

THE EARLY RESOLUTION PROJECT

**AN ASSESSMENT OF ITS IMPLEMENTATION, IMPACT AND
FUTURE DIRECTIONS IN HALIFAX REGIONAL MUNICIPALITY**

SUBMITTED TO

PUBLIC PROSECUTION SERVICE, NOVA SCOTIA

BY

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EXECUTIVE SUMMARY

In September 2005 the Nova Scotia Public Prosecution Service (PPS), following up on an earlier aborted Early Case Resolution (ER) foray, launched its ER initiative. Like similar projects of other prosecutorial services elsewhere in Canada, the central objectives were to reduce court backlogs and improve the efficiency of court processing, as well as to improve the efficiency and effectiveness of the PPS itself, and reduce costs (monetary and otherwise) for all court role players (e.g., PPS, police services). The methods employed in this assessment, in addition to consultations with PPS management, ran the gamut from roughly 90 one-on-one interviews with judges, crowns, different types of defence counsel, police administrators, other court-related officials, and accused persons to literature and documentation search and court room observation. A special effort was made to place the ER in context by carrying out telephone and email interviews with crown prosecutors involved in similar initiatives across Canada. A comparison site, Dartmouth, managed by the same PPS organization but where ER was not initiated, was also employed. In order to examine the impact of the ER project more objectively a special data set was created from the PPS and JEIN data systems.

Generally, the ER initiatives advanced in the other provinces have achieved their objectives though major issues remain concerning crown discretion (court crowns' discretion in negotiations with defence counsel) and the buy-in by others such as defence attorneys and, to a lesser extent, the judges. Also, recent critiques of case processing for criminal cases have underlined the continuing problems in that regard. The small sample of other ER programs considered in this assessment provides no clear trend in such country-wide ER programming. In some jurisdictions there has been a retreat by the prosecution service to "ECR on demand only" while in other places there has been a promising new combination of pre-trial coordination at the court level and file ownership with some commitment to ER expected on the part of the crowns, and, in still other jurisdictions, ER teams, more or less operating under an exclusive prosecution service initiative, remain intact.

The PPS's ER initiative has been basically a Crown project with limited collaborative input from either the Judiciary or the Defence and it has focused squarely on front-end activity prior to a trial date being set. The PPS initiative has been somewhat singular in that one ER official has made all the ER recommendations; the singularity was not in having a senior crown do the ERs since experience elsewhere has often led to that option – apparently the logic is that senior crowns can draw on their experience to confidently determine an appropriate bottom line offer; rather, the singularity has been that only one senior crown has done essentially all the ERs (i.e., roughly 97%-98% of all incoming police files). This clearly makes for a considerable workload for the one ER official (it may be noted that here the senior crown, a well-regarded trial prosecutor, also continues to try the occasional case in Nova Scotia's Supreme Court). The underlying logic apparently has been that having only one ER official provides consistency and prevents a variant of crown-shopping. Aside from workload implication, such a system could result – and has to some degree - at least in the views of others, in the conflation of the ER program and the justice approach of the person drafting the ERs. Generally, the view of most

informed interviewees was that the ER approach, implicit in the recommendations advanced on charges and sentencing, has been “fair but tough”.

The PPS initiative too can claim some success in meeting its objectives since, as the data show, roughly one-third of the ER offers have been accepted and where the ER offer has been accepted, there have been fewer appearances by the accused persons and court processing of the cases has required fewer days from first appearance to court sentencing or case disposition. At a general, theoretical level there has been widespread support of the ER concept by all court role players though it is fair to say that for many defence counsels and even some crowns, the ER should be seen as basically an initial sentencing position (ISP), readily adjusted at the courtroom level as new information and arguments come into play. Most crowns, duty counsel lawyers and judges at both the Halifax and Dartmouth provincial courts considered the ER program as a positive step, something that, with modest changes, should be maintained and extended to Dartmouth.

Overall, as detailed in the text above, the Halifax crowns were quite positive about the ER initiative, emphasizing not only the benefits for file assessment and effective advocacy of improved police information reports but also the benefits in case processing and for courthouse dynamics; their suggestions for future directions called for modest changes, largely more resources (human and otherwise) for the ER role. Still, a few senior crowns raised serious objections to the ER as implemented (e.g., claims such as infringement on crowns’ discretion, and not taking into account information other than police information and criminal record) and two or three other crowns hedged their support for it, adopting a “wait and see” approach contingent on examining the results of the ER impact (e.g., acceptance rate, variance between ER offer and actual case disposition). Defence counsel, especially Legal Aid and the private criminal bar, were very critical of the ER, highlighting the allegedly high-end sentencing in the ER offer and the negative implications for courthouse level input and crown-defence negotiations; in their view the conventional system, in conjunction with the significant early file assessment realized in the ER initiative, would be the preferred option. Duty counsel and the private lawyers less engaged in criminal cases were more supportive of the ER program though they raised similar issues, albeit in a less critical fashion. Judges were generally quite appreciative of the ER’s possibilities for improving case flow, and positive about its future, their chief criticism being the need to accommodate to new information and to case dynamics at the courthouse level. Other role players were supportive though also claiming to have been minimally involved in the initiative and not impacted significantly by it. The small sample of accused persons or clients generated a variety of views ranging from enthusiastic support to strong negative views where the ER offer called for a jail term and / or involved an offence of person violence. There was among them a real lack of knowledge about the ER program but it can be noted that courtroom observation by the evaluator’s assistants over the year of assessment has found that ER is much more referenced in open court of late by the different court role players.

The analyses of the PPS-provided data have been detailed in the text. Suffice it to reiterate here that a comparison of the number of appearances and days from first appearance to final case disposition yields no evidence supporting a positive effect for ER in the Halifax court

vis-à-vis the Dartmouth jurisdiction. Analyses of the ER impact in the Halifax court do provide evidence for a positive impact. Also, where the ER offer was accepted, the court sentence/disposition was virtually always the same or equivalent to the ER offer, with some variance where the main charge was one of person violence. Where the ER offer was rejected, the final court sentence or disposition was most often a less severe sentence, including, quite frequently, acquittal or dismissal. The three main variables that account for the variance between ER offer and final disposition were also responsible for explaining why the ER offer was not accepted; they are, whether the ER offer entailed a jail sentence, whether the main offence involved person violence, and whether the accused person was represented by Legal Aid. It was common for the accused persons in the ER sample to have significant previous criminal records; indeed almost half had at least seven previous cc convictions. At the high end (i.e., 5 or more previous cc convictions), record was associated, as expected, with rejection of the ER offer, facing multiple charges, four or more court appearances, an ER offer entailing jail time, and, modestly, a final sentence less severe than the ER recommendation. Surprisingly, level of previous convictions was not associated with the number of days entailed by the case processing nor was there a distinct gender impact. While level of previous convictions did impact in a variety of ways, in a “free fight” or regression analysis of ER acceptance or comparison of ER and Court sentencing, it was not significant and the key explanatory variables remained type of offence, Legal Aid representation, and whether the ER recommended a term of jail.

It seems clear that the ER program should be continued and that it should be extended to the Dartmouth jurisdiction, albeit paying heed to some of the modest suggestions for change, detailed in the text, from crowns, judges and others as it becomes transformed from a project to a program. More resources, human and otherwise, would clearly be required were ER to become a PPS program; in turn, this could facilitate a modest team approach to ER led by senior crown, an approach that could avoid the conflation of ER with one person’s perspective and perhaps contribute to the in-house learning milieu (i.e., apprenticeship). An issue in virtually all ER initiatives in Canada has been enhanced collaboration between the prosecution service and other role players, especially judges, defence counsel and the police service. Were ER to become a program, the change in status might well be accompanied by consultations and a more formal statement of the ER’s objectives and protocols, including how the ER recommendations may be amended, accommodating new information at the courtroom level and so forth. Another trajectory for the future could involve working more closely with the police service to determine the cost benefits of the reduced need for police attendance at court (i.e., tracking better the savings associated with calling off police witnesses). This assessment of the PPS’ ER project has underlined too the value of an enhanced research / evaluation capacity at the PPS.

The data show that the ER offers are indeed high-end or tough in comparison to final case outcome but whether that is a fatal flaw or an acceptable situation is perhaps a matter of values (e.g., how much should previous record count) and how far PPS is prepared to bargain for an early guilty plea (e.g., in some Ontario jurisdictions, while performance contracts do not link resolution or trial rates to compensation, crowns there are strongly encouraged to provide ER recommendations that could yield a high acceptance rate). On the basis of the data and the views of defence counsel and accused persons, it might be quite difficult to secure a much higher level of acceptance of ER offers without advancing much more generous sentencing

recommendations. It appears also to be the case that government policy on a zero tolerance approach to domestic violence also raises a number of thorny issues for any ER program targeting delays in case processing and requiring an early guilty plea. In the long run perhaps a domestic violence court in Nova Scotia – informed persons speculate that such an initiative is imminent - could impact positively on these thorny issues. Another possible trajectory, following the experiences in Manitoba and Alberta noted in the text, would be to embed an ER program in a court processing system that manages pre-trial coordination.

INTRODUCTION

PURPOSE

This report is an assessment of the Early Resolution (ER) initiative launched three years ago, September 2005, by the Public Prosecution Service (PPS) at the Spring Garden Provincial Court in Halifax. The ER provides the accused (or defence counsel), along with the disclosure and usually at arraignment, the Crown's recommendations for charges and sentencing should the accused enter a guilty plea. The accused has sixty days to accept the proposed early resolution of his or her case. Some negotiation of the terms of the ER recommendations (e.g., a certain undertaking) is possible but significant change has to be carried on directly through PPS officials (primarily, save on appeal, with the senior crown who writes up the ER for all files), not with the crown prosecutors at the courthouse. There could be many implications of this initiative for court processing of cases, for the accused persons, for sentencing outcomes when the ER is not accepted, and for all the court players and their relationships (prosecutors, defence counsel, judges, police witnesses etc). The ER initiative at this point in time is not available in Dartmouth, the other provincial court in the Halifax Regional Municipality (HRM), thereby making possible an interesting comparison within the same organization and same jurisdiction. The evaluation project describes the objectives of the ER initiative and the logic model associated with it, examines the implementation and evolution of the project over the past thirty-six months, analyzes the penetration and impact of the ER initiative, and explores the significance of the ER experience from the perspective of crown prosecutors, judges, defence counsel, police officials and PPS administrators, and the accused persons. There is also a comparison with the conventional processing of cases continuing at the Dartmouth court. In addition there is a limited examination of the ER experience in other jurisdictions.

MAJOR DIRECTIONS OF THE ASSESSMENT

The first task of the assessment has been largely descriptive. It focused on determining how the ER initiative has been conceptualized and framed. What have been the objectives and the underlying, if implicit, logic model for realizing these goals? How has the ER project been implemented in relation to its objectives and mandates, and how has it evolved with respect to protocols and substantive features (e.g., amending protocol, sentencing recommendations)? What administrative and data management procedures have been put in place to capture the penetration or reach of the ER initiative (e.g., how frequently has it been accepted?).

A second major task has been to examine the impact of the ER initiative. Has acceptance varied by offence, by representation type and other salient defendant or case characteristics? What impact has the ER had on actual sentencing; for example, have the sentences for those rejecting the ER been higher or lower on average than the sentencing recommendation offered in the ER? Has the ER impacted on the number of court appearances? Sped up court processing? Resulted in savings for the police services (witness costs for the officers)? Had any implication for Legal Aid usage or resource allocation?

A third major task has been to examine the implementation, evolution and impact from the perspectives of the court role players, that is the judges, the prosecutors, defendants, defence bar and so on, and from the organizational perspectives of the PPS, Halifax Regional Police Service (HRPS). Legal Aid (NSLA) and Victim Services (VS). What are their views about the ER initiatives, its benefits and possible challenges? How has the ER impacted on their roles? What have been the effects on the relationship between crown prosecutors and defence counsel, between court prosecutors and the ER directors, and so forth?

The fourth major task has been to provide a contextual base for the assessment by comparing the initiative with the conventional Dartmouth prosecutorial system, and examining in a more limited way, ER models and experiences in other jurisdictions would be examined.

There were no specific hypotheses or expectations that guided the assessment. It was assumed that there would be some evolution in the ER procedures and certainly in its acceptance rate over time. It was also assumed that the acceptance and positive response to ER would be less where adversarial roles are most pronounced such as among Legal Aid lawyers and the criminal bar defence counsel compared to duty counsel and other private lawyers. There was no basis for hypotheses regarding acceptance of the initiative among the crown attorneys (hereafter, crowns) save that when one person is drafting all the ERs it might be expected that those with quite different approaches to sentencing would be the least receptive to the initiative.

EVALUATION STRATEGY

The evaluation strategy has employed the following methodologies in carrying out the project:

1. *Literature and program document review.* There was a review of the ER program documentation (e.g., ER objectives, background documentation, statistical reports, etc.) supplemented with interviews with PPS officials. Also, there was a limited literature examination of research and evaluation studies examining ER initiatives in other jurisdictions, supplemented by telephone and in-person interviews with informed crown attorneys from the prosecution services in different jurisdictions in Canada. In both these milieus, Halifax and other parts of Canada, very little documentation was available and equally scarce was any evaluation materials or reports of any kind; as a result, virtually all the write-up concerning these considerations was based on personal interviews with key people.
2. *Gathering and analyzing ER file data.* Since the Nova Scotia court administration's data management system (i.e., JEIN) contains no reference to ER, a sample of disposed or closed cases had to be drawn from prosecution files in order to assess the penetration of the ER initiative, related issues such as the variation in acceptance by type of offence, type of representation and accuseds' characteristics, the number of

court appearances and the number of days from filing to disposition, and the variation in ER and final sentencing. A file was created in collaboration between PPS staff and the evaluator. It was a representative sample of 669 completed cases handled by PPS Halifax over the period 2005-2006 (i.e., from October 2005 to January 2007). The data were complete for all the variables identified as crucial for the assessment with the only significant omission being data dealing with criminal record. The sample size was quite adequate for the analyses undertaken which used the standard SPSS system.

3. *Key informant interviews.* One-on-one interviews, following an interview guide (see appendices), were carried out with court role players (twenty-three prosecutors, five judges, and twenty-three defence counsel) and officials in the identified stakeholder organizations, namely PPS (three persons), NSLA (three persons), Police Services (five persons), Victim Services (two persons) and Corrections (two persons). Most of these 66 contacts were face-to-face interviews. The initial target was approximately twenty five interviews but at the request of the PPS, the targeted number increased two and a half-fold to ensure adequate sampling of all stakeholder groupings.
4. *Defendant survey.* Telephone interviews, using a structured questionnaire format, were conducted with a modest sample of accused persons. The hope was that as many as fifty people might be interviewed but despite the several hundred letters sent out by the PPS (a representative sample of the 669 accused persons in the representative sample of Halifax PPS cases referred to above) requesting interested persons to contact the evaluator, only twenty persons responded and only fourteen of these completed the telephone interview. The letter sent out by the PPS, and the interview guide used by the evaluator, are appended.
5. *Dartmouth PPS Comparison.* The special data set prepared under the auspices of the PPS included a representative sample of 601 cases for the same period as the Halifax PPS cases. In addition to that special data set, judges, crown attorneys and defence counsel engaged in the Dartmouth provincial court were also interviewed usually in person, one-on-one; there were twelve such interviews (these numbers are included in those cited in #3 above).

All interview and other data collected, as promised, have been treated as confidential and as far as possible reported in an anonymous format. No individual comments in the report were attributed to a specific interviewee. All interviews and other confidential material will be destroyed within a year of the final report being submitted.

BACKGROUND TO THE ER INITIATIVE

Significant major social movements appear to be changing the landscape of the Justice System in recent years. Aboriginal Justice initiatives (e.g., sentencing circles in Nova Scotia, the Peacemaker court in Alberta, the Gladue court in Toronto), problem-solving courts (e.g., mental health courts in urban areas as different as Toronto and Saint John, drug treatment courts now in nine urban areas of Canada), and the resurgence of the restorative justice approach throughout Canada and most notably in Nova Scotia, to name but a few such movements, may presage a complex, fragmented but perhaps more efficient and effective post-modern Criminal Justice System (hereafter CJS). Similar evolution in Family and Civil courts has resulted there in a less adversarial process and a greater emphasis on conciliation, mediation and information/education (e.g., compulsory initial mediation in civil matters in several areas of Ontario, mediation initiatives in many Family Court venues in Canada, most notably British Columbia (Clairmont, 2006), and the United States (Bronstad, 2002)). Many scholars have referred to the twenty-first century as highlighting therapeutic jurisprudence and the problem-solving court (ibid, 2006).

It could be argued, however, in both criminal and family court settings, that attention may be diverted, unintentionally and inappropriately, from two of the most pressing concerns of mainstream twentieth century Justice, namely (a) access to Justice in the form of adequate legal representation for all citizens regardless of socio-economic status, gender, race/ethnicity and other social characteristics and circumstances, and (b) delays in processing cases whether at bail or getting to trial or the trial phase. Of course these two issues may overlap considerably. There is much concern that while funding and other resources are being provided for worthwhile special initiatives, the fundamental problems of unrepresented accused persons or litigants and a costly prolonged court processing of cases remain formidable. Despite the initiatives noted with respect to the problem-solving courts, recent critiques have highlighted these major continuing problems; for example, criminal law specialists have argued that the CJS has been crippled by irresponsible legal tactics and interminable trials that squander legal aid funds, disenchant the public, and drain resources which might otherwise go to litigants who have needs in family law and civil cases (see Michael Cote “Judicial power, size of juries could be system cures”, as cited in The Globe and Mail March 28, 2008). Interestingly, while the challenge of costly prolonged court processing in the CJS – at least for adult court – seems widely acknowledged, there are radically different causes and remedies posited (see, for instance, the editorial, “Justice Delayed” and the op-ed piece by Clayton Ruby, “What Happened to the Right to a Speedy Trial” in The Globe and Mail, November 11 and 12 respectively); it is unclear whether recent initiatives by the public prosecution services across Canada have significantly impacted on the problems.

Over the past five years a number of studies have been undertaken at the Atlantic Institute of Criminology examining the issues of representation and court case processing, as well as the problem-solving court. These studies – all available upon request - have highlighted the features of the unrepresented defendant phenomenon, assessed the impact of new initiatives to improve the representation problem such as a duty counsel system for non-custody or walk-in defendants in provincial criminal court, and the summary advice counsel for applicants and/or

respondents in Family Division, and explored the problem-solving court in the guise of drug treatment courts and “healing to wellness” (Aboriginal) courts. The ER initiative in Canada’s prosecution services can be considered a possibly important part of the amelioration of the issues of representation and costly case processing. It ostensibly provides important information up-front to the defendants (or legal counsel) which enables them to better appreciate their circumstance and possible options, and, by offering presumably the most lenient Crown recommendation likely to be rendered in exchange for an early guilty plea, may speed up case processing in an appropriate manner. Of course the ER’s penetration and impact may be modest and there may be unanticipated and possibly even negative implications for justice. An objective of the research would be to assess all these possibilities and, where possible, advance suggestions for the future evolution of the ER project in the Halifax area. It is very important therefore to research and assess the ER initiative, especially if one has a vision of the twentieth century – twenty-first century transition as noted above, a transition which appears to rest on dealing effectively, albeit imperfectly, with the very concerns that appear to have driven the ER initiative.

THE ER EXPERIENCE ELSEWHERE

There are many on-going initiatives such as ER, focusing on more efficient processing of cases at “the front-end”. Bail issues also loom large and these are driven by recent appeal court decisions. The three major areas for reform have been bail, diversion (alternative or restorative justice), and dealing with other accused persons on appearance orders. Despite the activity, it has been very difficult to locate published or otherwise accessible reports, assessments or more theoretical articles on ER. Basically what are available are program descriptions and brief references in various annual reports. The contacts developed across Canada – whose programs will be discussed below – indicated that nothing of that sort had been completed with respect to their own initiative; there was one exception but there the report was sketchy and of limited value.

The projects discussed here were scanned through in-person and telephone interviews and e-mail exchanges with key crown prosecutors responsible for the initiatives. There were nine interviews and four of the respondents were interviewed twice and e-mailed several times. Literature and reports where available were examined but with one exception this secondary material was neither theoretical / analytical nor evaluative. The initiatives examined include the Initial Sentencing Position in the Vancouver, Early Case Resolution in Alberta (Edmonton in particular), Pre-Trial Coordination and File Ownership in Winnipeg, and versions of the Case Management and “Up-Front Justice” in South-Western Ontario and Metropolitan Toronto respectively. It is difficult to generalize from such a limited and diverse sample but it seems safe to note that all the initiatives utilized teams of crowns in their ER project, entailed significant collaboration in most instances with the other court players, judges, defence counsel and police, and tried to make the ER ‘offers’ in exchange for an early guilt plea attractive to the Defence. While most respondents and the limited data available suggested that these ER initiative were

successful in the central objectives of reducing the number of cases set down for trial and the average number of days from file-received to case disposition, certainly problems and challenges were identified. For example, issues of crown discretion and the crown-defence collaboration were usually raised. If one could extrapolate a future trend, it could be that initiatives among Canada's prosecution services will increasingly combine ER and File Ownership approaches.

ER IN EDMONTON, ALBERTA

Background

In examining the interesting and path-breaking ER initiatives in Alberta, the focus was on Edmonton. There were five telephone interviews with three Crown respondents, one of who had been previously engaged with, and completed a report on, the well-known 1996 Lethbridge early case resolution (ECR) project. In addition, a few reports were accessed through the internet. Alberta has been a milieu for a number of important justice developments. It has had a significant alternative justice program for almost a decade, spawned sentencing circles and a Peacemaker Court in the Aboriginal community ((the T'suu T'ina First Nation), Youth Court Teams, and restorative justice programs for serious young offenders. Lethbridge has been the centre for the pioneering development of an important criminal justice system response to FASD-afflicted offenders. Calgary has initiated an early case resolution program for SOT traffic violations. There, defendants see the First Appearance Prosecutor rather than set a trial date. It is a variation on or alternative to court processing for some and, by pleading guilty and not taxing the system, they may get a deal such as a lesser fine, demerits waved and so forth. Apparently the Crown office, while not dismissing the charges, provides some consideration in mitigation of sentence, maybe an adjustment in charge, if the person accepts responsibility, shows remorse and can profit from the experience – driver education is a major goal of the Crown-based initiative and reportedly this program has handled as many as 40,000 cases (Marketplace January 30, 2005). The innovative Alberta role has also been evident with respect to early case resolution. An important Lethbridge initiative was launched in 1996 and its success led to similar programs elsewhere in Alberta by 2001 and ECR being implemented province-wide in 2003 (Alberta Law Newsletter, 2005). The ECR successes in Alberta have made it exceptional in Canada in dealing with the problem of worsening lengthy court processing time; a national case study recently reported, "This description holds for all jurisdictions with the exception of Alberta; this province not only had one of the smallest proportion of cases taking greater than eight months but also showed a decrease over time by 2002" (cited by Dann, 2005). As the Alberta Law Newsletter 2005 noted, the ECR initiative has generated other significant changes in Alberta Justice and spawned more broadly focused provincial committees chaired by senior members of the judiciary.

The Lethbridge ECR initiative (a pilot project) was launched in 1996 as a collaborative initiative of the Judiciary, the Crown, the Defence and the Police. The basic idea of ECR was to

settle all issues that could be settled, including the cases themselves, as early as is practical and reasonable. The idea behind ECR was that effective case management processes would reduce the percentage of cases being set down for trial, leaving more resources to be spent on those matters which really need to engage the full attention of the criminal justice system (Dann, *ibid*). Each party has its specific obligatory tasks to accomplish; for example, the Police had to provide the Crown two completed court briefs for virtually all cases at least one week prior to first appearance, and the Crown had to complete file review and disclosure prior to first docket appearance, both significant obligations (Lethbridge had only eight prosecutors). By 2000 the Lethbridge program had produced excellent results, reducing the number of matters being set down for trial by well over 60% and yielding not only a more efficacious prosecution service but also major savings in witness costs for Police and less time commitment and stress for all witnesses.

The Lethbridge success spawned further developments. Another ECR pilot project, drawing on the Lethbridge model, was conducted in 2000 by the Edmonton Prosecutors' Office and the Provincial Court. Apparently, in 11 months it saved 177 days of court time, and many witnesses (police and civilian) were spared from being subpoenaed. Its guidelines entailed the following: that all cases set down for trial are considered for resolution with the exception of homicide; that the Crown sends a time-limited offer to defence counsel stating their position on an early resolution of the matter and the defence counsel has 14 days to accept the offer; if witnesses are called the offer expires and the parties proceed to trial (Government of Alberta news release, December 2000). The Edmonton pilot project also yielded impressive results as the following citation indicates, "Since 1999, there has been a reduction of 700 trials scheduled per month and 170 fewer preliminary inquiries per month. Those 870 matters would all have had police and civilian witnesses required to attend. In addition, the time was made available for other matters that had to go ahead. The estimate of witnesses spared from attending in 2001, as a direct result of Early Case Resolution, is 3390 police witnesses and 3816 civilians" (Bilodeau "Off-ramps and plungers" for criminal lawyers", LawNow. August-Sept 2002).

An implication of the ECR pilot project successes was that a committee (representatives of the diverse court role players) was struck by the Chief Judge of the Provincial Court of Alberta in 2000 to examine existing practices and procedures and offer practical solutions to systemic problems which cause unnecessary delay in the processing of criminal cases. Especial concern was the development of ECR and more efficient pre-trial resolution of issues, that is facilitating meaningful consultation between the Crown and Defence prior to setting a matter down for trial, ensuring "that the parties agreed upon what could be agreed upon and settle what could be settled as early on in the process as possible" (Dann, 2005). An eight point "Practice Direction" was adopted unanimously by "this diverse and representative committee" (Dann, *ibid*). These points dealt with protocols for ECR and also for settling whatever issues can be settled, when the matter is to proceed to trial. The Practice Direction was implemented in 2001 with new prosecutors added in Edmonton, Calgary, Lethbridge, Red Deer and Fort McMurray.

What began as pilot projects in Lethbridge and Edmonton is now a full-fledged component of the criminal justice system. In highlighting the development, the Alberta Justice Minister stated, "There is a tremendous human cost associated with a criminal trial. The whole

process is stressful and expensive for everyone involved. Anything we can do to reduce that cost is worthwhile”. The Alberta approach has involved all the major parties, prescribed obligatory guidelines for them, set time lines and deadlines for response, and ostensibly defined some contingencies; e.g., the Crown’s ECR offer will detail the best offer that the Crown will ever accept, both in regard to the offence and the sentence and, if not accepted, the Crown will not agree to that same proposal (or anything less) in the future. The Practice Notes also provide for sufficient time – six weeks - for the Crown and Defence to meet for pre-trial negotiations before a trial date is set. While there may be a longer period of time between first appearance and the actual booking of a trial date, because many cases will now be resolved before trial, over time it is expected to improve court lead times. As a senior judge commented, "The problem has been that neither the Crown nor the Defence necessarily had the time to assess their cases until close to the trial. Through ECR, we try to get them to assess their case before a trial is booked, instead of a week before the trial date. (Chance, JustIn, 2002). The Dann report (2005) details the success of the Alberta approach (acknowledging that ECR has not taken root to the same extent in all parts of the province), noting a considerable reduction since 2001 in the percentages of charges laid that are subsequently being set down for trial as well as the benefits for the various court role players. The report also addressed various criticisms of the approach, most notably the argument that prosecutors are pressured to make offers well-below what is appropriate – the “sell the farm” criticism; Dann’s assessment indicates that good deals may be offered but “all that prosecutors are being asked to do is to recognize that an early acknowledgement of guilt by an accused is in most circumstances a mitigating factor in sentencing, a proposition which is well-established in criminal case law and has been for decades” (Dann, *ibid*).

Edmonton ECR in 2008

All Edmonton crown respondents noted that ECRs, detailing the Crown’s position on charges and sentencing if there is an early guilty plea, are no longer available for virtually all cases but rather are essentially provided only on demand. This evolution was occasioned by the Crown’s experience that for many, routine offences, such as impaired driving and theft under, there is not much that the Crown can offer in the way of inducement for an early guilty plea (the minimum for first time impaired, aside from mandatory loss of driving privileges, is \$600 and for shoplifting a fine of \$250) and even in many of these cases the ECR was not accepted and so went to trial (or were set for trial) anyway. The respondents echoed the views of one who added, “It was a partly a resource issue but it just wasn’t worth the effort for minor cases”. ECR nowadays then deals largely with repeat offenders in situations where there are multiple charges. It was noted by the respondents that a major issue for the ECR concerns which charges the accused will plead guilty to among the several charges he/she is facing. There are still a significant number of unrepresented accused persons in the Edmonton courts and they presumably become aware of the ECR on demand through the duty counsel though the respondents indicated that no data were available on how many ECR demands were generated in this way. ECRs are not generated for very serious cases such as murder since “the offer you could give those offenders would be very limited”. Deadlines are set forth for accepting the

ECR. In the case of an accused in custody, it is usually two weeks before the ECR is ready to be given them and an additional two weeks before the offer runs out; one respondent noted, “This is adequate time as 90% of the defendants who request the ECR have a lawyer already”. In non-custody cases, the Crown’s deadline is two weeks from the date of the letter though extensions are often granted for reasonable reasons.

The Edmonton Crown office is constituted of three major sections, namely General Prosecutions, Provincial Statutes, and Special Prosecutions (the focus in the latter is not on offence type but special cases such as government-linked and other high profile cases and prosecutors may prepare their own ECRs). The General Prosecutions grouping has special subdivisions including the pre-trial section and others such as homicide, special violent crimes, serial robbery of convenience stores, serious frauds (over \$25,000), and the family protection unit (spousal/partner assaults, elder abuse and sexual assault where the victim is under 14 years of age). In these offence-specific sub-units the case is assigned to a specific prosecutor who may make his / her own ECR offer. The pre-trial section has eight or nine crowns who deal with bail, dockets and ECRs. The lines between those who do docket work, and those who work on the ECR offers and speak on sentencing at the summary dispositions, are blurred for many practical reasons including personnel availability. They are not the trial lawyers but they do go to court to take the guilty pleas in ECRs or in contested sentencing cases (i.e., a guilty plea without accepting the ECR). They are experienced lawyers with trial experience who are familiar with sentence ranges. The assignments of Edmonton crowns are made on a rotating basis through the various sections but some crowns may be in the ECR section for a few months while others for a few years.

The respondents in the pre-trial section indicated that in drafting the ECR, “We make the lowest possible offer within the acknowledged range of sentencing. We have to give a discount. The crowns understand that, even tough crowns like me”. While there may be some negotiation with defense counsel at this stage, they implied that there was not a lot, and one emphasized that “There’s none with frequent flyers (well-known repeat offenders)”. Once the case goes to trial, the deal is off the table and the rule of thumb is “if the accused is convicted, the crown won’t go below what was initially offered and usually higher”. The consensus was that “There are a lot of cases where the defence counsel or client rejects the ECR so the offer has to be a good one. Still, defence counsel play strategies such as get delays, maybe the case against the client will weaken for different reasons etc”. Letters detailing the ECR recommendations for charges and sentencing are sent to the defence counsel and the accused. The victim is routinely also notified by letter, whether or not an ECR is prepared, that he/she should be prepared with a victim impact statement since the accused might plead guilty. A crown added, “We know in many cases that there will be no victim impact statement because of the charge (a minor offence) but if there is a red flag (for example, serious assault, significant economic loss justifying our seeking restitution) we try to contact the victim and sometimes the judge will adjourn to facilitate contacting the victim”.

The respondents indicated that sometimes there may be different sentences rendered than recommended in the ECRs. Dramatic change (i.e., from jail to probation) in the trial crown’s

recommendations would be very rare. Occasionally when a case goes to trial it can get resolved with lesser sentencing due to factors such as changes in the evidence. Judges sometimes give sentences lower than ECR offers, but this is rare as an ECR acceptance is a joint recommendation, which the judges usually follow. One crown commented, “The ECR gives the best offer you can offer. Presumably, the lowest type of sentence one can get within the range. But it does still happen, where the defence says the offer is too high. But one can’t say for sure how often that happens as we haven’t kept track”. All respondents held that where the accused persons reject the ECR and are convicted, most receive a higher sentence. It was noted that sometimes the defence counsel on matters that have been scheduled for summary disposition hearing (i.e., the ECR has been rejected whether actively or passively) ask whether the original offer is still open and often the Crown will accede to the request – indeed one respondent opined that in up to 50% of the matters set down for summary disposition, the defence finally accepts the offer. Most acceptances of the ECR however occur in the docket stage.

The respondents all held that crown shopping by the defence counsel is not a major problem, primarily because cases are divided and assigned to crowns on an alphabetical basis so the defence cannot say which crown they want to deal with. The only time when the defence counsel can crown shop is presumably in situations where there are multiple accused persons with different alphabets and a limited number of crowns; these cases would be handled by one crown so the defence would have some leeway in identifying which crown he/she would want to deal with. It was observed by two respondents that another major consideration would be that while the crowns may differ in their views on justice they operate as a team and follow the same guidelines. They all assess the strength of the crown’s case and determine the elements of the case that the Crown is likely to prove and then the range of sentences one is looking at after trial. The accused’s circumstances, primarily, it seems, his/her criminal record, are considered. Then, according to a respondent who leads the ECR team, the crown will apply discounts that can range anywhere from 15% to 40% at the crown’s discretion. The leader’s role is primarily administrative and he indicated that he does not tell the ECR crowns what to do since that would interfere with crown discretion; however, if one’s ECR offers were “totally offside”, “totally unreasonable”, he would discuss the situation with the crown.

Challenges and the Future Direction

The respondents indicated that in general terms the ECR approach has been successful. The ECR apparently works very well with individuals who face numerous charges. One crown observed, “It works better with these defendants than those with just a few files who are more likely to fight it out. Those with numerous – more than four - substantial files or charges are those that generally clog up court time and often do not show up at the court. When the issue becomes overwhelming and / or they are denied bail, they tend to request the ECR and accept it to resolve the issues”. The ECR crowns estimated that, while there are ups and downs, “way over 50% of the ECR offers are accepted and there has been an improvement in court flow. The

respondents agreed that the judges like it; as one stated, “Many judges think that the resolutions system is good and helps in clearing the docket, but a few will try to tinker with the sentence”. It was also claimed that defence counsel liked the ECR approach used in Edmonton. As for the police, it was observed that “The ordinary cops complain that, after all their work, we offer light, slap-on-the-wrist sentences but usually they do not appreciate issues of convictability”. None of the crowns were aware of any data reporting how much money the program saved the police service. Statistics and formal evaluations are basically non-existent. One senior crown pointed out that “When ECR was first starting, you measured success by counting up number of cases you closed out at an early stage, then estimating how many witnesses and court time would have been required had they gone ahead with trials. The result was good” but he also noted that “We stopped taking stats two or three years ago”.

There were three issues raised when the respondents were queried on the challenges or shortfalls of the ECR model. First, there were issues raised concerning crown discretion. It was argued that the value of ECR is tied to the exercise of discretion of individual prosecutors. One respondent elaborated on that point as follows, “It really depends on who’s doing the ECR. For example, some prosecutors are much more willing to ‘plea bargaining’ and some are not. The problem arises when you have someone who is not willing to negotiate get into the ECR unit. You need a crown who can accurately assess what the proper bottom line is. The crown must consider, “If we were to secure guilty plea after trial, considering the set of facts available to us now, what is the best sentence the accused could get out of this?” The ECR offer is supposed to be the bottom line the accused could get and unless the crown is willing to make that offer, it will hamper success of ECR. Crowns usually end up doing this the night before trial anyways. So they should take a realistic view of what you are going to get and put that on the table right away”. A related crown discretion factor for success of ECR that was cited was the experience of the prosecutor. Two respondents claimed that the more experience he/she has, the more confidence there is; “If you have an experienced, confident senior counsel in the ECR unit, it functions better as they have the confidence to make the calls, knowing where the bottom line of acceptable sentencing is, whether they have a case, etc; they can assess all of these things and have the confidence of acting on it and this makes ECR more effective”.

The second challenge or issue could be considered a follow-up to discretion in the ECR unit, namely discretion at the courthouse. One respondent put it as follows, “In theory, the first ER offer is the best offer that the accused is going to get. In theory, this is a good idea as it encourages the defence to take the offer. But in reality, many things can change between the time of ECR offering and sentencing – witness can disappear, new evidence can come up – which are just two of many examples. In theory, tying a prosecutor’s hands may be a good idea, but in reality, it leads to trouble. Ultimately, taking away discretion from trial crowns is just not workable. It’s fair to put make it mandatory for the trial prosecutor to explicitly articulate why they have deviated from the ECR offer, stating things like, “Such and such key witness didn’t appear/started backing up/disappeared”, or something like “Since this offer was given, the accused has got terminal cancer”. Apparently, the issue of the level and place of crown’s discretion is a debate that has been going back and forth in Alberta for some time throughout the ECR era. The respondents considered that professional autonomy and file ownership are

important for crowns. One respondent contended, “The history of law, nature of the justice system demands discretion for Crowns, or the system can’t work, unless if you want to book thousands of trials. Obviously, the minister of justice / attorney general is properly and appropriately in charge of the process but in order to really make the system work, crowns have to have considerable discretion”.

The third issue focused on the retreat from ECR for all cases to ECR only on demand (as the respondents stated, this is the case throughout Alberta for disclosure). It was reported that ECR only on demand is not pervasive policy in Alberta and that the Calgary Prosecution Service has been more willing to offer ECR for all cases. An argument was advanced that “If it’s on demand, the prosecution service is being passive. Just reacting if someone asks for it! In contrast, if offering it for every case, the Crown is being aggressive. In such approach, there are sometimes compromises to be made, such as not offering ECR on very simple cases like shoplifting”.

The respondents all noted that the ECR approach in Edmonton is about to experience a significant but uncertain impact from a new File Ownership initiative. This entails basically assigning files, at an early stage, to specific crowns who will stick with them to the end. Such a model is currently extant in Winnipeg and will be discussed below. One respondent commented, “File ownership” will change things again. ECR will become part of it but it is not entirely clear how it’s going to happen and what changes will be made to it. Whether it’s going to be kind of an independent ECR unit at the front end or if individual prosecutors will be divided into support groups”. None of the respondents suggested that the proposed changes represented a failure with respect to the ECR approach and it was unclear what is driving the new agenda.

Winnipeg’s Early Case Management

Background

There has been a domestic violence court in Winnipeg since the early 1990s. The decision by the government to “get tough” on domestic violence and make it mandatory for police to charge on domestic violence, greatly increased the number of domestic cases coming to court. By 2002, reportedly, the court was being swamped even while most of these cases were resolved before trial. Trials and dispositions were backed up as judges were busy with remand and other non-trial/disposition matters. So the strategy was advanced to take “those 90% of cases” that do not go to trial away from judges and give them to special pre-trial coordinators (i.e., the early, simple parts of cases). This in turn would free up judge’s time and open up more time for them to do trials. The Provincial Court Front End Project (PCFEP) began then with a

focus on domestic violence in 2003. It has won awards, both national and international; for example, in 2006 the project was recognized by a United Nations award for innovation in bringing justice to people in appropriately timely manner. It has recently been extended to include all adult charges, custody and non-custody cases (personal correspondence, 2008), so now all cases go through the Front End process. The objective in 2003 was summarized as “once a matter is before the judge a meaningful act will occur” (i.e., not delays, re-scheduling etc).

The PCFEP project was initiated by court officials (especially the judiciary) and has had the cooperation of crowns, defence counsels, court administrators and the Winnipeg police. Its centerpiece is the creation of the pre-trial coordinator role (PTCs). The PTCs preside in the court and follow a detailed, firm protocol. They conduct all administrative matters pertinent to the pre-plea processing of an accused, in collaboration with crowns and defence counsel. They are “senior court staff who are limited jurisdiction Justices of the Peace” (Pre-Trial Coordinator Protocol, The Provincial Court of Manitoba, 2005). A companion project, which started about the same time among the Prosecution Service’s crown attorneys, has been File Ownership. Here the crowns are assigned as files come into their office. It is considered that “Crown ownership ensures all necessary work [of an administrative sort] can be completed at an early stage” (Protocol, *ibid*). Apparently, the results of these complementary initiatives have been gratifying as trial delay has been reduced, the number of informations (criminal charges) reduced by 55%, and all the parties from crowns to defense to victims reportedly satisfied with the quicken court processing.

In describing the origins of the Provincial Court Front End Project (PCFEP), a senior manager noted that “It’s really difficult to make changes to the court system. Everyone realizes that there are tons of jurisdictions that are in backlog – not just in Canada, but in USA and countries all over the world. They all have backlog problems and it’s hard to get the Crown, defence and judges on the same table and all agreeing on the process. The chief judge, a pretty amazing person himself, brought the three parties together and said “We have to do something and together as group”. The whole project was built to have something beneficial for everyone”. The courts in Winnipeg reportedly decided to take the initiative. On the premises, according to one informant, that “It’s up to us to move the cases along” and that “Crown do a great job but they can’t stay on top of every file”, the courts hired pre-trial coordinators. An analogy was drawn by the respondents between the PTCs - judges relationship and nurse practitioners – doctors relationships; the PTCs handle much work that judges would routinely do (e.g., remands and other tasks up to the point of trials). They make sure that the cases move along. As a respondent commented, “When someone appears before the court for the first time, he appears in front of the pre-trial coordinators who give a deadline. They follow up with the accused and make sure they stay on top of things; in other words they are case managing, keeping notes on the accused’s progress and actively ensuring that lawyers [crown and defence role players] are talking. When the accused persons reach the first deadline, the trial date/disposition date should be ready to be set and, if they are not, they must answer at the administrative court explaining why they aren’t ready”. The accused is pushed to get legal counsel, legal aid or otherwise. All cases, as noted, go through the PCFEP including murder; a respondent commented that “before the PCFEP was implemented, some murder cases were just sitting there for years. We really had

to get a move on those cases too”. Not surprisingly, the number of PTCs has increased since 2003 and in 2008 there were nine in Winnipeg.

The Prosecution Service and File Ownership

As noted, around the time that the PCFEP was launched, the prosecution service changed the way crowns handled cases. It has taken the files and assigned them to individual attorneys; every file that comes in is signed to an individual attorney. When defence counsel is dealing with a crown, from the start it will always be the same Crown they will deal with through trial. Respondents considered that this format eliminates crown-shopping. Defence lawyers do have the right to request for a change of crowns but that is a rare occurrence according to informants. PCFEP managers considered that the Front-End project and the prosecution’s way of handling cases compliment each other. As one respondent commented, “Front-end could have gone ahead without the Crown assignment initiative but it would have been far more difficult to be successful. It also would have been far more difficult to hold crowns accountable”.

As the PCFEP developed, on both the crown and defence sides but especially on the crowns’, there has been increasing use of paralegals to represent the crown attorney and defence counsel in the matters dealt with by the PTCs. Legal aid, instead of sending duty counsels, now usually send paralegals and private defence counsel may send articling students or paralegals to appear on behalf of the law firm. E-mails communication is also extensive. Use of paralegals, for the presumably simple, quick matters, gives more time for crowns to stay at their office and prepare for disposition, trials and hearings. It was reported that, “Paralegals communicate with crowns back at the office through an electronic system with a built-in messaging program, so they can access information and ask questions and receive answers immediately. It’s working out great”.

Successes and Challenges

The respondents indicated that detailed evaluation data are lacking but there is evidence that the time to trial has been reduced. The average number of days from filing to disposition for domestic violence cases has been reduced from 197 in 2006-2007 to 188 in 2007-2008; as one respondent commented, “Not substantial maybe, but it’s going down”. Another respondent noted that disposition time has been reduced as the crowns spend more time pushing the case to the next stage. He reported that the number of appearances per case has not been reduced as much as the province would like, adding, “This is probably partly due to defence counsel and the nature of their clients. Defence counsel can be disorganized, and it seems that defence counsel like coming to court for the gossip. They love to gossip”. No defence counsel or judge was interviewed but the respondents indicated that there has been some resentment expressed by some defense counsel that the crowns always send their paralegals to the PTC-held meetings. One informant commented that some defence lawyers would prefer to deal with crowns than paralegals and, while both sides can engage their paralegals, the defence lawyers are much less

likely [presumably primarily the private bar] to do so. It was also reported that the prosecution's "File Ownership" initiative has been re-labeled "Case Management", apparently in large part because judges objected to the notion of crowns "owning" the files.

It was reported by the Crown respondent that "Crowns really like it [the new system]". He confirmed that crowns are assigned files early as possible and they deal with it through trial and even through appeal. In support of that format, in contrast to the conventional crown practice, he observed concerning the latter, "Files being passed around to different crowns [means that], confusion, uncertainty, unfamiliarity with the files is increased, some crowns end up selling the farm, each crown ends up not spending enough time on the files". Individual crowns have discretion within the parameters of policy and law. The respondent added, "It's often hard to second guess crowns on their cases because they know the case best since it's their file". Case management works to ensure that the crowns have an equivalent workload. If a crown is resolving many more cases than others, he/she gets more files; as a result it was contended that no crown is resolving cases with extremely low sentencing to the point of selling the farm in order to lessen their workload. Alternatively, if a crown is resolving significantly less cases than the others, management will sit down with that crown and discuss how to improve their success rate. The prosecution service in Winnipeg also has a "crown caution" program usually limited to first time, minor offenders such as shoplifters. The caution letter informs them that the Crown is dropping the charges but they are on record and the privilege of having the charge dropped would not happen again should they re-offend. This program reportedly was launched because the Crown's experience was that many people who are put in the adult diversion program are often set up to fail; lots of offenders presumably are in economic or other types of hardship and fail to meet the requirements for successful adult diversion program, so they end up back in court. A respondent added that there was also a resource issue in the prosecution service and just giving minor, first time offenders a crown caution letter has been helpful in ameliorating that challenge.

The respondents indicated that the Winnipeg prosecution service did consider implementing an ER program where if the accused rejected the ER offer and/or did not plead guilty, a more severe sentence would be recommended by court crowns upon conviction; indeed, for a short time period, it implemented such a system. Reportedly, it was dropped primarily because it was not working. One respondent offered the following explanation: "ER offers are generated from looking at the police reports – which always looks good for the Crown's case at the time because the police officers who are writing it obviously feel that there's strong case for a charge and a conviction. Over time, this case – the Crown's case - always gets worse due to witnesses losing interest, victims and witnesses moving away, police gets transferred etc. So even though the Crown can hold a stick in front of defence trying to tempt a guilty plea, defence counsels know that in 9 out of 10 cases, the Crowns' case will weaken considerably. Just looking at the police report isn't enough. You must look closely at the case and consider all factors before being able to make a reasonable ECR offer".

Vancouver, British Columbia and the Initial Sentencing Position (ISP)

Overview

In the 2004 – 2005 annual report / service plan of the British Columbia Ministry of Attorney General emphasis was given to four key points in the prosecution of cases and the development of measures to capture their successful attainment. The four themes were

1. importance of timeliness
2. timely charge assessment
3. screening
4. ISP functions

It was noted that by using a charge approval process Crown counsel ensures that cases which go to court are sufficiently supported by the anticipated admissible evidence, and that prosecutions are pursued only if they are in the public interest. The ISP initiative was considered central to the elaboration of the charge approval process and to timeliness in prosecutions. The Attorney General 2007/2008 Service Plan reiterated the importance of the ISP and set the target for “days from filing to disposition” as 179 in 2007-2008 whereas in 2006-2007 the actual average was more like 220 days.

The ISP of course specifically refers to the Crown’s position on sentencing for charges that are advanced. In its website a Vancouver law firm described the ISP as follows:

“The first document you are likely to be issued upon release from police custody is a Promise to Appear. The important thing for you at this point is that you appear as required and that you request disclosure of all circumstances or particulars from Crown Counsel. The particulars or circumstances of the offence which you receive from Crown Counsel will include an ISP. This lists the sentencing position that Crown Counsel will recommend to the Judge if you decide to plead guilty at an early stage of the proceedings. This offer is open until a Trial date is set so you are not required to enter a guilty plea on your first appearance in order to take advantage of this offer. You will be offered the opportunity to adjourn or reschedule your appearance in order to arrange to speak with legal counsel. The ISP is generally a lower sentence than Crown Counsel will seek should the matter proceed to Trial” (Shook, Wickham, Bishop and Field, website accessed in 2007).

The structural arrangement for the ISP in Vancouver Main Street Court is as follows: at the Crown’s office there is a first of all a division of labour with one group of crowns dealing with bail (and related issues) for persons in custody and another grouping dealing with charge approval. The latter in responding to a police information may reject it (i.e., no charge to be laid), direct it to extra-judicial sanctions, or advance the charge in the court process. Charges going on

are given an ISP by the team members. Each team member is responsible for a pile of police informations and team members discuss any particularly complex or problematic cases to reach a reasonably consensual ISP. According to an interviewee, there is little rancor or ultimate disagreement. All approved charges are given an ISP. Subsequently, following the charge approval path, the file is sent along to an arraignment team, where some attrition in the cases going forward may occur (i.e., the ISP is accepted and the accused pleads guilty). If there is any issue with the ISP, an arraignment team member will contact the ISP team and discuss the issues. Reportedly, there is little disagreement at this level. If a trial date is set and the case advances (i.e., the accused does not plead guilty and accept the ISP recommendation) then it gets handled by the crown trial team; if there are at this phase some issues about the ISP because of new information, no-shows or unwilling witnesses, some adjustments could be made regarding the ISP recommendation but generally the trial crowns would advance a tougher sentencing recommendation if the accused is convicted. Apparently, if trial crowns make major changes in the ISP recommendation, the protocol calls for them to discuss the issues with their team leader and perhaps contact the ISP team; at the least, reportedly, they are expected to inform the ISP team.

According to the interviews the ISP program works well and there is little disagreement or conflict among the crowns involved at any stage of the court processing. It used to be the case that senior crowns would do the trials and junior crowns the front-end work but currently rotation is the norm. No reports or evaluations have been carried out on the ISP initiative according to informants. It was reported that the central challenges to the efficiency of the ISP, and the objective of reduced the number of days from “filing to disposition”, have largely to do with defence counsels’ strategies; for example, defence counsel frequently seek to amend the ISP to call for a jail term so that the accused can obtain legal aid. Another issue cited as problematic has been the approach of some judges, allegedly their substituting a more lenient sentence in many cases; one informant commented, “the judges refuse to be reasonable and make my liberal approach seem ultra-conservative. It is not so much that judges are appointed because of their ideology but rather that after time they seem to get worn out and just don’t want to mete out justice”.

THE ONTARIO EXPERIENCE WITH ER

This write-up draws on four interviews with crowns engaged or formerly engaged in crown-initiated early case resolution initiatives in Ontario; all but one were (or had been) the central authorities responsible for coordinating the initiatives. The information accessed with respect to Metropolitan Toronto is limited to two one-time interviews while the information for South-Western Ontario (the area bounded by London, Kitchener and Windsor) draws upon in-person, telephone and e-mail exchanges with a senior official in London managing the initiative in the entire South-West region and one other official in the Kitchener area. The respondents indicated that no evaluation reports or accessible data were available nor any literature that they

are aware of with respect to the early case resolution, aside from unpublished research reports on the implications for bail. Indeed, web searches failed to uncover any but a few programmatic announcements.

South-Western Ontario

While there is significant variation in Ontario with its population of 12 million people residing in 54 counties, most crown offices give out a disclosure on first appearance which includes the “Screening Form” on which there is the Crown’s position with respect to an “Early Guilty Plea” (EGP). The screening form is a required document for Legal Aid to process the accused’s application (some of the EGPs will simply say jail and not specify the duration of the jail term since ‘jail’ is the operative word for Legal Aid). Eighty percent of the Ontario crowns’ work happens in sixteen large locations in Ontario where two-thirds of Ontario’s population lives; the rest take place in very small jurisdictions in the northern outreaches or eastern and western parts of Ontario. Of these sixteen large locations – the big box stores as one respondent put it – nine currently use the team approach to early case resolution and the others apparently “will eventually follow to do the same”. The South-Western Ontario prosecution service (especially the Kitchener office) has reportedly assumed a leadership role in effective ECR innovation. It has twelve offices in three jurisdictions, namely London, Kitchener and Windsor, and deals with well over one hundred thousand charges a year. The program there has been periodically re-labeled; as the respondent commented, “We initially called it a Criminal Case Management program and then it became know as Vertical File Management and lately we have been calling it Dedicated Prosecutions. I am sure it will have a new name by next year”.

The program involves screening all files from police and creating an EGP which is offered to the accused on first appearance. A major incentive is offered for the early guilty plea; as the respondent commented, “Crowns try to give enough of a discount so there’s an incentive [on the part of the accused] to taking it, to the point of offering probation instead of 14 days in jail”. There is no specified time frame for the accused to accept the offer lest it be taken off the table but the offer is usually good up to the point that a trial date is set. The respondent allowed that he would prefer to set a rigid date, but the judges would not support him. He is a self-described firm believer that the Crown must effect artificially a sense of urgency, and added, “We must recognize that things happen in our court system because we let them. Section 650.2 of the Criminal Code that allows the accused to designate counsel to appear without the accused being present is a [significant] source of problem in our system. My favourite saying is “No case gets resolved without the accused.”

The central feature of the South-Western Ontario approach appears to be the focus on “the teams” to which the incoming files are allocated, usually by alphabet. These sometimes labeled “vertical file teams” are usually groups of four or so, one of whom is designated team leader. The screening of files is a team responsibility, as is going to trial. Responsibility for the screening form and rendering the associated EGP is shared but there is some operational specialization and presumably the team leader has the major responsibility here. The

responsibility for the files subsequently is split among the other team members and if the case goes to trial another member of team handles the trial (in Kitchener once the file is assigned to a crown, that crown carries the file through to the disposition). Aside from these general Case Management teams there are special teams of crowns for youth, domestic violence cases, bail and Superior Court cases.

Asked about variation among the teams and within the teams, with respect to crown discretion and the EGPs, the respondent indicated that “At the beginning, there can be differences between each team, but later on consistency builds with each screening. There is no variation within a team among its members as the team is led by a team leader and its members must follow in unity. The team leads rotate every 12-18 months”. In elaborating upon the issue of crown discretion and “crown shopping” by defence counsel, the respondent wrote, “The key to avoiding Crown shopping is to take the screening and vetting function out of the hands of 25 people and put it in the hands of 4 or 5 and have those folks meet regularly so as to shrink the continuum for screening positions. The other key is to ensure that the crown speaks as one voice and that the initial screening position is honoured by all Crowns, absent a change in circumstances or new information”.

The respondent contended that the team approach is preferable to having one or two crowns designated to do the screening and provide the EGP sentencing recommendations. He observed that less than one of ten cases goes to trial so the most important part of the court proceedings is at the front end. In the South-Western Ontario approach, the front end team leader positions are given to the most senior, respected Crowns. The respondent added, “Since 90% of the cases are managed without a trial, why not put the best resources on those 90% of cases? The irony is that the 10% of cases that go to trials don’t necessarily have best Crowns”. It was reported too that that the Crown is not interested in making changes if the Defence is “just whining - saying the sentencing offer is too harsh” but if there are some material or circumstance changes, then they are willing to make those changes. It was acknowledged that the EGP recommendation was challenged but the respondent contended, “Everyone asks for less severe sentencing, but after a while, with consistency in the Crowns who are processing the screening files, the whining gets less or disappears because people come to know that they deal with the same Crowns everyday who are giving out the same consistent sentencing. In places where the teams of crowns are not in place, the whining continues”.

Several major challenges that an effective ER program encounters in South-Western Ontario, and likely elsewhere in Canada, were identified. It was suggested that the court systems are built on rich histories and traditions – systems very reluctant to embrace change. The respondent commented, “There’s a need to get judicial people, defence, and police to buy into it. Difficult to get it done. Crown is just part of the system. Court should manage the case – but by default Crown seems to be the one responsible for delay”. It was contended that the judiciary there are unprepared and unable to provide leadership which make it still very tough to achieve success. The respondent commented, “The crowns embrace the principle of giving the defendant higher sentence if they reject ‘ECR’ but most of the judges do not. Even if the minimum is the sentencing offered by the Crown and it gets rejected by the defendant, the judges still won’t go

above it. The judges do not want to punish someone for exercising their trial rights. In comparison, the crowns try to put into account that accepting early guilty plea is part of mitigating sentences”. The respondent would like to impede judge shopping just as crown shopping has been eliminated under the team approach of the Crown Attorneys.

Another challenge reportedly comes from the defence counsels. According to the respondent, they recognize that “the Charter created the right to delay trials, and it is indeed in the accused’s best interest to delay cases, so they keep doing it. The usual tactic is to “Delay, delay, delay, then when time runs out, then, deny, deny, deny.” The roster model of Legal Aid in Ontario allegedly also works against early case resolution since it may be in the material interests of some such lawyers not to enthusiastically support early resolution (i.e., “delays make money for them”). Material interests were also seen as a factor to deal with in respect to police support of the ER program despite the fact that there could be substantial savings to the police service since fewer officers need be witnesses and also there would be a greater likelihood that when they are called, the trial will happen and they will in fact be witnesses. Other challenges include the type of offenders which with the crown has to deal as many are ‘no fixed address’, inattentive to appearance notices etc, and difficult to engage in any early case resolution. It was noted that ER is a great idea but it is hard to pull off well, despite the fact that there benefits for the role players – judges, crowns, the accused persons and the police.

In South-Western Ontario a variety of strategies has been developed by the prosecution to deal with these and other challenges. One has been to consider the implications of the alignment of the ‘right’ crowns with the ‘right’ judges. Soft crowns with soft judges, for example, could impact on the incentives being offered for an early guilty plea; here a respondent commented that assessing the acceptability of an EGP is appropriate since “it is a major and proper concern of justice to be able to respond effectively to the more serious cases”. More generally, the prosecution service’s leaders have taken, unabashedly, quite an activist approach to boosting the ER option, targeting the reluctant defence counsel, pushing Adult Diversion, encouraging the police by providing them some funding to get the information into the Crown offices by four weeks (even encouraging Police to distribute legal aid forms upon arrest), having bonuses for crowns who get a lot of ERs resolution (and “not just those handling murder cases”). Crowns, too, apparently have to be convinced by a strong leadership position since “the summit for crowns is being a trial lawyer”. In this prosecution service the norm is becoming, as it has apparently earlier been in Kitchener, that there is a strong file ownership. Given the latter, and given the message that only one or two files should go trial, presumably crowns would pursue early resolution and focus on the more serious cases.

Strategies have also been developed to deal with low-end domestic violence cases and impaired driving offences. Both types tend to go trial, reportedly because the accused persons count on witnesses (victims) not pursuing the matter in domestic violence cases, and in the motor vehicle offences people fight to avoid losing their licenses. The prosecution in Ontario is faced with widely prevalent billboards and other media ads claiming to get people off on serious traffic charges so the strategy has been to offer as EGPs reduced suspension time in imaginative ways. In the case of ‘domestics’ an early intervention program has been put into place whereby the

individual pleading guilty and entering and completing a program can get a conditional discharge.

The South-Western Ontario prosecution service has developed standards to assess the extent to which their case management and early resolution program is effective. Their key criteria are the % of cases resolved without trials set, the % of cases that went to trial, and the average and number of appearances and days from file received to disposition. Perhaps the key standard set is that no more than 10% of the files should go to trial but there are other standards including one that less than 75% of the cases should be resolved without being set for a hearing. Kitchener has been held out as the model for the region's success. Reportedly, the file resolution rate for Ontario as a whole for the past year was 72% whereas in Kitchener it was 89%. The % of cases that went to trial was 9% in Ontario but only 4% in Kitchener, and the average number of days to disposition in Ontario was 200 whereas in Kitchener it was only 138. For advocates of early case resolution these are impressive figures.

Metropolitan Toronto

A former (recently retired) senior manager of the prosecution service in Ontario explained that the ER initiatives there especially took off in the early 1990s in conjunction with a Brampton Ontario case where an accused got his case thrown out upon appeal because the right to a speedy trial had been compromised. Apparently, subsequently some 50,000 cases had to be thrown out and the rule of thumb for time from filing to trial became "no more than eight months". This led to the Ontario "investment strategy" wherein some 100 crowns were engaged to conduct intense screening of charges and processes to resolve / dispose of cases prior to the trial date being set. That initiative has continued on and is labeled "Up Front Justice". Having the crown's position on sentencing available at first appearance has been provincial policy in the Toronto courts for some time. As one respondent noted, "It is important since, if the crown is going for jail, that would impact on access to legal aid". Duty Counsels and an out-of-court crown discuss the cases, and then, in court, handle the sentencing that comes from these pre-trial discussions. In recent years, according to this official, the Kitchener prosecution office has developed several models of early case resolution and the Toronto prosecution service has been trying out some of the approaches pioneered in Kitchener (see above). One model is to tie a case immediately to a particular crown so that both the police and defence know quickly who they have to deal with. This of course can be done in variety of ways, alphabetically, courtroom and so forth. Another approach is to tie a crown to a particular police unit such as robbery. The respondent acknowledged that there is still a concern about the backlog in court processing and, when asked why, cited a few administrative hurdles (The Toronto court has to deal with a huge number of homeless people and drifters) and also noted that delay can be a common defence strategy, hoping perhaps to get a break on the witnesses (e.g., no shows etc).

A current senior official with Up Front Justice, employed with the Department of the Attorney General, indicated that there are three dimensions to their activity. First, there is a focus

(indeed this would appear to be the central focus of the program) on bail and early case resolution associated with accused persons at the bail stage. The objective has been to reduce the wait for bail hearings (sometimes it had been as long as six days since there is a considerable number of bail hearings to contend with) and perhaps also deal with the case, resolve the case, at the same time. There is a crown review before the bail court and a sentencing offer for a guilty plea on first appearance. There is a triage model with contribution from the duty counsel. There are crown teams in three centres, two in Toronto and one in Ottawa. The program reportedly has been successful in dealing with the blockage at bail and in early case resolution, and has now expanded to four other sites; in each of these seven sites, the Attorney General pays for the crown attorney operating outside the courtroom. In attention to the initial bail activity, there is a “21 day custody” review wherein the designated crowns examine the files of those on remand to determine if anything has been missed that could justify bail. Legal aid or other defence counsels are contacted as well. Reportedly, this file review is essentially limited to cases involving minor offences (e.g., not gang-related crimes, sexual assaults) and, in any event, few changes result.

The second dimension of the Up Front Justice initiative involves diversion programs for minor offenses where the accused accepts responsibility for the offence. This program operates at eight sites in Ontario. One such program occurs at the courthouse where a Justice Worker reviews the cases for minor offenses and dispenses adult diversion type sanctions (e.g., write an apology, make a charitable contribution) right then and there. A second diversion program, the Community Justice Program, entails referring the offender to restorative justice programming (i.e., victims and accused persons attend and volunteers act as facilitators) conducted by a community-based organization such as John Howard or Elizabeth Fry. If not successfully processed here, the case is referred back to the court. The Attorney General compensates the lead community agency for the costs of carrying out the program. The former diversion program has reportedly worked satisfactorily in relation to the objectives set forth for it (e.g., quick resolution of minor offences). The second program however has had some problems, especially no-shows by the offenders, and its renewal after the contracted date ends in 2009 is in question.

The third Up Front Justice program refers to court processing of non-custody cases, the accused persons coming to court on appearance notices. At the Toronto courts the prosecution service has screening teams of crown attorneys and paralegals who are charged with looking over incoming cases and taking an initial position. There is now too one person who reviews all minor offenses for diversion prospects. There are specialty teams for domestic violence, child abuse etc. The screening teams then send the files to the court crowns. Circumstances, new information and so on can lead to change but for any significant change the court crown is expected to discuss it with the supervisor at court or even with the original sentencing team. Both respondents emphasized the importance of having the right person doing the initial sentencing position, someone in their view who is personable and flexible. Both also spoke to the need to secure buy-in by Legal Aid and defence counsels in general and noted that while the defence may resort to delaying strategies, the sentence recommendations must be attractive enough, “fair” in return for a guilty plea. The current Up Front Justice official indicated that there have been some challenges in developing appropriate initial sentencing norms and reiterated the need to select the right people. Both officials also suggested that an initial sentencing position should

only be on the table for a short time. The retired respondent held that the early assessments found that program had been successful in reducing court appearances and average length of case processing from ten appearances and one year to three appearances and just three months. No data were available on how effective this approach currently is in reducing the number of cases set for trial or the number of appearances, and the respondents were reluctant to speculate. They did allow that the judges were very supportive of the Up Front Justice Project and also observed that Victim Services personnel are at the courthouse which facilitates sensitivity to victim concerns.

SASKATCHEWAN: AN EARLY CASE RESOLUTION PROJECT BY LEGAL AID

In Saskatchewan an Early Case Resolution (ECR) was initiated in 2005. It focused on the delivery of legal aid services and, as it turns out, strengthening the legal aid component at Youth Court similar to what is in existence Halifax. The original intent of the ECR project was to increase the number of lawyers available for non-custodial adult accused clients with the hope of reducing the waiting time between determination of eligibility and appointment with a lawyer, and the number of trials. The leading sponsor, the Saskatchewan Legal Aid Commission (SLAC), anticipated that reducing this waiting time would allow clients to deal with their matters earlier, thus avoiding additional administrative charges such as failure to appear, increasing overall efficiencies for the clients, the Crown, and the court, and improving the clients' satisfaction with services provided by Legal Aid. Original project partners included the Crown, Defence Counsel, Legal Aid, Police, and the Court and Court Administration (SLAC 2005). The funds from Justice Canada were requested by and directed by the SLAC. When the federal Investment Fund program money became available the Early Case Resolution process was not in place. Thus, the Regina office reviewed other services to see where they could have a similar impact (i.e., helping clients resolve their cases earlier). The result was a restructuring of the services provided in Regina Youth Court. Increasing the number of counsel available to the Regina Youth Court allowed for the development of a Youth Team and specialization of duties amongst the Legal Aid team members.

An evaluation of the initiative was carried out, a very skimpy one based on limited data; project documents were reviewed and there was a handful of interviews. The ECR initiative was said to be based on the 1996 Lethbridge project (see above) and ostensibly had similar objectives. The project was considered successful on the basis of interviews with the directors and staff and some issues were highlighted, such as the heavy workload for the Legal Aid team, the division of labour among team members, and the need for an aboriginal presence in the Youth Team (Yelland Research and Evaluation Services, Evaluation Report, Early Case Resolution, Saskatoon, Saskatchewan, 2006). No further information was available on the initiative.

ER AT PPS HALIFAX

The PPS as such came into existence essentially as a consequence of the Marshall Inquiry's examination of the differences in how the prosecution service handled the Donald Marshall case in comparison to cases involving prominent Nova Scotian politicians. In all annual reports since its inception the following paragraph is prominent, "The NS PPS was established in 1990 as the first statutorily-based independent prosecution in Canada. All prosecutions within the jurisdiction of the Attorney General of Nova Scotia are the responsibility of the Director of Prosecutions. Crown Attorneys responsible to the Director conduct prosecutions independently of the Minister. The only limitation on the operational independence of the Director permitted by the Public Prosecutions Act arises when the Attorney General issues written instructions to the Director of Public Prosecutions. These instructions are binding and must be made public" (Public Prosecution Service, Annual Accountability Report, 2001-2002).

The PPS has initiated a number of innovative projects in its brief lifespan. In the early 1990s, in collaboration with the Tripartite Forum on Native Justice in Nova Scotia, and following up on another recommendation of the Marshall Inquiry, the PPS collaborated in the Shubenacadie Band Diversion project, the first alternative justice program implemented and managed by Mi'kmaq people in Nova Scotia (Clairmont, 1996). It involved both youth and adult offenders referred by the Crown and dealt with a wide range of minor offences. All 'conferences' were handled exclusively by a panel of Shubenacadie band members approved by the band council. The project was the harbinger for subsequent expansion of Aboriginal Justice programming in Nova Scotia which now is the most extensive and in-depth of any province in Canada (Clairmont and McMillan, 2006).

In 2001-2002 the "[PPS] implemented two federally-funded youth justice pilot projects for pre-charge screening and crown cautioning". According to the PPS Annual Report of that fiscal year, "The emphasis in these projects was on exploring the possibilities envisioned by the YCJA in the Nova Scotian context", where the Marshall Inquiry and other events had established a legacy of domain autonomy and role independence between police and prosecution on the issue of laying charges (i.e., laying charges was the responsibility of the police and something that they were expected, and indeed required, to insist upon). The central objective then was getting a sense of how such crown cautioning and pre-charge screening could work in a criminal justice system where there was significant recent innovation. The Nova Scotia Restorative Justice Program for young offenders had been established in 1999 and by 2001-2002 was province-wide; in addition there was an established Mi'kmaq justice program, the RCMP's Community Justice Forum programming, and Adult Diversion, all of which were also province-wide. At that time, no common-law jurisdiction in Canada had both police and crown cautioning programs, so clearly it was useful to see how the two might complement one another. And the Nova Scotia legacy of the Marshall Inquiry made even the use of the concept "screening" problematic when referring to how police and crown might collaborate in the charging process, so clearly, it was useful to explore the implications in a "team-type" milieu such as the Devonshire Family Court. The projects were described and assessed (Clairmont, Crown Cautions and Pre-Charge Screening in Nova Scotia, 2002). The projects were modest and their implications overtaken by other

events such as the inclusion of Youth Court in the Provincial Court on Spring Garden Road, but they appear to have at the least set the stage for the current Youth Court Team in Halifax which involves crowns, defence counsel, restorative justice representatives and others.

The PPS' ER project discussed here began in September 2005. A few years earlier the PPS had considered such an initiative but initial steps were not followed through, reportedly because "the defence did not buy into it". Federal Prosecutions in Halifax had launched an ER type program for drug cases in the 2002-2005 period. It appears that the program was more a case review to determine, subsequent to charges being laid but before court processing, whether the charges as such were warranted. The project was not directed to case flow issues per se but reportedly more to the fact that the central office was "farming out" a lot of minor prosecutions on a fee for service basis and had to be wary that the private lawyers contracted were not just prosecuting to earn the fee rather than because they had a strong case. One such federal official reported that "It operated for three to four year and did significantly reduce caseload but was suspended as it wasn't worth it"; at the same time, this respondent considered that a more general ER, applicable to the routine criminal code offences, would be quite worthwhile. That view was also shared by judicial leaders who indicated to this writer in 2005 (when he was engaged in an assessment of youth justice initiatives) that court resources in the Halifax area were adequate for youth but the major problem was the backlog in court processing of adult accused persons.

The PPS' ER project has been in operation for three years at a direct cost of roughly \$140,000 annually (a full crown's salary plus administrative support). In the first year it was officially written up as "Its objective is "to reduce court backlogs at the front end ... a senior Crown Attorney reviews files as they come in to flag those which look as though they may be easily resolved or where, failing short of the standard for pursuing a prosecution, discontinued. A letter is place in the file from the Crown outlining an acceptable sentence in the event of a guilty plea" (Annual Report, 2005-2006). Its fullest description in the PPS' Annual Accountability Reports came in 2006-2007 when it was described as follows,

"The early case resolution program in the Halifax office – intended to promote where appropriate, the early resolution of cases through timely entry of a guilty plea - is being reviewed. One senior crown attorney reviews all files on their arrival to determine which cases may be appropriately dealt with through early resolution. Certain categories of cases – for example, domestic violence cases designated as having a "high risk of lethality" – are excluded. In eligible cases, the Crown's sentencing position in the event of an early guilty plea is communicated to the accused and his counsel. The early resolution initiative seeks to reduce court backlogs and to reduce expenses".

Interviews with senior PPS officials fleshed out their views on the ER's objectives and format. Beyond speeding up the court process primarily by reducing the number of appearances by the accused persons, they envisaged that the ER initiative could result in better use of PPS resources in a variety of ways (e.g., more efficiency since there would be a thorough file review before the file was assigned to a crown; ER acceptance for routine cases would free crowns for more demanding cases), benefit duty counsel and Legal Aid lawyers by providing ER with

disclosure on arraignment, provide the accused persons (especially the unrepresented) up-front with clarity and options that would reduce unrealistic anxieties, produce savings on police services' considerable court costs, benefit victims by early case resolution, and reduce inconvenience for witnesses. Halifax was selected as the venue for the project since the provincial court there has the largest number of prosecutions and greatest backlog among the larger provincial courts (reportedly roughly twice the prosecution level as Dartmouth and Sydney courts). ERs were to be drafted for virtually all incoming files save high-end domestic violence, cases where there could be a significant victim impact statement (e.g., murder, serious sexual assault, impaired driving causing death), cases where victims could be at high risk, cases where one might expect unpredictability in victims' statements which could drastically alter the salience of the ER (e.g., some sexual assaults), and especially complex cases (e.g., cases involving severe mental health issues, complicated frauds) where crucial information may be required which is not readily available to the ER official. According to several PPS officials, the cases targeted for an ER letter constituted approximately 98% of all files received from the police.

The model employed by the PPS called for one senior, highly regarded crown to review all incoming files which annually have exceeded 4000. His responsibilities have included

- (a) Assessing the police reports and communicating with the police services' Integrated Court Section. Improving the quality of those reports has been a major consequence of the ER initiative. Because of the Marshall Inquiry legacy, the police lay the charges and these incoming police files frequently have to be edited and "corrected".
- (b) Terminating Crown proceedings on unwarranted cases, cases that are not prosecutable or do not contribute to the goals of justice (e.g., some cases of obstruction or resisting arrest vis-à-vis police officers).
- (c) Referring cases where appropriate to adult diversion via the ER recommendation. The police service continues to refer cases to adult diversion through its normal Crown channels so this activity by the ER official is an additional channel for diversion (actually one similar to the previous practice of court crowns themselves occasionally making referrals to Adult Diversion); according to the ER official, the police service could and should make more referrals to Adult Diversion.
- (d) More generally, drafting the ER letter for all non-terminated files where the Crown position on charges and sentencing, if there is an early guilty plea, is specified. The ER offer is specified as good for sixty days after which it is off-the-table. The senior crown – described hereafter as the ER official – attempts to provide the court crowns with a completed file two weeks before first court appearance if possible. The premise of the ER project, clearly appreciated by all informed court role players, is that the ER recommendation is "the bottom line", the lowest sentencing recommendation that the Crown will normally offer for a timely early guilty plea, since the latter saves "everybody" time and resources and has other benefits for the criminal justice system.
- (e) In addition to assessing the police information and drawing upon other justice data management systems (e.g., the court-based JEIN system, CPIC), the ER official scans

the PPS' own Prosecution Information Composite System (PICS), "a comprehensive computerized offender history information system which has eliminated the deficiencies of manual information management".

- (f) The ER official also may contact victims directly and even, though rarely, Corrections staff (Probation officers). With respect to victims, they may be phoned to obtain their views on the sentencing recommendations (e.g., the kinds of orders or conditions that may be part of the ER recommendation). There would be some reluctance reportedly to contact victims since if they recant on the phone (a not uncommon phenomenon) the ER official would be under an ethical imperative to include that in the disclosure since the telephone call has the status of a Crown interview. The PPS has been working on a protocol that would more quickly engage Victim Services (a provincial body) and HRPS' victim services in providing a victim impact statement.

PPS officials were familiar with similar ER thrusts elsewhere, particularly hoping to achieve results similar to those accomplished in the Lethbridge ER initiative noted above. The approach followed was more along the lines of the Ontario ECR projects described earlier in that it has been basically a Crown project with limited collaborative input from either the Judiciary or the Defence and it has focused squarely on front-end activity prior to a trial date being set. The PPS initiative was somewhat singular in that one ER official made all the ER recommendations; the singularity was not in having a senior crown do the ERs since experience elsewhere has often led to that option – apparently the logic is that senior crowns can draw on their experience to confidently determine an appropriate bottom line offer; rather the singularity has been that only one senior crown has done all the ERs. This clearly makes for a considerable workload for the one ER official (it may be noted that the senior crown, a well-regarded trial prosecutor, also continues to try the occasional case in Nova Scotia's Supreme Court). The underlying logic apparently has been that having one ER official provides consistency and prevents a variant of crown-shopping. Aside from workload implication, such a system could result, at least in the views of others, in the conflation of the ER program and the justice approach of the person drafting the ERs.

The ER initiative was launched in 2005 with limited engagement of the other court parties and indeed apparently without much discussion among the rank and file Halifax crowns or any distribution of a formal discussion paper or protocols. Virtually everyone interviewed, including other PPS managers, reported that it was a top management initiative. At the same time, it should be noted that an earlier PPS foray into ER had been aborted, presumably because of lack of support among some parties on the Defence side. Further, the PPS as an organization takes its statutory independence very seriously and appreciates that, in the words of a key ER advocate, "It's an adversarial system so one would expect some suspicion and opposition from the Defence side"; additionally, there was a recognition that some Justice officials might advocate policies somewhat incongruent with PPS responsibilities (e.g., seeing some virtue in the delay in processing cases of domestic abuse whereas PPS might see delay as creating new issues (e.g., victims petitioning PPS for a variance in conditions) plus weakening the case and not providing the accused person with timely justice, a major imperative for the Crown. Also, the

current initiative was designated as a pilot project which would be assessed before any transition to an on-going program status. There was, as was usually reported by informed court role players, a strong shared approach to justice between the initiators of the ER pilot project and the senior crown designated as the ER official, an approach which emphasized constraint in the ER offers (“not giving away the farm”), paying attention to criminal record or lack thereof (“If there is evidence of thefts and recent jail terms, well [the ER official] is not going to go back to square one and recommend a few community service hours”), and so forth.

The procedure established for modification of the ER involves several stages. When a crown receives the file from the ER official (hopefully at least days if not two weeks before arraignment), he/she is expected to review the file and ER letter and discuss any concerns with the ER official. At the courthouse the crown dealing with the file can make modest adjustments on their own in response to new information or requests. These modifications would have to be minor in scope, such as the time arrangement for community service hours or agreeing to intermittent jail time (on the weekends), but if a substantial modification is being considered or requested, the court crown would have to seek the approval of the ER official or inform the defence counsels that it is their responsibility, if they want to negotiate, to contact the ER official. An appeal can be made subsequently to PPS’ top management (here, the senior crown responsible for prosecutions in HRM). In the event that the ER is rejected (either passively or formally) the expectation is that if a conviction occurs the crown would normally advance a more severe sentencing recommendation. The ER protocols for modification have remained intact since 2005 with one exception; initially, any attempt to negotiate significant change in the ER terms were expected to go directly to the HRM crown manager whereas now they go to the ER official himself, though an appeal to the former, while rare, is still possible.

As in ER initiatives elsewhere, there have been some issues concerning the implications of ER for crowns’ discretion, raised both by some crowns themselves as well as by defence counsel. PPS management has disagreed with those critics who contend that the crowns’ discretion in handling cases has been taken away, and has held that the PPS is exercising discretion on behalf of the Crown, and also emphasized that there is a process for crowns to advance modifications in the ER. As one management person commented, “The whole idea was to make the case processing faster and relieve the crowns of pedestrian courthouse wheeling and dealing”. Several memos to staff, in response to some staff criticism, have laid out the management position on these issues. It is unclear whether and how the ER official may take into account judicial variation in approaches to sentencing when drafting the ERs but generally the judges are linked to specific courtrooms and the courtroom for the case is known in advance.

When this assessment of the ER was proposed by the writer, an internal assessment was already underway. PPS management was confident in the value of the ER project and aware of the diversity of viewpoints and other ER issues. The main implication for this assessment was to increase the number of planned interviews in order to adequately represent all viewpoints.

ER VIEWS AND EXPERIENCES: COURT ROLE PLAYERS

In this section the objective is to capture the ER views and experiences of the various court players, from accused persons to judges; to use sociological terminology the task is to grasp and convey their “definition of the situation”. Of course these definitions of the situations can be expected to differ by role – and within role categories - since interests and values shape the prism through which people filter their experience. In some cases the definition of the situation may well also incorporate inaccuracies concerning the ER but a sociological truism is that “if men define situations as real, they are real in their consequences” and so the identification and “correction” of any presumably factual errors is not the focus here. The ER protocol and process, formally at least, have been accurately set out earlier (pages 26-31) and quantitative data dealing with the impact of the ER project will be described and analyzed at length below (pages 101-150).

THE HALIFAX CROWNS AND THE ER INITIATIVE

Background

Seventeen crown prosecutors involved in the Halifax provincial criminal courts were interviewed, six of whom were females. Only five crowns had less than ten years experience in the role, with the median years with the PPS being twelve years. All crowns exercising a supervisory role at the PPS had more than the median years experience in the PPS. Non-supervisory crowns with ten or more years experience are designated below as senior crowns. The crowns typically were assigned to specific courtrooms but a few reported themselves to be “floaters”, going from courtroom to courtroom. Two of the crowns, because of their roles at PPS, had quite limited involvement on a day to day basis with the ER initiative but both had some experience with it and were well aware of details of the ER system. Three of the senior crowns interviewed are no longer in the employ of PPS.

The crowns’ characterizations of their role were quite similar, though several referred to it as “a quasi-judicial role” (“preserving the interests of the public, victims and even the accused”, seeking justice, obtaining convictions being secondary to the priority of truth and fairness) while others emphasized the advocacy dimension (especially but not only representing victims), and still others listed the functions of the role (e.g., providing advice to police and others, reviewing files, determining the realistic prospects for conviction etc). Several crowns were quite adamant as to what their role was not, namely in their view, seeking convictions or representing the victim; they were not denying that these are aspects of the crown’s role but only that they did not capture its essence. A few male senior crowns highlighted being in court as the top priority of their job.

The crown prosecutors identified a number of factors that make their work difficult, foremost being uncooperative witnesses and victims. One junior crown, for example, commented, “There is a notion that the public is law-abiding and wants justice but actually there

is a lot of apathy and outright contempt for the judicial process”. A close second identified difficulty concerned delays and blockages in the case flow which respondents largely attributed to the defense counsels, especially, not surprisingly, NSLA lawyers who provide defense counsel for the great majority of cases that are not resolved at the duty counsel level. Two senior crowns elaborated on this theme. One noted that “it can take up to two months for defendants to get a meeting with them [NSLA]”. The other commented that there has been a shift in case flow over the past decade from the Supreme Court to the Provincial Court which has paralyzed the provincial system. He attributed this to NSLA and other defense lawyers “who prefer the lighter sentences of provincial courts” and also to an ideological shift, on the part of the defense, where resolution is not sought or being avoided altogether “at the expense of case flow of course”.

Several crowns highlighted their heavy caseload as the major difficulty. A senior crown commented, “Back in 1995 I was able to carry my files for a day at court in a single plastic bag. Now I have at least two boxes on any given day”. Another senior crown, in elaborating on the this problem, noted that heavy caseload sometimes means little “prep time” which compels “low-balling” (“settle to get the files over with”). A few crowns, primarily male senior crowns, raised various issues about the judiciary as their major concern. Several crowns cited internal organizational issues, female crowns focusing more on management policies or lack thereof with respect to issues of gender equality (e.g., inadequate policies re pregnancy leaves), and senior males referring to issues around the ER initiative (e.g., perceived inappropriate limits on their discretion in negotiating sentences, “an atmosphere of conflict and distrust now”). A number of the crowns directed attention to the macro level citing as the major difficulty, public expectations and governmental / PPS policy. One senior crown expressed the opinion of a handful of others in citing “the false and unrealistic expectations that people, including justice officials, have of the crown’s role”. Several crowns raised issues of Justice policy. A senior crown expressed concern about the implications of government policy on domestic violence that required “cases be processed through the court no matter what”. Another respondent cited as a major difficulty the larger Crown framework with its emphasis on prosecution and convictions rather than extra-judicial sanctions and informal resolution, while another crown, who held that courts are not punitive enough, railed against the appeal process where “crowns often have no recourse”. A senior crown identified “government higher ups” (not PPS management) as treating crowns poorly, creating poor working conditions (e.g., wages etc) that she claimed were the reasons for several recent resignations at the PPS.

The crowns referred to “good days” as ones where their court cases went smoothly (e.g., witnesses showed up and were cooperative) and justice was served (several specifically mentioned being helpful to victims of crime). Several crowns identified “good days” as ones where they were able to give files “the attention they were due”. Several senior crowns characterized a good day as one where “cases were not constantly being adjourned or put off”. A few crowns cited days when they were dealing with an interesting and challenging file or where, in trials, they educed certain key points that otherwise might never have come to light. Along those lines, a supervisory crown commented “I enjoy the adversarial game, the advocacy and the possible contribution to be made to the protection of the public”. Bad days were depicted for the most part as days when the difficulties noted above came into play and there was a sense of “not

having enough time”. For example, several respondents referred to days “where unanticipated events unfold, new information emerges, that catch me off-guard”. One respondent, for example, reported, “A bad day is when administrative screw-ups delay things, witnesses do not show or they recant or when the system just doesn’t work, as when a sentence or acquittal is way out of whack (i.e., not congruent with law and/or the evidence)”. In particular, a number of crowns defined bad days as ones where they disagreed strongly with judges’ rulings and or sentences (e.g., “people let off too easily”, priority given to moving the docket along as quickly as possible).

Turning to how important specific features of crown work were for them personally, there was both consensus and divergence among the Halifax crowns. Overall, the majority of crowns considered that the specific features they were asked about – file ownership, negotiating with defense counsel, going to trial and so forth – assumed importance depending on the nature of the file they were dealing with. For the most part, the crowns did not hold that file ownership was important for routine, non-assigned cases which reportedly constitute the lion’s share of crown files and where the charges usually involve minor offenses. Virtually all crowns reported that these files were regularly passed around and file ownership was not crucial. One senior crown observed, “It may be frustrating for witnesses and victims to deal with several crowns on one case but that is inevitable”, while a junior crown stated that he liked the diverse range of viewpoints when files are passed around. With more serious complex cases, file ownership was generally deemed more important and most crowns reported that file ownership was readily granted in the PPS. One crown reported that in these cases it is usually mandated that specific crowns take file ownership; other crowns, while not explicitly referring to “mandatory” assignment, did suggest that for a variety of reasons, these files were best handled by one person. Still, a common view even in serious cases was expressed by one junior crown, namely “file ownership should not be a priority for crowns, even if it is on a personal level”. In this context, several crown prosecutors who were quite critical of the ER initiative, stood out for their greater emphasis on file ownership. One such crown argued that file ownership is always important as it relates to continuity; he commented that with files being passed around among several crowns, each makes some decisions and scribbles something in the file that he personally cannot understand or justify. Another such crown, self-described as “a very independent, self-directed crown”, held that file ownership is a huge part of being a crown, of having confidence in court, and to avoid confusion, co-managing a file should be restricted generally to “the crown you are paired with in a courtroom”.

Professional autonomy in handling files was seen as a related though different issue than file ownership. The crowns were split on the importance of professional autonomy, a majority emphasizing the organizational authority of PPS but others contending that the crowns have important individual-level authority (rights and responsibilities) inherent in their role as crowns that matter very much to them. **Regarding the former position**, one crown captured the common view in her comments, “I support the Crown’s position. I’m part of a team. It’s the Crown’s discretion I am concerned with preserving, not my own”. A junior crown stated that she was “dedicated to representing the Crown, not her own personal convictions” echoing the views of a senior crown who reported, “I am more concerned with the over-arching system. It should

be objective not personal”. **With respect to the latter position**, one crown, who emphasized that “professional autonomy is tremendously important for me”, acknowledged the overarching authority of PPS but stressed the discretionary authority of individual crowns in the field. Generally the crowns putting the most emphasis on professional autonomy were the most critical of the ER initiative.

The PPS management position on file ownership and professional autonomy was conveyed in the comments of a supervisory crown reported that “In the vast majority of cases, no, file ownership is not important. We are a team, an organization”. The respondent emphasized that crowns in practice largely function independent of management – “We don’t expect a report when they come back from court and we support the exercise of their discretion” – and that there is much informal consultation among peers. At the same time, professional autonomy operates in an organizational authority structure – “You are not a lone wolf and already accommodate various protocols and PPS policies; you are a member of an organization with a hierarchy and not in private practice where you are answerable only to yourself and ethics”.

The crowns attributed much importance to negotiations, especially senior crowns and especially in serious cases, and most expressed some liking for the interplay of negotiating with defense counsel. Most crowns explicitly mentioned that they did not like to become involved in any negotiation with unrepresented persons and were thankful for the duty counsel role which gives them a way to avoid that situation (i.e., inform the person to see the duty counsel). With few exceptions, trials were deemed to be things to avoid in less serious cases; most respondents echoed the views of one crown who said, “It depends on the case. I prefer resolution”. A junior crown commented “The job is inherently adversarial and trial is often a result of this but I am happy not to run a trial where it is unnecessary”. A senior crown commented further, “It is always more efficient not to go to trial but I am not afraid to do so if it is the right thing to do. Resolution [instead of trial] is better for the victims since they can avoid re-victimization and [also] the defendants are usually more likely to feel a sense of responsibility”. A correlate was the view that “Well, trials are always there so there’s nothing special about them”. However, several crowns commented that when they had assigned files or had invested much work on the file, they were often enthusiastic about going to trial.

The crowns were somewhat divided on caseload and case flow as problems, some highlighting these issues as major problems while most considered that caseload, at least, was manageable. The most common comment on caseload was that it was large but manageable or, as one respondent put it, “heavy but not overwhelming”. One crown, who reported that he did not feel overworked, suggested that caseload burden may depend on occasionally having to deal with unusual, complex cases but otherwise the perceived burden is largely the result of so much wasted time at court (“sometimes things don’t get going at court till almost 11am”) that cuts into the time needed to prepare. Another crown held that the manageability of her caseload was premised on people pleading guilty, not showing up for court etc, and, without the delays that these factors create, she probably would find her caseload for a day to be too large. Several crowns did report that the heavy caseload generated real pressure sometimes since it affected the time they had to prepare for court and a few crowns simply described the caseload as

“overwhelming”. The respondents typically did not think it productive to provide a numerical estimate of their caseload though one senior crown suggested an average yearly caseload at PPS of roughly 600 files. Several other respondents described an average caseload entailing eight to eleven court days per month.

With respect to case flow / court processing, there was a widespread, though definitely not unanimous, view that “Yes, it tends to be backed up”. A number of respondents pointed out that there was significant variation by courtroom. Several crowns contended that case flow had improved over the past three years, a time period roughly coterminous with the ER project while several others claimed that it had become more problematic (“definitely on the rise”) since the ER project began. One senior crown advanced the view that on case processing there is a social construction that speed is necessary but in fact he could not recall a case where there was an appeal based on long delay; case flow problems, in other words, in his view, may be more a mantra than something closely connected to reality. Most crowns who did identify case flow or court processing as a significant, real problem placed the onus on defense counsel requests for frequent adjournment. Some respondents saw this delay as a defense strategy, others as reflecting personal interests of the defense counsels (e.g., private lawyers who allegedly avoid early resolution and want to run a trial just to make a buck”), and sometimes (particularly in the case of NSLA representation) a consequence of the clients’ actions – “uncooperative public, witnesses and accused”.

The ER Initiative

The consensus among the Halifax crowns was that the ER project was management-driven and was launched without much discussion or fanfare. Some respondents referred to some e-mails and an occasional reference on the agenda of regional crown meetings, but virtually all respondents reported “it just appeared” and was not a consequence of specific problem-solving discussions among the crowns. There was consensus, including even some supervisory crowns, that the ER was essentially a top-down, senior management initiative. The crowns typically agreed that the objectives were to improve case flow (facilitate faster case processing), improve the caseload of the crowns by freeing them up to spend more time on more complex cases, reduce the anxiety of accused persons by giving them a quick indication of the crown’s position on charges and sentencing, and possibly saving dollars for other court players such as the police. In particular, the crowns usually considered the main goal to be “expediting the case flow”. Typically, too, they supported these ER objectives. Only a few crowns questioned the objectives. One senior crown held that he did not see any good reason for the ER as in his view there was no big problem of case flow in the first place that would warrant the PPS putting a senior crown in charge of it full-time.

The crowns usually agreed that in the ER program court crowns could make minor changes in the ER without consulting the ER official if circumstances had changed or unknown facts came to light, though some respondents indicated that they generally did notify him in such cases. One senior crown, for example, stated that she never made changes to the ER without

consulting the ER official. Another senior crown commented that if she had a problem with an ER, she would resolve the matter internally by going and seeing the ER official before going to court. Once in court she “always stand behind the ER” as she believes this is part of her job as a crown, though she did allow that in cases where only minor changes to the ER are necessary she would not consult because she would be confident that the ER official would support her changes. There was also a consensus among the crowns that to go beyond minor adjustments in the ER, they would definitely be expected to secure the approval of the official. There was no elaborate discussion with the court crowns as to what would be a minor or major change – neither with the ER official apparently nor with the interviewer - but implicit in the respondents’ comments was the view that the distinction was not particularly problematic to discern. One crown did suggest that there would be widespread agreement that altering a sentencing recommendation to allow for intermittent jail time or adjusting community service hours to accommodate the accused person’s employment would be minor issues whereas changing a recommendation of incarceration (e.g., from jail to house arrest) or significantly reducing the period of incarceration would be a major issue. On occasions when a file did not have an ER attached to it for no apparent reason (e.g., it was not a complex or serious case), the crowns reporting this circumstance, indicated they went ahead and drafted one then “ran it by [the ER official] who usually agreed [with the draft]”. Several crowns reported that a hitch in the process has been that the ER has not been available in sufficient time for review before court, thereby limiting the opportunity to meet with the ER official to discuss possible changes; most respondents identified the problem as largely due to the PPS not receiving a police file until a few days before arraignment.

All junior crowns (i.e., less than ten years experience at PPS) reported that they were comfortable making minor changes to the ERs on their own, based on new information, and that, if they had problems with an ER, they had no reluctance taking it up with the ER official. They indicated that “It is hard to make real changes” and also “for the ER to have integrity, there have to be limits”, so if the defense wants a change outside of what they consider the range of the ER, they will advise the defense counsel to go speak to the ER official. The respondents virtually all emphasized that there was a definite limit on what they would and would not change on their own initiative. More experienced, senior crowns generally shared that view of the court crowns’ role vis-à-vis the ER sentencing recommendations. One such crown, a self-described strong supporter of the ER project, detailed the process she has followed - When she gets the ER she assesses it to see if she agrees with the recommendations and, if she has any problems, she talks with the ER official “who has always been open to my suggestions about changes”. If she receives new information at court from the defense or accused, she is comfortable making changes without consulting the ER official “in the less severe cases”. Where she wants to reject the ER and has not had the opportunity to speak with the ER official, she may inform the court that she is not yet ready to render a recommendation but more often she will let the defense counsels reject the ER and have them deal with it. Concerning the process, one junior crown called attention to several other minor practical adjustments routinely made by court crowns, namely “ERs are routinely allowed to go past their expiration date, a modest technical violation of ER policy” and “Encouraging a request by the defense counsel for a PSR can go around the ER”.

Several senior crowns, quite critical of the ER program sometimes in theory and sometimes in implementation, contended that the ER system was “imposed” and they resisted the standard process for making changes in the ERs. For example, one expressed that position, shared by the others, as “There was not much official flexibility allowed court crowns and the PPS atmosphere [regarding the project] “made disagreeing with the ER akin to betraying the Crown role”. In their view any significant change had to be pitched to the ER official who was “difficult to disagree with”, so much so allegedly that they did not bother. In these instances, they either simply ignored the ER or used another crown to intervene and discuss the ER recommendation with the ER official on their behalf or left it to the defense counsel to contact the ER official to seek changes in the recommendations. One such respondent reported continuing a pre-ER practice of assessing each file and making personal recommendations, “sometimes it matches up with the “official” ER and other times it does not”; the respondent emphasized even “changing jail recommendations which most other crowns would never do [without the approval of the ER official]”. Only one “dissident” crown reported being sanctioned by PPS management for allegedly not following the prescribed ER process but others in this sub-grouping indicated that, in their view, they simply were not caught. Several of these crowns also contended that many other crowns, increasingly so, reject the ER and negotiate sentences on their own terms. There is no simple objective way to assess such statements since the crowns’ recommendations are not written in the case files and the only recourse would be to listen to the court tapes to differentiate between the crown’s recommendation and the judge’s sentence. The ER critics amongst the crowns acknowledged that there is an informal appeal process, for amending the ER, through to the chief of prosecutions for the Halifax courts but only one of the sub-group critical of the ER project reported resorting to that process and all of these crowns deemed such resort to be without value. Overall, among all crowns, there have been only a couple of such appeals made in the two and years since the ER was launched.

The Impact of the ER

There was substantial variation in the estimates of the crowns concerning the frequency with which the ERs are accepted by the accused or defense counsel on his/her behalf. The variation was ambiguous since there was some confusion by crowns on how to define acceptance or rejection of an ER. Most respondents considered that even if the ER is modified before accepted, it is still considered to be accepted, while others hedged on drawing that conclusion, suggesting that the significance of the change has to be carefully considered. Several crowns pointed out that there are other times when the ER is rejected then unofficially offered again during trial and the accused, accepting it, pleads guilty. Then, according to several crowns, it is not so much a matter of the ER being accepted or rejected but more of the sentencing recommendation being same as in the ER recommendation. A number of crowns indicated, too, that the sixty day limit for acceptance or rejection is occasionally waived, with or without formal approval from the ER official but, whatever the case, it is appropriately considered an

acceptance. Some crowns concluded their comments on the definition of acceptance or rejection of an ER by stating that “the lines are blurry and need to be clarified”.

A slight majority of the respondents considered that ERs were being accepted at a reasonable rate though few were confident about providing a numerical estimate. One senior crown, for example, simply stated “Not sure [about the rate], but people [the accused] are definitely taking them with or without legal advice” while a junior crown commented, “Defendants are responding to ER and are accepting them”. Another junior crown observed, “Yes, accepted, often 2 to 3 times in one day – but it’s hard to tell if it’s due to ER or because the file would have been resolved any way”. All of the crowns who were sharply critical of the ER, whether in theory or in implementation, held that the ERs were not being accepted. One senior crown suggested an acceptance level of only 5% while another held that, in the courtroom he serves, the ER has been rejected roughly 80% of the time. Not all respondents who believed that the ERs had a low rate of acceptance were especially critical of the ER program; one senior crown who was somewhat ambivalent about the program’s value, noted, “I am not sure about the ERs being accepted but a pretty small number, maybe one a week ... it’s rare for the ER to be accepted as is and variations to the recommendations were pretty much standard practice”.

There was much agreement among the crowns, especially the senior crowns, that a crucial factor affecting whether an ER will be accepted is whether or not the ER is recommending a jail sentence. A number of crowns specifically stated that avoidance of jail is the number one priority for the accused persons. Not surprisingly, it was generally considered that ERs were accepted most often in simple cases where, for example, a fine was being recommended. The critics of ER usually emphasized that rejection of the recommendations was the result of their being too tough or “high-end” and in support of this contention they commented that judges most often undercut the sentence if the ER is rejected and that some judges blatantly scorn the ER.

In terms of the ER objectives, overall, most crowns leaned towards the view that the ER initiative, to a significant degree, has been meeting its objectives (e.g., better case flow, benefits for the crown role, and for others, including the accused persons), but there was a sub-group which considered that it has been a failure in those regards and a smaller sub-group where the crowns explicitly stated they were suspending judgment pending the results of some assessment such as this one. The junior crowns and the female crowns were typically of the view that the ER had indeed improved case flow and had a positive impact on their caseload. A female crown reported, “ER definitely helps the workload of the crowns. Before its implementation I would have to draft up my own ER. Now that work is done for me”; her remarks were echoed by a young male crown who noted, “ER makes the file a no-brainer. Everything is taken care of in advance. Workload is definitely reduced”. Several junior crowns cited benefits for case flow; one noted, “ER definitely helps with case flow ... unclogs the system, relieves pressure of the normally astronomical overflow”, while another contended, “The ER promotes speed and efficiency. ER saves hundreds of “five minutes” which can add up to whole court days. This also leaves room and time for more important cases”. A male junior crown made the observation that “The ER is good at expediting files by helping to resolve cases in a timely fashion” and cited that

the main way that has been accomplished is through the reduction in fear and anxiety on the part of the defendants – “[they see] it is not as bad as they had imagined ... no jail time”. Another junior crown expressed the opinion of several others in her comments that ER had lightened her workload and has been a significantly useful tool for dealing with unrepresented accused persons. Echoing these observations, one senior crown held, “The ER provides relief for defendants by reducing the unknown factor in sentencing” (especially in her view in DUI cases); she also considered that because the ER has saved time, in turn, it has saved money. A young crown with but a few years experience held, “ER has made my job easier and more efficient, and accused persons can make decisions quicker”.

Among the other sub-groupings identified above, there was, as noted, caution and sometimes a totally different assessment of the ER’s success to date. One of the ambivalent crowns concluded, ultimately in his interview, that ER had probably improved case flow, reduced anxiety for some defendants, improved aspects of crowns’ workload and perhaps even saved time and expense for civilian and police witnesses, but the issue for him was “by how much”. Another of the ambivalent sub-group made essentially the same point, noting that the issue is whether the benefits justify the assignment of a senior crown exclusively to the task of drafting ERs. Among the sharp critics, all senior crowns, the conclusion was clear, namely the ER had definitely not achieved the stated objectives. One such respondent, expressing views that were common in this sub-group, commented that far from helping case flow, “There are more cases going to trial because the ER recommendations are so punitive [that they are usually rejected]” and added that “The ERs only increase anxiety for defendants”, primarily in his view because, at the courthouse, the crowns cannot meaningfully negotiate the ER recommendation, leaving the accused “in the dark”. Another crown, making the same argument, added “Sticking to the terms of the ER and then having to ask for something more [a tougher sentence] if the ER is rejected may weaken the salience of the crowns’ recommendations in the court system”. The only advantage of the ER for crowns “at the courthouse” that was cited by several of these respondents was that having a written offer to give to the unrepresented person enables the crowns to avoid negotiating with them [as opposed to their counsel]”. The other advantage they cited was that ER has entailed a vetting of incoming files, but these crowns usually added that they did not believe that their caseload has been improved because of the ER initiative.

Perceived Benefits and Shortcomings of the ER

As noted above, there was some disagreement among the respondents as to the impact of ER for the crowns’ role with respect to caseload and case flow. The most commonly cited benefit for the crowns was that it has helped in the vetting of files (“a lot of work is done for us”). A senior crown observed that she appreciated the fact that a senior PPS crown has completed a basic review of the file before she gets it and, also, that by doing so, and providing both crown and defense with the enhanced disclosure, the ER project has effected “more organization into the court process”. The fact that the ER official apparently examined the police reports and charges thoroughly, and corrected errors and other shortcomings, was much appreciated. A supervisory crown commented that there has been much benefit in having a

senior crown screening incoming files to determine “Is this a provable case?”, “Are there serious flaws in the received files?”. One senior crown elaborated on that point as follows, “[the ER official] is not afraid to piss off the cops”, and his vetting and getting more information from the police allows her “to preserve some of the relationship I need with police authorities while still getting the information needed for my work”. In the same vein, a junior crown observed, “The police hate [the ER official] because of ER. He forces them to actually do their jobs when pressing charges and creating reports or documents”. Another widely-held benefit for the crowns was deemed to be how it facilitated their dealings with the unrepresented persons, namely being able to give them (or the duty counsel) the ER recommendation and avoid any direct negotiation while providing a clear statement of the crown’s intentions on charges and sentencing. Among several strong ER supporters, an additional benefit of the ER has been that it represents “a kind of solidarity ... they can all stand behind the ER ... it represents a group consensus of sorts”. A related benefit according to several crowns has been “a necessary standardization for crowns when recommending a sentence”.

For a few crowns, the benefits balanced if not exceeded the negative implications they perceived of ER for their role. For example, one junior crown commented that the ER process is technically fettering his discretion at the courthouse but “having files organized and complete makes my job a lot easier and I am able to be more productive”. One of the senior crowns who expressed ambivalence about the value of the ER project held that “ER puts crowns in a spot”; on the one hand, when there was enough evidence to go to trial and win, because of the pressure to resolve early with ER, he would settle for a lower sentence, while, on the other hand, it can work the other way, with the ER being too high and sending a case to trial that did not need to go there. The strong critics of the ER initiative referred to the alleged negative impact that the ER has had on their reputation and status at the courthouse, something which they believed has consequences for the respect of the Crown’s role transcending their own sense of what being a crown properly entails. Here they referred to the constraints on their give and take with defense counsels and, more generally, to a loss of credibility with defense counsels and judges by having to go along with the allegedly inappropriate ER sentencing recommendations and even, by ER mandate, asking for tougher sentences if the ER is rejected, which, in their estimate, it usually is. One such senior crown contended that, for senior crowns who are confident in their role, ER reduces discretion and weakens their status and reputation in the courtroom milieu since they are seen as robotically advancing the ER recommendations; on the other hand, he allowed that younger, less experienced crowns may see the ER as having benefits for themselves. Another senior crown prosecutor who was critical of ER held that “ER makes the crown’s job more difficult. The recommendations are often way too high and changes cannot be made. This forces crowns to sneak around and potentially risk their reputations, which is not fair”.

All respondents were specifically asked about the implications of the ER for the other, different court role players. The ER impact for the unrepresented defendants, according to the crown, as noted above, was mixed though mostly deemed to be beneficial, especially providing them with the timely and concrete position of the Crown. One crown, with experience as duty counsel and private defense counsel, observed, “ER is particularly beneficial to the unrepresented. Even if they do end up with a lawyer, they are at least not completely lost on their

first day alone at court. With the ER they know what they are looking at on their first appearance. In conjunction with duty counsel the ER can finalize a case on first appearance”. Several senior crowns who were generally critical of the ER initiative commented that the ER provides at best only limited help for the unrepresented defendants since there is a complete lack of input from the accused or about his/her circumstances when the ER is drafted. Other crowns emphasized that while the ER is useful for the unrepresented, “It only works in conjunction with the duty counsel”. The crowns usually considered that the ER was useful for the duty counsel and facilitated their work defined as providing quick file assessment and legal advice to the unrepresented.

A supervisory crown noted that if the ER initiative was going to be successful, it would be important that Legal Aid lawyers “buy in”. It was considered, too, that it was reasonable to expect such cooperation since these defense counsels have a heavy caseload, are on salary and are paid from the public purse. Some crowns also considered that the ER made the role of defense counsel (apart from duty counsel) easier in that, as one senior crown observed, “they have a beginning and end point to approach their clients with”; a junior crown echoed that remark, saying “ER provides the defense counsel with a clear understanding of what the crown is proposing or going for”. The crowns generally acknowledged however that, apart from duty counsel, there was no enthusiasm among defense counsels for the ER initiative. Among crowns strongly supporting the ER, there was also the view that a major impact for defense counsels, one that the counsels did not like, has been that it impedes “crown shopping”. As one senior crown put it, “Defense [counsels] who are not supportive of the ER [are negative] because it has hindered their ability to ‘crown shop’, when defense lawyers essentially shop around for a crown who will give them the sentence they are looking for. It is a huge waste of time and resources”. Another crown supporter of ER reiterated that point and commented that “ER in this sense levels the playing field by introducing a standard recommendation that everyone has to work with”. A senior crown suggested that a major problem for ER has been the lack of cooperation from NSLA lawyers. He pointed to common strategies utilized by the defense counsel (or some accused persons themselves) which severely limit the effectiveness of the ER. These strategies include “Thinking they can do better [in terms of charges and sentencing] for their clients, they use delaying tactics to avoid jail or harsh sentences or any unfavorable outcome. They are unlikely to take an ER because they know that they’ll get a lighter sentence if they keep putting things off. Changes to ER should focus on changes to the court process in a larger sense [e.g., not allowing so many appearances for someone to even enter a plea]”. The crowns who were critical of ER generally held that the defense counsels do not support ER “primarily due to its perceived rigidity”.

The crowns on the whole did not think that the impact of the ER on judges was profound but held that the judges would like the ER project because it improves case flow and “ultimately it cuts down on their work load”. The crowns contended that judges could disagree with the joint recommendation that an accepted ER represented but most often they would consider themselves bound to accept it. One crown suggested that the ER is often not realistic since a lot of sentencing depends on the whether the judge is lenient or strict and it is the field /court crown who knows this, not the ER official at headquarters. Some crowns, basically among the strong

critics of ER, advanced the idea that the ER recommendations have been so “high-end” that in some courtrooms it has been almost as if there is an on-going clash between the judge(s) and the PPS.

Other shortcomings of the ER were identified by both supporters and critics among the crowns interviewed. Among the former, the shortcomings identified were modest and could be accommodated within the extant ER structure and process, such as receiving the files earlier from the ER officials and formalizing the amendment protocols. Crowns critical of ER generally indicated that the problems with ER stemmed largely from how it has been implemented. One such senior crown contended that the main problems / shortcomings were that one person drafted all the ER sentencing recommendations, did so with virtually no input other than police information, and that the ER recommendations were too punitive and did not allow for court crowns to negotiate with defense counsel. The other crown critics essentially reiterated those shortcomings and some summarized them with one phrase, “the minimization of crown discretion”. The crowns supporting the ER downplayed these criticisms, pointing to the amendment process discussed above, but some did acknowledge some issues in the lack of direct communication between the ER official and the courts. There was among most crowns no significant concern about one person doing the ERs or the tough philosophy (there was widespread agreement among all crowns that such a characterization was apt) of the ER official. Indeed, several crowns explicitly shared the opinion of one young crown that “Another good thing about the ER is that [the ER official] is the only one to draft it and he is familiar with cases and accuseds’ names...if the accused is a repeat offender, he will know this and an appropriate sentence for the new offence will reflect this knowledge ... [it] could have slipped through the cracks had numerous people been drafting ERs”.

FUTURE DIRECTIONS FOR THE ER

Overall, there are significant divisions among the Halifax crowns as to the desirable future for the ER project. The majority of the respondents (nine and possibly ten) would prefer that the initiative continue and some advanced suggestions for specific changes to improve perceived modest shortcomings. A minority (four) considered that the ER initiative would have to be quite substantially revamped, basically having the court crowns take responsibility for the ERs and, at best, having the ERs developed on the incoming files at headquarters become “initial sentencing positions of the PPS”. Two or three respondents displayed a more “disinterested” viewpoint, namely “if it is achieving the significant objectives [outlined above], keep it and if not scrape it”. Most crowns provided straight-forward and unambiguous responses when asked if they wanted the ER initiative to continue “pretty much as is”, but a few gave complex responses that made it difficult to label their position. There were two consensus opinions expressed, namely that (a) the ER official could use some assistance given the heavy workload he has, and the pressures of file management and the crowns wishing for timely receipt of the files, and (b) there is sufficient confusion about the official way of doing things that, as one crown, very supportive of the ER program, stated, “It would be helpful to have more specific instructions

when it comes to amending ER. A memo or some official document from higher up providing more protocol would be helpful”.

All but one of the female crowns and virtually all the young (non-senior) male crowns expressed much support for the ER initiative as conceived and implemented. Some of the assessments were unqualified; for example, one female commented simply “I support it and do not want it dropped” while another stated, “ER is fine the way it is.”, “I am a strong supporter of ER”. Asked about the alternative of leaving it to the court crowns to do the ER, the common view among the ER supporters was “Definitely not. It would create more work for the already overburdened crowns” or ““No. it would defeat the purpose and create more work.” Generally the supporters were not wont to tinker with the ER model in place. Asked about the option of a more “team approach”, the common response was reflected in the remarks of one respondent, “I don’t like it. [It would be] a waste of time, resources and staff, and defeat the purpose of the initiative to alleviate the workload and speed up the process”, while another echoed that position in noting, “No, that would involve more people and be too complicated”. Several of these respondents however did share a quite widespread view at the PPS that designating another person to work with the ER official would be advantageous, especially, but not only, for improving file management (e.g., getting the ERs to the court crowns earlier). One supporter noted “At least another person working with [the ER official] would be helpful. At least to cover him on vacations and add another perspective to ER”, while others highlighted his heavy workload in comments such as “If ER continues, they should have more people helping him” and “having another person drafting ER with him would be helpful to ease the workload.”

Among the minority of crowns who were sharply critical of the ER program -typically on the grounds that it represented the views and style of one person, and improperly fettered their rights and duty to exercise discretion in the files they handled at the provincial court - the preferred alternative was to re-emphasize the authority of the court crown either by doing away entirely with the central ER role or by re-conceptualizing it as generating an “initial sentencing position” which the court crowns would take under advisement. These respondents were all senior crowns and most of them indicated that they had been doing their own versions of an ER prior to the initiative and continued to do so. They were quite committed to their assessment of the ER project and adamant that the required change would entail both policy and personnel; as one stated, “have someone else draft the ER or scrap the program altogether”. Two respondents offered the alternative of a team approach whereby crowns assigned to a specific courtroom would collaborate (usually by rotation of the responsibility) in drafting the ERs but others suggested that there was a serious flaw in that approach, namely that if the crowns did not move to different courtrooms, they would invariably begin tailoring the ER recommendations to the specific judge(s), not to the file itself.

As noted above, a couple of respondents, on-the-whole favorable in their assessments of the ER project, gave more conditional support for its future. They held that the ER project provided benefits for court crowns and other court role players (e.g., the accused) and appeared to be accomplishing most of its objectives but they also contended that “changes in the ER are difficult to make because of the hierarchical arrangements within the PPS”, and that technically,

in their view, there is inappropriate subbing for their own discretion. One such respondent commented, “Some rules have to be in place [for bargaining between crown and defense]. You need a higher authority on the ER issue but I don’t believe blindly following protocol for the sake of it”. These crowns pointed to the assessment underway and suggested that “It depends on the assessment. If good, keep it; if not, it’s wasting a senior crown who could otherwise be helping [on the caseload].” They indicated that they were concerned with the lack of information on whether the ER project has been working and that scrapping the project (their expression) should be an option. One respondent added that “Even if the ER is scrapped, it is important to keep having someone vetting files, which helps caseload and case flow”.

There were a number of suggestions advanced that were offered as worthwhile and ‘do-able’ changes within the existing ER framework. The chief ones, as noted above, were more help for the ER official with the heavy workload (a consensus perception was that he had a very demanding job drafting all the ERs himself) especially so that the court crowns could get the files earlier, better file management (some ERs apparently have been misplaced, acceptance or rejection or modification of ERs have not been checked off on many case file folders), more formalization of the protocol for amending the ER, and monitoring the program to determine progress on its objectives and to identify shortfalls and bottlenecks. A few respondents sought more information on why the particular recommendations were made, on the grounds that “then the crown could explain it to the court even if the crown did not agree with it”. It was unclear whether this suggestion reflected a breakdown in the relationship between the specific crowns and the ER official (such they did not discuss the issues) or whether the respondents sought more elaborate discussion and collaboration.

Several crowns suggested that pre-sentence reports (PSRs) should be obtained prior to the official ER being conveyed to the accused and/or defense counsel; as one crown stated, “PSR reports should be added into the mix before ER recommendations are drafted in order for [ER official] to have all the facts”. Since PSRs are provided by probation officials under court order subsequent to conviction, it is difficult to appreciate how that suggestion could be implemented. PSRs already on file would presumably be out-of-date and it is hard to imagine the pressed probation officials responding to such requests. Another suggestion was to filter out, at in-take and before arraignment, all cases with minor charges and then deal with them with ERs on special court days. Presumably this approach would limit ERs to cases requiring less information about the offense and offender, “minor files that are clogging up the system”. A related suggestion advanced by a senior crown who supported the ER initiative but thought that changes in court processing were needed to “not allow four or five appearances for someone to enter a plea”, was a hard-line “take it or leave it” approach – he would have the ER person go to court on special ER days, meet with the accused / defense before they see the judge, and give them the one-time offer which they can either accept or not.

OVERVIEW, CENTRAL THEMES, HALIFAX CROWNS

There were a number of themes common in virtually all the crown interviews, namely

1. File ownership – not to be conflated with professional autonomy – was not emphasized by respondents save in the more major, serious cases. Most crowns indicated that routine files were routinely passed around without hesitation or sense of infringement. Even on assigned cases, the respondents reported that they had no problem having a colleague look it over. Presumably the practice of assigning crowns to courtrooms reinforced this viewpoint.
2. The ER initiative has been a management-driven project. There was neither significant pre-implementation discussion nor post-implementation collective assessment. As several crowns reported, “It just sort of appeared”. The protocols for crowns to deal with, and possible change, the ERs have been minimally formalized.
3. Because one senior crown is tasked with preparing all the ERs there is a conflation of program and person. One result is that the support-level for the ER program is significantly correlated with one’s relationship with the ER official. Another is that the ER recommendations are seen as reflecting that official’s approach to justice issues.
4. The consensus appears to be that ER is good, at least in theory if not in practice, especially for its value in reviewing incoming files, for providing crowns with a standardized sentencing framework (for charges and sentences), and for dealing with unrepresented accused persons and duty counsel.
5. In general, the ER has not been well-received, but rather sharply criticized, by NSLA lawyers and the private criminal bar lawyers for two reasons, namely the allegedly high-end sentences being recommended and the perceived difficulties for negotiated change of the recommendations.
6. The ER official could use some assistance given the heavy workload he has, and the pressures/demands of file management and the crowns wishing for timely receipt of the files.

The special common themes in the interviews of those clearly supporting the ER initiative include

1. There are substantial benefits for the crowns related to the ER initiative, especially having the ER official vett all incoming files for quality of the police reports, appropriateness of charges and possible sentencing. ER helps make the workload more manageable by having “ready to go” files for court crowns.
2. The standardization of the PPS response in terms of charges and sentencing recommendations, as achieved through the ER, limits “crown shopping” by defense counsel and is a major reason for their criticism of the program.
3. Dealing with the unrepresented accused person is very problematic and the ER is of value in facilitating such interaction (especially given the availability of the duty counsel to discuss the ER recommendations with the unrepresented).
4. Professional autonomy has to be placed in the context of the overall mandate of the PPS and the lawyers as agents of the Crown represent and properly take direction from the organization.

5. The ER official is generally seen as an authority figure having the confidence of PPS management and also effective in dealing authoritatively vis-à-vis outside role players such as the police services.
6. These crowns are comfortable making changes in the ER either through discussions with the ER official or on their own but all stressed that they referred only to minor changes.
7. Supportive of the ER initiative in theory and practice, these crowns limited their suggestions to modest reforms such as more help for the heavily burdened ER official and more formalization of the ER protocols.

The special common themes in the interviews of those crowns critical of the ER initiative include,

1. The ER program as implemented represents a major challenge to the professional autonomy of the court crowns. The dissident crowns argued strongly that the ER program not only limits their discretion in dealing with their files but also impedes their carrying out the responsibilities of their role as they and some other court role players see it (i.e., taking special circumstances into account in their recommendations to the court, and negotiating with defense counsel).
2. The ER sentences are often high-end and inappropriate because the ER official drafts them without awareness of the defense/accused person's arguments and circumstances, relying essentially on the information (often inadequate information) provided by the police, and his personal approach to justice issues.
3. The ER initiative has not significantly achieved its objectives with respect to reducing the caseload of the court crowns, speeding up the court processing of files, or benefiting the accused persons, especially the unrepresented.
4. The ER initiative has limited negotiations and worsened relations between court crowns and defense counsel, and hurt the reputation of the court crowns.
5. These respondents typically indicated that prior to the ER initiative they did quasi-ERs themselves for their files and that they have continued to do in their own way, sometime with subtlety, sometimes not, despite the ER program.
6. The ER project should be radically transformed, either becoming an initial sentencing position which the court crowns take under advisement or being discarded in favour of the traditional emphasis on the court crowns' discretion and negotiations.

Among crowns who were manifestly ambivalent in their appraisal of the ER initiative, there were a few special common themes, namely

1. There have been benefits of the ER, especially for the crowns' accessing better quality files as a result of the ER official's vetting incoming files, and for the unrepresented accused's obtaining a clear indication of the crown's position on charges and sentencing. The duty counsel role was considered crucial with respect to the latter impact.

2. There was acknowledgement that the crowns' caseload and the court case flow could both benefit by the ER project but uncertainty about the degree of impact given the perceived low rate of acceptance of the ERs and the constant flow of cases.
3. Making minor changes to the ER recommendations have been possible, sometimes without feeling any need to consult with the ER official, but the limits on the crowns' discretion are very real. The ER system technically at the least was seen as infringing on the rights and duties on the crowns.
4. The relationship between court crowns and defense counsel – the private bar and Legal Aid – has deteriorated and the court crowns have been subject to criticism for adhering to the ER recommendations.
5. It is crucial to obtain good evidence on the extent to which the ER program has been successful and if the evidence is largely negative, the costs of the ER are such that the program should be scrapped. Some strategies would have to be developed in that case to efficiently handle the many minor cases that clog the courts.

THE DARTMOUTH CROWNS AND THE ER INITIATIVE

Background

Six crowns, four males and two females, were interviewed, three with twelve years or more as crown prosecutors [referred to below as the senior crowns] and three with less than seven years. With one exception, all these respondents had spent virtually all of their legal careers to date as a crown prosecutor and only one had criminal court experience as a lawyer in another province. The crowns largely described their roles in a functional way; one crown for example said his role is advising policing authorities regarding possible charges, reviewing said charges and facilitating the presentation of evidence, while other crowns talked of “reviewing files and going to court”, “normal crown business and rotation”. One senior crown read the “Crown Motto”, highlighting “protect/defend rights of victims and serve the public in a just manner”. Another crown defined her responsibilities in a quasi-judicial way, namely figuring out and advocating sentences – “that’s my job”.

In discussing the biggest difficulties in their routine work, two features were frequently mentioned, namely (a) dealing with uncooperative victims and witnesses, not showing up or recanting their statements to the police, especially in domestic violence cases; one crown described the latter as particularly frustrating due to “the stand by your man syndrome”; another crown referred to “reneging by victims” in the context of the challenge of dealing with “the battered woman syndrome”; (b) the heavy and crammed caseload that translates into inadequate time for court preparation; one crown who strongly emphasized this difficulty complained about “a shortage problem at the office”, both in terms of available crowns and support staff, adding that files get to her desk way too late, while another crown described “a waiting room full of people, piles of work on the desk, and court clerks incessantly calling”. A variation of the latter theme was articulated by two respondents, one who said his biggest difficulty has been “There is always someone (the police, the defense, the unrepresented, the judge, court clerk etc) with a question that needed to be answered yesterday”, and the other who reported that “it is hard to meet expectations ... the court administration, defense and others rely heavily on the crowns to get things done”. A senior crown opted to define what he liked best about the job, namely that “It is interesting and always keeps me on my toes ... dealing with people ... helping them in a time of need or during a very low point in their lives”. In that vein, other crowns referred to working with cases where children have been sexually assaulted as challenging but rewarding - “feeling good when I can help vulnerable members of society”.

The crowns generally defined “good days” as ones when they were busy but effective, and “bad days” as ones where the workload for one reason or another was “really just too much”. With respect to the former, one respondent referred to arraignments days as good days, “busy in court all time but most productive”. Others referred to “things going smoothly”, “getting at files in a timely fashion” and “[timely] handed a file that is up-to-date, complete”. Bad days, on the other hand, were defined by the crowns as unproductive days where witnesses did not show (or they recanted) or there were interruptions but there was nevertheless a heavy volume of cases to get through. One crown commented, “[a bad day] is when too much is happening all at once ...

not having the time to speak with witnesses and be adequately prepared for court”. Finally, one crown said simply that a good day is “when the judge makes the right decision” (quickly adding, not necessarily in his favour but the best resolution) and conversely “a bad day is when the judge makes a bad call”.

In identifying the importance to themselves of various facets of the crown prosecutor’s role, the Dartmouth crowns varied significantly in their responses. Several crowns identified “file ownership” as very important but it is not clear whether they were conflating file ownership with professional autonomy in dealing with cases. One crown, who earlier had stressed that the crown’s paramount job is figuring out and advocating sentences, indicated that file ownership is on the top of her list. Two crowns said that file ownership is very important, linking that with taking pride in their work and manifesting the discretionary authority in their role. The three other crowns downplayed the significance of file ownership, noting that, for efficiency sake, files get passed around much, especially within courtrooms. They agreed that sometimes there is file assignment system for serious cases, and in such instances, “It’s better to have fewer people dealing with the file. Not to preserve sense of ownership but to provide the best possible service to ‘clients’ ... it’s better for their sense of ease if they are dealing with just one crown”. Two senior crowns reported that file ownership is important in a general sense, but in perspective and not to the same degree as it may be with the police officers responsible for laying the charges; as one put it, that “you should know about the all the files in your courtroom”. While noting that they enjoyed having the freedom of handling cases on their own terms, they both stressed that the crown’s role is not about personal values but representing the overall Crown position; besides, one added, “We [the Dartmouth crowns] are more or less on the same page”.

The crowns shared the view that, where possible, it is best to avoid dealing directly with the unrepresented accused, preferring of course to deal with the duty counsel or subsequently his / her defense counsel. The reasons were not surprising, namely “It is safer”, “It avoids misinterpretations”, “I don’t want to take advantage” and “I always suggest they get counsel”. One crown commented that there is an adversarial relationship between crown prosecutor and the unrepresented accused so it is important not to meet with them unless a police officer and / or investigator are present since the unrepresented often recant/manipulate a discussion into their advantage at court; a corollary of this position is not to speak directly with an accused who has defense counsel. While clearly viewing the relationship between crown and defense counsel as adversarial, the Dartmouth crowns also indicated that negotiations are crucial for their effective work at the provincial court; as one respondent commented, “It’s unavoidable and can be very fruitful”. Most respondents indicated that while negotiation can be difficult, it is very important as most cases are resolved through negotiation outside of court. Indeed, one crown considered that it is through such negotiation that he usually gets the most just results for all parties involved (e.g., the accused, the victim etc). Several crowns considered that they had good relationships with both the private criminal bar lawyers and the Legal Aid lawyers, especially the latter whom they regarded as particularly qualified.

The crowns did typically indicate that figuring out [crafting] and advocating sentences was a basic part of their role and some stressed that quasi-judicial feature of their work. They

exhibited much consensus in how they viewed “going to trial”. While sometimes referring to trials as “the fun part of the job”, they did not characterize it as the centerpiece of their role but rather as the unfortunate failure of early resolution or as appropriate chiefly in more serious important cases. One respondent commented that her preference is “to avoid trials at all costs”. Others, less stridently, echoed that view, preferring resolution over trials for a variety of reasons (“trials can get messy and unpredictable”). One senior crown stood out with his position that going to trial is the reason he is in the job and he loves it!

The interviewed Dartmouth crowns held mixed views on the issue of their caseload burden but shared a consensus that case flow / case processing was a major problem. Several respondents described their caseload as too big, such that it creates much strain for them, and, as one stated, “It impedes my ability to be properly prepared for my cases”. The other crowns considered their caseloads to be “heavy”, “hectic”, “cyclical”, “bunches up”, but “manageable”. With respect to case processing, there was much concern expressed. One senior crown noted that “courts are definitely backed up ... they are currently setting trial dates for [nine months down the road]”. Another senior crown described it as ‘frustrating’, citing Legal Aid as a big part of the problem with its long waiting time for an accused person to get an appointment. He noted that, during this time, judges may allow anywhere from seven to nine adjournments so that the defendant can find counsel. As time goes by, the crown’s case weakens with witnesses who forget details and victims who are no longer interested in testifying. Another crown prosecutor echoed these comments, commenting the situation is due to “the culture of non-resolution” in HRM courts. He held that in his “very backed up” courtroom, the delay works primarily against the crown and that defense counsel bank on that to get better deals for their clients. “Defense counsels often create the delay by adjourning over and over again”, which weakens the Crown’s case (witnesses are no-shows, forget details...etc). In some other provinces, he added, there is much more of a drive to resolve cases without trials.

Knowledge / Experience of ER

The Dartmouth crowns reported that they had received little formal information about the ER program in the Halifax courts. No reports, papers or protocols were available or accessed and only one respondent indicated any discussion of the project at the meetings of regional crown prosecutors. The project was seen as management-driven. Most respondents, however, did come across ERs in files that reaching their desks that involved prosecutions in both Halifax and Dartmouth and one had dealt directly with ER in the Halifax courts. There was a general acceptance of the value of the ER objectives (as listed by the interviewer) and an acceptance that these were the true objectives of the ER initiative. The comments of one senior crown about the ER goals were typical, “ER was introduced to cut a break on the number of cases going through the courts and to generally cut down on the overuse of court resources. ER is the most “justified” form of resolution if it promotes early acceptance of responsibility on the part of the defendant and gets the rehabilitative process started sooner. Early resolution is a more effective way of teaching defendants to learn from their mistakes”. One senior crown stood alone in her view “I don’t believe in giving a deal to entice guilty pleas. I prefer giving an appropriate sentence”

The respondents, while generally favorable in their assessments of ER, did usually cite one or both of the following two problems in it as they understood the program, namely (a) the ER is drafted before all the facts of the case have emerged, and (b) the sentencing recommendations are “too high” and crown discretion is fettered. Concerning point (a), the common position was articulated by a junior crown, namely “A lot can happen from the point that the ER is offered until its deadline and the recommendation may no longer be appropriate and in such situations the crowns need to be able to use their discretion as they have a quasi-judicial role”. Another crown put in more simply “ER should change if aspects of the case change”. Concerning point (b) there were more diverse views. Two senior crowns reported that there was nothing wrong with the ERs they had seen, and they would have no problem backing ERs even if they did not closely reflect their personal views. One of these crowns elaborated, commenting that he would comply with an ER if it was reasonable but he would not do so at the cost of his professional reputation for an ER he did not believe in. Several other crowns indicated that, in their view, based largely on what they have heard rather than any personal experience, the ERs drafted for the Halifax courts were too tough and, since, in their view, they could not be readily amended by court crowns, would also infringe on their discretion. The crowns were, not surprisingly, unsure of the track record for ERs in the Halifax courts, but several were of the opinion that only a small minority of ERs were accepted by the accused / defense counsel and that ER was not really making any difference in caseload or case flow.

Future Directions

The six crowns were asked if (a) they wished to see the ER extended to Dartmouth in its current format, (b) what benefits and negatives (costs) might be associated with such an extension for crowns, other court players, and case flow, and (c) what changes they would recommend were it to be implemented here. All three senior crowns indicated that they had had some experience themselves recently in drafting ERs for their own cases. According to one such respondent, some Dartmouth crowns have been doing ERs of their own, which helps the defendants, particularly the unrepresented. He added that the court crowns there have banded together and talked about taking one of their own out of court pool to draft ER proposals in order to shorten the docket. They have suggested this idea to their supervisors and also to some Dartmouth judges who were keen on the idea. Another senior crown said that he was actually doing his own version of ER until recently. He would make his own ‘disposition sheets’, which included a sentence recommendation for guilty pleas, for every new disclosure file provided at arraignment – “that way the defendant knows exactly what the crown wants”. Unfortunately, he said, neither the accused nor their defense (“even NSLA lawyers”) bothered to approach him or to ask him about these sheets before going to court, so he stopped drafting them altogether. The third senior crown reported that she drafts sentence recommendations for each of her files when she gets them but it was not clear whether these are routinely provided to defense counsel or the accused at arraignment.

Only one crown, a senior crown, was adamantly opposed to having the ER system in the Halifax courts extended to Dartmouth. That respondent had earlier indicated that “file ownership is at the top of my list [of what things are important for my role as a crown] and that “having to back someone else’s recommendations about sentencing issues would infringe upon my level of discretion”. Another, much more junior crown, expressed serious reservations based on his information that the ER recommendations have been “way too high and created an environment that is not conducive to resolution”; he added, though, that his understanding is that the ER has led to early case resolutions in some cases. The other crowns thought that, with some significant changes in the ER procedures, it would be a valuable adjunct to case processing in their four Dartmouth courts. Expressing a common view, one senior crown, for example, commented that “ER should be drafted by someone who is moderate and sharing the vision of majority of crowns. ER needs to be drafted by a court crown, not someone who hasn’t been in the field for a while.” Another respondent, noting that the ER is especially useful for minor charges – “It would help get rid of those files ...it would be nice to have a letter on such files when you receive them” - advanced the view that “If it comes to Dartmouth, the rules related to amending ER and the levels of crown discretion need to be made explicit. An approachable person should be drafting the ER, so that court crowns feel they can communicate their concerns.”

Interestingly, several crowns considered that, along with the changes suggested above, there should be a toughening up of the ER offers. Two senior crowns especially highlighted this point. One commented, “There should be more public education about ER. If it came to Dartmouth, there should be some targets – like to resolve 25% of cases to see if ER is working. Also, for it to work, every crown needs to support the ER and it should be “written in stone” otherwise there is no legitimacy to the process.” The other commented, “ER needs to be implemented with more severity; otherwise it sends the wrong message to defense/defendants. If someone isn’t going to take the offer up front, then it is off the table”.

Looking at the benefits and negatives of having the ER program in the Dartmouth courts, while there was agreement among the respondents that an objective of the ER should be to contribute to better case flow, there were divergent views on whether it would do so. The respondent most opposed to the ER extension, contended, “ER is probably like Adult Diversion. When diversion was introduced, it was supposed to reduce workload, but did no such thing. Even if ER would potentially reduce [my] work load, it would do so at the cost of my discretion. I do not want it in Dartmouth.” A senior crown supporting the extension commented, “ER’s number one priority should be reducing court docket; if it doesn’t do that, it’s not working”; he expressed some modest confidence that it would have a positive effect. The third senior crown believed that the impact on case flow would be positive but limited since ERs generally would not be accepted by defense counsel, either Legal Aid or the private criminal bar lawyers. In his opinion, there would be a more positive appreciation (and acceptance) of the ER by the unrepresented accused and by duty counsel. Another crown, who referred to ER in terms “It is a great idea and I would like to see it extended to Dartmouth ... anything that encourages early case resolution”, considered that there would be a significant challenge for any ER program since, unlike some other parts of Canada, there is a culture here that impedes early resolution. – “I think it would take a lot more than ER to change the climate of non-resolution in HRM courts”.

Generally, the respondents suggested that an ER program would work especially well with non-custodial duty counsel given their mandate to facilitate case flow and court processing. Only one respondent indicated that other types of defense lawyers would be receptive to the ER system; they typically did not elaborate on why there would be such resistance among NSLA and private counsel but several respondents suggested more adversarial relationships prevail there and others suggested that the ER would impede “crown shopping” by these defense counsel. They also generally believed that, while ER could be beneficial to most court role players, it could particularly benefit the unrepresented accused persons who would be less confused than they currently are by the court process and who may benefit from getting a better deal by pleading guilty earlier on in the process. On the negative side, a few respondents reported that the time frame of the ER offer in Halifax does not take into account how long it may take for defendants to obtain counsel, often about ten weeks. Other court role players whom most considered would appreciate an ER program would be judges; several respondents based that assessment on the positive response that judges had exhibited to their previous efforts at drafting “disposition sheets” to entice early guilty pleas and help with the court docket.

The sentiment and thinking among the Dartmouth crowns about extending the ER could be described as cautiously favourable. That disposition, plus their own modest spontaneous “ER” strategies, underlined a concluding comment by one crown, namely “Regardless of whether ER is implemented, I think that they need to have a crown in Dartmouth to review files at the intake stage for disclosure”. Even the one or two respondents with serious reservations about ER considered that that caseload and case flow were serious problems for the Dartmouth crowns that required some changes. In addition to calling for an ER more sensitive to the dynamics of provincial court and thus more flexible concerning modest changes and possibly extended time periods for acceptance, there was a pervasive sense among the Dartmouth crowns that an extension to Dartmouth would require more discussion with the ER official about protocols, more target setting and monitoring, and even more public education so the accused persons, particularly the unrepresented accused, could appreciate the significance of the ER offer.

NOVA SCOTIA LEGAL AID AND ER IN THE HALIFAX PROVINCIAL COURT

Introduction

Aside from top management, there are nine staff lawyers in the NSLA Halifax court unit. Three NSLA managers were interviewed for this assessment as were four staff lawyers and five NSLA duty counsel lawyers (three full-time staff members and two contracted lawyers); in addition there were short conversations on specific themes with two other staff lawyers. Two of the managers interviewed were senior officials and all managers had long experience with the organization. Among the staff lawyers, two had over twenty years experience, one ten years and two less than five years. Among the duty counsel, one had over twenty years experience while the other four had less than five years. In the Legal Aid / Duty Counsel group of respondents interviewed, there were three females. The discussion below will focus first on the regular NSLA lawyers and subsequently on the duty counsels.

Background

The Halifax NSLA respondents generally described themselves as a tight-knit group, functioning in a good working environment where there was support from colleagues, a sense of community, and support at all role levels, from management to support staff. Both management and staff reported that staff lawyers work mostly unsupervised as file ownership and professional autonomy is highly valued and the norm for practice in the organization. For example, staff lawyers' comments about its centrality in their work were underscored by a management respondent who stated its importance for staff and how supervisors / management rarely interfered with someone else's file, using the following phrase, "file ownership/professional autonomy are 'ABSOLUTE' in the office 'The boss' never interferes in another person's file and hates to micro-manage". The strong sense of professional autonomy is a source of pride for those at NSLA and several respondents, management and staff, compared their situation favorably to that at the PPS where, in their view, individual Crown autonomy is not a priority. There was no reference to whether that alleged difference is a function of personalities and management practices or the consequence of the different character of defense and crown roles in the criminal justice system.

The NSLA lawyers typically defined their role in terms of the conditions (low income level and the possibility of receiving a jail term) that must exist for a person to access regular NSLA legal service. For example, some said, "Protect those facing incarceration" and others said, "Represent those who cannot afford private counsel". A senior lawyer described his role as "a trial lawyer". Reference was made to legal aid as a possibly distinctive subcategory of criminal law, implicitly suggesting that it was an under-appreciated defense counsel specialty (given its special mix of mandates and clients); a few respondents thought that there would be, ultimately, such formal recognition.

There was a consensus among the NSLA respondents that the main difficulty they have encountered in their day to day work relates to the clientele. Here they referred to widespread

problems of mental health among clients, their unreasonable expectations about what the defense counsel can realistically provide and how the criminal courts function, and, more generally, major communication problems that regularly arise in the client-lawyer relationship. Several respondents noted that occasionally the clients were aggressive, both verbally and physically, cursing them and even taking a swing at them; a number of clients repeatedly changed their minds on pleas and so forth. An NSLA veteran identified the most demanding/difficult part of the job as ‘client control’. She noted that most of her clients were recidivists who know the ropes of the justice system and she prefers dealing with first-time offenders who are ‘scared shitless’ that they are going to jail; recidivists, on the other hand, were particularly difficult because they are not scared and are simply “looking for the best way to get a deal/get out of trouble”. Despite the many clientele-based difficulties, virtually all the NSLA respondents expressed much empathy towards the clients, emphasizing that difficult clients were often mentally ill, and socio-economically disadvantaged as opposed to purposefully deviant/difficult to deal with. As one respondent elaborated, such characteristics make it harder for them to get fair treatment as well since the justice system has been designed for the middle class (and reflects middle class values), to which the clients do not usually belong; in his view, the criminal justice system is an institutional milieu characterized by significant “systemic inequality”. Aside from clients’ features and circumstances, nearly half of the NSLA respondents identified “unreasonable” crowns and judges as their major quotidian difficulty. Several respondents also expressed comments along the lines of one veteran who stated, “It is difficult when unexpected things come up, but that is also part of the job”.

The NSLA respondents provided rather idiosyncratic accounts of what they would consider “good days” and “bad days”. With respect to good days, one senior lawyer, for example, quipped “when a client doesn’t tell me to fuck off” (suggestive perhaps of some of the clientele NSLA serves) but quickly added that “most of my days, which aren’t necessarily bad, are filled with tension and conflict between different parties”. The bad days for him were described as, “The worst kind of day is when it is extremely busy and, by the end of the day, I feel as though I haven’t served my clients needs”. Another lawyer referred to good days as when they can be divided up between court (the mornings) and office / research (the afternoon) phases rather than working all day in one or the other milieu; he added that he is “happy to provide clients with the information they need and to comply with their requests and if my client is happy, then I’m happy”. Bad days for this lawyer, who reported believing in resolution rather than being adversarial, were “All-day trial days. I always leave the court with a headache after these kinds of days ... [also] days when I’m needed in three different court rooms at once”. Another respondent echoed the views of the latter, reporting good days when clients “are happy and the results are good ... client satisfaction is number one” and, conversely, bad days as when he did not consider that he had met the clients’ needs.

As noted above, all the NSLA respondents emphasized the importance of file ownership and professional autonomy. The most senior of the NSLA staff lawyers stated simply, “Professional autonomy and file ownership are not seen as an issue because [staff lawyers] are their own bosses and [the supervisor/managers] do not interfere with the staff”. One veteran

respondent commented, “Files are mine ... No one is looking over my shoulder, overseeing my work”, citing this as one of the main reasons he loves working at Legal Aid. While he reported feeling supported by his colleagues, whom he freely goes to for advice, the respondent explicitly considered himself a “sole practitioner” at NSLA. Another veteran NSLA lawyer reiterated that viewpoint in his remarks, “File ownership and professional autonomy are ‘100% important’ and invaluable in the workplace”. He held that it is very important to him that no one is looking over his shoulder to ensure that his work is done properly (“this would drive me crazy”). All NSLA respondents contrasted, unfavourably, the comparative situation at PPS where they alleged that the crowns are micro-managed and have to put up with ‘unacceptable’ comments and expectations from their management. Not surprisingly, all respondents also argued that the ER initiative has further taken away individual crowns’ discretion and autonomy.

The NSLA respondents noted that having a good knowledge of the crowns and judges at the provincial court is of “paramount” importance for the satisfactory resolution of cases. One veteran commented “Justice is supposed to be blind and unbiased but the judge or crown you approach makes or breaks the case”. The respondents likewise considered that negotiating with crowns has been a feature of their work which they liked but all who discussed the negotiation dimension of their role were quick to indicate that ER has made that facet more difficult since “crowns are constrained from negotiating by their higher-ups”. Still, even with ER, the respondents noted that there are some flexible crowns and it is important for defense counsel to seek them out.

The regular NSLA lawyers were more oriented to trials – saw them as a more central part of their work - than the crown prosecutors. It is unclear whether that was because their types of clients were unlikely to make guilty pleas or because they themselves more routinely experienced being trial lawyers. There were some qualifications to their enthusiasm. One respondent, after noting that trials can be exciting, commented that he loathed “domestic cases”, and, claimed that in such cases, no more than one out of every five trials he prepares for, actually happens. That view about domestic violence cases was common amongst virtually all court role players interviewed in this assessment, whether defense counsels, crown prosecutors or judges. Another NSLA respondent stood out in his comments that he “is not into trials but prefer[s] resolution by settlement”. Also, more so than among the private defense lawyers, the NSLA counsels indicated that figuring out and advocating appropriate rehabilitative sentencing options was an important part of their role.

The general view among the NSLA respondents, both management and staff, was that the defense counsels’ caseload is heavy but manageable, and that case flow in the provincial court system is “definitely busy but not backed up”. One veteran, who reported that he typically has 130 files, commented that “Case load is okay for now. It was overwhelming before summer but now has slowed to a more manageable pace”. Several respondents indicated that caseload at NSLA has much improved over the past decade and typically they cited, as the chief reasons, the designation of an effective senior lawyer to work the cells, and, more recently (since 2003), the creation of a duty counsel role to serve the non-custody cases; these positions, dealing with cases / files at the front-end at the case processing at the courthouse, apparently have freed up the

regular NSLA staff to focus more efficiently on their referred cases and have contributed much to better case flow through the court process. A new formal intake system at NSLA for taking on new, non-cell cases every Friday morning is expected to further improve both caseload and case flow. One veteran lawyer reported that he is consistently busy (“there’s always a big pile on my desk”) but that is the way he likes it; he, too, reported that the workload has actually lightened in recent years for the reasons noted above, and, more generally, because of increased funding.

The respondents indicated that case flow has not been and is not now a major priority for them. One veteran observed that NSLA counsels often double or triple book themselves in different court rooms (for roughly the same time periods) but because of anticipated delays and other factors they usually can juggle the responsibilities and the strategy actually contributes to efficient case flow. Another veteran at NSLA explicitly emphasized that case flow is very low on his list of priorities. He said some courtrooms are too slow, others too fast, but that this was pretty irrelevant to him though it may be that the crowns’ and judges’ desire to speed up court process is at the root of the ER project. Overall, then, the NSLA respondents did not think their caseloads unmanageable nor did they consider case flow / case processing a priority concern. Organizational changes and appropriate funding were seen as the key factors in addressing earlier problems in these respects. All the respondents held that the ER initiative, if anything, had worsened both caseload and case flow.

The ER Initiative

NSLA management indicated that there were few contacts with PPS officials to discuss the creation, implementation or modification of the ER initiative. One commented, “There has been very little engagement between PPS and NSLA on this ER initiative. There was an announcement at a meeting in June 2005 about the PPS doing this but no consultation”. While several meetings were reportedly scheduled, for one reason or other – according to NSLA spokespersons, usually because of last minute deferral on the part of PPS officials - only one or two were actually held. The common view among respondents was that there were three factors effecting the PPS initiative, namely to benefit PPS management, to improve case flow, and because of its relative success in other provinces. For the respondents, the ER system “just sort of happened” and ER sheets began to appear with disclosures. A few respondents advanced a modest conspiracy theory, namely “In some ways, this is part of the nature of the project, which is to ‘catch people unawares’”. A veteran lawyer observed, “I started seeing these ER letters, and first thought it was a good idea until I heard that crowns could not deviate from it”. Another veteran commented that the implementation of ER was quite uneventful, in the sense that it just appeared. There was no letter, and no formal meeting (that he was involved in) to introduce the project. One lawyer reported that he was always very organized with his files and, with the advent of the ER, he has just incorporated the letter into his regular working system. Now, if an ER is missing from a file, he’ll actually call PPS and ask where it is.

NSLA respondents were of the view that the ER letter is written in very formal and somewhat threatening language and tone. It also allegedly quotes sections of legal documents that would be quite complex to any non-lawyer, let alone someone who may suffer from

illiteracy or a learning disability, as a good number of their clients do. A management –level NSLA respondent did report being involved in modestly changing the format and content of the original ER letter, making it reportedly more appropriate to case law in respect of a crown’s direct communication to the defendant. Aside from that instance, all the respondents stated that there has been no change or evolution in the ER, whether in format, sentencing recommendations or amendment protocols since the ER was introduced over two years earlier. Several respondents claimed to have made an effort to change some aspect of the ER but their efforts were in vain.

The NSLA lawyers (management and staff) noted that the ER protocol called for a guilty plea within sixty days if the ER offer is to stand and they acknowledged that the amendment protocol allowed for minor changes by court crowns while major changes would need the approval of the ER official. The sixty day requirement in their view often made the ER irrelevant since as one NSLA respondent recently observed, “By the time I see the client with the ER document, the expiry date of ER offer has passed. There is generally a three months delay between the date of a client receiving the ER to the date of legal aid appointment, so the sixty day limit isn’t enough”. For the most part, the respondents indicated that, in trying to negotiate amendments, their only option under the ER protocol – as long as the ER was on the table – was to deal directly with the ER official because the crowns at court “would not budge” as one said, and/or because the changes they sought were considered major (e.g., anything to do with incarceration usually would be a major issue).

Some NSLA lawyers did contact the ER official, increasingly so in writing rather than by telephone they claimed, but virtually all indicated that they found such actions bore little fruit, save with respect to what one described as “minor change, nothing significant”. The end result of this situation allegedly has been that they increasingly have ignored the ER altogether and set the matter down for trial, where all also claimed they usually end up with a lower sentence than the ER offer. There reportedly remains some ‘crown-shopping’ in that a few NSLA lawyers indicated that they seek out some crowns perceived to be “more flexible” or more willing to flout the ER protocol; however, it was noted that, unlike the pre-ER era, such ‘crown-shopping’ is modest and frequently involves getting a crown willing to negotiate rather than getting a crown with the same sentencing philosophy. It was also noted by a few respondents that new strategies for changing the ER have emerged. One respondent, for example, noted that getting the ER changed may depend on the stage at which the case is at; on trial day after the ER presumably has been rejected, some crowns will make a better offer even though technically they are not supposed to; such a practice was designated as “basically faking a trial to get the ER changed without going through with a whole trial”.

The ER Objectives

Initially at least, and in theory, senior NSLA officials indicated that they could well appreciate the objectives of the ER as set out in the interview. One such respondent in 2006 stated, “We can see a lot of upside with ER including saving lawyers’ time so they can give more to the more serious cases, improving the efficiency and quality of justice, and dealing with

irrational fears about sentencing by the defendants as well as providing them good deals for an early guilty plea”. After a year of implementation it became difficult to find any NSLA lawyers who spoke positively about the ER’s; objectives; they largely dismissed them as “nice words but not what goes on in reality”. A management person held that NSLA lawyers were especially critical that there was insufficient balance between the incentive to the accused and the benefit to the PPS (i.e., the offers for a guilty plea were deemed quite poor), that there was very limited opportunity for Legal Aid lawyers to “horse-trade” with crowns and meaningfully amend the ER at the courthouse, and that the timelines were too narrow (e.g., “It may be the earlier the better for the PPS but not for the NSLA”). The definition of the situation concerning the ER project that became rooted among these defense counsels has been almost totally negative, passionately scornful at times.

One veteran NSLA lawyer expressed a common view among NSLA staff that the ER has made all its objectives worse by essentially adding another layer of bureaucracy for all court role players to deal with. In that view, the ER has not improved the case flow or the crowns’ caseload but rather “added constraints on their [crowns] discretion that slows down the case processing immensely and creates more work for everyone”. In their view, “forcing” the defense counsel to go through the ER official for changes makes swift settlement unlikely; another respondent added a commonly stated correlate, namely “The only time ER works is when a rogue crown ignores it”. The NSLA respondents contended too that ER does not benefit the unrepresented accuseds, claiming that the ER letter “confuses them and raises levels of anxiety ... some are duped into taking bad deals”. Several NSLA respondents noted that NSLA clients are people who have seen the ER, decided they do not like it and have opted to get a lawyer and try for something better; as one lawyer expressed it, “Most if not all of the clients are not happy with the ER and certainly not relieved by it. The ER letter is very formal and threatening in language and tone”. Not surprisingly, the respondents also claimed that the ER has not saved money for any of the court role players such as the police, again because, in their view, it prolongs the process and leads to more trials or ‘fake trial’ situation as identified above. The best that any respondents offered up in their assessment of ER and its objectives was “It works when it is liked and accepted on the first go; [otherwise] more time and resources are used and consequently wasted on a file that need not have been”.

Experience with ER

The respondents usually reported that their experience with the ER, whether dealing with the crowns at the courthouse or the ER official via telephone or written requests for modifications of the ER, has been unsatisfactory and currently they are largely ignoring it and very infrequently recommending its acceptance to the client. They reported that, aside from some dissident crowns, the crowns do not budge save in very minor ways from the ER recommendations and that neither does the ER official when they contact him directly or, in some cases, use the NSLA supervisor as an intermediary. One lawyer expressed the group assessment with his comment that the PPS is inflexible and “I know any answer I going to get is

not in my favour”. The two major reactive strategies they reported employing, beyond simply a clear and final rejection of the ER, were first, the passive strategy of doing nothing on plea until the ER’s sixty days had expired (as noted, this is reportedly easy to do because of the waiting period for clients at NSLA) and then negotiating with the file’s crown and hoping, in the event of a conviction by plea or trial, that the judge’s sentence will be minimally no worse than the ER offer. The second strategy has been to set a trial date and wait for the file’s crown to approach them on the eve of the trial with a better offer, a pattern which several respondents claim has been commonplace. One respondent articulated a variant on this strategy as follows, “Trial dates are often set, not necessarily because the defense wants a trial, but to buy time until a different crown comes along or perhaps a witness decides not to show - all this because the defense cannot in good conscience accept an ER that is too high and not a good deal for their client. It is better for defense to do this than comply”.

The NSLA lawyers found it somewhat difficult to quantify the level of ER acceptance or rejection and also the likelihood of their clients, if convicted, receiving a harsher or less severe sentence. One veteran NSLA counsel stated that “up to 75% of the time, there is something wrong with the ER” (i.e., a significant change needs to be made). Most respondents reported that they rarely recommend acceptance of the ER. One veteran indicated that he recommends that his client accept the ER in less than 15% of the cases, adding that in almost all of these cases, the charge is a theft under or a breach, where the accused has been caught red-handed and there is not much of a defense possible, especially where defendant has long record. Another NSLA lawyer made essentially the same point; he reported that he does not recommend acceptance of the ER very often and the ER approach only works well for two kinds of files, namely a breach (“taking the ER gets you 21 days instead of 30 in jail”) and shoplifting files for those with long histories (a long record). A veteran with supervisory duties reported recommending acceptance almost solely when the ER recommendation is for adult diversion. The most senior of the NSLA lawyers interviewed stated that he rarely recommends that his clients accept an ER because they are usually able to get a better deal without it. All NSLA respondents reported that rejection of the ER usually resulted in a better deal for their client, basically a less severe sentence, if not acquittal or dismissal of charges. One respondent suggested that this was true “90% of the time”.

Benefits and Shortcomings

In elaborating on the underlying factors that have shaped their experience with the ER initiative, the NSLA respondents always returned to the alleged minimization of the court crowns’ meaningful mandate for negotiation as reflected in their unwillingness to amend the ERs’ recommendations. This shortcoming was considered fatal since, in the NSLA view, the ER official’s philosophy was inclined to tough sentences, and this tendency was presumably abetted by his drafting the ERs solely on the basis of “on paper” information (i.e., police information and criminal record) without taking into account the circumstances of the accused and the case or the realities of the provincial criminal court. Several NSLA respondents went beyond this basic line of argument to suggest that “ER is really about raising the bar for sentencing, not resolution. The

ER is set higher and when it inevitably gets rejected, it has still set the bar for a higher sentence”; in other words, allegedly, ER is pulling sentencing to a more punitive level. Some respondents contended that they have detected a certain tailoring of the ERs to specific courtrooms which they believe supports that allegation.

The NSLA respondents did allow that there might be some benefits for them in the ER initiative. One veteran reported that he “actually like[s] knowing the crown’s position early on and the fact that files are being read and reviewed well in advance”, suggesting that in the past failure to do so had been a serious problem at the PPS. Several crowns offered a slight variant, contending that ER benefits the defense since some court crown do not even look at files but just go with the ER which can be advantageous to the defense side because they are better prepared. Others suggested but did not elaborate on the crowns’ lack of discretion working to the defense’s advantage, the point apparently being that the crowns’ intransigence works against them when the judges decide sentencing. Overall, though, the consensus position was that there has been no significant benefit of ER for NSLA lawyers; as one veteran reported, “ER is a pain in the ass! It get in the way of negotiating with crowns, especially the reasonable ones. It causes more problems than it provides solutions. ER is often way too high and there is simply no incentive for the defense to advice clients to take them. When a resolution could be made and trial avoided, ER often forces a trial or delay because it is so unreasonable”.

The NSLA respondents rendered a negative assessment also with respect to the benefits of ER for the crowns themselves. Typically, they reported that ER has caused problems of low morale among many crowns, and their dissatisfaction with the initiative has been reflected in their comments to NSLA lawyers and “aspersions on the ER in open court when addressing the judges” on sentencing. While acknowledging that crowns may benefit in a variety of ways from the work spent on the files by the ER official, the respondents honed in on the initiative especially favouring “crowns who cannot make decisions” or who are inefficient and not on top of their files; allegedly, ER makes things easier for that sub-group of crowns. On the other hand, allegedly, crowns who are flexible and “go around the ER ... do so nervously and with considerable risk”.

The NSLA respondents considered that there has been no particular impact of the ER for provincial court judges, in large measure because, in their view, the judges do not have a good appreciation of the problems that ER has been causing. An exception identified, by most respondents, was that one or two judges have become known as critics of the ER recommendations; allegedly, they regularly override the ER recommendations in convictions (giving a less severe sentence) with the support of certain crowns. An NSLA management respondent did suggest that senior judges were hopeful that the ER initiative would meet its objectives (especially with respect to improving case flow and assisting the unrepresented accused). The respondents, on the whole, considered that the judges generally exerted “common sense” (i.e., gave sentences less severe than the ER) and their strategy of rejecting ERs, whether actively or passively, would appear to depend on this “positive” view of the judges’ sentencing.

Consistent with the above analyses, lawyers at NSLA did not think that, overall, the ER project benefited the accused persons. The consensus position was expressed in the following remarks of one veteran, “[among many defendants] there is a refrain of “I just want to get it over with” but maybe they didn’t do it or maybe they should not be accepting the ER for whatever reason. ER speeds up the process, but to the detriment of the accused”. It was also suggested that some accused persons accept ER because it allows them to avoid the effort and cost of retaining a lawyer. Another NSLA lawyer commented on this, “The problem is that defendants don’t know if the crown can even prove their case. ER looks straightforward, but it can actually entice a guilty plea where there is no case to be made”; along similar lines one respondent claimed, “[ER does not help accused} In fact, the ER letter makes things seem a lot worse than they are... ‘If you don’t plead guilty by this date’ ..., when, in reality, nothing will happen”. In sum, the perceived benefits were few and the perceived shortcomings were highlighted, especially increased anxiety associated with harsh sentencing recommendations, vulnerable accused persons accepting bad deals, and defendants who might have intended to get a lawyer prematurely pleading guilty.

The Future of ER

The NSLA respondents generally believed that the ER project should be scrapped, certainly as it is now being implemented. In their view, the only way it should survive would be to introduce much more flexibility – not ER but ISP (an initial sentencing position) - and allow court crowns the discretion to negotiate with defense counsel based on input from the accused, his/her circumstances, information from and/or about witnesses and victims, and other perspectives on justice. Even then, some respondents doubted the value of the whole ER exercise, decrying the priority of improving case flow that they believed to be at its heart and calling for a return to the pre-ER practice of give and take negotiations between individual defense counsels and crown prosecutors.

Several NSLA respondents specifically targeted the current ER official, contending that the ERs are too tough and “high-end” in their sentencing recommendations, reflecting a conservative approach to justice that they find unacceptable. Moreover, they claimed that the ERs are drafted away from the realities of the provincial criminal court, largely on the sole basis of police reports, and are almost impossible to amend given the style of the ER official and the fact that he is a dominant senior crown with the strong backing of PPS management, both of which, in their view, inhibit most court crowns from exerting discretion while the ER is on the table. The weak consensus position of the regular NSLA lawyers, though, appeared to be more a critique of the ER strategy than simply a call to have the PPS select another crown to draft the ERs. One veteran NSLA lawyer argued that the issue is not replacing the ER official but rather providing a significant discount for the accused’s accepting the ER offer and making an early guilty plea; in his words, “the minus Y is missing”. He and other NSLA respondents contended that the ER, while “good in theory”, is essentially an unrealistic assessment at the front-end and only an ISP or ER on-demand might adequately take into account unreliable witnesses, the many other factors that a defense counsel might see on looking at the file, and the diversity of judges

and sentencing perspectives. To adequately take such considerations into account, they usually contended that “the crowns have to be given back their autonomy and discretion” and that is the key to an appropriate adaptation to the reality of the provincial criminal courts. A few defense counsels claimed that in the ER approach someone [the ER official] who has never come to court [or as another said, “someone not in the fire”] gets to make all the decisions”. In urging a return to the pre-ER situation, a veteran supervisory NSLA lawyer commented, “Ours is a small community, not Toronto. We have the highest caseload in Nova Scotia and we’re small. We don’t need it [the ER] and the rest of the province doesn’t need it”.

The regular NSLA lawyers typically have, as clients, people who have, initially at least, usually passed on the ER offer and quite frequently are recidivists likely to receive an ER calling for a period of incarceration, something that they presumably want to avoid or minimize “at all costs”. One might expect that ER would be more favorably received by the NSLA’s duty counsels who have a somewhat different mandate and deal with a much wider diversity of accused persons, basically anyone, not in custody, appearing in court without counsel. To a significant degree, that expectation was borne out as evidenced in the next section.

THE DUTY COUNSEL AND ER

The duty counsels (DCs) described their role in the court system as working virtually exclusively with the unrepresented. The several full-time DCs emphasized that in carrying out that duty they are, as one put it, “a mediator of sorts, making all parties happy by reaching a fair resolution, which can hopefully be reached without adjourning too much or going to trial”. The concept “resolution” was underlined and it was advanced that it is in everyone’s best interests – the accused person, defense, crown, and judge - if, as one said, “I can negotiate a deal and avoid prolonging the inevitable”. The specific functions of the duty counsel role were understood to include providing short-term legal advice to the unrepresented, discussing the disclosure (including the ER letter) with the client, occasionally speaking to the sentence when the accused has opted to make an early guilty plea (on first or second appearance usually), informing and connecting the accused with respect to regular legal aid services where appropriate, and sometimes referring the accused to private lawyers or the lawyer referral service (i.e., Public Legal Information Society). Full-time DCs may carry a small number of files that they know will be readily resolved, usually files involving minor offenses such as DUIs and first-time offenders. In the Halifax provincial court, there is a specialization between DCs working the cells and those serving non-custody cases. In Halifax, the DCs, save for an interim period where the “roster model” was employed, have been full-time staff members of NSLA whereas, in the Dartmouth provincial court, contract attorneys have been consistently utilized for both cells and non-custody clients (i.e., NSLA has a contract with a private legal firm to provide such services). The contracted DCs typically combine the part-time DC job with regular criminal defense work; these usually young lawyers reported that, while the remuneration for the DC work is quite modest, it “pays the bill”, and provides an opportunity to “get known out there” and sometimes to take up further private counsel work with DC clients who do not wish to plead guilty and are not eligible for legal aid (for a full description and analysis of the DC role, see Clairmont, 2006).

The DCs gave varied accounts of the difficulties of their job. Several contract DCs commented that such work with the cell clients is “a crappy job”, primarily because they are seeking to help clients who have many problems and are difficult to work with. One contract DC commented that he likes doing DC work because it has him in court everyday (on both sides of the harbour) while a bad day is being stuck in the office doing paperwork which he hates. A veteran, full-time cell DC reported that “maintaining professionalism in a trying environment” is the biggest difficulty in the job. DCs working the non-custody files pointed to the difficulty of having to serve clients in sometimes hectic circumstances and with a limited mandate (e.g., providing short, quick legal assessments). Good days for the full-time DCs were ones where they achieved the “resolution” objective and bad days were ones where they did not. One DC, dealing with the non-custody files, elaborated “Good day? Being in arraignment court in the morning, having five or six new cases”. Bad days, on the other hand, were really busy days where she has to speak at sentencing for accused person(s) in addition to her other work. Since sentencing is the last time she can assist the defendant, it calls her away from other tasks - “All this work and having to be at so many different places can be very stressful”.

File ownership and going to trial, given the DC mandate, were not considered salient by the respondents. The non-custody DCs worked alone and, in the case of the Halifax cells, sharing the workload between NSLA and contracted staff rotated into the job, was seen as beneficial for case processing. DCs do not do trials but figuring out sentences and suggesting appropriate undertakings and rehabilitative treatments were considered important dimensions of the DC role. Having a good knowledge of the style and philosophy of the crowns and judges that one deals with were seen as “paramount for the resolution of a case”. Negotiation with crowns was especially highlighted; as one full-time DC commented, “Negotiation happens immediately, on the same day ... I do not have the luxury of crown shopping”. The DCs generally reported a less adversarial relationship with crown prosecutors than regular NSLA lawyers though their views varied and all reported that “some crowns are more flexible than others”. One full-time DC commented, “I can negotiate with most crowns but if one is being unreasonable I will adjourn”. A contract DC reported that he has a good working relationship with Crowns, adding ‘I don’t piss people off’. Despite the apparently large and sometimes hectic workload, the DCs reported that the workload under current conditions (e.g., the use of contract lawyers to complement regular NSLA staff) was “challenging but manageable” and the case flow “relatively quick”. The problem situations were sporadic occasions where the DC had to juggle responsibilities such as consulting with someone in court for the first time in one courtroom while dealing with another client in another courtroom or perhaps speaking for an unrepresented person at sentencing.

The Duty Counsel and the ER Initiative

The DCs indicated that the implementation of ER was informal, “just appeared”, and it was expected that they would work with it. There was no formal introduction to or discussion of the ER for them. Several DCs reported that their initial view at least was that “It was a good idea” but they were surprised that the crown drafting the ERs had not been down at the provincial court for a long time; as one full-time DC stated, “As someone on the ultimate ‘front line’ I was concerned about how a distant crown would be able to make recommendations”. The full-time DCs considered that the ER objectives, as listed by the interviewer, were accurate and reasonable. While their views varied significantly, they were much more positive than the regular NSLA lawyers and one respondent even commented, “When it is fair, it works perfectly”. Contract DCs also leaned towards a positive assessment; one such DC reported, “ER is helpful and speeds up the process, especially when you have a client who is ready and willing to plead guilty (wants to get it over with). It’s also easy if the ER isn’t what the client wants, just flat out reject it and move on”. Not all the DCs agreed that the impact of the ER initiative for case flow (case processing) or for reducing the defendants’ anxiety was especially significant in an overall sense but they did agree that it usually improved case flow and reduced anxiety “because the sentence is laid out for the defendant”. Several however were quick to comment that “Depending on the sentence, however, the ER may produce more anxiety than it relieves”, and all the DCs held that the ERs were often too high-end (i.e., too severe). Several DCs reported

that the ERs were too rigidly advanced and the court crowns – some at least –so reluctant to negotiate that it may have led to greater delay than in the pre-ER era. For example, one respondent cited a case where, presumably, the community service order recommended called for too many hours in a certain time period for his client who was working full-time but the crown could not deal with it; a roster or contract DC noted that the community service recommendations on the ER were “a real source of irritation ... [my clients] are often happy to go on probation, pay fines, whatever but community service impacts on their jobs”. It was commonly held by the DCs that the most significant impact of the ER may be that, as one put it, “It definitely reduces work for the crowns”.

The DCs indicated that they frequently did recommend – or, at the least, did not strongly recommend against – clients’ accepting the ERs. One full-time DC in 2008 suggested that she has been frequently recommending acceptance, perhaps as much as 50% or more of the time, but cautioned against giving a number (percentage) adding that “It really depends on the case”. Another full-time DC did not want to speculate about a number or a percentage of cases where the ER was accepted by her clients but did allow that “When the ER is fair, the clients can plead guilty and all is well. Most are perfectly content to plead guilty so long as the ER is reasonable”. A cells DC reported that “ER per client only comes into play 15% of the time” and, in most of these cases, the ER, often calling for a jail term, is neither accepted by the accused person nor recommended by himself.

The full-time DCs exhibited some confidence that they could “get around” ERs that they considered too high. These most experienced DCs indicated that they negotiated mostly with the specific crown working the file and only infrequently dealt with the ER official at the PPS with whom they described their relationship as not particularly adversarial or particularly cooperative. One such respondent indicated when she has spoke about amendments to the ER official in the past, it has worked in her favour, while another said he found the experience quite unsatisfactory for two reasons, namely that the ER official did not have the file in front of him, “so at the best is working with his memory”, and that “It defeats the point of early resolution. Contacting [the ER official] is taking a step back because it means that the case has had to be adjourned and time has been wasted”. The DCs, in general, dealt infrequently with the ER official since their work is essentially, as one said, “on the spot stuff” where basically the issues are accept, change or reject and move on. The roster or contract DCs were especially unlikely to have made appeals to the ER official. A few such DCs were quite uncertain about how much leeway the court crowns have to modify the ERs but the most common view was that “The crowns are bound by the ER and any negotiation required contacting [the ER official]”. They reported that they had rarely contacted the ER official (one allowed that he had once written a letter to the official seeking change in an ER), understandably enough given the mandate of the DC and the day-to-day work assignment of the contract DC role. Overall, then, for the DCs, when handling “on the spot stuff” (i.e., not passing the matter on to regular NSLA lawyers) the basic stance, where the ER was deemed problematic, was not to contact the ER official but to negotiate modestly with the court crowns and, where that was not satisfactory in their / clients view, to take it in front of the judge (i.e., the client pleads guilty but the ER-recommended sentence is contested) or to adjourn and hope for another more amenable crown. In the case of cell DCs, the pressure for quick resolution

of bail issues reportedly often allows for more meaningful negotiations with the court crowns since there has not been time for an ER to be drafted at PPS (however individuals facing a bail hearing frequently have outstanding charges which may have ERs).

In sum, the DCs were in consensus that the ER recommendations for sentencing, while useful and frequently effective in moving the file forward, were often too severe and unchangeable. In their view the main problem has been that “the recommendation it provides is based totally on paperwork (police reports and criminal records if there is one) and there is absolutely no input from the defense side”. The associated point frequently argued was that “the ER neglects to really take into account the mitigating circumstance that pleading guilty should be ... a lower sentence not the regular sentence for the offence or, worse, a higher sentence”. As was found among other defense counsel, some DCs held that, as one said, “[The ER official] is hoping that defendants will just throw in the towel and take the ER to get it over with”. The third major problem in the ER identified by the DCs focused on the amendment process and especially the lack of discretion – whether allowed or exercised - by court crowns. A common position was that the ER has often complicated what should be a simple negotiation between defense counsel and crowns, a situation reportedly ameliorated somewhat by the alleged fact that “some crowns will go ‘under the table’ and make deals regardless of the ER”.

The DCs were in agreement that contesting the sentence when the accused pleaded guilty usually resulted in a more favorable sentence. A senior cell DC reported that often he has “clients who want to resolve the situation but the ER is not enticing enough” so he will “pitch to the judge instead. The crowns will respond by recommending either the ER or higher” but “75% of the time the client will get a better deal”. A contract DC, who works both cells and walk-in files, contended that he often finds dealing with the judge to be a better option than taking an ER. One full-time, non-cell DC commented: “Where the ER is ridiculous, for example seven days in jail for a first offence, I steer the client in the direction of Legal Aid / private counsel to contest the sentence. [Where that is not an option] I conduct ‘contested sentencing’, asking the judge to decide if the ER is appropriate and almost always judges give lower sentences”. Another strategy DCs use in such circumstances is “to enter a guilty plea without accepting the ER and then asking for a pre-sentence report so the judge knows the whole story”.

Other Benefits and Shortcomings

As noted, the DCs allowed that there were some positives as well as negatives in the ER initiative for their own role. Most readily stated that the ER is helpful since “it puts the Crown’s position out in the open” and, therefore, instead of having to sit down with the file crown after arraignment, the DC can sometimes resolve a case as soon as it comes to court. The DCs usually noted that with the ER program, the crowns are more accountable to the defense in that they have to read the files over in advance and be prepared; allegedly, “in the past it was not uncommon to be dealing with a crown who had obviously not read a file, thus holding up negotiation and resolution”. A contract DC commented on this alleged pre-ER circumstance as follows, “Without the ER, there is a lot of back and forth between defense counsel and the crown before an agreement can be reached. This looks unprofessional in court”. The DCs also held that, with ER,

it is a lot easier to talk to the accused persons, especially the ones they deal with, when they know what the Crown's position is. A contract DC noted a negative implication of the ER for DCs such as himself, namely that it sometimes has compromised his good relationship with the crowns; here he described cases where he/his clients would agree to an ER and then the clients changed their minds last minute in front of the Judge, adding that he is not interested in compromising his reputation with the crowns for some guy he just met and will never see again. A full-time DC advanced another negative implication, pointing out that some judges and crowns tend to think of the function of ER as simply moving things along and the function of duty counsel to give five minute consultation to the accused to just explain the ER. He was advised to do this by a judge one day when the non-cell duty counsel was not available but objected, saying that his job requires much more, "to explain the charge, the ER offer, make sure the accused understands that even if the case looks very bad for the accused and even if the ER offer is good, that he has complete right to go through trial."

The DCs advanced two major themes when focusing specifically on the ER impact for the unrepresented accused persons. First, 'clients' are very often happy to get the matter over with and do not want the delays that adjournment or trial would involve, so most are perfectly content to plead guilty, so long as the ER is reasonable. Secondly, they are concerned with the ER to the extent that it recommends jail or not. A senior cells DC commented about his clients and ER as follows, "ER affects them only to the extent if it helps or impedes getting out of jail and clients would not go for an ER that recommends jail. As for defendant anxiety, if the ER recommends getting out of jail, then great. But, if not, there is no relief. Clients in the cells constitute a very specific demographic of clients at the courthouse, those who are in custody, so whatever 'anxiety relieving' effect the ER may or may not have is often irrelevant [for them]". The DCs varied in their explicit concern about whether the ER encouraged 'premature' guilty pleas; one full-time DC indicated that this was not a problem, while a contract DC argued, "ER makes it easy for clients to plead guilty unnecessarily because they want to get it over with and are happy to take the Crown's offer, even if it is not the best".

The DCs, as noted earlier, generally held that the ER has reduced the workload for the crowns, but at a significant cost. One contract DC summed up this alleged trade-off in the comment, "The ER makes it easier for most Crowns to do their job because the work is done for them. At the same time, it also emasculates them – takes away their power to negotiate". The DCs usually opined that some crowns were "really pissed off" about the impact of ER on their discretionary authority in negotiations but others were more "laid-back". The consensus was, however, that to the extent that the ER initiative had evolved at all over the past two years, it has been with respect to the crowns becoming more critical of the ER and more flexible in dealing with it at the courthouse, an evolution which the DCs accounted for by suggesting that the crowns – usually senior crowns - have been rebelling and ignoring the ER recommendations, usually, they posited, by stealth.

The DCs did not think that the judges were much impacted by the ER. As noted, the DCs usually reported that the judges gave less severe sentences where the client pleaded guilty but rejected the ER offer. They were also of the view that if the ER was accepted, judges would be

expected to comply with the recommended sentence. The DCs considered that judges are fairly removed from the ER program but did support its objectives with regards to decreasing backlog/delays. One DC offered that “The only marked difference for judges is that instead of having prosecutors say ‘and the Crown recommends’, they say ‘and the ER is’ when speaking to sentence”.

The Future

The non-cells DCs all indicated that they would like to see the ER continued and extended to Dartmouth provincial court. As one such DC noted, “The idea of the ER makes sense. It would be very difficult without it”. However, that DC quickly reiterated her conviction that court crowns need more discretion, particularly when presented with facts from the defense/defendant’s side, and also her concern that “the ER, with the way it is being run, is compromising true justice”. The DCs all shared a consensus that the ER is one-sided and often too harsh in its recommendations. Their preference was for PPS to re-conceptualize the ER as a framework as opposed to a final offer, a starting point for court crowns to work with. Interestingly, a senior DC who strongly advanced that position also expressed concern “there needs to be more uniformity amongst crowns”, something that the ER presumably has had among its implementation objectives.

DARTMOUTH LEGAL AID AND THE ER

The two NSLA lawyers interviewed each had roughly a decade of experience in that role and several years in private practice prior to that. Both saw their role as highlighting advocacy. One defined her role as “an advocate on behalf of my clients and providing frank advice as to their legal position” while the other described himself as a “front-line human rights worker”. They described the particularly demanding and difficult challenge of their work as being the heavy volume of cases; one commented, “When I was in private practice even the most senior lawyers had only up to 60 clients whereas, currently, I have 140 files open - ranging from first degree murder right down to breach of probation. We are considerably overworked here”. The other lawyer added that a major difficulty is “the fact that you are dealing with people in crisis all the time. The clients are mostly living in poverty. There are social welfare issues. The criminal aspect is just one part of their lives; they have many other challenges”. One lawyer defined a good day at work as one when she is able to be where she is needed and can effect good outcomes for her clients, and a bad day is the obverse. The other lawyer said that a good day for him is when there is a good outcome for his clients, and bad days are when there is an unwarranted client complaint or when the judge makes a wrong decision in law and neglects certain facts and he has to consider the possibility of making an appeal.

The NSLA lawyers emphasized the importance to them of professional autonomy and “file ownership”. One commented, “[file ownership] is quite important. I like it that I don’t have to take marching orders from anyone. I can evaluate my file and give advice to the client”. The other lawyer reiterated that point – “as a legal aid lawyer, I have autonomy, and that’s what I love. I can pick someone else’s brain if I have to, but, ultimately, I have file autonomy” – and underlined its importance by reporting that when he was offered a job as a crown, he did not take it as “they have no professional autonomy there the collective decision making by crowns is a recipe for disaster and inefficiency as they can’t do anything without checking with one another”. Both respondents considered that negotiating with crowns on charges and sentencing recommendations was a crucial part of their job. One noted that “I try to maintain good rapport with crowns, use a lot of humour, be light, direct, don’t hold cards close to the chest”, that he could not handle the workload without this negotiation, and that he “plays open-hand” without withholding information from the crown, even to the point of being criticized by some of his colleagues. The other respondent observed, “Certainly the majority of cases don’t go to trial. Most of them are all about trying to get the best possible plea negotiation – to reduce the charge, advocate for a fair and appropriate sentence; the trial preparation, the trial, is a much smaller part of the job”.

Having a good knowledge of the style and philosophy of the crowns and the judges one might be dealing with was also considered crucial to the defense role. As one respondent commented, “the more experience you have dealing with a particular crown or judge teaches you what approach will be most effective for your client. There are different personalities and approaches; some judges are more persuaded by legal arguments, some more by personal scenarios, the circumstances of the client, and you learn to tailor your approach”. The other lawyer linked the need for such knowledge to the exigencies of having a large workload; for example he noted, “There are some judges in Dartmouth court, where on drug matters, especially cocaine, it’s hard to get reasonable acquittals so in those cases it’s critical to advise my client – “it is almost certain that you are going to get convicted in this charge – so you should elect out.”, essentially saying, do not go in front of this judge for a cocaine charge”. Both lawyers, while noting that most cases are settled before trial, indicated that they love the trial; one respondent noted, “I love it. It’s the drama, it’s the play, it’s the performance” while the other commented, “I love it. It’s so different. There are very few trials where you are running the same argument over and over again. It gives you chance to put your teeth in it. It forces you to change to do your job effectively”. Both Legal Aid lawyers also considered their role as informing and advocating rehabilitative options to be important (e.g., “I am a big advocate of creative sentencing and go out of my way to find best program/ approach for the client”; “We have contacts with different social service agencies. If a woman has a problem of shoplifting, I would tell her about the “stoplifting” program, then she would take initiative to enroll into the course before sentencing, get a certificate and bring it to court before sentencing, resulting in a much lighter punishment”. Both expressed concern that resources for creative options are limited and diminishing in the area. Finally, the respondents were asked whether caseload and court processing blockages were major problems in their work. Both agreed that caseload certainly was and that a major case can generate considerable pressure in that regard. Regarding court processing, it was reported that the waiting period – defined as from the time an accused enters a not guilty plea to the trial – is

usually no longer than six months and in that regard Dartmouth is better than Halifax and some other court jurisdictions in Nova Scotia. The waiting period for NSLA – from application to getting a lawyer – was said to be at least a month; one respondent added that how efficient the criminal justice system works depends on all the components, from the accused to the police to setting trial dates, and Legal Aid is often blamed for delays when in fact the police may be the source of the problem or the accused has waited months before making an application.

The ER Project

Both Legal Aid lawyers reported modest experiences with ER, basically encountering it in situations where a client, facing charges in both Halifax and Dartmouth and wanting to take care of it all in Dartmouth, showed them the ER from the Halifax court. One respondent had actually had some dealings with the ER on such a matter whereas the other observed, “I never had to work with it because by the time I saw the ER letter, it was outside the 60 days limit and the crown was no longer bound by the ER”. Asked about the reasonableness of the three objectives of the ER initiative as articulated by the researcher, both researchers considered them fine and even praiseworthy but they quickly noted that, in their view, the implementation mechanics were all wrong. As they saw it, the key to realizing the objectives was securing an early guilty plea and there was no objection to that; as one said, “I don’t see a problem with early guilty pleas as long as the client had legal advice”. However, in their view, that required a different approach not “high-end” sentencing set in stone”. One lawyer provided the following illustration: “When ER comes in, offering suspended sentence or whatever, and I go to the crown and say, “my client has these issues that you weren’t aware of”, would you consider conditional discharge? The crown says no because the ER doesn’t say it. Then I say [the ER official] doesn’t know this, so reconsider. The crown says, “I can’t, my hands are tied”. ER has no defence side at all and they are not willing to negotiate”. The Legal Aid respondents contended then that there is “no discussion or real negotiation, just the consistently excessive recommendations on sentence ... [it’s] a waste of time”.

The Legal Aid lawyers reported that there has been little information made available to them on the ER initiative either by the PPS or their own NSLA management. At best, the matter received “marginal discussion” at staff meetings and certainly there has been no organized approach on the part of NSLA to take a position on the project. Both lawyers reported that they did not know the protocols or steps / circumstances whereby court crowns could make changes to the ER but one contended that “They don’t have authority from my experience. More senior crowns with a mindset of ‘this is my job, not what my employer tells me it is’ have no difficulty ignoring the ER. It’s the more junior lawyers who say “I have to follow this”.

The lawyers generally agreed that in theory the rejection of an ER offer should result in higher sentences if the person is convicted. As one said, “The whole purpose of an early guilty plea is mitigation so in theory an offer made early should be better than one following trial”. The other respondent elaborated on the theme, commenting that “If ER was truly designed to be an ER then I would say that ignoring the ER would be a dangerous thing . . . If I’m giving up some of the rights to trial and all, there must be some incentive to do so other than “getting it

done early” which is usually not a strong motivator for most of my clients”. They also contended that in practice, to their knowledge, rejection of the ER has not resulted in higher sentences. One lawyer held that “The few offers that I have seen were not lower than what the person might be looking at without the ER, not necessarily unfair offers, but not encouraging for early resolution”. The other lawyer echoed those comments, “The ER recommendation usually is the sentence the guy is going to get if he just runs the process without ER, so I tell the guy, “[you] might as well run the trial as you’re going to get the same thing; fortunately, I never had someone phone me saying, “you bastard, I ended up getting more time”. More generally, the respondent reiterated that an effective ER could have benefits for the unrepresented accused (“Consistency might be a benefit if you are a frequent flyer”), the defence counsel (“It would be nice to know every time what the crown’s looking for. Currently I have to track down crowns to see what sentencing they are recommending”), judges (“reduce wait times”) and other such as the police (“saving dollars from attending court”). However, in their view, the ER program has not reduced matters going to trial, may have increased the anxiety of the accused (especially first time offenders) through high-end sentencing recommendations (e.g., criminal record, jail), and might have frightened some accused persons into not seeking counsel by the threat “if you run trial, it’s only going to get worse”.

ER in Dartmouth?

The NSLA lawyers in Dartmouth indicated that they would welcome an ER program in their courts but only if the sentencing recommendations were pitched at an attractive enough level “that might encourage an early guilty plea” and/or “if the ER was truly an ER, a starting point, not end point”. In their view, the Halifax-based ER initiative did not meet either of these criteria and would not be an acceptable model. They contended that the ER official gave high-end sentencing recommendations and has not been open to hearing the defense-side or to negotiation (“the ER is locked in stone”); therefore, “I would see it as a waste of time”. Both lawyers had some, albeit limited, first-hand experience with the Halifax ER project but they shared similar views and also reported these views about ER as representative of the NSLA grouping in Dartmouth.

Despite their critical assessment of the current ER initiative in Halifax, the respondents could anticipate some benefits of an ER project that was more acceptable to them. In particular, they identified benefits for the PPS as being a more efficient sifting out of cases that should not go forward in the court process. As one NSLA lawyer commented, “If someone [at PPS] was screening the files in preparing the ER, they would be looking at each of the charges, seeing if there’s evidence to support those charges (i.e., what evidence the crown could reasonably prove) and this would cut down the screening each crown would have to do when they pick up the file because that work would have been already done. It might weed out cases if there’s no reasonable prospect of conviction. It would also give the crown better opportunity to quickly catch cases that were already dealt with, wrongful charges, etc”. The associated benefits for other role players and the court process itself presumably would be fewer trials, fewer witnesses and victims having to come in to testify, and faster turnover of cases (i.e., improved flow of cases).

Neither lawyer envisaged any reduction in the NSLA caseload; as one put it, “I don’t know if Legal Aid would be any less busy because whenever they close a file, they open up another one”. Other possible benefits identified included crowns having to spend less time responding to defense counsel asking what they are recommending, and, if the ER increased the likelihood of alternatives to jail, there could be some benefit for offenders such as prostitutes who might take advantage of treatment options if such services were simultaneously more resourced.

Like other defense counsel respondents, the Dartmouth Legal Aid lawyers focused more on the potentially negative effects of ER (as presently constituted), if extended to Dartmouth. One respondent noted that if the ER recommendation is not reasonable, it sets an inappropriate bar: “If you run the trial and the client is convicted, our concern would be that the crown would look at the ER and make a sentence recommendation that is higher than the ER; people would receive greater punishment, or risk receiving it, because of the arbitrary number that one person put on the ER, so in the end it could be worse”. Unreasonable offers, she added, discourage early resolution and thus the initiative would have the opposite impact of what it was intended to have, namely “a lot more trials being scheduled and everything slows down”! Another lawyer likened ER to conditional sentencing in that, in his view, it promises one thing but, in implementation, delivers the opposite. He held that the conditional sentence option, aimed at reducing the number of accused persons sent to jail, has actually led crowns to recommend jail more often now than “high probation” and, with ER, more people would be charged since the court crowns could exercise less discretion to drop charges. Indeed, he held that police will be more likely to charge on borderline cases, so the court caseload would not decrease and might even increase; the point apparently is that the police would exercise less discretion in advancing charges, leaving the winnowing out more to the ER official.

Asked about several alternatives or modifications to the current ER program to make it more acceptable to themselves, the Legal Aid lawyers rejected the “set team” alternative. They argued that the federal crowns have a team approach and, in their view, it also has not worked well. (i.e., “they do not make good early resolution offers”). Leaving it to the court crowns to do their own ERs was more acceptable; acknowledging that there would be more diversity in the crowns’ recommendations, one Legal Aid lawyer contended there may be some trade-off with consistency but consistency with high-end sentencing recommendations – “what is the point of that”! The implementation mode of choice was considered to be a rotation among crowns doing the ERs with a greater commitment to flexibility in response to new information and arguments at the court (“the ER cannot be set in stone”). One lawyer commented that he remembered when PPS brought the ER in, some NSLA staff upon hearing that one senior crown would set out the ERs for virtually all cases and who that selected person was, all agreed that it would never work. He decried the fact, as he saw it, that PPS did not regularly monitor the ER initiative and so appreciate the shortcomings in its implementation.

The Legal Aid lawyers considered that the option of simply dropping the ER project altogether should be considered. They did not think that it was working in Halifax and held that it would probably not be modified sufficiently to make it work in Dartmouth. They suggested in its stead a greater use of adult diversion by the crowns and by the police in the first place. One

lawyer talked about changing the parameters for sentencing options so that the court crowns can have more tools, especially in relation to encouraging diversion. He emphasized, in place of an ER program, an alternative such as the community court in Vancouver where the objectives he believed were similar to the ER program here but the strategy is focused on getting at the underlying problems of the accused's behaviour, not punishment.

THE PRIVATE CRIMINAL BAR AND ER

Background

Seven private criminal bar lawyers, all males, were interviewed and several others of the private criminal bar were consulted on specific questions. The seven were veterans with at least ten years of experience in that role (the median number of years as private defense counsel was nineteen) and five, and perhaps six, of the seven are regarded as among the outstanding and most-well-known defense counsels in HRM and throughout Nova Scotia. Five of the seven reported that over 90% of their work is criminal law work. Three had had significant (several years) previous experience as a crown prosecutor and two of the others had earlier been employed in law enforcement. All projected a hard-working, serious and independent demeanor and either operated their own firm or were partners in a small firm. The lawyers who characterized their role used conventional descriptive phrases such as, "primarily helping people who are in trouble" and "ensuring that the rights of my clients are protected and providing the best possible defense for them".

In describing the challenge of their work for themselves, the comments were more varied. One lawyer discussed the challenge he faces in distancing himself from some of the moral aspects of what his clients have done/are accused of having done. Given his background in law enforcement, he has had to set aside old biases that may not be useful or helpful to his role as defense counsel. He often has trouble when a sentence for his client is too lenient; however, he is equally distressed by those sentences that seem too harsh. Another respondent cited the challenge of work overload and finding the appropriate balance between working and other pursuits and obligations, while a third lawyer, elaborating on the latter theme, said that he can easily pick up an extra three clients a week, on top of the many he has already, but he is determined to make time for his family and leisure activities. One senior criminal lawyer identified his chief challenge as a defence counsel as handling the volume of cases in the time available, largely because of the inefficiencies of the court process – "There is a lot of standing around (for example, a court case set for 9.30 am routinely does not get going till 11 am and so on) and just wasted time". Another respondent described his biggest challenge as a private criminal lawyer in the words, "the biggest headache is getting paid". Describing what constituted a "good day" and a "bad day" in their work, the private criminal lawyers also gave varied responses. One lawyer succinctly commented, "Getting paid and winning cases would be good

and bad would be the opposite”. Another respondent described a “good day” as one where a just and fair resolution is reached (“not necessarily a not guilty verdict”) that satisfies all parties (the client, the crown etc), and a “bad day” one when, guilt or innocence aside, an adequate resolution has not been met. A senior lawyer referred to a “good day” as a challenging one, whether he is sitting in his office doing research or in court or meeting with clients. He stressed that it is not what one does so much as it is having a sense of accomplishment at the end of the day. A “bad day”, on the other hand, is one that is either boring or where he has not had time to properly prepare for a court session or a meeting with a client.

The criminal bar lawyers, not surprisingly, emphasized the importance of professional autonomy and file ownership. One respondent emphasized that he chooses how many and what cases to take on and works alone; he added, though, that he will consult peers and that there are other defence lawyers in his office area with whom he regularly exchanges ideas. Another respondent noted that he has always preferred to be on the private defense side of the law, despite having even a background in law enforcement, because file ownership and professional autonomy are important to him. He often gets asked why, with his background, he is not a crown, but he stresses the autonomy of his role. In his view, crowns lack autonomy and the PPS organization has “too much politics” while, when he was in Legal Aid, he was not able to pick and choose his files. He says that he does get referrals, but, for the most part, he has great autonomy when it comes to the files he works on.

All the private defence lawyers reported that negotiating with the crowns has always been an important, albeit often frustrating, part of the defence counsel role. A few respondents noted that they enjoyed negotiating with crowns and that, before the ER was introduced, there was a lot more room for negotiation, especially when new information was introduced to the crown. Most respondents however shared the view of one who held that, prior to the ER project, there was indeed a big problem with case flow as there were many deferrals and delays largely occasioned by the crowns’ not being prepared – “they had stacks of files and had not done their homework”. There was what one respondent called “pre-trial limbo” where, until trial date, the crowns often were not prepared to discuss and negotiate. Like others of the criminal bar, another respondent acknowledged that some senior crowns were on top of their cases and more accessible to negotiation but for the most part, the crowns were not and they “were asking for too much and not budging on sentencing”. Most of the criminal law lawyers considered that even before ER, crowns did not exercise the discretionary powers that they have. Generally, these defense lawyers thought that the ER initiative has stifled, not improved, this negotiation process.

The defense counsels considered that knowing the judges and the crowns – their styles and idiosyncrasies – was essential for their work at the provincial court. Some held that the courtrooms had designated judges and crowns “for the most part” so it was possible to anticipate the potential impact on one’s case and sometimes to successfully get one’s case scheduled in the courtroom of choice. One respondent allowed that he made no apology for judge and crown shopping. According to him, it is standard practice to try and secure a specific crown and/or judge depending on the file at hand. Reportedly, one can “crown shop” by looking at the ‘Crown schedule’ which indicates which crown is going to be in which courtroom on which day and then

he and other defense counsel attempt to schedule their court days according to this time table. If one has a file well enough in advance, before a Crown schedule has been made, then one might call a crown that he prefers at PPS and, if all goes well, that person might get assigned to the file. Shopping for judges is a little harder, as they are always in a certain courtroom. If he finds his case assigned where the judge is known to be particularly difficult, he will elect to take the case to Supreme Court where he will get 'Judge Roulette' - "it's a gamble, you don't know which judge you are going to get (however, it is definitely not going to be the judge he was trying to avoid at provincial court) but "that risk is usually worth it". Another respondent was adamant that he did not "judge shop" and, as for "crown shopping", he argued that since crowns are assigned to courtrooms he would have to pick between the two (go for the judge or go for the crown) which in his view, "doesn't leave much wiggle room".

The defense counsels usually emphasized the priority of negotiation and achieving through that, the best resolution possible for all parties. As a result, going to trial is not necessarily the biggest or most exciting part of the role as a defense lawyer. The lawyers generally reported that going to trial is an important facet of the defense role and they enjoyed it where it had a purpose, but "some cases need to go and others don't ... a lot of time and client's money is wasted on trials where the matter could have been resolved [through negotiation between crown and defense] in the first place". A prominent defense counsel commented tersely that "It's not up to me but to the client to decide. I will go [to trial] when I have to"; later in the interview he commented that he considered himself being 'duty-bound' to test the Crown, regardless of his clients' guilt or innocence. The lawyers also did not emphasize the role of the defense counsel as suggesting rehabilitative alternatives for the clients, although they referred to the advantages of community courts and the reputedly more progressive justice systems in Western Canada which emphasize rehabilitative alternatives to incarceration. Finally, they usually offered that while their caseloads were "busy, busy" and Legal Aid lawyers were overburdened, the crowns' caseloads were not excessive.

The ER Initiative

Most defense bar lawyers reported that they received only informal and piece-meal information about the launching of the ER project. They reported no formal sit-down or meeting and receiving no literature on the subject. One senior lawyer commented that prior to its coming into existence, there was, as far as he knew - and he has been a very active member of the Bar for years - no meeting between the PPS and the Bar Society or with the private bar or Legal Aid. Respondents acknowledged that they knew that a pilot project was launched, that a certain senior crown would set the ERs and that the ER was defined as the "best deal" that their clients would get from the prosecution. Several respondents complained that there was a total lack of guidance concerning the ER project provided to defense counsel and that could not be justified on the grounds that it was a pilot project. One respondent said he was amazed that initiatives like this would be introduced with such minimal discussion or even communication with the other court role players; another respondent asked rhetorically, "It was supposed to be a pilot project so why is it still in place"? Other respondents reported that apparently there were some meetings

tentatively scheduled with PPS officials to discuss the ER project once the project began but they were cancelled by the PPS at the last moment. Another respondent reported that in the early stages of the ER's implementation there was "a casual meeting" of several private criminal bar lawyers with PPS officials where "we offered the input (a) if you go with ER, don't bind the crowns; (b) the ER recommendations, and the person in charge should be flexible; (c) there should be a reasonably good incentive for a quick guilty plea" but, according to that respondent, "our input went unheeded".

The private criminal bar lawyers generally expressed no problem with the objectives of the PPS as conveyed by the interviewer, considering them to be a fair statement of the rationale on the PPS' part, but their view was best captured by one respondent's comment, "Yes, at some exalted level those might well have been the objectives". Several defense lawyers expressed some concern that, theoretically at least, an attractive ER could induce an accused to plead guilty when he/she was innocent or should not plead guilty, but this was not seen to be a significant problem with the ER project here since the ER recommendations have been so "high-end" in their view. There was, however, concern (see below) that there should be an appropriate discount for the accused's collaborating and foregoing the right to trial. Discussion around that issue was nuanced since several of the defense counsels simultaneously argued with much emotion that ER is set up to penalize people for having a trial; as one defense counsel commented "As for ERs going higher if they are rejected and the matter is laid down for trial – this is absurd! There should not be a penalty because you go to trial. Going to trial is not an aggravating circumstance". The key perhaps to the congruence of these positions is that virtually all the defence lawyers believed that the ER was set at a level approximately equal to what convicted accused persons would receive anyways and, therefore, encouraging more severe sentences for non-acceptance of the ER would be punishing them inappropriately for choosing to go to trial.

There was consensus among the respondents that the ER project as implemented has not met the presumed objectives. Indeed, one of the seven respondents, by far the most favourably disposed to ER when first interviewed, nine months later commented that he did not see how ER has really helped anything and, if anything, the ER program has made things slower at court. There was also a high level of agreement concerning what the central problem has been, most respondents echoing the remarks of one who said, "The biggest problem with the ER is that it is drafted at a stage when there is no knowledge of the defendants and their position, and the in-court crowns are not allowed to negotiate". Another respondent argued that "the biggest problem with the ER is that it is based solely on the charges laid by the police. Not only is the ER missing the defendant's perspective, but it may also be based on faulty/inaccurate charges"; he added further that "there is definitely corruption and a hard-line approach to 'criminals' in the police forces". Another respondent expressed the same point as follows: "The problem with the ER is that it does not take [new] information into account or any of the Defense's side [views] when drafting a recommendation. The ER is simply a reflection of initial police charges/reports with a ton of information missing". Variant articulations of the major problem cited the alleged lack of flexibility in the ER recommendations. For example, one criminal bar lawyer commented, "Inflexibility is the major flaw of the ER system. Whether or not it was designed to be, the ER makes it difficult to resolve what should be easily done. The ER is s a penalty, as opposed to the

offer it is supposed to be. It is supposed to be better than what one could normally get through negotiation or before a judge, not the same and especially not worse which it often is. Don't offer me what I can negotiate already”.

In a logic sense, the immediate cause of the critical views about the ER, the consequence linked to the lawyers' various conceptualizations of its central problem, was that there has been, in their view, no discount in the ER recommendations for making an early guilty plea. One respondent cited Chief Justice Constance Glube's ruling in a Nova Scotia Supreme Court decision where she presumably stated that a discount of one-third (from the usual sentence) for a quick guilty plea is reasonable, and he decried that ERs offered nothing as substantial. Another defence counsel commented that he sees a lot of cases where diversion or a conditional discharge would be more appropriate - especially in cases where people do not have records – but the ER, contrary to standard legal procedure in his view, focuses on the offence and does not take the offender's circumstances into account (for example, the fact that someone is in college, or is starting a new job and how having a record could impact that person's future). This respondent conceded that now and then the ER “will go low” and a court crown will say “You're lucky you got this because I wouldn't have given you this”, but in his view, “This is how it should work because it's supposedly a discount”!

The respondents all considered that the ER recommendations were consistently “high-end” and unacceptable. Particular attention was drawn by most of the defence lawyers to cc MVA charges such as refusing or failing the breathalyser, drunken driving (DUI), and, to a lesser extent, domestic violence cases. One respondent who indicated that he handles a significant number of such cases commented, “ERs are useless, not a deal, especially for DUIs, because they offer the official sentence that you would get without going to trial”. He contended that he has that option already and does not need an ER letter to tell him so! (“It's waste of paper and a waste of a job – [the ER official job]”). Another respondent echoed that view in his comment, “It [ER] “sucks””, “It is a ‘waste of time and not a deal at all, especially with DUIs”; in his view there is absolutely no incentive for his clients to plead guilty and accept what the ER offers. Another defense lawyer reiterated that there are very few ERs he would recommend his clients accept. “They are a waste of time, especially when it comes to breathalyzers and DUI charges”. The argument against ERs in the case of domestic violence was essentially that such matters should be resolved outside of court but that the ER forces them in the other direction, a perhaps inappropriate criticism since the policy for dealing with domestic violence is standard government (Department of Justice) policy.

The busy private defense lawyers reported that they usually did not encourage clients to accept the ER offer and argued they only did so when the sentencing recommendation was very low or to curtail other matters coming to light in a trial. One respondent observed that occasionally the ER was acceptable (“if it was for a peace bond or something like that”) but that he had only recommended a client accept the ER three times in the past year. Another lawyer claimed that he does not recommend to the client that he/she accept the ER save in cases where the ER calls for adult diversion. A third respondent, commenting that, “They [the ER recommendations] were way high and so largely irrelevant”, allowed that he has on occasion

recommended acceptance to a client but never because of the “wow, this is a good deal” factor. Sometimes, he said, “say in a drunk driving charge”, he knows that the client has had another conviction years before in another county and if that came out in a trial the sentence could be greater than the ER so here he might suggest the client take the ER. Only one private defense lawyer reported that he might occasionally recommend acceptance of the ER to a client as a result of getting the ER changed or, as he said, “tweaking an original ER offer”. However, in another context when relations with the court crowns were being discussed, several other respondents indicated that they were able to negotiate last-minute “deals” on sentencing with some crowns after rejecting the ER offer.

The defense counsels all claimed that the actual sentences their clients received were minimally no worse than recommended in the ER and usually better (i.e., less severe). One respondent, who said he rarely encouraged clients to accept the ER, contended that when the accused person is convicted or pleads guilty after rejecting the ER, the sentence received usually has been less. Another defense counsel claimed that he is more likely to get a lower sentence by pleading his client guilty (regardless of ER) and putting it before the Judge to decide. A third defense counsel reported that in light of the high-end ER recommendations, his approach has been to put the matter down for trial and, whether through last minute deals from the crown with the file or a sentence by the judge, he almost always got a lower sentence with this method. Another respondent made the same argument, namely “The ERs are never a good deal” and he has been way more likely to get a better deal if he puts the matter down to trial whether because witnesses do not show up or the judges appreciate that the crown’s recommendation is excessive. Another defense counsel commented that even in cases where his clients are pleading guilty, he tells them to keep their mouths shut and let the judge decide, which he claimed has usually resulted in a lower sentence than the ER (the criminal bar lawyers frequently alluded to the “reasonableness” of the judges). The most modest statement made by a defense lawyer on this issue was “Well, the final sentence is not always less than the ER but it is almost always not more”! There was little mention by the respondents of whether the ERs were beneficial for their clients in terms of any recommendations for charges to be downgraded or withdrawn. One defence counsel did note that he has tried to meet the crowns half-way, by pleading guilty on certain charges so that others are dropped, but the crowns did not budge; he added that “the result is a trial and usually an acquittal on the charge in question”.

The criminal bar respondents who, as noted above, put so much stock in their effectiveness at negotiating with court crowns, typically considered the ER system as a ‘roadblock to negotiation’. Several respondents used the phrase “It adds a whole other level of bureaucracy to the process that is totally unnecessary”. One respondent, who bemoaned the crowns’ alleged limited use of their discretionary authority in the pre-ER era, complained that now matters are worse since “ER means another hurdle to tip toe around”. The defense respondents reported that, in their view, the protocol for attempting to modify an ER involved talking to the crown with the file at court who largely directed them to contact the senior crown at PPS headquarters responsible for setting the ERs. Usually, they indicated that they had had some limited contact with the ER official but were unsuccessful in effecting significant change in the ER. The common view of the defense lawyers was that the ER official was a conservative,

tough, law and order type of crown who would not budge much on his initial recommendation. As a result, most defense lawyers reported that it was “pretty useless” to even bother contacting him. One criminal bar lawyer was an exception to the rule. He reported that on the occasions where he has contacted the ER official, the latter was amenable to amendments, albeit “within a pretty narrow range”, but this respondent also reported that more often he would attempt negotiations with court crowns, particularly those he saw as reasonable; regardless, he claimed that he was usually guaranteed a lower sentence if he put a matter down for trial and did not accept the first-offer ER.

The criminal bar lawyers, perhaps more than any other category of respondents, usually conflated the ER project with the ER official. They depicted the large majority of court crowns as reluctant to consider changes to the ER and did not see them as exercising much discretion to alter the ER recommendation, whether through inclination or fear of alienating PPS management. One defense counsel characterized the court crowns as “inflexible puppets”, claiming that they are not allowed to negotiate when it comes to the ER recommendation and that when an ER is rejected they always have to go higher. Typically, the defense lawyers emphasized that management’s “heavy hand” was a dominant feature of the ERs, and that, for the most part, only a handful of senior crowns, willing to risk some organizational displeasure, were open to serious negotiation about the ER at the courthouse. Two of the defense counsel did not share the general view, contending that the court crowns – whom they typically characterized in unflattering terms – simply did not exercise the discretion regarding the ER initiative allowed them by PPS management. One such respondent depicted newer/younger crowns as “out to get a conviction and inflexible when it comes to negotiating”. Another echoed the claim that the younger crowns in particular did not exercise the discretion allowed them by the ER protocol, arguing that this was due in part to laziness and in part to their lack of skill / confidence in negotiating with defense lawyers. Virtually all the defense lawyers contended that there was a deep division among the junior and senior crowns concerning their authority and willingness to amend the ER recommendations; indeed some used the word, “mutiny”, suggesting that among the senior crowns there was frequent disregard of the ER as well as an overt derision of its recommendations at the courthouse. Regardless, the defense lawyers were of the view that in many instances, the crowns “would cave on the eve of a trial and agree to a lower sentence in return for a guilty plea, a waste of resources since everything has been prepared for a trial by the time the court crowns are willing to negotiate”.

Overall, then, the criminal bar lawyers did not consider that the ER initiative had improved the case flow at provincial court. Instead, they referred to it as “another hurdle”, “a roadblock”, a slower pace in court processing. They typically suggested that there were now more appearances for all role players as a direct result of less crown-defense negotiation up front. For example, one lawyer noted that often he rejects recommendations simply to ‘buy some time’, hoping that he will be able to deal with a “more reasonable” crown on the issue and avoid a trial; still, though, this process, in his view, prolongs what could have been resolved were court crowns given more discretion. The respondents considered that some crowns were more likely to negotiate than others, particularly senior crowns, but most were deemed to be quite inflexible.

While the defense lawyers were unanimous in arguing that the ER has not reduced their workload or made their work easier, they gave mixed views on its impact for the crowns. Several argued along the lines that crowns like the ER because it takes all the pressure off of them – “they don’t have to account for their recommendations because they can just defer to the ER”. Another defense lawyer believed that the ER initiative might well have increased the crowns’ workload since another step has been added and most ERs are rejected. Several respondents contended that the effect on the crowns has been to create “poor morale and to “robotize” them which probably has had negative implications for other aspects of their role” (he was not specific here). Several respondents commented that some crowns have been placed in an awkward position where they are scared of repercussions if they exercise their discretion on sentencing. A few respondents claimed that there remains a problem of getting some crowns to read their files on time; as one said, “The ER was actually supposed to help with this problem but it has actually made things worse”.

The criminal bar lawyers did not think that the ER initiative had much implication for the judges, save that, insofar as the accepted ER constitutes a joint recommendation, judges are expected to follow the recommendation, though as one said, “nothing is written in stone”. One respondent commented that judges would never know about the ER except when the crowns, perhaps distancing themselves from the recommendation, might say “the sentence suggested by my office”; then the judge would clearly know that the crown was talking about the ER and may also detect that the crown is not enthused about it. As noted above, generally the respondents advanced the view that the judges were reasonable, and indicated that they relied on this belief when rejecting ERs and setting matters down for trial, fairly confident that, if the case got that far, the judge’s sentence would be perhaps equivalent to that recommended in the ER and quite possibly less severe.

The defense lawyers generally did not think that the ER initiative had helped the accused persons. In their view, it hurried their judgment – “ER does not allow enough time for defendants to seek counsel” – and, with the “high-end” sentencing recommendations, increased their anxiety. For example, one respondent said that getting charged with a crime is traumatizing enough and that the ER recommendation does nothing to alleviate an already tense situation for his clients. Another, especially critical, defense lawyer dismissed any suggestion that the ER was meant to help clients, arguing that the “ERs are often way off [too high], provide no relief, and frustrate his clients often wanting to resolve the issue, but not being able to because of the ER and the inflexible approach of the crown [in court]”. Several defense counsels agreed that “it all comes down to whether or not the ER suggests jail; if it does then the ER is most certainly not a relief”; the ER, it was conceded, does provide some level of relief to clients because it gives them a starting point of what they are looking at and “When the recommendation is not jail, then an ER letter can be very comforting for clients”!

The Future of ER

Looking to the future, most private defense lawyers reported that the ER system has not changed over the past two-three years, and apparently is not amenable to what they would call

positive change; they suggested that the ER project should be “scrapped”. One respondent who made this judgment commented, “It does not benefit my clients and it does not benefit me”. Another, who used that phrase [scrape it], reiterated the importance of negotiation which has diminished with the ER project and added that he likes dealing with prosecutors, and the flow and resolution in exchange – “We don’t always agree but we can at least have a discussion, maybe agree on the charges and argue over sentence”. All the respondents reported that their recommendations to clients to accept the ER are infrequent and not increasing as the ER system has not evolved to overcome its major flaws. The consensus view was that, while the ER may be good in theory, as one respondent said, “It cannot continue as is”.

The chief change that would have to be made in their view is that restrictions be lifted on the in-court crowns’ ability to negotiate with the defense, especially when new information is presented. A second prerequisite for its continuance in their view is that the ER offer the client something worthwhile, unlike the current situation where the ER offer is allegedly no better and sometimes worse than the accused could get after going through trial. The defense lawyers’ clear preference was that the ER be recast as a negotiable, initial sentencing position by the crown; as one respondent observed, “I like [an ER] as a starting point for discussion. You know the crown’s position. ERs only happen on less serious files anyway. If it was meant to encourage dialogue, as opposed to monologue, then yes it has its place. There would be no downside. As long as the crown who picks it up is not bound by it”. This position was usually expressed with a correlate, namely that one person, particularly one with a hard-line philosophy, in their view, should not write all the ERs. Several defence lawyers expressed considerable scepticism that such changes could be effectively made in the PPS. One respondent, for example, contended that “Saying you have flexibility does not mean the crowns would see it that way; they would still be reluctant and possibly fear making initiatives on their own. Rotation regarding who does the ER might have possibilities but again would crowns feel comfortable exercising discretion in the PPS milieu”? Short of such changes, several defense lawyers suggested alternatives to ER such as the police getting disclosure out faster, the crowns reviewing their files in advance, and a justice system more focused on extra-judicial sanctions and problem-solving as in some other parts of Canada.

PRIVATE LAWYERS OUTSIDE THE CRIMINAL BAR

It would appear that private lawyers managing a more general practice (i.e. doing only occasional criminal law work) might be better disposed to the ER initiative since it provides them with a quick sense of what the crown’s position on charges and sentencing recommendations would be; moreover, providing only occasional counsel at the provincial court, they may be less caught up in a competitive, adversarial relationship with the prosecution and less familiar with the dynamics of the court process. Only two such lawyers were interviewed,

but there was a brief discussion with two other corporate lawyers (who reported that they occasionally handled minor criminal matters as a favour to regular clients). The results do suggest that the premise or hypothesis may well be accurate. One of the two interviewees was a veteran lawyer who had 16 years practicing law while the other had but one year of practice under his belt. Both lawyers were members of a large firm specializing in wills and estates and other largely civil matters and neither was a member of the criminal lawyers' association. The young lawyer had had only a few criminal cases and very limited experience with the ER but he indicated that he was quite supportive of such an initiative and sought – unsuccessfully – information about it on the internet. The senior lawyer reported that his workload is only 20% criminal law but that he is the point person for routine HRM criminal cases in his large national firm. He described his role as being an advocate for his clients and the hardest part of the job as being the business aspect of it. He often has trouble getting clients to pay their pay bills and hates having to hound people to do the right thing. A “good day” involves obtaining a resolution, hopefully timely, that is mutually satisfactory to both his client and himself, and a “bad day” one when this goal is not achieved. Professional autonomy is paramount for this lawyer but he reported that he often has ‘juniors’ working on files (or parts of them), and described a significant file sharing that occurs both within and between firms in HRM.

The senior lawyer emphasized that case flow blockages and delays have been definitely a crucial issue in his view. He blamed this problem on the gap between the time that the police lay charges and when a crown sees the file, and the difficulty of getting crowns to look at files early on. As for case load, he noted that ‘I could always use more work’. He stressed the importance for effective, efficient defense counsel of negotiating with the crowns to achieve early resolution but quickly added that “unfortunately, early resolution occurs less frequently than I would like”. The fault in his view lies squarely with the crowns. Firstly, it is often hard to find a crown who will look at your file; he claimed that while he would like to be negotiating, there is often no one to do this with and unfortunately he has to charge his clients for the extra time it takes to find a crown. Secondly, in his experience, when he does find a crown, it is usually at the very beginning stages of a case or at the last minute (“there is no in-between”) and neither is desirable – “the early-bird crowns who jump on a case are often inflexible and stubborn, while the last-minute crowns are ill-informed and under prepared, making early resolution all but impossible”. Either way, negotiation between defense counsel and crown has not usually been “a smooth or fruitful process”. For these reasons, he contended that the strategic importance of knowing the philosophies or approaches of crowns and judges cannot be understated. He needs to have a keen sense of their leanings in order to reach resolution and get a fair deal for his clients. Negotiations are the central feature of his legal work. The lawyer reported that, while he really likes going to trial, that it is not always the best option, and as for figuring out/advocating rehabilitative options, he held that is not really an important facet of the defense counsel's role.

The senior lawyer believed that the ER initiative likely was launched to deal with back-ups and delays in court processing of cases. . He described his introduction to the program as ‘informal’, though he partly attributes this to his inactivity in the criminal lawyers association. As for trying to negotiate changes in the ERs, he simply said, “I don't do it”. If an ER is not what he and his client are looking for, the matter is set down to trial. In his view the PPS official

drafting the ERs is a very experienced crown prosecutor and the court crowns toe the line (“they are not going to negotiate”). He indicated that he actually likes the ER initiative, though he conceded that it does not always work. He said that 10 to 25 percent of the time, the ER works very well (this is how often he recommends that his clients take the ER). In particular, the respondent commented that he has recommended acceptance to unrepresented accused persons who called him after getting an ER letter to ask for advice (which he provides pro bono) and end up accepting the ER and pleading guilty. He added that the ERs he sees are not ‘lotto wins’, that the recommendations are not always that great but they are not out-of-line. The lawyer indicated that it is always a ‘gamble’ when he and his clients decide to forego the ER since he cannot be sure if they will get a better deal. However, he noted that crowns often offer deals at the very last minute in desperation due to lack of a case against his clients. As for non-ER guilty pleas, the respondent said that these are not a regular occurrence. If his clients are pleading guilty, they are usually taking the ER or some variation on it. When they are not guilty, the ER is irrelevant. He did imply, though, that sometimes clients who may be guilty to some degree have matters set down to trial in order to avoid “bad” ERs.

The senior lawyer, like his junior counterpart and the other private corporate lawyers consulted, considered that the ER initiative has definitely helped with the court docket/case flow and provides benefits for both crowns (a seasoned veteran does the basic work on each case) and defense counsel (they get an earlier indication of the crowns’ position on charges and sentencing). He sees it as a positive step for all the court role players from judges to the unrepresented accused persons. He also held that the ER project may benefit victims because justice is brought more swiftly and the accused is forced to accept responsibility at an early stage. The respondent commented that he could not see how judges could not like the ER since “joint recommendations are sacrosanct for judges, and the ER often leads to these”; at the same time he was quick to point out that judges are not really part of the process until the very end, so the ER may not be all that important to them. The senior lawyer finished the interview by reiterating that he is a supporter of the ER and would like to see it expanded to all HRM courts.

JUDGES AND THE ER

Background

Five senior provincial court judges were interviewed, one-on-one for this assessment of the ER initiative, three from the Halifax court and two from the Dartmouth court, three men and two women. All five judges were supportive of the ER project. The judges generally indicated that some of the central court processing problems they had identified in interviews two or three years earlier, first on the issue of the unrepresented accused and subsequently on the duty counsel initiative (The Unrepresented Defendant and the Unbundling of Legal Services, 2004; The Provincial Court Duty Counsel Pilot Project, 2006), had diminished in the past three years, and that the ER initiative had the potential to further ameliorate these shortcomings. In their consensus view, the ER initiative should be maintained, improved operationally (“tweaked” was a favorite word used), and extended to the Dartmouth provincial court.

The judges, while occasionally pointing out specific shortcomings largely to do with the turnover and inconsistencies among contracted duty counsel lawyers, generally considered that the launching of the duty counsel program by NSLA had improved significantly the problem of the unrepresented accused in provincial court. Judges reportedly can have more confidence that the unrepresented accused has talked, albeit sometimes very briefly, with legal counsel and understands the charges, or at least had had the opportunity to consult. And, as one judge commented, the ER project “completes the circle” since it better informs the accused persons about the crown’s position, usually reducing their anxiety, and it provides the duty counsel with something to work with in dealing with clients. Other judges reiterated the comment that, as for the accused persons and their anxiety about the process and sentence, the duty counsel has made a big difference; they also usually considered that the duty counsels would be quite receptive to the ER project. In sum, the judges considered that the ER project can be expected to expedite the work of duty counsels, to improve the awareness of the accused, and to deal better with their anxiety and often exaggerated fears about sentencing.

The problem of case flow and backlogs in the courts – central in judges’ views since justice must be timely in principle and for effectiveness – has been more difficult to resolve. One judge, in observing that work flow is a major problem, likened it to “overwhelming waves”. She and the other judges explicitly identified the roots of the problem as multifold: “Well the defence is savvier here [Halifax] and raise a lot of Charter challenges. Also, people no longer go to the Supreme Court in such numbers so we get longer and longer trials (many witnesses etc). Another factor is that the municipal court is done by provincial judges too and that takes time. Still another factor is the waiting around for the sheriff’s people to show up (they claim there are not enough vans etc to transport accused in custody and so on)”. Another judge held that the case flow issue has in fact become worse over the years in part because of Charter issues used by the defence but also for other reasons such as spousal assault case rules where what the victim spouse said at the time of the incident can be used as evidence even though she may have recanted (“crowns would push for this of course”), so the time for some cases has increased and the case drags on. A Dartmouth judge commented that “Yes, court backlogs are an issue. Cases

take longer and longer to resolve. Long trial court cases (3 days or longer) are plentiful. Courts are routinely overbooked. Just the other day, I had a bail hearing and 2 trials scheduled for the same time. I dealt with bail first – that is the priority under those circumstances – and while doing so (it took up almost all morning) the defence and crowns got together and came to an agreement on the other cases”. Another Dartmouth judge reiterated the point about overbooking, noting that trial dates are now being set eight months hence; she added that “overbooking sometimes brings bad results but we have to do it ... I am in court a lot more nowadays”. In response to this writer’s observation that summary offense tickets (SOTs) have declined over the past five years and that could have been expected to reduce the judge’s work burden, she replied, “There has been a huge spike in traffic-related SOTs because of the recent re-establishment of the traffic cops (i.e., the HRPS motorcycle division) who are committed and tireless”.

Overall, then, the judges highlighted a number of reasons for blockages and the stretching of court time in criminal cases, and considered that, while ER would hopefully improve court processing, the problems are complex. Referring to recent increases in the number of appearances per case, on the average, one senior judge commented that “Court processing is very negatively affected by the accuseds and/or witnesses simply not showing up”. He referred to some recent American research which showed that if the sheriff’s unit simply phoned people beforehand, the rate of “shows” went way up; in the project cited, if persons could not be contacted, in that special project, the sheriff’s people went out to see if they could locate them. He added that here a bench warrant might be issued but there is no special unit phoning or chasing down people so it may be months before police or similar authorities stumble onto the person. He believed that comparable initiatives in HRM could speed up the court processing more than anything and save dollars and complaints from witnesses, police and others.

The ER Initiative

All the judges considered that the three objectives of the ER, as distilled by the writer through conversation with the PPS management, were fine and reasonable and indeed were the main objectives of the ER initiative in their view. The three objectives - facilitating more efficient court processing, better use of PPS resources, (impacting on the caseloads for crowns and NSLA defense counsel), and reducing anxiety for, and more fully informing, the accused, especially those with least legal counsel representation – elicited interesting observations. The judges especially highlighted the possible implications for the objective relating to the unrepresented accused, implications which also bore on their own responsibilities as a judge. For example, one judge observed that the ER definitely helps the unrepresented persons as he can say to them, “do you understand the implications for sentencing if you plead guilty”, with some confidence that the answer is meaningfully positive. It is the judge’s duty to be satisfied that the accused knows what he / she is pleading guilty to and has some awareness of the consequences of the plea. “Now I can ask the accused persons if they have seen the crown’s recommendations or ask them to see the crown to find out what is being recommended” (Indeed, on several occasions the research team observed judges directing the unrepresented accused to seek such information before making a plea). One judge, although of the view that many defendants were

‘okay with the ER’, cautioned that great pains have to be taken to avoid having people who are not guilty pleading so, just to get on with things. She added that “people have right to a trial and it seems perverse to say if you exercise that right you are going to get a stiffer sentence, especially when the [ER] recommendation is already on the high side”. Responding to this concern about the ER as an enticement to plead guilty, another judge commented, “Well the law allows that a guilty plea is a mitigating factor so of course there would be an inducement. The ER in some ways is just a formalization of what the crown would normally do anyways in talking with defense counsel”.

In light of the judges’ views on the underlying multifold factors impacting on court processing issues as noted above, it is not surprising that they were more cautious about the practical implications of ER for court flow and case processing, acknowledging the value of that objective whilst emphasizing the importance of these other considerations and the role of the defense counsel beyond the duty counsel. One judge commented “It’s tricky [the impact of ER] since the driver for delays is usually NSLA lawyers. It gets referred to them, then, a few months later they say they have not got this or that and need more time. There is variation and the best NSLA lawyers seem to get things done sooner”. As for the private defense bar, he noted that “lawyers get fee money up front and it is in trust and they can only draw on it as case proceeds so they should have an interest in seeing the case come to an end. Also, asking for delays and charging the client for appearances would probably alienate some clients, especially of course those without deep pockets”. Other judges, however, differed on whether there is a personal, material incentive for the criminal bar lawyers to prolong cases.

The judges were of the view that other court role players would, like themselves, generally welcome the ER initiative because it could make their workload easier in some respects, and perhaps leave them more time for complex cases. At the same time, they acknowledged that there could be diverse reception among defense counsel and among the crown prosecutors handling the actual court cases. Several judges allowed that, since the ER recommendations are generated by a PPS official outside the courthouse milieu, some crowns who are senior, do the prosecution work efficiently, and are on top of the files, might have reservations about the ER system reducing their exercise of discretion in the prosecution of cases, while younger, and perhaps less efficient crowns, on the other hand, might welcome the ER initiative’s relieving them of much of the onus of working out a basic prosecution response to a file. While the several judges allowed that there could be different interpretations of prosecutorial professionalism and discretion manifested in the ER project, those who elaborated on this issue specifically rejected a strict comparison between crowns and legal aid lawyers with respect to the principle of autonomy vis-à-vis their organizational affiliation; in their view, Legal Aid lawyers have to be more autonomous in their work whereas crown prosecutors have to acknowledge employee responsibilities to organizational positions and protocols in their work.

Similarly, there were some expectations of different reception to ER on the defense side, especially duty counsel versus regular NSLA counsel, and among the private bar (the criminal bar versus other lawyers infrequently taking on such clients). According to the judges, duty counsel lawyers presumably would likely be more receptive than other NSLA lawyers given that

they might be more committed to early resolution of cases, and, similarly, the private bar not specializing in criminal cases might be more receptive than the criminal bar. One senior Dartmouth judge, for example, reported that he could readily appreciate the differences between the full-time criminal bar and other defense counsel in terms of their willingness to recommend to their client acceptance of the ER; since adversarial relationships are central to court processing, some Legal Aid and criminal bar counsel “might be ideologically focused on getting the accused off at all costs” or at least feel more challenged to do better than the ER recommendation.

Aside from crown prosecutors and defense counsel, several judges indicated that other court role players such as probation staff and police could be impacted by the ER program. In the case of probation, ER recommendations might well “pile on” conditions which affect the probation workload while, more on the positive side, the police reports vetted through the court-based police could be subject to closer scrutiny under the ER initiative and consequently bear improved quality.

The judges on the whole reported no consultations with PPS officials prior to the implementation of the ER and were uncertain about the nuances of the ER process. They indicated that there was limited information provided to them about the ER initiative. A senior Halifax provincial court judge reported that, while he could not remember if there was a specific formal meeting with the PPS on the ER, he and other judges were well aware of its coming since there had been many informal chats in the previous years. Another Halifax judge claimed that there had been no discussion with the judges prior to implementation and she contrasted that unfavourably with the implementation recently of the Adult Bail Program where there was much consultation. A third Halifax judge observed that he was not surprised at the absence of consultation and discussion since it was only “a project” and only carried out in the Halifax provincial court. A senior Dartmouth judge, while not surprised at the way ER was introduced in Halifax, held that if it were to be extended to Dartmouth - and he seemed to think it should be - some preliminary discussions among the PPS, NSLA and the judges would be useful and he would have no qualms about participating in such discussions.

The judges all appreciated that the ER recommendations were set by one well-known, senior crown at the central offices of PPS but were uncertain about how the recommendations could be amended either by the prosecutors responsible for the file in court or in response to input from the accused or his / her counsel. Typically, they were unclear about PPS “protocols” for crown prosecutors raising issues about the ER recommendations when they first received the file or subsequently when salient information was brought to their attention at the courthouse, and one Halifax judge appeared to be misinformed about ER, seeing it more as an initial sentencing position than as a set PPS position. Not surprisingly, they were unsure about the level of discretion that courtroom crowns could exercise with the ER recommendations of a file as well as what the process was for effecting changes in it. One judge held that there were probably some “lines in the sand” (such as a jail sentence or not) beyond which, modifications would require major discussion with the ER official. Another Halifax judge held that there should be no “lines in the sand” since significant new circumstances often arise at the courtroom level. All the

Halifax judges were aware however that there was some flexibility in the ER recommendation; for example, one noted that “some tweaking by good crowns can extend the 60 day limit for ER”.

The Halifax judges all expressed views on the actual impact of the ER initiative. One judge observed that a major result of the ER program has been the “greater consistency in the crowns’ position on sentencing, something which over the years has been striking in its diversity”. It also gives, he believed, the duty counsel something to work with; in his words, “ER streamlines things”! All the judges were aware of the divisions among the crowns in their enthusiasm for ER and its specific sentencing recommendations. One judge commented that “sometimes it is as if the crowns hold their noses when advancing the ER recommendation”. Another Halifax judge observed “Many crowns put the ER on the record – your honour, the ER is Especially if they are going to add some mitigating circumstances - this is of course as much as to say, we would recommend less”; that observation was echoed by the third Halifax judge who noted that some crowns convey clearly though implicitly that the ER recommendation they are advancing would not be their own recommendation if they were to render their own views. At the same time, all these Halifax judges acknowledged that many crowns give no indication of any lack of support for the ER program.

All five judges agreed that the ER official by reputation and actual practice could be seen, and indeed is seen by most other court role players, as making high-end sentencing recommendations but they differed on whether this could be construed as a shortcoming of the ER program. One Halifax judge commented “One cannot give away the store in these ER recommendations without discrediting the PPS; indeed if the ER is too generous then it might increase the number of guilty pleas that should not be made”, adding that in the case of specialty courts (e.g., drug treatment courts) where people can get a treatment option in place of jail time, the attractiveness of pleading guilty and getting access might outweigh the unwise if not dangerous (to the accused and to the court process) premature guilty plea. The same judge challenged the claim that the court crown would necessarily know more details about the case than the ER official, noting that the crowns do not talk to the accused and sometimes just read from police synopses in court whereas the ER official may examine files and records and even make judicious phone calls in the course of preparing the ER recommendations. He modified his position somewhat when taking into account duty counsel or other defense counsel getting information and passing it on to the court crown but was still rather skeptical about court crowns having better and more detailed salient information on the cases. He did acknowledge however that often there are a lot of circumstances to take into account in sentencing that emerge in the court milieu and was of the view that once the ER was accepted, the duty counsel or other defense counsel could argue for a different sentence – a view that, on the surface at least, appears to contradict the concept of the ER acceptance as in effect constituting a joint recommendation of the ER sentencing recommendation to the judge.

The other Halifax judges also addressed the above issues. One contended that the ER recommendations have been reasonable but limited since the ER official would not be aware of the circumstances and mitigations (e.g. mental illness) that a defence counsel might uncover and

raise at court. He suggested that since court crowns had little room for discretion in amending the ER, they would have to communicate with the ER official and that slows down the court processing. He was uncertain as to any PPS protocols for court crowns in changing the ER. The other Halifax judge was quite critical of the ER program for both its alleged high-end sentencing recommendations and the perceived limited discretion allowed the court crowns. The judge contended that there was too little incentive for those accused persons wanting to take accountability for their actions and that front-line crowns needs to have significant discretion since there is a dynamic to provincial court as information flows in from the defense and defendant side; this dynamic, it was argued, “cannot be appreciated at the PPS headquarters where there is much dependence on the information put together by the police, information that may be of poor quality to begin with”. In this judge’s view, ER can work, does work to some extent, but needs tweaking as “it is personality-driven whereas it should be process-driven”.

The Dartmouth judges emphasized the need for flexibility in the ER recommendations to allow for what one referred to as “the court experience factor”. One judge noted that a lot of new information becomes available on the spot and that could well throw off the ER. She mentioned twice that she has seen cases totally unravel in front of her eyes so what happens at court is very significant and maybe the ER program does not fully appreciate that point. The other judge highlighted the importance of the ER mindset being rooted in provincial court with its wheeling and dealing between crowns and defense counsel (“crowns usually go summary on hybridized offenses and there are a lot of them”) rather than Supreme Court where the trials are. In his view the ER challenge is to be flexible and advance attractive sentencing recommendations without being ridiculous.

The judges were reluctant to discuss the impact of the ER initiative on the accused persons (though as noted they expected it to be positive), on the number of court appearances per case, and on other role players such as probation officials and the police since relevant systematic data (e.g., the ER acceptance rate) were not available. Based on their own experience the Halifax judges noted that the ER program was appropriately flexible on the 60 day time limit for acceptance by the accused. They also appreciated that, depending on its acceptance rate, ER could generate savings for the police departments (fewer police being called as witnesses) and that, even with low acceptance, the ER program should lead to an improvement in the quality of the police reports rendered in court. Asked if they would feel compelled to go along with an accepted ER’s recommendation (as articulated by the court crown) – whether or not the accused person pleading guilty had legal counsel – the judges indicated that in either case it would be a joint recommendation, and, in several recent appeal cases, the appeal court has rapped the knuckles of the judge for not going with the joint recommendation and now requires that several conditions be met before that would be appropriate.

Future Directions

All the judges interviewed considered that the ER initiative should be continued and expanded to the Dartmouth court. At the same time they advanced various suggestions to improve its implementation. One Halifax judge, citing the importance of new information that

becomes available at the court appearances and the divisions among the court crowns, initially suggested having the different crowns read files in advance and prepare their own ER but he realized that this then could result in great variation in sentencing recommendations and could be problematic for the PPS. Consequently, he suggested more scope for the individual crowns to tweak the ER recommendations from head office if there is new and significant information received from the defendant or his / her lawyer at court. He acknowledged, however, being uncertain as to the scope of the discretion that court crowns could presently exercise. Insofar as the ER recommendations are too high-end or the ER official perceived as inflexible, these in his view were “only an operational issue” and not a reason to shelve an important PPS initiative.

Another Halifax judge reiterated that PPS’ ER is a good idea but needs tweaking, basically providing for more discretion at the front-line crown level. She underlined that at the provincial court the dynamics of factors being raised in particular cases are crucial and that the ER recommendations from head office depends too much on the police reports and there are issues about the quality of those reports. In her view, there could be no “hard lines in the sand – have positions but then tolerate court crowns going beyond or changing the recommendations with the proviso that they have to explain why did – they have to be accountable”. In other words, the ER attached to the court file should be more like an initial sentencing position rather than the set PPS position. In addition she argued for having more than one person drafting the ERs and recasting the ERs to be on “the low side”, a more attractive carrot for accused persons (and their counsel) that could encourage them to take responsibility for their actions. Her bottom-line position was “We need something like the ER so let’s make it work. It is problematic right now given that it has a tough conservative approach”.

The third Halifax judge expressed some concern that the PPS might withdraw the ER program. He thought it was a good initiative and would like to see it spread to Dartmouth and indeed to the rest of Nova Scotia. Its main strengths were streamlining court dealings, providing consistency in the crowns’ recommendations, and being helpful for the accuseds. He was uncertain whether any major changes were required in the way the program was delivered, acknowledging the initiative’s reputation for being tough and high-end in advancing ER recommendations, but also, suggesting that that approach may be required. Certainly, though, he too, suggested that the dynamics of the provincial court require some flexibility at the courthouse level.

The Dartmouth judges were both in favour of having the ER program extended to their court. They appreciated that there would have to be an incentive for an early guilty plea and that significant new information about the case and other changing circumstances often emerge at court appearance so flexibility and crown discretion in sentencing recommendations would have to be imaginatively combined with accountability of the court crowns to the initial PPS position. Both also suggested that prior to such an extension of the ER, some preliminary discussions among the PPS, NSLA and the judges would be valuable.

ER AND THE ACCUSED IN HALIFAX PROVINCIAL COURT

Introduction

Over 200 letters were sent out by the PPS to accused persons from the sample of files utilized in the quantitative analyses of the impact of ER. The letter (see appendix A) explained that an independent assessment of the ER was being undertaken and invited their participation in a telephone interview. The letter made clear that the project would have no implication for any specific case they have had or might have with the courts and that anonymity and confidentiality would be guaranteed by the professor responsible for the project. If they were willing to participate, they could notify the PPS by signing a form and sending it back in the self-addressed and stamped envelope; the form would be passed along to professor. Unfortunately only a small number of such acceptances were received and only fourteen interviews completed; accordingly, no quantitative analysis of the interview data was possible. A second problem, aggravated by the small number of participants, was that only half the small sample could recall having received an ER and several respondents had other intertwined charges, factors that made the interviews quite complex and occasionally confusing.

Acceptance of the ER

In about half the cases the respondents could recall having received an ER and reacting to it. In five of the fourteen cases, the accused person accepted the ER while in seven of the remaining the ER was not accepted; in several instances the rejection was more a matter of not being aware of the ER, while, in two instances, it was unclear whether the ER should be considered accepted or rejected. In the cases where the ER was accepted, only two were straight-forward cases involving quick acceptance of an unmodified ER. In both these cases the recommended sentence was considered 'light', one where the ER called for a conditional discharge and the other where the recommended sentence was 'one day in jail' considered served by the plea appearance. In the other three cases where the ER was accepted, there was a significant delay in the process and in one of these cases a dramatic change in the ER recommendation.

The two straight-forward cases involved males charged with minor property offenses. Both accused persons indicated that they were happy with the ER. One young man charged with destroying public property (a security camera in the drunk tank) reported that he received the ER in the mail before his first appearance but after he spoke to his private lawyer. He credited the lawyer for "negotiating" the favorable ER recommendation. For this accused, the crucial matter was to avoid a criminal record and the conditional discharge (plus restitution for the damaged camera) accomplished that goal. He commented that the ER initiative, as he experienced it, was fine, reducing anxiety about having to go to court and freeing up time for everyone. The other quickly resolved case involved a 64 year old man charged with stealing food. This accused person had an extensive record and was facing other charges as well where apparently he later received a three month jail sentence. The accused quite happily accepted the one day jail

sentence associated with the theft of food. He received the ER at first appearance and described the proposed sentence as “a great deal” since he was able to go directly home from the court appearance.

In the other acceptances, a common thread was the significant delay between first court appearance and sentencing. In one instance a young man charged with 253(b) accepted the ER as conveyed to him by his private lawyer (the latter apparently did not recommend acceptance or rejection but allowed that if he was adamant perhaps expert witnesses could be called upon to contest the accusation of intoxication) but he wanted to delay proceedings and getting a criminal record until he had completed some planned travel. He decided to plead guilty on his own and without legal counsel at his sentencing but he deferred the guilty plea until his travel was completed. The case, accordingly, dragged on for six months. The sentence received was a fine of \$800 and one year loss of driving privileges, as recommended in the ER. The respondent was positive about the ER program but critical that he did not personally receive the ER letter. He also was unhappy with the requirement that he take a course on drinking and driving, especially as the other participants there were repeat offenders whereas he was a first time offender. In another case a man with two previous DUIs faced an ER calling for 14 days in jail plus a driving prohibition for two years. He did not have a lawyer at first but when he made his guilty plea, the judge told him to seek legal counsel. His Legal Aid counsel subsequently advised him not to take the ER as it was and apparently attempted to negotiate the jail sentence (the respondent was “scared about the prospect of jail”) but the crown emphasized that that part of the ER sentence was non-negotiable. The respondent accepted the ER when the crown dropped the order not to possess or consume alcohol. Overall, the respondent reported that he was happy with the resolution, adding “despite the jail time, there was no getting around it”.

The third case concerned a young male charged in a domestic violence matter. Initially the charges were 266(b) and 267(b) and the ER called for a jail term of 60 days (among other things). He claimed to have received the ER after his first appearance and discussed it with the Duty Counsel. The latter made no specific recommendations vis-à-vis accepting or rejecting the ER but did reportedly provide useful information. The 267(b) charged subsequently was dropped by the crown and a revised ER put forth for the common assault charge, a downsizing that was acceptable to the respondent since it did not call for a jail term but only probation, anger management programming and a no contact order. The respondent was pleased to avoid jail and, while hesitant to call the resolution fair (“Lots of things in court aren’t fair. It was satisfactory”), acknowledged that he was fine with it. It gave him “a sense of responsibility and guilt and I could go on with life. Couldn’t do better”. He believed that the charges and sentencing recommendations of the initial ER were too severe “because she wasn’t that hurt” and it would have made his livelihood very difficult.

Non-Acceptance of the ER

In two cases, the respondents indicated that they were completely unaware of any ER offer for their case and had they had the offer communicated well to them they would have accepted it. In one instance a 51 year old woman charged with common assault (266b) had an ER calling for a conditional discharge, probation, community service hours, and counseling. The woman reported that she became aware of the offer only as she examined documents for the telephone interview, and had she been aware the offer on appearance, she would have accepted it; in her view, “The offer was very appropriate, not harsh at all”. However, she did not examine her documents and the Legal Aid lawyer who provided counsel from start to finish apparently never elaborated on the ER offer, only telling her that the crown might recommend community service hours. Reportedly, on the day of her plea, her lawyer spoke to the crown prosecutor outside the courtroom and then came back and told her that the charges were going to be dropped. She claimed that she was not sure what her lawyer did to have the charges dropped. In the other instance, a young man was charged with theft under (2 counts) and the ER called for a fine. The respondent claimed that he never received any ER offer and the case dragged on for almost two years before, on the advice of the duty counsel, he pleaded guilty. He indicated that if he knew about the ER earlier he would have accepted it though he found the \$200 fine “too harsh” because he is a disabled person. The long delay may have been in large measure because he initially pleaded not guilty and also because he wanted the two theft charges combined.

In three instances the respondents indicated that they rejected the ER and subsequently the charges were dismissed or withdrawn. In one instance, a young woman charged with uttering threats (264 1.1.a) received an ER calling for a fine, probation, counseling and no contact with the victim. She went to Legal Aid and they eased her fears about the case so on second appearance she pleaded non-guilty with her legal counsel at her side. A trial date was set but then the charges were dropped, reportedly “for lack of evidence”, and officially the case was closed as a DWOP with a peace bond. In the second instance, a 44 year old male was charged with 266(b) in a domestic violence case involving his wife. The ER called for a conditional discharge, and probation plus conditions. Prior to his plea on the charge, the respondent successfully obtained release from a no-contact undertaking but was surprised to find that replaced by an undertaking to completely abstain from alcohol. He obtained the ER recommendation through his private legal counsel and “laughed at it because it was so high”. He held that he was innocent and his wife would not have called the police had she known the repercussions. He pleaded not guilty at his second court appearance where his lawyer was present and the matter was set down for trial. At the third appearance the crown, he reported, was willing to negotiate and he pleaded guilty in return for a conditional sentence wherein provided he did not get into trouble with the law for the next nine months all charges would be dropped and he will have no criminal record. The PPS data set describes a slightly different case resolution, namely a DWOP with a peace bond. In the third case, a 53 year old male was charged with cc145, failure to appear, and the ER called for a fine of \$200. This file was complicated by the fact that there was also an initial theft charge to take into account. Apparently, the cc145 charge was withdrawn.

In another case a 67 year old man was charged with common assault (266b) and the ER called for 30 days in jail, probation, counseling, plus a no-contact order. The respondent received the ER with the disclosure on his first appearance. He sought Legal Aid and was advised not to accept the ER because “he was 67 years old and the ER was too harsh”. He reported that his lawyer assured him that he would get a better sentence from the judge and so he pleaded guilty without accepting the ER. There were two additional appearances on the charge and the sentence rendered by the judge was no jail but three months house arrest and probation. The respondent commented that he was eager to “get it over with”, quick to admit guilt, and very glad that his counsel advised him not to accept the ER. In his view, the crown was very adversarial but the judge most fair, and concerned about the possibility of an elderly man such as himself doing any jail time.

The remaining three cases were all complex for one reason or another and the quality of the interviews was disappointing. In one case a 65 year old was charged with multiple counts of failure to comply with undertakings (cc145.3) and the ER called for 10 days consecutively on each count. The man, a self-confessed alcoholic and cocaine addict, was also facing several “theft under” charges for which those ERs called for jail terms. He was represented by Legal Aid and at the time of the interview the respondent had not yet entered a plea but was enrolled in a treatment program and on the short list for an intensive in-patient treatment centre in Halifax. He reported that his lawyer was hoping to get the charges heard by a certain judge who was sympathetic to drug addicts, especially one making an effort to deal with his underlying problems. He reported that the crown has not been willing to negotiate perhaps because of his very long record (e.g., over 40 convictions for theft). The respondent acknowledged his guilt but also stressed that continuing treatment, rather than going to jail, is the only thing that will save him. In the second case, a male, charged with “theft under”, had an ER calling for 90 days in jail. He was advised of the ER recommendation by his Legal Aid lawyer. The respondent, a frequent defendant in criminal court, noted that he did not want to contest the charge but believed that he could do better than 90 days so he rejected the ER. Subsequently, he pleaded guilty and received a sentence of only 45 days – in his view a significant reason for this lesser sentence was that the court took into account some remand time that he incurred. In the final case, a middle aged man was charged with ccMVA offenses (253 and 252) and received an ER calling for 45 days in jail (actually 45 days on one charge and 30 days concurrent on the other) and loss of driver’s license for two years. He obtained a Legal Aid lawyer who conveyed the Crown’s position though the respondent claimed not to have received an ER himself. The subsequent guilty plea resulted in a sentence of 30 days and two years loss of license, a less harsh sentence but still one that the respondent claimed surprised him because of the jail sentence. At the time of the interview he was desperate to find some way to regain his driving privileges.

Concluding Comments

The response to ER varied significantly among this small sample of accused persons. Generally, though, where the ER recommended a non-jail sentence and especially, not

surprisingly, a conditional discharge, the ER was accepted with enthusiasm. Clearly, this finding was in line with the views that ER may sometimes reduce defendants' anxiety and quicken the court processing. Where the ER called for a jail term, there was much resistance and often the defendants received legal advice that they could do better (i.e., less jail time, house arrest), pleading guilty but rejecting the ER and pitching their case to the judge; in these latter instances, the results bore out that presumption. Generally the respondents wanted to get the case over with as soon as possible but not when jail loomed. In a few instances even acceptable ERs did not result in a quick resolution due to defendants' strategies such as delay, judge-shopping and so forth. There appeared to be a significant number of cases where the charge was ultimately withdrawn, especially where domestic violence allegedly occurred. There was much uncertainty among respondents about the ER and it appeared that some did not personally receive it but depended on legal counsel to inform them. In a number of cases the specific ER in question was intertwined with other charges (especially in the ERs for administration of justice offenses) which were combined in the sentence, making it difficult if not impossible to appreciate the significance of the specific ER (e.g., even when the charge was withdrawn, it may have contributed to the sentence received on the other charges); such circumstance also made it difficult for the respondents to sort out what happened on the charge in question. The number of interviews obtained is far too small to support generalizations and in the future any assessment will have to find a better way to tap into this grouping, the defendants. The successful strategies employed by the evaluator in other court projects were based on contacts established at the courthouse.

ER and OTHER KEY ROLE PLAYERS (POLICE, VICTIM SERVICES, CORRECTIONS)

There are other key role players that could be impacted by the ER initiative. Most obviously are the police services, especially the Halifax Regional Police Service (HRPS) since the ER initiative is limited to the provincial court in Halifax and most RCMP informations for HRM are filed at the Dartmouth provincial court, save those generated by the RCMP unit at Tantallon. The major anticipated benefit for the HRPS would be savings in overtime as police witnesses were called off by successful ERs but there could well be non-monetary benefits as well such as HRPS being able to direct officers on regular duty to other police activities than waiting around at the courthouse. Another implication could be the speed with which the police files are provided to the PPS and the quality of those files since the ER initiative has the objective of drafting the ER prior to first appearance, and also the drafting is done by a highly competent, senior PPS crown who has a reputation for demanding high quality police reports. Other significant players could well be Victim Services and Corrections' staff persons. In the former instance, protocols are established for contacting victims through Victim Services and in most ER initiatives in Canada much argument for an ER program points to the benefit it provides for early resolution of victim concerns (e.g., closure). With respect to Corrections, aside from the direct impact on the probation caseload (i.e., would probation be more frequently recommended?), it might be anticipated that some of the orders or undertakings recommended by the ER might draw on the expertise and suggestions of Probation officers, though it is not clear what the impact would be for pre-sentence reports from Corrections.

Impact on the Police Service

In numerous interviews over the past year with HRPS management and the Integrated Court Section (HRPS and RCMP), several major themes have emerged. First, all respondents indicated that an effective, successful ER project could indeed possibly generate huge monetary savings and the other benefits noted above. Secondly, to date, there has been minimal sign of any significant ER-related effect with respect to saving police overtime costs or in calling off police witnesses. Thirdly, while there have been a few short discussions between PPS and HRPS managements concerning the ER, there has been no particular protocol or plan put into effect and no specific undertaking by the PPS or the HRPS to assess any ER effect on policing. Fourthly, there has been significant telephone contact between the ER official and the police court team with respect to the informations that police have filed or requesting a quick preparation of a disclosure.

The interviewees all indicated that HRPS is positive about the idea of the ER though less enthused about the way it was introduced and the low level of collaboration to date. One senior officer expressed a common view in remarking that, "There is no follow-up to discussions and you never know when they are going to stress their independence rather than collaboration". Senior RCMP managers in HRM also indicated that there were enthused about the prospects of the ER, especially the potential cost savings to the police service and the benefit of its enabling officers to be used elsewhere rather than waiting around in court. Current police management

indicated that police officers do not attend arraignment for witness sakes but subsequent to that, yes, they attend, and that at least 75% of the time when overtime is paid, the officers are not called to the stand; there was consensus, too, that, as one stated, “It is a terrible waste of resources”. Recently retired police managers underscored that observation, decrying the waste and suggesting that the 75% figure would be an underestimate and the true percentage would be between 85% and 90% of the time where police witnessing is not needed. One senior HRPS officer estimated that if ER was successful it could make quite a dent in the departmental court budget of approximately one million dollars. HRPS officials reported that there are no data showing any diminution in police witnessing or in the overtime budget since ER was launched (indeed it was reported that the HRPS budget was roughly \$800,000 over budget for officer court time in 2006) and generally considered that the ER initiative “does not appear to be working”. It was acknowledged that they not collecting any specific data respecting an ER impact for policing but they also reported that they would be willing to tag such cases if there was a plan but thus far PPS has not involved the police service in any planning associated with the ER initiative.

The leaders of the Integrated Court Section, two sergeants, one from HRPS and the other RCMP, are charged, among other duties, with the responsibility of determining whether a case requires police witnesses (and how many). They reported that, if not necessary, officers do not get assigned, and, in that way, the sergeants winnow down the potential costs. Sometimes, though, the crowns may overrule them. In any event, they confirmed that roughly 75% of the time officers get overtime pay but do not get called for one reason or another, sometimes because they are not called off in sufficient time according to the protocol the police services have for paying overtime for court**. They suggested that if the PPS even got only 25% of the cases in the ER project [i.e., successful ER] that would save significant money. They also reported no noticeable decline in overtime-related costs in last two years but added that there have been over a hundred police officers added to the police service and that means a lot more charges so any savings on ER would have been hard to discern.

Apart from the issue of monetary savings, the sergeants in the Integrated Court Section police unit agreed with the top police managers that the significant number of new officers hired during the time that the ER has been in implementation has created some challenges since “a steep learning curve is required when it comes to laying charges and writing up the informations”. Their contact with the ER official has been with respect to those duties, the preparation of police court files – the informations. They reported having been contacted over matters such as the charges being laid, and specifics such as the amount of restitution that should be sought. The officers could readily appreciate the interventions of the ER official to ensure quality and allowed that now that the police services have added the officers on the front lines, they need to shore up the infrastructure staffings such as the court section officers. They also considered that having a crown attached to Integrated Court Section would be very valuable with respect to charge specification and disclosure issues.

**The two police services have different systems of compensation for their members with respect to overtime in the case of court appearances. RCMP members basically get double time for court appearances on their days off. In the case of HRPS the arrangement is more

complicated and a distinction is drawn between regular days off and days off during designated “vacation blocks”, the entitlement to which varies by seniority. For regular time off days the compensation varies between time and a half and double time (with a standard guarantee of four hours minimum) depending on where the day falls in the normal work-off work cycle. For court appearances during the “vacation blocks” the officers are guaranteed \$800 (three times the regular wage). The police services also have different policies regarding cancellation without compensation of members’ scheduled court appearances. The RCMP can cancel on much shorter notice than HRPS.

Impact for Victim Services and Corrections

Senior officials at Victim Services reported having a few meetings with PPS management to discuss the ER initiative and expressed some dissatisfaction with the perceived lack of collaboration. One official commented that there was no communication of any sort from the PPS on the initiative until at least a year after it was up and running. The Victim Services (VS) representatives readily acknowledged the merit of the ER objectives, especially speeding up court processing, and agreed that there could be some benefit for victims as typically they do not like to see the case dragged out (“it can be very traumatic”). They also pointed out that victims have rights in the criminal code and so VS was concerned that these might be bypassed; as one noted, “In the criminal code it is explicit that the victim has to be informed of the opportunity to give a victim’s impact statement. Such statements can only be submitted to court via Victim Services since one has to follow guidelines and use set forms. Victim Services staff in turn tries to be professional and not encourage the client to crank up the rhetoric in the victim impact’s statement. As it is, of say 7000 victims a year only 639 (9%) do actually submit a victim impact statement”. Reportedly, VS drafted a protocol for ER collaboration whereby PPS would send VS a letter when they send it to the accused person or his/her lawyer and, in turn, VS would get a letter out to the victim immediately and request the person to call them; it was added that neither VS nor the victim needed to see the recommended sentence that the PPS was offering. The draft protocol was not initially accepted by the PPS, according to the VS representative, because PPS was concerned about possibly delays and violations of the accuseds’ rights. Reportedly, now – Fall, 2008 - a draft protocol has been agreed to in principle though “there have been some glitches that still need to be worked out (mostly around timely referrals)”. The current situation has been described by VS as follows: “We have been consulted regarding the issue of Victim Impact Statements. We did have some concerns about victims not having enough time to submit, but we have not witnessed a lot of problems, perhaps due to the fact there are actually not a lot of cases where an early resolution is achieved. We want to ensure that the victim perspective is considered. The PPS has indicated that victims are being consulted and that their concerns are being taken into consideration. I am not aware of any major problems with the ER process”.

PPS officials, including the ER official, have indicated that where there could be a significant victim impact statement (e.g., serious domestic assault, a serious injury), they are

reluctant to do an ER, and that in most other cases there is not a victim impact statement but victim views may be recorded, rarely though in property type offenses. The crown can always, post-ER acceptance, request an adjournment for sentencing and incorporate a victim impact statement. There is a PPS directive requiring the crown in domestic violence cases to get the victim's views before an ER so the ER official will call others and run by them what he is going to recommend (and explore having conditions recommended such as no alcohol). Currently, as noted above, PPS officials report that they are working on a protocol with VS and the Victim Services unit (largely focused on domestic violence) at HRPS. From the PPS perspective, in this and other ways, the program is evolving.

Senior Corrections managers reported in interviews in both 2007 and 2008 that, aside from information provided in the interview, they had not heard of ER, did not know what it was about, and had no discussion of the initiative with PPS officials at any level. Also, there has been no discussion of the ER project within Corrections. It was reported that there has been no indication of any obvious impact of ER on the caseloads of probation officers, though no specific examination of probation data specifically exploring possible impact has ever been undertaken. It was acknowledged that any significant change in the number of persons incarcerated or given probation effected by the ER project could have implications for Corrections' strategies and manpower allocation but there has been no sign of any significant impact.

ANALYSES OF THE SPECIAL PPS SUB-SAMPLES

As noted above, a sample of disposed or closed cases was drawn from PPS prosecution files in order to assess (a) the penetration of the ER initiative, (b) related issues such as the variation in acceptance of the ER by type of offence, type of representation and type of ER recommendation, and by accuseds' characteristics, (c) the number of court appearances and the number of days from filing to disposition, and (d) the variation between ER recommendation and final sentencing or case disposition and the factors that account for the differences. The ER data set was created in collaboration between PPS staff and the evaluator. It was a representative sample of 669 completed cases handled by PPS Halifax over the period 2005-2006 (i.e., from October 2005 to January 2007). The sample size was quite adequate for the analyses undertaken which used the standard SPSS system. The data were adequately complete for all the variables identified as crucial for the assessment, namely the offences charged, accuseds' characteristics (age and gender), frequency of court appearances related to the case, number of days from first appearance to disposition, type of legal representation, the ER recommendation, the actual sentence or disposition, whether police and other witnesses were called off, whether there was a victim impact statement, and whether there was a pre-sentence report (see appendix for a complete listing of the raw variables).

There were several important issues concerning the PPS-generated data set. There were no data pertaining to the criminal record of the accused persons, a shortfall since the ER policy, as noted above, took criminal record very seriously in drafting sentencing recommendations while it is unclear whether the same significance was accorded it by the judges. Extensive research on sentencing carried out for the Marshall Inquiry found that previous criminal record (including whether or not a person was on parole or probation at the time of the new offence) was much more significant than most other variables such as gender or race/ethnicity in predicting sentencing outcomes (Clairmont, *Marshall Inquiry, Volume 4*, 1990). The 669 cases in the sample may also contain a few repeaters though the cases themselves involved separate incidents. Another issue was that in the PPS data set, an accused was coded as accepting the ER if he/she pleaded guilty within the set ER time frame; that coding decision would modestly inflate the number of ER acceptances. The special data prepared under the auspices of the PPS also included a representative sample of 601 Dartmouth court cases for the same time period as the Halifax PPS cases. Here there was of course no measure of ER but data were gathered for the other variables and an integrated data set created for comparison purposes.

From the original data set, new variables were created by the evaluator for analytical purposes; the main created variables were whether the offence charged was a minor or major offence, a typology of offences, whether or not the ER recommendation entailed a jail term, and a taxonomy for comparing the ER sentencing recommendation with the final case disposition. Where an accused faced several charges a new variable was created identifying the main charge; here, major criminal code charges of course took priority as did person violence over other types of offences. In coding the number of charges, the combination of 334b and 355b (theft under and possession under) was defined as a single charge as was the combination 253a and 253b/254 (cc motor vehicle charges). The typology of offences used was based on a five-fold coding scheme,

namely person violence, property offences, administration of justice offences, cc motor vehicle offences, and other criminal code (e.g., prostitution). Coding the ER recommendation as calling for a jail term or not was quite straight-forward; conditional sentences / house arrests and “one day in jail where appearance was considered time served” were both classified as “not jail”.

The most complex coding involved the comparison of ER recommended sentences and actual disposition. The categorization took the ER as the basis and compared the actual disposition in terms of whether it was much more severe, more severe, the same, equivalent, less severe, much less severe, or an acquittal/dismissal. The coding was done independently by two persons and discrepancies in their assessments were discussed and resolved; in several instances outside informed opinion was sought. There were a small number of cases where the court disposition read “dismissed, peace bond in effect” and such cases were coded as “acquitted or dismissed”. A fine or probation without specification of it being conditional was considered more severe outcome than an ER recommendation for a conditional discharge, and a final disposition of adult diversion was considered less severe than an ER recommendation of conditional discharge (which invariably involved at least nine months probation). In the analyses below, the ‘equivalent’ and ‘same’ categories were combined. In most of the analyses, the variables were dichotomized (e.g., sixty days or less vs more than sixty days) for statistical convenience.

Halifax and Dartmouth Comparisons

Tables A1 to A13 provide the basis for this comparison of Halifax and Dartmouth court cases. Table A-1 indicates that over 80% of the cases featured minor charges. There were significant differences by location in the frequencies of the five types of offences; not surprisingly, given the Halifax economy, property offences (especially “theft and possession under”, usually shoplifting) were much more common in Halifax (i.e., 38% to 19%, double the level in Dartmouth), whereas all other types of offences were modestly more proportionately common in Dartmouth. A predictable correlate was that minor offences were also more common in the Halifax cases too (86% to 80%). Overall, 34% of the Dartmouth sample’s cases were essentially cases of person violence compared to 30% of the Halifax cases, a difference accountable by the greater proportion of domestic violence cases in Dartmouth (i.e., 22% to 17% in the Halifax sub-sample). Given the proportions of minor and property offences, one might presume that the Halifax cases on average would be more likely to be resolved early and with fewer appearances by the accused persons.

Table A-2 describes the two sub-samples by age, gender and type of representation. There were only slight differences by age and gender, with the Halifax accused persons being slightly younger adults (37% to 34% under 30 years of age) and more often females (23% to 18%), findings consistent with the greater level of property crime in the Halifax sample. Males of course were by far most likely to be the accused gender in both sub-samples (77% and 82%). The proportion of Halifax cases where the accused was represented by Legal Aid was greater than in Dartmouth (63% to 49%). Dartmouth cases more often featured accused persons

represented by private counsel (25% to 16% in Halifax) or self-represented (22% to 13%). The data on type of representation are somewhat questionable in the case of representation by private counsel since duty counsels were not identified as such and in Dartmouth the duty counsel activity is contracted out by Nova Scotia Legal Aid. Nevertheless, the greater association with Legal Aid would presumably be linked to more appearances by the accused and more days between police filing and case disposition in Halifax, thus countering the implication by offence type.

Tables A-3 through A-6 begin the consideration of whether there are significant differences between the two sub-samples in terms of court processing. A-3 and A-4 indicate that, for both sub-samples combined, where the offence involved was minor, self-represented persons were far more likely to make fewer court appearances (e.g., 56% had only one or two appearances compared to 36% of those represented by private counsel and only 22% of those represented by Legal Aid). In cases where the offence was categorized as major, the differences by type of legal representation were solely between Legal Aid and the only types of representation, 75% of Legal Aid's cases requiring at least four appearances compared to 62% with other representation. A-5 and A-6 indicate that for both minor and major offences, Legal Aid handled more cases in Halifax than in Dartmouth and that the private bar was proportionately more involved in major than in minor cases in both jurisdictions.

Tables A-7 indicates the variation by court (Halifax, Dartmouth) in terms of the number of appearances by accused persons and the number of days per case from first appearance to final disposition. There was no significant difference in terms of the number of appearances; in both sub-samples 48% of the accused persons made three or fewer appearances. The Dartmouth sample however had significantly more cases disposed within ten days (29% to 18%) and modestly more within sixty days (45% to 39%). Tables A-9 and A-9 replicate the above analysis controlling for whether the offence in question is minor or major. In the case of minor offences, it can be seen that the percentage of cases disposed with three or fewer appearances is still quite similar in Halifax and Dartmouth (50% to 53%) but the Dartmouth cases took fewer days – 33% to 20% were completed in ten days or less and 48% to 41% in under sixty days. In the case of major offences, the number of appearances was less in Halifax than in Dartmouth (i.e., 34% in Halifax were completed with three or fewer compared to 28% in Dartmouth) while Dartmouth had a slight edge in quicker case completion (15% to 12% for ten days or less and 36% to 29% for within sixty days). In sum, then, there was little difference by location in the number of appearances but more consistent difference in terms of the number of days required to complete the court processing – a pattern that may well be linked to the greater involvement of accused persons with Legal Aid on the Halifax side of the harbour.

Tables A-11 and A-12 examines the comparative significance of the factors that may have impacted on the number of appearances and the number of days in court processing. The regression statistic is a strategy to make such a determination since it essentially throws all the salient independent variables in the mix and has them engage in a sort of free fight to predict the dependent variable, here appearances and days respectively. It is a measure of the impact that a variable has on the dependent variable when other variables are statistically controlled for.

Looking first at the number of days for completion (A-11), four factors or variables impacted on this dependent variable. The most impact, as judged by the beta weight and significance level depicted in the table, was whether the offence entailed person violence or not (domestic violence is of course a sub-category); if it did, it required more than sixty days to disposition on average. The second most important independent variable was whether the offence was a cc motor vehicle offence and, if so, on average it required less than sixty days to disposition. Age and location (whether Halifax or Dartmouth) both had a modest impact. Younger adults were more likely than older adults to have cases completed within sixty days, and accused persons in Halifax were less likely than those in Dartmouth to see their cases completed within sixty days. When other variables were controlled for, Legal Aid representation had no significant impact on the number of days it took for cases to go from first appearance to final disposition, nor did whether the charge in question was minor or major or whether the case involved a single or multiple charges. These results were surprising in two ways. First, Legal Aid guidelines that it gets involved basically when an accused could be facing jail time presumably means that Legal Aid deals with more complex cases and cases where the accused may want to stretch out the process, so it is surprising that it did not yield a primary effect; apparently, its effect is wrapped into person violence and Halifax court location. Also, the modest effect of Halifax location runs counter to expectations about ER.

Table A-12 provides the regression results for total appearances. Here the explained variance was greater (.14 compared to .09 for the regression dealing with number of days to final disposition) and more factors contributed to the impact even when so many variables were simultaneously controlled for. The three most important determinants of the number of appearances were the number of charges (the more charges, the more appearances), Legal Aid representation (the more this type of representation, the more appearances), and cc motor vehicle offences (if cc motor vehicle, then the fewer appearances compared to the norm offence). Other variables that impacted on the number of appearances were whether the offence was person violence (if so, then more appearances than the norm offence) and whether the offence was a minor or major charge (if major, then there were more appearances). It may be noted that when these and other salient variables were controlled for statistically, there was no significant impact for the location variable – that is, whether the case was in Dartmouth or in Halifax and eligible for ER made no impact on the number of appearances per case.

Table A-10 examines other factors by court location. There were no significant differences between Halifax and Dartmouth court processing for police and other witnessed scheduled, witness called off, victim impact statements being presented or pre-sentence reports completed.

EARLY RESOLUTION DATA ANALYSIS (TABLES AND GRAPHS)

Table A-1

Offence Characteristics by Court Location, Halifax and Dartmouth

Offence Characteristics	Halifax		Dartmouth	
	#	%	#	%
Domestic Violence*	115	17	131	22
Offence Type**				
Person Violent	201	30%	204	34%
Property	250	38%	115	19%
Adm of Justice	88	13%	123	21%
Other CC	29	4%	39	6%
ccMVA	101	15%	120	20%
Minor and Major Offenses***				
Minor	573	86%	481	80%
Major	96	14%	120	20%

*significant at <.04

**significant at <.000

***significant at <.008

Table A-2

Comparison of Sample Characteristics, Halifax and Dartmouth Provincial Courts

Age of Accused				
	Halifax		Dartmouth	
	#	%	#	%
45 or older	188	28	168	28
30 to 44	233	35	230	38
Under 30	248	37	203	34
Gender of Accused *				
	Halifax		Dartmouth	
	#	%	#	%
Male	515	77	491	82
Female	154	23	110	18
Representation **				
	Halifax		Dartmouth	
	#	%	#	%
Legal Aid	421	63	295	49
Private Bar ***	108	16	150	25
Self-Rep	87	13	134	22
Unknown	53	8	22	4

* Significant at <.04

** Significant at <.000

*** It is not clear how private lawyers acting as duty counsel were defined in court records. Duty counsels were not separately identified.

Table A-3

Minor Offences: Total Court Appearances of Accused by Representation * Total Sample

Total Appearances	Legal Aid		Private		Self	
	#	%	#	%	#	%
One	49	8	27	14	63	33
Two	84	14	44	22	43	23
Three	105	18	33	17	33	17
Four to Six	206	34	70	35	45	24
Other	152	26	24	12	6	3

*Significant at < .000

Table A-4

Major Offences: Total Court Appearances by Accused by Representation ** Total Sample

Total Appearances	Legal Aid		Private		Self	
	#	%	#	%	#	%
One	4	3	5	8	1	3
Two	8	7	11	18	6	19
Three	18	15	7	12	5	16
Four to Six	51	42	22	37	11	36
Other	39	33	15	25	8	26

**Significant at < .05

Table A-5

Minor Offences, Representation by Court Location**				
	Halifax		Dartmouth	
	#	%	#	%
Legal Aid	362	63	234	49
Private Bar ***	87	15	111	23
Self-Rep	74	13	116	24
Unknown	50	9	20	4

**significant at <.000

Table A-6

Major Offences, Representation by Court Location				
	Halifax		Dartmouth	
	#	%	#	%
Legal Aid	59	62	61	51
Private Bar ***	21	22	39	32
Self-Rep	13	14	18	15
Unknown	3	3	2	2

Table A-7

Processing Cases by Court Location, Halifax and Dartmouth

Number of Court Appearances by Accused				
	Halifax		Dartmouth	
	#	%	#	%
Three or Less	318	48	287	48
Four to Six	231	34	190	32
Other	120	18	123	20
Total Days from ER/First Appearance to Final Disposition				
	Halifax		Dartmouth	
	#	%	#	%
1 to 10	116	18	173	29
11 to 60	130	21	95	16
61 to 120	141	22	99	17
121 to 180	111	18	69	12
181 to 270	82	13	112	19
271 to 365	46	7	41	7
Total:	626	100	589	100

Table A-8

Processing Minor Cases by Court Location, Halifax and Dartmouth

Minor Offences: Number of Court Appearances by Accused				
	Halifax		Dartmouth	
	#	%	#	%
Three or Less	285	50	253	53
Four to Six	192	34	142	30
Other	96	16	86	17
Minor Offences: Total Days from ER/First Appearance to Final Disposition				
	Halifax		Dartmouth	
	#	%	#	%
1 to 10	105	20	155	33
11 to 60	114	21	70	15
61 to 120	120	22	83	18
121 to 180	98	18	52	11
181 to 270	59	11	79	17
271 to 365	38	7	31	7
Total:	534	100	470	100

Table A-9

Processing Major Cases by Court Location, Halifax and Dartmouth

Major Offences: Number of Court Appearances by Accused				
	Halifax		Dartmouth	
	#	%	#	%
Three or Less	33	34	34	28
Four to Six	39	41	48	40
Other	24	25	38	32
Major Offences: Total Days from ER/First Appearance to Final Disposition				
	Halifax		Dartmouth	
	#	%	#	%
1 to 10	11	12	18	15
11 to 60	16	17	25	21
61 to 120	21	23	16	13
121 to 180	13	14	17	14
181 to 270	23	25	33	28
271 to 365	8	9	10	8
Total:	92	100	119	100

Table A-10

Processing Cases by Court Location, Halifax and Dartmouth Samples

	Halifax		Dartmouth	
	#	%	#	%
No Police Witnesses Scheduled	454	68	397	66
No Civilian Witnesses Scheduled	483	72	418	70
Witnesses Called Off	61	9	47	8
Presentence Report Completed	72	11	82	14
Victim Impact Statement Present	6	1	8	1

Table A-11

Total Days (Under and Over 60 days) First Appearance to Disposition, Full Sample

<i>Dependent variable=Total Days to Disposition (<60 vs >60)</i>	β	Sig.
Age (older vs young adults)	-.06	0.05
Gender	ns	
Minor-Major Offence	ns	
Number of Charges (one vs two or more)	ns	
Adm Justice Offence	ns	
Person Violence Offence (yes vs no)	-.18	0.00
cc MVA	-.14	0.00
Property Offence	ns	
Location (Halifax, Dartmouth)	-.07	0.01
Legal Aid Representation	ns	

N=1095; $r^2=.09 <.000$

Table A-12

Total Appearances (Three and Under) Full Sample

<i>Dependent variable=Total Appearances Under or Over Three</i>	β	Sig.
Age (Young adults)	ns	
Gender	ns	
Location (Halifax, Dartmouth)	ns	
Adm Justice Offence	ns	
cc MVA (no vs yes)	-.12	0.001
Minor vs Major Offence	.08	0.01
Number of Charges (one vs two or more)	.15	0.00
Person Violence Offence (yes vs no)	-.09	0.02
Property Offence (no vs yes)**	.09	0.02
Legal Aid Representation (yes vs no)	-.12	0.00

N=1134; $r^2=.13 <.000$

**Property offences as an offence category was not related to the number of appearances at the zero order level.

Assessing ER in Halifax Provincial Court

Tables B-1 to B-28 provide the patterns found when focusing solely on the Halifax cases where of course the ER might be accepted or rejected. Table B-1 points to some of the key correlates of the 243 ER acceptances (36% of the Halifax sample). In slightly less than one-fifth (18%) of all ER acceptances, the sixty day acceptance limit was extended. Police and civilian witnesses had not been scheduled in 96% of all ER acceptances (compared to roughly 70% for the sample as a whole) and only in 3% were any witnesses called off (compared to 9% for the whole sample). There were no victim impact statements, comparably to the 1% in the whole Halifax sample and only in 1% of the cases was there a pre-sentence report compared to 11% in the entire Halifax sample. In terms of the gender and age characteristics of those accepting the ER, the percentage female was close to the percentage female in the whole Halifax sample (21% to 23%) but the percent thirty years of age or less was greater (42% to 37%). Those accepting the ER were less likely than in the whole Halifax sample to be facing person violence charges (22% to 30%); similarly the percentage was less for persons facing domestic violence charges (12% to 17% in the entire sample). Those accepting the ER were more likely to be facing charges for minor offences (90% to 86% in the whole sample) and were less likely to have Legal Aid representation (52% to 63%). Acceptors of the ER had significantly fewer court appearances of three or less (67% to 48%) and their case entailed significantly fewer days from first appearance to final disposition (70% to 39% of the cases were closed within sixty days). Where the ER was accepted, the sentence received was usually similar to that recommended in the ER and in only 5% of the cases was the court sentence less severe. In sum, in the 36% of the Halifax cases where the ER was accepted (or a guilty plea rendered within the sixty day limit), those accused persons accepting the ER were somewhat more likely to be younger adults, males, facing minor charges and not having Legal Aid representation. They were less likely to be facing charges of person violence or its sub-category, domestic violence. Few cases of ER acceptance apparently involved Police, Victim Services or Corrections. Accused persons accepting the ER offer made significantly fewer court appearances and saw their cases completed earlier than those who did not accept the ER offer.

Over 15% of all the ER recommendations in the Halifax sample called for either adult diversion or conditional discharge (accompanied usually by a period of probation and the victim surcharge fine). All but five of the thirty-two adult diversion ER recommendations were accepted; in four of these five cases the accused person was listed as “missing” and in the other instance, whether actively or passively by not accepting the ER within sixty days, the accused rejected adult diversion and subsequently received a conditional discharge. Somewhat surprisingly, only thirteen of the sixty-eight ER conditional discharge recommendations were accepted. Of the thirteen, three persons, who also exceeded the ER time limit, received different sentences than ER recommended; in two instances the accused received adult diversion, while, in the other case, a modestly more severe sentence (i.e., more probation and community service hours). In the fifty-five cases where the ER conditional discharge offer was not accepted, five accused persons ultimately received essentially the same sentence from the court, five received

less severe sentences, eleven persons got more severe sentences (e.g., probation and/or fines without conditional discharge), and the remaining cases ended in acquittal or dismissal (e.g. DWOP); in twelve of these latter cases it was stated that a peace bond had been put in place.

Table B-2 and its accompanying graph depict the basic comparisons between the ER recommended sentence and the actual court sentence for the entire 669 Halifax cases. It can be seen that the largest frequency is “sentence the same” at 39% and that the “sentence equivalent” is 5%, so roughly 44% of the time the court disposition matched up very well with the ER recommendation. In approximately 12% of the cases the court sentence was more severe and in 22% of the time it was less severe; if one includes, as is done in subsequent analysis, acquittal and dismissal with the less severe, the less severe disposition occurred 39% of the time. There were a number of cases (5% of the 669) where the ER recommendation was listed as “unknown”.

Tables B-3 to B-5 present cross-tabulations between ER acceptance or not and three variables, namely type of representation, total days for case processing, and total number of appearances. Legal Aid representation was associated with 52% of the ER acceptances and 69% of the ER rejections while the comparative figures for private counsel were 20% and 14%, and for self-representation, 21% and 8%. Most cases (70%) where the accused persons were represented by Legal Aid were ER rejections while only 55% of those involving private counsel and only 40% of those where there was self-representation were ER rejections. The next two tables underline the significance of ER. Table B-4 shows that where the ER offer was accepted, 70% of the cases were court processed within sixty days (i.e. from first appearance to final disposition) whereas where the ER was rejected, only 21% of the cases were processed within that time span. Table B-5 presents a similar picture for court appearances; 50% of ER acceptances involved only one or two appearances while only 17% of the ER rejections did. These three findings are quite predictable of course. The next set of tables deal with less predictable impacts, namely what the correspondences are between ER recommended sentences and final case dispositions.

Tables B-6 through B-23 examine the similarities and differences between ER sentencing recommendations and the final court dispositions for minor and major charges, single and multiple charges and the various types of offences. The overall patterns are depicted in tables and graphs, B-6 and B-7. The reader will note the captions “Best Output Table”. It reflects the decision to merge the original codes “same sentence” and “equivalent sentence” into the one category, “same”. B-6 presents the results for all cases where the ER was accepted. There, the ER and court disposition were “the same” 90% of the time and the court disposition more severe 3.3% of the time and less severe (including acquittal and dismissal) in 5.3% of the cases. Table B-7 depicts the overall patterns when the ER has been rejected. There, the ER sentence and the court disposition were “the same” in 18% of the cases, the court disposition more severe in 18% of the cases, and the court disposition less severe in 64% of the cases. The single largest court result in cases where the ER offer was rejected was acquittal/dismissal which occurred 30% of the time. In sum, where the ER was accepted, its offer constituted the court disposition and the modest variance was rather evenly split between more severe and less severe court dispositions.

Where the ER was not accepted (here considered as rejected), the result more often was a less severe court disposition but in 36% of the cases, the court disposition was either the same or more severe compared with the ER offer.

Tables B-8 to B-11 provide the correspondence between ER offer and court disposition for cases involving minor and major offences. B-8 shows that in 92% of the cases where the ER was accepted there was perfect correspondence, and the remaining variance roughly equally split between more severe court sentences (3.3%) and less severe dispositions (5.1%). Roughly the same high correspondence was found in ER acceptance cases involving major offences. Table B-10 shows a perfect correspondence in 88% of the cases and the remaining three cases split between more and less severe court dispositions. Where the ER offer was rejected, in cases involving minor offences, 19% of the court dispositions were the same as the ER recommendation, 20% resulted in more severe court sentences, and 61% of the cases resulted in a less severe court disposition; the large single type of court disposition was acquittal/dismissal (28% of all the cases). Where the offence was a major one and the ER was rejected, the court dispositions were the same as the ER offer in 15% of cases, more severe in 9% and less severe in 76% of the cases. Again, the single largest disposition was acquittal/dismissal (40% of all cases). Clearly, where the ER offer was accepted, the correspondence with final court sentence was, as anticipated, very great and the modest variance fairly evenly spread between more and less severe dispositions. In the case of ER rejections, the most common court disposition was a less severe one and the single largest category of disposition was acquittal/dismissal; this pattern was especially evident in cases involving major offences. The results were virtually identical when the variable under examination was one charge versus multiple charges (i.e., B-12 to B-115); simply put, substituting the one charge for minor charge yield highly similar results as does substituting multiple charges for major charge. Perhaps the only added point that should be made is that in the case of ER rejections where there were multiple charges, the acquittal/dismissal disposition was not so dominant.

The next set of tables, B-16 to B-23 examine the correspondence between ER sentencing recommendation and court sentence/disposition for each of four types of offences; the fifth, “other criminal code”, had too few cases in the sample for meaningful analysis. These tables – and their accompanying graphs – indicate that where the ER offer was accepted, the court sentence was the same or equivalent in at least 92% of cases for all types of offences save person violent offences; in the latter, the agreement between ER offer and court disposition was only 83% with 7% of the accused receiving a more severe sentence and 9% a less severe one.

In the more numerous instances where the ER offer was not accepted, there was more variation by offence type. Person violence cases again stood out as only in 9% of these cases was the court disposition the same as or equivalent to the ER offer while in a whopping 77% of the cases, the court disposition was less severe (12% less severe, 18% much less severe and 47% dismissed or acquitted). In the case of property offences, the court sentence matched with the ER offer in 23% of the cases while it was more severe in 27% and less severe in 50% (13% less severe, 23% much less severe and 14% dismissed or acquitted). Administration of justice offences and cc MV offences were fairly similar. In the former, in 22% of the cases the court

sentence matched up with the ER offer while in 14% it was more severe and in 64% less severe (17% less severe, 15% much less severe and 32% dismissed or acquitted). With respect to the cc MV type, in 30% of the cases the court disposition and the ER offer were the same while in 12% the court rendered a more severe sentence and in 58% a less severe one (28% less severe, 14% much less severe and 16% dismissed or acquitted). Overall, then, for all offences the majority outcome when the ER offer was not accepted was a less severe court disposition of the case and that was especially true for person violent cases and least true for property offences.

Regression analyses were employed to sort out which variables impacted the most on whether or not the ER was accepted and whether or not the court sentence/case disposition involved a less severe outcome for the accused than the ER offer entailed. The variables most predictive of whether or not an accused accepted the ER offer were – see Table B-24 – legal aid representation, person violent offences and age; if the accused persons were represented by legal aid, charged with a person offence or above 30 years of age, they were more likely than their counterparts to reject the ER offer. The variables most predictive of receiving a less severe court sentence than the ER offer – see B-25 - were age (older accused persons compared to those 30 years of age or less), major vs minor offence, and either person offence or the combination of other property and cc MV offences (when the latter were entered into the regression equation they squeezed out person offences since both were negatively associated with person offences).

A second set of regressions were completed on the expectation that an ER offer that entailed a jail term might be an important if not the most important determinant of whether the ER offer was accepted. Table B-26 indicates that indeed an ER offer that required a jail term made a big difference, 84% of the time the ER was rejected compared to a rejection level of 53% where the ER offer did not require a jail term. Likewise the variable impacted, though less so, on whether the final case disposition was less severe than the ER offer, 70% of the time it was compared to 58% of the cases where the ER offer did not require a jail term. Table B-27 indicates that when the variable “ER offer involving a jail term” was included in the regression it was the dominant variable impacting on ER acceptance or rejection, followed by person violent offence and representation by legal aid; these three variables predicted rejection of the ER offer and indeed no other variables were statistically significant. Table B-28 examines the variables impacting on whether the court sentence was less severe than the ER offer when the ER was rejected. Again the same three variables – an ER offer entailing jail, a person violent offence and legal aid representation – were pivotal and no other variables were statistically significant. Interestingly, while the first two (jail offer and person offence) predicted less severe sentences, legal aid representation here was associated with the same or a more severe sentence than offered by the ER.

Other analyses, not shown in the tables, indicated that for the Halifax sample as a whole, four variables were statistically significant in their impact on the number of court appearances by the accused, namely whether the ER was accepted, whether there were multiple charges in the case, whether the ER offer involved jail, and whether there was legal aid representation; acceptance of the ER led to fewer appearances while the other variables all led to more court appearances. A similar regression analysis of days from first appearance to case disposition for

the whole Halifax sample found that a high level of explained variance was attained with only two independent variables being statistically significant, namely whether or not the accused accepted the ER offer (powerfully predictive of fewer days with a beta of .55) and person violence (a beta of .12); if the ER was accepted, the court processing involved a low number of days, and if the case was a person violent offence it required a high number of days.

The Impact of Previous CC Convictions

Subsequent to completion of the penultimate draft of this ER assessment, it was decided to go back to the original data and incorporate data on previous criminal code convictions. Only criminal code offences were considered and the codes ranged from 0 to 7+ previous convictions. As well, for each accused, previous convictions within the past five years were noted and whether or not any of these entailed a major cc offence. Beyond an interest in assessing the impact of previous convictions on a host of variables such as acceptance or rejection of the ER, it was anticipated that the PPS approach would give more salience to previous conviction than court sentencing, record thereby being a significant factor in explaining the differences between ER recommended sentences and final sentences rendered by the court.

The bar graph (Table B-29) depicts the distribution of previous convictions in this special representative sub-sample. Fully 43% of accused persons in that sample had seven or more previous criminal code convictions and only 27% had none in their lifetime to date. Looking at just the previous five years (no table or graph is included), the distribution was similar and the majority of those convicted in that time frame had a major offence on their record.

Table B-30 indicates the general patterns of association found in relating a binary measure of previous convictions (“few” refers to “4 or less” previous convictions while “many” refer to “5 or more”). In the table, no data are presented on the implications of a major offence within the past five years since those associations were a very close echo of the general record for previous convictions. It can be seen that record did have an impact in that accused persons with many previous convictions were very much more likely than those accused with few previous convictions to have received an ER calling for a jail term (56% to 10%). Not surprisingly, in light of the findings presented above, the frequent “repeaters” were less likely to have accepted the ER offer (27% to 46%), more likely to have Legal Aid counsel (82% to 54%), more likely to have an ER case involving two or more charges (46% to 25%) and more likely to have cases that involved more than three court appearances (64% to 41%). The fact too that final sentencing was less severe than the ER recommendation more often where the accused persons had many previous convictions (46% to 36%) provides modest empirical support for the expectation noted above that previous record may have greater salience for the PPS approach than for final sentencing by judges.

Table B-30 yields other interesting patterns. Surprisingly, to this writer at least, there was no significant difference between accused persons with few and many previous convictions with respect to the number of days a case took for court processing; roughly 60% of the cases in each category of accused persons took more than 60 days. Also there was no difference by gender in

that females constituted 21% to 25% among each category of accused persons. There were interesting differences by type of offence dealt with in the ER and these can be seen in Table-30 and in the accompanying bar graphs (B-31 to B-33). Persons accused in the ER of person violence or the sub-type of domestic violence offences were more likely to have few previous convictions – indeed the plurality response was 0 previous offences – while those accused of property offences were much more likely to have many previous conviction – indeed the plurality response was 7 or more previous convictions. Clearly, such sharp differences point to different styles of offenders with implications for the ER objective of early case resolution. First-time accused persons facing a person violence charge may be unlikely to see themselves as “criminal” and their actions as warranting a record, so they resist accepting an ER, while regular repeaters facing a property charge may anticipate a jail term and adopt the common strategy of delay, delay.

Though not shown here, regression analyses were carried out with ER acceptance and less severe final sentencing as dependent variables and including the previous conviction variable along with the other independent variables noted in the regressions above. No measure of previous record – several were operationalized – was statistically significant and in all cases the key significant independent variables remained “a person violence offence”, “whether or not the ER called for a jail term”, and “whether the accused person was represented by Legal Aid”.

In sum, it was common for the accused persons in the ER sample to have significant previous criminal records; indeed almost half had at least seven previous cc convictions. At the high end (i.e., 5 or more previous cc convictions), record was associated, as expected, with rejection of the ER offer, facing multiple charges, four or more court appearances, an ER offer entailing jail time, and, modestly, a final sentence less severe than the ER recommendation. Surprisingly, level of previous convictions was not associated with the number of days entailed by the case processing nor was there a distinct gender impact. While level of previous convictions did impact in a variety of ways, in a “free fight” or regression analysis of ER acceptance or comparison of ER and Court sentencing, it was not significant and the key variables remained type of offence, Legal Aid representation, and whether the ER recommended a term of jail.

Concluding Overview

A central comparison for this assessment focused on the Halifax and Dartmouth provincial courts since the same PPS organization provides the prosecutorial service but the ER initiative is limited at present to the Halifax side of the harbour. The courts’ business differed in some important respects. There were proportionately many more minor property offences processed in Halifax so it could be presumed that the Halifax cases on average would be more likely to be resolved early and with fewer appearances by the accused persons. On the other hand, the greater association of the Halifax cases with Legal Aid could presumably be linked to more appearances by the accused and more days between first appearance and case disposition, thus countering the implication by offence type. Analyses of sub-samples for the same time

period drawn from Halifax and Dartmouth crown records revealed that there was little difference by location in the number of court appearances for accused persons but more difference in terms of the number of days required to complete the court processing; there were fewer days required in Dartmouth, a pattern that ran counter to expectations but that may well be linked to the greater involvement of accused persons with Legal Aid in the Halifax sub-sample. There were no significant differences between Halifax and Dartmouth court processing for police and other witnessed scheduled, witness called off, victim impact statements being presented or pre-sentence reports completed.

Regression analyses completed for the number of days required from first appearance to case disposition identified four factors or variables significantly impacting on this dependent variable. The most impact was whether the offence entailed person violence or not (domestic violence is of course a sub-category); if it did, on average it required more than sixty days to disposition on average. The second most important independent variable was whether the offence was a cc motor vehicle offence and, if so, on average it required less than sixty days to disposition. Age and location (whether Halifax or Dartmouth) both had a modest impact. Younger adults were more likely than older adults to have cases completed within sixty days, and accused persons in Halifax were less likely than those in Dartmouth to see their cases completed within sixty days. These results were surprising in two ways. First, Legal Aid guidelines that it gets involved basically when an accused could be facing jail time presumably means that Legal Aid deals with more complex cases and cases where the accused may want to stretch out the process, so it is surprising that it did not yield a primary effect; apparently, its effect is wrapped into person violence and Halifax court location. Also, the modest effect of Halifax location runs counter to expectations about ER.

The regression analyses for number of court appearances identified three important determinants of the number of appearances, namely the number of charges (the more charges, the more appearances), Legal Aid representation (the more this type of representation, the more appearances), and cc motor vehicle offences (if cc motor vehicle, then the fewer appearances compared to the norm offence). Other variables that impacted on the number of appearances were whether the offence was person violence (if so, then more appearances than the norm offence) and whether the offence was a minor or major charge (if major, then there were more appearances). It may be noted that when these and other salient variables were controlled for statistically, there was no significant impact for the location variable – that is, whether the case was in Dartmouth or in Halifax and eligible for ER made no impact on the number of appearances per case.

The central focus of the assessment however was the impact of the ER initiative on the Halifax court processing. In the 36% of the Halifax cases where the ER was accepted (or a guilty plea rendered within the sixty day limit), those accused persons accepting the ER were somewhat more likely to be younger adults, males, facing minor charges, and not having Legal Aid. They were less likely to be facing charges of person violence or its sub-category, domestic violence. Few cases of ER acceptance apparently involved Police, Victim Services or Corrections. Accused persons accepting the ER made significantly fewer court appearances and saw their

cases completed earlier than those who did not accept the ER offer. Over 15% of all the ER recommendations in the Halifax sample called for either adult diversion or conditional discharge (accompanied usually by a period of probation and the victim surcharge fine). All but five of the thirty-two adult diversion ER recommendations were accepted but only thirteen of the sixty-eight ER offers of conditional discharge were; thirty-nine of the remaining fifty-five cases where ER was rejected resulted in either less severe sentences or acquittal/dismissal.

Comparing the ER offer and the court sentence/disposition, it was found that in 44% of the cases the court sentence matched up very well (i.e., was the same or equivalent) with the ER recommendation. In approximately 12% of the cases the court sentence was more severe and in 22% it was less severe; if one includes acquittal and dismissal with the less severe, the less severe disposition occurred 39% of the time. Where the ER offer was accepted, 70% of the cases were court processed within sixty days (i.e. from first appearance to final disposition) whereas where the ER was rejected, only 21% of the cases were processed within that time span. 50% of the ER acceptances involved only one or two appearances while only 17% of the ER rejections did. Where the ER was accepted, its offer essentially constituted the court disposition and the modest variance was rather evenly split between more severe and less severe court dispositions. Where the ER offer was not accepted, the end result more often was a less severe court disposition but in 36% of the cases, the court disposition was either the same or more severe compared with the ER offer.

There were detailed analyses made of how the ER offer and the final court disposition varied by whether the case involved a minor or major offence, single or multiple charges and the various types or categories of offences. Clearly, in both minor and major offences, where the ER was accepted, the correspondence of the ER offer with final court sentence was, as anticipated, very great and the modest variance fairly evenly spread between more and less severe dispositions. In the case of ER rejections, the most common court disposition was a less severe one and the single largest category of disposition was acquittal/dismissal; this pattern was especially evident in cases involving major offences. The results were virtually identical when the variable under examination was one charge versus multiple charges. The tables for the various types of offences indicate that where the ER offer was accepted, the court sentence was the same or equivalent in at least 92% of cases for all types of offences save person violent offences; in the latter, the agreement between ER offer and court disposition was only 83% with 7% of the accused receiving a more severe sentence and 9% a less severe one.

In the more numerous instances where the ER offer was not accepted, there was more variation by offence type. Person violence cases stood out as only in 9% of these cases was the court disposition the same as or equivalent to the ER offer while in a whopping 77% of the cases, the court disposition was less severe. In the case of property offences, the court sentence matched with the ER offer in 23% of the cases while it was more severe in 27% and less severe in 50%. Administration of justice offences and cc MV offences were fairly similar. In the former, in 22% of the cases the court sentence matched up with the ER offer while in 14% it was more severe and in 64% less severe. With respect to the cc MV type, in 30% of the cases the court disposition and the ER offer were the same while in 12% the court rendered a more severe

sentence and in 58% a less severe one. Overall, then, for all offences the majority outcome when the ER offer was not accepted was a less severe court disposition of the case and that was especially true for person violent cases and least true for property offences.

Regressions were carried out to determine which variables impacted most on whether the ER offer was accepted and whether the sentence/disposition rendered in court was less severe than the ER offer. The variables most predictive of whether or not an accused accepted the ER offer were legal aid representation, person violent offences and age; if the accused persons were represented by legal aid, charged with a person offence or above 30 years of age, they were more likely than their counterparts to reject the ER offer. The variables most predictive of receiving a less severe court sentence than the ER offer were age (older accused persons compared to those 30 years of age or less), major vs minor offence, and either person offence or the combination of other property and cc MV offences.

Subsequently a second set of regressions were completed on the expectation that an ER offer that entailed a jail term might be an important if not the most important determinant of whether the ER offer was accepted. Cross-tabulations indicated that indeed an ER offer that required a jail term made a huge difference - 84% of the time the ER was rejected compared to a rejection level of 53% where the ER offer did not require a jail term. The variable also impacted, though less so, on whether the final case disposition was less severe than the ER offer, 70% of the time it was compared to 58% of the cases where the ER offer did not require a jail term. When the variable "ER offer involving a jail term" was included in the regression it was the dominant variable impacting on ER acceptance or rejection, followed by person violent offence and representation by legal aid; these three variables predicted rejection of the ER offer and indeed no other variables were statistically significant. In the regression examination of ER and court sentencing/ dispositions when the ER was rejected, again the same three variables – an ER offer entailing jail, a person violent offence and legal aid representation – were pivotal and no other variables were statistically significant. Interestingly, while the first two (jail offer and person offence) predicted less severe sentences, legal aid representation here was associated with the same or a more severe sentence than offered by the ER.

For the Halifax sample as a whole, four variables were statistically significant in their impact on the number of court appearances by the accused, namely whether the ER offer was accepted, whether there were multiple charges in the case, whether the ER offer involved jail, and whether there was legal aid representation; acceptance of the ER led to fewer appearances while the other variables all led to more court appearances. A similar regression analysis of days from first appearance to case disposition for the whole Halifax sample found that a high level of explained variance was attained with only two independent variables being statistically significant, namely whether or not the accused accepted the ER offer (powerfully predictive of fewer days with a beta of .55) and person violence (a beta of .12); if the ER was accepted, the court processing involved a low number of days, and if the case was a person violent offence it required a high number of days.

A major shortfall for this quantitative analysis of the impact of the ER was the absence of data pertaining to the criminal record of the accused persons, since the ER policy, as noted above, took criminal record very seriously in drafting sentencing recommendations while it is unclear whether the same significance was accorded it by the judges. Extensive research on sentencing carried out by the evaluator for the Marshall Inquiry (1989) found that previous criminal record (including whether or not a person was on parole or probation at the time of the new offence) was much more significant than most other variables such as gender or race/ethnicity in predicting sentencing outcomes

EARLY RESOLUTION DATA ANALYSIS (TABLES AND GRAPHS)

Table B-1

Characteristics of Cases Where ER Accepted, Halifax Court Sample
(N=243, 36% of Halifax Sample)

Characteristics	#	%
ER was extended	45	18
No Civilian Witnesses Scheduled	233	96
No Police Witnesses Scheduled	232	96
Witness Called Off	8	3
Accused < 30 years of age	102	42
Accused Female	51	21
Accused Faced 2 or More Charges	64	26
A Person Offence	54	22
Domestic Violence Involved	30	12
A Minor Offence	219	90
Legal Aid Representation	127	52
Pre-Sentence Report Included	3	1
Court Sentence Less Severe than ER	12	5
Victim Impact Statement Included	0	0
Three or Fewer Court Appearances for Accused	162	67
Six or Fewer Appearances for Accused	260	95
Less than 60 Days from ER to Final Disposition	166	70

Table B-2

Basic Output Tables For Court Sentences vs ER Recommendations

	Frequency	Percent	Valid Percent	Cumulative Percent
Sentence much more severe	31	4.6	4.6	4.6
Sentence slightly more severe	47	7.0	7.0	11.7
Sentence same	261	39.0	39.0	50.7
Sentence slightly less severe	67	10.0	10.0	60.7
Sentence much less severe	76	11.4	11.4	72.0
Acquitted/Dismissed	117	17.5	17.5	89.5
Sentence Equivalent	32	4.8	4.8	94.3
N/A	1	.1	.1	94.5
Missing/Unknown	37	5.5	5.5	100.0
Total	669	100.0	100.0	

Bar Graph: Basic Output Court Sentence vs ER

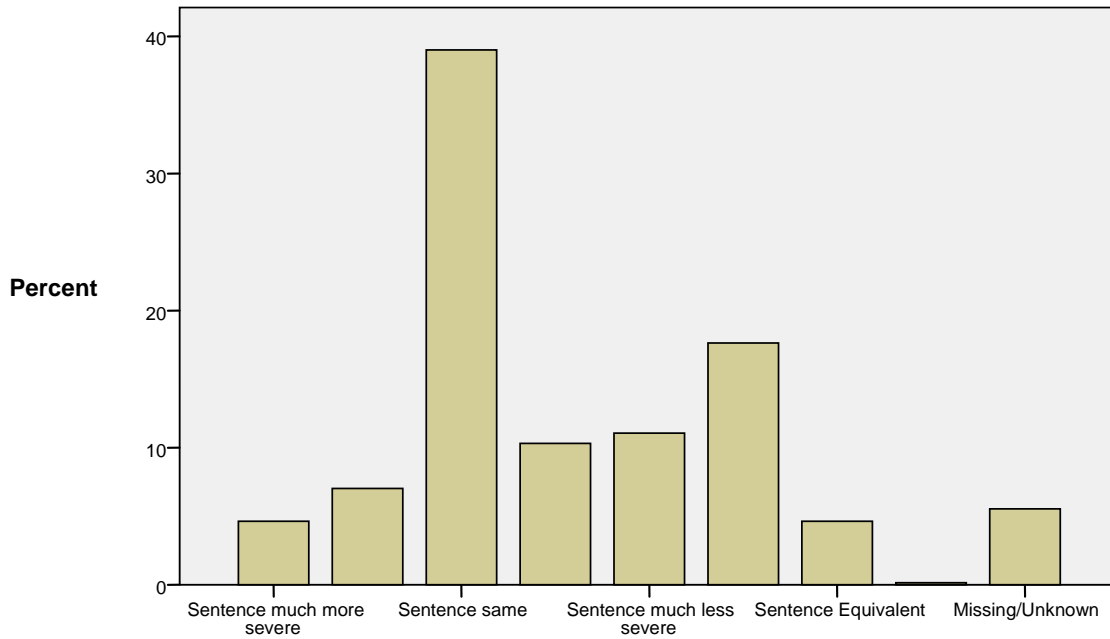


Table B-3

ER Acceptance and Type of Representation

			ER Accepted			Total
			Yes	No	Unknown/ Missing	
Type of Representation	Legal Aid	Count	127	293	1	421
		% within ER-accepted	52.3%	69.4%	25.0%	62.9%
	Private Bar	Count	48	60	0	108
		% within ER-accepted	19.8%	14.2%	.0%	16.1%
	Self	Count	51	35	1	87
		% within ERaccepted	21.0%	8.3%	25.0%	13.0%
	Unknown	Count	17	34	2	53
		% within ERaccepted	7.0%	8.1%	50.0%	7.9%
Total		Count	243	422	4	669
		% within ERaccepted	100.0%	100.0%	100.0%	100.0%

Table B-4

ER Acceptance and Total Days for Case Processing

			ER Accepted			Total
			Yes	No	Unknown/ Missing	
Total days since ER	10 or less	Count	87	29	0	116
		% within ERaccepted	36.9%	7.5%	.0%	18.5%
	11 thru 60	Count	78	52	0	130
		% within ERaccepted	33.1%	13.4%	.0%	20.8%
	61 thru 120	Count	45	95	1	141
		% within ERaccepted	19.1%	24.5%	33.3%	22.5%
	121 plus	Count	26	211	2	239
		% within ERaccepted	11%	62%	66.70%	38.1%
Total		Count	236	387	3	626
		% within ERaccepted	100.0%	100.0%	100.0%	100.0%

Table B-5

ER Acceptance and Total Court Appearances by Accused

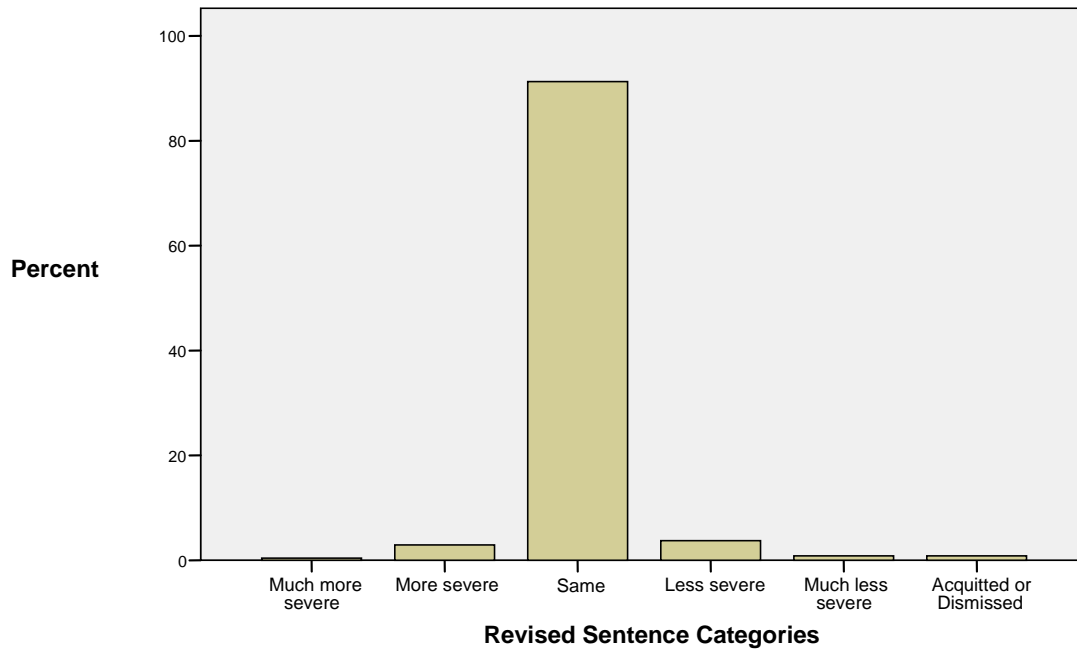
			ER Accepted			Total
			Yes	No	Unknown/ Missing	
Total # Appearance	1	Count	54	23	1	78
		% within ERaccepted	22.2%	5.5%	25.0%	11.7%
	2	Count	68	50	0	118
		% within ERaccepted	28.0%	11.8%	0%	17.6%
	3	Count	40	81	1	122
		% within ERaccepted	16.5%	19.2%	25.0%	18.2%
	4-6	Count	68	161	2	231
		% within ERaccepted	28%	39%	50.0%	34.6%
	7 plus	Count	13	107	0	120
		% within ERaccepted	6%	24%	0%	17.9%
	Total	Count	243	422	4	669
		% within ERaccepted	100.0 %	100.0 %	100.0%	100.0 %

Table B-6

Best Output Table Court Sentence vs ER (ER Accepted)

Revised Sentence Categories		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Much more severe	1	.4	.4	.4
	More severe	7	2.9	2.9	3.3
	Same	221	90.9	91.7	95.0
	Less severe	9	3.7	3.7	98.8
	Much less severe	2	.8	.8	99.6
	Acquitted or Dismissed	1	.4	.4	100.0
	Total	241	99.2	100.0	
Missing	System	2	.8		
Total		243	100.0		

Bar Graph: Best Output Court Sentence vs ER (ER Accepted)



B-7

Best Output Table Court Sentence vs ER (ER Rejected)

Revised Sentence Categories		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Much more severe	30	7.1	7.7	7.7
	More severe	40	9.5	10.3	17.9
	Same	72	17.1	18.5	36.4
	Less severe	60	14.2	15.4	51.8
	Much less severe	72	17.1	18.5	70.3
	Acquitted or Dismissed	116	27.5	29.7	100.0
	Total	390	92.4	100.0	
Missing	System	32	7.6		
Total		422	100.0		

Bar Graph: Best Output Court Sentence vs ER (ER Rejected)

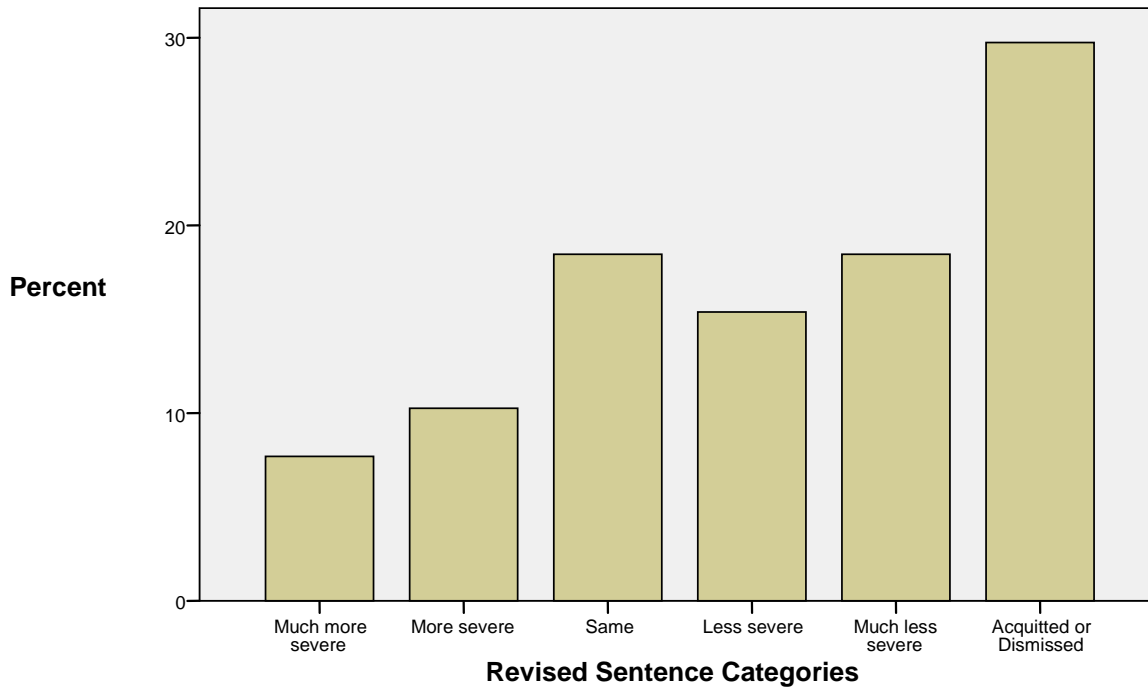


Table B-8

Best Output Table for Court Sentence vs ER (ER Accepted – Minor Cases)

Revised Sentence Categories		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Much more severe	1	.5	.5	.5
	More severe	6	2.7	2.8	3.2
	Same	200	91.3	92.2	95.4
	Less severe	9	4.1	4.1	99.5
	Much less severe	1	.5	.5	100.0
	Total	217	99.1	100.0	
Missing	System	2	.9		
Total		219	100.0		

Bar Graph: Best Output Court Sentence vs ER (ER Accepted – Minor Cases)

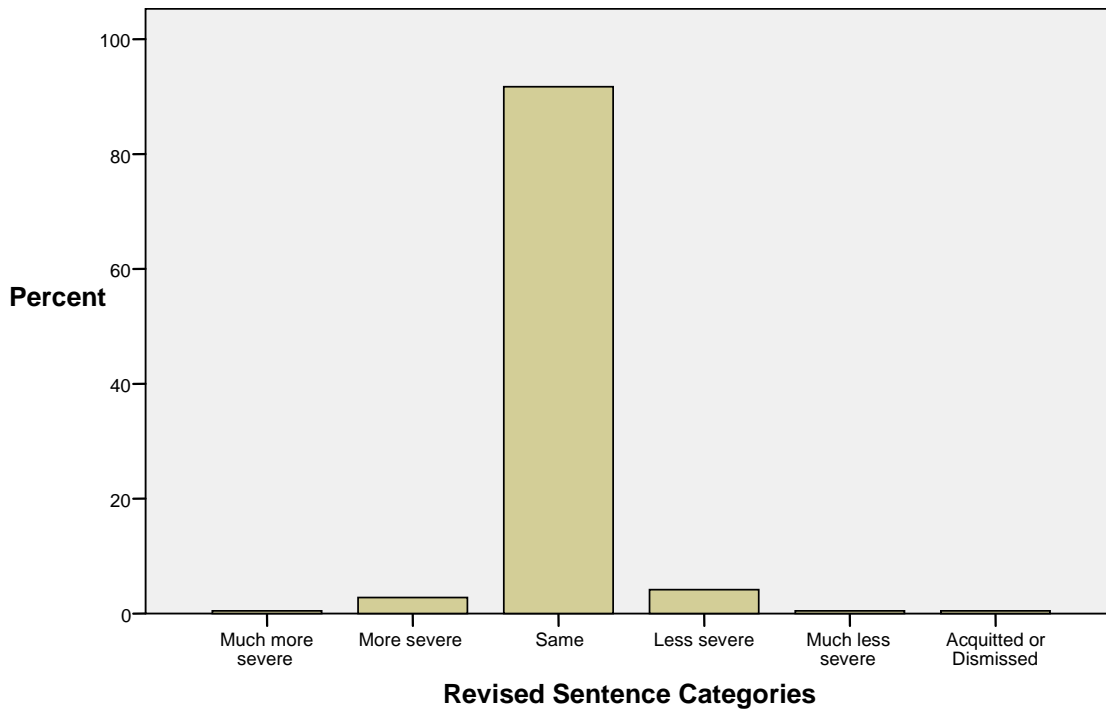


Table B-9

Best Output Table for Court Sentence vs ER (ER Rejected – Minor cases)

Revised Sentence Categories		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Much more severe	28	8.0	8.7	8.7
	More severe	36	10.3	11.1	19.8
	Same	62	17.7	19.2	39.0
	Less severe	54	15.4	16.7	55.7
	Much less severe	54	15.4	16.7	72.4
	Acquitted or Dismissed	89	25.4	27.6	100.0
	Total	323	92.3	100.0	
Missing	System	27	7.7		
Total		350	100.0		

Bar Graph: Best Output Court Sentence vs ER (ER Rejected – Minor Cases)

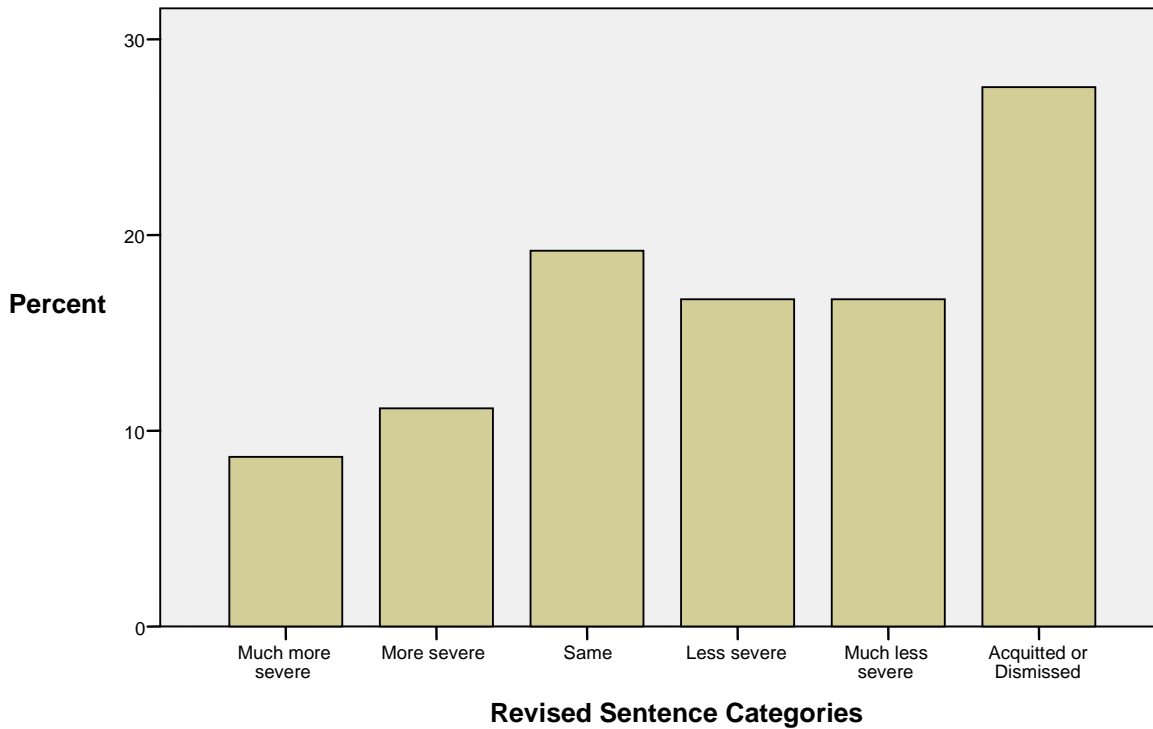


Table B-10

Best Output Table for Court Sentences vs ER (ER Accepted – Major Cases)

Revised Sentence Categories		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	More severe	1	4.2	4.2	4.2
	Same	21	87.5	87.5	91.7
	Much less severe	1	4.2	4.2	95.8
	Acquitted or Dismissed	1	4.2	4.2	100.0
Total		24	100.0	100.0	

Bar Graph: Best Output Court Sentence vs ER (ER Accepted – Major Cases)

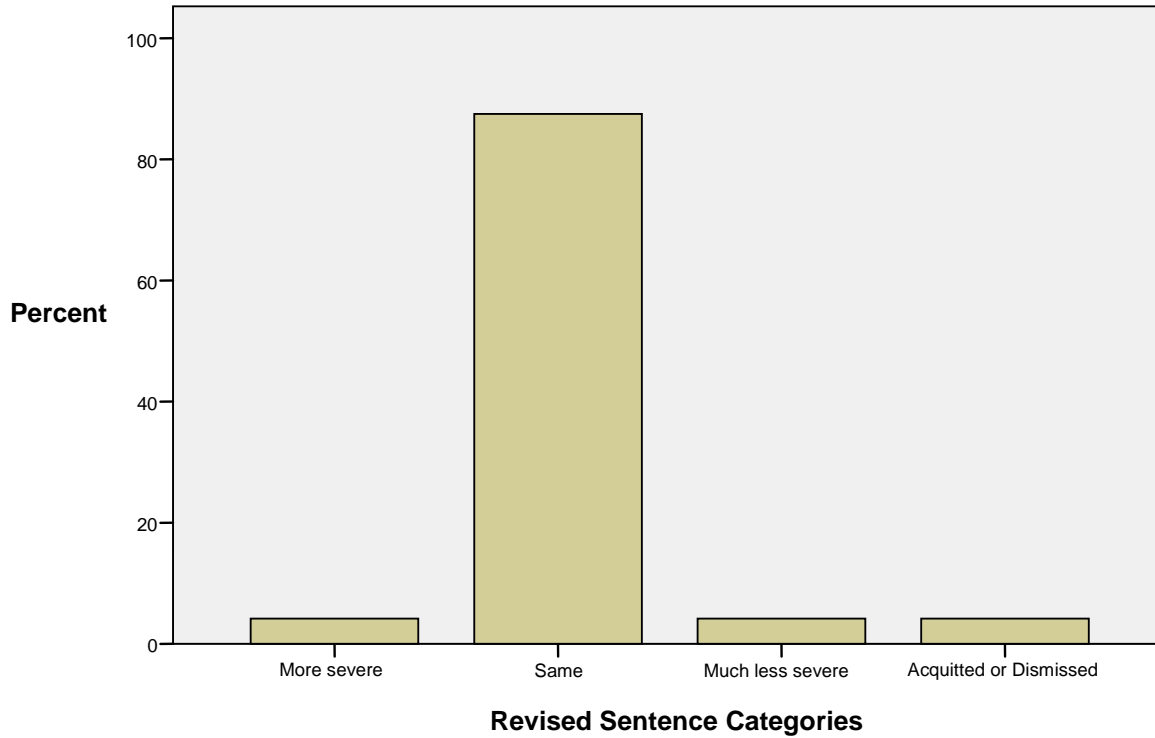


Table B-11

Best Output Table for Court Sentences vs ER (ER Rejected – Major Cases)

Revised Sentence Categories		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Much more severe	2	2.8	3.0	3.0
	More severe	4	5.6	6.0	9.0
	Same	10	13.9	14.9	23.9
	Less severe	6	8.3	9.0	32.8
	Much less severe	18	25.0	26.9	59.7
	Acquitted or Dismissed	27	37.5	40.3	100.0
	Total	67	93.1	100.0	
Missing	System	5	6.9		
Total		72	100.0		

Bar Graph: Best Output Court Sentence vs ER (ER Rejected – Major Cases)

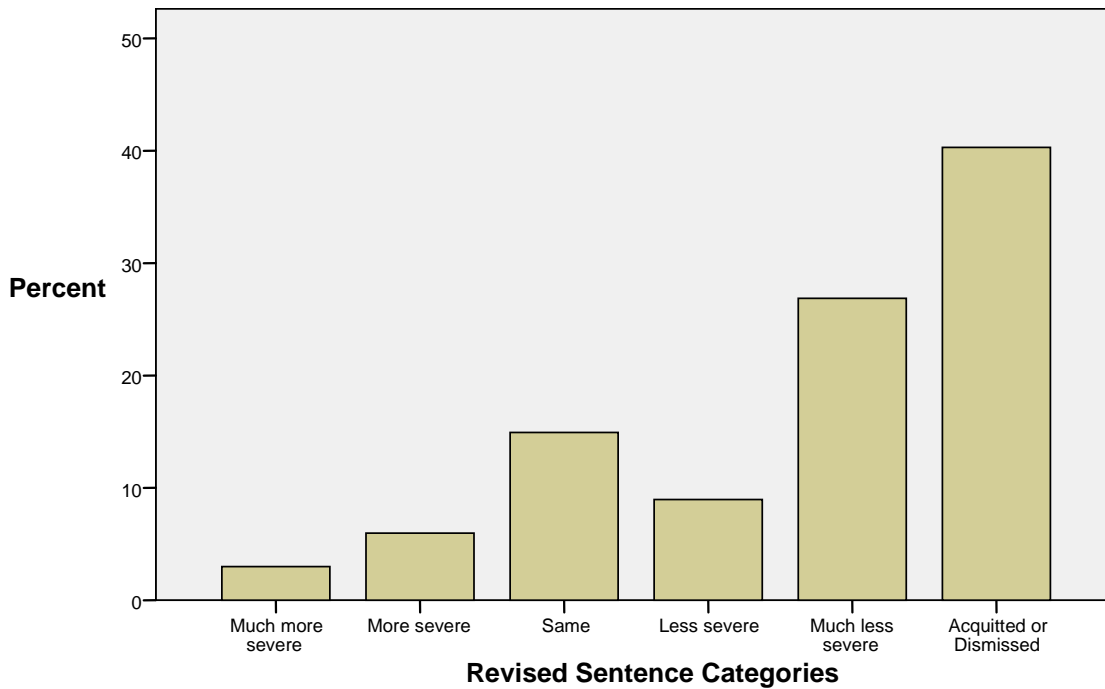


Table B-12

Best Output Table for Court Sentences vs ER (ER Accepted – One Charge)

Revised Sentence Categories		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	More severe	6	3.4	3.4	3.4
	Same	165	92.1	92.7	96.1
	Less severe	7	3.9	3.9	100.0
	Total	178	99.4	100.0	
Missing	System	1	.6		
Total		179	100.0		

Bar Graph: Best Output Court Sentence vs ER (ER Accepted – One Charge)

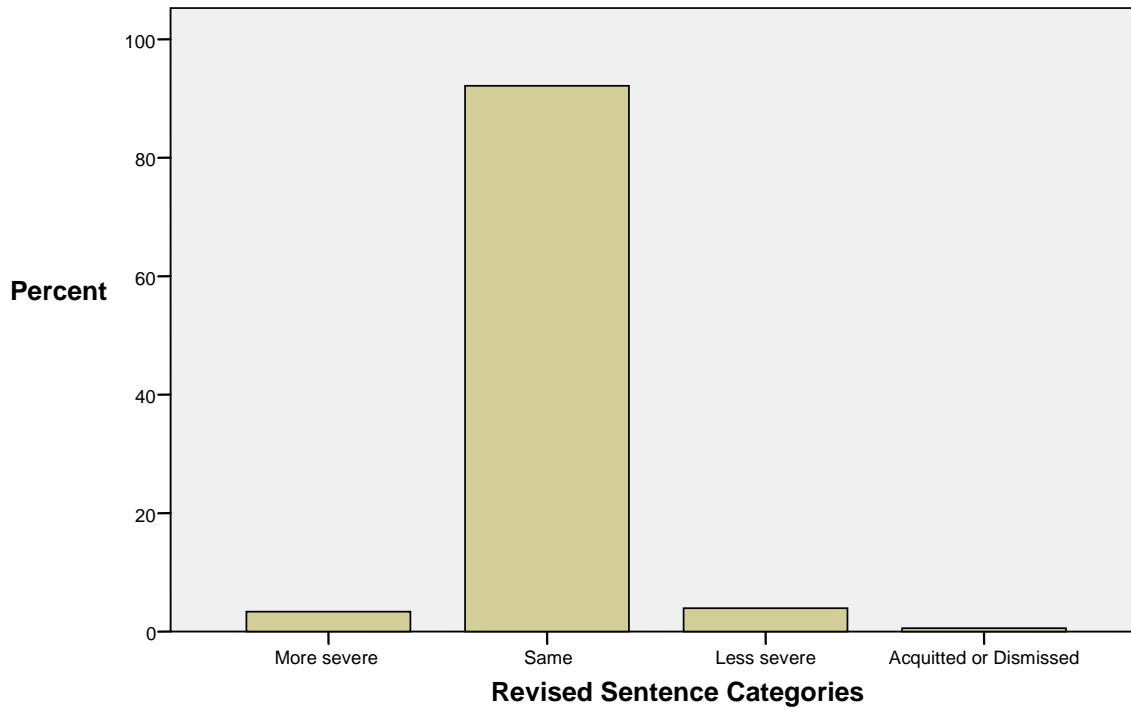


Table B-13

Best Output Table for Court Sentences vs ER (ER Rejected – One Charge)

Revised Sentence Categories		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Much more severe	14	5.5	6.1	6.1
	More severe	27	10.7	11.7	17.8
	Same	49	19.4	21.3	39.1
	Less severe	32	12.6	13.9	53.0
	Much less severe	32	12.6	13.9	67.0
	Acquitted or Dismissed	76	30.0	33.0	100.0
	Total	230	90.9	100.0	
Missing	System	23	9.1		
Total		253	100.0		

Bar Graph: Best Output Court Sentence vs ER (ER Rejected – One Charge)

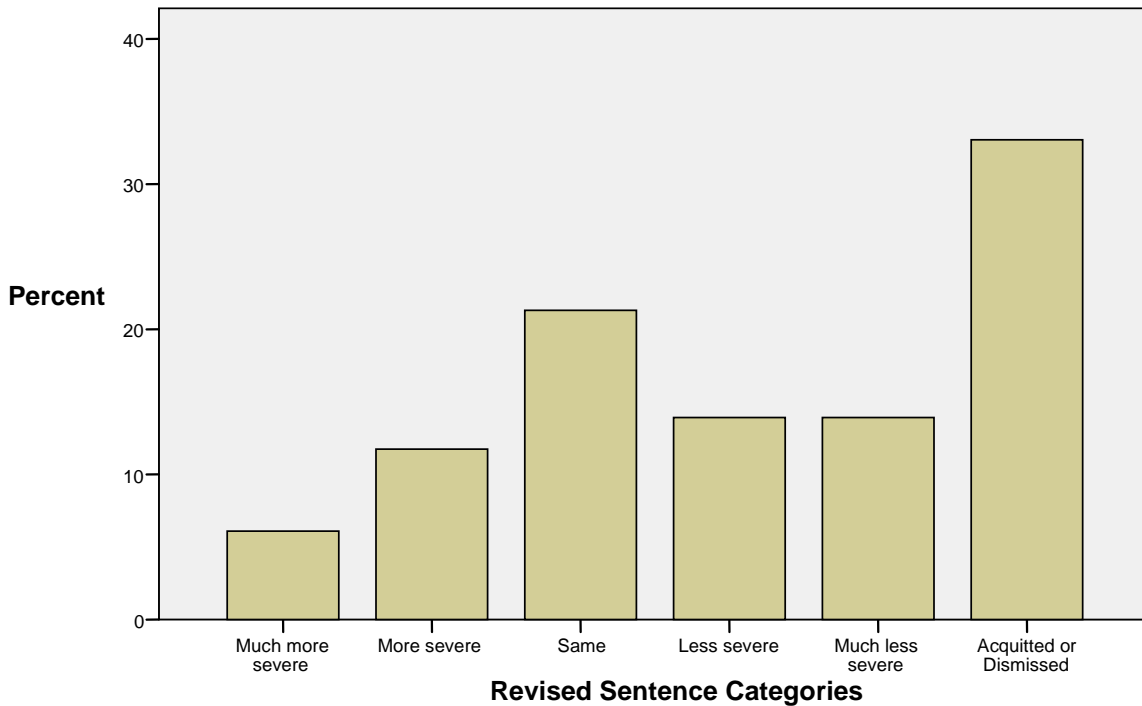


Table B-14

Best Output Table for Court Sentences vs ER
(ER Accepted – More than One Charge)

Revised Sentence Categories		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Much more severe	1	1.6	1.6	1.6
	More severe	1	1.6	1.6	3.2
	Same	56	87.5	88.9	92.1
	Less severe	2	3.1	3.2	95.2
	Much less severe	2	3.1	3.2	98.4
	Acquitted or Dismissed	1	1.6	1.6	100.0
	Total	63	98.4	100.0	
Missing	System	1	1.6		
Total		64	100.0		

Bar Graph: Best Output Court Sentence vs ER
(ER Accepted – More than One Charge)

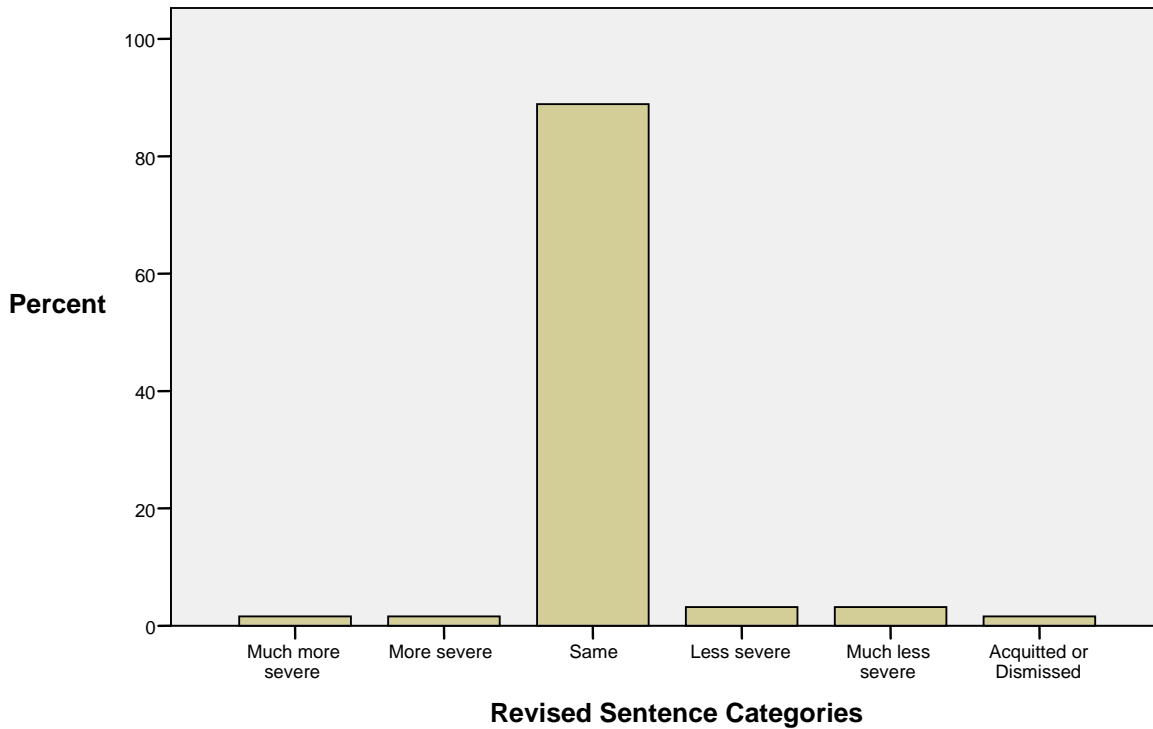


Table B-15

Best Output Table for Court Sentences vs ER
(ER Rejected – More than One Charge)

Revised Sentence Categories		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Much more severe	16	9.5	10.0	10.0
	More severe	13	7.7	8.1	18.1
	Same	23	13.6	14.4	32.5
	Less severe	28	16.6	17.5	50.0
	Much less severe	40	23.7	25.0	75.0
	Acquitted or Dismissed	40	23.7	25.0	100.0
	Total	160	94.7	100.0	
Missing	System	9	5.3		
Total		169	100.0		

Bar Graph: Best Output Court Sentence vs ER
(ER Rejected – More than One Charge)

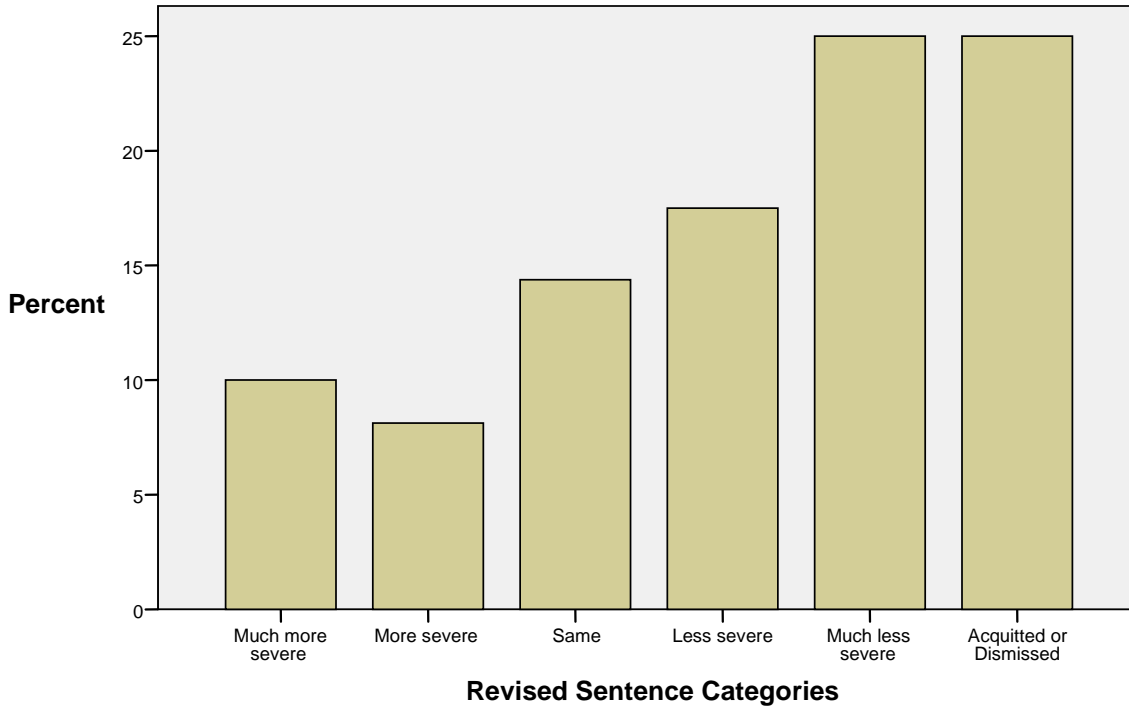


Table B-16

Best Output Table for Court Sentences vs ER
(ER Accepted – Offence Type - Person Violence)

Revised Sentence Categories		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	More severe	4	7.4	7.4	7.4
	Same	45	83.3	83.3	90.7
	Less severe	4	7.4	7.4	98.1
	Acquitted or Dismissed	1	1.9	1.9	100.0
Total		54	100.0	100.0	

Bar Graph: Best Output Court Sentence vs ER
(ER Accepted – Offence Type – Person Violence)

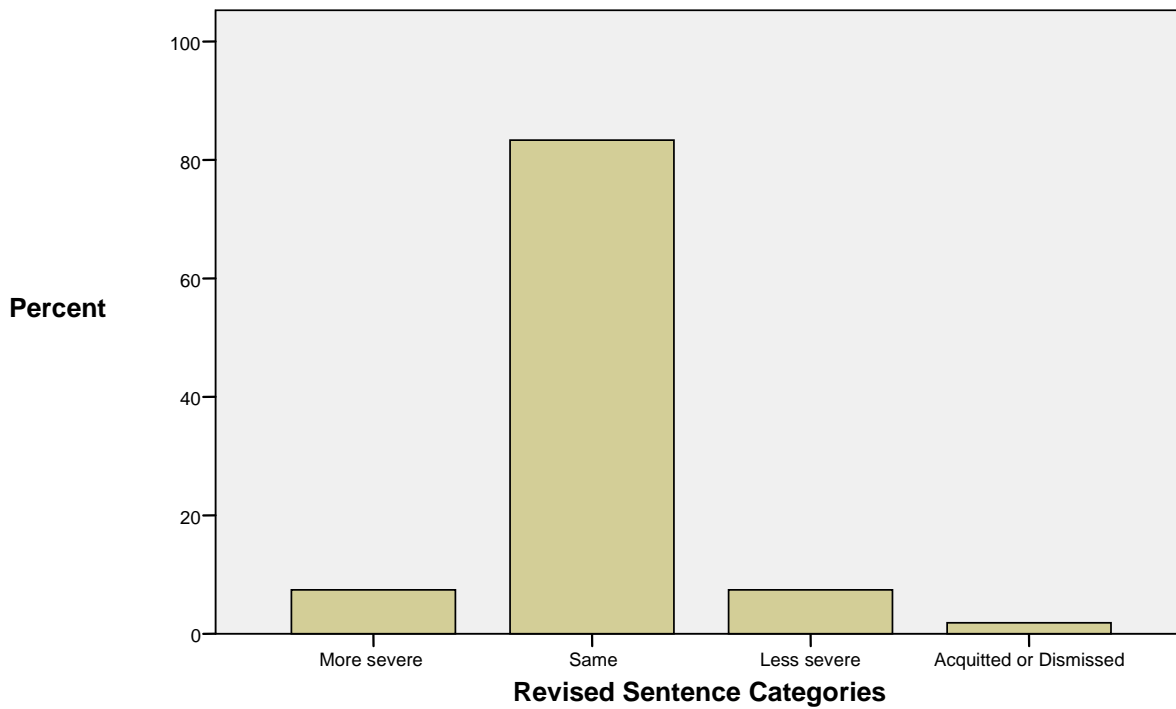


Table B-17

Best Output Table for Court sentences vs ER
(ER Rejected – Offence Type – Person Violence)

Revised Sentence Categories		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Much more severe	7	4.8	5.0	5.0
	More severe	12	8.2	8.6	13.6
	Same	13	8.9	9.3	22.9
	Less severe	17	11.6	12.1	35.0
	Much less severe	25	17.1	17.9	52.9
	Acquitted or Dismissed	66	45.2	47.1	100.0
	Total	140	95.9	100.0	
Missing	System	6	4.1		
Total		146	100.0		

Bar Graph: Best Output Court Sentence vs ER
(ER Rejected – Offence Type – Person Violence)

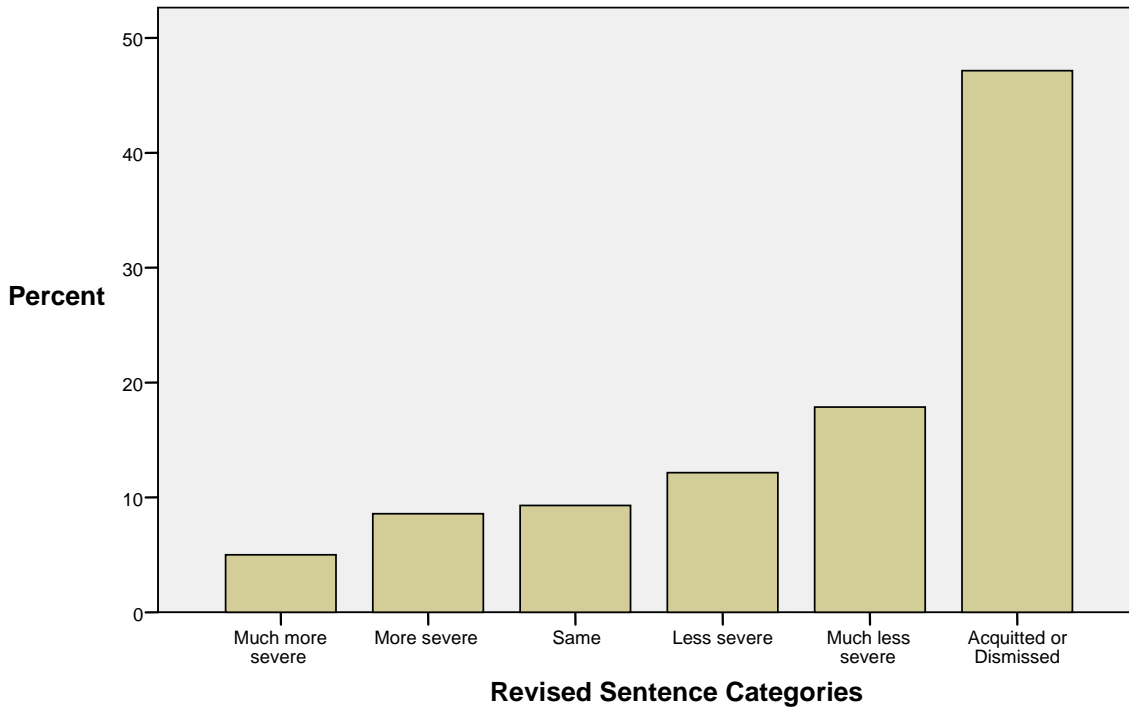


Table B-18

Best Output Table for Court Sentences vs ER
(ER Accepted – Offence Type – Property Offences)

Revised Sentence Categories		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	More severe	2	2.1	2.1	2.1
	Same	88	91.6	93.6	95.7
	Less severe	2	2.1	2.1	97.8
	Much less severe	2	2.1	2.1	100.0
	Total	94	97.9	100.0	
Missing	System	2	2.1		
Total		96	100.0		

Bar Graph: Best Output Court Sentence vs ER
(ER Accepted – Offence Type – Property Offences)

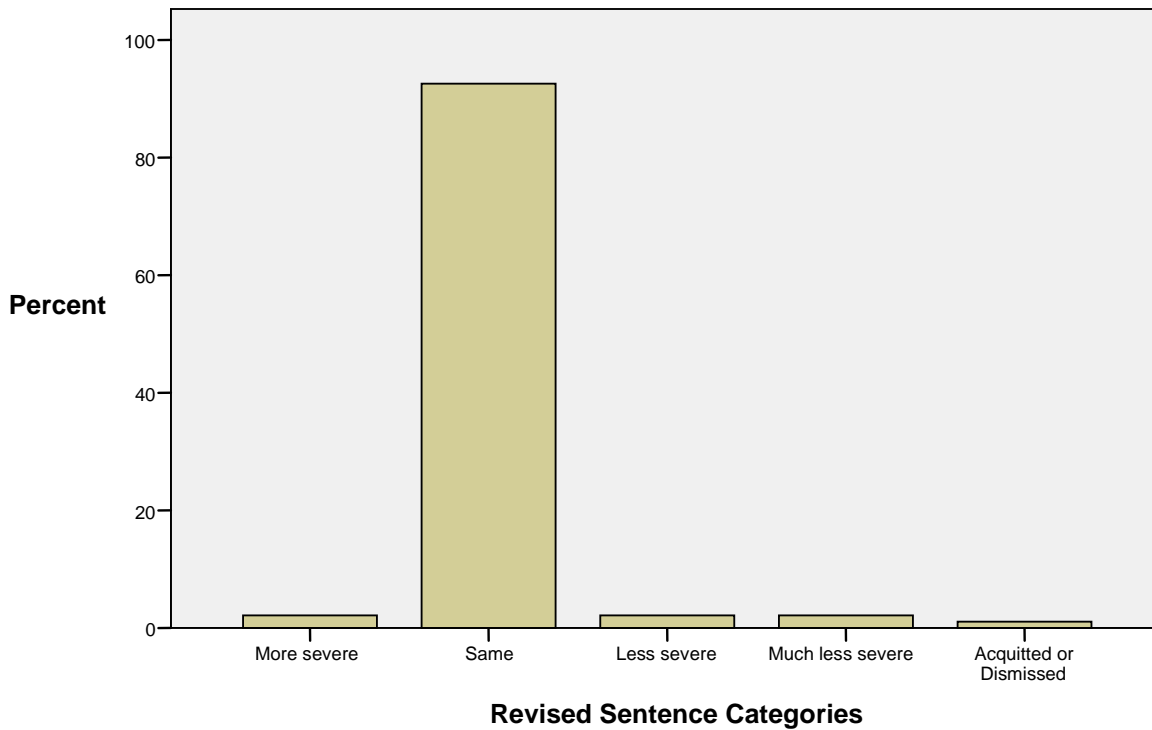


Table B-19

Best Output Table for Court Sentences vs ER
(ER Rejected – Offence Type – Property Offences)

Revised Sentence Categories		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Much more severe	18	11.8	13.0	13.0
	More severe	19	12.5	13.8	26.8
	Same	32	21.1	23.2	50.0
	Less severe	18	11.8	13.0	63.0
	Much less severe	31	20.4	22.5	85.5
	Acquitted or Dismissed	20	13.2	14.5	100.0
	Total	138	90.8	100.0	
Missing	System	14	9.2		
Total		152	100.0		

Bar Graph: Best Output Court Sentence vs ER
(ER Rejected – Offence Type – Property Offences)

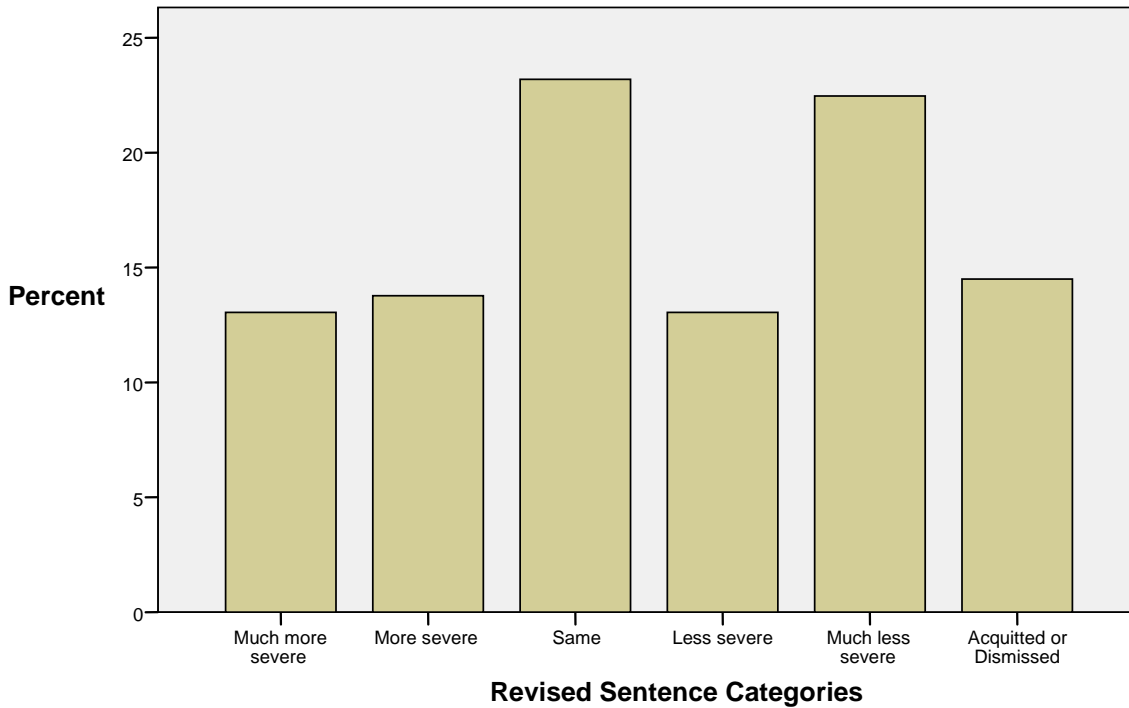


Table B-20

Best Output Table for Court Sentences vs ER
(ER Accepted – Offence Type – Administrative Offences)

Revised Sentence Categories		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Much more severe	1	4.0	4.0	4.0
	Same	23	92.0	92.0	96.0
	Less severe	1	4.0	4.0	100.0
Total		25	100.0	100.0	

Bar Graph: Best Output Court Sentence vs ER
(ER Accepted – Offence Type – Administrative Offences)

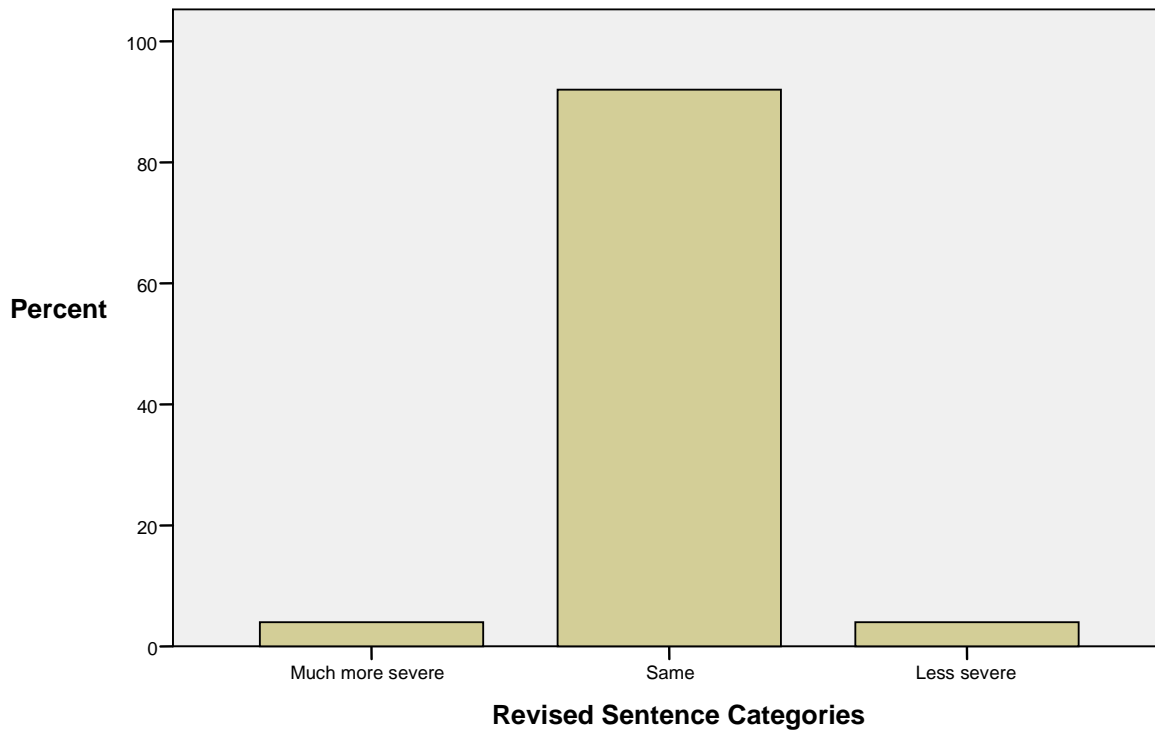


Table B-21

**Best Output Table for Court Sentence vs ER
(ER Rejected – Offence Type – Administrative Offences)**

Revised Sentence Categories		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Much more severe	4	6.3	6.8	6.8
	More severe	4	6.3	6.8	13.6
	Same	13	20.6	22.0	35.6
	Less severe	10	15.9	16.9	52.5
	Much less severe	9	14.3	15.3	67.8
	Acquitted or Dismissed	19	30.2	32.2	100.0
	Total	59	93.7	100.0	
Missing	System	4	6.3		
Total		63	100.0		

**Bar Graph: Best Output Court Sentence vs ER
(ER Rejected – Offence Type – Administrative Offences)**

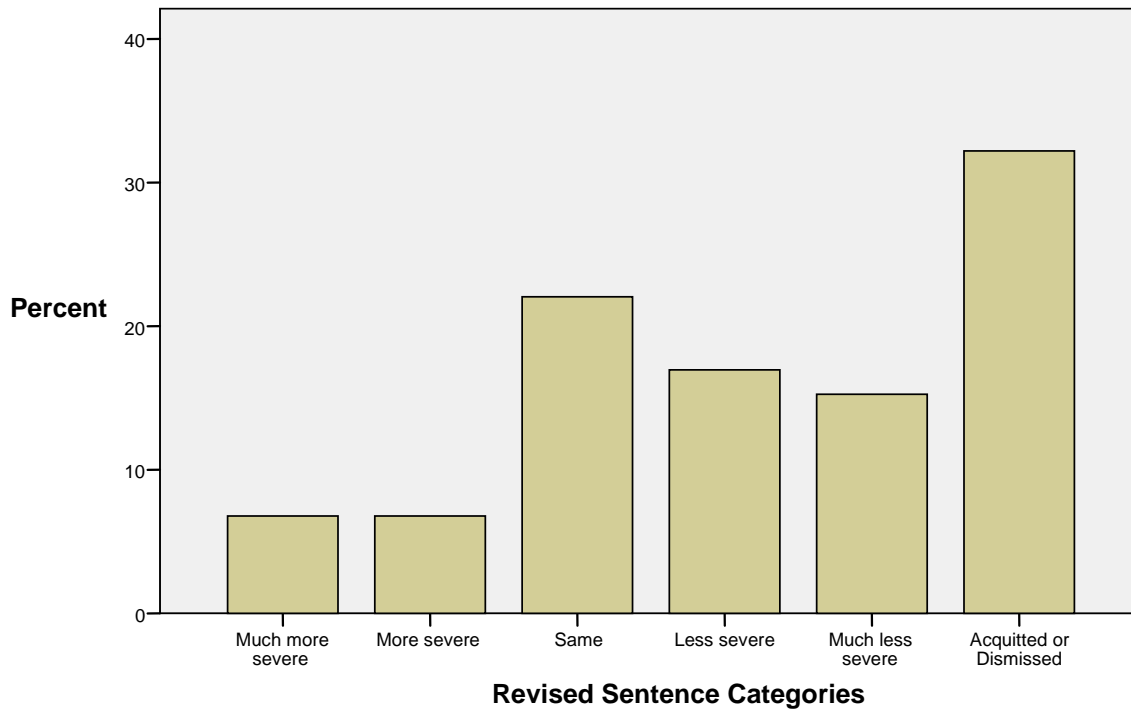


Table B-22

Best Output Table for Court sentences vs ER
(ER Accepted – Offence Type – MVA Offences)

Revised sentence categories		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	More severe	1	1.8	1.8	1.8
	Same	53	96.4	96.4	98.2
	Less severe	1	1.8	1.8	100.0
Total		55	100.0	100.0	

Bar Graph: Best Output Court Sentence vs ER
(ER Accepted – Offence Type – MVA Offences)

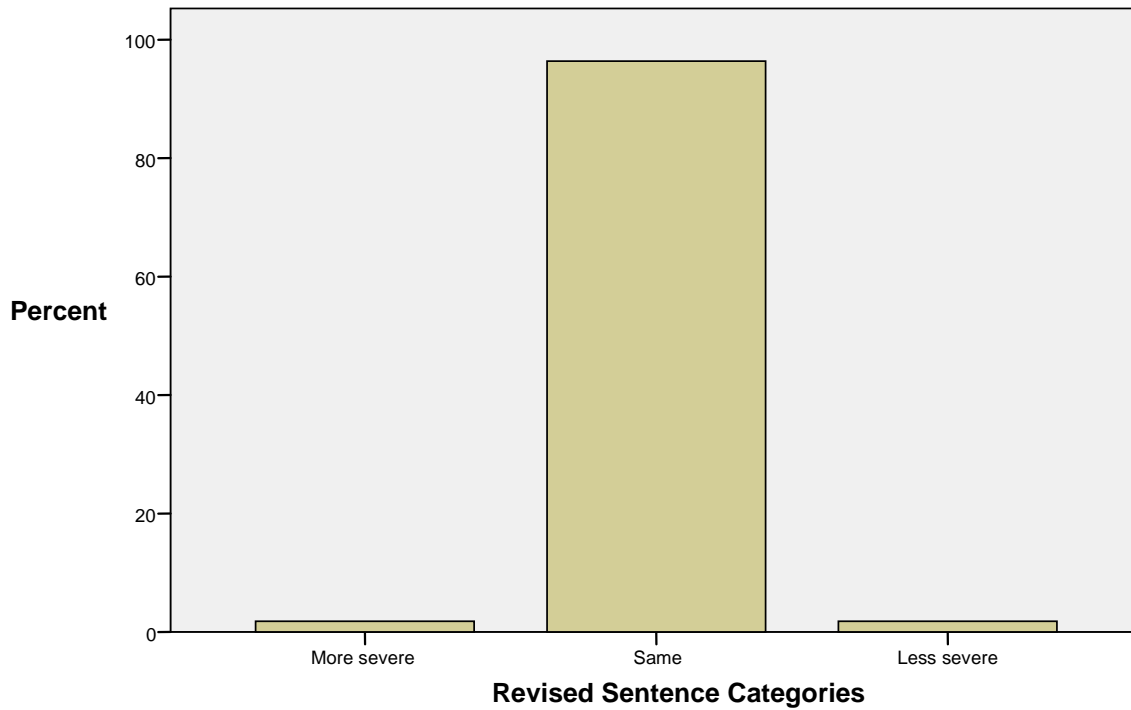


Table B-23

Best Output Table for Court sentences vs ER
(ER Rejected – Offence type – MVA Offences)

Revised Sentence Categories		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Much more severe	1	2.2	2.3	2.3
	More severe	4	8.7	9.3	11.6
	Same	13	28.3	30.2	41.9
	Less severe	12	26.1	27.9	69.8
	Much less severe	6	13.0	14.0	83.7
	Acquitted or Dismissed	7	15.2	16.3	100.0
	Total	43	93.5	100.0	
Missing	System	3	6.5		
Total		46	100.0		

Bar Graph: Best Output Court Sentence vs ER
(ER Rejected – Offence Type – MVA Offences)

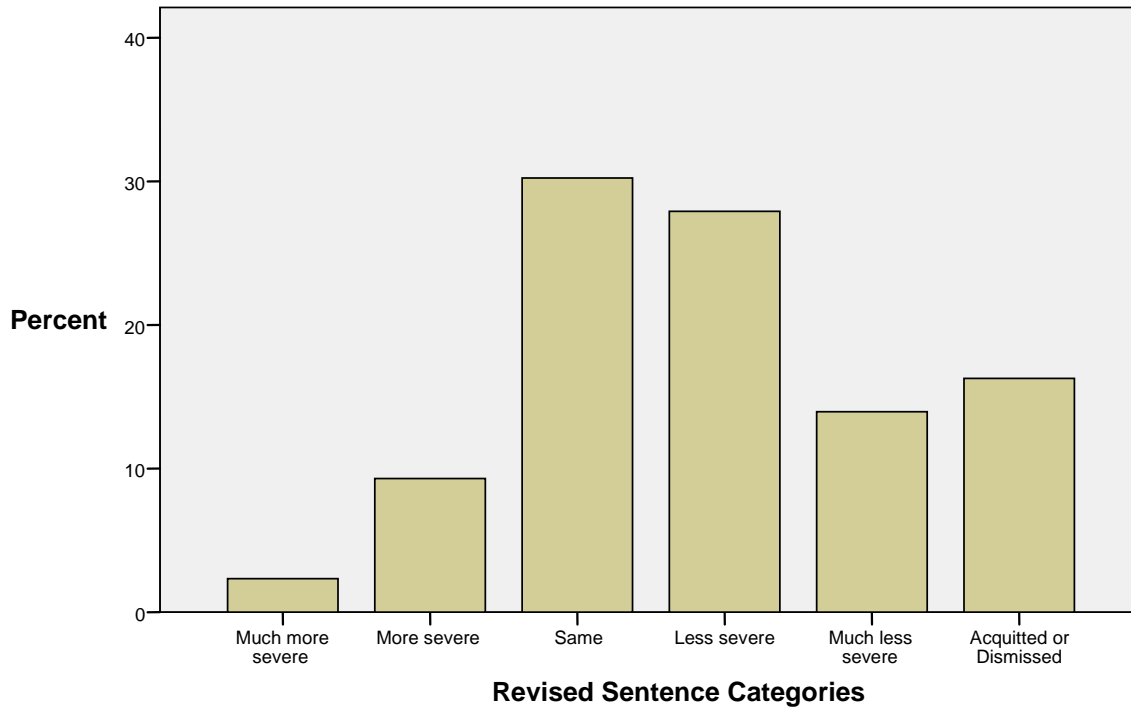


Table B-24

Regression Analysis: ER Acceptance

<i>Dependent variable=Acceptance of ER by Accused (yes or no)</i>	β	Sig.
Age (older vs young adults)	-.09	0.02
Gender	ns	
Minor-Major Offence	ns	
Person Violence Offence (yes vs no)	-.12	0.001
Adm Justice Offence	ns	
Property Offence	ns	
cc MVA	ns	
Number of Charges Faced	ns	
Legal Aid Representation (yes vs no)	-.16	0.000

N=615; r² = .09 < .000

Table B-25

Regression Analysis: Court Sentence Compared to ER

<i>Dependent variable=Court sentence less severe than ER</i>	β	Sig.
Age (older vs young adults)	-.09	0.03
Gender	ns	
Cc MVA (no vs yes)	-.12	0.03
Property Offence (no vs yes)	-.14	0.02
Minor vs Major Offence	.10	0.02
Person Violence Offence**	ns	
Adm Justice Offence	ns	
Number of Charges Faced	ns	
Legal Aid Representation (yes vs no)	ns	

N=604; r² = .09 < .000

** Despite being most strongly related to the sentencing variable at the zero order level, person offense as a category of offenses was squeezed out in the multiple regression primarily because it is negatively related to both property and ccMVA offenses.

Table B-26

Impact of An ER Jail Recommendation

ER Jail Recommendation				
	Yes		No	
	#	%	#	%
ER Rejected*	183	84	237	53
Final Disposition Less Severe**	121	70	126	58

***This relationship between a jail recommendation and an ER rejection is significant at <.000**

****Disposition includes withdrawn and dismissed outcomes as well as less severe sentences. The relationship here is significant at <.04**

Table B-27

Regression Analysis: ER Acceptance

<i>Dependent variable=Acceptance of ER by Accused (yes or no)</i>	β	Sig.
Age (older vs young adults)	ns	
Gender	ns	
Minor-Major Offence	ns	
Person Violence Offence (yes vs no)	-.16	0.000
Adm Justice Offence	ns	
Property Offence	ns	
cc MVA	ns	
Number of Charges Faced	ns	
ER for jail, yes vs no	-.26	0.000
Legal Aid Representation (yes vs no)	-.12	0.006

N=613; r²=.14 <.000

Table B-28

Regression Analysis: Court Sentence Compared to ER When ER Rejected

<i>Dependent variable=Court sentence less severe than ER</i>	β	Sig.
Age (older vs young adults)	ns	
Gender	ns	
Cc MVA (no vs yes)	ns	
Property Offence (no vs yes)	ns	
Minor vs Major Offence	ns.	
Person Violence Offence (yes vs no)	-.26	0.000
Adm Justice Offence	ns	
Number of Charges Faced	ns	
ER rec for jail (yes vs no)	-.19	0.00
Legal Aid Representation (yes vs no)	.13	0.001

N=379; $r^2=.10 <.000$

Graph B-29

Previous CC Convictions: All Accused

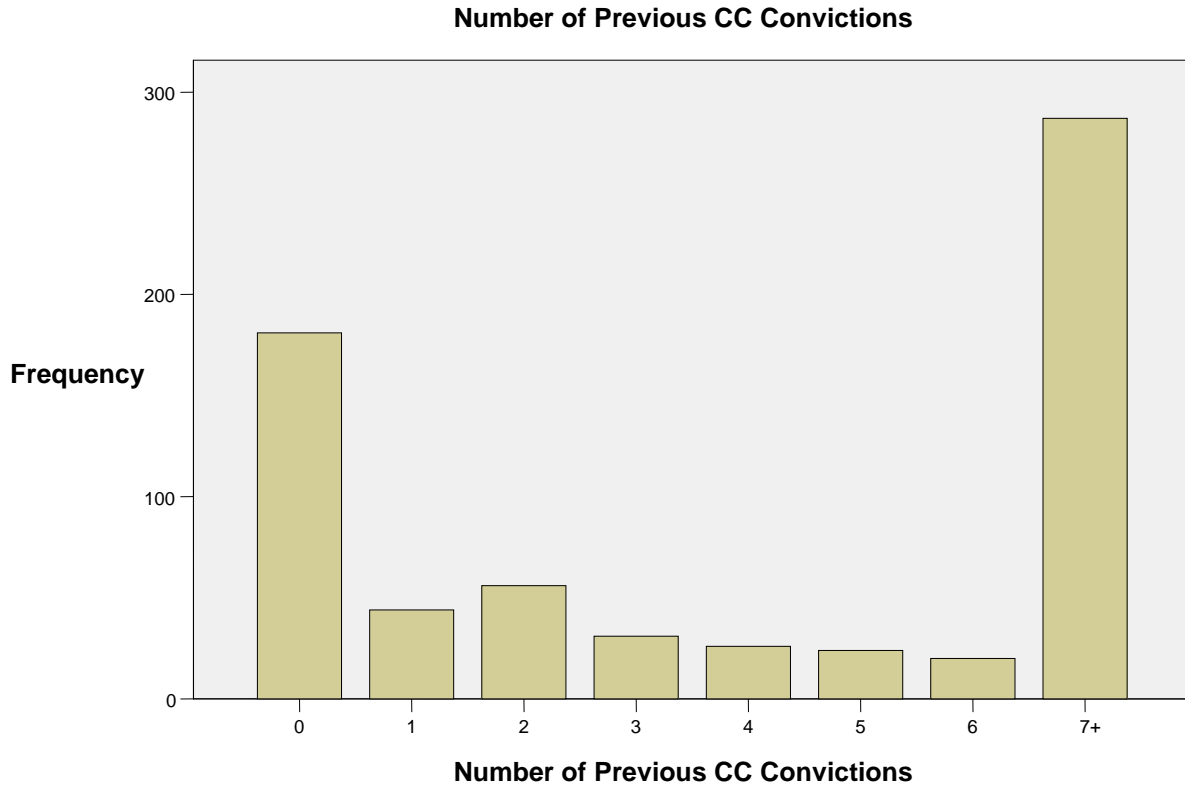


Table B-30

Correlates With Few and Many Previous CC Convictions*

Characteristics	Few Previous CC Convictions	Many Previous CC Convictions
ER was accepted**	46%	27%
ER Offered Jail**	10%	56%
Sentence Less Severe Than ER Offer **	36%	46%
Case Had More Than 3 Appearances**	41%	64%
Case Took More Than 60 Days	61%	60%
ER For A Person Offence***	36%	26%
ER For a Property Offence**	27%	48%
ER For an Adm Justice Offence**	8%	18%
Legal Aid Representation**	54%	82%
ER Involved Two or More Charges**	25%	46%
Accused was Female	25%	21%
Accused was Less Than 30 years of Age**	44%	30%
ER Offence Was Minor	83%	88%

*Few is operationalized as 0 to 4 previous convictions and many as 5 or more.

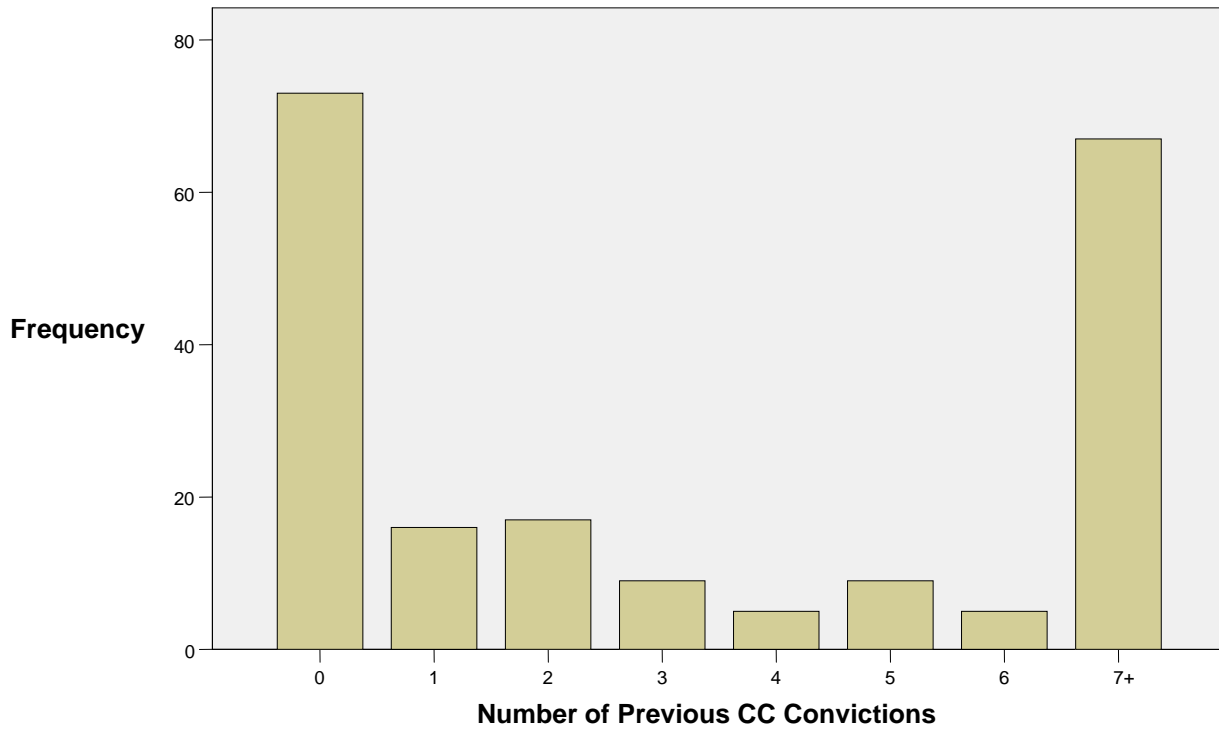
** Significant at the <.000 level.

*** Significant at the <.002 level

Graph B-31

**Previous CC Convictions: Accused Persons Charged in ER
With Person Violence Offences**

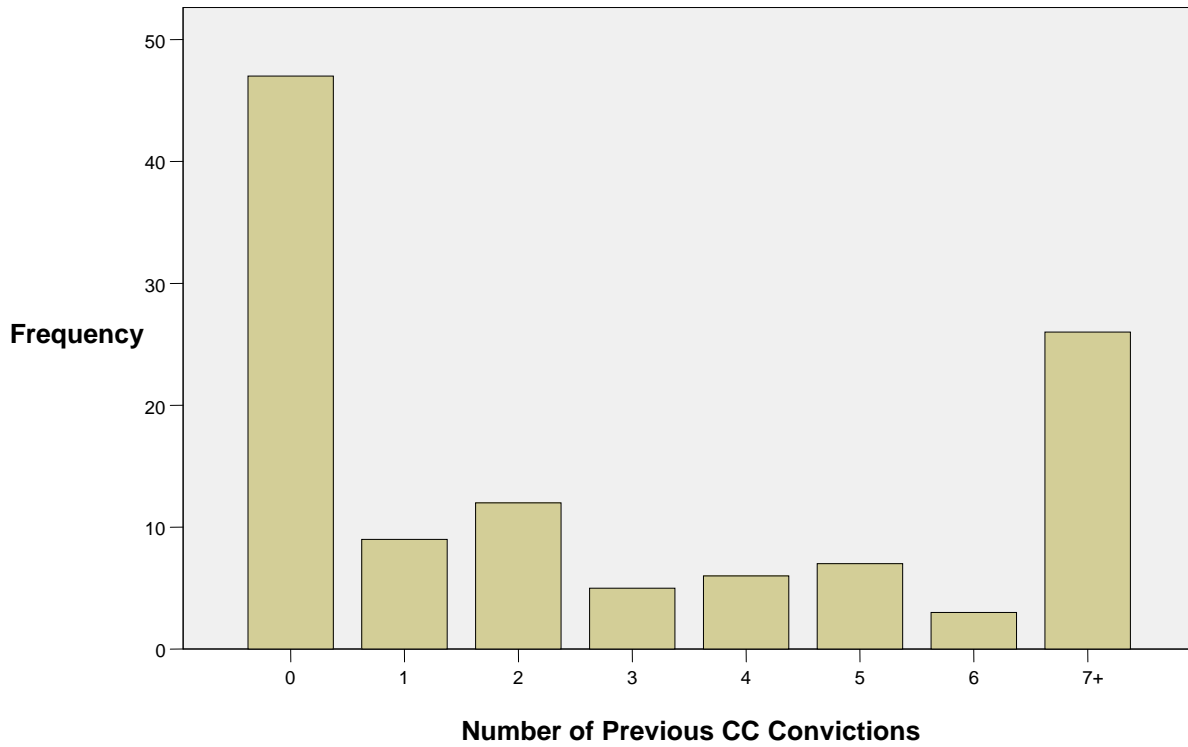
Number of Previous CC Convictions



Graph B-32

**Previous CC Convictions: Accused Persons Charged in ER
With Domestic Violence Offences**

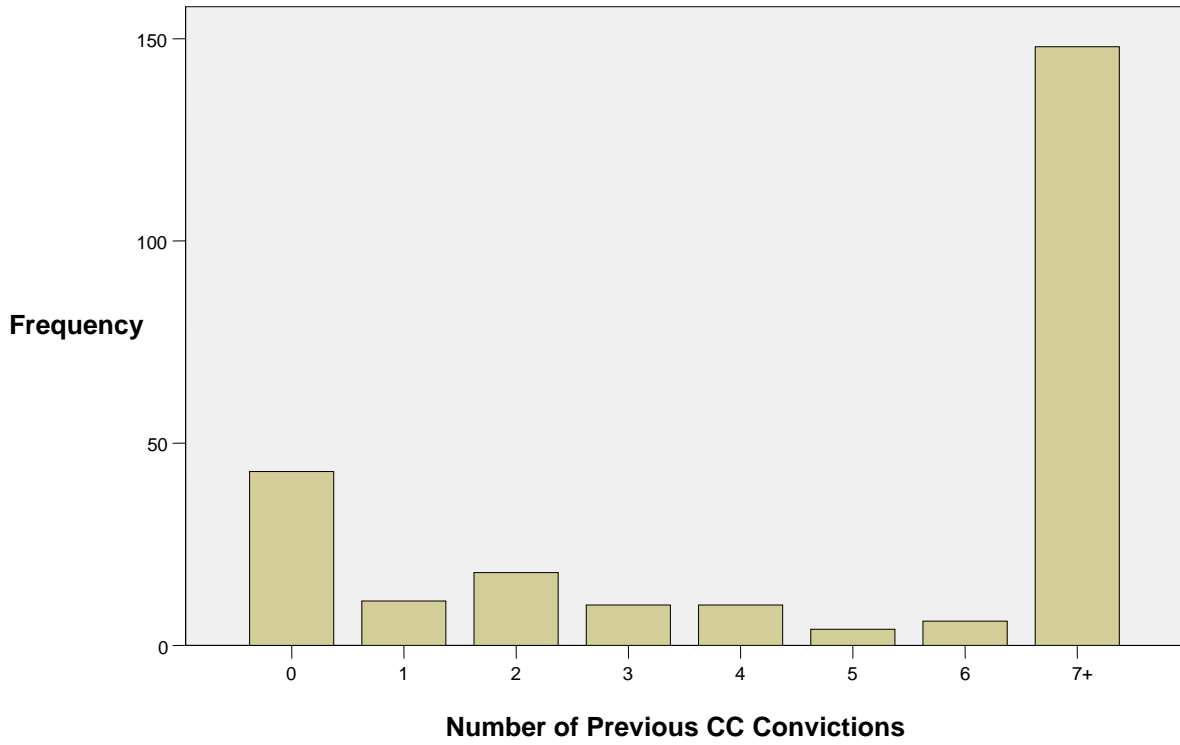
Number of Previous CC Convictions



Graph B-33

**Previous CC Convictions: Accused Persons Charged in ER
With Property Offences**

Number of Previous CC Convictions



CONCLUSIONS AND FUTURE DIRECTIONS

In September 2005 the PPS, following up on an earlier aborted ER foray, launched its ER initiative. Like similar ER projects of other prosecutorial services elsewhere in Canada, the central objectives were to reduce court backlogs and improve the efficiency of court processing, as well as to improve the efficiency and effectiveness of the PPS itself, and reduce costs (monetary and otherwise) for all court role players (e.g., PPS, police services). Generally, the initiatives advanced in the other provinces have achieved their objectives though major issues remain concerning crown discretion (court crowns' discretion in negotiations with defence counsel) and the buy-in by others such as defence attorneys and, to a lesser extent, the judges. Also, recent critiques of case processing for criminal cases have underlined the continuing problems in that regard. The small sample of other ER programs considered in this assessment provides no clear trend in such country-wide ER programming. In some jurisdictions there has been a retreat by the prosecution service to "ECR on demand only" while in other places there has been a promising new combination of pre-trial coordination at the court level and file ownership and some commitment to ER expected on the part of the crowns, and, in still other jurisdictions, ER teams, more or less operating under an exclusive prosecution service initiative, remain intact.

The PPS's ER initiative has been basically a Crown project with limited collaborative input from either the Judiciary or the Defence and it has focused squarely on front-end activity prior to a trial date being set. The PPS initiative has been somewhat singular in that one ER official has made all the ER recommendations; the singularity was not in having a senior crown do the ERs since experience elsewhere has often led to that option – apparently the logic is that senior crowns can draw on their experience to confidently determine an appropriate bottom line offer; rather, the singularity has been that only one senior crown has done essentially all the ERs (i.e., roughly 97%-98% of all incoming police files). This clearly makes for a considerable workload for the one ER official (it may be noted that here the senior crown, a well-regarded trial prosecutor, also continues to try the occasional case in Nova Scotia's Supreme Court). The underlying logic apparently has been that having only one ER official provides consistency and prevents a variant of crown-shopping. Aside from workload implication, such a system could result – and has to some degree - at least in the views of others, in the conflation of the ER program and the justice approach of the person drafting the ERs. Generally, the view of most informed interviewees was that the ER approach, implicit in the recommendations advanced on charges and sentencing, has been "fair but tough".

The PPS initiative too can claim some success in meeting its objectives since, as the data show, roughly one-third of the ER offers have been accepted and where the ER offer has been accepted, there have been fewer appearances by the accused persons and court processing of the cases has required fewer days from first appearance to court sentencing or case disposition. At a general, theoretical level there has been widespread support of the ER concept by all court role players though it is fair to say that for many defence counsels and even some crowns, the ER should be seen as basically an initial sentencing position (ISP), readily adjusted at the courtroom level as new information and arguments come into play. Most crowns, duty counsel lawyers and

judges at both the Halifax and Dartmouth provincial courts considered the ER program as a positive step, something that, with modest changes, should be maintained and extended to Dartmouth.

Overall, as detailed in the text above, the Halifax crowns were quite positive about the ER initiative, emphasizing not only the benefits for file assessment and effective advocacy of improved police information reports but also the benefits in case processing and for courthouse dynamics; their suggestions for future directions called for modest changes, largely more resources (human and otherwise) for the ER role. Still, a few senior crowns raised serious objections to the ER as implemented (e.g., claims such as infringement on crowns' discretion, and not taking into account information other than police information and criminal record) and two or three other crowns hedged their support for it, adopting a "wait and see" approach contingent on examining the results of the ER impact (e.g., acceptance rate, variance between ER offer and actual case disposition). Defence counsel, especially Legal Aid and the private criminal bar, were very critical of the ER, highlighting the allegedly high-end sentencing in the ER offer and the negative implications for courthouse level input and crown-defence negotiations; in their view the conventional system, in conjunction with the significant early file assessment realized in the ER initiative, would be the preferred option. Duty counsel and the private lawyers less engaged in criminal cases were more supportive of the ER program though they raised similar issues, albeit in a less critical fashion. Judges were generally quite appreciative of the ER's possibilities for improving case flow, and positive about its future, their chief criticism being the need to accommodate to new information and to case dynamics at the courthouse level. Other role players were supportive though also claiming to have been minimally involved in the initiative and not impacted significantly by it. The small sample of accused persons or clients generated a variety of views ranging from enthusiastic support to strong negative views where the ER offer called for a jail term and / or involved an offence of person violence. There was among them a real lack of knowledge about the ER program but it can be noted that courtroom observation by the evaluator's assistants over the year of assessment has found that ER is much more referenced in open court of late by the different court role players.

The analyses of the PPS-provided data have been summarized above. Suffice it to reiterate here that a comparison of the number of appearances and days from first appearance to final case disposition yields no evidence supporting a positive effect for ER in the Halifax court vis-à-vis the Dartmouth jurisdiction. Analyses of the ER impact in the Halifax court do provide evidence for a positive impact. Also, where the ER offer was accepted, the court sentence/disposition was virtually always the same or equivalent to the ER offer, with some variance where the main charge was one of person violence. Where the ER offer was rejected, the final court sentence or disposition was most often a less severe sentence, including, quite frequently, acquittal or dismissal. The three main variables that account for the variance between ER offer and final disposition were also responsible for explaining why the ER offer was not accepted; they are, whether the ER offer entailed a jail sentence, whether the main offence involved person violence, and whether the accused person was represented by Legal Aid. It was common for the accused persons in the ER sample to have significant previous criminal records; indeed almost half had at least seven previous cc convictions. At the high end (i.e., 5 or more

previous cc convictions), record was associated, as expected, with rejection of the ER offer, facing multiple charges, four or more court appearances, an ER offer entailing jail time, and, modestly, a final sentence less severe than the ER recommendation. Surprisingly, level of previous convictions was not associated with the number of days entailed by the case processing nor was there a distinct gender impact. While level of previous convictions did impact in a variety of ways, in a “free fight” or regression analysis of ER acceptance or comparison of ER and Court sentencing, it was not significant and the key explanatory variables remained type of offence, Legal Aid representation, and whether the ER recommended a term of jail.

It seems clear that the ER program should be continued and that it should be extended to the Dartmouth jurisdiction, albeit paying heed to some of the modest suggestions for change, detailed above, from crowns, judges and others as it becomes transformed from a project to a program. More resources, human and otherwise, would clearly be required were ER to become a PPS program; in turn, this could facilitate a modest team approach to ER led by senior crown, an approach that could avoid the conflation of ER with one person’s perspective and perhaps contribute to the in-house learning milieu (i.e., apprenticeship). An issue in virtually all ER initiatives in Canada has been enhanced collaboration between the prosecution service and other role players, especially judges, defence counsel and the police service. Were ER to become a program, the change in status might well be accompanied by consultations and a more formal statement of the ER’s objectives and protocols, including how the ER recommendations may be amended, accommodating new information at the courtroom level and so forth. Another trajectory for the future could involve working more closely with the police service to determine the cost benefits of the reduced need for police attendance at court (i.e., tracking better the savings associated with calling off police witnesses). This assessment of the PPS’ ER project has underlined too the value of an enhanced research / evaluation capacity at the PPS.

The data show that the ER offers are indeed high-end or tough in comparison to final case outcome but whether that is a fatal flaw or an acceptable situation is perhaps a matter of values (e.g., how much should previous record count) and how far PPS is prepared to bargain for an early guilty plea (e.g., in some Ontario jurisdictions, while performance contracts do not link resolution or trial rates to compensation, crowns there are strongly encouraged to provide ER recommendations that could yield a high acceptance rate). On the basis of the data and the views of defence counsel and accused persons, it might be quite difficult to secure a much higher level of acceptance of ER offers without advancing much more generous sentencing recommendations. It appears also to be the case that government policy on a zero tolerance approach to domestic violence also raises a number of thorny issues for any ER program targeting delays in case processing and requiring an early guilty plea. In the long run perhaps a domestic violence court in Nova Scotia – some informed persons speculate such an initiative is imminent - could impact positively on these thorny issues. Another possible trajectory, following the experiences in Manitoba and Alberta noted above would be to embed an ER program in a court processing system that manages pre-trial coordination.

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APPENDICES

Template of Early Resolution Offer



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Service
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Our File: **HA-0**

HRP Inc #0

[name of accused]

[date]

Dear Sir/Madam:

RE: Early Resolution of Criminal Charges

Accused:

Court Appearance Date: _____, Courtroom #

I have reviewed the charges in the attached Information for which you are appearing in Halifax Provincial Court.

In an attempt to deal with these charges in an early fashion, thereby freeing up Court time, saving the expense of repeated court appearances, and as well the potential inconvenience to witnesses attending for trial, the Crown is prepared to accept guilty pleas to the following charge(s) and to recommend to the Judge the following sentence(s) as a "joint recommendation":

Charges: s. [list charges] of the Criminal Code

Recommended Sentence: [list recommendations]

Section 606 (1.1) of the Criminal Code states as follows:

606(1.1) Conditions for accepting guilty plea - A court may accept a plea of guilty only if it is satisfied that the accused
(a) is making the plea voluntarily; and
(b) understands
(i) that the plea is an admission of the essential elements of the offence,
(ii) the nature and consequences of the plea, and
(iii) that the court is not bound by any agreement made between the accused and the prosecutor.

If guilty pleas are entered to the above charge(s) on or before **[date - approx. 2 mths]** all other charges in the attached Information will be dropped by the Crown at the time of your sentencing.

The facts supporting those charges to which you agree to plead guilty are set out in the police investigation reports provided to you.

If you presently have counsel, or it is your intention to retain legal counsel to represent you, it is most important that this proposal letter and all other relevant documents in your possession be brought to their attention as soon as possible. To accept this proposal at any time **up to and including [date - approx. 2 mths]**, you or your Counsel must contact the Crown Attorneys' Office, telephone 424-8734, or you or your lawyer bring it to the attention of the Crown Attorney present in Court on the date of your next appearance in that Court.

As this resolution proposal is an attempt to resolve these charges in an early fashion, the Crown's proposal respecting plea and sentence will no longer be available to you after **[date - approx. 2 mths]**.

If the Crown receives new information after your receiving this proposal, but before your acceptance of the proposal, and this information does affect the Crown's position as to an appropriate disposition or whether the charges should be dealt with through "Early Resolution", the Crown will advise you that this "Early Resolution" proposal has been withdrawn.

Sincerely,

ER Initiative Assessment

Interview Guide – the Crowns

Introduction

Good morning/Good afternoon, my name is Alexandra Little and I am here on behalf of Professor Don Clairmont. As you know, we are carrying out an assessment of the Early Resolution initiative in conjunction with your office (Public Prosecution Service).

Before we begin, I would like to assure you that this interview is in confidence and no person will be named in any report whether oral or written. Should you require it, I am also happy to provide you with past assessments/projects/studies that we have conducted at the AIC.

Before we discuss the ER, I would like to get a sense of your role as Crown with the PPS.

1. How long have you been a Crown with the PPS in HRM?
2. Please describe your role as a Crown with the PPS.
3. What is particularly demanding/difficult about your job?
4. What would constitute a good day for you?
5. Conversely, what would constitute a bad day?
6. How important are the following to you, as a Crown:
 - File ownership
 - Negotiating with Defence/Unrepresented (re: charges and sentence recommendation)
 - Going to Trial (is this the exciting part of your role?)
 - Professional autonomy
 - Figuring out/advocating sentences
7. In carrying out your role, do find that there are problems with case flow (court process) and/or case load (quality and quantity)?

Thank you for this background information. We will now move on to questions specifically related to the ER initiative and your role as Crown.

8. As we understand it, the objectives of the ER include:
 - Improving case flow
 - Reducing/Improving case load of Crowns
 - Reducing anxiety for defendant
 - Saving \$ for police (trial, witnesses...etc.)

- a) Are these objectives accurate? What do you think are the objectives of the ER?
 - b) Why do you think the ER was initiated?
 - c) Who initiated it? (grass roots or other)
 - d) How marked was the switch to ER?
9. How much discussion has there been from management about the ER in relation to your role as courtroom Crown? (staff meetings, policy directives)
10. What role does the court Crown have vis-à-vis the ER? What can/can't they do?
- a) What is the protocol when it comes to Crowns (you) making changes to the ER?
 - b) How often do you make changes?
 - c) Would this occur before or during court proceedings?
 - d) If the defence/unrepresented wants to change the ER, what level of authority to you have in amending sentence recommendation/charges or both (clarify distinction)?
 - e) How often is the ER accepted/rejected?
 - f) Does rejection of ER usually result in lower/higher sentences?
 - g) Have there been any policy changes over past two years related to the ER and the court Crown's role?
11. It's been two years since its implementation. What do you think is the most important impact of the ER?
- a) On different players/stakeholders (Crown, Judges, Defence, Unrepresented)?
 - b) In relation to the objectives outlined in Question 7.
12. Are there any other positive/negative impacts of the ER that you can think of?
13. And, finally, what changes would you recommend to the ER initiative?
- Address Alternatives*
- a) Team approach for serious or specific types of offences
 - b) Leaving it to the court Crowns to do the ER
 - c) Dropping the whole thing.

Thank you for your time. Exchange Emails.

ER Initiative Assessment

Interview Guide – the Defence Counsel (NSLA)

Introduction

Good morning/Good afternoon, my name is Alexandra Little and I am here on behalf of Professor Don Clairmont, Director Atlantic Institute of Criminology (AIC), Dalhousie University. As you know, we are carrying out an assessment of the PPS' Early Resolution initiative as indicated in the letter sent around by Gerard Lukeman. Before we begin, I would like to assure you that this interview is in confidence and no person will be named in any report whether oral or written. Should you wish, I am also happy to provide you with past assessments/projects/studies that we have conducted at the AIC.

Before we discuss the ER, I would like to get a sense of your role as defence lawyer with NSLA.

14. How long have you been a defence lawyer with NSLA?
15. How would you succinctly describe your role?
16. What is particularly demanding/difficult about your job?
17. What would constitute a good day for you on the job?
18. Conversely, what would constitute a bad day?
19. How important are the following to you, as a defence lawyer:
 - File ownership / professional autonomy
 - Negotiating with the Crowns (re: charges and sentence recommendation)
 - Having a good knowledge of the style and philosophy of the Crowns and the Judges you might be dealing with?
 - Going to Trial (is this the exciting part of your role?)
 - Figuring out/advocating sentences, including rehabilitative options
20. In carrying out your role, do find that there are problems with case flow (court process) and/or your case load (quality and quantity)?

Thank you for this background information. We will now move on to questions specifically related to the ER initiative and your role as a defence counsel.

21. The ER initiative was launched by PPS approximately two years ago in the provincial court on Spring Garden. As we understand it, the objectives of the ER include:
 - Improving case flow
 - Reducing/Improving case load of Crowns
 - Reducing anxiety for defendant

- Saving \$ for police (trial, witnesses...etc.) and other role players

Are these objectives accurate in your view? What do you think are the objectives of the ER?

Why do you think the ER was initiated?

How marked was the switch to ER, from your perspective as a defence counsel?

22. How much discussion has there been about the ER in relation to your role as defence counsel? (staff meetings, policy directives)

23. What role does the defence counsel have vis-à-vis the ER? What can/can't they do?

- What is the protocol when it comes to your trying to modify the ER on behalf of your client?
- How often do you suggest modifications to the court-based Crowns? To BM at PPS?
- Would this occur before or during court proceedings (court processing)?
- How often do you recommend to a client that he/she accept the ER?
- How often in your estimate is the ER accepted/rejected by your clients?
- How often do you estimate it is (5%, 15% etc) that a rejection of the ER, for whatever reasons, results in either a dismissal or an acquittal?
- In the event of a non-ER guilty plea or a conviction at trial, is the ensuing sentence usually a lower or a higher sentence?
- From your perspective as defence counsel, have there been any changes over past two years related to the ER and the court Crown's role?

24. It's been two years since its implementation. What do you think is the most important impact of the ER?

- On different players/stakeholders (Crown, Judges, Defence, Unrepresented)?
- In relation to the objectives outlined in Question 7.

25. Are there any other positive/negative impacts of the ER that you can think of?

26. And, finally, what changes would you recommend to the ER initiative?

Address Alternatives

- More generous charges/sentencing trade-offs for a quick guilty plea
- More flexibility on probations orders and other conditions
- Leaving it to the court Crowns to do the ER
- Dropping the whole thing.

Thank you for your time. Exchange Emails.

Defendants Interview Guide

Name –

Gender – Approximate age (year born if have to ask) –

The charge (s) -

The date -

The ER recommendation -

Introduction – Hello I am calling on behalf of Professor Clairmont who is doing an assessment of the Public Prosecution Service of Nova Scotia. We are examining especially its Early Resolution program where defendants or their lawyers are given a letter at first appearance indicating what the prosecution is offering in return for a plea of guilty within 60 days. You indicated you were willing to talk about your experience in **DATE** when you were charged with a **section XXX** offense. We appreciate that and would like to ask a few questions about that experience.

1. Do you still remember that court case fairly clearly?
2. Do you recall reading a letter with the prosecution's offer to make a sentencing recommendation if you pled guilty? If so, ask re details such as was it at first appearance in court on that charge? Was it part of the disclosure given you by the prosecutor?
3. Did you talk to a lawyer in that court case? If so, ask private? Duty counsel? Legal aid? A mix?
4. Did you talk with a lawyer about the prosecution's early resolution proposal? If so, were you advised to accept it?
5. Did you accept the prosecution's ER proposal?
6. **If yes, why?**
7. Then probe along the following lines: (a) did you think it was a fair offer? (b) did you just want to get the matter over with? (c) were you frightened at the possible sentence you might have received if you did not agree?

8. **If no**, why was that?
9. Then probe along the following lines: (a) did you want to contest the charge in court? (b) did your lawyer convince you that you would receive a better sentence from the judge? (c) did you think the prosecution's offered sentence was too severe?
10. Did you or your lawyer try to negotiate the terms of the sentence offer with the prosecution?
11. **If yes**, probe for details: (a) did you have a different sentence in mind –what? (b) who did you or your lawyer contact – the prosecutor in court? The prosecution officials in their headquarters? (c) was there any give and take in the negotiation attempt? (d) what was the result?
12. **If no attempt at negotiation**, why not?
13. Probe for details: (a) did you think that you could not negotiate? (b) did your lawyer advise you that negotiation was useless? (c) did the court prosecutor suggest it was not possible?
14. Looking back, are you satisfied with the way your court case worked out?
15. If so, why? If not, why?
16. Looking back do you think it would have been better to have accepted the prosecution's offer?
17. The ER program is supposed to have has three objectives (a) speeding up the flow of cases through the court process, (b) cutting down on the number of appearances that a defendant would have to make, (c) reducing anxiety among accused persons re what sentence the prosecution is going to argue for.
18. Do you think these objectives are acceptable from the defendants' point of view as well?
19. Were any of these objectives achieved in your case?
20. Does the ER program need to be changed in any way to accomplish these objectives and be fair to the defendants? How?

Letter sent by PPS to a sample of defendants.

November 2007

Dear

The Public Prosecution Service (PPS) of Nova Scotia regularly reviews its policy initiatives in order to ensure that they have been implemented effectively and appropriately and are consistent with the principles and goals of the Service. The PPS has engaged Professor Don Clairmont, Dalhousie University, to undertake an independent assessment of its Early Resolution of Cases initiative which was launched some two years ago. Professor Clairmont has been obtaining the views of judges, defense counsel and Crown Attorneys regarding the value of the Early Resolution initiative. Professor Clairmont will also be attempting to gather the views of randomly selected defendants on the issue of the value of the Early Resolution initiative. Those views will be obtained in a highly confidential and anonymous basis.

In a search of a random sample of cases brought before the Spring Garden Road Provincial Court over the past two years, your name came up as one of those defendants who may have been involved in the Early Resolution initiative. I am writing to inquire if you would be willing to be interviewed by telephone by Professor Clairmont, or his graduate student assistant. The interview would take approximately ten minutes. As indicated earlier, you would be guaranteed confidentiality and anonymity. No names will be used in any report, written or oral, presented by Professor Clairmont to the Public Prosecution Service. This review carries no implications of any kind regarding dealings you may have had in the past with the Public Prosecution Service. Our hope regarding this project is to ascertain the true value of the Early Case Resolution initiative and to improve it where possible. If you are willing to participate in the brief interview with Professor Clairmont or his assistant as discussed above, please indicate that willingness and also provide your telephone number for contact purposes using the enclosed letter and return it in the addressed and stamped envelope provided. Your participation in this initiative would be much appreciated. Thank you.

Yours very truly,

Deputy Director of Public Prosecutions

CONSENT FORM

TO: Deputy Director Public Prosecutions

Please be advised that I am willing to be interviewed by telephone by Professor Clairmont (or his graduate student assistant) to discuss my views regarding the Public Prosecution Service's Early Resolution of cases initiative. By signing this consent form, I authorize the Public Prosecution Service (PPS) to provide my name and telephone number to Professor Clairmont (or his graduate student assistant).

I understand that my name will not be used in any report, written or oral, presented by Professor Clairmont to the PPS.

NAME:
Signature

PHONE NUMBER:

Please reply at your earliest convenience using the addressed stamped envelope enclosed.

Early Resolution Data Fields

	Field Name	Description
1	Name	Last Name, First Middle
2	Date of Birth	dd mm yy from the Information
3	Gender	M or F
4	PPS File Number	From file
5	ER Letter Date	From the ER letter
6	Offence Date	From the Information
7	Case Number	From PICS, one for each charge
8	Charges	from PICS and cross checked to the Information and the ER letter
9	First Appearance	Start of TND. From PICS, May be before receipt of ER letter - in that case I use the Court appearance date from the letter
10	Final Disposition	From PICS, or Court Proceedings sentencing date
11	Total Appearances	From PICS
12	Sentence	From PICS (Bail Sheet) and cross checked to Court Proceedings
13	Courtroom Number	From PICS
14	ER Accepted	From file, Court Proceedings. Regardless of acceptance Yes/No - I list the ER offer for each charge
15	ER Accepted Date	Usually the same as sentencing date
16	Representation	Four choices from JEIN - Legal Aid, Private Defence, Self Represented, Unknown in case of no lawyer noted in JEIN or unrepresented
17	ER Stamp on File	Red stamp on file - I note whether it is there and Checked or Not checked
18	ER Extended	From Court Proceedings. Will usually be noted by RBM. Usually found in case of Adult diversion
19	Domestic	In the case of assaults or weapons charges I check in the Crown Brief Report

20	Spousal Discontinuance	Rare, but seems to be agreement to withdraw charges due to insufficient evidence because the complainant has recanted.
21	Trial Notice	If TN is red circled in Court Proceedings, I look for the actual Trial Notices in the file, from this I also get any witnesses to whom subpoenas were issued
22	Witness Police	Identified on the Trial Notice
23	Witness Civilian	Identified on the Trial Notice
24	Call Off Witness	if I find a COWT stamp in Court Proceedings I look for COWT letter in the file for the date of issuance
25	Pre-Sentence Report	If noted in Court Proceedings then I look for one in the file. (May sometimes be a copy of a PSR done for an earlier trial)
26	Victim Impact Statement	Rare to see in the file but if I find one I make a note of it
27	Total Number of Days	(TND) Calendar days from either First Appearance to final disposition or Letter receipt date to final Disposition
28	Data Entered By	My email name
29	Comments	anything unusual that is not taken care of in the Field - for example a Notice of Intention to Seek Increased Penalty in the case of Impaired Driving charges