel:

- At least 50 percent of self-represented accused, and accused assisted by duty counsel, entered their plea on or before their second appearance.
- Fifty percent or more of accused represented by private counsel did not enter a plea until their fourth appearance or later.

<b>Figure E-9. Distribution of Appearance Number at Which Plea was Entered By Type of Representation at Plea Appearance, Edmonton</b>			
<b>Appearance Number at which Plea was Entered</b>	<b>Represented by</b>		
	<b>Self</b>	<b>Duty Counsel</b>	<b>Private Counsel</b>
25th Percentile	1	1	2.25
Median	2	2	4
75th Percentile	3	2	5
95th Percentile	5	5	9
Total Cases	87	66	288
<i>Notes * If plea entered at more than one appearance, last appearance at which plea entered is shown.</i>			

*Total number of appearances before disposition*

Figure E-10 shows the total number of appearances in the case – according to representation type at last appearance. Again, these data indicate that self-represented cases, as well as cases involving duty counsel, *do not* make more court appearances overall. More specifically:

- Fifty percent or more of accused unrepresented at last appearance and those assisted by duty counsel made only one or two appearances, as compared to accused represented at last appearance by private counsel, 50 percent of whom made at least four appearances.

Number of Appearances	Represented by		
	Self	Duty Counsel	Private Counsel
25th Percentile	1	1	3
Median	2	2	4
75th Percentile	3	2	6
95th Percentile	5	4.7	10
Maximum	8	5	13
Total Cases	149	65	380

Taken together, the data presented in this section indicate, contrary to a widely held perception, that unrepresented accused, in fact, made fewer rather than more court appearances than did accused represented by private counsel.

*d Elapsed time for cases to resolve*

The disposed cases sample also yielded information about the time elapsed between the first and last appearance. This information is important from a due process perspective. However, that perspective yields two potential hypotheses: first, “Justice delayed is justice denied,” and second, “Justice rushed is justice crushed.”<sup>53</sup> The first concern is relevant to those who feel that delays in obtaining legal representation adversely affect the fairness of the court process and the final outcome. The second concern is especially relevant to those concerned that unrepresented accused may plead out the case early “to get it over with,” or because they are not aware of viable legal defences.

As shown in Figure E-11:

- Cases represented at last appearance by duty counsel took the least time to resolve – 50 percent were settled in two weeks or less, and 75 percent were settled in 12 weeks or less.
- Cases self-represented at last appearance took considerably longer, with 50 percent settled within 8.6 weeks, and 75 percent settled within 17.7 weeks.
- Cases represented by private counsel at last appearance took the longest time to be resolved, with 50 percent settled within 13.4 weeks and 75 percent settled within 20.6 weeks.
- Approximately 5 percent of all cases took ten months or more to be resolved.

	Time (in weeks) between First and Final Appearance when Represented by		
	Self	Duty Counsel	Private Counsel
25th Percentile	1.4	0.21	5.7
Median	8.6	2	13.43
75th Percentile	17.7	12.1	20.6
95th Percentile	48.6	43.9	40.7
Maximum	642	61	470
Total Cases	91	37	371

<sup>53</sup> The latter phrase was first suggested to one of the authors by a widely respected colleague, Carl Baar.

## **5.5 Overall conclusions**

### **5.5.1 Key overall findings**

Our key findings with respect to the key questions raised by the study include:

*With respect to frequency of self-representation*

- There is a significant number of accused who proceed through key parts of the criminal court process without the benefit of legal representation.

*With respect to impact on the accused*

- Interviews with key officials strongly suggest that the unrepresented accused (especially those with little prior experience in the court system) are less likely to be aware of the legal remedies available to them at key stages in the process – and are therefore unlikely to understand many key decisions and events in the process.
- Accused represented by private counsel enter guilty pleas less often than do accused who either represent themselves or are assisted by duty counsel.
- Rates of conviction are lower for accused who represent themselves, or are represented by private counsel, than for accused assisted by duty counsel.
- Accused who represent themselves are less likely to receive custodial sentences than are accused who are assisted by duty counsel or represented by private counsel
- The evidence is insufficient to conclude whether or not self-represented accused are more likely to be convicted or to receive harsher sentences as a result of their lack of legal representation. Nevertheless, a significant number of unrepresented accused suffer serious penalties or deprivations of liberty as a result of their court case. Some 53 percent receive a criminal record and a smaller, but a still significant number (in the order of 27 percent) receive custodial sentences.

*With respect to impact on the court*

- Many judges, as well as other court officials, respond to the presence of unrepresented accused with efforts to reduce the impact on accused persons of their lack of representation. Some such efforts may appear to threaten the impartiality of the judicial role.
- Self-represented accused and those assisted by duty counsel make fewer court appearances than do accused represented by private counsel.
- Cases where the accused are assisted by duty counsel are of shorter overall duration than are cases involving self-represented accused or accused represented by private counsel (which typically run the longest).
- Individual appearances by self-represented accused are typically somewhat shorter in duration than are appearances for accused assisted by duty counsel or private counsel.



### 5.5.2 General reasons for the current situation regarding unrepresented accused

Reluctance on the part of the private bar to accept legal aid certificates is not seen as a major contributor to the number of adult accused appearing without counsel in Edmonton Provincial Court. The exception to this may be complex cases that the private bar may decline to accept, given the current tariff. (Some of these cases would result in court-appointed counsel.) Such cases may be seen as inadequately compensated under the legal aid tariff. At a more general level, the private bar sees the time allowances under the tariff as very limited, meaning that the services they are able to provide to legal aid clients are minimal at best.

Rather, the main cause is seen as the limited eligibility criteria for legal aid and the perception held by working poor that they cannot afford to hire private counsel. Other comments were:

- Bail hearings outside of normal business hours (M-F, 9-5) take place at the Edmonton Hearing Office (EHO). At the EHO, accused are either assisted by private counsel or are on their own. Duty counsel do not attend the EHO.
- Duty counsel in Edmonton do not handle trials. One member of the private bar noted that the coverage of duty counsel was limited. They do not cover diversion, plea negotiations, or pre-trial discussions with the Crown. Some concern was also expressed that some accused may plead guilty “too early” with duty counsel.
- Some Aboriginal accused may plead guilty, even when they are not, simply to “get it over with.”
- Some accused whose facility in English is weak (but not non-existent) may be “lost” during their appearances, without obviously appearing to be so.
- Some accused may not recognize the seriousness of the consequences of conviction.

### 5.5.3 Solutions suggested by key informants

Among the solutions offered by individual interviewees were the following (not suggested by or agreed to by all).

- Use mediation and pre-trials more with unrepresented accused.
- Increase scope of duties of duty counsel to include reviewing disclosure with unrepresented accused, a greater presence in federal docket court, and a defined role in early resolution process. Duty counsel, themselves, do not favour a broader role for duty counsel at trials.
- Broaden eligibility for criminal legal aid.
- Have Crown inform unrepresented accused if they will be seeking custodial sentences, so that they can better gauge both their need for counsel and their potential eligibility for legal aid.

- Provide a duty counsel “rover” to assist at sentencing of unrepresented accused, or if unrepresented accused arrives on trial date with no lawyer, after saying s/he had one coming.
- More case management so that cases stay with the judges who first hear them – so reducing opportunities for stalling. Also, if a judge knows that a case is coming back, there may be more incentive to complete the case expeditiously.
- Raise the legal aid tariff.
- Implement a public defender system similar to the one currently in place for young offenders.
- Expand legal aid coverage to include summary offences.
- Expand diversion options.
- Distribute information packages on legal aid, trial process, and consequences of conviction to all accused, along with their appearance notices.
- Have Crowns give advanced notice of elections (for hybrid offences), so that accused would know better whether their charge is covered by legal aid.
- Improve access to disclosure packages. It currently takes 10-to-14 days to get disclosure package vs. approximately two weeks between first and second appearance dates.

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## Chapter 6: Bathurst, New Brunswick

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### 6.1 Objectives and methodology

The Department of Justice and the Federal-Provincial-Territorial Permanent Working Group on Legal Aid engaged the research team to measure:

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

The methodology for the Bathurst part of the national study followed a strategy for data collection and site visits similar to that followed in the other sites.

The methodology involved data collection and site visits. Information was available on the question of unrepresented accused from three sources:

- **A Disposed Cases sample.** This was created for the project, containing key data, including representation, on all appearances for a total of 252 cases which were disposed in late 2001.
- **Direct Observation** of 151 appearances in arraignment/first-appearance court over seven days during May and June of 2002; trial courts were not observed.
- **Interviews with key informants** (judges, Crowns, legal aid staff and management, court administrators, private bar members, local service agencies, etc), whose anonymity was assured.

Throughout this project, we received excellent co-operation and assistance from all those we asked to participate. We also gratefully acknowledge the very able assistance and expertise of the Bathurst-based researcher who assisted in observing in court and in creating the Disposed Cases file.

### 6.2 Context of the court and legal aid

One of the major conclusions of this research – supported by the data from all sites – was that data on the extent of legal representation in a particular court cannot be interpreted out of the context of (at least):

- The type of community served (including the nature of accused persons brought before the court).
- The resources and management and operations practices in place in the courts.
- Legal aid policies and practices.
- The duty counsel system in place.
- The policies and practices of all of the other key participants in the court process – including the judiciary, the police, the Crown attorneys, court workers, court administrative officials, the private bar and other supporting agencies.

All of these factors, policies and practices can have significant mitigating or exacerbating influences on the impacts of self-representation. This contextual information is thus essential to understanding the problems and potential solutions to challenges related to the unrepresented accused.

This section will specifically address the first four of the above areas. Information on the fifth is contained throughout the report.

### 6.2.1 The community

Bathurst is a small municipality in northern New Brunswick, on the Bay of Chaleur, near the Gaspé Peninsula. It originally served as a trade centre for the surrounding region. Traditional industries include farming, fishing, mining, and pulp and paper. The area was settled by both the British and Acadians, and remains strongly bilingual: each official language is spoken in the home by close to 50 percent of the population.

In 2001, the population of Bathurst was 12,924, which represented a decrease of 6.4 percent from the 1996 population of 13,815. This was a greater percentage decrease than that reported for the province of New Brunswick as a whole (the provincial population decreased by 1.2 percent in the same period). The population of Bathurst included a comparatively high proportion of females over the age of 65 (15 percent). Approximately 21 percent of males and 19 percent of females in Bathurst were in the 15-to-29 age range associated with the highest rates of crime. The population density of Bathurst was 141.2 per square kilometre.

In 2001, the average total income of persons 15 years and older was \$20,664, slightly lower than the provincial average income of \$20,755. The average household income for Bathurst in 2001 was \$45,000 (compared to \$46,100 for New Brunswick as a whole) and the per capita income was \$17,900, almost the same as the province's \$17,800.

The unemployment rate in 2001 for the city of Bathurst (13.6 percent) was higher than that of the province of New Brunswick as a whole (9.6 percent). About 13 percent of males and 10 percent of females were unemployed in the province, very similar to the figures for Bathurst, at 13 percent for males and 9 percent for females.

Of the population of Bathurst aged 25 years and over, 18.8 percent reported less than a Grade 9 education (19.9 percent of females and 17.7 percent of males). The same trend was apparent in provincial statistics, although percentages were slightly higher overall (19.4 percent). Just over 60 percent of residents of the city of Bathurst reported having a high school certificate or higher, a similar proportion to the province as a whole.

In 2001, about 14 percent of Bathurst’s estimated 7,750 families were single-parent, which is the same as the percentage for New Brunswick as a whole.

Of the estimated 10,105 occupied private dwellings in Bathurst in 2001, 72 percent were owner-occupied. The provincial rate was 74 percent for the same year.

For the year 2001, Bathurst reported 2,285 total person, property, and other *Criminal Code* offences (2,129 actual offences). This was a decrease from the previous year, when there were 2,371 reported *Criminal Code* offences (2,239 actual offenses). There were 105 reported drug offences in 2001 (up from 37 the previous year), and 18 reported “other federal statute” offences (compared to 13 in the previous year).

### 6.2.2 The court

The Bathurst courthouse handles approximately 3,600-4,000 criminal cases (both adult and youth) per year. For accused in custody, first appearance is always within 24 hours of arrest (this is consistent throughout New Brunswick). For accused in custody, trials are scheduled approximately 30 days after first appearance. For those accused who are not in custody, the first appearance is usually within one week, and the trial or hearing date in approximately three months. The courtrooms hearing criminal matters are described in the following chart. Three courtrooms are typically required for Provincial Court cases.

One arraignment/first appearance courtroom (plea day) (Provincial Court only)	Sits one day per week	Courtrooms handle both adult and youth Do not split drugs and CCC
Trial courtroom (same as above – for other criminal matters, e.g., preliminary hearings and trials)	Sits rest of week hearing Provincial Court cases	
Second courtroom	Sometimes used for overflow of Provincial Court cases	
Three additional courtrooms	Queen’s Bench criminal, civil and family matters for the districts of Bathurst and Tracadie-Sheila	
Circuit Courts	None	

### 6.2.3 The legal aid system

The legal aid system in New Brunswick is regulated by the *Legal Aid Act* and the Regulations under that Act. The Act provides for the structure as well as the operation of the Plan. It provides for the Law Society of New Brunswick to establish and administer a Plan known as Legal Aid New Brunswick. While the legislation provides for the establishment of legal aid services in both criminal law and civil cases, presently, legal aid services are being offered only in criminal and family law matters.

In criminal matters, eligibility is limited to those who meet the financial eligibility criteria, who face charges that carry the risk of jail time or loss of means of earning a livelihood upon conviction, and

who have not received services through Legal Aid on more than two occasions within the previous two years. Further, Legal Aid New Brunswick requires a financial contribution on the part of eligible clients. The client's financial contribution is means-tested.

Applications for legal aid are made directly at Legal Aid New Brunswick offices. Usually applications are processed immediately – there is virtually no waiting period. Once applications have been assessed, a certificate is issued to the client. Clients are able to take their certificate to a lawyer of their choosing. There is no evidence that clients in receipt of a certificate experience any difficulty in finding a lawyer to accept their case. Quite often the client has been sent to the Legal Aid New Brunswick office by the duty counsel who provided assistance to the client at the client's first appearance.

Legal aid lawyers are paid on an hourly basis up to a maximum amount of approximately \$25,000 per case, subject to discretion. Lawyers submit their bills to Legal Aid New Brunswick, which reviews the billing and then pays 60 percent of the fees owed, plus any disbursements. The remaining 40 percent of the fees are not paid until fiscal year end. Lawyers only receive the full amount owing if Legal Aid New Brunswick does not have a deficit. The 40 percent hold-back has always been paid in full, although in the following year in one instance.

#### 6.2.4 Duty counsel

Under the Criminal Law program, Legal Aid New Brunswick offers duty counsel services. This provides accused persons with the opportunity to consult with legal counsel prior to their first appearance. Duty counsel are available on "first appearance day," which is every Monday in Bathurst. At the time of our site visit, there was a roster of fourteen private lawyers doing legal aid work and also serving as duty counsel on a rotating basis.

Current duty counsel are all highly experienced members of the bar, with the most junior member having between five and ten years of experience. Two of the lawyers have over 15 years of experience practising criminal law.

Duty counsel provide assistance regardless of eligibility for legal aid, in order that any accused may have the opportunity to consult with a lawyer prior to his/her first appearance.

However, duty counsel is not available to accused beyond the first appearance. If an accused individual requires legal assistance after first appearance, the duty counsel will advise the accused to apply for legal aid. However, one duty counsel noted that this can be a frustrating issue for the duty counsel, because, in some cases, they know in advance that the individual is unlikely to get a certificate from Legal Aid.

There is some continuity of service in that, according to interviewees, quite often accused who are assisted by the duty counsel will apply for a Legal Aid certificate on the advice of the duty counsel. The accused will then use the certificate to retain the lawyer who served as duty counsel at their first appearance. Lawyers who do duty counsel work generally do legal aid work on a regular basis, and have put their names forward as being available for duty counsel work. They are paid the same hourly rate as for other legal aid work.

## 6.3 Frequency of unrepresented accused

### *a Overview of key informant perceptions on representation*

In general, our key informants in Bathurst were of the view that relatively few accused go through the entire legal process without representation. In situations where accused appear without representation, they are strongly encouraged to seek legal representation by Crowns and judges.

Legal aid lawyers noted that, on occasion, they took cases in which the accused was denied legal aid, and yet was unable to afford to pay for legal representation from their own pocket, on a *pro bono* basis.

In the perception of one interviewee, the number of unrepresented accused appeared to be increasing. This was in part, according to this individual, because of Legal Aid New Brunswick's requirement that clients contribute. It was not always possible, or clients were not always willing to make the required contributions.

### *b Overview of empirical findings on representation*

It is apparent from the Disposed Cases file that it is not possible to characterize representation over the life of a case in any simple manner. An accused's representation status will often change from one appearance to the next, as, for example, when an accused may be represented by duty counsel at the bail hearing, but be self-represented afterwards.

Looking at the pattern of representation over all appearances, our analysis of the data, from complete records of 252 randomly selected cases completed in late 2001 in Bathurst Provincial Court, indicates the following.

- At first appearance, 53.6 percent of criminally accused adults in Bathurst Provincial Court were unrepresented. An additional 28.6 percent used the services of duty counsel, and 17.9 percent had private counsel.
- At second appearance (if any), 38.2 percent of criminally accused adults in Bathurst Provincial Court were unrepresented. An additional 9.8 percent used the services of duty counsel, and 51.4 percent had private counsel.
- At third appearance (if any), 31.5 percent of criminally accused adults in Bathurst Provincial Court were unrepresented. An additional 5.6 percent used the services of duty counsel, and 62.9 percent had private counsel.
- At final appearance, 46.0 percent of criminally accused adults in Bathurst Provincial Court were unrepresented. An additional 11.1 percent used the services of duty counsel, and 42.5 percent had private counsel.
- For at least one appearance, 45.6 percent of criminally accused adults in Bathurst Provincial Court had private counsel.
- For all of their appearances, 17.1 percent of criminally accused adults in Bathurst Provincial Court had private counsel.
- There was no representation for 36.9 percent of criminally accused adults in Bathurst Provincial Court at all of their appearances.
- Duty counsel represented 7.5 percent of criminally accused adults in Bathurst Provincial Court at all of their appearances.

Readers should note that, throughout this report, references to “private counsel” encompass both privately retained counsel and private counsel paid through a legal aid certificate. For the purposes of this study, we were not able to make this distinction in our collection or analysis of either the disposed cases data or the court observation data.

It is evident from the foregoing section that the data from the disposed cases sample did not support the perception of many key informants that unrepresented accused were rare in Bathurst Provincial Court. This seeming contradiction is examined in more detail below.

### 6.3.2 Self-representation by category of offence and stage of process

Although, as noted earlier, duty counsel was available to help all accused, regardless of financial eligibility, at first appearance – the stage in the criminal process where the largest number of unrepresented accused might be found, according to our key informants, was at first appearance. Their general estimate was that approximately 50 percent of accused did not have representation at their first appearance. Further, some key informants noted that few accused consulted a lawyer prior to the day of their first appearance or arrived in court for their first appearance with a lawyer. A significant number of accused relied on duty counsel to guide them through their first appearance – however, some key informants suggested that some accused were so familiar with the process that they didn’t require the assistance of the duty counsel.

There was general agreement among our key informants that it was crucial for accused persons to have representation at all stages of the criminal process. Many interviewees noted that an accused needed representation even at the first appearance, where it was important to know one’s options before pleading. However, one interviewee pointed out that there was no error that could be made at the first appearance that could not be remedied subsequently.

According to our key informants, there was a tendency for the proportion of unrepresented accused to decrease as they moved through the legal process. It was reported to be extremely rare for accused to be unrepresented at trial, particularly if they were in remand. The proportion of unrepresented accused was believed to drop very sharply after first appearance.

Those denied legal aid who did not risk jail time faced a choice of pleading guilty, representing themselves at trial, or paying for legal assistance. According to some of our key informant in Bathurst, it was not uncommon for accused to plead guilty in such a situation.

There was a consensus among interviewees that the more serious the charge, the more likely the accused was to have representation. Thus, for the most part, unrepresented accused were generally perceived to be charged with less serious crimes.

At early stages of the legal process, there was a tendency on the part of some unrepresented accused to underestimate the seriousness of the charges against them. According to interviewees, these individuals tended to quickly realize how crucial it was for them to have representation. In these situations, the accused were usually able to get representation either through Legal Aid or privately.

As noted above, our key informants in Bathurst were generally of the view that there were relatively few accused who went through the entire process without representation, especially if the charges they faced were relatively serious. At this point, we return to the data from the Disposed Cases sample that



indicates the proportions of accused at each appearance who were unrepresented. Figure B-1 displays this information according to the category of the most serious charge in the case.

Most Serious Charge Category	Proportion of Unrepresented Accused at				Total Number of Cases
	First (%)	Plea (%)	Defence Election (%)	Final (%)	
Homicide	***	***	***	***	6
Sexual Assault	***	***	***	***	4
Assaults excl. Common	50	21	50	43	14
Robbery	***	***	***	***	4
Break and Enter	27	13	29	13	15
Impaired Driving	70	67	70	67	43
Common Assault	48	30	50	30	23
Drugs excl. Simple Possession	***	***	***	***	3
Weapons Offences	***	***	***	***	9
Thefts and Frauds	53	40	54	47	58
Simple Possession of Drugs	***	***	***	***	9
Offences against Administration of Justice	57	39	57	41	51
Public Order	92	100	92	92	13
<b>All Offences</b>	<b>54</b>	<b>41</b>	<b>54</b>	<b>46</b>	

*Notes* \* Excludes cases for which representation was unspecified in the file.  
 \*\*\* The cell contains too few cases to report a percentage.

Figure B-1 indicates that:

- Contrary to the views of some key informants, significant numbers of accused were unrepresented at first, plea, election and final appearances, regardless of the nature of the charges they faced.
- Persons accused of impaired driving or public order offences were most likely to be self-represented at first and subsequent appearances.

### 6.3.3 Socio-demographic characteristics of unrepresented accused

Our key informants believed that, in general, unrepresented accused were likely to be working poor, meaning those who fell outside the financial eligibility criteria for legal aid. They also mentioned individuals who had received legal aid more than twice in the previous two years and were, as a result, ineligible for further coverage.

### 6.3.4 Other types of representation

Figure B-2 displays the representation provided by counsel of various types at each stage of the criminal process. These data indicate that:

- Approximately 50 percent of accused were unrepresented at each appearance listed in Figure B-2.
- The proportion of accused represented by private counsel was much higher at final appearance than at first appearance, and conversely for those assisted by duty counsel.

<b>Figure B-2. Distribution of Representation Type By Appearance Type, Bathurst</b>				
<b>Appearance</b>	<b>Represented by</b>			<b>Number of Cases</b>
	<b>Self (%)</b>	<b>Duty Counsel (%)</b>	<b>Private Counsel (%)</b>	
First appearance	54	29	18	252
Plea	41	16	42	232
Defence Election	54	28	18	249
Final Appearance	46	11	43	252
<i>Notes_ * Excludes cases for which representation information is not available.</i>				
<i>** Percentages may not total to 100 due to rounding.</i>				

Figure B-3 shows the most serious offence charged in cases with different types of representation at the final appearance. These data indicate that:

- Persons charged with impaired driving and public order offences were most likely to be self-represented at final appearance. Legal Aid New Brunswick does not provide certificates for impaired driving offences unless bodily injury is involved.

**Figure B-3. Distribution of Representation Status at Final Appearance by Most Serious Charge Category, Bathurst\***

Most Serious Charge Category	Proportion of Cases represented by			Number of Cases
	Self %	Duty Counsel %	Private Counsel %	
Homicide	***	***	***	6
Sexual Assault	***	***	***	4
Assaults excl. Common	43	0	57	14
Robbery	***	***	***	4
Break and Enter	13	13	73	15
Impaired Driving	67	12	21	43
Common Assault	30	9	61	23
Drugs excl. Simple Possession	***	***	***	3
Weapons Offences	***	***	***	9
Thefts and Frauds	47	19	33	58
Simple Possession of Drugs	***	***	***	9
Offences against Administration of Justice	41	10	49	51
Public Order	92	0	8	13
<b>All Offences</b>	<b>46</b>	<b>11</b>	<b>43</b>	

*Notes \* Excludes cases for which representation at final appearance was unspecified in the file.*

## 6.4 Evidence on the impacts of lack of representation

### 6.4.1 Perceived impacts of a lack of representation

#### *a Impacts on the accused*

In general, our key informants in Bathurst were of the view that, with the possible exception of unrepresented accused, who did a poor job representing themselves, there were few adverse impacts on the accused as a result of their lack of representation. In general, judges were reported to compensate for the accused's lack of representation by providing explanations where necessary. Some key informants believed that not being represented may even work to the benefit of some accused.

On the other hand, some interviewees suspected that there were significant numbers of accused who simply pled guilty because they did not have legal representation. These accused thus ended up with a criminal record when it may have been avoided. As well, some interviewees noted that unrepresented accused tended to be more dissatisfied with their legal process than accused who had representation. They often felt that the system worked against them, and they tended to have a heightened sense of persecution.

The most serious and common error committed by unrepresented accused, according to interviewees, was taking the stand. Unrepresented accused who took the stand often proved the Crown's case. Other mistakes made by unrepresented accused include:

- Unrepresented accused pled guilty too early in the process.
- Unrepresented accused couldn't objectively assess the facts of the cases against them – did not know when to cut bait, deal.
- Unrepresented accused didn't know how to bargain, or properly present their defence.
- Unrepresented accused didn't know the "going rate" for sentences.
- Unrepresented accused didn't know the "best" judges.
- Unrepresented accused admitted to things that were not helpful to their cases.
- Unrepresented accused made poor tactical decisions, and couldn't objectively assess prospective risks.
- Unrepresented accused tried to shift the blame elsewhere, making it appear that there was a lack of remorse on their part. Blaming the victim is generally not looked upon favourably by judges.

#### *b Impacts on the court*

Judges in Bathurst typically made considerable efforts to explain the process to unrepresented accused and to try to guide them through their points of choice. This was both time-consuming and placed the judges in the uncomfortable position of seeming to "bend over backwards" to assist unrepresented accused when their function is to independently try the facts of the case. From the Crown's perspective, the judge begins to act as the accused's lawyer – a situation that makes everyone uncomfortable.

Court personnel reported that, in some instances, unrepresented accused sought help or advice from court personnel on how to proceed with their case. This put the court administration in an awkward position, because they are supposed to remain impartial.

All interviewees agreed that the legal process was much slower when an unrepresented accused was involved. Specifically, judges took the time to explain the process to the accused in order to ensure that the process was as fair as possible. Some interviewees estimated the process to take one and a half to two times as long. Judges reported being put into an awkward position in such trials because they were forced to explain the process to the accused and at the same time remain objective. Judges reported having to:

- Explain what was happening as the process unfolded.
- Outline the options available to the accused.
- Protect the rights of the accused.
- Call recesses in order to allow the accused to prepare.

One Crown reported that unrepresented accused had a tendency to want to discuss their case with the Crown. However, the Crown is not permitted to discuss the case with the accused, something the unrepresented accused often can't understand.

## 6.4.2 Empirical findings regarding the impacts of a lack of representation

The preceding section described the perceptions of those interviewed regarding the impacts of accused appearing before the court without representation. In this section we provide empirical evidence on what actually happened to unrepresented accused, using data on cases in the disposed cases file and from the appearances directly observed in court.

It is, however, important to make it clear at the outset that the information is not presented to draw causal inferences, but simply to describe the events at various stages in the process. For instance, the evidence is not presented to suggest that the lack of representation *caused*, for example, a higher (or lower) likelihood that an unrepresented accused would be convicted. Rather, it simply describes whether or not, and how frequently, significant decisions were made and certain outcomes occurred with or without the presence of counsel.

### *a Type of plea entered by type of representation*

As noted earlier, a number of interviewees raised the issue of whether or not unrepresented accused were more likely to plead guilty – for instance, to “get it over with,” or because they had neither the knowledge nor resources to contest the charges.

Figure B-4 displays the plea entered by the type of representation available to the accused at that appearance. These data indicate that:

- Of all pleas, 76 percent were guilty pleas.
- Guilty pleas were entered in 90 percent of cases represented by duty counsel. This was almost exactly the same proportion as the guilty plea rate of unrepresented accused.
- Cases represented by the private bar were much less likely to involve a guilty plea (63 percent). These may include certificates.

Plea	Proportion of all Pleas by or on behalf of Accused Represented by			Number of Cases	Proportion of Cases
	Self %	Duty Counsel %	Private Counsel %		
Guilty	87	90	63	214	76%
Not guilty	13	10	37	69	24%
Total Cases	100	100	100	283	

*Notes \* Excludes cases for which representation at plea was unspecified in the file.*

### *b Conviction rates by type of representation*

The Disposed Cases database enabled an analysis of conviction rates in terms of representation at final appearances.

Figure B-5 shows conviction rates by representation at final appearance. These data show essentially no variation in conviction rates across types of representation. More specifically:

- Overall, 95 percent of all disposed cases resulted in a conviction on one or more charges.
- The conviction rates were 96 percent for accused who were self-represented, 96 percent for accused assisted by duty counsel, and 94 percent for accused represented by private counsel.

<b>Figure B-5. Distribution of Disposition by Type of Representation at Final Appearance, Bathurst</b>					
<b>Disposition</b>	<b>Proportion of Dispositions For Accused Represented by</b>			<b>Number of Cases</b>	<b>Proportion of Cases</b>
	<b>Self %</b>	<b>Duty Counsel %</b>	<b>Private Counsel %</b>		
Convicted*	96	96	94	236	95%
Not Convicted**	4	4	6	12	5%
Total Cases	115	28	105	248	
<i>Notes_ * Includes guilty verdict and peace bond ordered. ** Includes not guilty, withdrawn, dismissed, stayed, and discharges</i>					

Earlier we cautioned against using these data to imply a causal connection between type of representation and conviction rates. However, given the impact of having a criminal record (on employment opportunities and the likelihood of being charged with further offences, etc.), the data can definitely be used to show that unrepresented accused are very likely to experience serious negative impacts as a result of the court process (but no more likely than accused assisted by duty counsel or private counsel).

### *c Custodial sentence and type of representation*

The proportions of cases that resulted in custodial sentences were examined in terms of representation at the final appearance.

Figure B-6 shows the distribution of custodial sentences for cases disposed at final appearance, by type of representation. These data indicate that:

- Overall, 25 percent of all disposed cases resulted in a custodial sentence.
- Unrepresented accused fared best of all (9 percent custodial rate), while cases finalized with duty counsel had the next highest imprisonment rate (21 percent), followed by cases with private counsel (32 percent).

<b>Figure B-6. Distribution of Custodial Sentence by Type of Representation at Final Appearance, Bathurst</b>					
<b>Sentence</b>	<b>Represented by</b>			<b>Number Of Cases</b>	<b>Proportion of Cases</b>
	<b>Self %</b>	<b>Duty Counsel %</b>	<b>Private Counsel %</b>		
Custodial Sentence	9	21	32	51	25%
No Custodial Sentence	91	79	68	201	75%
Total Cases	100	100	100	252	100

Again we caution against using these data to imply a causal connection between type of representation and likelihood of receiving a custodial sentence. However, the results are directly relevant from another important perspective. Specifically, it is accepted that eligibility for legal aid should depend (in part) on the sentence that the Crown is likely to request as a penalty. Although one cannot expect to predict with total accuracy whether a case will result in a custodial sentence, it is relevant that custodial sentences were received by approximately one in ten self-represented accused. The data do not reflect reduced sentences.

### 6.4.3 Overall impacts on court operations

#### *a General*

In most provincial criminal courts in Canada, only 4-to-10 percent of cases go to trial. The overwhelming majority of appearances for cases are therefore not trials – and, as noted elsewhere in this report, in Bathurst (as in other courts) these appearances are typically in the order of a few minutes per case. What would, in other situations, seem a very minor increase in the time taken to perform a function at a case appearance, can therefore represent a major increase in judicial, crown, legal aid, defence counsel and court administration workloads – proportionally and in total.

Our Court Observation data confirmed that efforts were often made in the courtroom to make unrepresented accused aware of the opportunities and benefits of having a lawyer. In 66 percent of appearances by unrepresented accused, comments were made by judges concerning representation. In these appearances, the judges asked the accused about his or her representation status, or instructed the accused to speak to duty counsel, get a lawyer or apply for legal aid.

#### *b Nature and length of individual court appearances*

Interviewees noted that the efficiency of the entire system was much greater when the accused was represented – “wasted” appearances were reduced, useless discussions and arguments were largely eliminated, and work was concentrated on what is relevant.

The Court Observation data also yielded some information about how many interim (i.e., not final) appearances were “productive,” in the sense that they resulted in decisions on (or, at least, consideration of) one or more of three matters: namely bail, plea, and elections. Figure B-7 shows the breakdown of courtroom events (or non-events) at interim (not final) appearances, according to representation status at last appearance.

<b>Figure B-7. Court Observation Data: Percentage Distribution of Cases: Type of Decision Made by Accused's Representation Status At Interim (Not Final) Appearances, Bathurst*</b>			
<b>Representa- tion Status</b>	<b>Type of Decisions at Interim Appearance (Remanded or Stood Down)</b>		
	<b>**No decision %</b>	<b>Plea entered and/or election made – no bail %</b>	<b>Total number of Cases</b>
Self	16***	84	32 (100%)
Duty counsel	34	66	29 (100%)
Private lawyer	3	97	38 (100%)
Total Appearances	16	83	99 (100%)
<i>Notes: * Appearances for which data were unavailable or unclear are not included.                      ** Bail not considered, no elections made by either Crown or defence, and no plea entered.                      ***May involve adjournments to allow application for legal aid.</i>			

One of the most striking observations is that, overall, only 16 percent of interim appearances in cases in which the accused was unrepresented occurred without consideration of bail, elections, or the entering of a plea. However, appearances that were, in that sense, “unproductive,” were most frequent when the accused was represented by duty counsel (34 percent), compared to only 3 percent of interim appearances where the accused was represented by a private lawyer.

Most of our key informants appeared to agree that unrepresented accused slowed down the court process, since they did not benefit from the skill that an experienced lawyer would be able to apply to move the process along expeditiously. The court observation also yielded data on the length or duration of individual court appearances. Figure B-8 summarizes these data by representation type. The general conclusion supported by these data is that appearances by self-represented accused were typically longer in duration than were appearances for accused assisted by duty counsel, but of similar duration to appearances involving private counsel.

<b>Figure B-8. Distribution of Appearance Durations (in minutes) By Type of Representation at Final Appearance, Bathurst</b>			
	<b>Appearance Duration (in minutes) when Represented by</b>		
	<b>Self</b>	<b>Duty Counsel</b>	<b>Private Counsel</b>
25th Percentile	1.0	0.0	1.0
Median	3.5	1.0	3.0
75th Percentile	6.8	2.3	6.0
95th Percentile	6.7	6.4	14.6
Total Appearances	32	30	43



Some specific perceptions reported by our key informants, on the impacts of unrepresented accused on the duration of court proceedings, included:

- Unrepresented accused didn't know to admit evidence so more witnesses and evidence were called than would be the case if a lawyer was involved.
- Unrepresented accused wouldn't know to narrow issues, so trials took longer.

*c Number of appearances per case*

Some of our key informants suggested that unrepresented accused often “tied up the system” and caused lost court time through “wasted appearances.” Virtually all agreed that the system moved more efficiently when the accused was represented. Adjournments for and failures to appear by unrepresented accused wasted a great deal of court time. Cases that “collapsed” and resulted in a plea of guilty on the day of trial were very costly also.

A direct indicator of the workloads caused by – and resources required to deal with – individual cases is the number of court appearances required to complete a case. A related indicator is the appearance number at which key activities take place. The Disposed Cases sample yielded information on the number of appearances made by accused who were or were not represented.

*Appearances before a Plea is Entered*

Figure B-9 shows the appearance number at which the plea was entered for accused who had various types of representation. The data suggest that self-represented cases in general *did not* generate more appearances before entering a plea, especially in comparison to cases handled by private counsel:

- Half of self-represented accused, and accused assisted by duty counsel entered their plea at their first appearance.
- Half of accused represented by private counsel did not enter a plea until their third appearance or later.

<b>Figure B-9. Distribution of Appearance Number at Which Plea was Entered By Type of Representation at Plea Appearance, Bathurst</b>			
<b>Appearance Number at which Plea was Entered</b>	<b>Represented by</b>		
	<b>Self</b>	<b>Duty Counsel</b>	<b>Private Counsel</b>
25th Percentile	1	1	2
Median	1	1	3
75th Percentile	2	1.25	4
95th Percentile	4	3	5
Total Cases	95	38	98
<i>Notes_ * If plea entered at more than one appearance, last appearance at which plea entered is shown.</i>			

*Total Number of Appearances before Disposition*

Figure B-10 shows the total number of appearances in the case – according to representation type at last appearance. These data suggest that self-represented cases *did not* take more court appearances overall, especially in comparison to accused represented by private counsel. More specifically:

- Half of accused unrepresented at last appearance made only one or two appearances compared to those with private counsel, 50 percent of whom made at least four appearances.

- Accused assisted by duty counsel typically made the fewest appearances, with 50 percent making only one appearance.

Number of Appearances	Represented by		
	Self	Duty Counsel	Private Counsel
25th Percentile	1	1	3
Median	2	1	4
75th Percentile	3	2	5
95th Percentile	5	5.6	7.6
Maximum	6	6	9
Total Cases	116	28	107

*d Elapsed Time for Cases to Resolve*

The Disposed Cases sample also yielded information about the time elapsed between the first and last appearance. This information is important from a due process perspective – however, that perspective yields two potential hypotheses: first, “Justice delayed is justice denied,” and second, “Justice rushed is justice crushed.”<sup>54</sup> The first concern is relevant to those who feel that delays in obtaining legal representation adversely affect the fairness of the court process and the final outcome. The second concern is especially relevant to those concerned that unrepresented accused may plead out the case early “to get it over with,” or because they are not aware of viable legal defences.

As shown in Figure B-11:

- Cases represented at last appearance by duty counsel took the least time to resolve – 50 percent were settled in two weeks or less, and 75 percent were settled in nine weeks or less.
- Cases self-represented at last appearance took considerably longer, with 50 percent settled within 6.8 weeks, and 75 percent settled within 12.4 weeks.
- Cases represented by private counsel at last appearance took the longest time to be resolved with 50 percent settled within 13.2 weeks and 75 percent settled within 18 weeks.

	Time (in weeks) between First and Final Appearance when Represented by		
	Self	Duty Counsel	Private Counsel
25th Percentile	2	1.6	6.6
Median	6.8	2	13.2
75th Percentile	12.4	9	18
95th Percentile	22.7	-	39
Maximum	52	17	76
Total Cases	60	11	100

<sup>54</sup> The latter phrase was first suggested to one of the authors by a widely respected colleague, Carl Baar.

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## 6.5 Overall Conclusions

### 6.5.1 Key Overall Findings

Our key findings with respect to the key questions raised by the study include:

*With respect to frequency of self-representation*

- A significant number of accused adults in Bathurst proceed through key parts of the criminal court process without the benefit of legal representation. It is the view of Legal Aid New Brunswick that some accused may be unrepresented because of informed choice.

*With respect to impact on the accused*

- Accused represented by private counsel enter guilty pleas less often than do accused who either represent themselves or are assisted by duty counsel. This may include certificate work.
- Rates of conviction do not vary by type of representation. The rates of conviction may be greater for charges on more serious matters.
- Accused who represent themselves are less likely to receive custodial sentences than are accused who are assisted by duty counsel or represented by private counsel. This does not account for seriousness of offences.
- The evidence is insufficient to conclude whether or not self represented accused are more likely to be convicted or to receive harsher sentences as a result of their lack of representation.
- A significant number of unrepresented accused suffer serious penalties or deprivations of liberty as a result of their court case. Some 96 percent receive a criminal record and a smaller, but still significant number (in the order of 9 percent) receive custodial sentences.
- Interviews with key officials strongly suggest that unrepresented accused (especially those with little prior experience in the court system) are less likely to be aware of the legal remedies available to them at key stages in the process – and are unlikely to understand many key decisions and events in the process.

*With respect to impact on the court*

- Judges often make efforts to encourage unrepresented accused to obtain counsel.
- Unrepresented accused typically make fewer, and shorter court appearances than do accused with private counsel.

## 6.5.2 General Reasons for Current Unrepresented Accused Situation

The existence of unrepresented accused in Bathurst was attributed by the majority of interviewees to inadequate funding for legal aid. The current budget has forced Legal Aid New Brunswick to tighten the criteria for eligibility for legal aid, thereby denying legal aid to some accused. In general, interviewees feel that the criteria are too strict, particularly the limit on the number of certificates that may be granted within a two-year period and the requirement that there be a risk of jail time.

Despite concern over the number of unrepresented accused, there is a sense that the problem is not more severe as a result of:

- Judges' and Crowns' strong encouragement for those arriving at court without representation to get representation. Judges may avoid setting a trial date until the accused has a lawyer.
- Proceedings being delayed in order that the accused may seek representation.
- *Pro bono* work done by lawyers in situations where the accused has been denied legal aid and lacks the financial means to pay for representation.

Most interviewees believe that the legal aid system in New Brunswick is not functioning as well as it should be. This is generally blamed on the lack of adequate funding. The key problems cited by interviewees include:

- Legal aid lawyers are paid significantly less than Crowns with comparable experience. Provincial Crowns and temporary Crowns are paid a maximum of \$100 per hour, while legal aid lawyers are paid a maximum rate of \$60 per hour. In addition, 40 per cent of the hourly rate paid by Legal Aid is held back until the end of the fiscal year. This amount is then paid based on the year-end financial results of the Legal Aid program. If there is a shortfall, then legal aid lawyers get less than the full amount owed at the end of the year.
- Preparation time for duty counsel was reported to be inadequate in most cases. The time to discuss the case, review relevant documents and explain the accused's options, and the implications of these options, is considered inadequate by duty counsel interviewed. One duty counsel referred to this as the "fast food" of legal representation.

## 6.5.3 Suggested Solutions

**Staff system or combination of staff and certificate.** Most interviewees believe that either a staff system or a combination of staff and certificate would decrease the number of unrepresented accused. A few interviewees disagreed, believing that a staff system would bureaucratize the legal system. Few interviewees support a purely staff system because it is felt that this would eliminate, or at least sharply curtail, the extent to which accused are able to exercise choice of counsel.

**Increasing funding to the legal aid system.** This would allow for more flexibility in the eligibility criteria for legal aid, and it would allow for higher rates to be paid to legal aid lawyers, thereby increasing the number and quality of lawyers accepting legal aid cases.

**Additional time with duty counsel for unrepresented accused.** In situations where an accused is not eligible for legal aid, a system should be set up whereby these individuals are provided with an hour or two of time with duty counsel to review their case and discuss options. This approach was implemented in family law, where the \$43 per hour fee was charged to the courthouse. This system is believed to have worked well for the clients, and saved the courthouse money by reducing the number of delays and adjournments.

**Increasing awareness among accused of the availability of duty counsel.** Some key informants believe that not all unrepresented accused are even aware of the existence or availability of duty counsel. Efforts to increase the “visibility” of duty counsel might be of assistance to some of these accused, particularly in the larger courts.



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## Chapter 7: St. John's, Newfoundland

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### 7.1 Objectives, report format and methodology

#### Key Objectives

The Department of Justice and the Federal/Provincial/Territorial Permanent Working Group on Legal Aid retained the research team to conduct a national study to measure:

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

A brief overview of the full national study – covering nine court sites – has been presented previously. The methodology for the St. John's part of the national study followed a strategy for data collection and site visits similar to that followed in the other sites.

#### 7.1.1 Report Format

The findings for St. John's are presented in seven sections.

- Section 1* outlines the objectives of the study, describes the format of the report, and discusses the methodology used to collect information.
- Section 2* provides important contextual information for interpreting the findings of the report. Special attention is given to key characteristics of the community, the court, legal aid, duty counsel and disclosure.
- Section 3* describes how frequently self-represented accused appear at different stages of the court process.
- Section 4* explores the frequency with which accused persons have other types of representation, and how those frequencies vary at different stages of the court process.
- Section 5* focuses on the important impacts of self-representation on the accused. The section discusses both perceptions provided from our interviews and empirical evidence from data especially collected for the project.
- Section 6* then describes other significant impacts due to the presence of unrepresented accused – on victims, on the key groups involved in the courts (e.g. legal aid, duty

counsel, Crown attorneys, judges and court personnel) and on court operations (including: court workloads and time to deal with and dispose of cases).  
*Section 7* completes the report with key overall findings and solutions that have been suggested by those interviewed in St. John's.

### 7.1.2 Methodology

For St. John's, information was available on the question of unrepresented accused from three sources:

- **Key person interviews** with over 20 key informants (judges, Crowns, legal aid staff and management, court administration and court clerks, private bar members, local service agencies, etc.). Interviews were from 30 minutes to 1 hour duration, covered all aspects of the study and most were conducted by two interviewees. The anonymity of those interviewed was ensured.
- **A Court Observation sample.** A local person with extensive experience in the St. John's court was hired to sit in court and directly observe and record information on the events and decisions that occurred in 191 case court appearances over a period of ten days. Those observations took place in first-appearance court, and during the non-trial portion at the beginning of the day in other courts, in June and July of 2002<sup>55</sup>.
- **A Disposed Cases sample.** This file consists of data on all 1,490 court appearances for 501 cases<sup>56</sup> that involved a *Criminal Code* offence or violation of another federal statute, and were disposed in September, October or November 2001.
  - The file was constructed by combining data manually coded from court records (informations and reporters' notes) and data especially extracted from the court automated information system (PCIS).
    - Since the court in St John's does not systematically record the type of legal representation at each appearance for cases in the automated information system (PCIS), it was necessary to hire a local person knowledgeable in court administrative procedures to perform a manual search of court records and to record – for each of the 1,255 counts associated with the 501 disposed cases<sup>57</sup> – the type of representation data that was available. Even then, data on representation was recorded on manual records for only the first and last appearances.
    - The original data from PCIS was provided in three separate tables. The first contained data on events and decisions that happened at each individual appearances (e.g., date of appearance, plea, bail, reason for appearance). The second contained data on the case/defendant (e.g. date of birth and number of prior convictions). And the third contained data on each offence (e.g., offence type, disposition and sentence). Information from these three data files was combined for specific cases

<sup>55</sup> Trials were not included in this part of the data collection.

<sup>56</sup> For the Disposed Cases sample, a "case" is defined as the collection of all counts on all charges for which a particular offender had his or her first court appearance in the same courtroom on the same day. Note: This definition of a "case" may or may not be identical to that used by other reports from the courts in St. John's or from other sources such as the Canadian Centre for Justice Statistics.

<sup>57</sup> More specifically, information on representation was collected separately for each of the 1,255 count/defendants associated with the 501 disposed cases.



by the researchers, using common identifiers that were contained in each file (e.g., the case/count identifier and the defendant identifier).

- The manual and automated data were then combined into the Disposed Cases sample.

In all parts of the project, we received excellent co-operation and assistance from all those we asked to participate in the study. We also gratefully acknowledge the very able assistance and expertise of the two St. John's-based persons who assisted in observing in court and in preparing the Disposed Cases file of data.

### 7.1.3 An Important Caveat

We were fortunate to have designed the study to ensure that we would have multiple sources of data to conduct a study of this type. This design strategy was especially important in St. John's.

As in most other courts in the current study, court manual and automated systems had not been designed to collect accurate and comprehensive data on either the frequency or impact of legal representation. Before reporting the results of the data analysis, we therefore conducted a number of checks to assess the extent to which we should rely on different sources of data for different parts of the analysis.

In particular, we concluded that the analysis for St. John's should place **more emphasis on the Court Observation** (as opposed to the Disposed Cases data) when discussing frequency of **representation at first appearance – or non-final appearance**. The court observations were carried out by a very knowledgeable person specially trained by the researchers to observe matters related to legal representation. Thus, when we noticed that statistics based on data from the Disposed Cases file gave estimates of self-representation at first appearance that were considerably higher than estimates of self-representation at first and other non-final appearances based on the direct court observation – and on our interviews – and on the researcher's own observations – we felt it reasonable to discount the first appearance statistics from the Disposed Cases file.<sup>58</sup>

- On the other hand, a comparison of statistics at last appearance from the Court Observation file, with the analogous statistics from the court observation, strongly suggested that both gave reasonably consistent results.

The following sections will make it clear when these inconsistencies in the different sources of St. John's data should be explicitly taken into account.<sup>59</sup>

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<sup>58</sup> Although further research is required to determine with complete certainty the source of the discrepancy, it is expected that, for first-appearance court, staff often record representation by counsel as self-representation.

<sup>59</sup> In addition, there may be differences in sample sizes for specific tables. This is because in a number of instances (including representation), data on particular variables was not available on a proportion of cases. Any table will include data on only those cases for which data is available on all variables needed for the table.

As well, there were a number of instances in which the key data needed to link various PCIS files provided were not coded consistently among all files (e.g., John Smith might be coded as "John Smith" or "John S. Smith" or "John S Smith" in different files. We tried to correct such errors manually, but because of such errors that remain, our sample size of disposed cases fell to 481 in certain instances.

## **7.2 Context of the court and legal aid**

### **7.2.1 The community**

St. John's, one of the oldest European settlements in North America, is the most easterly city in North America. It is the main financial and commercial centre for Newfoundland, and boasts a rich cultural heritage. However, a historical over-reliance on the now failing fisheries industry has led to economic difficulties, and a significant reduction in the population of the province in recent years. Other industry sectors include oil and gas, information technology and communications, marine technology, mining, manufacturing, and tourism. In the 2001 Census, the vast majority of the population (99 percent) of the St. John's Census Metropolitan Area (CMA) reported speaking English in the home.

The population of the city of St. John's was 99,182 in 2001. From 1996 to 2001, the population of the city decreased by 2.7 percent, a smaller decrease than for Newfoundland as a whole (4.9 percent). The population of the St. John's CMA was estimated at 173,833 in 2001, a decrease of 1.77 percent from 1996. The population density of St. John's was 222.4 per square kilometre.

Approximately 21 percent of males and 20 percent of females in the city of St. John's were in the 15-to-29 age range associated with the highest rates of crime. For the CMA, these percentages were marginally higher (24 percent of males, 22 percent of females).

In 2001 the average income for a person living in St. John's was \$23,409, higher than that of the province of Newfoundland's average income of \$19,710. For the CMA, the average household income in 2001 was estimated at \$53,800 (provincial was \$46,400), and per capita income was \$20,300 (provincial was \$17,000). In the province of Newfoundland in 2001, 19 percent had an income below the national average; in the CMA of St. John's, the equivalent figure was four percent.

The city's 2001 unemployment rate of 9.1 percent was significantly lower than the provincial unemployment rate of 15.7 percent. The province of Newfoundland recorded the highest unemployment rate of all provinces across Canada in 2001.

Of the population of St. John's aged 15 and over, 32.3 percent reported completing less than high school. Of those aged 25 years and over, 11.0 percent reported having less than a Grade 9 education, while 69.5 percent reported having a high school certificate or higher level of education. Females and males reported very similar levels in each education category. Overall, residents of the city reported higher levels of education than did residents of the province as a whole.

For the CMA of St. John's, there were approximately 8,538 single-parent families, 16 percent of the CMA's total 51,833 families. This was higher than the provincial rate of 13 percent.

Of 36,970 dwellings in the city of St. John's, 22,125 were owner-occupied and 14,845 (40 percent) were rented. The provincial "rented" rate was estimated at 23 percent in 2001.

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Rates of violent crime in the city of St. John's decreased from 1999 to 2000 by 1.6 percent. The rate of violent crime in 2000 was 851 per 100,000 population. Property crime increased dramatically by 12.6 percent to a rate of 3,831 in 2000. Total offences against the *Criminal Code* increased by 9.6 percent to a rate of 6,759 per 100,000 population. The total number of *Criminal Code* and "other federal statutes" offences in St. John's in 2000 was 11,832.

## 7.2.2 The court

### *a Scheduling of cases*

The chart following highlights the key features of the courthouse and the case scheduling practices. In general, all cases originating in St. John's are scheduled for their first appearance in Courtroom 7. That courtroom hears only first appearances.

If the case is not disposed at the first appearance, it will be scheduled to one of the trial courts, which will hear all subsequent appearances on the case. Two possibilities exist:

- If the case is not expected to be going to trial at the next appearance, it will be scheduled to a half-hour time period, from 9:30 to 10:00 a.m., in one of three trial courts.
- If the case is expected to be going to trial at the next appearance (from either the first-appearance court or the 9:30 to 10:00 a.m. "trial court"), it will be scheduled after 10 a.m. in one of the five trial courts.

<b>Figure St.J-1 Highlights of Scheduling of Cases in St John's</b>		
Nine courtrooms in total	<ul style="list-style-type: none"> <li>• One Traffic &amp; Peace Bond</li> <li>• One Small Claims</li> <li>• One Youth</li> <li>• Six Criminal</li> </ul>	•
One full time arraignment/first-appearance courtroom (Courtroom 7)	<ul style="list-style-type: none"> <li>• Courtroom No. 7</li> <li>• Sits every day</li> <li>• Only courtroom with separate prisoner access</li> </ul>	<ul style="list-style-type: none"> <li>• Do not split Drugs and CCC for purposes of scheduling</li> <li>• Normal sitting times are 9:30 to 12:30 and 14:00 to 16:30</li> <li>• Sit every day in the afternoon</li> <li>• Roughly 4,500 CCC &amp; Drug cases (7-8,000 charges) per year (excl. traffic and youth)</li> </ul>
Five trial courtrooms for other Criminal Matters (e.g., post-first/pre-trial appearances, preliminary hearings and trials)	<ul style="list-style-type: none"> <li>• Two full time trial courts</li> <li>• Three other nearly full time trial courts hear                             <ul style="list-style-type: none"> <li>○ post-first/pre-trial appearances between 9:30 and 10 a.m.</li> <li>○ trials rest of day (10.00 to 12:30 and then 14:00 to 16:30)</li> </ul> </li> <li>• Courtrooms 4, 6 &amp; 3 hear first appearances from Bell Island, Tors Cove and Holyrood one day every two weeks</li> </ul>	
Special courts	<ul style="list-style-type: none"> <li>• Just started pre-trial program (hold court on weekend for youth) – Crown, judge and legal aid</li> </ul>	
Circuit Courts	<ul style="list-style-type: none"> <li>• None (only court in Newfoundland without circuits)</li> </ul>	

*b Special case/case-flow management concerns*

The St. John's court is facing significant backlogs. Courts were booking trials four-to-six months ahead at the time of the site visit.

*c An overview of case volumes and mix of cases*

Figure St.J-2 provides an overview description of the numbers of cases heard in the St. John's court in a recent 12-month period. The Figure shows that two offences – common assault (13 percent) and theft (17 percent) – made up 30 percent of the caseload of the court. Adding impaired driving cases (11 percent) and fraud cases (8 percent) would account for roughly half of the total court caseload.

<b>Figure St.J-2: Disposed Cases by Type of Offence (Comparison of St. John's and Newfoundland – 2000/2001)</b>							
Most Serious Offence	St. John's				Newfoundland		
	#	as % of St. John's Total		as % of Nfld	#	as % of Nfld Total	
<b>Total</b>	2,629	100%		38%	6,977	100%	
<b>Homicide</b>	4	0%		57%	7	0%	
<b>Attempted Murder</b>	4	0%		100%	4	0%	
<b>Robbery</b>	12	0%		67%	18	0%	
<b>Kidnapping</b>	0	0%		—	0	0%	
<b>Sexual Assault</b>	21	1%		15%	142	2%	
<b>Sexual Abuse</b>	5	0%		19%	27	0%	
<b>Major Assault</b>	139	5%		44%	313	4%	
<b>Abduction</b>	1	0%		100%	1	0%	
<b>Common Assault</b>	344	13%		34%	1,003	14%	
<b>Break &amp; Enter</b>	80	3%		31%	261	4%	
<b>Arson</b>	5	0%		50%	10	0%	
<b>Fraud</b>	202	8%		57%	356	5%	
<b>Possess Stolen Property</b>	55	2%		41%	133	2%	
<b>Theft</b>	453	17%		55%	822	12%	
<b>Property Damage/Mischief</b>	108	4%		46%	235	3%	
<b>Weapons</b>	24	1%		29%	82	1%	
<b>Administration of Justice</b>	191	7%		48%	399	6%	
<b>Public Order Offences</b>	89	3%		43%	207	3%	
<b>Morals – Sexual</b>	10	0%		34%	29	0%	
<b>Morals – Gaming/Betting</b>	1	0%		100%	1	0%	
<b>Other Criminal Code</b>	300	11%		35%	847	12%	
<b>Criminal Code Traffic</b>	32	1%		34%	95	1%	
<b>Impaired Driving</b>	283	11%		38%	743	11%	
<b>Traffic/Import Drugs</b>	51	2%		50%	102	1%	
<b>Possession Drugs</b>	104	4%		37%	283	4%	
<b>Other Federal Statute</b>	111	4%		13%	857	12%	

Source: Canadian Centre for Justice Statistics: Statistics Canada

In total, the St. John's court handles 38 percent of the comparable caseload for all of Newfoundland. There are also some obvious differences in the mix of cases in St. John's and the rest of the province – with St. John's having certain categories of offence more prominent in its caseload, particularly those shaded in Figure St.J-2 (Robbery, Fraud, Theft, Administration of Justice and Trafficking/Importing of Drugs).<sup>60</sup>

### 7.2.3 Legal aid

Legal aid in Newfoundland is overwhelmingly a service delivered by staff lawyers. Conflict of interest cases may be handled by a separate office of the Commission. Staff lawyers handle a workload of both criminal and civil matters, and virtually all of them have at least ten years at the bar. Their salary levels are on a par with those of Crown attorneys with similar experience. Applications for legal aid are made in person, by appointment, at the Legal Aid Commission offices, approximately a fifteen-minute walk from the courthouse building.

Commission officials indicated that the time required to process a legal aid application and assign a lawyer was three to four weeks. If the accused brought all documentation right away, a lawyer could be assigned within a few days. This was in contrast to the impressions of court personnel, who believed the delays to be considerably longer, long enough to actually drive the court schedule itself. The reasons for the differing impressions were not clear, but may have included prevarication by accused who wished to delay the process and blame it on legal aid, and often related to applicants not having the required documentation. Commission officials agreed that repeat offenders tended to “take their time applying,” while first-timers often applied immediately.

Court officials also had the impression that 90 percent of refusals of legal aid assistance ultimately resulted in a grant of assistance – leading them to wonder at the value of the initial review process – while Commission officials stated that the reverse was true.

A final related concern raised was that of the cost of paying for lawyers appointed by the court (usually after an accused had been refused legal aid through the usual application process). Such appointments often involved costs that were very difficult to absorb in addition to the regular demands on the legal aid budget. However, others interviewed believed that court-appointment of a lawyer was a very rare event in St. John's.

### 7.2.4 Duty Counsel

Duty counsel is available to help all cases in first appearance court, and does so without first applying financial eligibility tests or coverage criteria. In this court, the Crown shares a copy of the disclosure immediately with the duty counsel in order to allow the bail or plea process to be handled expeditiously. Duty counsel normally has sufficient time during the day to talk both to Crowns and to accused who want help, holding matters down if necessary in order to have the required discussions. Of assistance in this process is that custody cases are called late in the day. If the case is uncomplicated and can be resolved relatively quickly through a guilty plea, the duty counsel will assist the accused through the plea and sentencing process. Duty counsel will also interview accused who wish to plead not guilty or ask for a postponement.

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<sup>60</sup> Only offences with 10 or more cases are noted.

Few accused who are in custody are unwilling to wait for the day or two it will take for the duty counsel to prepare and argue for their release. Some accused at first appearance, however, do not see duty counsel, perhaps because they are seeking a delay. However, duty counsel will often stand outside first appearance court and actually announce his/her presence and availability, and will often approach people who "look" like they might have to appear in court, and offer assistance

Duty counsel also does an initial screening of cases on the basis of the seriousness criterion (likelihood of imprisonment) and advises those accused who appear to be eligible for legal aid to make an application.

The same staff lawyer had been handling duty counsel for the past year, and appeared to thrive on it. There was general agreement that duty counsel was not an assignment for which everyone was equally suited. Interviewees who spoke to the issue suggested that it was critical not to rotate staff through the duty counsel function rapidly; . On certain days, the duty counsel function would be carried out by another staff lawyer, and this super-rapid rotation caused problems, including a tendency to put matters over.

Duty counsel was not provided in the trial courts – either before or after 10 a.m. In fact, a number of persons interviewed indicated that Legal Aid lawyers in trial courts for specific cases usually did not offer assistance to unrepresented accused, and judges did not tend to advise the self-represented accused that legal aid staff lawyers were there. At the same time, other persons interviewed noted that there were instances when judges would call upon a Legal Aid staff solicitor, who might be in a trial court with a client, to lend some assistance to an unrepresented accused. If time permitted, the Legal Aid solicitor would likely render assistance.

A number of those interviewed also suggested that benefits would accrue if duty counsel were available in the trial courts – especially for interim appearances between 9:30 and 10:00. In fact, accused without other representation often expected that “their lawyer” (either the duty counsel who helped them in first appearance court, or the Legal Aid lawyer who interviewed them at Legal Aid) would be there at appearances held between 9:30 and 10 a.m.

The one situation in which an accused was often provided with duty counsel assistance in the trial courts was where the accused was in custody by virtue of a warrant issued out of one of the trial courts – for a failure to appear (thereby resulting in a bail hearing in the trial court which issued the warrant). In those instances, Legal Aid would provide counsel for the bail hearing, on a duty counsel basis, as long as sufficient notice was given to arrange for counsel to be present.

### 7.2.5 Disclosure

The disclosure process appeared to work well, if not as quickly as some would like. First appearances usually occurred within six weeks, and although disclosure may be available within four weeks, it was reportedly not unusual to see two or three appearances before disclosure was available and considered by defence. However, the Crown shows his/her copy of the disclosure to the duty counsel in first appearance court. Police make copies of the disclosure for Crowns, and then the Crowns make a copy available for defence counsel or unrepresented accused, who must provide a written request and sign for it.

The Crowns do try to process requests for disclosure as quickly as possible and a number of reasons were offered to account for cases being remanded “for disclosure”:

- The disclosure had been available from the Crown, but nobody from the defence had asked for it – or had asked only a day or two before the court appearance.
- The disclosure package may have been made available, but it was not picked up.
- Remands for disclosure may, in reality, be to give defence counsel time to read the disclosure that has been provided – or more time to discuss the disclosure with the client.

Although we did not specifically try to collect empirical data on the influence on court operations of the availability of disclosure, it is worthwhile noting that 10 percent of the requests for remand directly observed in court were “for disclosure or particulars.”<sup>61</sup>

### **7.3 Frequency of accused appearing without representation**

#### **7.3.1 Self-representation over the life of the case and at selected appearances**

As shown later, the interviews and the analysis of the data specially collected for the project indicate that not having representation has significant implications for the accused – and for other groups involved in the court process. It is therefore important to start by describing how frequently self-represented accused appear at different stages of the court process.

The Court Observation data cover both first appearances and “interim non-final” appearances from 9:30 to 10:00 a.m. before the trial courts. As noted earlier, these data are our preferred source of information on non-final court appearances.

Taking all appearances observed together, the court observer found that:

- The accused was self-represented at only 17 percent of interim appearances, overall (i.e., first appearances plus interim appearances).
- At first appearance court (where duty counsel is tasked with representing all persons who ask for help), only 14 percent of appearances involved a self-represented accused.
- At “interim” appearances at the beginning of trial court days (where duty counsel is not present), 19 percent of appearances involved a self-represented accused.

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<sup>61</sup> i.e. 13 of the 131 case/appearances observed that resulted in remands.



As noted earlier, the statistics provided on representation at first appearance by the Disposed Cases file are suspect.<sup>62</sup> However, that file likely does provide reasonably accurate estimates of the percentages of cases appearing at last appearance without representation. According to that file:

- There was no legal representation for 34 percent of cases at final appearances (including both guilty and other dispositions).

### 7.3.2 Self-representation by category of offence

Interviewees suggested that the criminal charges most likely to be faced by unrepresented accused were impaired driving, public disturbances, frauds, shoplifting and other theft under \$5000 (except for those with lengthy records), simple possession of drugs, and non-domestic assaults.

The Court Observation sample can be used to indicate the proportion of accused who were unrepresented at first and interim appearances. The Disposed Cases sample indicates the analogous proportion at last appearance who were unrepresented. Figure St.J-3 displays this information according to the offence category<sup>63</sup> of the most serious charge in the case.<sup>64</sup>

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<sup>62</sup> Nonetheless, for completeness, the findings from the Disposed Cases file (i.e., from data extracted from the court manual records) follow.

The St. John's Disposed Cases sample contained a unique aspect, in that information was available on representation only at the first appearance and the last appearance. This did not allow us to track representation through different stages in the full life of each case. However, the pattern of representation at first and last appearance is available – except for the quite sizeable number of cases (105 out of 501) cases in which representation information was missing for both appearances. Among the remaining 396 cases:

- In 37 percent of the cases, the accused was self-represented at both appearances.
- In another 28 percent of the cases, the accused was self-represented at one of the two appearances.
- Therefore, according to this (suspect) data source, the accused was self-represented at either the first or last appearance, or both, in 65 percent of the cases.

As noted earlier, a comparison of these numbers with the Court Observation file data suggests that many of the manual court informations that indicate that the accused may have been unrepresented, at least at first appearance, in fact reflect missing – or incorrectly recorded – data.

<sup>63</sup> See Appendix A for a listing of the offences contained in each of the “offence categories.”

<sup>64</sup> Although estimates for representation at first appearances from the Disposed Cases file are very suspect, for completeness, they are reported as follows: Homicide (\*\*), Sexual Assault (\*\*), Assaults excl. Common (54), Robbery (n/a), Break and Enter (65), Impaired Driving (68), Common Assault (61), Drugs excl. Simple Possession (50), Weapons Offences (47), Thefts and Frauds (65), Simple Possession of Drugs (65), Offences against Administration of Justice (46), Public Order (77), Miscellaneous *Criminal Code* (\*\*), Other Federal Statutes (\*\*\*), All offences combined (62).

<b>Figure St.J-3. Case/Apearances and Disposed Cases: Proportion of Accused who were Unrepresented by Type of Appearances by Most Serious Charge Category, St. John's*</b>				
Most Serious Charge Category	Proportion of Unrepresented Accused at			
	First & Interim Appearance <sup>1</sup>		Final Appearance <sup>2</sup>	
	%	# of cases	%	# of cases
Homicide	***	0	***	1
Sexual Assault	***	8	***	2
Assaults excl. Common	16%	19	19%	68
Robbery	***	0	***	0
Break and Enter	0%	15	25%	20
Impaired Driving	23%	18	42%	98
Common Assault	8%	13	36%	42
Drugs excl. Simple Possession	0%	20	16%	19
Weapons Offences	***	2	45%	20
Thefts and Frauds	16%	59	37%	114
Simple Possession of Drugs	***	3	43%	21
Offences against Administration of Justice	0	17	21%	28
Public Order	***	3	86%	14
Miscellaneous <i>Criminal Code</i>	***	0	***	1
Other Federal Statutes	31%	15	***	3
<b>Total</b>	<b>16%</b>	<b>191</b>	<b>34%</b>	<b>472</b>
<i>Notes</i>				
<sup>1</sup> Calculated using Court Observation sample.				
<sup>2</sup> Calculated using Disposed Cases sample.				
* Excludes cases for which representation was unspecified in the file.				
** Combined total for first and last appearances.				
*** The cell contains too few cases to report a percentage.				

The table suggests that 16 percent of accused were unrepresented at first or interim appearances, and 34 percent of accused were unrepresented at last appearance. The small number of cases for each offence category makes it difficult to draw many comparisons between offence groupings.

### 7.3.3 Self-representation by stage in process

Many interviewees found themselves unable to venture a numerical estimate of the proportions of unrepresented accused at various stages in the process, and those who did differed widely:

- At first appearance: Estimates of unrepresented accused ranged from 20 percent to 50 percent
- At bail: Interviewees noted that duty counsel was available at the bail stage, but some suggested that perhaps 10-to-25 percent did not avail themselves of duty counsel.
- At plea: Estimates of unrepresented accused ranged from 10 percent to 80 percent.
- At trial: Estimates of unrepresented accused ranged from 10 percent to 90 percent.

Unfortunately, since the court records did not capture the type of representation at specific court appearances, we could not use these records to estimate the percentages of cases with different representation at each of these stages in the court process.

Fortunately – at least for first and interim court appearances – we can shed some light on this issue using the Court Observation sample. As shown in Figure St.J-4 – for appearances on the first and interim courts’ dockets – accused were most likely to be unrepresented at appearances in which there was a final disposition. Conversely, accused were least likely to be unrepresented at appearances that involved a bail hearing.

<b>Figure St.J-4. Cases/Apearances in which Accused are Self-Represented by Stage in Court Process, St. John’s*</b>		
<b>Stage in Process</b>	<b>Percent of Cases</b>	<b>Number of Cases</b>
<b>No Final Disposition</b>		
• No bail, no plea, no election	21%	63
• Bail considered – no plea no election	4%	53
• Plea and/or election – no bail	17%	41
• Bail & Plea	***	6
<b>Final Disposition</b>		
• At least one guilty or S. 810	32%	25
• Other Final Disposition	***	3
• All Stages	16%	
* Source: Court Observation sample.		

### 7.3.4 Socio-demographic characteristics of unrepresented accused

Most interviewees agreed that the only differences between unrepresented accused and other accused were in income, prior record and the likelihood of imprisonment. Most interviewees agreed that unrepresented accused did not understand what was happening to them in the court process, to what one interviewee called a “frightening” degree. The numbers of functionally illiterate or borderline literate accused was reportedly high. Most interviewees (though not all) stated that accused with mental disorders were, if anything, more likely to be represented because of their low economic status, although significant delays were reported in the legal aid approval process for these difficult clients. Several interviewees noted the large proportion of accused with mental disorders, from depression to alcohol abuse.

## 7.4 Other types of representation

### 7.4.1 Prevalence of other types of representation

Figure St.J-5 displays the type of representation provided at various stages of the court process. As before, note that different data sources are used to estimate percentages for different stages of the court process.

<b>Figure St.J-5. Case/Apearances and Disposed Cases: by Type of Representation by Stage in Court Process, St. John's</b>					
<b>Appearance</b>	<b>Represented by</b>				<b>Number of cases</b>
	<b>Self-Represented</b>	<b>Duty Counsel</b>	<b>Other Legal Aid</b>	<b>Private Lawyer</b>	
First Appearances *	14%	74%	0%	12%	112
Interim Appearances (in 9:30 to 10:00 a.m. dockets only)*	19%	4%	43%	34%	79
No Final Disposition (first and interim appearances dockets only)*					
• No bail, no plea, no election	21%	19%	32%	29%	63
• Bail considered – no plea no election	4%	89%	2%	6%	53
• Plea and/or election – no bail	17%	34%	20%	29%	41
• Bail and Plea	***	***	***	***	6
Final Disposition (first and interim appearances dockets only) *					
• At least one guilty or s. 810	32%	36%	8%	24%	25
• Other Final Disposition	***	***	***	***	3
• All Stages	16%	45%	18%	21%	
Last Appearances**	35%	30%		34%	477
* Source: Court Observation sample. ** Source: Disposed Cases sample (note: the manual court records do not distinguish between duty counsel and Legal Aid staff lawyers. *** Numbers of cases too low to provide reliable estimates.					

The Figure first shows:

- The key role played by duty counsel in the first appearances courts, where duty counsel represented the accused in roughly three out of every four cases.
- Especially striking was the strong role played by duty counsel at bail appearances – with duty counsel representing cases at roughly nine out of every 10 appearances at which bail was considered.
- Duty counsel also represented the accused in about a third of all appearances at which a plea was taken in these courts.
- Duty counsel also represented nearly half (45 percent) of all accused who received a final disposition.<sup>65</sup>
- There was a strong presence of other Legal Aid staff lawyers and other privately retained lawyers (43 percent and 34 percent, respectively) after first appearance.
- It was rare to see a case represented by a private lawyer in first appearance court (12 percent).

<sup>65</sup> As noted earlier, we do not regard the Disposed Cases data as a preferred source of representation information at first appearance. Nonetheless, for completeness we note the database indicated that: at first appearance, 62 percent of accused were self-represented; 21 percent were represented by legal aid/duty counsel; and 16 percent were represented by private counsel. Further investigation would be required to determine the precise reason for this data source providing estimates so different from our other sources.

- For all cases at final appearance, accused were split roughly evenly between those who represented themselves (35 percent), those represented by duty counsel or legal aid (30 percent), and those represented by other privately retained lawyers (34 percent).

#### 7.4.2 Variation of representation by prior record of the accused

Figure St.J-6 shows the distribution of representation type according to the accused’s prior record – including prior convictions (the total number of counts for which a conviction was received) and prior jail terms (for each count convicted). As one would expect, there were more unrepresented accused among those with no prior convictions and one prior conviction, since these persons would be less likely to be facing a jail term if convicted on the current charge. However, approximately the same proportion of unrepresented accused could be found among those with 2-5, 6-10, and over 10 prior convictions. Representation by legal aid almost doubled among those accused with two or more prior convictions, as compared to those with one or none. Retention of private counsel was most common among those with one prior conviction, and more common than self-representation for those with between two and 10 prior convictions. Roughly the same pattern can be observed across variances in prior jail terms.

Prior Record	Proportion of Cases represented by			Number of Cases
	Self	Legal Aid	Private Counsel	
<b>Number of Prior Convictions</b>				
None	41	25	34	280 (100%)
One	36	23	41	44 (100%)
2-10	25	40	35	91 (100%)
Over 10	26	49	26	39 (101%)
<b>Number of Prior Jail Terms</b>				
None	41	25	34	357 (100%)
One	13	44	44	16 (100%)
2-10	23	42	35	52 (100%)
Over 10	24	52	24	33 (100%)
<i>Notes</i>				
* Excludes cases for which representation at final appearance was unspecified in the file.				
Source: Disposed Cases file.				

### 7.5 Impact of self-representation on the accused

#### 7.5.1 Overall impact

All interviewees suggested it would be preferable if Legal Aid could accept more cases. In the words of one interviewee, “Lack of representation is an expensive option.” Later sections will document the costs to the court system occasioned by self-represented accused. However, perhaps a more important general impact of the situation, said one interviewee, was that the community was left with the impression that there was one justice system for the rich and another for the poor.

A number of those interviewed indicated that self-represented accused often have not understood the court process generally, or what decisions were made in their own specific case. For instance, interviewees felt self-represented accused often did not understand discovery, elections, *voir dire*, hearsay, procedure during trials, etc. Further, it was not a rare event for court staff to have to explain, just after conviction, the details of a sentence to the convicted person – or to retrieve records to explain the sentence to an accused who had been convicted some time before. The emotional impact of being without counsel caused the accused anxiety and, in some cases, “panic.”

Further, many unrepresented accused did not understand the full consequences of conviction – with regard to getting a certificate of conduct, crossing the U.S. border, military service; and the impacts on getting or keeping certain types of job. Unrepresented accused could wind up with bail or probation conditions they could not live with. While, in some cases, a less harsh sentence might be received, normally unrepresented accused were “not well served on sentence,” because of information and arguments not brought to the court’s attention.

This lack of understanding of the process and the implications of conviction brought into question the ability of the accused to make appropriate decisions about the conduct of their case.

Most interviewees were also of the view that unrepresented accused suffered significant negative impacts from the lack of representation.

It was therefore not surprising to find that the procedures manual for one group of (non-legal) courtworkers who assist accused persons began with three points: 1) Ask the accused if he/she has a lawyer; if not, tell them to apply to legal aid; 2) Discourage accused persons from representing themselves; and 3) Encourage the accused to ask the judge for time to get counsel.

### 7.5.2 Specific strategic and tactical mistakes by the accused

Most interviewees agreed that the most important stages in the criminal process at which the accused requires counsel were the earlier ones – initially at arrest, after charging, pre-trial release, and plea. Trials are, as in most courts, the exception, but a number of interviewees suggested that trials involving unrepresented accused presented so many problems – including appealable errors, and an unacceptably high appeal rate – that trials, too, were a high priority. Sentencing was also cited by most interviewees as a stage requiring some expertise.

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

- Testing the tolerance levels of judges by seeking multiple postponements.
- Not understanding the consequences of a guilty plea, conviction, conditional sentence or conditional discharge.
- Pleading guilty without understanding the charges against them.
- Pleading guilty “just to get it over with.”
- Not knowing the best time to plead guilty.
- Pleading guilty while still feeling they had an “explanation.”
- Pleading guilty when they have a viable defence.
- Not knowing the law of, e.g., assault – what constitutes an assault and what is an allowable defence to an assault charge.

- Not being aware of their entitlement to disclosure.
- Not being aware of victim impact statements and pre-sentence reports.
- Not picking up their disclosure packet in advance of trial.

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

- Not knowing what arguments to raise, including at sentencing.
- Not knowing what approaches worked best with different judges.
- Not understanding that the accused can only present evidence by testifying as a witness.
- Presenting useless or unnecessary arguments.
- “Mouthing off at the judge.”
- Assuming they were “supposed to” testify at their own trial, and consequently “hanging themselves,” including in cases where the Crown had not made its case.
- Not knowing how to subpoena a witness.
- Not demanding a trial or a dismissal on trial days when the Crown witnesses have failed to show.
- Not realizing a Crown witness who has left for the mainland will likely not be brought back.
- Allowing inadmissible evidence to go before the court.
- Not knowing mandatory sentences for certain offences, or the “going rate” for others.
- At sentencing, not knowing enough to say they have a job and ask for an intermittent sentence (some judges will inquire, but others will not).
- Not asking for a conditional discharge or conditional sentence.
- Not understanding the early release from jail provisions.

The court observations found that, overall, the average amount of time taken per appearance was seven and a half minutes.<sup>66</sup> Of those observed, a quarter of the appearances took two minutes or less, and half took three minutes or less. Within the context of this type of time pressure, it is not difficult to understand why many of those interviewed noted that an accused without a developed understanding of court procedures would make specific mistakes – and would be disoriented generally throughout the court process.

### 7.5.3 Type of plea entered by type of representation at last appearance

Most of the above discussion of impacts on the accused relies on perceptions of those interviewed. The study also collected empirical evidence on what actually happened to unrepresented accused (i.e., from the Disposed Cases file and from the appearances directly observed in court.)

It is, however, important to make it clear that the information is not presented to draw causal inferences, but simply to describe the events at various stages in the process. For instance, the evidence is not presented to suggest that the lack of representation *caused*, for example, a higher (or lower) likelihood that an unrepresented accused would be convicted. Rather, it simply describes whether or not, and how frequently, significant decisions were made and certain outcomes occurred with or without the presence of counsel.

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<sup>66</sup> This included appearances by accused with private bar lawyers who simply appeared to ask for a set date for the next appearance.

As noted earlier, a number of interviewees raised the issue of whether or not unrepresented accused were more likely to plead guilty – for instance, to “get it over with,” or because they had neither the knowledge nor resources to contest the charges. Interviewees also identified a group of people who pled guilty because they felt morally wrong and ashamed and who pled guilty to avoid public shame.

Figure St.J-7 displays the plea entered by the type of representation at the last appearance (information on the appearance at which the plea may have been entered initially is not available).

- Of all pleas, 82 percent of all pleas were guilty pleas.
- Considerably more (91 percent) unrepresented accused pled guilty than did accused represented by legal aid staff lawyers (81 percent) or private counsel (74 percent).

<b>Figure St.J-7. Distribution of Disposed Cases in Which a Plea was Entered : by Type of Plea Entered and by Type of Representation at Last Appearance, St. John’s*</b>					
<b>Plea</b>	<b>Proportion of all Pleas by or on behalf of Accused Represented by</b>			<b>Number of Cases</b>	<b>Proportion of all Cases</b>
	<b>Self</b>	<b>Legal Aid</b>	<b>Private Counsel</b>		
Guilty	91	81	74	338	82
Not guilty	9	19	26	76	18
Total Cases	100%	100%	100%	414	100%
<i>Source: Disposed cases file.</i>					
<i>Note</i>					
<i>* Excludes cases for which representation at plea was unspecified in the file.</i>					

#### 7.5.4 Conviction or not by type of representation

Figure St.J-8 shows whether or not the accused was convicted by type of representation at final appearance. When all disposed cases are considered, 84 percent of cases were convicted.

- Rates of conviction for unrepresented accused and accused represented by legal aid staff lawyers were identical (86 percent).
- Rates of conviction for accused represented by private counsel (other than appointed counsel) were again slightly lower (80 percent) than for those with no representation or representation by Legal Aid staff lawyers.

One should, however, note that, in comparing conviction rates for self-represented accused with those for represented accused, one should take into account the likely impact of post-charge and pre-court process “diversion” on these conviction statistics. Accused who were diverted were extremely likely to not have a lawyer. Given that successful completion of the diversion program would result in non-conviction, the existence of a diversion program would be expected to result in lower overall conviction rates for self-represented cases (with little if any impact on conviction rates for represented case). Unfortunately, data were not available on which cases were diverted, or even the percentage of cases that were diverted, and therefore we cannot say what the conviction rate would be for unrepresented accused who were not diverted. However, it is safe to say that the rate for non-diverted non-represented accused would be higher than the 87 percent shown in Figure St.J-8.



<b>Figure St.J-8. Distribution of Disposed Cases: by Type of Disposition by Type of Representation at Final Appearance, St. John's</b>					
<b>Disposition</b>	<b>Proportion of Dispositions for Accused Represented by</b>			<b>Number of Cases</b>	<b>Proportion of Cases</b>
	<b>Self</b>	<b>Legal Aid</b>	<b>Private Counsel</b>		
Convicted*	87	85	80	391	84
Not Convicted**	13	15	20	76	16
Total Cases	100%	100%	100%	467	100%
<i>Source: Disposed Cases file.</i>					
<i>Notes</i>					
* Includes guilty verdict and peace bond ordered.					
** Includes not guilty, withdrawn, dismissed, stayed, and discharges.					

For three specific offence categories, the number of cases in the file was sufficient to permit individual analysis of conviction patterns across representation type. This analysis shows that the overall pattern did not hold for individual offence groupings:

- For thefts and frauds, conviction rates for unrepresented accused were *considerably* higher (95 percent) than for accused who were represented by Legal Aid staff lawyers (87 percent) or private counsel (85 percent).
- For impaired driving, accused who were represented by Legal Aid staff lawyers fared considerably better (73 percent conviction rate) than did unrepresented accused (83 percent) or accused represented by private counsel ((82 percent).
- For assaults other than common assault, accused who were represented by Legal Aid staff lawyers had a slightly higher conviction rate (96 percent) than did unrepresented accused (92 percent), but a much higher rate than accused represented by private counsel (83 percent).

Earlier, we cautioned against using these data to imply a causal connection between type of representation and conviction rates. However, given the impact of having a criminal record (on employment opportunities and the likelihood of being charged with further offences, etc.) the data can definitely be used to show that unrepresented accused are very likely to experience serious negative impacts as a result of the court process. Whether or not that possibility alone is sufficient to call for greater availability of legal representation is a matter of public policy.

### 7.5.5 Custodial sentence and type of representation

Figure St.J-9 extends the analysis by showing the proportions of cases receiving a custodial sentence, according to the type of representation available to the accused at the final appearance.<sup>67</sup>

- Overall, 30 percent of cases received a custodial sentence.

<sup>67</sup> The percentages shown in this table are based on the total numbers of cases – whether or not the cases resulted in a conviction. This choice was made to address the question of risk to a person entering the court system. If one were, instead, interested in the risks of receiving a custodial conviction after being convicted, then one should recalculate the percentages using the number of persons convicted as the base for the percentages.

- Cases represented by Legal Aid staff lawyers were (as the seriousness criterion, as well as the prior record pattern seen in Figure St.J-6, would suggest) more likely to receive a custodial sentence (42 percent).
- Cases represented by private counsel were less likely to receive a custodial sentence (31 percent).
- Unrepresented accused were least likely to receive a custodial sentence (18 percent).

<b>Figure St.J-9. Disposed Cases: by Whether or Not a Custodial Sentence was Given by Type of Representation at Last Appearance, St. John's</b>					
Sentence	Represented by			Number of Cases	Proportion of Cases (%)
	Self (%)	Legal Aid (%)	Private Counsel (%)		
Custodial Sentence	18	42	31	138	30%
No Custodial Sentence	82	58	69	329	70%
Total Cases	100%	100%	100%	467	100%

*Source: Disposed Cases file.*

We also conducted an analysis of custodial sentences by representation at final appearance, according to the three individual offence categories for which a sufficient number of cases were available to permit comparison. The analysis shows that this overall pattern (of cases represented by Legal Aid staff lawyers having the highest percentage receiving a custodial sentence) held across these offence groupings (thefts and frauds (32 percent), assaults excluding common assaults (52 percent), and impaired driving (53 percent). Self-represented accused had the lowest percentage receiving a custodial sentence for assaults excluding common assaults (31 percent) and impaired driving (10 percent). However, accused represented by private counsel had the lowest percentage (18 percent) for thefts and frauds.

Again we caution against using these data to imply a causal connection between type of representation and likelihood of receiving a custodial sentence. However, the results are directly relevant from another important perspective. Specifically, it is accepted that eligibility for legal aid should depend (in part) on the likelihood of a case receiving a custodial sentence. Although one cannot expect to predict with total accuracy whether a case will result in a custodial sentence, it is relevant that custodial sentences were received by almost two in 10 self-represented accused.

## 7.6 Further impacts of lack of representation

The previous section described the impacts *on the accused* of their appearing before the court without representation. In this section we discuss the impact of self-representation on the key groups involved in the courts – and on court operations.

Information is presented from both the interviews and the data specially collected for the project. It is, however, important to repeat that, where empirical information is presented, it is not presented to draw causal inferences, but simply to describe the events at various stages in the process.

### 7.6.1 Impacts on victims

A number of those interviewed noted that victims and witnesses were often placed – some would say inappropriately – in very uncomfortable positions when questioned and cross-examined in court by a self-represented accused.

Counsel could serve as a kind of “buffer” between the accused and victim, to the benefit of both.

### 7.6.2 Impacts on court officers and others

#### *a Impacts on Legal Aid and duty counsel*

Virtually all interviewees agreed that staff lawyers did not have enough time to spend on cases, being “run off their feet.” Some characterized the system as, e.g., “less than minimal,” and one that “cannot accommodate the knock on the door,” or the needs of the court.

Some interviewees suggested that there was a prevailing impression among Legal Aid clientele that legal aid services were undesirable. This impression may have contributed to the apparent reluctance of some potential clients to apply for legal aid. Reported aspects of this perception included:

- Perceived shortcomings of some staff lawyers in terms of commitment, industriousness or competence.
- Difficulty in reaching staff lawyers by telephone or getting face-to-face meetings with them.
- Not being able to meet with staff lawyers before court appearances.
- Appearing in court alone, after being told that a Legal Aid staff lawyer would be there to help them.
- Pressure from the legal aid system to plead guilty.

#### *b Crown attorneys*

Crowns generally would not talk to unrepresented accused or negotiate a plea with them. If they felt compelled to, however, they normally conducted such discussions in the presence of the investigating police officer. The Crowns interviewed noted the danger of the accused making admissions during such discussions that would not only be incriminating, but would result in the Crown being called as a witness in court.

The Crowns also took seriously their role as officers of the court, and said they felt the burden of having to make their best efforts to ensure that unfair or tenuously based guilty pleas from unrepresented accused were not entered.

#### *c Judges*

Among the difficulties noted were a higher number of remands ordered by judges to enable the unrepresented accused to get a lawyer. Judges were put in the awkward position of assisting unrepresented accused as best they could. It was the general perception that most judges “bend over backwards” to protect the unrepresented accused’s rights. Also – especially if they felt the accused was likely to get a custodial sentence – the judges would encourage the accused to get legal assistance.

#### *d Court administrative personnel*

Most interviewees pointed to delays and postponements created by unrepresented accuseds, leading to multiple and useless court appearances. Some court personnel indicated that the court schedule appeared to be driven by time delays built into the Legal Aid application, approval and access system. As noted above, however, Legal Aid officials reported that delays in the legal aid application and approval process were not as severe as they were perceived to be, providing the accused was not interested in delaying the criminal court process. Clerks at the registrar's counter indicated that they spent a great deal of time trying to explain things to unrepresented accused.

#### *e Security staff*

Few security problems were reported, despite the physical shortcomings of the courthouse. However, unrepresented accused were generally acknowledged to be "more lippy and unruly" without counsel to rein them in.

### 7.6.3 Overall impacts on court operations

#### *a Court workloads: Length and nature of individual appearances*

##### *Length of Appearances*

In most provincial criminal courts in Canada, only 4-to-10 percent of cases go to trial. The overwhelming majority of appearances for cases are therefore not trials – and, as noted earlier, in St. John's (as in other courts) these appearances are typically in the order of one or two minutes per case. What would, in other situations, seem a very minor increase in the time taken to perform a function at a case appearance, can therefore represent a major increase in judicial, Crown, legal aid, defence counsel and court administration workloads – proportionally and in total.

Our Court Observation data did indicate that concern was present that the unrepresented accused be aware of the opportunities and benefits of having a lawyer – and the expression of that concern did extend the time taken for individual court appearances.

In 10 percent of the appearances involving unrepresented accused, a comment concerning representation was made by either the judge, the accused, the Crown, or duty counsel. Typically, the comment was by the judge, who asked the accused whether s/he had spoken to duty counsel, or instructed the accused to get a lawyer. Interviewees often noted that cases were stood down for a short period of time to allow the accused to talk to duty counsel. The point was made that considerable court time would be saved if duty counsel had more opportunity to talk to the accused before the case came up in court.

##### *With respect to appearances prior to trial*

To create our Direct Court Observation file, court observers sat in first appearance and 9:30-10:00 a.m. docket courts and captured the time taken by each case/appearance. The results speak directly to the issue of whether appearances of self-represented accused (in the appearances prior to trial) were longer or shorter than those with other types of representation. As shown in Figure SJ-11, in the first appearance court, appearances in which the accused was unrepresented seemed to be *quicker* than those for accused represented by either duty counsel or private counsel. (This result applies whether one uses the 25th, 50th or 75th percentile times.) From a court resources perspective, this was perhaps a positive result. However, from an access to justice perspective, there may be reason to be concerned

that, when a duty counsel or private counsel was involved in a first appearance, more time was spent dealing with the case.

In the 9:30 to 10:00 a.m. docket courts, the reverse was true. There, appearances in which the accused was unrepresented were *longer* than those for accused represented by either Legal Aid staff lawyers or private counsel.

An attempt was also made to differentiate between case/appearances that resulted in a remand or a final disposition. Unfortunately, too few case/appearances were present in the database to consider the latter. Nonetheless, as shown in Figure St.J-10, case/appearances that resulted in a remand and in which the accused was self-represented were generally shorter (generally by 50 percent) than those in which the accused was represented by duty counsel, Legal Aid staff lawyers or private counsel.

<b>Figure St.J-10. Case/Apearances: Distribution of Time (seconds) for different types of Case/Apearances by Type of Representation , St. John's</b>					
<b>Appearance Number at which Plea was Entered</b>	<b>25th/ median/ 75th percentile times for case/appearances represented by</b>				<b>All Types of Represent- ation*</b>
	<b>Self</b>	<b>Duty Counsel</b>	<b>Staff Legal Aid</b>	<b>Private Counsel</b>	
<b>Type of Docket Court</b>					
• First appearance	25th = 60 50th = 120 75th = 225 (n= 16)	135 240 705 (n=76)	**	120 180 570 (n= 13 )	120 240 570 (n=105)
• 9:30-10:00 a.m, courts	25th = 180 50th = 24 0 75th = 450 (n=13)	**	120 180 375 (n=30 )	120 180 405 (n= 24)	120 180 420 (n=70)
<b>Result of Appearance</b>					
• Remanded or Stood Down	25th = 60 50th = 120 75th = 240 (n= 19)	120 240 540 (n= 63)	120 180 390 (n= 29)	120 180 300 (n= 31)	120 180 315 (n=142)
• Final	25th = 150 50th = 240 75th = 420 (n=9)	300 420 720 (n=11)	**	**	240 360 780 (n=27)
<i>Source: Direct Court Observation file.</i>					
<i>** Less than 10 case/appearances.</i>					

Another factor that would add to the time taken by a case on a court docket would be the process of “standing down” a case to later in the day to complete consideration of any matters that day. In fact, cases that were self-represented had a substantial likelihood of being stood down – and were more likely to require being stood down than were cases with different types of representation. The relevant likelihoods of having a case stood down were:

- 26 percent for self-represented accused ( $n = 31$ ) (38 percent in first appearance court, 13 percent in 9:30 docket court);
- 13 percent for accused represented by duty counsel ( $n = 88$ ) (all but three in first appearance court);

- 21 percent for cases represented by staff legal aid lawyers ( $n = 34$ ) (all in 9:30 docket court); and
- 10 percent for cases represented by private counsel ( $n = 40$ ) (all in 9:30 docket court).

*With respect to trials*

Most interviewees agreed that trials involving unrepresented accused took longer than those of represented persons. Those who did not agree said that unrepresented accused had no idea what questions to ask and did not think to call witnesses or present important arguments in their defence. Virtually all seemed to agree, however, that trials with unrepresented accused were to be avoided if at all possible. Several interviewees noted the “injustices” of unrepresented accused trials and their vulnerability to appeal – “a simple trial will leave 15 grounds for appeal.” Unnecessary appeals from trials where, e.g., available defences were not raised, were, therefore, another impact. Other interviewees noted the distress caused to the victim by unrepresented accused trials.

Those who believed that unrepresented accused trials took longer – many said at least twice as long – suggested that unrepresented accused would, at trial, delay the proceedings by:

- requiring lengthy explanations from judges (e.g., of *voir dire*), with some processes requiring two or three repetitions of the explanation;
- being unable to waive procedures (e.g., preliminary inquiries) without a lengthy explanation; and
- requiring otherwise unnecessary procedures

For other unrepresented accused, trials took a shorter time because the accused did not know how to proceed, and so did little or nothing in his or her defence. Such trials were considered “unnecessary.”

*Events occurring at individual court appearances*

The court observation data also yielded some information about how many appearances (at first appearance and 9:30-10:00 a.m. docket courts) were “productive,” in the sense that they resulted in decisions on (or, at least, consideration of) one or more of three matters: namely bail, plea, and

elections. Figure St.J-11 shows the breakdown of courtroom events (or non-events) according to representation status at last appearance.

**Figure St.J-11. Court Observation Data: Percentage Distribution of Cases/Appearances: by Accused’s Representation Status**  
**By Type of Decision Made and Case Status (Interim or Final Appearance), St. John’s**

Representation Status	Type of Decisions at Interim Appearance (Remanded or Stood Down)					Type of Decisions at Final Appearance		
	*No decision	Bail decision considered	Plea entered and/or election made	Bail, election and plea entered	Total number of non-final Cases	Guilty verdict or peace bond	Other verdict	Total number of final cases
Self	57%	9%	33%	0%	21	88%	12%	9
Duty Counsel	18%	58%	21%	3%	72	82%	18%	11
Other Legal Aid	63%	3%	25%	9%	32	100%	0%	2
Private lawyer	53%	9%	35%	3%	34	100%		6
Total	40%	30%	26%	4%	159	89%	11%	28

Source: Court Observation sample.  
 Notes:  
 \* Bail was not considered, no elections were made by either Crown or defence, and no plea was entered.

Cases are broken down according to whether the appearance was or was not a final one in the case.<sup>68</sup> The columns in the left half of the table show data for “interim” (i.e., non-final) appearances. The columns in the right half of the table show data for final appearances.

The Figure suggests that:

- At non-final appearances, duty counsel cases were the most likely (82 percent) to result in a decision of some kind (most of them bail decisions, but also a significant number of pleas entered). Only 18 percent of duty counsel appearances did not result in a decision of some kind (i.e., column 2 – “no decision”).
- At non-final appearances, a little over half of the appearances in self-represented cases (57 percent) and private counsel cases (53 percent) did not result in a decision of some kind.
- At non-final appearances (again in the first appearance and 9:30 a.m. courts), two thirds of appearances handled by other staff lawyers (63 percent) did not result in a decision of some kind.

The numbers of appearances observed in which a final decision as to verdict or sentence was made (i.e., the right-most columns in Figure St.J-11) were too small to suggest distinctions that might exist between different types of representation.

<sup>68</sup> The figure omits three cases in which the accused’s representation status was unclear to the court observer.

*b Workloads: Number of appearances per case*

Some interviewees suggested that court schedules appeared, at earlier stages at least, to be driven by time delays built into the legal aid application, approval and access system, although Legal Aid officials indicated this was a misconception. Some interviewees were also of the view that there was a certain segment of the accused population who were aware of the delays inherent in the legal aid process, and took advantage of these delays in order to obtain successive postponements of their case. (The reverse phenomenon was also seen – of accused who “just wanted to get it over with,” and pled guilty with or without the assistance of counsel.) Multiple postponements for accused who were unrepresented were also reportedly common, as some judges postponed the proceedings in hopes the accused would obtain counsel. Such appearances were costly for the courts and its officers. After a number of unproductive appearances, some judges attempted to move the process forward by decreasing the length of remands to get counsel.

*Reasons for remands at early appearances*

The Direct Court Observation file provided information to at least initiate an exploration of the reasons for remands – and the results show that a significant percent of the reasons for granting remands were related to obtaining counsel. For instance:

- Of the remands granted in case/appearances, 55 percent were for self-represented accused “to get a Legal Aid certificate” (21 percent), or “to get a lawyer” (36 percent) [*n* = 14].
- Of the remands granted in case/appearances involving duty counsel, 30 percent were “to get a Legal Aid certificate” (16 percent), “to get a lawyer” (11 percent), or “to a date at which a missing lawyer would be available (3 percent) [*n* = 61].

If these results were to apply when data from a larger sample of case/appearances were obtained, then they would certainly indicate that remands to obtain legal assistance were a significant source of delays.

*Appearances before a plea is entered*

A second type of direct indicator of the workloads caused by – and resources required to deal with – cases is the number of court appearances required to complete a case.

A related indicator is the appearance number at which key activities took place.

The Disposed Cases sample yielded valuable information on the number of appearances made by accused who were or were not represented.

Figure St.J-12 begins by showing the appearance number at which the plea was entered for accused who had various types of representation at last appearance.<sup>69</sup>

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<sup>69</sup> Because of the limitations of the data, we could not provide analysis based on the type of representation *at plea*.



<b>Figure St.J-12. Disposed Cases: Distribution of Appearance Number at Which Plea was Entered by Type of Representation at Final Appearance, St. John's</b>				
<b>Appearance Number at which Plea was Entered</b>	<b>Represented by</b>			<b>All Types of Represent- ation*</b>
	<b>Self</b>	<b>Legal Aid</b>	<b>Private Counsel</b>	
25th Percentile	1	2	2	1
Median	1	4	3	3
75th Percentile	3	6	6	5
95th Percentile	7	13	13	10
Total Cases	162	146	160	462
<i>Source: Disposed Cases file.</i>				

Conventional wisdom suggested that self-represented cases in general generated more appearances before entering a plea. In fact, the opposite seemed to be true:

- Fully half of the unrepresented accused entered a plea at the first appearance, and three quarters pled after three or fewer appearances. (This may be because – as suggested by interviewees – many unrepresented accused pled guilty quickly “just to get it over with.”)
- The accused represented by Legal Aid staff lawyers and private counsel made more appearances before entering a plea. At least half of the cases represented by duty counsel/Legal Aid took four appearances to enter a plea.

*Total number of appearances before disposition*

Figure St.J-13 shows the total number of appearances in the case – according to representation type at last appearance. The data suggest that cases self-represented at first appearance *did not* require more court appearances overall. More specifically:

- Accused self-represented at the last appearance made fewer appearances in total than did accused with representation at last appearance.
- Half the accused unrepresented at last appearance made only one or two appearances. In comparison, at least half of those accused represented at last appearance by Legal Aid or private counsel required five or more appearances.
- Little difference was seen between the numbers of appearances made by accused represented by Legal Aid staff lawyers and accused represented by private counsel.

<b>Figure St.J-13. Disposed Cases: Distribution of Number of Appearances in Case by Type of Representation at Last Appearance, St. John's</b>				
<b>Number of Appearances</b>	<b>Represented by</b>			<b>Total: All Types of Representation</b>
	<b>Self</b>	<b>Legal Aid</b>	<b>Private Counsel</b>	
25th Percentile	1	3	3	2
Median	2	5	5	4
75th Percentile	3	8	7	6
95th Percentile	7	14	13	12
Maximum	20	27	27	27
Total Cases	162	141	160	467

*Source: Disposed Cases file.*

*c Elapsed time for cases to resolve*

The Disposed Cases sample also yielded information about the time elapsed between the first and last appearance. This information is important from a due process perspective – however, that perspective yields two potential hypotheses: first, “Justice delayed is justice denied,” and second, “Justice rushed is justice crushed.”<sup>70</sup> The first concern is relevant to those who feel that delays in obtaining legal representation adversely affect the fairness of the court process and the final outcome. The second concern is especially relevant to those concerned that unrepresented accused may plead out the case early “to get it over with,” or because they are not aware of viable legal defences.

As shown in Figure St.J-14:

- As noted above, accused self-represented at last appearance made fewer appearances, and this was reflected in such cases taking less time between first and last appearance than cases represented by Legal Aid staff lawyers or private counsel.
- A significant proportion of unrepresented cases were resolved extremely quickly – a quarter were resolved at first appearance, and half were resolved in less than a week.
- Most cases represented by private counsel at last appearance took slightly less time to be resolved than did legal aid cases (half took 18 weeks or less, while half the legal aid cases took 21 weeks or less).
- A quarter of all cases took over seven months to be resolved.

<b>Figure St.J-14. Disposed Cases: Distribution of Time (in weeks) Between First and Final Appearance by Type of Representation at Final Appearance, St. John's</b>				
	<b>Time (in weeks) between First and Last Appearance when Represented by</b>			<b>All Types of Representation</b>
	<b>Self</b>	<b>Legal Aid</b>	<b>Private Counsel</b>	
25th Percentile	0	8	8	0.4
Median	0.1	21	18	12
75th Percentile	8	43	41	34
95th Percentile	40	77	65	64
Maximum	128	130	192	192
Total Cases	162	141	160	467

<sup>70</sup> The latter phrase was first suggested to one of the authors by a widely respected colleague, Carl Baar.

Source: Disposed Cases file.

## 7.7 Overall conclusions

### 7.7.1 Key overall findings

Our key findings with respect to the key questions raised by the study include:

*With respect to frequency of self-representation*

- A significant number of accused proceed through key parts of the criminal court process without the benefit of legal representation.

*With respect to impact*

- Interviews with key officials strongly suggest that the unrepresented accused (especially those with little prior experience in the court system) are less likely to be aware of the legal remedies available to them at key stages in the process – and are unlikely to understand many key decisions and events in the process.
- The evidence is insufficient to conclude whether or not self-represented accused are more likely to be convicted or to receive harsher sentences.
- A significant number of unrepresented accused suffer serious penalties or deprivations of liberty as a result of their court case. Almost 90 percent receive a criminal record, and a smaller, but still significant number (in the order of 20 percent) receive custodial sentences.

### 7.7.2 General reasons for current unrepresented accused situation

Interviewees who were able to speculate on the subject suggested the following key reasons for the unrepresented accused situation in St. John's (not all were mentioned or agreed to by all):

- The financial eligibility and coverage restrictions on legal aid leave little room to maneuver, and effectively exclude the working poor and those who are not likely to receive a jail term.
- Some accused “just want to get it over with,” and plead guilty as soon as possible.
- Some accused (reportedly) decline the assistance of legal aid (see below).
- Others assume they will not be granted legal aid and do not bother to apply.

### 7.7.3 Solutions suggested by interviewees in St. John's

Among the solutions offered by individual interviewees were the following (not suggested by or agreed to by all):

- Hiring more Legal Aid staff lawyers, and reducing “bean-counter-type” administrative controls.

- Stronger professionalization, quality control and mentoring over legal work and more effective caseload management for legal aid.
- Higher salaries for Legal Aid staff lawyers, to attract good candidates.
- A mixed system of staff lawyers and certificate service.
- Making accused aware earlier of the availability of legal aid – and the procedures for applying for it (including what documents are needed). One possibility mentioned was that police would hand out printed information.
- Duty counsel-type coverage of all appearances after the first, to enable a case to be held down briefly while legal advice is provided. In fact, virtually all interviewees advocated placing a duty counsel in all courts (i.e., more than first appearance court) at times when they are dealing with non-trial appearances. Currently, this is from 9:30 to 10:00 in Courtrooms 1 through 6. Two scheduling problems would be presented by placing duty counsel in these courts at that time: Trials currently scheduled for 10:00 would have to start later, and there would be conflicts for staff lawyers, who routinely have to be in family court (in a different building) at 10:00. The majority of interviewees suggested that it was important for the courts, the Crowns and the Legal Aid Commission to find a way to organize their business in a way that would make duty counsel available to assist accused persons at subsequent appearances.
- Having a Legal Aid office in the courthouse, or at least closer to it and more plainly marked, to increase accessibility and visibility, and to reduce commuting time between the Commission offices and the courthouse.
- Eliminating or re-framing the “likelihood of jail” criterion, especially in cases where there is a “real issue deserving trial” – or the possibility of injustice to the accused.
- Relaxing the financial eligibility cutoffs.
- Having judges ask more rigorous questions of, and granting shorter postponements to out-of-custody accused who claim to be having difficulty navigating the legal aid approval process.
- Having the plea deemed after a certain number of unproductive appearances.
- A better court case management system, wherein all court parties would co-operate in the process of moving cases expeditiously through the system. (This would include expanded duty counsel service, having Crowns make their best offer at an early stage, and requiring Crowns to indicate before first appearance those cases where they will be seeking jail, ) so reducing useless appearances.)

Several interviewees noted that some of the suggested solutions would require a strong co-operative effort among all involved parties towards commonly agreed-upon goals. It was noted that the current priority initiatives and strategic plan established by the Minister of Justice and Attorney-General and the Newfoundland Department of Justice support just such a co-operative effort in some of the suggested areas. Our site visit occasioned discussions, on several fronts, of the usefulness of integrated action, possibly involving the results of this research as one building block within discussions towards such integrated strategies.

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## Chapter 8: Kelowna, British Columbia

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### 8.1 Objectives and Methodology

The Department of Justice and the Federal/Provincial/Territorial Permanent Working Group on Legal Aid engaged the research team to measure:

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

A brief overview of the full national study – covering nine court sites – was presented in Chapter 1. The methodology for the Kelowna part of the national study followed a strategy for data collection and site visits similar to that followed in the other sites.

The methodology involved data collection and site visits. Information was available on the question of unrepresented accused from three sources:

- **A Disposed Cases database**, acquired from JUSTIN, encompassing all 1,020 adult criminal cases concluded in Kelowna Provincial Court in 2001.
- **Direct Observation** of 214 appearances in first appearance and arraignment courts over six days during May and June of 2002; trials were rarely observed..
- **Interviews with key informants** (judges, Crowns, legal aid staff, court administrators, private bar members, local service agencies, etc.), whose anonymity was assured.

Throughout this project, we have received excellent co-operation and assistance from all those we asked to participate in the study. We also readily acknowledge the very able assistance and expertise of the Kelowna-based researcher who conducted the court observations. Our appreciation is also extended to those officials of the B.C. Ministry of the Attorney-General who provided us with the file of disposed cases from the JUSTIN court information system.

### 8.2 Context of the court and legal aid

One of the major conclusions – supported by the data from all sites – was that data on the extent of legal representation in a particular court cannot be interpreted out of the context of (at least):

- The type of community served (including the nature of accused persons brought before the court).
- The resources and management and operations practices in place in the courts.
- Legal aid policies and practices.
- The duty counsel system in place.
- The policies and practices of all of the other key participants in the court process – including the judiciary, the Crown attorneys, the police, court administrators, the private bar and other supporting agencies.

All of these factors, policies and practices can have significant mitigating or exacerbating influences on the impacts of self-representation. This contextual information is thus essential to understanding the problems and potential solutions to challenges related to the unrepresented accused.

This section will specifically address the first four of the above areas. Information on the fifth is contained throughout the report.

### 8.2.1 The community

The largest city in the Okanagan Valley of British Columbia, Kelowna is situated on the eastern shore of Okanagan Lake. Kelowna is the main marketing and distribution centre of the Okanagan Valley, with a flourishing tree-fruit industry, and a growing light industrial sector. Also known for forestry and the manufacture of boats, plastics, fibre-glass, body armour and oil field equipment, Kelowna has a growing high technology sector that includes aerospace development and service. Tourism is also a major contributor to the regional economy.

In the 2001 Census, the city of Kelowna reported a population of 96,288, a 7.7 percent increase from the previous Census in 1996. The population of Kelowna included comparatively high proportions of residents over the age of 65 (16 percent of males and 19 percent of females). Approximately 20 percent of males and 19 percent of females in Kelowna were in the 15-to-29 age range associated with the highest rates of crime. The population of the Census agglomeration of Kelowna in 2001 was estimated at 156,701. The population density was 455.9 per square kilometre in 2001. Close to 96 percent of residents reported that the language spoken in their home was English.

The average income of Kelowna was reported to be \$24,187. The average income for Kelowna was somewhat lower than the provincial average. The estimated average employment income in the Census agglomeration area of Kelowna was \$48,100, and the per capita income was \$19,300, compared with \$53,600 and \$21,200 respectively for the province.

In 2001, Kelowna's unemployment rate was 6.6 percent, somewhat lower than the provincial unemployment rate of 8.7 percent.

Of the population aged 25 years and over, the majority (68.5 percent) had a high school certificate or higher; 46.1 percent had a trade or non-university certificate or higher level of education, and 13.4 percent had completed university. Just over nine per cent had less than a Grade 9 education. Compared to the province of British Columbia, Kelowna had slightly more people over the age of 25 with lower levels of education. Women were more likely than men to report less than Grade 9 education, and men were more likely than women to report a high school certificate or higher as their level of education.

The number of single-parent families in the Census agglomeration area of Kelowna was estimated at 5,986, or 13 percent of the reported 46,307 families. This is comparable to the provincial rate of 13.5 percent.

Of the estimated 62,977 occupied private dwelling in the Census agglomeration area of Kelowna in 2001, 73 percent were owner-occupied and 27 percent were rented; the proportion of owner-occupied dwellings was higher than that noted provincially (65 percent).

For the city of Kelowna, the total number of reported property crimes decreased from 8,672 in 1999 to 8,231 in 2000. The number of reported violent crimes also decreased, from 1,561 in 1999 to 1,492 in 2000. Overall, the total number of reported *Criminal Code* offences decreased from 15,510 in 1999 to 14,720 in 2000.

### 8.2.2 The court

Kelowna has a consolidated courthouse that handles Provincial Court and B.C. Supreme Court civil, criminal and family matters. The courtrooms that hear criminal matters are described in the following chart. Twelve courtrooms are available for criminal cases. Of these, six are regularly used for Provincial Court cases.

First appearance court	<ul style="list-style-type: none"> <li>• Sits three days a week</li> <li>• For cases not in custody</li> </ul>	<ul style="list-style-type: none"> <li>• Courtrooms handle both adult and youth</li> </ul>
Arraignment court	<ul style="list-style-type: none"> <li>• Sits Monday, Tuesday and Thursday</li> <li>• Cases in custody are usually dealt with daily in this courtroom</li> </ul>	<ul style="list-style-type: none"> <li>• Do not split drugs and CCC</li> <li>• (Shared Provincial Court and Supreme Court)</li> </ul>
Trial courts	<ul style="list-style-type: none"> <li>• Sit daily as needed</li> </ul>	
No circuit courts		
No special courts		
Bail hearings by video from:	<ul style="list-style-type: none"> <li>• Kamloops Regional Correctional Centre</li> <li>• Penticton</li> <li>• Vernon</li> </ul>	

In 2001, 1,020 adult criminal cases were concluded in Kelowna Provincial Court. Breakdowns of these cases by a range of characteristics are presented in later sections of this chapter.

On a related point, the Criminal Caseflow Management (CCFM) rules in B.C. require defendants to make appearances at specific stages between first appearance and trial. The courts go out of their way to ensure that accused know their legal rights, including that of speaking to counsel. They are typically encouraged to speak to counsel, given weeks to do so, and given multiple opportunities. All of these measures encourage unrepresented accused to get counsel and discourage rapid settling of cases. One interviewee saw an impact of the CCFM rules only on cases where large amounts of court time were expected to be required.

### 8.2.3 Legal aid

Criminal legal aid in British Columbia is administered by the B.C. Legal Services Society (BCLSS). Most legal aid services in British Columbia are provided by the private bar “on referral” from the BCLSS. However, some criminal legal aid services in some locations, including Kelowna, have been provided by staff lawyers.

Recently, the complement of BCLSS staff lawyers providing representation in adult criminal matters has been reduced across the province. In Kelowna, one staff lawyer has been providing a mix of duty counsel and representation to eligible adults facing criminal charges. This staff lawyer has covered approximately 25 percent of duty counsel hours, with the remainder covered by several members of the private bar paid on a per diem basis. Representation of persons eligible for criminal legal aid is mostly provided by members of the private bar, although the staff lawyer also handles a portion of these cases. Payment for services provided by the private bar is made in accordance with the legal aid tariff, or schedule of fees.

In criminal matters, financially eligible adults may be covered by legal aid if, on conviction, they are likely to go to jail, might lose their means of earning a livelihood, or could be deported from Canada. Special accommodation is provided for persons with mental or emotional disabilities that prevent them from defending themselves.

Applications for legal aid are taken at the BCLSS office, which is located several blocks from the courthouse. Approval of applications usually takes two weeks or so.

Most of the legal aid cases handled by the private bar in Kelowna were described as taken by a core of 10-to-12 lawyers. Very few of the informants interviewed in Kelowna believed that an accused with a BCLSS referral was likely to experience any real difficulty finding a private lawyer willing to take the case (despite the widely-expressed dissatisfaction with the legal aid tariff). Complex cases may be the exception here, as the tariff pays for representation services on a block fee basis (not hourly), meaning that the private bar may be reluctant to accept such referrals.

With respect to bail hearings, the situation in Kelowna is as follows: If an accused is arrested on a weekday, he or she will typically appear before a judge the same day. If arrested overnight, he or she will appear before a judge the next day, at which point duty counsel is available to assist. If the accused is arrested on a weekend or holiday, a “stipendiary JP” will go to the RCMP detachment where the person is being held. At this point, duty counsel may be available by telephone. Elsewhere in B.C., a 24-hour call centre, the “JP Service Centre,” conducts bail hearings by conference call. Kelowna will convert to use of this call centre as local stipendiary JPs retire.

### 8.2.4 Duty counsel

Duty counsel services are available in Kelowna to any accused who request them. No eligibility assessment is conducted for these services. They are available both to accused in custody and to those not in custody. Duty counsel attend most days at the remand facility, and at first appearance court. Duty counsel do not provide representation at trials. For this, an accused must be assessed for eligibility for a legal aid referral.



Duty counsel services in Kelowna are provided by the BCLSS staff lawyer, and the private bar on a per diem basis, with the staff lawyer covering about 25 percent of the total hours available (mostly for in-custody accused). An additional four hours of attendance at first appearance court by private lawyers is covered by the per diem arrangement.

Pay levels of staff duty counsel used to be about the same as provincial Crowns, but may now be lower, depending on seniority levels (approximately \$80,000 vs. \$95,000).

### **8.3 Frequency of unrepresented accused**

There was general agreement among our key informants in Kelowna that it was rare to see unrepresented accused at trial. Most accused facing serious charges would be able to retain counsel, one way or another.

The general view was that unrepresented accused were more often observed at earlier appearances than at trials. As many as half of all accused were estimated to appear at initial appearance court without counsel. Duty counsel was available at initial appearance court to assist these individuals. Often these accused would want to plead guilty with the help of duty counsel. It was estimated that perhaps 25 percent of accused in arraignment court were unrepresented.

While most key informants were uncomfortable estimating actual numbers of unrepresented accused, there was a general perception that these numbers were increasing, especially as the (then-) recently announced cuts to legal aid funding and services took effect.

#### **8.3.1 Overview of representation**

It was apparent from the Disposed Cases file that it was not possible to characterize representation over the life of a case in any simple manner. An accused's representation status would often change from one appearance to the next, as for example when an accused might be represented by duty counsel at the bail hearing, but be self-represented afterwards.

Looking at the pattern of representation over all appearances, our analysis of data from complete records of 1,020 cases completed in Kelowna Provincial Court in 2001 indicated the following.

- At first appearance, 35 percent of criminally accused adults in Kelowna Provincial Court were unrepresented. An additional 42 percent used the services of duty counsel, and 23 percent had private counsel (or an agent).
- At second appearance (if any), 29 percent of criminally accused adults in Kelowna Provincial Court were unrepresented. An additional 27 percent used the services of duty counsel, and 41 percent had private counsel (or an agent).
- At third appearance (if any), 24 percent of criminally accused adults in Kelowna Provincial Court were unrepresented. An additional 20 percent used the services of duty counsel, and 53 percent had private counsel (or an agent).
- At final appearance, 28 percent of criminally accused adults in Kelowna Provincial Court were unrepresented. An additional 24 percent used the services of duty counsel, and 48 percent had private counsel.

- Private counsel represented 45 percent of criminally accused adults in Kelowna Provincial Court for at least one appearance.
- Private counsel represented 13 percent of criminally accused adults in Kelowna Provincial Court for all of their appearances.
- For all of their appearances, 17 percent of criminally accused adults in Kelowna Provincial Court were unrepresented by any counsel.
- Duty counsel represented 15 percent of criminally accused adults in Kelowna Provincial Court at all of their appearances.

Readers should note that, throughout this report, references to “private counsel” encompass privately retained counsel, private counsel paid through a legal aid referral or certificate, and the Legal Aid staff lawyer. For the purposes of this study, we were not able to make these distinctions in our collection or analysis of either the Disposed Cases data or the Court Observation data.

### 8.3.2 Self-representation by category of offence and stage of process

Most of our key informants in Kelowna were of the view that the charges faced by most unrepresented accused were typically minor in nature. Some interviewees described these in terms of the four-level categorization used by BCLSS, where category one includes breaches and minor motor vehicle offences. The private bar was described as being reluctant to accept referrals of these cases, due to the low level of compensation under the tariff. Otherwise, the most frequently mentioned charges faced by unrepresented accused were reported to concern:

- Impaired driving (especially first offences)
- Family violence
- Shoplifting
- Mischief
- Drug possession
- Driving while prohibited
- Breaches
- Minor assaults
- Environmental violations

These views were only partially supported by our analysis of the Disposed Cases sample. Figure K-1 indicates the proportions of accused at each appearance who were unrepresented, according to the offence category of the most serious charge in the case.

Figure K-1 indicates:

- Accused persons facing charges of impaired driving were most often self-represented, followed by those charged with simple possession of drugs.
- The proportion of accused persons who were unrepresented generally declined across appearances.

**Figure K-1. Proportion of Accused who were Unrepresented At Various Appearances, by Most Serious Charge Category, Kelowna \***

Most Serious Charge Category	Proportion of Unrepresented Accused at				Total Number of Cases
	First (%)	Bail (%)	Plea (%)	Final (%)	
Homicide	***	***	***	***	6
Sexual Assault	31	0	33	25	13
Assaults excl. Common	23	9	20	24	87
Robbery	***	***	***	***	6
Break and Enter	33	17	15	18	41
Impaired Driving	62	20	55	51	92
Common Assault	30	8	34	28	68
Drugs excl. Simple Possession	36	21	11	27	47
Weapons Offences	32	17	20	32	19
Thefts and Frauds	41	10	29	31	251
Simple Possession of Drugs	46	0	45	39	57
Offences against Administration of Justice	24	16	15	17	268
Public Order	25	20	26	24	49
<b>All Offences</b>	<b>35</b>	<b>13</b>	<b>28</b>	<b>28</b>	

*Notes* \* Excludes cases for which representation was unspecified in the file.  
 \*\*\* The cell contains too few cases to report a percentage.

### 8.3.3 Socio-demographic characteristics of unrepresented accused

Few of our key informants were able to identify any demographic or other personal characteristics of accused persons they would associate with being unrepresented. Individual interviewees suggested the following:

- Most unrepresented accused had limited financial means, but nothing else distinguished them from other criminally accused adults.
- Seasonal workers might be over-represented among unrepresented accused.

Persons with mental health problems were seen by some of our key informants as possibly over-represented because the private bar don't want them on referral, as they are time-consuming and may be associated with a greater risk of complaint. On this same point, a second interviewee commented that there were very good services in Kelowna for accused with mental health problems.

#### Other types of representation

Figure K-2 displays the representation provided by counsel of various types at each stage of the criminal process. These data indicate that:

- The majority of accused were either unrepresented or assisted by duty counsel at first appearance.

- The proportion of accused persons with private counsel rose across appearances, while the proportion who were unrepresented, or assisted by duty counsel, fell.

Appearance	Represented by			Number of Cases
	Self (%)	Duty Counsel (%)	Private Counsel (%)	
First appearance	35	42	23	996
Bail	13	62	25	293
Plea	28	26	47	702
Defence Election	16	9	75	81
Final Appearance	28	24	48	981

*Notes Excludes cases for which representation information is not available.  
Percentages may not total 100 due to rounding.*

Figure K-3 shows the most serious offence charged in cases with different types of representation at the final appearance. These data indicate that:

- Persons charged with impaired driving were most likely to be unrepresented.
- Persons charged with the relatively serious charges of assaults other than common assault, break and enter, drug offences excluding simple possession, and weapons offences, were most likely to be represented by private counsel.

Most Serious Charge Category	Proportion of Cases represented by			Number of Cases
	Self %	Duty Counsel %	Private Counsel %	
Homicide	***	***	***	6
Sexual Assault	25	25	50	12
Assaults excl. Common	24	19	58	85
Robbery	***	***	***	6
Break and Enter	18	23	60	40
Impaired Driving	51	11	38	92
Common Assault	28	26	46	61
Drugs excl. Simple Possession	27	11	62	45
Weapons Offences	32	11	58	19
Thefts and Frauds	31	29	39	242
Simple Possession of Drugs	39	18	43	56
Offences against Administration of Justice	17	32	50	253
Public Order	25	18	55	49
<b>All Offences</b>	<b>28</b>	<b>24</b>	<b>48</b>	

*Note: Excludes cases for which representation at final appearance was unspecified in the file.*

## 8.4 Evidence on the impacts of a lack of representation

### 8.4.1 Perceived impacts of a lack of representation

#### *a Impacts on the accused*

**At trials:** Opinion was divided as to the impact of a lack of representation at trials on unrepresented accused. It should be noted that most interviewees thought it rare that accused faced serious charges at trial without counsel.

One suggested negative impact at trial was that sentences might be more harsh for unrepresented accused, especially compared to the results of plea negotiations conducted by counsel. One other comment on the impacts on accused persons of being unrepresented at trial was that there might be little difference in the probability of conviction or severity of sentence if the unrepresented accused could express themselves clearly.

**At stages before trial:** The main impact of a lack of representation before trial was seen to be on accused persons held in custody. Representation at the bail stage was seen as important both in terms of the accused's likelihood of pre-trial release and in terms of their access to diversion programs.

A lack of representation was seen as having little real impact on accused persons at first appearance. These individuals were encouraged to apply for legal aid and/or retain private counsel, depending on their circumstances. Several interviewees noted that this advice often went unheeded, with the result that many accused made their next appearance seeming to have done nothing in the meantime to obtain representation.

Negative impacts of a lack of representation at stages before trial which were suggested were:

- Unrepresented accused might plead guilty to more charges, but the overall sentence might not be different.
- Cases that should be diverted went to court.
- Cases that should have been discharged resulted in convictions.
- Unrepresented accused might not understand the impacts of conviction, with the result that some would plead guilty when they clearly ought to have sought legal advice.
- The consequences of a conviction might be more severe, as unrepresented accused couldn't effectively negotiate with Crown on numbers of charges (although Crowns in Kelowna went out of their way to be fair to unrepresented accused).

Our key informants were also asked to identify the types of errors made most often by unrepresented accused. Included on this list were the following:

- Most unrepresented accused had no sense of the trial process.
- Most unrepresented accused did not understand what the Crown has to prove, or what defences were available to them.
- Unrepresented accused did not know what their questions needed to accomplish.
- Unrepresented accused would sometimes disclose incriminating information that they were not obliged to.
- Most unrepresented accused were incapable of testing Crown witnesses.

- Unrepresented accused did not know what they needed evidentially to establish their defence.
- Some unrepresented accused would plead guilty when they had a defence they had not used.

#### *b Impacts on court officers and others*

Judges in Kelowna typically made considerable efforts to ensure that unrepresented accused were treated fairly. They would also assist unrepresented accused to better understand the court process. These efforts may, at times, have made it appear that their impartiality was being compromised.

Crowns also tried to ensure fair treatment for unrepresented accused. This may have involved adopting a less aggressive stance if an accused was unrepresented, in terms of pursuing individual charges and/or in terms of sentences sought.

The main perceived impact on the court of unrepresented accused concerned the time consumed by unrepresented accused. Here, opinions varied somewhat. Most were of the view that appearances involving unrepresented accused took longer than otherwise similar appearances with counsel present. This was due in part to the need to explain the process to unrepresented accused and to guide them through the choices they had to make. Some suggested that the time differential might be as high as 300 percent.

Some estimated that trials with unrepresented accused might be faster (in part because they did not cross-examine Crown witnesses), while previous appearances were slower. Also slow were cases in which unrepresented accused pled guilty “with an explanation” that negated their guilty plea, resulting in time wasted and a confused accused. Sentencing was also described by some as a process that could be particularly slow with unrepresented accused, as they were often unprepared to offer or substantiate arguments that might reduce the severity of their sentences.

One of the effects of unrepresented accused’s more frequent delays and adjournments (“to get counsel”) was to create attendance problems for Crown witnesses.

### 8.4.2 Empirical findings regarding a lack of representation

The preceding section described the perceptions of our key informants in Kelowna regarding the impacts of accused persons appearing before the court without representation. In this section we provide empirical evidence on what actually happened to unrepresented accused, using data on cases in the Disposed Cases file and from the appearances directly observed in court.

It is, however, important to make it clear at the outset that this information is not presented to draw causal inferences, but simply to describe the events at various stages in the process. For instance, the evidence is not presented to suggest that the lack of representation *caused*, for example, a higher (or lower) likelihood that an unrepresented accused would be convicted. Rather, it simply describes whether or not, and how frequently, significant decisions were made and certain outcomes occurred with or without the presence of counsel.

*a Type of plea entered by type of representation*

A number of our key informants raised the issue of whether or not unrepresented accused were more likely to plead guilty – for instance, to “get it over with,” or because they had neither the knowledge nor resources to contest the charges.

Figure K-4 displays the plea entered by the type of representation available to the accused (for cases in which a plea was entered).

- Of all pleas, 94 percent were guilty pleas.
- Guilty pleas were entered in 96 percent of cases represented by duty counsel. This was higher than the rate of guilty pleas by unrepresented accused (88 percent), which was, in turn, higher than the rate for accused represented by private counsel (82 percent).

<b>Figure K-4. Distribution of Type of Plea Entered by Type of Representation at Plea Appearance, Kelowna *</b>					
<b>Plea</b>	<b>Proportion of all Pleas by or on behalf of Accused Represented by</b>			<b>Number of Cases</b>	<b>Proportion of Cases</b>
	<b>Self</b>	<b>Duty Counsel</b>	<b>Private Counsel</b>		
Guilty	88%	96%	82%	614	94%
Not guilty	6%	0%	8%	38	6%
Total Cases	185	173	294	652	
Note Excludes cases for which representation at plea was unspecified in the file					

*b Conviction rate by type of representation*

Conviction rates were also examined in terms of representation at final appearances. In this analysis, pleas of guilty were combined with findings of guilt.

Figure K-5 shows conviction rates by representation at final appearance. These data indicate that:

- Overall, 72 percent of all disposed cases resulted in a conviction on one or more charges.
- The conviction rates were highest 78 percent for accused assisted by duty counsel. The conviction rates for accused who were self-represented, and those represented by private counsel were essentially the same (71 percent and 70 percent, respectively).

<b>Figure K-5. Distribution of Disposition By Type of Representation at Final Appearance, Kelowna</b>					
<b>Disposition</b>	<b>Proportion of Dispositions for Accused Represented by</b>			<b>Number of Cases</b>	<b>Proportion of Cases</b>
	<b>Self</b>	<b>Duty Counsel</b>	<b>Private Counsel</b>		
Convicted*	71%	78%	70%	707	72%
Not Convicted**	29%	23%	30%	274	28%
Total Cases	272	236	473	981	
Notes: * Includes guilty verdict and peace bond ordered. ** Includes not guilty, withdrawn, dismissed, stayed, and discharges.					

Earlier we cautioned against using these data to imply a causal connection between type of representation and conviction rates. However, given the impact of having a criminal record (on employment opportunities and the likelihood of being charged with further offences, etc.) the data can definitely be used to show that unrepresented accused are very likely to experience serious negative impacts as a result of the court process (but no more likely than are accused assisted by either duty counsel or private counsel).

*c Custodial sentence and type of representation*

Again, the proportion of cases that resulted in custodial sentences was examined in terms of representation at the final appearance.

Figure K-6 shows the distribution of custodial sentences for cases disposed at final appearance by type of representation. The Figure suggests that:

- Overall, 31 percent of all disposed cases received a custodial sentence.
- Unrepresented accused fared best of all, and by a wide margin, with an 11 percent custodial rate. Cases finalized with the assistance of duty counsel had the highest imprisonment rate (42 percent), followed closely by cases with private counsel (37 percent).

<b>Figure K-6. Distribution of Custodial Sentence by Type of Representation at Final Appearance, Kelowna</b>					
<b>Sentence</b>	<b>Represented by</b>			<b>Number of Cases</b>	<b>Proportion of Cases</b>
	<b>Self</b>	<b>Duty Counsel</b>	<b>Private Counsel</b>		
Custodial Sentence	11%	42%	37%	305	31%
No Custodial Sentence	89%	58%	63%	676	69%
Total Cases	272	236	473	981	

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

8.4.3 Overall impacts on court operations

*a General*

In most provincial criminal courts in Canada, only 4-to-10 percent of cases go to trial. The overwhelming majority of appearances for cases are therefore not trials – and, as noted elsewhere, in Kelowna (as in other courts) these appearances are typically in the order of a few minutes per case. What would, in other situations, seem a very minor increase in the time taken to perform a function at a case appearance, can therefore represent a major increase in judicial, Crown, legal aid, defence counsel and court administration workloads – proportionally and in total.



Our Court Observation data confirmed that efforts were made in the courtroom to make unrepresented accused aware of the opportunities and benefits of having a lawyer. In 27 percent of appearances by unrepresented accused, and 8 percent of appearances assisted by duty counsel, comments were made, mostly by judges (or justices of the peace in first appearance court), concerning representation. In these appearances, the judges or JPs most often asked the accused about his or her representation status or instructed the accused to get a lawyer or apply for legal aid.

***b Nature and length of individual court appearances***

Some of our key informants suggested that unrepresented accused often “tied up the system” and caused lost court time. Virtually all agreed that the system moved more efficiently when the accused was represented. Adjournments for, and failures to appear by unrepresented accused wasted a great deal of court time. Cases that “collapsed” and resulted in a plea of guilty on the day of trial were very costly also.

Interviewees noted that the efficiency of the entire system was much greater when the accused was represented – “wasted” appearances were reduced, useless discussions and arguments were largely eliminated, and work was concentrated on what was relevant.

The Court Observation data yielded some information about how many appearances were “productive,” in the sense that they resulted in decisions on (or, at least, consideration of) one or more of three matters: namely bail, plea, and elections. Readers are reminded that these observations were not made primarily in first appearance courts. Figure K-7 shows the breakdown of courtroom events (or non-events) at interim (not final) appearances, according to representation status at last appearance.<sup>71</sup>

<b>Figure K-7. Court Observation Data: Percentage Distribution of Cases: Types of Decision Made by Representation Status At Interim (not Final) Appearances, Kelowna*</b>			
<b>Representation Status</b>	<b>Type of Decisions at Interim Appearance (Remanded or Stood Down)</b>		
	<b>**No decision %</b>	<b>Bail, plea and/or election considered %</b>	<b>Total number of Appearances</b>
Self	95	5	60 (100%)
Duty counsel	94	6	36 (100%)
Private lawyer	86	14	88 (100%)
All	92	14	(100%)

*Notes: \* Appearances for which data were unavailable or unclear are not included.  
 \*\* Bail not considered, no elections made by either Crown or defence, and no plea entered.*

<sup>71</sup> The figure omits cases in which the accused’s representation status was unclear to the court observer.

One of the most striking observations was that 92 percent of all interim appearances did *not* involve consideration of bail, elections, or the entering of a plea. If the accused was either unrepresented or represented by duty counsel, the proportion of “unproductive appearances” was higher (95 percent and 94 percent, respectively) than was the case for appearances in which the accused was represented by private counsel (86 percent of which were “unproductive”).

The Court Observation also yielded data on the length or duration of individual court appearances (again, *not* primarily from first appearance court). Figure K-8 summarizes these data by representation type. The general conclusion supported by these data is that, while the majority of all appearances in these courts were short, appearances by self-represented accused were similar in duration to appearances with private counsel, and somewhat shorter in duration than appearances for accused assisted by duty counsel.

<b>Figure K-8. Distribution of Appearance Durations (in minutes) by Type of Representation at Final Appearance, Kelowna</b>			
	<b>Appearance Duration (in minutes) when Represented by</b>		
	<b>Self</b>	<b>Duty Counsel</b>	<b>Private Counsel</b>
25th Percentile	1	1.5	1
Median	2	3	2
75th Percentile	3	5	3
95th Percentile	10.0	11.5	21.1
Total Appearances	51	31	72

*c Number of appearances per case*

Most of our key informants were of the view that unrepresented accused slowed down the court process, since they did not benefit from the skill that an experienced lawyer would be able to apply to move the process along expeditiously. Multiple postponements before a trial date was set for accused who were unrepresented were common; some judges repeatedly granting adjournments in hopes the accused would obtain counsel. Such appearances were costly for the courts and its officers. After a number of unproductive appearances, some judges attempted to move the process forward by decreasing the length of remands to get counsel.

A direct indicator of the workloads caused by – and resources required to deal with – individual cases is the number of court appearances required to complete a case. A related indicator is the appearance number at which key activities take place. The Disposed Cases sample yielded information on the number of appearances made by accused who were or were not represented.

*Appearances before a plea is entered*

Figure K-9 shows the appearance number at which the plea was entered for accused who had various types of representation. The data suggest that self-represented cases in general, as well as those involving duty counsel, *did not* generate more appearances before entering a plea, especially in comparison to cases handled by private counsel:

- At least 50 percent of self-represented accused, and accused assisted by duty counsel entered their plea on or before their second appearance.
- At least 50 percent of accused represented by private counsel did not enter a plea until their fourth appearance or later.

<b>Figure K-9. Distribution of Appearance Number at Which Plea was Entered By Type of Representation at Plea Appearance, Kelowna</b>			
<b>Appearance Number at which Plea was Entered</b>	<b>Represented by</b>		
	<b>Self</b>	<b>Duty Counsel</b>	<b>Private Counsel</b>
25th Percentile	1	1	2
Median	2	2	4
75th Percentile	3	3	7
95th Percentile	7	8	16
Total Cases	195	179	325
<i>Notes If plea entered at more than one appearance, last appearance at which plea entered is shown.</i>			

*Total number of appearances before disposition*

Figure K-10 shows the total number of appearances in the case – according to representation type at last appearance. These data indicate that self-represented accused *did not* typically make more court appearances overall than did accused assisted by duty counsel or private counsel. More specifically:

- Fifty percent of accused unrepresented at last appearance, and those assisted by duty counsel, made only one or two appearances.
- Fifty percent of accused with private counsel at their last appearance made up to four appearances.

<b>Figure K-10. Distribution of Number of Appearances in Case By Type of Representation at Final Appearance, Kelowna</b>			
<b>Number of Appearances</b>	<b>Represented by</b>		
	<b>Self</b>	<b>Duty Counsel</b>	<b>Private Counsel</b>
25th Percentile	1	1	2
Median	2	2	4
75th Percentile	4	3	7
95th Percentile	9	6	16
Maximum	32	20	40
Total Cases	273	236	467

*d Elapsed time for cases to resolve*

The Disposed Cases sample also yielded information about the time that elapsed between the first and last appearances. This information is important from a due process perspective – however, that perspective yields two potential hypotheses: first, “Justice delayed is justice denied,” and second, “Justice rushed is justice crushed.”<sup>72</sup> The first concern is relevant to those who feel that delays in obtaining legal representation adversely affect the fairness of the court process and the final outcome. The second concern is especially relevant to those concerned that unrepresented accused may plead out the case early “to get it over with,” or because they are not aware of viable legal defences.

As shown in Figure K-11:

- Cases represented at last appearance by duty counsel typically took the least time to resolve – 50 percent were settled in less than one week and 75 percent were settled in three weeks or less.

<sup>72</sup> The latter phrase was first suggested to one of the authors by a widely respected colleague, Carl Baar.

- Cases self-represented at last appearance typically took somewhat longer, with 50 percent settled within one week, and 75 percent settled within 7 weeks.
- Cases represented by private counsel at last appearance typically took the longest time to be resolved, with 50 percent settled within four weeks and 75 percent settled within 11 weeks.

**Figure K-11. Distribution of Time (in weeks) Between First and Final Appearance By Type of Representation at Final Appearance, Kelowna**

	Time (in weeks) between First and Final Appearance when Represented by		
	Self	Duty Counsel	Private Counsel
25th Percentile	0	0	1
Median	1	0	4
75th Percentile	7	3	11
95th Percentile	51	16	71
Maximum	167	166	175
Total Cases	273	236	467

*Note: Percentile values of '0' in this table indicate durations of less than one week*

## 8.5 Overall conclusions

### 8.5.1 Key overall findings

Our key findings with respect to the questions addressed by this study include:

*With respect to frequency of self-representation*

- A significant number of accused proceed through key parts of the criminal court process without the benefit of legal representation.

*With respect to impact on the accused*

- Interviews with key officials strongly suggest that the unrepresented accused (especially those with little prior experience in the court system) are less likely to be aware of the legal remedies available to them at key stages in the process – and are therefore unlikely to understand many key decisions and events in the process.
- Accused represented by private counsel enter guilty pleas less often than do accused who either represent themselves or are assisted by duty counsel.
- Rates of conviction are lower for accused who represent themselves, or are represented by private counsel, than is the case for accused assisted by duty counsel.
- Accused who represent themselves are less likely to receive custodial sentences than are accused who are assisted by duty counsel or represented by private counsel
- The evidence is insufficient to conclude whether or not self-represented accused are more likely to be convicted or to receive harsher sentences **as a result of their lack of legal representation**. Nevertheless, a significant number of unrepresented accused suffer serious penalties or deprivations of liberty as a result of their court case. Some 71 percent receive a criminal record and a smaller, but still significant proportion (in the order of 11 percent) receive custodial sentences.

*With respect to impact on the court*

- Many judges, as well as other court officials, respond to the presence of unrepresented accused with efforts to reduce the impact on accused persons of their lack of representation. Some such efforts may appear to threaten the impartiality of the judicial role.
- Self-represented accused and those assisted by duty counsel make fewer court appearances than do accused represented by private counsel. For duty counsel, this reflects the fact that they do not handle trials.
- Cases where the accused are assisted by duty counsel are of shorter overall duration than are cases involving self-represented accused or accused represented by private counsel (which typically take the longest times). Again, for duty counsel, this reflects the fact that they do not handle trials.
- Individual appearances by self-represented accused, in first appearance and arraignment courts, are similar in duration to appearances with private counsel, and somewhat shorter in duration than are appearances for accused assisted by duty counsel.

### 8.5.2 General reasons for the current situation regarding unrepresented accused

There was general agreement among our key informants that most unrepresented accused in Kelowna were individuals who applied for legal aid, but were refused for either financial or coverage reasons, and who found private counsel to be too costly. In this regard, several interviewees noted that the financial eligibility cutoff was very low.

Many of our interviewees in Kelowna commented on the (then-) recent and forthcoming reductions in legal aid services. In particular, the availability of duty counsel was described by some as “inadequate.” Whereas there used to be two duty counsel (one for accused in custody, and another for accused not in custody), plus the staff “public defender,” there was no longer a full-time staff lawyer position providing representation (as opposed to part-time duty counsel). Even with the previously higher resource level, the service provided by duty counsel was described by some as “rudimentary,” and it has become more strained since the cuts were introduced.

Duty counsel coverage was not complete across all days of the week, and was limited to four hours a day (for per diem services). The use of several different lawyers to cover duty counsel was seen as militating against service continuity. Duty counsel were seen as being less available than they were in the past to assist in arraignment court with guilty pleas. The valuable capacity of duty counsel to meet with accused not in custody, to discuss diversion and assist with guilty pleas, was being stretched. Some saw duty counsel as doing little more than “quicky” interviews with accused, scanning their files, and (perhaps) disposing of some cases inappropriately. Finally, some per diem duty counsel days were being taken by out-of-town counsel, who, by nature of that fact, were not routinely available in Kelowna.

On the positive side, the time available to duty counsel to meet before court with accused in custody was described as adequate. As well, duty counsel were generally able to speak to the Crown about accused in custody before their bail hearings.

While the quality of the representation provided by the former BCLSS “public defender” was described as being very high, there was less comfort with the services provided by the private bar on referral. To some considerable degree, these concerns arose from the view that the tariff was inadequate, especially

for legal aid clients (who might be relatively demanding) and for more complex cases. One interviewee believed that some successful applicants for legal aid were not able to find a private lawyer willing to take their referral (due to the block fees) if the case was likely to be time-consuming.

Some interviewees saw the criminal legal aid bar as increasingly composed of the more junior and inexperienced lawyers. This was attributed to the perception that fewer and fewer lawyers were taking referrals, and that fewer and fewer lawyers were practising criminal law.

### 8.5.3 Solutions suggested by our key informants

Our key informants in Kelowna offered the following suggestions for reducing the numbers of unrepresented accused. It should be noted that reluctance on the part of the private bar to take legal aid referrals (complex cases excepted) was not generally seen as a major problem in Kelowna.

- Expand the “public defender” service (meaning representation by staff lawyers, including at trials), and assign more resources to the “front-end” for more clients, i.e., case assessment and early advice.
- Introduce incentives into the tariff for early resolution.
- Crowns could assist unrepresented accused by indicating as early as possible whether or not incarceration would likely be sought, so that they could better assess their chances of being eligible for legal aid.
- Expand PLEI programs aimed at informing people facing criminal charges, as well as the general public, about legal aid and the consequences of convictions.
- Expand the availability of in-custody duty counsel.
- Broaden eligibility for legal aid.
- Expand the scope of duty counsel services to encompass examination of disclosure packages (this is currently part of services for accused not in custody).
- Expand the scope of duty counsel to include conducting trials.
- Raise the legal aid tariff. For judicare to work, the tariff must be adequate. Private bar interviewees were not in favour of a public defender model. They did not see that model’s incentives encouraging either quality or productivity.

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## Chapter 9: Scarborough, Toronto, Ontario

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### 9.1 Objectives and methodology

The Department of Justice and the Federal/Provincial/Territorial Permanent Working Group on Legal Aid engaged the research team to measure:

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

A brief overview of the full national study – covering nine court sites – was presented in Chapter 1. The methodology for the Scarborough part of the national study followed a strategy for data collection and site visits similar to that followed in the other sites.

#### 9.1.1 Report Format

The findings for Scarborough are presented in seven sections.

- Section 1* outlines the objectives of the study, describes the format of the report, and discusses the methodology used to collect information.
- Section 2* provides important contextual information for interpreting the findings of the report. Special attention is given to key characteristics of the community, the court, legal aid, duty counsel and disclosure.
- Section 3* describes how frequently self-represented accused appear at different stages of the court process.
- Section 4* explores the frequency with which accused persons have other types of representation, and how those frequencies vary at different stages of the court process.
- Section 5* focuses on the important impacts of self-representation on the accused. The section discusses both perceptions provided from our interviews and empirical evidence from data especially collected for the project.
- Section 6* then describes other significant impacts due to the presence of unrepresented accused – on the key groups involved in the courts (e.g. legal aid, duty counsel, Crown attorneys, judges and court personnel) and on court operations (including: court workloads and time to deal with and dispose of cases).
- Section 7* completes the report with key overall findings and solutions that have been suggested by those interviewed in Scarborough.

## 9.1.2 Methodology

The methodology involved data collection and site visits. Information was available on the question of unrepresented accused from three sources:

- **A Disposed Cases sample.** This special file was created manually by an experienced former court manager by coding data from informations for a sample of 495 disposed cases<sup>73</sup> that involved a *Criminal Code* offence or violation of another federal statute, and were disposed in September through November, 2001. Data were collected on the characteristics of each case (e.g., offence type), and on events and decisions that were taken at each of some 3,132 case/appearances (e.g., plea, elections, remands, verdicts and sentences) associated with the 495 cases.
- **A Direct Court Observation sample.** This was a sample of events and decisions that occurred in 510 case appearances directly observed during ten days in bail court, first appearance, plea court and set date court during June and July of 2002.<sup>74</sup>
- **Key Person Interviews.** These were conducted with over 20 key informants (judges, Crowns, legal aid staff and management, court administration and court clerks, private bar members, local service agencies, etc.). Most interviews were from 30 minutes to one hour duration, covered all aspects of the study, and most were conducted by two interviewees. The anonymity of those interviewed was ensured.

In all parts of the project, we received excellent co-operation and assistance from all those we asked to participate in the study. We also readily acknowledge the very able assistance and expertise of the local Scarborough worker who assisted in observing in court and in creating the disposed cases file.

## 9.2 Context of the court and legal aid

One of the major conclusions – supported from data from all sites – was that data on the extent of legal representation in a particular court cannot be interpreted out of context of (at least):

- The type of community served (including the nature of accused persons brought before the court).
- The resources and management and operations practices in place in the courts.
- Legal aid policies and practices, and especially those relating to duty counsel.
- The policies and practices of all of the other key participants in the court process – including the judiciary, the police, the Crown attorneys, court workers, court administrative officials, the private bar and other supporting agencies.

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<sup>73</sup> For the Disposed Cases sample, a “case” is defined as the collection of all counts on all charges for which a particular offender had his or her first court appearance in the same courtroom on the same day. Note: This definition of a “case” may or may not be identical to that used by other reports from the courts in Scarborough or from other sources such as the Canadian Centre for Justice Statistics.

<sup>74</sup> Trial courts were not included in this part of the data collection.



All of these factors, policies and practices can have significant mitigating or exacerbating influences on the impacts of self-representation. This contextual information is thus essential to understanding the problems and potential solutions to challenges related to the unrepresented accused.

This section will specifically address the first three of the above areas. Information on the fourth is contained throughout the report.

### 9.2.1 The community

The former city of Scarborough (incorporated in 1983) merged with five other cities to form the new City of Toronto in January 1998. It comprises Toronto's East Side, covering a large geographic area, and is home to a variety of industries, numerous apartment complexes and housing rentals. It is a highly multicultural community whose population represents 13 percent of all immigrants to Canada. Since 1980, the majority of new arrivals have come from Asia, Africa, Latin America and the Caribbean. Overall, the largest proportion of immigrants have come from Italy, followed by the United Kingdom, People's Republic of China, Hong Kong and Jamaica. From 1991 to 1996, the city saw the arrival of over 300,000 new immigrants; the most numerous groups were people from Sri Lanka, the People's Republic of China, the Philippines, Hong Kong and India. In the 2001 Census, just under 66 percent of Scarborough residents reported that the language most in use at home was English, compared to 83 percent for Ontario as a whole. The next most commonly used languages were Chinese (12.8 percent), Tamil (4 percent), Tagalog (1.5 percent), Italian and Greek (1 percent each), and Macedonian, Gujarati, Farsi, Urdu and Polish.

Scarborough had an estimated population of 612,581 in July 2001, an increase of 6.16 percent from 1996. This was comparable to the increase over the same period for Ontario as a whole (6.45 percent). About 20 percent of males and 19 percent of females were in the 15-to-29 age range associated with the highest rates of crime.

The average household income in Scarborough in 2001 was \$57,642, compared to \$60,862 for the province of Ontario overall. The per capita income in Scarborough was \$19,460, compared to the provincial figure of \$22,848.

The unemployment rate for male residents of Scarborough was estimated at 7.1 percent, and for females it was higher, at 9 percent. This was higher in both cases than the rates for males (5.2 percent) and females (6.2 percent) in the province as a whole.

Of the estimated population of Scarborough over the age of 15 in 2001 (495,169), 10 percent had less than a Grade 9 education, while 23 percent had from Grade 9 to Grade 13 without a certificate or diploma. This echoed the statistics for the province of Ontario as a whole, where an estimated 10 percent of the over-15 population had less than a Grade 9 education, and 23 percent had from Grade 9 to Grade 13 without a certificate or diploma.

There were approximately 171,563 families in Scarborough in 2001, and, of these, 19 percent were single-parent families. This is higher than the estimated provincial rate of 14 percent.

Of the estimated 206,807 private dwellings in Scarborough in 2001, it was somewhat surprising to note, given the amount of rental housing in the area, that 60 percent were owner-occupied. The provincial rate was 65 percent owner-occupied for the same year.

## 9.2.2 The court

### *a Scheduling of cases*

Figure SC-1 highlights the key features of the courthouse and the case scheduling practice during our sites visits in July 2002. Since September 3, 2002, all first appearances have been combined with the set date court for adults.

<b>Figure SC-1. Highlights of Scheduling of Cases in Scarborough</b>	
Ten criminal courtrooms in total	<ul style="list-style-type: none"> <li>• Nine adult courtrooms</li> <li>• One (No. 408) for young offenders</li> </ul>
One full-time first appearance adult court	<ul style="list-style-type: none"> <li>• Courtroom 406</li> <li>• Also hears pleas and set dates</li> <li>• Hears first appearance of accused not in custody in the afternoon</li> </ul>
An additional adult set date court	<ul style="list-style-type: none"> <li>• Courtroom 407</li> <li>• Sits in mornings</li> </ul>
One adult bail court	<ul style="list-style-type: none"> <li>• Courtroom 412</li> </ul>
Two courts for adult “specials”	<ul style="list-style-type: none"> <li>• Courtrooms 403 (one-day trials) and 405</li> </ul>
Four adult trial courts	<ul style="list-style-type: none"> <li>• Courtrooms 404, 409, 410 and 411</li> </ul>
Other Special Purpose Courts (e.g., drug court)	<ul style="list-style-type: none"> <li>• None</li> </ul>
Circuits	<ul style="list-style-type: none"> <li>• None</li> </ul>

### *b Special case/case-flow management concerns*

The Scarborough court is facing backlogs of at least eight months (and frequently a year or more) for trials of out-of-custody cases and four months for cases involving pre-trial detention. Other indicators of numbers of appearances per case, time per case and court delays are presented later in this report.

The court has made attempts to improve the case and case-flow management policies and practices. For instance, the Crown is available (in a room called “the Cave”) to discuss upcoming cases with duty counsel and other defence lawyers, and Judicial Pre-trials are held as well (but only to a limited degree in open court for unrepresented accused). The court also has an operations committee that meets regularly to discuss court practices.

## 9.2.3 Legal aid

Legal aid in Scarborough is delivered by Legal Aid Ontario, an independent agency reporting to a board of directors. Service is provided through a system of staff duty counsel and certificates issued to the private bar through a local area office.

The nearest area office for accused in Scarborough is located in an adjacent part of the shopping mall that houses the courthouse. Applications for legal aid must be made in person, without appointment. Delays for the legal aid application and approval process in Scarborough have recently been reduced by the creation of additional interview rooms for reviewing the accuseds’ applications and documentation. Currently, a certificate normally will be issued within two weeks or less, once all documentation is received.

For the province as a whole, 48,730 adult criminal Legal Aid certificates were issued in fiscal 2001/2002 – a figure that was 21 percent of the number of adult persons charged. Although separate data was not available for Scarborough, 13,281 Legal Aid certificates were issued in Toronto – a figure that was 29 percent of the number of persons charged.

#### 9.2.4 Duty counsel

The original concept of the use of duty counsel in Ontario called for the use of duty counsel or certificate counsel for serious matters (likelihood of jail) where a guilty plea was entered, and duty counsel service for minor matters where a guilty plea was entered. Trials were to be handled through certificate for serious matters and for minor matters if there was a defence considered to have merit. That original model holds today, with the exception that trials for minor matters are no longer covered by legal aid, except that duty counsel may “in very rare circumstances” handle a “very quick” trial requiring little or no preparation time.

In Scarborough, the majority of duty counsel service is delivered by a team of six lawyers who are on three-year renewable contracts with Legal Aid Ontario. (Scarborough also has a number of “per diem duty counsel,” who do piecework, including “specials” – cases with a mental health aspect.) At the entry level, duty counsel are paid about \$12,000 less than Crown attorneys. The disparity in salary levels between duty counsel and Crown attorneys increases with years of experience. The difference in salaries between the two groups can be as much as \$40,000 for the most experienced lawyers. As a result of these (and possibly other) factors, duty counsel at the Scarborough court are all junior lawyers, with the exception of the Duty Counsel Supervisor, who (like other Supervisors in the province) is very experienced in this and other courts, and in trial work. With the exception of Supervisors, those hired into duty counsel positions are often just recently out of law school.

Duty counsel must perform a brief financial eligibility test on adult accused (unless they are in custody, in which case duty counsel may assist with whatever processes occur, with the exception of trials, and regardless of financial eligibility). If the accused is out of custody and does not qualify financially, policy prohibits duty counsel from assisting them with trial (except in very rare circumstances), and from attending court and speaking to the matter for plea or sentence submissions. Duty counsel do assist financially ineligible as well as eligible persons with plea negotiations, however. Bail hearings for legal aid clients are, virtually without exception, conducted by duty counsel, since private bar members working on certificate take the view that the inadequacies of the tariff system do not permit them to “waste” two hours doing a bail hearing. Trials can be conducted only by private bar members on certificate. Duty counsel are assigned to specific courtrooms, so the same duty counsel will not follow a case from start to finish. In theory, duty counsel are permitted to help unrepresented accused with plea negotiations on the day of trial, but all duty counsel will, in fact, be tied up in other courts (there is no floating duty counsel).

#### 9.2.5 Disclosure

By agreement with Toronto police, disclosure is made available in 95 percent of the cases within six weeks for out-of-custody cases and two weeks for in-custody cases. The policy is for the police to provide a copy to the Crown, and a second copy to be given to the accused at the first appearance. The Crown also has a dubbing system to make copies of video- and audio-tapes.

In practice, however, there are problems with disclosure. In bail court (because it often happens so soon after arrest), the synopsis is not always made available to duty counsel, and, in many cases, the duty counsel will be handed the Crown copy to read in the “two minutes” while the accused is being brought up from the cells. Occasionally a judge may ask that duty counsel assist with the plea before the duty counsel has seen the disclosure. In such cases, the duty counsel and the accused may read the disclosure together hurriedly during a pause in the proceedings; such occurrences are more common where the accused is in custody or where the accused wishes to plead guilty at first appearance.

Although we did not specifically try to collect empirical data on the influence on court operations of the availability of disclosure, it is worthwhile noting that 11 percent of the requests for remand directly observed (in the non-trial courts) were “for disclosure or particulars.”<sup>75</sup>

### 9.2.6 Other groups available to assist the accused

A number of services are available to assist accused persons and have offices within the courthouse – Mental Health Services, The Springboard Program, the Toronto Bail Program, the Salvation Army, and Interpreters. In addition, Native Courtworkers are available, although they do not have offices in the Scarborough courthouse.

All provide valuable services to assist all accused (including the unrepresented accused). Given the ethnic and cultural mix of the community, the interpreters are especially important.

Mental Health Services plays a special role in assisting accused persons with mental challenges.<sup>76</sup> Of particular relevance for the current study is their role in assisting unrepresented accused to get legal aid. Legal aid policy and practice make it very likely that persons with mental challenges will get either “normal” legal aid or the appointment of a “special duty counsel.”<sup>77</sup> However, these people require particular assistance in getting their applications together, since they are likely to be disorganized (e.g., they are simply missing bank books and records, or lack permanent residences and jobs). Mental Health Services also links up with other services to provide psychological and case management support to the accused – and, in general, provides help through diversion, bail and other aspects of the court process.

## 9.3 Frequency of accused appearing without representation

This section presents the information obtained on the frequency of lack of representation in the Scarborough court. However, it should be noted that most interviewees believed that while there were very few *unrepresented* accused, there was a serious problem of *under-representation* in the Scarborough court. This latter perception is explored in a later section.

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<sup>75</sup> I.e., 44 of the 404 case/appearances directly observed that resulted in remands.

<sup>76</sup> 330 to 350 cases are handled per year, with perhaps 12-15 percent getting diversion.

<sup>77</sup> I.e., a private counsel specially appointed to deal with the accused during the early (and perhaps later) stages of the case.

### 9.3.1 Self-representation over the life of the case

Given the general perception that not having representation has significant implications for the accused, it is important to understand how frequently self-represented accused appear at different stages of the court process.

It is apparent from data from the Disposed Cases file that it is not a simple matter to categorize cases with respect to presentation received. Since an accused's representation status will often change from one appearance to the next, as for example when an accused may be represented by duty counsel at the bail hearing, but self-represented afterwards – and be represented by privately retained counsel later.

Looking at the pattern of representation over all appearances, it is seen that representation information was not available for four percent of the cases. Of the remainder:

- In one percent of the cases, the accused was self-represented at all appearances.
- In 30 percent of cases, there was a mix of self-representation at some appearances and representation (by duty counsel, private lawyer or clinic lawyers) at others.
- Therefore, the accused was unrepresented on at least one appearance in 31 percent of cases.
- In 16 percent of the cases, the accused was represented by duty counsel at all appearances.
- In 37 percent of the cases, the accused was represented by a combination of duty counsel and private bar or clinic lawyers.
- In 12 percent of cases, the accused was represented by law student clinics or private bar lawyers at all appearances.

The Direct Court Observation sample captured 472 appearances in first appearance, bail, plea and set date courts over 14 days. At four of those appearances, the court observer could not discern the accused's representation status. Among the remainder:

- 19 percent involved an accused who was unrepresented;
- 42 percent involved an accused who was represented by a private member of the bar;
- 36 percent involved an accused who was represented by duty counsel (including 10 percent in which duty counsel was standing up for a private bar member who could not be present); and
- 3 percent involved an accused who was assisted by an agent or a student.

### 9.3.2 Self-representation by category of offence

Key informants suggested that the criminal charges most likely to be faced by unrepresented accused were thefts, stolen goods, mischiefs, assault (including family violence where there was no record or only a minor one) – “cases where the limit for sentence would be six months.” In addition, legal aid was rarely granted in cases of shoplifting, “low-level family violence,” and drug possession – but many such cases were diverted. Representation was also less likely in “domestics,” where the defendant was confident the complainant would not testify.

Finally, legal assistance was less likely to be given in impaired driving cases since it was unlikely that the accused would get a jail sentence. As noted elsewhere, however, in many cases the impact of a conviction could be very serious, especially if the accused could not afford to lose his/her driving licence (for work, or fulfilling parental obligations such as driving children to school).

The Disposed Cases sample provided empirical evidence on the actual proportions of accused at each appearance who were unrepresented. Figure SC-3 displays this information according to the offence category<sup>78</sup> of the most serious charge in the case.

Among the offences that are sufficiently represented to permit comparisons, there was little variance from the overall self-representation rate for all offence types – with the exceptions of impaired driving, which had a high rate of self-representation at plea and final appearance (17 percent and 30 percent); weapons offences, which had a high rate of self-representation at disposition (30 percent), and common assault, which had a surprisingly low rate of self-representation at plea (4 percent).

### 9.3.3 Self-representation by stage in process

As noted in later sections, those interviewed felt that it was important to have legal representation not only at trial, but at all stages – and especially the earliest stages – of the court process.

- Answers to questions regarding the frequency of unrepresented accused were very telling, inasmuch as most interviewees inadvertently showed the same lack of regard for duty counsel as they complained the system did – i.e., failing to count duty counsel assistance as “representation.” As a result, “guesstimates” of the proportions of unrepresented accused often moved into a discussion of the duty counsel system.

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<sup>78</sup> See Appendix A of Chapter 2 for a listing of the offences contained in each of the “offence categories.”

<b>Figure SC-3. Disposed Cases: Proportion of Accused who were Unrepresented At Various Appearances, by Most Serious Charge Category, Scarborough*</b>					
Most Serious Charge Category	Proportion of Unrepresented Accused at				Total Number of Cases (all accused)
	First (%)	Bail (%)	Plea (%)	Final (%)	
Homicide	n/a	n/a	n/a	n/a	0
Sexual Assault	***	***	***	***	8
Assaults excl. Common	4	4	18	16	128
Robbery	***	***	***	***	4
Break and Enter	***	***	***	***	10
Impaired Driving	3	0	27	25	33
Common Assault	4	4	4	15	114
Drugs excl. Simple Possession**	n/a	n/a	n/a	n/a	0
Weapons Offences	0	0	17	30	10
Thefts and Frauds	8	3	13	15	99
Simple Possession of Drugs	***	***	***	***	5
Offences against Administration of Justice	0	0	11	13	36
Public Order	10	0	0	14	21
Miscellaneous <i>Criminal Code</i>	0	0	17	13	15
Other Federal Statutes	***	***	***	***	1
Provincial/Municipal Statutes	***	***	***	***	9
Unknown offence	***	***	***	***	1
Total number of all accused at this appearance	472	195	260	470	494
Proportion of unrepresented accused at this appearance	5	3	13	16	
<i>Notes</i>					
* Excludes cases for which representation was unspecified in the file.					
** The Scarborough court does not handle drug cases other than simple possession.					
*** The cell contains too few cases to report a percentage.					

That being said, estimates of unrepresented accused (not including those represented by duty counsel) were:

- At first appearance: 5 percent.
- At bail: zero percent to “less than 10 percent.”
- At plea: estimates of unrepresented accused varied from 5 percent to 10 percent.
- At trial: estimates of unrepresented accused varied from 5-10 percent to 50-60 percent.

With regard to Aboriginal accused, one service provider suggested that “globally,” 25-to-30 percent of Aboriginal accused were unrepresented.

Native Courtworkers reported feeling pressure to assist Aboriginal unrepresented accused with bail hearings, disclosures, pre-trials and other processes requiring legal advice – but their policy was not to provide it.

Figure SC-3 also shows – by offence type – the percentages of accused who were without representation at key stages in the court process, namely, first appearance, bail, plea, elections and final (disposition) appearance.

The Figure suggests that:

- It was at first appearance and bail that accused were least likely to be unrepresented, confirming the critical role of duty counsel at the earliest stages.
- The highest incidence of unrepresented accused occurred at final appearance, where eligibility limits and limitations on the role of duty counsel affected the availability of representation.
- Those accused of less serious offences, which were less likely to incur a custodial sentence, were less likely to be represented.

### 9.3.4 Socio-demographic characteristics of unrepresented accused

Most interviewees agreed that the only demographic difference between unrepresented accused and other accused lay in income, with unrepresented accused most likely to be “people without money” (and without any prior record, which would affect the likelihood of term of imprisonment).

A significant proportion of the accused in the Scarborough court did not understand English well enough to function effectively. Legal Aid Ontario officials suggested that the average reading level of their clientele was Grade 3 or 4.

Mentally disordered accused were more likely to get representation because of their income, but often faced lengthy remands and delays in decisions – while their condition deteriorated (often because medication and treatment was interrupted) – because of transfers between courts, and general lack of expertise in dealing with their unique challenges.

In general, those with mental challenges – and their families – were especially overwhelmed by the process. “Duty counsel do a good job, but don’t have the time.” The parts of the *Criminal Code* are also quite complicated and the families often become disheartened when the process does not move along as quickly as they anticipate.

## 9.4 Other types of representation

### 9.4.1 Prevalence of other types of representation

Figure SC-4 shows the representation provided by counsel of various types at each stage of the criminal process. It suggests that:

- Duty counsel were the most common type of representation at first appearance and bail, assisting three quarters of all accused at those stages.
- Duty counsel was able to take about a quarter of all cases to plea (24 percent) and final resolution (22 percent).
- Private counsel appeared at only about a fifth of first appearances and bail hearings.
- Private counsel was the most common type of representation at plea (62 percent) and final appearance (61 percent).



- Significant proportions of accused were, nonetheless, unrepresented at plea (14 percent) and final appearance (16 percent).

Appearance	Represented by				Total: All Types of Representation (including self)
	Self (%)	Duty Counsel** (%)	Private Counsel (%)	Other*** (%)	
<b>Representation at First Three Appearances</b>					
First appearance	5	71	21	4	472 (101%)
Second appearance	9	57	33	1	452 (100%)
Third appearance	9	49	41	1	408 (100%)
<b>Representation at Key Stages</b>					
Bail	3	77	20	1	195 (101%)
Plea	14	24	62	1	260 (101%)
Final appearance	16	22	61	1	470 (100%)
<i>Notes</i>	* Excludes cases for which representation information is not available. ** Includes instances of duty counsel acting in place of a private lawyer. *** Includes agents, students and clinic assistance. **** Percentages may not total to 100 due to rounding.				

Figure SC-5 (in the following subsection) on the following pages shows the most serious offence charged in cases with different types of representation at the final appearance. It suggests that:

- Impaired driving accused had a higher frequency of self-representation at final appearance (25 percent);
- Duty counsel took a higher proportion of thefts and frauds (35 percent), public order offences (38 percent), and miscellaneous *Criminal Code* offences (40 percent) to final appearance.
- Private counsel were most likely to represent accused who were charged with assaults, other than common assault, at final appearance (74 percent).

## 9.5 Impact of self-representation on the accused

### 9.5.1 Overall impact: Perceptions of those interviewed

The site visit interviews provided some interesting insights on the subject of impacts on accused persons.

Three *general* impacts of under-representation and lack of representation suggested by interviewees were that:

- Charter arguments were not raised because matters were pled out or not properly tried.
- Consequently, the “audit function” that trials serve in relation to police conduct was diminished.

- The entire system is premised on the assumption and principle that both sides (Crown and defence) are equally matched. When they are not, everything (and everyone) suffers.

**Figure SC-5. Disposed Cases:  
Proportion of Accused who were Unrepresented  
At Final Appearance, by Most Serious Charge Category, Scarborough\***

Most Serious Charge Category	Proportion of Cases Represented by				Number of Cases
	Self (%)	Duty Counsel (%)	Private Counsel (%)	Other (%)	
Homicide	n/a	n/a	N/a	n/a	0
Sexual Assault	***	***	***	***	8
Assaults excl. Common	16	9	74	1	120
Robbery	***	***	***	***	4
Break and Enter	***	***	***	***	10
Impaired Driving	25	13	63	0	32
Common Assault	16	24	61	0	110
Drugs excl. Simple Possession**	n/a	n/a	N/a	n/a	0
Weapons Offences	***	***	***	***	10
Thefts and Frauds	15	35	47	2	93
Simple Possession of Drugs	***	***	***	***	5
Offences against Administration of Justice	13	26	61	0	31
Public Order	14	38	43	5	21
Miscellaneous <i>Criminal Code</i>	13	40	47	0	15
Other Federal Statutes	***	***	***	***	1
Provincial/Municipal Statutes	***	***	***	***	9
Unknown offence	***	***	***	***	1
<b>Total</b>	<b>16</b>	<b>22</b>	<b>61</b>	<b>1</b>	

*Notes*  
 \* Excludes cases for which representation was unspecified in the file.  
 \*\* The Scarborough court does not handle drug cases other than simple possession.  
 \*\*\* The cell contains too few cases to report a percentage.

Most interviewees were of the view that the availability of representation would significantly affect unrepresented accused especially at the early stages of the criminal process. A few felt that, at plea or trial, “If the Crown was acting in his or her Minister of Justice role,” there would be little impact on the verdict. Others felt that, although they tried, the judiciary could not make up for the limitations.

Among the impacts cited by interviewees were:

- Unrepresented accused were less likely to get bail and might plead guilty to get out of custody – or (because they did not get released) did not have the opportunity to get a job and pay for a lawyer or to accumulate evidence that they had turned their lives around prior to sentence.
- Unrepresented accused were less likely to get charges reduced or dropped;
- Unrepresented accused were more likely to be convicted, even where the case might not be viable and the behaviour did not reflect the charge.

- Trials in minor cases that had merit, possibly including a defence concerning Charter rights, were no longer covered, which may have increased the guilty plea rate and reduced the review of police procedures.
- Since no written translation of the disclosure was made, and the disclosure was only briefly translated on the day of trial, unrepresented accused with a limited knowledge of English would have had little understanding of the case against them. The gradual accumulation of a criminal record would make future consequences more severe.
- Charter arguments that were not raised.
- Harsher sentences.

### 9.5.2 Specific strategic and tactical mistakes by the accused

Most interviewees agreed that the most important stages in the criminal process at which the accused requires counsel were the earlier ones – initially at arrest, after charging, pre-trial release, and at plea. Most interviewees also said sentencing was a stage that required some expertise.

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

- Failing to show up for fingerprinting, resulting in a new charge.
- Believing that if they were innocent, they did not need a lawyer.
- Not understanding their Charter rights or when they have been breached; the law of search and seizure, etc.
- Believing that, if they were denied bail, their sentence would be “time served.”
- Not understanding that bail conditions continued beyond the next court appearance – leading to breaches of conditions and additional charges.
- Not understanding the consequences of a conviction, e.g.:
  - next time the charges would be higher and the failure to appear charge would not be dropped;
  - impacts on their being able to immigrate or on their being deported; and
  - impacts on child custody.
- Thinking only about whether or not they would be sent to jail or deported.
- Not understanding that a failure to appear would affect the likelihood of bail the next time.
- Pleading guilty as soon as they were denied bail, in order to get out of jail (e.g., because of jail conditions, and/or to get off onerous bail conditions, and/or to keep their jobs, and/or to go home to their families).
- “Blurting out” something at first or other early appearance that would prejudice their case later.
- Pleading guilty before seeing the disclosure, and not knowing how to assess the strength of the Crown’s case.
- Pleading guilty to offences they did not commit. (Duty counsel would not assist with such pleas, whereupon the accused would do so unassisted.)
- Some out-of-custody accused “just wanted to get it over with” and pled guilty as soon as possible, especially where:
  - the charge was a minor one and the accused was convinced s/he would not get legal aid;
  - the accused wanted to lift unworkable bail conditions; and/or

- the charge was related to family violence and the accused was desperate to return home.
- Pleading guilty out of shame alone. (This was particularly common among some Scarborough residents of Asian descent.)
- Pleading guilty to all the original charges (not knowing that Crowns have a practice of withdrawing certain charges or reducing others), and not pleading to charges more in keeping with the actual behaviour.
- Pleading guilty even if it meant they would be deported.

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

- Showing up on the day of trial thinking that the trial would be sometime in the future.
- Going to trial when there were no issues worthy of a trial, and “not getting a good deal.”
- Deciding to testify when they should not.
- Making accidental and damaging admissions, e.g., mentioning breaches of no-contact orders.
- Not calling the witnesses they needed – and not knowing how to state the key elements of their defence by interviewing witnesses.
- Getting so wound up in their own case that they did not listen to and understand the key elements of the Crown’s case.
- Not asking for a directed verdict when the Crown had not proved its case.
- Not understanding the available defences (especially in impaired driving cases).
- Not seeing the relevance of evidence.
- Poor cross-examination
- Not asking the judge to waive the Victim Fine Surcharge. (Interviewees indicated that most judges would often waive it, if asked.)

The Direct Court Observation found that, overall, a quarter of the appearances took one minute or less. The median amount of time taken per appearance was two minutes – meaning that half the cases took less than two minutes and half took more.<sup>79</sup> Within the context of this type of time pressure, it is not difficult to understand why many of those interviewed noted that an accused without a developed understanding of court procedures would make specific mistakes – and would be disoriented generally throughout the court process.

### 9.5.3 Type of plea entered by type of representation

The previous discussion focused on the perceptions of those interviewed regarding the impacts of accused appearing before the court without representation. In this and following sections we provide empirical evidence on what actually happened to unrepresented accused, using data on cases in the Disposed Cases file and from the appearances directly observed in court.

It is, however, important to make it clear at the outset that the information is not presented to draw causal inferences, but simply to describe the events at various stages in the process. For instance, the evidence is not presented to suggest that the lack of representation *caused*, for example, a higher (or lower) likelihood that an unrepresented accused would be convicted. Rather, it simply describes

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<sup>79</sup> This included appearances by accused with private bar lawyers who simply appeared to ask for a set date for the next appearance.

whether or not, and how frequently, significant decisions were made and certain outcomes occurred with or without the presence of counsel.

As noted earlier, a number of interviewees raised the issue of whether or not unrepresented accused were more likely to plead guilty – for instance, to “get it over with,” to alleviate unworkable bail conditions, or because they had neither the knowledge nor resources to contest the charges. A number of accused also mentioned the frequency with which unrepresented accused plead guilty on the day set for trial.

Figure SC-6 displays the plea entered by the type of representation available to the accused.

- Of all pleas in the sample, 87 percent were guilty pleas.
- Unrepresented accused were *least* likely to plead guilty (69 percent).
- Pleas entered by accused who were represented by duty counsel were *almost always* guilty pleas.
- Cases represented by the private bar resulted in a guilty plea less often than cases represented by duty counsel (86 percent) – but considerably more often than unrepresented cases.

<b>Figure SC-6. Disposed Cases in which a Plea was Entered By Type of Plea Entered by Type of Representation at Plea Appearance, Scarborough</b>					
Plea	Proportion of all Pleas by or on behalf of Accused Represented by			Number of Cases	Proportion of Cases
	Self	Duty Counsel	Private Counsel		
Guilty	69%	98%	86%	225	87%
Not guilty	31%	2%	14%	33	13%
Total Cases	100%	100%	100%	258	100%
<i>Notes</i>					
* Excludes cases for which representation at plea was unspecified in the file, and cases represented by agents.					

Three of the offence categories contained enough cases to permit comparisons of pleas by type of representation.

- The pattern for cases as a whole did not hold up for thefts and frauds, where guilty pleas were entered in virtually all instances, regardless of representation type.
- The pattern for cases as a whole did not hold up for assaults excluding common assault. In these cases, a guilty plea was entered in 92 percent of private bar member cases, but only 88 percent of duty counsel cases, and 62 percent of self-represented cases.
- For common assaults, the pattern held up. All of the accused represented by duty counsel pled guilty, none of the self-represented accused did, and 74 percent of the accused represented by private counsel pled guilty.

### 9.5.4 Conviction or not by type of representation

Conviction rates were examined in terms of representation at two stages of the court process – at appearances where the plea was entered (containing more dispositions by way of guilty plea), and at final appearances (containing a higher proportion of cases that went to trial).

Figure SC-7 shows the conviction rates for cases by the type of representation at plea. The data suggest that:

- Overall, 94 percent of cases in which a plea was entered resulted in conviction.<sup>80</sup>
- Conviction rates for cases assisted by duty counsel (98 percent) were slightly higher than for those represented by private bar members (93 percent).
- Conviction rates for self-represented cases were lowest of all (86 percent).

The overall pattern for cases as a whole held up when the three most common offence categories were examined, with the exception that a conviction was entered in every case in which the most serious charge was theft or fraud.<sup>81</sup>

<b>Figure SC-7. Disposed Cases: by Type of Disposition By Type of Representation at Plea Appearance, Scarborough</b>					
<b>Disposition</b>	<b>Proportion of Dispositions for Accused Represented by</b>			<b>Number of Cases</b>	<b>Proportion of Cases</b>
	<b>Self</b>	<b>Duty Counsel</b>	<b>Private Counsel</b>		
Convicted*	86%	98%	93%	241	94%
Not Convicted**	14%	2%	7%	17	7%
Total Cases	100%	100%	100%	258	100%
<i>Notes</i>					
* Includes guilty verdict and peace bond ordered.					
** Includes not guilty and discharges.					

Figure SC-8 shows similar information but, instead, analysis was done using representation at final appearance. Different results were possible for a number of reasons. First, accused who were unrepresented at plea may have retained private counsel or had a certificate lawyer assist them later in the court process. To the extent that those with weaker cases would retain counsel, the conviction rates of unrepresented cases would go down and the conviction rates of cases with counsel would be higher. However, an even more important reason for lower conviction rates showing in Figure SC-8 – of cases with all types of representation – was that pleas were hardly ever entered in cases stayed or withdrawn by the Crown – a not insignificant proportion of cases. The inclusion of such cases in Figure SC-8, but not in Figure SC-7 would be expected to have a significant impact on the percentages shown in the Figures.

In fact, when all disposed cases were considered (i.e., not only those in which a plea was entered), overall, 54 percent of cases resulted in convictions.

- Similar conviction rates were observed for cases with different types of representation.

<sup>80</sup> Note: Pleas are not entered in cases in which all charges were withdrawn or stayed.

<sup>81</sup> It would have been useful to split out these data with a separate analysis for conditional and absolute discharges. However, the data collected were not adequate to support such an analysis.

- Cases represented by private counsel at last appearance had the highest conviction rates (55 percent), but only slightly higher than for duty counsel (52 percent).
- Self-represented cases had a slightly lower conviction rate (50 percent), perhaps reflecting those cases that did not qualify for legal aid because they were likely to be diverted.

One should, however, note that in comparing conviction rates for self-represented accused with those for represented accused, one should take into account the likely impact of post-charge and pre-court process “diversion” on these conviction statistics. Accused who were diverted were extremely likely not to have a lawyer. Given that successful completion of the diversion program would result in non-conviction, the existence of a diversion program would be expected to result in lower overall conviction rates for self-represented cases (with little if any impact on conviction rates for represented case). Unfortunately, data were not available on which cases were diverted or even the percent of cases that were diverted, and therefore we cannot say what the conviction rate would be for unrepresented accused who were not diverted. However, it is safe to say that the rate for non-diverted non-represented accused would be higher than the 50 percent shown in Figure SC-8.

Disposition	Proportion of Dispositions for Accused Represented by			Number of Cases	Proportion of Cases
	Self	Duty Counsel	Private Counsel		
Convicted*	50%	52%	55%	216	54%
Not Convicted**	50%	48%	45%	250	46%
Total Cases	100%	100%	100%	466	100%
<i>Notes</i>					
* Includes guilty verdict and peace bond ordered.					
** Includes not guilty, withdrawn, dismissed, stayed, and discharges.					
*** Excludes cases represented by students or agents.					

When the three most common offence categories are considered individually, this overall pattern breaks down:

- For common assaults, conviction rates were highest for duty counsel cases (58 percent), lower for private counsel cases (45 percent), and much lower for self-represented cases (18 percent).
- For thefts and frauds, private counsel cases had the highest conviction rates (73 percent), considerably than those for self-represented (57 percent) and duty counsel cases (39 percent).
- For assaults excluding common assaults, self-represented cases had the highest conviction rates (63 percent), significantly higher than for private counsel (55 percent) and duty counsel cases (46 percent).

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

### 9.5.5 Custodial sentence and type of representation

Figure SC-9 extends the analysis by showing the proportions of cases receiving a custodial sentence, according to the type of representation available to the accused at the plea appearance. The figures suggest that the legal aid criterion concerning “likelihood of imprisonment” was applied accurately:

- Overall, 39 percent of cases in which a plea was entered received a custodial sentence.
- Cases represented at plea by private counsel were more likely to receive a custodial sentence (63 percent).
- Duty counsel cases were less likely to result in a custodial sentence (48 percent).
- Self-represented cases were least likely to result in a custodial sentence (29 percent).<sup>82</sup>

Three offence categories were sufficiently represented to permit comparison of custodial patterns, according to type of representation. When these were considered separately, the overall pattern did not hold. For thefts and frauds, cases represented by duty counsel were most likely to receive a custodial sentence (62 percent), and there was no difference between the incarceration rates for self-represented cases and cases represented by private counsel (29 percent). Common assault was most likely to receive a jail term if self-represented (50 percent), and least likely if represented by duty counsel (21 percent). For other assaults, the incarceration rate in duty counsel cases was highest (50 percent), followed by that in private bar cases (43 percent) and self-represented cases (23 percent).

<b>Figure SC-9. Disposed Cases: by Whether or Not Custodial Sentence Received by Type of Representation at Plea Appearance, Scarborough</b>					
Sentence	Represented by			Number of Cases	Proportion of Cases
	Self	Duty Counsel	Private Counsel		
Custodial Sentence	29%	48%	63%	100	39%
No Custodial Sentence	71%	53%	34%	158	61%
Total Cases	100%	100%	100%	258	100%
<i>Notes</i>					
* Cases represented by agents and students are not included in the table.					

Figure SC-10 shows the distribution of custodial sentences for cases by representation at final appearance (which contains additional cases in which a plea was not entered). The Figure suggests, as the likelihood of imprisonment criterion would suggest, that:

- Overall, 22 percent of disposed cases received a custodial sentence.
- Duty counsel and private counsel cases were more likely to receive a custodial sentence (26 percent and 23 percent respectively).
- Of accused who were unrepresented at final appearance, 13 percent received a custodial sentence.<sup>83</sup>

<sup>82</sup> The percentages shown in this table are based on the total numbers of cases – whether or not the cases resulted in a conviction. This choice was made to address the question of risk to a person entering the court system. If one were, instead, interested in the risks of receiving a custodial conviction after being convicted, then one should recalculate the percentages using the number of persons convicted as the base for the percentages.

<sup>83</sup> The differences in these results and those based on cases in which a plea was entered can be found in differences – by type of representation – in the likelihoods of having all charges in a case withdrawn or stayed (the latter cases would appear in tables considering all last appearances, while they would not appear in tables considering only cases in which a plea was taken).



Sentence	Represented by			Number of Cases	Proportion of Cases
	Self	Duty Counsel	Private Counsel		
Custodial Sentence	13%	26%	23%	103	22%
No Custodial Sentence	87%	74%	77%	363	78%
Total Cases	100%	100%	100%	466	100%

*Notes*  
 \* Excludes cases represented by students and agents.

Three offence categories were sufficiently represented to permit individual analysis of custodial rates according to representation type. For common and other assaults, self-represented cases had the lowest imprisonment rates (6 percent and 11 percent), but private bar cases were more likely to result in incarceration (16 percent and 29 percent) than both self-represented and duty counsel represented cases. For thefts and frauds, duty counsel cases had the highest imprisonment rates (24 percent) and self-represented cases the lowest (14 percent).

Again we caution against using these data to imply a causal connection between type of representation and likelihood of receiving a custodial sentence. However, the results are directly relevant from another important perspective. Specifically, it is accepted that eligibility for legal aid should depend (in part) on the likelihood of a case receiving a custodial sentence. Although one cannot expect to predict with total accuracy whether a case will result in a custodial sentence, it is relevant that custodial sentences were received by more than one in 10 self-represented accused – and by almost three in 10 accused who are self-represented at plea.

## 9.6 Further impacts of lack of representation

### 9.6.1 Impacts on officers of the court and others

#### *a Legal Aid staff duty counsel*

It was noted above that a number of key informants suggested that the representation problem at the Scarborough court was less one of *lack of representation*, and more one of *under-representation*.

For instance, interviewees expressed serious concern about what were characterized as the built-in limitations on the effectiveness of duty counsel. “The real issue is whether duty counsel is enough representation.” The duty counsel function was of critical importance to the functioning of the court, but had, effectively, never really been “accepted” by all, and was hampered by numerous factors, including:

- Salary levels that virtually ensured that the only lawyers hired into duty counsel positions would be inexperienced, and, in particular, would have no trial experience.
- Salary and experience levels that placed duty counsel in a poor position to conduct plea bargains with Crown attorneys, who “pushed duty counsel around.”

- Restrictions on duty counsel handling trials, such that duty counsel could not say to Crowns, “I know from my trial experience that you won’t be able to prove that at trial – give me a better offer or we’re going to trial.”
- Duty counsel did not have adequate support resources (e.g., to talk to witnesses, or gather new evidence) – while the Crown had the police to continue to collect evidence against the accused.
- Hiring structures and compensation that virtually ensured that “Duty counsel will leave the position just when they are getting good at it.”
- “Huge dockets and resource shortages” left too little time for each case. There was, e.g., too little time to review the disclosure in detail (some afternoon lists contained 50 to 100 cases). “Duty counsel could spend 30 minutes to one hour per person to give good, thorough legal advice.”
- Plea negotiations were done “on the fly” for “people you met 10 minutes ago.”

### *b Private bar acting under Legal Aid certificates*

With respect to the question of under-representation, several interviewees also mentioned that the limitations in the tariff system led to serious shortcomings in the quality and quantity of legal assistance given by a portion of the private bar, including:

- Generally, disincentives for the private bar to “go the whole nine yards” on a case.
- Appearances at which the accused was “represented” by a member of the private bar who did not show up.
- Private bar members who sent an agent in their place who could not handle, e.g., pre-trials, and had to have the case remanded again.
- In particular, bail hearings that were virtually always conducted by duty counsel, because private bar members invested their tariff dollars at other stages.
- Private bar members who rarely practised in Scarborough did not have the knowledge of the idiosyncrasies of individual judges that would assist their clients at sentencing. They did not have the interest or time to research judges’ patterns (e.g., where a particular judge would not grant an intermittent jail term without written proof that the accused had a job).
- “Lousy sentence submissions.”

Clearly such comments do not apply to all instances in which the accused was represented by a member of the private bar under a Legal Aid certificate. However, the fact that these issues were raised at all by a number of those interviewed is certainly a cause for further investigation.

### *c Crown attorneys*

Crowns generally would not talk to unrepresented accused or negotiate a plea with them, but would only discuss plea resolutions in open court. It was not uncommon for duty counsel to be asked to assist on the spot in such situations, sometimes being pulled out of other courtrooms to help out. Pre-trials with unrepresented accused were “impossible,” not allowing the court to narrow the issues and proceedings for trial. Crowns’ ability to manage their time effectively could be hampered by trials that were remanded by concerned judges when the accused showed up on the day of trial without representation.

Crowns also were troubled by issues related to under-representation, which made life “more hectic.” Among the difficulties noted:

- Bail hearings were “a disgrace,” according to a number of interviewees, with private bar members on certificate rarely in evidence; cases being called in an order that had no regard for whether the duty counsel had interviewed the accused or was ready for the bail hearing; the disclosure available to the Crown sometimes not being made available to duty counsel; and with permissions being refused by the presiding justice of the peace to hold matters down until duty counsel could be ready later in the day.
- Large numbers of “no-shows” by private counsel, which slowed down the process.
- The huge dockets and rushed pace suffered by duty counsel, which put them in a poor position generally, and especially (according to some) when compared to Crowns and private counsel.
- Some Crowns mentioned that duty counsel would sometimes assist with guilty pleas before seeing full disclosure, although reviewing disclosure with the accused at the same time as plea may be the more common experience.

#### *d Judges*

Those interviewed indicated that most judges “bend over backwards” to try to preserve the rights of unrepresented accused. “It’s very hard on judges to wear so many hats, but they don’t want to sit there and watch someone plead in cases where the Crown is not in a good evidentiary position.” However, some judges were more thorough in this role than others, who might “leave the accused to flounder.”

Most interviewees agreed that trials involving unrepresented accused took longer than those of represented persons – perhaps twice as long, or “ten times as long if an interpreter is needed.” Those who did not agree said that unrepresented accused had no idea what questions to ask and did not think to call witnesses or present important arguments in their defence. In addition, many unrepresented accused “get shut down a lot during the trial and by the time of sentencing don’t want to talk much.” Most seemed to agree, however, that trials with unrepresented accused were a difficult process for all. On the other hand, although definitely in a minority, some felt that talking directly to the accused resulted in some stages of the court process being more efficient and effective.

#### *e Court administrative staff*

Unrepresented accused asked court administrative staff to explain court procedures and even what strategy they should use to fight their case. However, the court staff could not give legal advice and referred the accused to duty counsel.

Court staff often found that they had to explain to unrepresented accused what had happened to them in court. Especially difficult explanations were needed when accused understood, for the first time, what bail or sentencing conditions meant – or found out for the first time that they had to pay a Victim Fine surcharge that represented a considerable amount of money for poor accused (i.e., \$50 per count on summary conviction, and \$100 per count for conviction by way of indictment).

#### *f Court security*

Although the problems were not frequent, there had been some security problems related to mentally challenged accused – with the threats being felt most by other accused persons (especially other prisoners). Such problems were, however, not restricted to such persons who were unrepresented.

### 9.6.2 Overall impacts on court operations

#### *a Court workloads: Length and nature of individual appearances*

*Length of appearances*

In most provincial criminal courts in Canada, only 4-to-10 percent of cases go to trial. The overwhelming majority of appearances for cases are therefore not trials – and as noted earlier, in Scarborough (as in other courts) these appearances are typically in the order of one or two minutes per case. What would, in other situations, seem a very minor increase in the time taken to perform a function at a case appearance, can therefore represent a major increase in judicial, crown, legal aid, defence counsel and court administration workloads – proportionally and in total.

Our Direct Court Observation data did indicate that concern was present that the unrepresented accused were aware of the opportunities and benefits of having a lawyer – and the expression of that concern did extend the time taken for individual court appearances.

In nearly one third (32 percent) of all observed appearances, and 64 percent of the appearances involving self-represented accused, a comment concerning representation was made by either the judge, the accused, the Crown, or duty counsel. Typically, the judge asked the accused if s/he was represented, and the accused would reply that s/he would be self-represented; was applying to Legal Aid; had been refused; had spoke to a lawyer but not retained one; had a lawyer who was not present in court; and so on. A few appearances seemed to reflect impatience – the Crown asking for proof that the accused had applied for legal aid, or the judge stating that trial would begin on the next appearance, whether or not the accused was represented.

Interviewees agreed that some processes would take longer and others would take less time when the accused was unrepresented. Unrepresented accused could “hang up on some irrelevant point,” while a lawyer would have moved directly to what was relevant – but unrepresented accuseds may also have failed to raise issues out of ignorance, language barriers, anxiety or intimidation.

Those who believed that unrepresented accused trials took longer suggested that unrepresented accused would, at trial, delay the proceedings by:

- Requiring lengthy explanations.
- Not stipulating evidence or waiving processes where a lawyer would.
- Considering all things to be relevant.
- Asking “stupid, irrelevant” questions.
- Making statements instead of asking questions.

It is also important to note that Scarborough has implemented a practice of Judicial Pre-trials – meetings among the parties in the judge’s library or chambers to ensure the most effective use of the parties’ and the court’s time at trial. (Judicial Pre-trials are not held in this manner for cases with unrepresented accused, although a greatly restricted form of pre-trial may be held in open court.)

Most interviewees appeared to agree that unrepresented accused slowed down the court process and contributed to backlogs, in the sense that unrepresented persons would appear more times on the same case. One interviewee suggested that three quarters of all accused would have a lawyer within a month, and the remaining quarter were “jerking the system around.”

*With respect to appearances prior to trial*

To create our Direct Court Observation file, the court observer sat in bail, first appearance and set date courts and captured the time taken by each case/appearance. The results spoke directly to the issue of

whether appearances of self-represented accused (prior to trial) were *actually* longer or shorter than those with other types of representation.

**Figure SC-11. Case/Apearances:  
Distribution of Time (seconds) for different types of Case/Apearances  
by Type of Representation , Scarborough**

Appearance Number at which Plea was Entered	25th/ median/ 75th percentile times for case/appearances represented by				All Types of Represent- ation
	Self	Duty Counsel	Duty Counsel assisting Private Lawyer	Private Counsel	
• All appearances	25th = 60 50th = 90 75th =120 (n= 77)	60 120 240 (n=123)	60 120 300 (n=52)	60 120 240 (n=208)	60 120 180 (n=473)

*Source: Direct Court Observation file.*  
\*\*\* Less than 10 case/appearances

As shown in Figure SC-11, in the first appearance/docket/set date courts – overall, using the typical or median case as the measure – appearances seemed to be *shortest* when the accused was self-represented (median length of appearance, 90 seconds) – and longer for cases represented by duty counsel, by duty counsel assisting a private lawyer, or by private lawyer (all having equal medians, 120 seconds). Similar results are evident if the 75th percentile is used as the measure for comparison – although that measure showed appearances in which the accused was represented by duty counsel assisting a private lawyer as taking longer than those represented by duty counsel or a private lawyer alone.<sup>84</sup>

From the perspective of achieving cost savings for courts, it might be thought a positive result to have unrepresented cases over more quickly than the alternative of being represented by duty counsel. However, from an access to justice perspective, there may be reason to be concerned that, when an accused is not represented, less time is spent dealing with issues in the case. One key informant suggested that a case for an unrepresented person took less time because it was not informed, prepared or spoken to.

Another factor that would add to the time taken by a case on a court docket would be the process of “holding down” a case to later in the day to complete consideration of any matters that day. In fact, our court observer saw 12 percent of the cases being held down – with the percentage being highest for cases represented by duty counsel (16 percent). Of the 61 cases that were held down, 11 (18 percent) were stood down because a lawyer was not present (i.e., in cases where the accused was represented by duty counsel assisting a private lawyer, or by a private lawyer alone). However, by far the most likely reason given for holding a case down was to transfer the case to another court that day (69 percent overall, and 91 percent of stand downs for self-represented cases).

<sup>84</sup> An attempt was also made to differentiate between case/appearances that resulted in a remand or a final disposition. Unfortunately, too few case/appearances were present in the database to consider the latter. Nonetheless, as shown in Figure SC-11, case/appearances that resulted in a remand and in which the accused was self-represented were again over more quickly than cases with any of the other types of representation – with, again, cases represented by duty counsel, assisting a private lawyer, taking the longest.

It should, however, be noted that, according to interviewees – and the researchers’ direct court observations – the justices of the peace in the bail courts were often quite reluctant to grant a request to hold down or stand down a case – for the duty counsel to read the particulars, confer with the accused or the Crown, or to speak with or contact a surety, for example. Given that such refusals would have resulted in wasted court appearances and the accused having to be transported back to jail (and back to court for the next appearance), having representation to ensure that matters such as sureties are in order would have to be considered important to the accused.

*Events occurring at individual court appearances*

Interviewees noted that appearances without counsel would often be wasteful of the court’s time, and as noted below, unrepresented accused would put in more appearances than represented ones.

The Court Observation data also yielded some information about how many appearances were “productive,” in the sense that they resulted in decisions on (or, at least, consideration of) one or more of three matters: namely bail, plea, and elections. Figure SC-12 shows the breakdown of courtroom events (or non-events) according to representation status at last appearance. The columns in the left half of the table show data for “interim” (i.e., non-final) appearances. The columns in the right half of the table show data for final appearances.<sup>85</sup>

With respect to interim appearances, the Figure suggests that, overall, appearances in a case were least likely *not* to involve consideration of bail, elections, or the entering of a plea (see column 2 – “no decision”) if the accused was represented by a private lawyer (93 percent), and most likely not to involve such a decision if the accused was unrepresented (98 percent). For all types of representation, however, the proportion of appearances where no decision was made as to bail, plea or elections was very high (93 percent overall). This proportion was lower (but still high at 88 percent) for duty counsel, especially as regards their role in bail hearings.

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<sup>85</sup> The figure omits four cases in which the accused’s representation status was unclear to the court observer.

<b>Figure SC-12. Court Observation Data: Percentage Distribution of Cases/Appearances: Type of Decision Made by Accused's Representation Status And Case Status (Interim or Final Appearance), Scarborough</b>								
Representation Status	Type of Decisions at "Interim" Appearances (Remanded or Stood Down)					Type of Decisions at Final Appearance		
	*No decision %	Bail decision considered %	Plea entered and/or election made %	Bail, election and plea entered %	Total number of appearances	Guilty verdict or peace bond %	Other disposition %	Total number of appearances
Self	98	2	0	0	87 (100%)	****	****	5 (100%)
Duty Counsel	88	12	0	0	118 (100%)	****	****	6 (100%)
Private lawyer**	93	7	0	0	229 (100%)	50	50	22 (100%)
Other***	100	0	0	0	13 (100%)	****	****	0 (100%)
Total	93	7	0	0	447 (100%)	39	61	33 (100%)

**Notes:**  
 \* Bail was not considered, no elections were made by either Crown or defence, and no plea was entered.  
 \*\* Includes private lawyer or duty counsel standing up in place of private lawyer who was not present.  
 \*\*\* Agent or student.  
 \*\*\*\* Too few case/appearances (i.e., less than 10) to justify presenting percentages.

With respect to *final appearances* (i.e., the right-most columns in Figure R-12), the numbers of appearances observed were small – only 33 out of 480 for which all data for this analysis were present. No conclusions could be drawn from these scant data.

***b Workloads: Number of appearances per case***

Most interviewees appeared to agree that unrepresented accused slowed down the court process and contributed to backlogs, in the sense that unrepresented persons would appear more times on the same case. One interviewee suggested that three quarters of all accused would have a lawyer within a month, and the remaining quarter were “jerking the system around.” Interviewees suggested that appearances without counsel would often be wasteful of the court’s time, and as noted above, unrepresented accused put in more appearances than represented ones.

***Reasons for remands at early appearances***

The Direct Court Observation file provided information to at least initiate an exploration of the reasons for remands – and the results showed that a sizeable percentage (19 percent) of the reasons for granting remands were related to obtaining counsel.<sup>86</sup> More specific reasons given were: to get a Legal Aid certificate (2 percent), to get a lawyer (8 percent), to get proof that the accused had a lawyer (3 percent) and to find a date that a missing lawyer could make himself available (6 percent).

<sup>86</sup> The single most frequent (29 percent) non-lawyer reason given for a remand was to set a trial date (29 percent). It is also noteworthy that 7 percent of the remands were because the accused did not show for his or her appearance in court.

If these results were to apply when data from a larger sample of case/appearances were obtained, then they would certainly indicate that remands to obtain legal assistance *were* a significant source of delays.

*Appearances before a plea is entered*

A second direct indicator of the workloads caused by – and resources required to deal with – cases is the appearance numbers at which key activities take place.

Figure SC-13 begins by showing the appearance number at which the plea was entered for accused who had various types of representation.

The data suggest that self-represented cases in general did in fact generate more appearances before entering a plea than did cases represented by duty counsel, but, except for the extremely drawn-out cases, did not generate more appearances than cases represented by private counsel. In addition:

- Few unrepresented accused pled guilty early in the process. The one quarter of unrepresented accused who pled guilty the soonest still took up to four appearances to plead.
- Half the accused represented by duty counsel had entered a plea by the second appearance.
- A quarter of the self-represented accused made 13 or more appearances before pleading, and a quarter of those in private counsel cases made 10 or more appearances before pleading.

<b>Figure SC-13. Cases in which a Plea was Entered: Distribution of Appearance Number at Which Plea was Entered by Type of Representation at Plea Appearance, Scarborough</b>				
<b>Appearance Number at which Plea was Entered</b>	<b>Represented by</b>			<b>All Types of Representa- tion</b>
	<b>Self</b>	<b>Duty Counsel</b>	<b>Private Counsel</b>	
25 <sup>th</sup> Percentile	4	1	4	3
Median	7	2	7	6
75 <sup>th</sup> Percentile	13	4	10	9
95 <sup>th</sup> Percentile	n/a	16	17	16
Total Cases	35	61	160	260
<i>Notes</i>				
* If plea was entered at more than one appearance, last appearance at which plea was entered is shown.				

*Total number of appearances before disposition*

Figure SC-14 shows the total number of appearances in the case – according to representation type at last appearance. The data suggest that self-represented cases *did* require more court appearances than duty counsel cases, but, except for the extremely drawn-out cases, generated slightly fewer appearances than cases represented by private counsel. More specifically:

- The speediest half of accused self-represented at the last appearance made one less appearance than privately represented cases (six or fewer vs. seven or fewer) – however, the speediest half of cases represented by duty counsel were finished much earlier, within three appearances.
- A quarter of the self-represented accused made 11 or more appearances and a quarter of the privately represented accused made 10 or more appearances.
- A small minority of self- and privately represented cases resulted in an extraordinary number of appearances. Five percent of the accused unrepresented at last appearance appeared 28 or more times in the case, and five percent of the accused represented by private counsel at last appearance made 16 or more appearances.



<b>Figure SC-14. Disposed Cases: Distribution of Number of Appearances in Case by Type of Representation at Last Appearance, Scarborough</b>				
<b>Number of Appearances</b>	<b>Represented by</b>			<b>All Types of Representation</b>
	<b>Self</b>	<b>Duty Counsel</b>	<b>Private Counsel</b>	
25th Percentile	3	2	4	3
Median	6	3	7	6
75th Percentile	11	5	10	9
95th Percentile	28	10	16	14
Maximum	30	17	25	30
Total Cases	76	105	285	471
<i>Notes</i>				
<i>Source: Disposed cases file</i>				

*c Elapsed time for cases to be disposed*

The Disposed Cases sample also yielded information about the time elapsed between the first and last appearance. This information is important from a due process perspective – however, that perspective yields two potential hypotheses: first, “Justice delayed is justice denied,” and second, “Justice rushed is justice crushed.”<sup>87</sup> The first concern is relevant to those who feel that delays in obtaining legal representation adversely affect the fairness of the court process and the final outcome. The second concern is especially relevant to those concerned that unrepresented accused may plead out the case early “to get it over with,” or because they are not aware of viable legal defences.

As shown in Figure SC-15:

- Duty counsel cases took the least time to resolve, from every perspective.
- The speediest quarter of self-represented cases took three weeks longer than privately represented cases to resolve, and 12 weeks longer than cases represented by duty counsel.
- At the halfway mark, there is no difference in time taken to resolve between self-represented and privately represented cases.
- The lengthiest quarter of the cases represented by private counsel took longer to resolve than the equivalent group of unrepresented cases.
- A quarter of all cases took more than seven months to be resolved.

<sup>87</sup> The latter phrase was first suggested to one of the authors by a widely respected colleague, Carl Baar.

<b>Figure SC-15. Disposed Cases: Distribution of Time (in weeks) Between First and Final Appearance by Type of Representation at Final Appearance, Scarborough</b>				
	<b>Time (in weeks) between First and Last Appearance when Represented by</b>			<b>All Types of Representation</b>
	<b>Self</b>	<b>Duty Counsel</b>	<b>Private Counsel</b>	
25 <sup>th</sup> Percentile	13	1	10	6
Median	24	5	24	20
75 <sup>th</sup> Percentile	39	14	42	37
95 <sup>th</sup> Percentile	78	52	75	68
Maximum	84	66	224	224
Total Cases	76	105	286	471

## 9.7 Overall conclusions

### 9.7.1 Key overall findings

Our key findings with respect to the key questions raised by the study include:

*With respect to frequency of self-representation*

- Few accused proceed through the first appearance and bail processes without the benefit of legal representation, but a significant minority are unrepresented at plea and final appearance.
- There appears to be a greater problem of *under-representation* for accused in the criminal court process, caused by structural limitations and procedural problems, particularly in bail court

*With respect to impact*

- Interviews with key officials strongly suggest that unrepresented accused (especially those with little prior experience in the court system) are less likely to be aware of the legal remedies available to them at key stages in the process – and are unlikely to understand many key decisions and events in the process.
- The evidence is insufficient to conclude whether or not self-represented accused are more likely to be convicted or to receive harsher sentences.
- A significant number of unrepresented accused suffer serious penalties or deprivations of liberty as a result of their court case. Some 50 percent receive a criminal record and a smaller, but still significant number (over 10 percent) receive custodial sentences.

### 9.7.2 General reasons for current unrepresented accused situation.

Interviewees who were able to speculate on the subject suggested the following key reasons for the unrepresented accused situation in Scarborough (not all were mentioned or agreed to by all). Notably, finding private bar members to accept cases on a certificate was not considered to be a problem at the time of the site visit, although local bar associations have since announced plans for a strike over the low tariff.

- The financial eligibility test, which some characterized as “ridiculously low,” and which does not make special allowances for the higher cost of living in Toronto, as compared to the rest of the province.
- Coverage restrictions on legal aid, which leave little room to maneuver and effectively cover only those for whom there is a “really strong chance (probability)” of receiving a jail term.
- Some accused in the Scarborough court believe that if you are innocent, you do not need a lawyer.
- Finally, some interviewees felt that, in general, many accused have no idea what is happening in court and what they have to do to get legal aid – in particular what steps have to be taken before the next court appearance.

### 9.7.3 Solutions suggested by interviewees in Scarborough

All interviewees suggested it would be preferable if Legal Aid could accept more cases. Most believed that structural limitations on the duty counsel function should be corrected. Among the solutions offered by individual interviewees were the following (not suggested by or agree to by all):<sup>88</sup>

- Accept that duty counsel is and will remain an essential, integral and specialized part of the system, and treat the function and the lawyers who perform it accordingly. This would require:
  - Generally, practices that reflect the duty counsel function as a valued career track and demonstrate that lawyers who perform the duty counsel function well are welcome to remain in the position for long periods, the better to use their skills and experience.
  - Generally, enhancing the in-house Legal Aid staff duty function – for instance, by using it less as an entry-level function, by giving it more recognition as a specialized function requiring special expertise, by rotating senior lawyers through local staff duty counsel, and providing mentoring, training in specific areas, etc.
  - The use of staff positions instead of contracts for duty counsel work.

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<sup>88</sup> The interested reader is also referred to the following recent reports for suggestions to improve the access of litigants to legal representation:

- Commission on Systemic Racism in the Ontario Criminal Justice System, *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* (Queen’s Printer for Ontario, December 1995).
- Ontario Legal Aid Review, *Report of the Ontario Legal Aid Review: A Blueprint for Publicly Funded Legal Services* (1977).
- Criminal Justice Review Committee, *Report of the Criminal Justice Review Committee* (Queen’s Printer for Ontario, February 1999).
-

- Compensation levels that are on a par with Crowns, and that will attract and keep senior, top-notch, experienced lawyers who are suited to the unique demands and critical importance of the job.
- Salary increments that recognize years of experience in the position.
- Allowing duty counsel to handle trials.
- Reform of the tariff levels “to something better than an insult.”
- Speeding up and improving the process for submitting and considering applications for legal aid, including:
  - Having the police hand out a notice explaining availability of and procedures for applying for legal aid. (Translations would be required in Scarborough.)
  - Placing a legal aid application officer in the court in order to allow the matter to be held down and returned with a set date the same day.
  - Better empowerment for front-line Legal Aid staff.
  - Finding a way to get an earlier indication that the Crown will be seeking a custodial sentence. Presently, the judge may ask in open court, or the duty counsel may go into the Crown’s meeting room (“the cave”) and inquire about cases coming up in the next few days.
  - Allowing Native Courtworkers to take, assist with the completion of, and process legal aid applications.
- The use of “advice duty counsel” (the term used by the Commission on Systemic Racism in the Ontario Criminal Justice System), who would spend little time in courtrooms, but would be available in the courthouse to offer advice and explanations without being burdened so much by the requirements of their next courtroom appearances.
- Extended duty counsel service, for greater continuity of service.
- Provision of a “roving duty counsel” available to the trial courts.
- Placing greater emphasis in the legal aid system, and in training, on the early stages of the criminal process and on sentencing.
- Relaxation of the coverage criterion requiring a likelihood of imprisonment. Some suggested this criterion be relaxed to allow all first offenders to receive legal aid in order to reduce unnecessary first convictions.
- Relaxation of the financial eligibility limits or at least the living allowance for the Greater Toronto Area.
- The use of “opinion letters” about whether there is an arguable defence, and granting legal aid if there is.
- Reforms to bail court, including:
  - Calling the bail docket according to which cases are ready to proceed (when both Crown and defence are ready).
  - Allowing duty counsel in all cases to see all information available to the Crown at the bail stage so duty counsel can assess the strength of the case.
  - Reducing the high number of adjournments by permitting cases to be held down to later in the day to arrange sureties, etc., and to allow the bail hearing to be completed later that same day.
  - More flexible bail court hours and practices regarding the granting of requests to stand the case down to collect information.
  - More duty counsel in bail court. One interviewee suggested bail court could easily use three or four (rather than the current two) duty counsel, since “Duty counsel in bail court have to be in court, in the cells, on the phone, and in the corridors.”
  - The use of judges, not Justices of the Peace, in bail court.

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- Having someone “on-site” (perhaps specially trained duty counsel), available to deal with special challenges associated with mentally ill defendants (because of the need to intercede quickly to prevent the interruptions of medication and treatment).
  - Better case management procedures, agreed to by all court parties, and including agreement on processes for speedy resolution, including “the best Crown offer up front.”
  - More networking between duty counsel and community organizations that can assist to formulate a plan for managing the accused in the community.
  - The use of properly trained paralegals to support lawyers and handle summary and hybrid offences. (Some interviewees strongly opposed this idea, saying, “What these people need is lawyers.”)



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## Chapter 10: Sherbrooke, Quebec

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### 10.1 Objectives and Methodology

The Department of Justice and the Federal-Provincial-Territorial Permanent Working Group on Legal Aid engaged the research team to measure:

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

The methodology for the Sherbrooke part of the national study followed a strategy for data collection and site visits similar to that followed in the other sites.

The methodology involved data collection and site visits. Information was available on the question of unrepresented accused from three sources:

- **A Disposed Cases sample**, created for the project, containing a total of 397 adult criminal cases disposed in The Sherbrooke court in late 2001.
- **Direct Observation** of 157 appearances in first appearance/arraignment court over six days during June and July of 2002; trial courts were rarely observed..
- **Interviews with key informants** (judges, Crowns, legal aid staff and management, court administrators, private bar members, local service agencies, etc.), whose anonymity was assured.

In all parts of the project, we received excellent co-operation and assistance from all those we asked to participate in the study. We also readily acknowledge the very able assistance and expertise of the Sherbrooke-based individuals who assisted in observing in court and in creating the Disposed Cases file.

### 10.2 Context of the court and legal aid

One of the major conclusions – supported from data from all sites – was that data on the extent of legal representation in a particular court cannot be interpreted out of the context of (at least):

- The type of community served (including the nature of accused persons brought before the court).
- The resources and management and operations practices in place in the courts.

- Legal aid policies and practices.
- The duty counsel system in place.
- The policies and practices of all of the other key participants in the court process – including the judiciary, the police, the Crown attorneys, court administrators, the private bar and other supporting agencies.

All of these factors, policies and practices can have significant mitigating or exacerbating influences on the impacts of self-representation. This contextual information is thus essential to understanding the problems and potential solutions to challenges related to the unrepresented accused.

This section will specifically address the first four of the above areas. Information on the fifth is contained throughout the report.

### 10.2.1 The community

Sherbrooke is located just 30 minutes from the U.S. border in the historic Eastern Townships region of Quebec. Major industries have included farming, fishing, lumber and mining. The population density is 1,305.5 per square kilometre. Sherbrooke boasts a rate of bilingualism (40 percent) that is one of the highest in Quebec.

The 2001 Census reported that close to 94 percent of people in Sherbrooke spoke French at home. English was the choice of just under 3 percent. In the Sherbrooke Census Metropolitan Area (CMA), 91.7 percent cited French and 5.5 percent cited English as the language spoken at home.

In 2001, the population of the city of Sherbrooke was reported to be 75,916, 1.1 percent below the 76,786 reported in the 1996 Census. The population of the Sherbrooke CMA was estimated to be 155,790, an increase of 3.8 percent from 1996, slightly more than the increase for the province of Quebec as a whole during that period (2.35 percent).

The population of Sherbrooke included a comparatively high proportion of females over the age of 65 (17 percent). Approximately 22 percent of males and 20 percent of females in Sherbrooke were in the 15-to-29 age range associated with the highest rates of crime.

The average income of Sherbrooke residents in 2001 was \$20,931, somewhat less than the provincial average income of \$23,198. The average household income in the Sherbrooke CMA in 2001 was \$36,700, and the average income per capita was \$18,100. These were lower than the provincial estimates of \$46,900 and \$19,300 respectively.

Sherbrooke's 2001 unemployment rate of 7.8 percent was slightly lower than the provincial rate of 8.2 percent. Of Sherbrooke's population 25 years of age and older, 20.5 percent had less than a Grade 9 education, and 66.4 percent had a high school certificate or higher level of education.

In the city of Sherbrooke, there were estimated to be 4,614 single-parent families (22 percent), higher than the provincial average of 16 percent.

Of the estimated 38,481 dwellings in Sherbrooke in 2001, 13,689 were owner-occupied and 24,792 (64 percent) were rented. This was a considerably higher percentage of rented dwellings than for the province as a whole (43 percent rented) in the same year.



The rate of violent crime in Sherbrooke increased by 10 percent from 1999 to 2000, to 438 per 100,000 population. The property crime rate also increased slightly (0.8 percent) to 3,927 per 100,000. Total *Criminal Code* offences for the city of Sherbrooke remained at the same rate of 5,829 per 100,000. The total number of crimes reported in 2000 in Sherbrooke was 8,913.

### 10.2.2 The court

Sherbrooke has a consolidated courthouse that handles civil, criminal and family matters as well as Supreme court matters. The courtrooms hearing criminal matters are described in the following chart. Four courtrooms are usually required for criminal cases. The backlog faced by the court for accused who are not incarcerated is approximately 10 months. There is no backlog for individuals who are incarcerated.

One arraignment/first appearance courtroom	Usually sits five days a week, 9:30 to 4:30 (at the discretion of the presiding judge)	<ul style="list-style-type: none"> <li>• Courtrooms handle adult cases only</li> <li>• Do not split drugs and CCC</li> </ul>
Two trial courts	Usually sit five days a week, 9:30 to 4:30 (at the discretion of the presiding judge)	
One Superior court – criminal matters	Sits at the discretion of the presiding judge.	
No special courts		

There are no circuit courts which operating from the Sherbrooke courthouse. Two separate courts are devoted to juvenile cases.

### 10.2.3 Legal aid

Legal aid in Quebec is the responsibility of *La Commission des services juridiques*. The Commission oversees legal aid in Quebec through regional Legal Aid centres. Accused are able to get advice through a 24-hour *Brydges* help-line. This help-line is staffed by lawyers who review the case with the accused and provide advice. We noted that the ability of the lawyers to provide detailed advice is limited, because they do not have access to the accused’s file and so must accept the accused’s interpretation in forming their assessment of the merits of the case. This help-line is available to all accused at arrest.

Legal aid in Quebec is provided through a mixed system of certificates (mandates) and permanent staff lawyers who are contracted to provide legal aid services. In Sherbrooke, legal aid services are the responsibility of a single law firm, comprising a number of lawyers. It oversees the entire process for the region, including the application process. Those in need of legal aid present themselves to the law firm, where they make their application. If they are eligible, accused are immediately granted a certificate/mandate for legal aid. Thus, members of the “franchised” law firm (the “permanent lawyers”) will take and process the accused’s legal aid application, issue a certificate/mandate and offer

their own services under the certificate, or allow the accused to select a lawyer from another firm to accept the certificate work. Clients thus have some choice in who represents them. Interviewees said there were no indications that eligible individuals had difficulty finding legal representation.

Eligibility is based on financial criteria and whether there is a risk of imprisonment or loss of means of employment on conviction. Those who are deemed financially able are required to make a contribution to the cost their legal defense. Legal Aid reform, completed in 1999, has resulted in most clients being required to contribute, and in tighter eligibility criteria. At present, for example, legal aid is free to those whose family income is below \$17,500 (for a family with two or more children). Those who earn more than \$24,938 (for a family with two children) are not eligible for legal aid.

Rates paid to lawyers for legal aid work are based on block fees, so there are no hourly rates and it is generally not in the interest of the lawyers to prolong the case any longer than necessary.

#### 10.2.4 Duty counsel

Duty Counsel is not a position – or, except to a very limited extent, a function – that exists in Sherbrooke or the rest of Quebec. However, the “permanent” lawyers spend much of their time at the courthouse, and it is in their interest to be visible and available to accused prior to, or at their first appearance, since this allows them access to likely Legal Aid clients. Therefore, these lawyers may, on occasion, provide advice to accused and/or explain their procedural options to them at, or prior to their first appearance, even though the accused has yet to apply for Legal Aid. The “permanent” lawyers will not go so far as to give plea advice, assist with bail hearings or sureties, or help to enter a plea, since they cannot represent clients who are not eligible for Legal Aid beyond first appearance, except under exceptional circumstances. On very rare occasions, the “permanent” lawyers may represent the accused beyond the first appearance at the request of the presiding judge.

### 10.3 Frequency of unrepresented accused

Overall, there was agreement among interviewees that the number of unrepresented adult accused was very small in Sherbrooke and did not present a problem from the perspective of the functioning of the court. Estimates of the proportion of accused who were unrepresented at first appearance generally ranged between 5 and 10 percent.

We were informed that there was a general sense of moral obligation among the legal profession in Sherbrooke to help an accused, even if they might not be eligible for legal aid or may not pay the bill in the end. Lawyers appeared willing to risk not being paid rather than leave an accused to his or her own devices – particularly if the lawyers were asked for help by the accused. However, the “permanent” lawyers were not supposed to represent accused who were not eligible for legal aid.

In general, interviewees believed that the number of unrepresented accused decreased sharply after the first appearance. There was a sense that, after the first appearance, the accused more fully comprehended the implications of the charges against them, and so realized that they were unable to manage their own legal proceedings. One interviewee believed that accused were unrepresented at their first appearance, they were likely to continue to be unrepresented through the legal process.

### 10.3.1 Overview of representation

It was apparent from the Disposed Cases file that it was not possible to characterize representation over the life of a case in any simple manner. An accused's representation status could change from one appearance to the next, as for example when an accused was represented by duty counsel at the bail hearing, but self-represented afterwards.

Looking at the pattern of representation over all appearances, our analysis of data from complete records of 397 randomly selected cases completed in the Sherbrooke court in late 2001 indicated the following.

- At first appearance, 9.1 percent of criminally accused adults in the Sherbrooke court were unrepresented. The remaining 90.9 percent used the services of private counsel.
- At second appearance (if any), 2.2 percent of criminally accused adults in the Sherbrooke court were unrepresented. The remaining 97.8 percent have private counsel.
- At third appearance (if any), 0.8 percent of criminally accused adults in the Sherbrooke court were unrepresented. The remaining 99.2 percent used the services of private counsel.
- At final appearance, 6.1 percent of criminally accused adults in the Sherbrooke court were unrepresented. The remaining 93.9 percent had private counsel.
- Private counsel represented 94.2 percent of criminally accused adults in the Sherbrooke court for at least one appearance.
- Private counsel represented 89.9 percent of criminally accused adults in the Sherbrooke court for all of their appearances.
- Only 5.8 percent of criminally accused adults in the Sherbrooke court were unrepresented at all of their appearances.

Readers should note that, throughout this report, references to "private counsel" encompass both privately retained counsel and private counsel paid through a legal aid referral or certificate. For the purposes of this study, we were not able to make this distinction in our collection or analysis of either the disposed cases data or the court observation data.

### 10.3.2 Self-representation by category of offence and stage of process

According to most interviewees, unrepresented accused were most often found at first appearance. In most cases, unrepresented accused who have willingly presented themselves in court without representation quickly realized the seriousness or the implications of their situation and decided it best to have representation at their next appearance. The general view of our key informants was that the few unrepresented accused who presented themselves without representation at subsequent appearances fell into two categories: those who had applied for and been refused legal aid, and those who were difficult clients who couldn't keep a lawyer.

There was general agreement that those facing serious charges were likely to have a lawyer, even if they were not eligible for legal aid. Any accused facing serious charges, who presented themselves at court without a lawyer, would be strongly encouraged by the judge to get a lawyer. We noted this was, for the most part, a hypothesis on the part of interviewees. They agreed that there were very few instances of unrepresented accused at the Sherbrooke courthouse.

For the most part, these views were supported by our analysis of the Disposed Cases sample. The Disposed Cases sample indicated the proportions of accused at each appearance who were unrepresented. Figure S-1 displays this information according to the offence category<sup>89</sup> of the most serious charge in the case.

<b>Figure S-1. Proportion of Accused who were Unrepresented At Various Appearances, by Most Serious Charge Category, Sherbrooke*</b>					
<b>Most Serious Charge Category</b>	<b>Proportion of Unrepresented Accused at</b>				<b>Total Number of Cases</b>
	<b>First (%)</b>	<b>Plea (%)</b>	<b>Defence Election (%)</b>	<b>Final (%)</b>	
Homicide	***	***	***	***	0
Sexual Assault	***	***	***	***	3
Assaults excl. Common	6	2	7	0	47
Robbery	***	***	***	***	10
Break and Enter	2	0	2	2	50
Impaired Driving	28	26	24	26	51
Common Assault	4	5	4	0	23
Drugs excl. Simple Possession	0	0	0	0	24
Weapons Offences	***	***	***	***	4
Thefts and Frauds	12	5	6	5	67
Simple Possession of Drugs	10	7	10	7	29
Offences against Administration of Justice	5	1	4	3	87
Public Order	***	***	***	***	2
<b>All Offences</b>	<b>9</b>	<b>6</b>	<b>7</b>	<b>6</b>	

*Notes \* Excludes cases for which representation was unspecified in the file.  
 \*\*\* The cell contains too few cases to report a percentage.*

Figure S-1 indicates that:

- Accused facing charges of impaired driving were most likely to be self-represented.
- Rates of self-representation generally declined across appearances.

<sup>89</sup> See Appendix A for a listing of the offences contained in each of the “offence categories”.

### 10.3.3 Socio-demographic characteristics of unrepresented accused

In general, our key informants expressed the view that those who were unrepresented after their first appearance fell into two categories: those who were ineligible for legal aid, and those who, due to personal conflict, could not stay with the same legal representation. Those who did not qualify for legal aid were, generally, the “working poor” – those above the financial cut-off point for legal aid in Quebec (\$24,938 for a couple with two or more children). Even for those barely eligible, paying the required \$800 contribution was often a difficult financial barrier (according to some interviewees).

Those who were unrepresented after their first appearance because of their inability to maintain legal representation may be what some interviewees described as individuals who had “borderline mental illness.” In other words, they were unlikely to suffer from a diagnosed mental disorder, were often quite intelligent, but had difficulty in their relationships with others.

### 10.3.4 Other types of representation

Figure S-2 displays the representation provided by counsel of various types at each stage of the criminal process. These data indicate that:

- The proportions of self-represented accused were low at all appearances.
- Rates of self-representation generally declined across appearances.

Appearance	Represented by		Number of Cases
	Self (%)	Private Counsel (%)	
First appearance	9	91	397
Plea	6	94	374
Defence Election	7	93	391
Final Appearance	6	94	396

*Notes \* Excludes cases for which representation information is not available.  
 \*\* Percentages may not total to 100 due to rounding.*

Figure S-3 shows the most serious offence charged in cases with different types of representation at the final appearance. These data indicate that:

- The only offence category for which a large number of accused were without legal counsel was impaired driving.

<b>Figure S-3. Distribution of Representation Status at Final Appearance By Most Serious Charge Category, Sherbrooke*</b>			
<b>Most Serious Charge Category</b>	<b>Proportion of Cases represented by</b>		<b>Number of Cases</b>
	<b>Self %</b>	<b>Private Counsel %</b>	
Homicide	***	***	0
Sexual Assault	***	***	3
Assaults excl. Common	0	100	47
Robbery	***	***	10
Break and Enter	2	98	49
Impaired Driving	26	75	51
Common Assault	0	100	23
Drugs excl. Simple Possession	0	100	24
Weapons Offences	***	***	4
Thefts and Frauds	5	96	67
Simple Possession of Drugs	7	93	29
Offences against Administration of Justice	3	97	87
Public Order	***	***	2
<b>All Offences</b>	<b>6</b>	<b>94</b>	<b>396</b>
<i>Notes * Excludes cases for which representation at final appearance was unspecified in the file.</i>			

## 10.4 Evidence on the impacts of lack of representation

### 10.4.1 Perceived impacts of a lack of representation

#### *a Impacts on the accused*

Opinions on the impacts of the lack of representation on accused were offered in the context of there being very few unrepresented accused in Sherbrooke. In general, it was felt that unrepresented accused would not be aware of all the options open to them, and the end result might not be to their benefit. However, none were able to offer specific examples, since few interviewees had much experience with unrepresented accused.

According to one interviewee, there were situations where it might be to the advantage of the accused to avoid getting representation for as long as possible – to delay the inevitable sentence. This was suggested as being particularly true of impaired driving accused.

According to some interviewees, in many cases the unrepresented accused would “plead out,” because they saw few other options. This was particularly true in cases involving relatively minor charges.

The most serious errors made by unrepresented accused, according to interviewees were:

- Blaming the victim.
- Making unnecessary/unsolicited admissions.
- General ignorance of the legal system. Not knowing, for example, that witnesses can be subpoenaed.
- Not knowing how to argue their case.

#### 10.4.2 Empirical impacts of a lack of representation

The preceding section described the perceptions of those interviewed regarding the impacts of accused appearing before the court without representation. In this section we provide empirical evidence on what actually happened to unrepresented accused, using data on cases in the Disposed Cases file and from the appearances directly observed in court.

It is, however, important to make it clear at the outset that the information is not presented to draw causal inferences, but simply to describe the events at various stages in the process. For instance, the evidence is not presented to suggest that the lack of representation *caused*, for example, a higher (or lower) likelihood that an unrepresented accused would be convicted. Rather, it simply describes whether or not, and how frequently, significant decisions were made and certain outcomes occurred with or without the presence of counsel.

##### *a Type of plea entered by type of representation*

As noted earlier, a number of interviewees raised the issue of whether or not unrepresented accused were more likely to plead guilty – for instance, to “get it over with,” or because they had neither the knowledge nor resources to contest the charges.

Figure S-4 displays the plea entered by the type of representation available to the accused. These data indicate that:

- Of all pleas, 87 percent were guilty pleas. This figure was the same for both unrepresented accused and accused represented by private counsel

<b>Figure S-4. Distribution of Type of Plea Entered by Type of Representation at Plea Appearance, Sherbrooke*</b>				
<b>Plea</b>	<b>Proportion of all Pleas by or on behalf of Accused Represented by</b>		<b>Number of Cases</b>	<b>Proportion of Cases</b>
	<b>Self %</b>	<b>Private Counsel %</b>		
Guilty	87	87	326	87%
Not guilty	13	13	48	13%
Total Cases	23	351	374	100%

*Note: Excludes cases for which representation at plea was unspecified in the file.*

***b Conviction or not by type of representation***

Conviction rates were examined in terms of representation at final appearance, as shown in Figure S-5. The data suggest that:

- Overall, 90 percent of all disposed cases resulted in a conviction on one or more charges.
- The conviction rates were essentially the same for accused who were self-represented (92 percent) and for accused represented by private counsel (90 percent).

<b>Figure S-5. Distribution of Disposition by Type of Representation at Final Appearance, Sherbrooke</b>				
<b>Disposition</b>	<b>Proportion of Dispositions for Accused Represented by</b>		<b>Number of Cases</b>	<b>Proportion of Cases</b>
	<b>Self %</b>	<b>Private Counsel %</b>		
Convicted*	92	90	353	90%
Not Convicted**	8	10	41	10%
Total Cases	24	370		
<i>Notes * Includes guilty verdict and peace bond ordered.                      ** Includes not guilty, withdrawn, dismissed, stayed, and discharges.</i>				

Earlier we cautioned against using these data to imply a causal connection between type of representation and conviction rates. However, given the impact of having a criminal record (on employment opportunities and the likelihood of being charged with further offences, etc.) the data can definitely be used to show that unrepresented accused are very likely to experience serious negative impacts as a result of the court process.

***c Custodial sentence and type of representation***

The proportion of accused who received custodial sentences was also examined in terms of representation at the final appearance.

Figure S-6 shows the distribution of custodial sentences for cases disposed at final appearance by type of representation. The data suggest that:

- Overall, 38 percent of all disposed cases resulted in a custodial sentence.
- Unrepresented accused fared better (4 percent custodial rate) than did accused with private counsel (40 percent). This may reflect the over-representation of impaired driving charges faced by unrepresented accused.



**Figure S-6. Distribution of Custodial Sentence  
 by Type of Representation at Final Appearance, Sherbrooke**

Sentence	Represented by		Number of Cases	Proportion of Cases
	Self %	Private Counsel %		
Custodial Sentence	4	40	141	38%
No Custodial Sentence	96	60	233	62%
Total Cases	23	351	374	

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

#### 10.4.3 Impacts on court officers and others

According to our key informants, judges in Sherbrooke made great efforts to explain things to unrepresented accused in their courts. Judges were said to be very uncomfortable with this, because they thought they risked their appearance of impartiality.

Our court observation data confirmed that efforts were made in the courtroom to make unrepresented accused aware of the opportunities and benefits of having a lawyer. In 50 percent of appearances by unrepresented accused, comments were made, mostly by judges, concerning representation. In these appearances, the judges asked the accused about their representation status or instructed the accused to get a lawyer or apply for legal aid. In a handful of appearances observed, the judge informed the accused that if they failed to retain counsel for the next appearance, the trial would proceed regardless.

Crowns were generally uncomfortable dealing with unrepresented accused because such cases were much more difficult to manage, direct dealing impossible, and communication problematic.

#### 10.4.4 Overall impacts on court operations

##### *a General*

In most provincial criminal courts in Canada, only 4-to-10 percent of cases go to trial. The overwhelming majority of appearances for cases are therefore not trials – and, as noted elsewhere in this chapter, in Sherbrooke (as in other courts) these appearances are typically in the order of a few minutes per case. What would, in other situations, seem a very minor increase in the time taken to perform a function at a case appearance, can therefore represent a major increase in judicial, crown, legal aid, defence counsel and court administration workloads – proportionally and in total.

Most interviewees felt that an unrepresented accused would slow down proceedings but that this would vary depending on the case and the personality of the accused. Some accused were more proactive, but most were lost and generally had little to say for themselves.

***b Nature and length of individual court appearances***

The Court Observation data yielded some information about how many appearances were “productive,” in the sense that they resulted in decisions on (or, at least, consideration of) one or more of three matters: namely bail, plea, and elections. Figure S-7 shows the breakdown of courtroom events (or non-events) at interim (not final) appearances, according to representation status at last appearance.<sup>90</sup>

<b>Figure S-7. Court Observation Data: Percentage Distribution of Cases: Type of Decisions Made by Representation Status At Interim (not Final) Appearances, Sherbrooke*</b>			
Representation Status	<b>Type of Decisions at Interim Appearance (Remanded or Stood Down)</b>		
	**No decision	Bail considered, and/or plea entered	Total number of Appearances
Self	25%	75%	43 (100%)
Private lawyer	52%	48%	59 (100%)
Total	44%	56%	102 (100%)

*Notes: \* Appearances for which data were unavailable or unclear are not included.  
 \*\* Bail not considered, no elections made by either Crown or defence, and no plea entered.*

One of the most striking observations was that, overall, 44 percent of interim appearances did not involve consideration of bail, or the entering of a plea. If the accused was unrepresented, the proportion of interim appearances that were, in that sense, “unproductive” was only 25 percent compared to 52 percent of appearances involving legal counsel.

The court observation also yielded data on the length or duration of individual court appearances. Figure S-8 summarizes these data by representation type. The general conclusion supported by these data is that appearances by self-represented accused were much shorter in duration compared to appearances with private counsel.

<sup>90</sup> The figure omits cases in which the accused’s representation status was unclear to the court observer.

<b>Figure S-8. Distribution of Appearance Duration (in minutes) by Type of Representation at Final Appearance, Sherbrooke</b>		
	<b>Appearance Duration (in minutes) when Represented by</b>	
	<b>Self</b>	<b>Private Counsel</b>
25 <sup>th</sup> Percentile	1	2
Median	1	5
75 <sup>th</sup> Percentile	2	10
95 <sup>th</sup> Percentile	22.2	26.5
Total Appearances	45	94

*c Number of appearances per case*

Most of our key informants appeared to agree that unrepresented accused slowed down the court process, since they did not benefit from the skill that an experienced lawyer would apply to move the process along expeditiously.

A direct indicator of the workloads caused by – and resources required to deal with – cases is the number of court appearances required to complete a case. A related indicator is the appearance number at which key activities take place. The Disposed Cases sample yielded information on the number of appearances made by accused who were or were not represented.

*Appearances before a plea is entered*

Figure S-9 shows the appearance number at which the plea was entered for accused who had various types of representation. These data indicate that self-represented cases in general *did not* generate more appearances before entering a plea, in comparison to cases handled by private counsel:

- Three quarters of self-represented accused entered their plea at their first appearance.
- Only half of accused represented by private counsel had entered a plea at or before their third appearance.

<b>Figure S-9. Distribution of Appearance Number at Which Plea was Entered By Type of Representation at Plea Appearance, Sherbrooke</b>		
<b>Appearance Number at which Plea was Entered</b>	<b>Represented by</b>	
	<b>Self</b>	<b>Private Counsel</b>
25 <sup>th</sup> Percentile	1	1
Median	1	3
75 <sup>th</sup> Percentile	1	6
95 <sup>th</sup> Percentile	2	11
Total Cases	23	351
<i>Note. * If plea entered at more than one appearance, last appearance at which plea entered is shown.</i>		

*Total number of appearances before disposition*

Figure S-10 shows the total number of appearances in the case – according to representation type at last appearance. These data indicate that self-represented cases *did not* take more court appearances overall. More specifically:

- Three quarters of accused unrepresented at last appearance made only one appearance, as compared to accused with private counsel, 50 percent of whom made up to four appearances.

<b>Figure S-10. Distribution of Number of Appearances in Case By Type of Representation at Final Appearance, Sherbrooke</b>		
<b>Number of Appearances</b>	<b>Represented by</b>	
	<b>Self</b>	<b>Private Counsel</b>
25th Percentile	1	2
Median	1	4
75th Percentile	1	7
95th Percentile	3.5	11.4
Maximum	4	13
Total Cases	24	372

*d Elapsed time for cases to resolve*

The Disposed Cases sample also yielded information about the time elapsed between the first and last appearance. This information is important from a due process perspective – however, that perspective yields two potential hypotheses: first, “Justice delayed is justice denied,” and second, “Justice rushed is justice crushed.”<sup>91</sup> The first concern is relevant to those who feel that delays in obtaining legal representation adversely affect the fairness of the court process and the final outcome. The second concern is especially relevant to those concerned that unrepresented accused may plead out the case early “to get it over with,” or because they are not aware of viable legal defences.

As shown in Figure S-12:

- Of cases in which the accused was self-represented, 50 percent were settled within 13.1 weeks, and 75 percent settled within 23.1 weeks.
- Cases represented by private counsel at last appearance typically took longer to be resolved with 50 percent settled within 19.3 weeks and 75 percent settled within 36.9 weeks.

<b>Figure S-12. Distribution of Time (in weeks) Between First and Final Appearance By Type of Representation at Final Appearance, Sherbrooke</b>		
	<b>Time (in weeks) between First and Final Appearance when Represented by</b>	
	<b>Self</b>	<b>Private Counsel</b>
25th Percentile	6.2	4.6
Median	13.1	19.3
75th Percentile	23.1	36.9
95th Percentile	-	55.8
Maximum	33	69
Total Cases	5	309

<sup>91</sup> The latter phrase was first suggested to one of the authors by a widely respected colleague, Carl Baar.

## 10.5 Overall conclusions

### 10.5.1 Key overall findings

Our key findings with respect to the key questions raised by the study include:

*With respect to frequency of self-representation*

- The number of criminally accused adults who proceed through the criminal court process in Sherbrooke without the benefit of legal representation is relatively small – in the order of 9 percent.

*With respect to impact on the accused*

- Our key informants in Sherbrooke reported only limited direct experience with unrepresented accused. This limitation notwithstanding, they expressed the view that unrepresented accused are less likely to be aware of the legal remedies available to them at key stages in the process or to understand the key decisions and events in the process.
- Unrepresented accused in Sherbrooke are equally likely as accused with legal counsel to plead guilty and be convicted. They are much less likely to receive custodial sentences on conviction.

*With respect to impact on the court*

- Many judges, as well as other court officials, try to reduce the impact on accused persons of their lack of representation. Some such efforts may appear to threaten the impartiality of the judicial role.
- Self-represented accused typically make fewer court appearances than do accused represented by private counsel.
- Cases where the accused are self-represented are typically of shorter overall duration than are cases involving private counsel.
- Individual appearances by self-represented accused are typically shorter in duration than are appearances with private counsel.

### 10.5.2 General reasons for current unrepresented accused situation

According to interviewees, on the rare occasion that an accused was not represented, when facing more serious charges, it was for one of two reasons: the accused was ineligible for legal aid and unable to financially afford legal representation, or the accused had fired his or her lawyer. In situations where the charges were relatively minor, the accused often saw legal representation as an unnecessary expense and so didn't bother getting a lawyer.

### 10.5.3 Suggested solutions

For the most part, interviewees did not feel any solutions were necessary since they saw no real problem with unrepresented accused in Sherbrooke. However, two solutions proposed were:

- Opening up the legal aid criteria. Specifically, increasing the financial eligibility thresholds.
- Implementing a staff system to ensure that someone is always around to guide an accused person through the legal system.