Conclusions

The stated object of this report was to enable Commonwealth jurisdictions to benefit from the experience of others in dealing with delays in the trial process. On the basis of the materials presented here, it is fair to say that a great deal of effort has been devoted to tackling what appears to be a problem of great magnitude and widespread implications. The diversity of response offers a rich source that every Commonwealth country can consult in drawing up a plan of action. Equally important, it also provides a valuable index of possible pitfalls.

It is now apparent, for example, that procedures which may save time at one stage of the criminal justice process may produce serious delays at the other; that informal time-saving mechanisms can become rigid and formalised and consequently of little benefit; that utilising modern technology and administrative techniques in the court system can be very useful, but that many charges, such as those aimed at streamlining jury trials, at decriminalisation or at diverting people from the system, will affect only a very small proportion of criminal cases. While it may not appear to be very systematic, each part and procedure of the criminal justice system is inextricably linked, and this must be constantly borne in mind in drawing up reforms. A controlled intake is just as important as efficient processing mechanisms. An unrestrained flood of cases can sabotage the most innovative procedures. In fact, speedier processing and increased resources may make criminal prosecution a more viable and attractive proposition in cases which previously might have been kept out of the system, thus making it even more imperative that controls be maintained on the numbers and types of cases that come into the criminal justice system.

These are not the only concerns, or even the most important ones, that must be addressed by any Commonwealth jurisdiction which is considering instituting changes to deal with delays in the administration of justice. There are a number of basic issues which, although touched on in the body of the text, are not dealt with at length. Nevertheless, they cannot be ignored in the hope that they will disappear. In contrast to the rather technical problems raised in the preceding paragraph, these issues are of a more jurisprudential nature, and logically, should be addressed before reforms are instituted. Unfortunately, this is rarely, if ever, the case. Instead, policy-makers pursue the path of expediency, leaving others to ponder the future of the philosophical underpinnings of the common law system of criminal justice.

An all-pervasive atmosphere of crisis is prompting numerous changes in how we process criminal cases; but what we have is a classic case of being so concerned with pruning individual trees that the basic state of the forest is being neglected. For example, throughout the common law world there is a dearth of adequate research on the operations of the criminal justice system. The overriding concern, both now and in the past, is on getting the work done rather than on analyzing how it is done. This makes it difficult to say with any degree of certainty whether delays are indeed any worse than they have been in the past, and if they are, what the causes are. There is little hard evidence that the criminal courts used to function more efficiently. It is possible that while they were perhaps once able to process cases more expeditiously, this was because there was a distressing lack of concern for the interests of the accused.

Given the existence of this deficiency, we lack an adequate basis for grounding reforms. Such research would take a significant amount of time and effort. Unfortunately, the widespread feeling of crisis makes us reluctant to wait for this information, before deciding on a plan of action. Hence, we proceed in a piecemeal fashion on a trial-and-error basis, adhering faithfully to the principle of incrementalism. Further, having instituted this plethora of changes, it is often difficult to see just how much impact they are having, in the absence of adequate evaluation of the criminal justice system. New procedures and administrative measures are often introduced without there also being an in-built evaluation of their operation. General methods of measurement may show that processing time has been reduced, but in the absence of controls and follow-up studies, it is possible that other factors are responsible for this result.

Rationality, not desperation, should be the guiding principle. This demands not only careful observation and analysis of the way the system operates, but also a thoroughgoing examination of the broader implications of both the problem and its possible solutions. What needs to be considered, for example, is whether the use of the criminal law as a regulatory tool has got out of hand. Can the criminal justice process, as presently constituted, ever cope satisfactorily with the kind of caseload it is currently being presented with? In other words, what should the criminal law legitimately be used for? Should the criminal justice process be adjusted to accommodate the changing nature of its caseload? If using this process is perceived to be the best way of handling such behaviour, then the answer should be in the affirmative. Otherwise, due consideration should be given to finding alternative methods of dealing with non-traditional crimes, leaving the criminal courts to deal with what has long been accepted to be the criminal law's business. Regardless of whether the ambit of the criminal law is circumscribed or not, there should also be a reassessment of modern-day expectations of the criminal justice system. Perhaps many of our current difficulties stem from the fact that our expectations are unrealistic. Technology, automation and assembly-line production have conditioned us to expect instant gratification. Instant justice, however, is neither desirable nor feasible; justice cannot be stamped out of plastic moulds.

Of course, justice itself is not a static immutable quality. What a fair trial should consist of should also be the subject of careful consideration. Have circumstances so altered that fundamental changes in trial procedures are necessitated? Can the widespread right to counsel and legal aid justify more summary forms of trial and less restrictive rules of evidence, for example? The answer should depend on whether such changes measure up to reformulated standards of fairness or whether they are simply the product of expediency.

This brings us back to a major theme threading through the body of this study; the tension between expediency and fairness. Elevation of the former to a motivating force behind system change would tend to support the proposition that the mere accomplishment of adjudication is enough. But is it? Should we not endeavour to keep alive the worthy ideal that the manner of adjudication is of paramount importance. Progress can still be made in making the criminal justice system more efficient, for it is far from being perfect in design or in its administration. Nevertheless, efficiency must not be pursued oblivious of fairness and justice:

> [D]ue process today is threatened by the inefficiencies which afflict courts all across the country. Unless antiquated, wasteful, and cumbersome procedures are replaced by those more rational and expeditious, the courts may find themselves unable to afford deliberative, due process adjudication to any litigants. The machinery may simply grind down under the overload, while public respect for legal institutions erodes correspondingly. The legal order is not powerless to deal with this threat. The whole point of introducing more efficient and better structured...processes is to make it possible for the courts to have time for reflection and study and hence sound judgement on contested issues of substance, in the face of unprecedented caseloads. Efficiency is a means, not the end. Properly understood, it is a rubric for new ways in court procedures of eliminating steps which serve no purpose, of eliminating long

> lapses of time where nothing happens....of relieving judges of chores which do not require judicial attention, and so on, all to the end of making it possible for the indispensable process of judgement to function on an informed basis and within some acceptable period of time. Thus, viewed in proper perspective, efficiency and expedition are the handmaidens of due process.[1]

A blind concern with eliminating delays cannot be tolerated because it is likely to produce an over-emphasis on haste, which is perhaps the greater of the two evils. Delays in the administration of justice did not manifest themselves overnight and it would be doing them, and the participants in the criminal justice system, an injustice if overnight solutions were to be attempted.

Footnotes

[1] D.J. Meador, Criminal Appeals: English Practices and American Reforms (Charlottesville, 1973), p. 163.

APPENDIX

Ontario Attorney General's Guidelines on Disclosure in Criminal Cases

The Guidelines are in effect only in relation to prosecutions to which the following Criminal Code sections apply:

47(1)(2)(a)(b), 75, 76.1, 76.2, 78(a), 79(2)(a), 144, 146(1), 203, 218(1), 219, 221(1), 222, 223, 230, 232, 247(1), 251(1), 303 and 304.

These sections constitute all offences under the Criminal Code where the maximum penalty is life imprisonment except the offence of breaking and entering a dwelling house.

The Guidelines are:

1. Where Crown Counsel is of the belief that a plea of not guilty may be entered, he will make himself available to defence counsel by proposing in writing to defence counsel, prior to the date on which the matter is set to proceed, that defence counsel meet with him prior to the date on which the matter is set to proceed to review the evidence that the Crown expects is available and to discuss the nature and scope of the written disclosure that can be available in the case in the manner described in paragraphs 2(b) and (c) below.

2. (a) When such a meeting takes place, Crown Counsel, after reviewing the evidence that the Crown expects is available and discussing the nature and scope of the written disclosure that can be available in the manner described in paragraphs 2(b) and (c) below, will ask defence counsel to undertake to the Crown what the accused's election is going to be.

   (b) If the accused proposes to elect trial in Provincial Court, Crown Counsel will agree to provide him with the written disclosure described in paragraph 3 below within a reasonable period of time prior to trial.

   (c) If the accused proposes to elect trial in County or Supreme Court, or if the offence is in the absolute jurisdiction of the Supreme Court, Crown Counsel will endeavour to reach agreement with defence counsel as to the number of witnesses that must be called at the preliminary hearing. If agreement is reached on the limitation of witnesses, Crown Counsel will, in order to ensure committal for trial, ask defence counsel to undertake that he will, after the calling of the agreed number of witnesses at the preliminary hearing, either:

   (i) consent to a committal for trial pursuant to s.476 of the Criminal Code,

   or (ii) admit, for the purpose of the preliminary hearing, such facts as are disclosed in the written disclosure as, in the opinion of Crown Counsel, are necessary for the purpose of the preliminary hearing, or (iii) agree to the filing of the synopsis of the expected evidence of such witnesses who have not testified at the preliminary hearing as, in the opinion of Crown Counsel, are necessary for the purposes of the preliminary hearing.

If such an undertaking is made by defence counsel, Crown Counsel will undertake to provide the written disclosure described in paragraphs 3(a) to (e) below after the agreed number of witnesses are called at the preliminary hearing.

(d) If

(i) defence counsel refuses to participate in a disclosure discussion after being afforded a reasonable opportunity to do so,

or (ii) a disclosure discussion is held but defence counsel refuses to give an undertaking regarding his client's election,

Crown counsel shall apply, pursuant to paragraph 6 below, for exemption from adherence to these guidelines.

(e) If a disclosure discussion is held but:

(i) agreement is not reached on the total number of witnesses to be called at the preliminary hearing,

or (ii) defence counsel refuses to give an undertaking pursuant to paragraph 2(c) to ensure a committal for trial,

Crown counsel will conduct a preliminary hearing in the ordinary way and will, after committal for trial, provide written disclosure pursuant to paragraphs 3(b), (c) and (d) below;

(f) If defence counsel participates in a disclosure discussion and agreement is reached as to the total number of witnesses to be called at the preliminary hearing and as to the manner of ensuring committal for trial pursuant to paragraph 2(c) above, but defence counsel subsequently, after the calling of the agreed number of Crown witnesses at the preliminary hearing, seeks to be relieved of his undertaking pursuant to paragraph 2(c) above, Crown Counsel will continue the preliminary hearing in the ordinary way, after an adjournment if necessary, and will, after committal for trial, provide written disclosure pursuant to paragraphs 3(b), (c) and (d).

(g) In a case involving more than one accused, where either paragraph 2(d)(i) or 2(d)(ii) or 2(e)(i) or 2(e)(ii) or 2(f) becomes applicable to one or more of those accused, Crown Counsel shall comply with these guidelines with respect to the remaining accused unless Crown Counsel applies for and receives an exemption from adherence to these guidelines pursuant to paragraph 6 below with respect to those remaining accused. If no such application for exemption is made or granted, Crown Counsel is entitled to seek an undertaking from counsel for the remaining accused, that any information provided to them by the Crown pursuant to these guidelines not be passed on by them to the other accused or counsel for the other accused.

3. Written disclosure should include the following:

(a) A synopsis of the evidence of each witness who is not examined at the preliminary hearing by either the Crown or the defence and whom the Crown proposes to call at trial as part of the Crown's case-in-chief.

No such synopsis need be provided in respect of any witness whom the Crown proposes to call at trial in reply only.

No synopsis that is provided need necessarily refer to any evidence of the witness that the Crown does not propose to elicit as part of the Crown's case-in-chief because such evidence would be relevant in reply only.

Each synopsis will be prepared on a form which will bear the following caution:

> "This synopsis is provided to defence counsel as part of a programme designed to give to the accused disclosure of the Crown's case. It may not have been possible for Crown Counsel to interview this witness prior to the delivery of this document to defence counsel and, accordingly, the synopsis may be incomplete. Should other material matters come to the attention of Crown Counsel, he will provide to defence counsel a synopsis of such additional matters orally or in writing if feasible prior to the calling of this witness at trial. The Crown will consider such additional matters as part of the original synopsis."

(b) A copy of any written statement and a report of any oral statement made by the accused to a person in authority which the Crown intends to tender at trial as part of the Crown's case-in-chief, together with any other written statement or report of any oral statement or part thereof made by the accused to a person in authority which, on its face, relates to the proof or disproof of the elements of the offence, within the custody or control of the prosecution.

(c) A copy of any prior criminal record of the accused in the custody or control of the prosecution.

(d) Copies of photographs and documentary evidence capable of reproduction which the Crown proposes adducing at trial and copies of all expert's reports which on their face relate to the proof or disproof of the elements of the offence and which are in the custody or control of the prosecution.

(e) The names and addresses of all witnesses whom the Crown, at the time of the delivery of items (a) to (d) above, proposes to call as part of the Crown's case-in-chief at trial, unless, in the opinion of Crown Counsel, there is reason to anticipate that the witness may be intimidated or otherwise improperly influenced.

4. Crown Counsel will further agree to provide such further materials within categories (a) to (e) in paragraph 3 above as may come into the possession of the Crown prior to the calling, at the trial, of the witness to whom the material relates except in cases to which paragraphs 2(e) and (f) above apply in which event the further material referred to therein shall be limited to categories (b), (c) and (d) in paragraph 3.

5. Crown Counsel shall in his discretion determine how these guidelines can best be followed in a case when an accused is unrepresented.

6. The Attorney General has directed that these guidelines be followed in every prosecution involving the section numbers of the Criminal Code referred to above unless Crown Counsel in charge of the prosecution is exempted from adherence to the guidelines or any part thereof by the Regional Crown Attorney.

OUTLINE FOR PRE-TRIAL CONFERENCE REPORT, ISSUED BY THE HIGH COURT OF ONTARIO

NOTE: THE POSITIONS HEREIN ARE TENTATIVE, ALL AGREEMENTS ARE WITHOUT PREJUDICE AND PURELY FOR THE ASSISTANCE OF THE COURT IN THE RESOLUTION OF TRIAL PROBLEMS. IF ANY CHANGE BECOMES NECESSARY COUNSEL WILL ENDEAVOUR TO ADVISE EACH OTHER AND THE COURT PROMPTLY.

____
Date

REGINA v. _______________________

Counsel for Crown:

Counsel for Accused;

Indictment reads as follows:

1.

2.

3.

4.

COUNSEL FOR THE CROWN STATES THAT HE HAS MADE AND WILL MAKE DISCLOSURE OF THE CROWN'S CASE AS FOLLOWS:

(check one) _____ Pursuant to the Attorney General's guidelines;

(Where guidelines are not applicable)
By responding to all reasonable requests to make
_____ known to the defence all relevant factual matters.

1. SUMMARY OF BACKGROUND FACTS:

2. PRELIMINARY MATTERS:

(a) Will there be any preliminary matters raised by the prosecution? If so, what?

(b) Will there by any preliminary matters raised by the defence?

Motion to quash	___Yes	___No
Application for separate trial	___Yes	___No
Application for change of venue	___Yes	___No
Challenge for cause	___Yes	___No

Others (please specify)

(c) Is there any issue as to the competency of the accused to stand trial? ___Yes ___No

Will it be raised by the defence? ___Yes ___No

Will it be raised by the Crown? ___Yes ___No

3. WILL THE ISSUE OF INSANITY UNDER s.16 OF THE CRIMINAL CODE BE RAISED AT THE TRIAL?

By the Crown? ___Yes ___No

By the Defence? ___Yes ___No

4. THEORY OF THE PROSECUTION:

5. THE DEFENCE:

6. WILL ANY OF THE FOLLOWING SPECIFIC DEFENCES BE RAISED?

(a) drunkenness ___Yes ___No

(b) provocation ___Yes ___No

(c) alibi ___Yes ___No

(d) lack of intent ___Yes ___No

(e) self-defence ___Yes ___No

(f) automatism ___Yes ___No

(g) accident ___Yes ___No

7. WILL EXPERT EVIDENCE BE CALLED BY THE DEFENCE?

8. FACTUAL ADMISSIONS COUNSEL ARE PREPARED TO MAKE PURSUANT TO s.582 OF THE CRIMINAL CODE:

9. DOES THE DEFENCE ADMIT CONTINUITY OF EXHIBITS?

10. OTHER LEGAL ISSUES LIKELY TO ARISE AT TRIAL:

(a)

(b)

Do counsel anticipate there will be a voir dire and if so, on what issues?

11. HAS A DATE BEEN SET FOR TRIAL?

ESTIMATED LENGTH OF TRIAL:

12. REMARKS: