

PRE-TRIAL REMANDS IN CUSTODY

A memorandum by the Government of Canada

Issue

What efforts have been made in Canada to restrict the number of persons deprived of their liberty while awaiting trial ?

As suggested at the previous Commonwealth Law Ministers' meeting, these efforts might take the form of (a) increasing the availability of bail, (b) streamlining pre-trial criminal procedures, (c) imposing deadlines on the prosecution, and (d) taking into account time spent in custody in fixing any subsequent sentence.

Background

The Canadian Government has addressed the issue of pre-trial remands in custody through legislation based on at least two fundamental rights:

(1) Right to Judicial Interim Release or Bail

Even though the right to interim release has traditionally been at the foundation of the common law legal system inherited largely from England, this right is now enshrined in the Canadian Charter of Rights and Freedoms, being Part 1 of the Constitution Act 1982. Current provisions for interim release are set out in Sections 448 to 459 of the Criminal Code of Canada as amended by the Bail Reform Act of 1971. These provisions stem from recommendations made by the Canadian Committee on Corrections (Quimet Commission) in 1969 and serve to increase the onus on the arresting police officer to provide reasons at a show cause or bail hearing as to why a suspect should be remanded in custody, thus increasing the likelihood that the suspect will be released on bail. Under these provisions, the court may only remand an accused in custody:

- "On the primary ground that his detention is necessary to ensure his attendance in court in order to be dealt with according to law; or
- On the second ground, that his detention is necessary to the public interest or for the protection or safety of the public having regard to all the circumstances including any substantial likelihood that the accused will, if he is released from custody, commit a criminal offence or an interference with the administration of justice."

(2) Right to Trial Within a Reasonable Time

Under section 11 of the Canadian Charter of Rights and Freedoms, 1982, any person charged with an offence "has the right....to be tried within a reasonable time". This right

was incorporated into the Criminal Code through the Criminal Law Amendment Act of 1985. Some of the factors which the courts have been prepared to consider are the length of delay, the reason for the delay, the accused's assertion of his right to a speedy trial and the prejudice to the accused occasioned by the delay.

At the present time, a Correctional Law Review is being conducted as part of an overall review of the criminal law in Canada. It is expected that the report, due in 1987, will rationalize further the sentence calculation process by ensuring that it will include a consideration of the time a person spends in pre-trial custody. For example, the issue will be examined as to whether a person in pre-trial custody could be eligible for a Temporary Absence and, as well, be allowed to earn remission for good behaviour.

Status

An overview of the use of pre-trial custodial remands for adults (aged 18 years and over) in Canada is provided by recent statistics on adult correctional services from the Canadian Centre for Justice Statistics (Statistics Canada):

- During the fiscal year 1984-85, an approximate total of 900,000 persons were charged with an offence but only 61,000 (6.7%) or 1 out of every 15 persons charged was remanded in custody. Conversely, nearly 93% of accused persons remained in the community or were granted interim release, pending further court proceedings.
- During this same period (1984-85), approximately 189,000 of the total persons charged were admitted to provincial, territorial, or federal adult correctional institutions but the 61,000 remands represent only 32% of these admissions and account for 12% of the average daily inmate count.

The Canadian figures may be placed in the context of comparable ones contained in the conference papers of other Commonwealth countries (LMM(86)9 #9, #28 and #34):

<u>Country:</u>	<u>Time Period:</u>	<u>Percent of Prison Population:</u>
Canada	1984-85 fiscal	12.0% of average daily count
Australia	Sept.1, 1985	14.3%
New Zealand	July 1, 1985	9.6%
Hong Kong	Dec. 1, 1985	8.9%
Ghana	a recent year	20% "approx."

A recent (1986) Canadian Centre for Justice Statistics study (Custodial Remand in Canada - A national Survey) conducted a three month "snapshot" during April-June, 1985 of "pure remand" (i.e. persons in custody for remand only under a Warrant of Remand or a Warrant for Committal, and without the "dual status" of serving at the same time a sentence for another offence). While there were some limitations on the study (e.g. Quebec observes different reporting practices for remand), it nevertheless produced valuable information, including the following description of remand inmate characteristics:

- the vast majority were males (92%), non-Native (88%), less than 30 years old (67%) including 46% aged between 18 and 25 years, single (72%), unemployed (55%) and with between 9 and 12 years of education (75%).
- 70% of remand inmates had served a jail or prison sentence previously and some were known to be on probation at the time of admission;

-with regard to the most serious offence, some 27% of the remand inmates were charged with offences "against the person" while, using another method of classifying the most serious offence, nearly one half of these inmates were charged with either "serious violent" (11%) or "serious" (38%) offences.

In the same study it was found that custodial remand status was routinely terminated within one week or less in 64% of the cases. In addition, the modal (i.e. most common) length of stay was 1 day, the median (mid-point) length was 4.6 days and the mean (average) length of stay in remand was 11.1 days. However, it was also found that the group representing 64% of the cases utilized only about 12% of the "bed space" available for remand inmates in correctional institutions while the remand inmates who were detained for one month or more comprised only 14% of the cases but used 65% of the remand "bed space" during the year.

Reasons given in this study for terminating a custodial remand status were: 45% were "released at court" and 32% were moved directly from remand status to "sentenced" (i.e. serving a jail or prison sentence).

Canadian Perspective

The issue of a large number or proportion of persons deprived of their liberty while awaiting trial is now considered to be a relatively minor one in Canada. This position is taken because legislative initiatives in recent years that articulate fundamental rights in Canadian society have addressed this issue sufficiently to ameliorate most of the problem that existed in the past.

Rather than intrude on judicial powers or impose deadlines directly on the prosecution, the Canadian approach to the issue is to allow the courts to interpret independently those fundamental rights under the Charter which contribute towards the likelihood of persons being released from custody. As indicated above, these include the right to release from custody unless sound reasons are provided to show otherwise and the right to a speedy trial. Consequently, it is not considered necessary, for the objective of pre-trial remand, to streamline further the pre-trial criminal procedures or to impose deadlines on the prosecution. Nonetheless, time spent in pre-trial custody is currently being re-examined to ensure it is a consideration for any subsequent sentence.

In addition, the Department of Justice Canada is embarking on a national study of the disposition of criminal cases of which one area is the granting of judicial interim release and bail and the placing of persons charged in pre-trial custodial remand.

In contrast to the Canadian perspective, other countries have addressed the problem more directly. In Hong Kong (see paper LMM(86)28), where the problem is currently being examined by the Law Reform Commission, it is likely that bail will become more widely available. In addition to making bail more easily obtained, solutions suggested in the Ghana paper (LMM(86)34) are to try cases more speedily and to reduce the use of custodial sentences. Another approach, which is now being examined in the United Kingdom (see LMM(86)9), is to set limits in custody cases on the time spent in prison between first appearance and trial.

Finally, the analysis by Mr W Clifford (LMM(86)9), indicating a trend in a number of countries towards an increasing use of pre-trial remand, suggests this may be attributed to the growth of widespread discretion and accountability throughout the criminal justice process. However the Canadian approach appears to provide a balance to these trends.