Proportionality Discussion Paper

Steering Committee on
Justice Efficiencies and Access to the Justice System

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Executive Summary

Criminal rules of evidence and procedure, and *Charter* applications available in criminal cases have, over the last twenty years, dramatically lengthened criminal trials and increased their cost. Although the drafters of the original *Criminal Code* made procedural rules proportionate to the seriousness of the offence charged, the justice system has now drifted to a place where essentially the same rules and remedies apply to all criminal charges, regardless how serious.

As the recent Green Paper issued by the Attorney General of British Columbia points out, although crime rates and charge rates are down in that Province, court backlogs and delays continue to grow. The Green Paper suggests that the work done to date to streamline processes has not been sufficiently bold and that more dramatic action may be required.[1]

This discussion paper presents proportionality options for relatively minor infractions that avoid the use of unnecessarily robust rules currently required for all criminal trials. Hopefully, this paper will serve to stimulate discussion and creativity regarding this exciting but challenging issue.

In this paper, the Steering Committee on Justice Efficiencies and Access to the Justice System (The Committee) considers offences to be "relatively minor" when they historically have attracted low penalties. Ultimately, of course, elected officials would be responsible for determining which offences, if any, should be visited with a more proportional response.

A number of proportionality options were examined by the Committee. Five proportionality options were thought to merit specific comment:

1. Administrative approaches to impaired driving (effectively decriminalizing the first offence of impaired driving).
2. Increased hybridization (hybridization is the legislative process of converting a straight summary offence or a straight indictable offence into a hybrid offence).
3. A 'No jail' election in the *Criminal Code* (amending the *Criminal Code* to allow the Crown to elect that an offender not receive a custodial sentence).
4. Provincial legislation for minor property offences such as theft or mischief.

[1] *Modernizing British Columbia's Justice System*, Ministry of Justice and Attorney General Green Paper, February 2012

5. Criminal arbitration (with the accused giving up his/her right to a trial and *Charter* protection in favour of a more user-friendly and less intimidating process).

The Committee discussed the advantages and disadvantages of each option with options 1 and 5 attracting the greatest interest. Ultimately, the Committee recommends that the general principle of proportionality should inform the advancement of any initiatives aimed at streamlining criminal processes or developing justice efficiencies. In the post *Charter* world, moving towards greater proportionality is challenging but, the Committee believes, essential.

The Committee also strongly recommends that proportionality options should complement, and not replace, initiatives aimed at diverting people out of the criminal process entirely in appropriate circumstances, especially when those people have mental health and addiction challenges.

Introduction: The Burgeoning Growth and Complexity of the Criminal Justice System

The increasing complexity of criminal rules of evidence and procedure, and *Charter* applications available in criminal cases have, over the last twenty years, dramatically lengthened criminal trials and increased their cost. Notable examples are *Charter* applications litigating issues such as disclosure (ss. 7, 11(d)); search and seizure (s. 8); detention (s. 9); and the right to counsel (ss. 7, 10(b)). Although the drafters of the original *Criminal Code* made procedural rules proportionate to the seriousness of the offence charged, we have now drifted to a place where essentially the same rules and remedies apply to all criminal charges, regardless how serious. While the full protection of the *Charter* is necessary and strict rules of evidence are appropriate to ensure fairness to a person charged with a serious criminal offence, particularly where the person's liberty is in jeopardy, is this protection necessary and appropriate with respect to every offence, no matter how serious the nature of the offence or how serious the consequences upon conviction? Is this a proportionate response?

Imagine if the criminal justice system were a health care system. Patients who may be suffering from maladies ranging from heart failure to hangnail have one destination, the hospital. Forty years ago hospitals could diagnose and treat patients promptly. Over the passage of time, however, diagnostic equipment and techniques have improved a great deal. Some are also, however, extremely costly and take time and resources to use. All patients arriving at this hospital, regardless of what might be potentially wrong with them, have the right to be assessed using the full panoply of available equipment and services, up to and including the most expensive: CAT Scans and MRIs. They also have the right to be seen and diagnosed by the most costly resource the hospital has to offer, the physician. As a result, patients with severe, life-threatening conditions are often kept waiting while a radiologist is using an MRI to diagnose a simple laceration and a senior surgeon sutures the wound.

This situation bogs the hospital down to the point that there are actually more people in the waiting room waiting to receive diagnosis and treatment than there are patients in the hospital receiving treatment. There is even talk of providing treatment in advance of diagnosis in the waiting room itself since the condition of many patients continues to deteriorate as they are waiting.

There are a number of ways the hospital administration can solve this problem. One is simply to increase the availability of everything for everyone – brute force resourcing. This would, however, bankrupt the system even assuming the human resources for such an initiative were available. It

would be wonderful if unlimited resources were available to diagnose even the smallest of maladies but it would not, of course, be realistic.

Another way to fix the time to treatment issue is to make the use of current diagnostic procedures as efficient as possible. Best practices from other jurisdictions are studied for the most effective use of all of the diagnostic equipment in the hospital. Meetings are held with the physician and the patient to urge the patient to agree to forgo MRI use and the use of other expensive diagnostic techniques. The decision, however, remains with the patient and patients cannot be criticized for insisting on the best.

Another option is to provide that the rigorousness of diagnosis be proportional to the severity of the potential malady. The hangnail patient does not get an MRI, nor does she see a physician. A nurse practitioner with the ability to recognize a hangnail when he sees it can do the job.

This does not result in the perfect diagnosis of all maladies in the hospital. But, by reducing the resources used to treat minor cases, more serious cases like heart failure are diagnosed more quickly and accurately.

Seeking proportionality in the criminal justice system may be seen by some as the bureaucracy's attempt to save money. However, assuming resources are not infinite, the goal of proportionality is to achieve a fair resolution to a case with means that are proportionate to the seriousness of the charge. While the implementation of proportionality options may be challenging and controversial, it may provide significant advantages for offenders, victims, and society.

Principles to Guide Decisions about What Proportionality Options are Best

The Committee believes that the following principles should guide any analysis of potential proportionality options:

- Proportionality options should not undermine respect for the administration of justice.
- Proportionality options should affect high volume offences.
- Proportionality options should target those cases that use a disproportionate amount of trial time in court.
- Proportionality options should target cases least likely to result in incarceration.
- Proportionality options should have a limited impact on public safety.
- Proportionality options should improve the efficiency of the criminal justice system.
- Proportionality options are easiest to implement when within provincial legislative competence. More difficult options involve federal legislative changes. The most difficult options require a coordination of federal and provincial legislative changes.
- Proportionality options should not operate unfairly to the alleged wrongdoer.

Overview of Proportionality Options

1. Administrative approaches to impaired driving

In April 2010, British Columbia introduced major amendments to its *Motor Vehicle Act* (MVA), ensuring that impaired drivers would face an instant loss of their driving privileges and impoundment of their vehicles. Through the use of administrative sanctions, British Columbia's goal was to apply immediate and severe penalties to impaired drivers, with the goal of increasing deterrence.

With the introduction of strengthened administrative sanctions, the potential exists to deal with first time impaired drivers through administrative sanctions, rather than the *Criminal Code*. While impaired drivers would still face the potential for *Criminal Code* charges, in practice administrative sanctions only would generally be applied to first time offenders, where no harm occurred. Since impaired driving prosecutions take up a substantial amount of court time, the administrative approach to impaired driving has great potential to increase justice efficiency.

2. Increased hybridization

Reclassification, or hybridization, is the legislative process of converting a straight summary offence or a straight indictable offence into a hybrid offence. The latter permits the Crown to elect whether to proceed by indictment or summarily and therefore allows the Crown to select the most appropriate procedure for prosecuting an offence in light all of the circumstances surrounding the case.

An accused person facing a summary conviction trial in provincial court benefits from a more expeditious procedure, lower penalty range, wider appeal rights, more advantageous rules with respect to pardons, and generally a lower potential impact associated with a conviction. For instance, a person convicted of a summary conviction offence in first instance will not necessarily be viewed as harshly on a second conviction as a person who had previously been convicted of an indictable offence. With respect to pardons, a person sentenced for an offence punishable on summary conviction must generally be conviction-free for three years before applying for a pardon, while someone sentenced for an offence prosecuted by indictment must be conviction-free for a period of at least five years, depending on the circumstances, before seeking a pardon.

In addition to the benefits to an accused person, keeping proceedings in provincial court has advantages to the justice system as a whole in terms of reducing delay and allocation of resources. The procedural efficiencies include:

- A significant reduction in overall court time required;
- A decrease in the time elapsed between arrest and trial. It is to everyone's advantage to proceed more quickly;
- Fewer transcripts, subpoenas and indictments need to be prepared, resulting in reduced costs for the administration of justice;
- Fewer cases need to be transferred between the provincial and superior courts; and
- Less demand for jury panels to be brought in.

In addition to the purely procedural advantages associated with trial in provincial court, proponents argue that hybridization allows a measured response by the prosecution based on the gravity of the offence and the circumstances of the witnesses. The increased flexibility that would be available to the prosecution in electing how to proceed would permit the Crown to reflect upon the seriousness of "a particular offence" and the "particular offender," while taking into account any special circumstances surrounding the victim or any of the witnesses. When matters proceed summarily, witnesses are not required to testify on two separate occasions i.e. for the preliminary hearing and then for the trial. This may result in a reduction in the inconvenience to the private citizens called on to testify, as well as significant savings for law enforcement agencies.

However, it is important to note that the disclosure obligations, full Charter rights and protections, and many procedural protections remain the same for both indictable and summary prosecutions.

In the fall of 2003, Federal/Provincial/Territorial (FPT) Ministers Responsible for Justice requested that the Working Group on Criminal Procedure of the Coordinating Committee of Senior Officials (CCSO) develop a hybridization scheme for the reclassification of a large number of offences, conduct consultations and report back on its findings.

Ultimately, the Working Group recommended that rather than simply hybridizing all offences, each offence would be considered individually. In making determinations about whether to hybridize offences within a particular group, one could consider, among other factors, whether or not the offence embraced a wide range of behaviours varying considerably in gravity. For example, arson by negligence is currently a straight indictable offence (subsection 436(1) of the *Criminal Code*). However, situations that fit the elements of the offence vary considerably in their seriousness and may justify, in some circumstances, a Crown election to proceed summarily (e.g. where the fire does not cause bodily harm and results in minimal damage to property).

3. 'No jail' election in the *Criminal Code*

Most of the offences occupying time and attention in the criminal courts do not result in a deprivation of liberty upon conviction, nor was deprivation of one's liberty ever a real prospect. Yet, the trials of these offences can involve frequent and lengthy *Charter* applications. Strict rules of evidence also apply in such cases. Is this necessary?

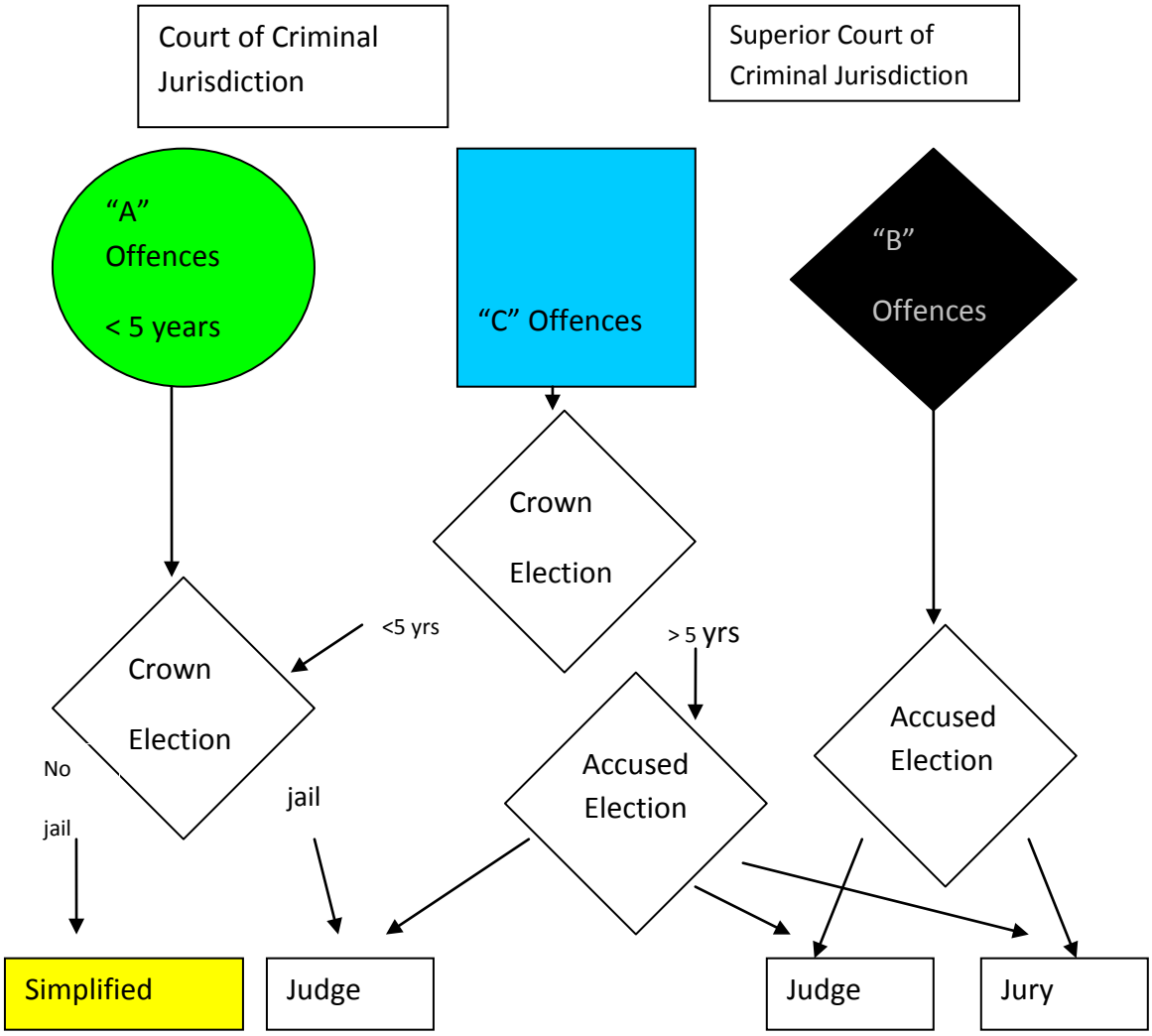
What if the *Criminal Code* were amended to allow the Crown to elect that an offender would not receive a custodial sentence? The "no jail" election option could result in a separate stream of court proceedings where deprivation of one's liberty, i.e. imprisonment, is not possible. Section 7 of the *Charter* is available only where there is a deprivation of life, liberty and security of the person not in accordance with the principles of fundamental justice. In the absence of imprisonment as a sanction, the liberty component of s. 7 of the *Charter* may not come into play or may be reduced, with the result that *Charter* applications based upon s. 7 may not be available.[2] It is possible as well that less demanding rules of evidence could be provided for in these cases without offending the *Charter*. Furthermore, in a system where a person's liberty interest is not imperiled, the scope and extent of the other *Charter* legal rights (i.e., ss. 8-14) may be reduced.[3]

[2] One of the most time and resource intensive aspects of criminal litigation is the provision of disclosure. The right of the accused to disclosure is rooted in Section 7 of the *Charter.* For these less serious cases, if the impact of section 7 is reduced it would like translate into less onerous disclosure requirements.

[3] It is possible that the courts will decide that there would be liberty infringements arising from conditional sentences as well as incarceration.

Following are two potential "no jail" options:

A) "No Jail" Option Requiring Significant Procedural Reform



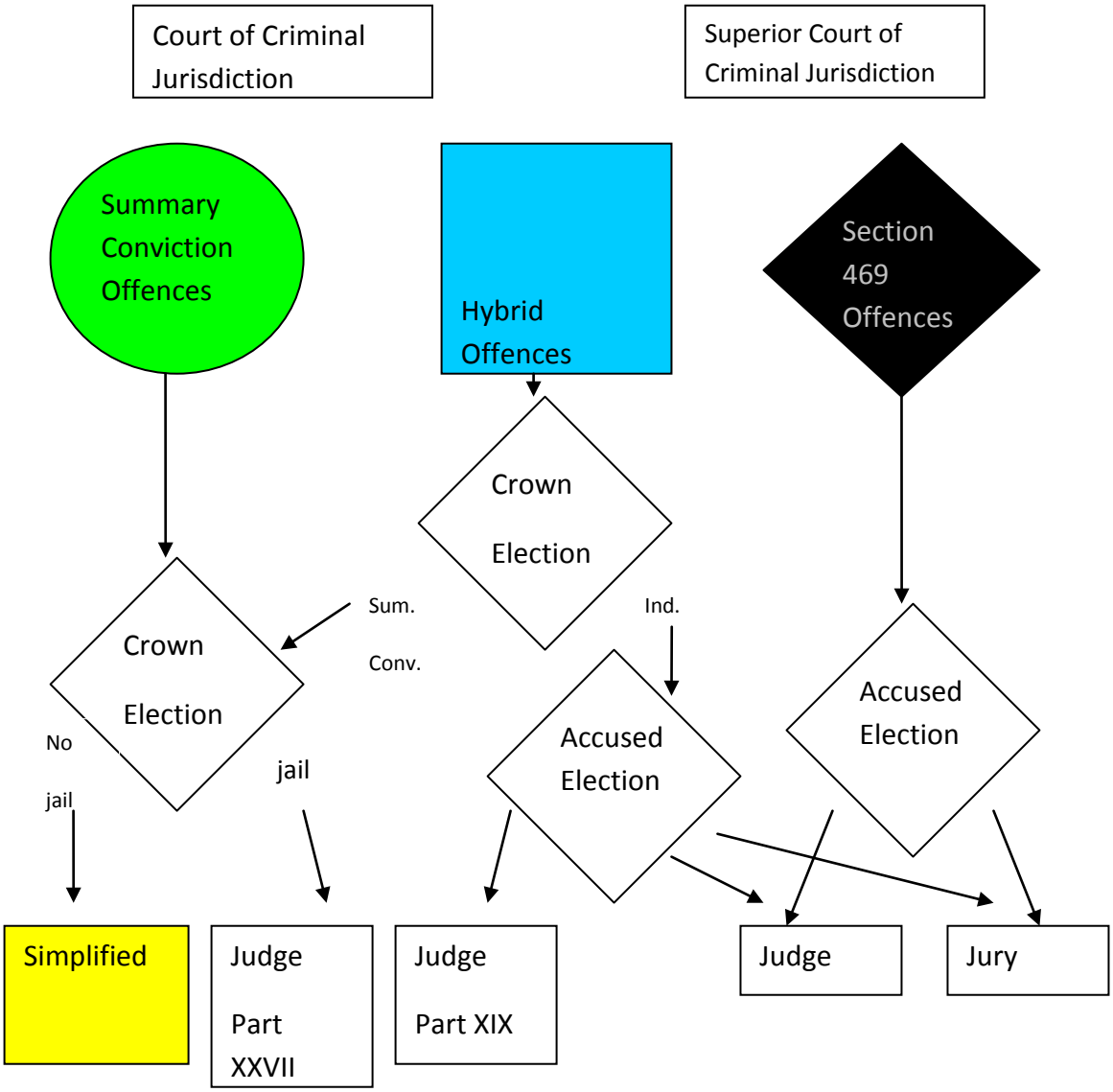
The proposal above would require significant procedural reform. Under this new procedure there would be three categories of offences. "A" offences would be low category offences tried by a Court of Criminal Jurisdiction. Upon a Crown "no jail" election, the offences would be tried using a more simplified procedure.

"B" offences would be high category offences tried by a superior court judge or superior court judge and jury, depending upon the election of the defendant. Imprisonment would always be a possible sanction and they would always be tried traditionally.

"C" offences would be hybrid offences. The Crown would elect as to whether the offence should be subject to a lower or a higher maximum punishment. If subject to the lower maximum (5 years to avoid a jury trial), it would be tried by a Court of Criminal Jurisdiction and the offence would be tried by simplified procedure or traditionally depending upon a further election by the Crown as to whether imprisonment were a possible sanction. If subject to the higher maximum, it would be tried traditionally by a provincial court judge, a superior court judge, or superior court judge and jury, upon election by the defendant.

When tried traditionally, offences would be tried as they are now. The significant change would occur when an offence is tried in the new simplified fashion. Although this "simplified" box occupies a small part of the chart, we know from statistical research that many less serious cases fall inside this box. The procedure for these offences could be more streamlined in nature, similar to a bail hearing, for example. Just as different jurisdictions in Canada now have unique bail procedures, this model could allow for local practices. Disclosure could be reduced and could consist of an outline of the Crown's case and the evidence that it intends to adduce. Most significantly, with imprisonment not being possible, *Charter* applications would no longer be the norm, decreasing both the frequency and length of trials. In trying offences for which a person's liberty is not in jeopardy, the court system would provide a more proportionate response, leaving it better able to effectively and efficiently deal with more serious category "B" and "C" offences.

B) Simplified "No Jail" Option



The option above is a more modest "no jail" option, building on, rather than fundamentally re-tooling, the current system of classification in the *Criminal Code*. The advantage of this second option would be an easier transition. The disadvantage would be that it would be more complicated since it would still include "absolute jurisdiction" offences in Part XIX.

4. Provincial legislation for minor property offences such as theft or mischief

Provinces could develop an administrative or quasi-criminal approach to handle less serious offences involving "property and civil rights."

With a quasi-criminal approach, minor property offences would be prosecuted provincially - like traffic offences or regulatory offences, without the possibility of jail or criminal stigma.

With an administrative approach, like that being followed for impaired driving cases in British Columbia, an adjudicator could, after considering the circumstances of the case, issue timely no-jail dispositions (such as fines, compensation orders, or work orders) for minor infractions. If the violator wanted the imposition of the administrative penalty to be reviewed, rather than bringing the case before a judge for a full (adversarial) hearing, he would appear before an independent reviewer and the reviewer would ensure that the initial adjudication followed the rules of natural justice. The review hearing could be based on an exchange of written submissions and responses and informal oral representations rather than the formal presentation of evidence like a criminal trial. The principles of natural justice would apply. The accused would retain the right to counsel, the right to discovery, and the right to examine documents - but only as these apply in the administrative law context.

5. Criminal arbitration

Criminal arbitration could apply where the accused is not willing to admit responsibility, and still wants their "day in court," but is willing to give up the right to a trial and *Charter* protection in favour of a more user friendly and less intimidating process. This would be a radical change in approach. However, if decision makers agree that there is an urgent need to find better alternatives to criminal prosecution, as the burgeoning criminal system is becoming paralyzed under its own weight, this option may be viable.

Arbitration, a form of Alternate Dispute Resolution (ADR), is well known across Canada and around the world in the area of civil litigation. ADR often includes dispute resolution

processes and techniques that act as a means for disagreeing parties to come to a resolution without traditional litigation. ADR has gained widespread acceptance among both the general public and the legal profession in recent years. The rising popularity of ADR can be explained by the increasing caseload of traditional courts, the perception that ADR imposes fewer costs than litigation, a preference for confidentiality, and the desire of some parties to have greater control over the selection of the individual or individuals who will decide their dispute.[4] The hope of ADR is "to replace justice and rights "talk" with actual compromise and agreement away from the courts." [5]

An example of an inquisitorial arbitration process currently underway in Canada exists in the form of the Indian Residential School Independent Assessment Process. Recognizing that the use of a traditional court process could delay matters until long after many potential claimants are dead, claims are currently being settled through the arbitration process, which was designed to be a timely, fair and safe alternative to civil litigation for claimants to resolve validated physical and sexual abuse claims, including wrongful confinement claims, outside of the litigation process.[6] This process involves an application and private hearings before an independent adjudicator. The adjudicator, as an independent decision-maker, is responsible for setting compensation awards within an established compensation framework. The claimant has the option to accept the award, appeal the decision, or pursue litigation.

There is not much literature on Criminal ADR. Sayantan Gupta, an Indian commentator makes some comment on the concept in his 2009 paper:[7]

> "Not all broken laws require prosecution to rectify the wrong. In today's complex society, prosecution often eludes justice. Often to obtain justice, we must reach outside the traditional parameters of prosecution. Movement in this direction comes from the growing realization that court-based adjudication is not the ideal form of justice in all circumstances. For some cases legal prosecution is not successful in terms of rehabilitating the offender, helping the victim, or protecting society. Prosecution is not

[4] Iriekpen, Davidson. "Nigeria: Multi-Door - Courthouse With a Difference" 2009. Available at: http://allafrica.com/stories/200903190148.html

[5] Grace, Maggie T. "Criminal Alternative Dispute Resolution: Restoring Justice, Respecting Responsibility, and Renewing Public Norms." *Vermont Law Review*, vol. 34, 2010: 563-596.

[6] A copy of the guide to this process can be found at http://iap-pei.ca/content/pdf/iap_guide_eng.pdf

[7] Gupta, Sayantan. "Alternative Criminal Dispute Resolution System: An Evolving Interface in India." 2009. Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1461375

> always viable even for legally sufficient cases. A legally sufficient case is that which is identified as having probable cause and all the elements of the crime present. Nevertheless, a legally sufficient case is not necessarily a trial sufficient case. To be trial sufficient a case must be strong enough to support a conviction. When it is not, we can use ADR techniques to resolve the conflict without 'dropping' the case."

By taking some "no-jail" cases out of the traditional court system, where Crown prosecutors and defence counsel engage in an adversarial process, and by engaging in an arbitration process, a large number of charges could be dealt with in a manner that works better for all concerned. Accused persons would face a less expensive, less intimidating and less complex option to deal with their criminal charges. The court system, at the same time, would have more time and resources for the expedient resolution of more serious cases.

For any kind of criminal arbitration to work effectively, the accused would need to waive his/her *Charter* rights, particularly the right against self-incrimination, as a condition precedent. Any sort of **forced** arbitration would surely violate sections 7 and 11(d) of the *Charter*.

<u>How could Arbitration be implemented in Criminal Cases?</u>

One possibility would be to amend the *Criminal Code* to allow provinces to elect whether or not they wish to develop a program of arbitration which would be contingent on an informed *Charter* waiver by the accused. Framed in this manner, the choice to develop an arbitration program would be left to the provinces and solutions could be crafted to deal with local demands. A precedent for this exists in section 717 of the *Code* which allows the establishment of a program of alternative measures. A procedure similar to the one followed by Indian Residential Schools Independent Assessment Process could be followed where an independent adjudicator uses an inquisitorial process.

<u>What would motivate an accused person to waive *Charter* rights to use Criminal Arbitration?</u>

This is a question asked by lawyers and judges. Why in the world would an accused person voluntarily give up his rights under the *Charter?* In order to answer this question, one must

view the criminal process through the eyes of the accused, not through the eyes of an experienced justice system participant.

Many accused persons facing justice unrepresented might sooner serve time in jail than face the intimidating and confusing world of criminal litigation. Even when represented, many accused persons who may be low functioning or suffering from addictions or mental illness do not understand what is happening in court. Further, many Aboriginal offenders do not trust the traditional justice system or may find it paralyzingly intimidating. Is justice being served in these cases? Would arbitration be seen by them as a better option? For those who argue that abandoning adversarial litigation in favour of arbitration would serve to imperil the interests of the accused, another argument might be made that it would reduce the risk of wrongful conviction in cases where intimidated accused would sooner plead guilty than face a process they greatly fear.

Arbitration and Help for the Offender

Criminal arbitration could be linked to justice services targeting addictions, mental health, etc. that address the root causes of crime, and increase public safety in the long run. These helping services would be a better fit in the world of criminal arbitration than they are in the world of adversarial criminal litigation.

Arbitration and Legal Aid:

An arbitration option may dovetail well with new approaches being used by legal aid programs. Instead of the "all or nothing" approach to the provision of legal aid, some programs are favoring an emphasis on the provision of duty counsel at the front end of the process.

Where an accused person may not be eligible for full legal aid coverage, initial advice by duty counsel on the effect of *Charter* waiver in criminal arbitration cases could be provided following which the accused, if the arbitration path were followed, would be more comfortable continuing on self represented.

Proportionality Options Comparison Chart

Proportionality Option	Advantages	Disadvantages	Mitigating Steps
1. Administrative approach to impaired driving (decriminalize simple, first offence for impaired driving)	• Impaired driving is a high volume offence that uses a disproportionate amount of court time. Targeting this offence could reap large benefits. • Impaired driving rarely results in a sentence of incarceration, thus, the penalties applied through administrative sanctions are similar to those obtained in the criminal process. • B.C. has already tried this approach with success. The B.C. government has not faced criticism for being soft on impaired drivers. Administrative sanctions were successfully communicated, and most news articles referred to B.C. having "the toughest impaired driving laws in Canada." • Impaired drivers in B.C. face steep fines and fees,	• There may not be support for an initiative that does not treat all impaired driving cases criminally. • Some are concerned that the process tips the scales of justice unfairly against the accused, without providing for a day in court. • A section of B.C.'s impaired driving law has been declared unconstitutional.[9] Justice Jon Sigurdson determined that the immediate 90-day driving penalty, fines and costs issued to people who blow over .08 in roadside tests are not "demonstrably justified in a free and democratic society." • As of February 1, 2012, a total of 250 people have joined a class action lawsuit to receive compensation after being	• This approach has been implemented in B.C., without any negative publicity, due to B.C.'s ability to successfully communicate the "toughness" of administrative sanctions.[10] • MADD has provided complete support for the BC approach. [11] • The Communications strategy could emphasize that all this option does is create an optional administrative approach; impaired driving will still be a *Criminal Code* offence. • The administrative option has the benefit of increasing capacity in the justice system. • The administrative approach should include a reasonably robust appeal process to mitigate

[9] *Sivia v. British Columbia (Superintendent of Motor Vehicles),* 2011 BCSC 1639

[10] An April 27th, 2010 news release Ministry of Public Safety and Solicitor General states, "B.C. introduces Canada's Toughest Impaired Driving Laws." Find at: http://www2.news.gov.B.C..ca/news_releases_2009-2013/2010PSSG0026-000472.htm

[11] "B.C.'s measures target impaired drivers more effectively than any Canadian jurisdiction has to date," said Andrew Murie, CEO of Mothers Against Drunk Driving Canada. "We believe these major, escalating penalties will better support both deterrence and enforcement, save lives and prevent hundreds of injuries each year on B.C.'s roads. We encourage other provinces to study what B.C. is doing and follow its example."

Proportionality Option	Advantages	Disadvantages	Mitigating Steps
	as well as driving prohibitions, vehicle impoundment and forced ignition interlock. This can all be triggered during a roadside stop by a police, without any immediate criminal charges or time in court. In other words, deterrence is achieved without a large criminal justice investment. • B.C.'s impaired driving laws are showing positive results. The first eight months of data (October 2010 to May 2011) showed a 51% decrease in fatalities, as compared to the average for the previous five years for the same time period. There were 35 alcohol-related motor vehicle fatalities between October 2010 and May 2011, compared to an average of 72 alcohol-related motor vehicle fatalities for the same October to May time period for the previous five years.[8]	punished under B.C.'s administrative approach.	*Charter* concerns.[12]
2. Increased hybridization	• There are many more *Criminal Code* offences that could be hybridized, thereby impacting a large number of prosecutions. • Greater hybridization of offences increases	• There may be a perception that hybridizing an indictable offence reduces the perceived seriousness of the offence. Alternatively, hybridizing a summary offence could	• A careful determination must be made as to which offences are appropriate for hybridization. Much of this work has been completed. • The benefits of

[8] http://www.pssg.gov.B.C..ca/osmv/news/index.htm
[12] *Supra* note 10.

Proportionality Option	Advantages	Disadvantages	Mitigating Steps
	efficiency and effectiveness by allowing Crown prosecutors the flexibility to choose the appropriate choice of procedure and penalty for the facts of a case. • Hybridization offers a way to simplify and accelerate the trial process in cases which are less serious and warrant a trial by summary conviction. Summary offences generally proceed more expeditiously and do not involve preliminary inquiries or jury trials. • Public safety could be enhanced by hybridizing serious summary offences, allowing Crown prosecutors discretion to proceed by indictment. • A great deal of F/P/T work has been done on this issue.	compel more people to provide fingerprints and photographs and subject them to greater criminal consequences. • The Canadian Bar Association, among others, has expressed concerns about limiting the use of preliminary inquiries and reducing the number of jury trials.	hybridization must be clearly communicated. It would be beneficial to provide statistics from Justice Canada's 2007 study on hybridization to communicate the benefits of hybridization and alleviate fears. • Place reasonable limitations of the rules of hybridization, such as excluding indictable offences punishable by a maximum term of imprisonment of fourteen years or more.
3. 'No jail' election in the *Criminal Code* (amending the *Criminal Code* to allow the Crown to elect that an offender not receive a custodial sentence).	• The "no jail" option would be applied to high volume offences that rarely result in imprisonment. • The "no jail" option would result in a separate stream of court proceedings where deprivation of one's liberty, i.e. imprisonment, is not possible. In the absence of imprisonment as a sanction, the liberty component of s. 7 of the	• This option would require significant procedural reform, and would need to be led at the federal level. • This option could lead to *Charter* challenges. • This option could be criticized as not maintaining criminal deterrence.	• While a lot of up-front work would need to be undertaken to advance this option, it has the potential to result in time-savings for criminal justice practitioners in court, and to increase efficiency system-wide. • There are multiple ways to develop a simplified "no jail" procedure, including: the use of bail

Proportionality Option	Advantages	Disadvantages	Mitigating Steps
	Charter may not come into play or may be reduced, with the result that *Charter* applications based upon s. 7 may not be available. • One of the most time and resource intensive aspects of criminal litigation is the provision of disclosure. The right of the accused to disclosure is rooted in Section 7 of the *Charter*. For less serious cases, if the impact of section 7 is reduced, it would likely translate into less onerous disclosure requirements. • It is possible that less demanding rules of evidence could also be provided for in "no jail" cases without offending the *Charter*. In a system where a person's liberty interest is not imperiled, the scope and extent of the other *Charter* legal rights (i.e., ss. 8-14) may be reduced. As such, these cases would take up less court time and involve fewer legal arguments. • There are multiple ways that a "no jail" option could be developed; some options are more procedurally complex than others. • There would be a significant benefit to the accused since there would be no possibility of		hearing procedure (hearsay evidence); or, adopting the procedure used for breaches of conditional sentence orders (evidence submitted by way of a report). Due to the number of "no jail" options available, a great deal of flexibility exists in crafting a solution that is acceptable to F/P/T partners.

Proportionality Option	Advantages	Disadvantages	Mitigating Steps
	incarceration.		
4. Provincial legislation or a *Contraventions Act* approach for minor property offences such as theft or mischief	• Provincial legislation could be enacted to deal with high volume, but minor, *Criminal Code* offences such as theft or mischief. These offences take up a large amount of criminal court time, although they rarely attract incarceration on the minor end of the spectrum. This approach would increase capacity in the criminal court system. • Alternatively, the *Contraventions Act* could be used for this purpose. • Provinces have constitutional jurisdiction over property and civil rights, and it could be argued that minor provincial property offences are constitutionally valid. • Since the swiftness and certainty of sanctions is more effective in preventing crime than increasing the severity of consequences, a provincial regulatory approach may actually be more effective in deterring crime.	• There may be resistance to a non criminal approach to these offences. • The absence of criminal stigma upon conviction may result in less general deterrence. • As with all initiatives, the impact on resources throughout the Justice System should be considered.	• The benefits of dealing with minor offences in a new and innovative manner could be communicated. Benefits include increasing efficiency in the courts and boosting deterrence due to the speed of the process. • It could be emphasized that by taking minor matters out of the criminal justice system, we are increasing capacity to deal with serious and violent crimes. • The option could be introduced as a pilot, and the results of the pilot could be tracked to determine whether minor property crimes increase or decrease when dealt with under provincial legislation.
5. Criminal arbitration (the accused gives up his/her right to a trial and *Charter* protection in favour of a more user friendly and less intimidating	• Arbitration, a form of Alternate Dispute Resolution (ADR), includes dispute resolution processes and techniques that act as a means for disagreeing parties to come to a resolution	• The arbitration option would involve a radical re-thinking of how we handle the prosecution of minor offences. • Criminal arbitration may result in a parallel system, just as complex	• The arbitration option would have to be successfully communicated, and its benefits, such as addressing the root causes of crime, would need to be emphasized.

Proportionality Option	Advantages	Disadvantages	Mitigating Steps
process.)	without traditional litigation. Arbitration has the potential to lower the number of high volume but low severity cases entering the courts. • Accused persons, who may or may not be self-represented, would face a less expensive, less intimidating and less complex option to deal with their criminal charges. • Criminal arbitration can be linked to justice services targeting addictions, mental health, etc. that address the root causes of crime, and increase public safety in the long-run. • Criminal arbitration can be implemented at the provincial level, and the option would require only one *Criminal Code* amendment to allow provinces to elect whether or not they wish to develop a program of arbitration (which would be contingent on an informed *Charter* waiver by the accused.) Framed in this manner, the choice to develop an arbitration program would be left to the provinces, and solutions could be crafted to deal with local demands.	as the criminal justice system. • There are significant resource implications for the use of mediators. • There is potential that the rights of the accused, which are scrupulously protected in criminal trials, will be sidestepped in ADR processes.	• Arbitration has been used successfully in the civil justice system, and this fact could also be communicated. • The accused would have to make an informed decision waive his/her *Charter* rights.