

THE PROVINCIAL COURT DUTY COUNSEL PILOT PROJECT

**Assessing Its Implementation, Impact and
Feasibility**

SUBMITTED TO

COURT SERVICES DIVISION, NOVA SCOTIA DEPARTMENT OF JUSTICE

BY

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EXECUTIVE SUMMARY

This research on the implementation of duty counsel systems in Nova Scotia's provincial criminal courts is part of a larger research thrust undertaken by the Atlantic Institute of Criminology (AIC) at Dalhousie University. As the 20th century came to an end, there were very significant developments occurring in the justice system, such as the resurgence of the restorative justice movement, the problem-solving or specialty court movement, and aboriginal justice movement. However the conventional and longstanding problem of basic access for defendants or litigants whether in criminal or family court milieus justifiably trumped these developments at least in Nova Scotia. The AIC-based extensive research in 2002-2004 into the feasibility of a drug treatment court in metropolitan Halifax indicated both the possible viability and value of such an initiative but also the greater priority (in the view of many Justice officials) of responding to the problems of unrepresented defendants or litigants (Clairmont, 2004). Accordingly, a major study was undertaken over the period 2003-2004, with the collaboration of the Bar Society, of the unrepresented defendant in provincial criminal court (see Clairmont, 2004). This latter research, which is discussed in the text below, found that most experts and court officials emphasized the need for duty counsel programs for non-custody adults in HRM and for cells duty counsel in Sydney. NSLA launched such duty counsel initiatives in 2004. In 2005 this research began where the main objectives have been to assess the new initiatives and the impact they have had on the many issues of self-representation. In 2003-2004, NSLA, with the Department of Justice's collaboration and in one case special federal funding, launched a duty counsel initiative for Family Division court centers in Halifax and Sydney. In 2006, an AIC-based assessment of the latter initiative was completed (see Clairmont and Joyce, 2006).

The 2006 study of the duty counsel (summary advice counsel) in family courts found that the program had been well-implemented and deemed very beneficial from the view of all parties, the clients, judges and court administration. A few issues or areas for improvement were identified but it was concluded that these were quite amenable to change and could be accomplished incrementally. This research on the duty counsel systems in criminal court reached basically similar conclusions. In both studies, a wide range of methodologies was employed, including literature review, analyses of accessible secondary data, in-person interviews with key officials and telephone interviews with clients or potential clients. This study also emphasized document review and courthouse observations as well as interviewing more defendants. It is concluded that the programs realized their objectives in large measure and that incremental changes, suggested in the section below on Future Directions, can lead to further improvements. There remain a number of issues concerning the quality and quantum of the duty counsel consultation but clearly it has been an effective use of scarce NSLA resources in HRM and in Sydney. It may be argued that while the "unrepresented defendant or litigant phenomenon" has certainly not been resolved, significant progress has been made and the priority of that issue over other justice initiatives could now perhaps be re-considered.

A detailed eleven page digest of the research findings and brief section on Future Directions is enclosed with the two part report.

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INTRODUCTION

Significant major social movements appear to be changing the landscape of the Criminal Justice System (hereafter CJS) in recent years. Aboriginal Justice initiatives (e.g. the Gladue court), problem-solving courts (e.g., mental health courts, drug treatment courts), and the resurgence of the restorative justice approach, to name but a few such movements, may presage a complex, fragmented but perhaps more efficient and effective post-modern CJS. It could be argued, however, that attention may be diverted, unintentionally and inappropriately, from one of the most pressing concerns of mainstream twentieth century Justice, namely access to Justice for all citizens regardless of socio-economic status, gender, race/ethnicity and other social characteristics and circumstances. There is much concern that while funding and other resources are being provided for worthwhile special initiatives, state provided legal assistance may be increasingly restricted to fewer needy defendants by stringent income and offence criteria. A provincial court judge in Nova Scotia recently contended (personal correspondence, 2003)- and preliminary analyses of the data would support his statement - that fully 50% of the accused persons appearing before his court are without legal aid or private bar representation. Whether as a litigant in Family court or as a defendant in criminal court the self-represented person has been common, nevermind other justice milieus such as regulatory and civil justice. More recently the Chief Justice of the Supreme Court of Canada (hereafter SCC) in a 2005 address in Vancouver called attention to the serious problems entailed by the large number of unrepresented defendants in the criminal court process. The Globe and Mail, December 14, 2006, published a major piece where it was contended that the unrepresented defendant or litigant phenomenon continues to grow and that it places a major responsibility on the judge, even to the point of questioning the evidence on behalf of the unrepresented person. It could well be argued that a major brake on the development of the problem-solving court and other justice innovations, such as with respect to the interstices of criminal justice and regulatory justice (e.g., CJS policy may encourage non-imprisonment strategies for certain offenders but Health regulations may severely limit alternative treatment options for convicted persons), continues to be the justifiable priority of access issues in general.

In 2003 and 2004 Nova Scotia Legal Aid (hereafter NSLA) launched duty counsel initiatives (free summary advice or legal counsel on a first-come, first-serve basis to litigants) for family court in the Halifax and Sydney area where there is a unified family court system. Those initiatives were assessed and found to be have been very beneficial to all, the clients, the court officials and the court process (Clairmont and Joyce, 2006). In an earlier report (Clairmont, 2004), this researcher identified the dimensions of the unrepresented defendant problem in Nova Scotia's provincial criminal court and the views of various CJS role players (judges, crowns, Legal Aid staff, private counsel, and others) and unrepresented defendants themselves with respect to the issues entailed and the possible solutions. It was noted there – and deemed congruent with the data – that a duty counsel system for non-custody adult defendants was seen by most informants and interviewees as central to dealing effectively with the problems identified. The need was especially pronounced in the metropolitan Halifax area (hereafter HRM). In 2004 federal funding enabled NSLA to develop several duty counsel (hereafter DC) initiatives. These

included hiring full-time staff duty counsel at the Halifax, Dartmouth and Sydney provincial criminal courts; in the Halifax and Dartmouth instances, these staff were dedicated to non-custody adult defendants since a cell DC and a youth DC were already in place, while in Sydney the two staff positions were for adult and youth custody cases. This research project has aimed at describing the duty counsel programs put in place – primarily the HRM initiatives - and assessing their impact for the CJS and for the potential client groupings. In addition, it sought to explore the problems, issues and potential futures of the duty counsel program. An important theoretical concern focused on what might be the implications of these initiatives for the future of the Nova Scotian justice system.

THE RESEARCH STRATEGY

The first task of the research was to determine how the duty counsel initiatives were implemented and have evolved over time. Essentially this entailed describing the objectives and mandates of the duty counsel with respect to the services provided to clients and the engagement with other CJS role players and in the CJS court process (e.g., how far does the duty counsel activity extend into the stages of court processing). It was deemed important to determine the extent of penetration vis-à-vis the targeted pool, namely unrepresented defendants (e.g., How many does it reach? Who specifically are the clients? Is there analyses and discussion of disclosure? Is there involvement at the level of sentencing?), and, of course to obtain the views of the duty counsel lawyers themselves regarding issues, challenges and suggestions for the future.

A second major task was to examine the impact of the new initiatives from the perspectives of the other court role players, that is the provincial court judges, the crown prosecutors, regular Legal Aid lawyers, private defence counsel and others in Justice Administration (including the Bar). Equally important was the need to assess the impact for the clients and potential clients of the new DC programming (What has been their experience in utilizing the service and their sources of satisfaction and dissatisfaction? Why have potential clients not accessed the service?). The third major task was to provide a contextual basis for assessment. This involved a number of activities such as a review of pertinent NSLA documentation (e.g., job descriptions), a review of the salient literature drawing upon recent such reviews carried out by the researcher, and where feasible, a review of what is happening elsewhere in Canada concerning the duty counsel role. It was anticipated that court data captured in the JEIN data system would shed much light on the impact of the new DC programs.

The research strategies included the following:

1. The main focus was on the adult DC initiatives in HRM for “walk-in” or non-custody defendants but some attention was directed at the custody DC initiatives at the Sydney justice Centre.
2. There was an extensive review of the literature on the unrepresented or

self-represented defendants and on the duty counsel system.

3. There was much observation of the duty counsel role at the Halifax courthouse. All told there were 41 observation sessions, most of which were in the morning, over a fifteen month period.
4. There were 26 in-person interviews with provincial court judges, crown prosecutors, NSLA and private counsel, most of which focused on the HRM milieu. In addition, there were 8 in-person interviews with duty counsel lawyers.
5. A major and very time consuming effort was expended to obtain the views of DC clients or potential clients. Most research consulted on the unrepresented defendant largely avoided a significant sample and it is easy to understand why. Here there were two samples of telephone interviews. The first sample was obtained at the courthouse by approaching unrepresented persons or persons who had seen the DC and requesting permission to do a telephone interview. All told 28 useable interviews were obtained in this fashion (the interview guide used can be found in Appendix A). The second sample was obtained by accessing names and addresses of closed or disposed cases for the period November 2004 to January 2006. Telephone numbers were sought for thousands of names and addresses were examined and a final sample of 152 useable interviews were obtained (see Appendix B for the interview guide utilized); there were actually few refusals but disconnected phone numbers, wrong numbers and “no answers” were frustratingly common.
6. Secondary data and administrative records were also examined, the former being the JEIN system for court data and the latter the activity records for some staff duty counsel. The JEIN system proved very frustrating. After waiting months to access the appropriate data set, it was found that the crucial variable of “type of legal representation” was missing. Several more months passed before that problem was corrected but then it was found that there has been no direct recording

of the duty counsels' involvement at any stage in the court process. The DCs' speaking to sentencing, for example, is not recorded apart from the generic Legal Aid categorization.

LITERATURE REVIEW: THE UNREPRESENTED LITIGANT PROBLEM¹

INTRODUCTION

In recent decades, Canadian and American criminal courts have been subject to a variety of criticisms from users, academics and practitioners concerning procedural issues at both the macro and micro-operational levels. At the micro end of the spectrum, some have suggested that more emphasis ought to be afforded to addressing the problem of docket delays, simplifying and streamlining the rules of evidence and improving the amount and quality of communication among relevant role players. At the macro-level, some have suggested that we ought to re-assess the utility associated with the perpetuation of Canada's adversarial system's approach to dispute resolution (as contrasted with other systems, such as the inquisitorial system employed in some European states) and others have suggested that much more emphasis ought to be afforded to alternative (non-court) processes of justice such as restorative justice. One issue, however, that has commanded significant attention in more recent years has been the problem of unrepresented litigants in Canadian court processes.

While concerns about unrepresented litigants are not new to the judicial or governmental policy landscapes, they have been better articulated in recent years. The reason for the shift in attention to the unrepresented problem could be the result of several variables but is most likely related, at least in part, to the fact that there has been reported growth, in the past fifteen years, in the number of persons appearing at criminal court hearings without legal representation. The seriousness of the problem was described by one coalition of sixty women's groups as "... the canary of the coal mine: the sign of system breakdown."² Very recently, December 2006, the unrepresented defendant or litigant was reported to continue to be a growing phenomenon and the responsibilities it places on judges have begun to modify their role in court, requiring a more "inquisitorial" approach. The phenomenon has been deemed to be greatest in the family court milieu but still also in the criminal courts. Most of the information, upon which concerns are based, comes from anecdotal observations of individuals who work in the criminal justice system as there is little concrete data available about unrepresented defendants in Canada or in extra-territorial jurisdictions.³ Although criminal courts do tend to employ systems for collecting empirical bodies of data that are superior to those of the civil courts, the information available is often limited at the best of times. That said, the statistics that are available do shed light on the seriousness of the unrepresented problem in Canadian criminal courts. For instance, statistics collected by the most

¹ Portions of the academic literature and jurisprudential review section have been adapted from: Clairmont, Don and Ian Joyce. The Summary Advice Counsel Initiative: Assessing Its Implementation, Impact and Future Directions in Two Nova Scotia Urban Areas. Halifax: Atlantic Institute of Criminology, 2006.

² Buckley, Melina. The Legal Aid Crisis: Time for Action. Ottawa: Canadian Bar Association, 2000. 45.

³ Alberta Law Reform Institute. Alberta Rules of Court Project: Self-Represented Litigants: Consultation Memorandum No. 12.18. Edmonton: Alberta Law Reform Institute, March 2005.

extensive and most recent study of unrepresented criminal accused at nine Provincial courts across Canada indicated that the percentage of unrepresented accused at first appearance ranged from five percent to sixty-one percent and at final appearance from six percent to forty-six percent.⁴ The Spring Garden Road Court House in Halifax was one of the nine national sites that the study examined. There, an analysis of 509 cases disposed between September 2001 and May 2002 indicated that the accused was unrepresented at all appearances in twelve percent of cases. In twenty three percent of the cases, the accused was unrepresented at final appearance. It was reported that unrepresented litigant cases “usually involved summary and minor property offences, minor assaults, domestic violence and impaired driving.” The study further reported – without presenting any data - that unrepresented accused were typically the working poor with limited education.

The statistics further suggest that the unrepresented accused problem is not exclusive to courts of first instance. Indeed, some statistics suggest that unrepresented accused also present problems for superior and appellate courts. Statistics collected from the Nova Scotia Court of Appeal in 1999 reported that eight out of forty-four litigants (18.2%) in criminal appeals were unrepresented and twenty-three out of 114 litigants (20.2%) in civil appeals were unrepresented.⁵ Statistics from the same court in 2000 reported that self-represented litigants appeared in four out of eighteen criminal appeals (22.2%) and five out of forty-three (11.6%) civil appeals.

THE UNREPRESENTED

The reasons for which a particular defendant or litigant may present to court without legal representation are multiple. Given the unique factual circumstances that characterize each criminal case, it would be difficult, if not impossible, to create an exhaustive list of potential factors that lead to persons appearing at court alone. Review of the literature, however, seems to suggest that there are at least six acknowledged categories of unrepresented persons.

The first group is comprised of those individuals who appear at court alone based on financial constraints that prevent them from retaining counsel.⁶ This cohort presumably represents the largest number of unrepresented defendants or litigants.⁷ According to Trussler, this grouping has been created as the consequence of the high cost of (private) legal services and cutbacks to legal aid programs.⁸ The end result is that many litigants in Family Division courts or defendants in criminal courts have no other option but to appear unrepresented. Thompson and Reiersen have suggested that the financially constrained group of unrepresented litigants in the former courts may be

⁴ Hann, Robert et al, Court Site Study, Department of Justice, Canada, 2002.

⁵ Alberta Law Reform Institute ...

⁶ Trussler, Marguerite. “A Judicial View on Self-Represented Litigants.” *Canadian Family Law Quarterly* 19 (2001). 1.

⁷ *Ibid.*

⁸ *Ibid.*

divided into three sub-categories.⁹ The first category, “left unrepresented by legal aid” consists of persons who qualify financially under the legal aid rules but are unable to obtain legal aid by reason of cutbacks and case priorities.¹⁰ The majority of these persons are applicants and women. The second group Thompson and Reieron describe as the “near misses.” It is into this group that members of the ‘working poor’ fall. These are persons who are unable to afford access to private legal advice but, because of their income, are ineligible for legal aid services.¹¹ The third group Thompson and Reieron have described as “good guy respondents.”¹² Within this group are placed individuals who might be able to afford a lawyer but make a constrained decision not to obtain one. According to Thompson and Reieron, many of these persons are burdened by other pressing financial obligations such as excessive debt-loads or other children to support which take precedence over hiring a lawyer.¹³ Similar labels could be applied to this category in the criminal courts where legal aid is unavailable for modest income earners and certain offence categories even among the poor (e.g., criminal code motor vehicle offences).

The second category of unrepresented litigants has been described by Trussler as “recreational” litigants.¹⁴ This group consists of persons who have spare time that they are able to afford to the litigation process. In the civil domain, a large proportion of this group consists of fathers who are disenchanted with a prior hearing or who contest their obligation to pay child support. Many of these litigants are unemployed or under-employed and some become obsessed with their court cases. Thompson and Reieron have referred to members of this group as “lawyer wannabes” who want to be treated by the court like lawyers but who often personally hold negative conceptions about lawyers and the profession in general.¹⁵

A third category of unrepresented litigants consists of what Thompson and Reieron describe as the “do-it-yourselfers.”¹⁶ Within this group are found those individuals who regard their case as being “simple.” Members of this group suggest that the lack of complexity justifies proceeding without formal legal assistance. According to Trussler, these people “... are intelligent, or sometimes just self-absorbed, who feel that they can do better than a lawyer.”¹⁷ In some instances these persons are effective in presenting their own cases to the court, but, in other instances, their lack of legal training and experience is detrimental.¹⁸ Perhaps, in the criminal court milieu, this category would largely be composed of defendants who believe that they are guilty of the “simple” offence and want to plead guilty and get the whole episode over with.

⁹ Thompson, Rollie D.A. and Lynn Reieron. “A Practising Lawyer’s Field Guide to the Self-Represented.” Canadian Family Law Quarterly, 19.3. 531.

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² *Ibid* 532.

¹³ *Ibid.*

¹⁴ Trussler 1.

¹⁵ Thompson, Rollie D.A. and Lynn Reieron. “A Practising Lawyer’s Field...” 532.

¹⁶ *Ibid.*

¹⁷ Trussler 1.

¹⁸ *Ibid.*

Dangerous or deluded people comprise the fourth, and perhaps smallest, category of unrepresented litigants.¹⁹ According to Thompson and Reiersen, members of this group have, at some point during the proceedings, crossed the line between “difficult” and “dangerous.”²⁰ Proceedings involving these litigants tend to be prolonged and are often treated carefully by both the court and by opposing counsel.²¹

A fifth category of unrepresented litigants consists of individuals who attach a negative stigma to lawyers or the legal profession in general.²² Some of these individuals subscribe to societal stereotypes of lawyers being “crooked” or “untrustworthy” despite having had no personal experience with them. Others simply contend that lawyers charge too much money for the services that they render. Many of these litigants, however, will have personally had a previous negative experience with a lawyer or know personally of someone who has. In one study conducted in Kingston, Ontario discussed by Langan in the *Queen’s Law Journal*, twenty-one percent of survey respondents reported having had a previous negative experience with a lawyer.²³ One respondent, for instance, recorded on the survey form: “When I had a lawyer argue the same points I put forth, the situation was totally different and I started to gain some ground in court. However, as has happened to me on about three different occasions, the lawyers then find new things to fight about or a different way to fight about the same things, all for the purpose of increasing your fees.”²⁴ Another respondent to the same survey submitted: “The requirement of a court order to simply alter incorrect information at the [Family Responsibility Office] is a waste of time and money. That the legal profession supports this situation as it stands is truly shameful and indicates dishonesty.”²⁵

A final category of unrepresented litigants may be comprised of persons who have become participants in the current trend against the utilization of professional services in general. It was suggested at one conference on unrepresented litigants hosted in the State of Florida in 2000 that American people are moving away from their dependence on professional services, including legal services.²⁶ By extension, it was suggested that this trend has and will continue to affect the rate of unrepresented litigants in family court if not in criminal courts. According to Trussler, this American phenomenon could be a precursor of what is to come in Canada but the current lack of empirical studies on the issue limits further speculation.²⁷

The effects of a growing number of unrepresented litigants in Canadian courtrooms have been felt by court administrators, the judiciary, crown prosecutors, counsel for opposing parties, and by unrepresented parties themselves. Family law

¹⁹ *Ibid.*

²⁰ Thompson, Rollie D.A. and Lynn Reiersen. “A Practising Lawyer’s Field...” 533.

²¹ Trussler 1.

²² Langan, Anne-Marie. “Threatening the Balance of the Scales of Justice: Unrepresented Litigants in the Family Courts of Ontario.” *Queen’s Law Journal*. Spring, 2005: 825 – 862. 836.

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ *Ibid* 837.

²⁶ *Ibid* 838.

²⁷ *Ibid.*

researchers have emphasized that the impact of an unrepresented litigant in a court hearing is felt by all role-players and affects virtually every phase and facet of court procedure. The scope of effects was, perhaps, best summarized by Howard Rubin:

Any person has a right to represent himself or herself (...) This basic right has created an ordeal in the courts arising from the statement, "I wish to represent myself." From this point on, the adversary system, upon which civil procedure rules are based is out of synchronization. The judge is faced with the task of balancing fundamental fairness and order in the proceedings. The pro se litigant must struggle with how to present his or her case. The opposing attorney must protect and advocate his or her client's interest, while meeting the legal obligation to bring the truth to the court's attention. Further, the party represented by counsel, having a right to demand vigorous representation, must cope with escalating legal costs because of numerous delays.²⁸

Similar comments could be addressed to the self-representation problem where judges and crown prosecutors have to be very careful in their interaction with such defendants.

IMPLICATIONS FOR THE OTHER COURT ROLE PLAYERS

The participation of an unrepresented litigant in a court proceeding, it has been suggested, presents Provincial Court Judges with four notable dilemmas or problems.²⁹ First, many judges struggle to determine what standards of procedure and conduct ought to be applied to unrepresented litigants.³⁰ While it is true that lawyers, having benefited from formal legal education, are to be expected to conform to a high standard of conduct, it is questionable as to whether unrepresented litigants, not having the benefit or experience of counsel, should be expected to conform to the same standard.³¹ This determination, it has been suggested, is especially difficult in the area of criminal law because, by default, the opposing side to the dispute, the Crown, is represented by legal counsel. The dilemma faced by judges was well-articulated by Langan:

...If the judge chooses to relax the rules of the court for the unrepresented litigant, this might create the appearance of bias (...) Whether or not a judge will be lenient in applying the rules of civil procedure may depend on the reason why the person is not represented. If the person has simply chosen not to hire a lawyer, the judge is less likely to be lenient than if the person is unrepresented because of lack of resources. Judges are most likely to take this into account when deciding questions such as whether to grant the unrepresented party an adjournment."³²

²⁸ *Ibid* 839.

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ *Ibid.*

³² *Ibid.*

A second dilemma created for judges by unrepresented litigants concerns to what degree a judge ought to attempt to educate the unrepresented party on such issues as the rules of criminal procedure, the rules of evidence, etc.³³ In many instances judges feel obligated to provide at least some information to unrepresented litigants as many litigants lack an understanding of the necessary rules and procedures. The problem, however, is that explaining legal rules and procedures to laypersons can require a significant amount of time and consequently prolongs court proceedings. According to Langan, the judge is therefore required to balance the unrepresented party's right to a fair trial with the represented party's right not to have exorbitant legal fees (or, in the criminal court milieu, not increasing the State's time and resources).³⁴

Some judges have further suggested that a lack of legal representation may undermine the integrity of the justice system.³⁵ Lawyers are regarded as having a central role in the legal process as they serve as the official liaisons between judges and litigants to ensure the protection of the integrity of the court process.³⁶ Lawyers, for instance, are charged with the task of explaining the rules of evidence to clients, outlining the sequence of events in the court process, assessing whether a particular motion ought to be brought forward, explaining the importance of the oath or affirmation to tell the truth while on the witness stand, etc. Unrepresented parties do not have the benefit of a liaison to explain these and other issues and due to the fact that unrepresented litigants are not, by definition, officers of the court, judges may not rely on them in the way that they rely on lawyers to protect the integrity of the court and court processes.³⁷ Some judges have further suggested that unrepresented litigants further compromise the integrity of the justice system because they present the court with "insufficient and improperly presented documents and evidence upon which to make informed decisions."³⁸

A third problem created for judges by unrepresented litigants concerns the issues that are brought into the court room.³⁹ Litigants represented by legal counsel usually appear in front of a judge with well-defined, narrowed issues of a legal nature for the purpose of receiving a determination at law. These individuals have usually been briefed concerning how they should behave in court, what they are permitted to say and what they are not permitted to say and with the general rules of evidence. This is not always the case, however, with unrepresented litigants. Many judges complain that unrepresented litigants appear in court with issues that extend well-beyond the legal domain. A study conducted for the Toronto Region Courts, for instance, found that "Judges' functions have undergone changes as they appear to be asked to assume the

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ *Ibid* 840.

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ Toronto Region Family Courts Committee. Report of the Working Group on Unrepresented Litigants. Toronto: March 1997. 11-18.

³⁹ *Ibid.*

inappropriate roles of intake worker, interviewer, lawyer and social worker.”⁴⁰ This submission was supported by one family court judge cited by Langan: “So little of our work involves genuine legal issues to be truly adjudicated. At our level in family court we are a dumping ground for massive social and economic issues (...) I feel that I am more a social worker than a judge.”⁴¹

The problems created by unrepresented litigants also detrimentally affect the opposing side to the dispute (the Crown Attorney) and the victims and witnesses associated with the alleged act in question. The most obvious problem created for the Crown and those with associated interests is that court proceedings are often prolonged and costs to the state, to witnesses, etc. are, in consequence, elevated. In most instances, unrepresented litigants are, as above suggested, uneducated in and unfamiliar with the rules of Provincial Court and court procedures. In consequence, many Provincial Court judges spend a significant amount of time acquainting the lay litigant with these rules and procedures. Further, many unrepresented litigants delay the process because of their inability to complete required paperwork and file documents. According to the Toronto Courts Committee, unrepresented litigants increase the time spent by Crown Attorneys on cases by “waiting for hours while the unrepresented party sees duty counsel [and] taking more time to obtain necessary information such as financial disclosure.”⁴²

A second often-cited problem created by unrepresented litigants for opposing counsel relates to issues of conflict of interest. As discussed by Langan, unrepresented litigants often turn to the Crown Attorney for free legal information and advice.⁴³ In some situations, specific questions are brought forward but in other instances queries involve simple procedural issues. Prosecutors and Crown staff often struggle with these questions from adverse parties due to the fact that they are prohibited under conflict of interest rules from formally advising the accused.⁴⁴ At the same time, though, the rules of conduct further require that lawyers treat adverse litigants in the same way that they would treat adverse parties.⁴⁵ Thus, many lawyers involved in proceedings with unrepresented litigants may experience difficulty in achieving a proper balance between these two requirements.⁴⁶

Problems suffered by the individuals who appear at court without legal representation are numerous and not easily categorized. Review of the literature, however, does suggest that common complaints put forward by unrepresented litigants concern unfairness created by the fact that they do not understand legal rules and procedures, potential prejudicial effects created by their lack of knowledge of judicial remedies and prolonged proceedings because of their lack of knowledge. In one study conducted in Kingston, Ontario the most common problems reported by unrepresented litigants concerned: “difficulty understanding and filling out court forms, knowing and

⁴⁰ Toronto Region Family Courts Committee ... 11-18.

⁴¹ Langan. 840.

⁴² Toronto Region Family Courts Committee... 11-18.

⁴³ Langan. 842.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

understanding court procedures, talking to and negotiating with judges and lawyers and knowing their legal rights.”⁴⁷ A recent study conducted by the American Bar Association reported that many unrepresented litigants were unaware of the fact that they were missing essential information about their case. The problems suffered by unrepresented litigants in Canadian criminal courts were succinctly summarized by one senior researcher for the Federal Department of Justice as follows: “... [S]elf-representing accused are unsure about the charges against them and the possible consequences, are completely ignorant about the court process, do not know when or how to make arguments, talk too long and get off the point when they do speak in court.”⁴⁸

Finally, the increase of unrepresented litigants has had profound effects on the general operation of criminal courts in Canada and on the work performed by court officers and staff. As suggested by the Toronto Committee, the unrepresented litigant problem has complicated case management and has caused it to work “... at a significantly less satisfactory level of efficiency where litigants are not represented by counsel.” In addition, court procedures and practices have had to evolve to take into account the need for increased security measures. Furthermore, some have suggested that the increased number of unrepresented litigants has resulted in a general decline in respect for the courts as unrepresented litigants become frustrated with their inability to understand the legal process. The macro-level effects of the unrepresented litigant problem were, perhaps, best summarized in a submission by the Ontario Judges’ Association in 1997 to the Ontario Legal Aid Review:

There are undoubted costs to the justice system resulting from the withdrawal of legal aid. There are more adjournments and longer court dockets. Charges which might have been withdrawn proceed. Trials take longer. More witnesses are required. Guilty pleas take longer. People who might have been fined or placed on probation go to jail. Delays and backlogging increase.

When the justice system experiences these kinds of problems, the public is affected as well as the accused. In cases where the delay extends beyond what is constitutionally reasonable, serious charges will be stayed. Witnesses are inconvenienced by repeated attendances at court, when their attendance could have been avoided by agreement between Crown and defence counsel. In some cases an unrepresented accused may be in a position of cross-examining his spouse or child.⁴⁹

The Jurisprudential History of Duty Counsel Systems

⁴⁷ *Ibid* 843.

⁴⁸ Currie, Ab. *A burden on the Court? Self-Representing Accused in Canadian Criminal Courts.* Ottawa: Department of Justice Canada, Research and Statistics Division, 2005. 1.

⁴⁹ Brief submitted to the Ontario Legal Aid Review by the Ontario Judges’ Association (1997). 35-26.

Review of Canadian jurisprudence, the evolution of Canadian constitutional law and Government policy development evidences the recent attention afforded to the problem of unrepresented litigants in Canadian courts. Over the course of the past decade, much progress has been made in attempting to further advance and accord constitutional standing to the principle of fairness in the operation of criminal law processes. In recent years, important steps have been taken to help ensure that the principle of fairness is protected even in instances where criminal accused appear before the Court without legal representation. The introduction and popularization of duty counsel systems has represented one such scheme aimed at promoting the realization the fairness principle.

The Canadian legal system operates using the adversarial model of dispute resolution. Traced back historically to the medieval mode of trial by conduct,⁵⁰ the adversary system pits one party against another party or parties and relies on those parties to present evidence using which an impartial decision maker reaches a determination of the legal issues.⁵¹ The decision maker often plays a passive role in the process and often lacks specific information about the case beyond that presented in court by the parties to the dispute. The adversarial system is often contrasted with the inquisitorial system employed in some European states in which the judge, or a group of judges, instead of the parties to the litigation, play(s) an active fact-finding role in investigating the case before the court.

The proper operation of Canada's adversarial system is premised on a presumption that the two sides to the legal dispute, in the criminal context the accused and the Crown, are on a relatively level playing field.⁵² In an ideal world, each accused would have access to the legal information, advice and resources necessary to sufficiently prepare a defence to the Crown's case. In many instances, however, this is not the case as litigants often have access to insufficient legal resources which affect their ability to properly respond to criminal charges. The situation created when such circumstances arise was well articulated by the New Brunswick Court of Appeal in *New Brunswick (Minister of Health) v. G.(J.)*:

The procedure here is founded on the adversary system ... it is based on the premise that the truth will emerge from the contest between the two adversaries where each presents its case before an impartial tribunal. Each side will do its best to establish its own case and to destroy the opponent's case. Out of this conflict, truth and justice will surface. Where, however, in fairness and in the circumstances of the case, one of the parties is incapable of self-representation, confidence in the system is threatened. The adversaries must be equal or relatively equal before

⁵⁰ History of the Adversarial System. Homepage. Wikipedia. Accessed: 7/02/06. Available at URL: <http://en.wikipedia.org/wiki/Adversarial_system#History_of_the_adversarial_process>

⁵¹ Carmichael, Kathy. New Directions: Divorce and Administrative Law. Homepage. Canadian Forum on Civil Justice. Accessed: 6/09/06. Available at URL: <<http://www.cfcj-fcjc.org/full-text/divorce.htm>>

⁵² Buckley. 7.

the tribunal. If they are not, the procedure is in danger of degenerating into one of moral ambivalence.”⁵³

The achievement of fairness and the provision of legal representation to litigants have represented values championed by Canadian criminal law both before and after the introduction of the *Canadian Charter of Rights and Freedoms*. Prior to the introduction of the *Charter* in 1982, the common law afforded emphasis to the right to counsel mainly in circumstances where a lack of legal representation would detrimentally affect the litigant’s right to a ‘fair trial.’⁵⁴ As suggested by Buckley, prior to the introduction of the *Charter*, “The presence of defense counsel, and more particularly state-funded counsel, was generally not found to be an essential component of that right at common law.”⁵⁵ Instead, the right of an accused to state-funded counsel was assessed on a case-by-case basis. It was not until 1976 that the Supreme Court of Canada, in *R v. Barette*, attempted to define the specific circumstances in which an accused should be afforded a right to legal counsel. In that case, the Court held that an accused has a right to legal counsel where “... the case against the accused is such that the accused cannot defend himself without testifying” and “... where an offence is serious enough to warrant a sentence of six months in jail.”⁵⁶ The circumstances in which an accused ought to be appointed state-funded legal counsel were similarly explored by the British Columbia Court of Appeal in the case of *Re Ewing*. In that case, Seaton J. stated:

I reject the contention that it is always necessary to appoint counsel but it does not follow that it is never necessary to appoint counsel. The trial judge is bound to see that there is a fair trial. Because of the complexity of the trial, the accused’s lack of competence or other circumstances, a trial judge might conclude that defence counsel was essential for a fair trial. In the past when a trial judge thought he could not secure a fair trial without counsel for the defence, he approached the Attorney General or the Bar. Under similar circumstances today he might contact the legal aid society. If a trial judge concluded that he could not conduct a fair trial without defence counsel and his requests for defence counsel were refused he might be obliged to stop the proceedings until the difficulties have been overcome. Our law would not require him to continue a trial that could not be conducted properly.⁵⁷

The right of an accused to legal counsel upon arrest or detainment was entrenched by Parliament in the *Canadian Charter of Rights and Freedoms* in 1982. It has been

⁵³ *New Brunswick (Minister of Health) and Community Services v. G. (J.)* (1997), 187 N.B.R. (2d) 81 (N.B.C.A.).

⁵⁴ Buckley 7.

⁵⁵ *Ibid.*

⁵⁶ *R. v. Barette* (1976), 29 C.C.C. (2d) 189 (S.C.C.)

⁵⁷ *Re Ewing* (1974), 18 C.C.C. (2d) 356 at 365-66.

suggested that the current right to counsel is a product of sections 7, 10, 11 and 15(1) of the *Charter*. The section that most expressly addresses the right to legal representation is section 10 (b) which provides:

10. Everyone has the right on arrest or detention

b) to retain and instruct counsel without delay and to be informed of that right;⁵⁸

The right to retain and instruct counsel without delay and to be informed of that right, as provided by s. 10(b) of the *Charter*, was explored in the context of duty counsel systems by the Supreme Court of Canada in the landmark decision of *R. v. Brydges*.⁵⁹ On the facts of that case the accused was arrested in Manitoba for a murder that took place in Edmonton, Alberta. At the time of his arrest, the accused was advised by the arresting officer of his right to retain and instruct counsel at which time the accused stated to police that he could not afford legal advice. The accused was subsequently interrogated by police after which he asked one of the interrogating officers whether he was entitled to legal aid services. The police officer stated that he was from an extra-territorial jurisdiction and that he was consequently unfamiliar with Manitoba's legal aid eligibility requirements. Questioning of the accused continued until such a time that the accused demanded legal counsel. The trial judge, at first instance, excluded the statements made by the accused to police during interrogation, holding that the right of the accused to legal counsel had been violated, contrary to s. 10(b) of the *Charter*. The Court of Appeal over-turned the decision of the trial Judge, holding that there was no restriction on the appellant's right to counsel and that there was no causal connection between the alleged violation and the evidence obtained.

On further appeal, the Supreme Court of Canada upheld the decision of the trial judge, holding that the accused's right to legal counsel includes the right to be informed of any available legal aid. The court held that the police, when cautioning an accused, are obliged to advise the accused of not only the right to contact and retain counsel but also of the existence and availability of systems of duty counsel and legal aid in the relevant jurisdiction. This duty was discussed by Lamer J. for the majority of the Court:

On the specific facts of this case, the Court is faced with the following question: when an accused expresses a concern that his inability to afford a lawyer is an impediment to the exercise of the right to counsel, is there a duty on the police to inform him of the existence of duty counsel and the ability to apply for Legal Aid? In my view there is. I say this because imposing this duty on the police in these circumstances is consistent with the purpose underlying the right to retain and instruct counsel. A detainee is advised of the right to retain and instruct counsel

⁵⁸ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c. 11, s. 10(b).

⁵⁹ *R v. Brydges*, [1990] 1 S.C.R. 190.

without delay because it is upon arrest or detention that an accused is in immediate need of legal advice. As I stated in *Manninen*, supra, at p. 1243, one of the main functions of counsel at this early stage of detention is to confirm the existence of the right to remain silent and to advise the detainee about how to exercise that right. It is not always the case that immediately upon detention an accused will be concerned about retaining the lawyer that will eventually represent him at a trial, if there is one. Rather, one of the important reasons for retaining legal advice without delay upon being detained is linked to the protection of the right against self-incrimination. This is precisely the reason that there is a duty on the police to cease questioning the detainee until he has had a reasonable opportunity to retain and instruct counsel.⁶⁰

The *ratio decidendi* of the *Brydges* case, therefore, is that any individual who has been arrested or detained has the right to be informed by the police of the availability of legal aid and duty counsel. More specifically, *Brydges* clarified the duty placed on police officers such that a police officer who arrests or detains an accused must not only inform that individual of his or her right to obtain legal representation but also: (a) advise the accused of the availability of legal aid and duty counsel if it is available and how to access those services; (b) provide the accused with a reasonable opportunity to contact duty counsel or his or her own lawyer and (c) cease questioning the accused until he or she has had a reasonable opportunity to obtain legal advice.⁶¹

The duty right to retain and instruct counsel without delay, the right to be informed of that right and the corresponding duty placed upon state agents was subsequently explored by the Supreme Court of Canada in six post-*Brydges* cases: *Bartle*, *Harper*, *Pozniak*, *Cobham*, *Matheson* and *Prosper*. In the 1994 impaired driving case of *Bartle*⁶², the accused, upon being detained, was advised of his right to retain and instruct counsel, was advised that he had the right to free legal advice from a legal aid lawyer and that if charged, he would have the right to apply for legal aid assistance. The police, however, neglected to inform the accused of the availability of twenty-four hour a day legal advice through a toll-free telephone number. On the facts, the Supreme Court held that the police officer's failure to provide the information about the availability of the toll-free service constituted a serious breach of s. 10(b) of the *Charter* and held that the evidence collected (an incriminating statement and the results of a breathalyzer test) were to be excluded, pursuant to s. 24(2) of the *Charter*. Chief Justice Lamer held that:

Because the purpose of the right to counsel under s. 10(b) is about providing detainees with meaningful choices, it follows that a detainee should be fully advised of available services before being expected to

⁶⁰ *Ibid.*

⁶¹ Verdun-Jones, Simon. A Review of A Review of Brydges Duty Counsel Services in Canada. Ottawa: Department of Justice Canada, 2003. 4.

⁶² *R. v. Bartle* [1994], S.C.J. No. 74

assert that right, particularly given that subsequent duties on the state are not triggered unless and until a detainee expresses a desire to contact counsel. The purpose of the right to counsel would be defeated if police were only required to advise detainees of the existence and availability of Legal Aid and duty counsel after some triggering assertion of the right by the detainee.⁶³

The decision in *Bartle* was upheld by the Supreme Court of Canada in the decisions of *Harper* and in *Pozniak*, both of which were factually similar to *Bartle*. In the case of *Harper*⁶⁴, the accused was advised by police of his right to retain and instruct legal counsel without delay and was further advised that if he could not afford a lawyer a legal aid service would be made available to him. The police, however, like in *Bartle*, failed to inform the accused of the existence of a twenty-four hour a day on-call service that was available to litigants through Legal Aid Manitoba. The Court held that this oversight by police constituted a violation of the accused's section 10(b) right.

In *Pozniak*⁶⁵, the accused had been charged at 4:00 am with impaired driving and was subjected to a breathalyzer test. The police advised the accused, upon arrest, of his right to free legal advice from a legal aid lawyer but did not inform the accused of the fact that there was a twenty-four hour a day phone number available to litigants in the Province of Ontario. Following *Harper*, the Supreme Court of Canada held that the accused's section 10(b) right was violated and therefore excluded the results of the breathalyzer test.

In the 1994 case of *R. v. Cobham*⁶⁶ the Supreme Court of Canada, taking into account the fact that the level of duty counsel service available varies from jurisdiction to jurisdiction in Canada, addressed and clarified the issue of how precise the content of the information provided by police to an accused must be. On the facts, Cobham was charged shortly after midnight with impaired driving and with refusing to provide a breath sample. In the jurisdiction where Cobham was arrested a twenty-four hour a day toll free service was unavailable. Despite the unavailability of a twenty-four legal aid service, however, the police force, like other police forces in the Province, maintained a list of local private attorneys who were willing to receive after-hours phone calls for legal advice. The Supreme Court held that because the police failed to inform the accused of the existence and availability of the scheme a section 10(b) violation had been made out. In the words of Lamer J., "... a detainee is entitled under the information component of s. 10(b) of the *Charter* to be advised of whatever system for free and immediate, preliminary legal advice exists in the jurisdiction, if indeed one exists, and of how such advice can be accessed."⁶⁷

⁶³ *Ibid.*

⁶⁴ *R. v. Harper*, [1994] 3 S.C.R. 343.

⁶⁵ *R. v. Pozniak*, [1994] 3 S.C.R. 310.

⁶⁶ *R. v. Cobham*, [1994] 3 S.C.R. 360.

⁶⁷ *Ibid.*

The issue of whether provinces are charged with a constitutional duty to provide *Brydges*-style duty counsel services was considered in the cases of *Matheson* and *Prosper*. In *Matheson*⁶⁸, the accused was charged at 1:00 am with impaired driving and with refusing to provide a breath sample. He was advised by police of his right to counsel and of the availability of legal aid. At the time of the alleged offence, however, the Province of Prince Edward Island did not offer *Brydges* duty counsel services. The Court held that section 10(b) of the *Charter* does not "... impose a positive obligation on governments to provide a system of *Brydges* duty counsel or likewise afford all detainees a corresponding right to free, preliminary legal advice 24 hours a day."⁶⁹ Lamer J. stated that because there was no twenty four-hour on call duty counsel available in the jurisdiction, it was neither necessary nor appropriate for the police to advise the accused about a right to duty counsel.

In *Prosper*⁷⁰, two Halifax police officers observed an accused operating a motor vehicle erratically. Following a chase on foot, the accused was arrested and charged under the *Criminal Code of Canada* with car theft and impaired driving. The accused was advised of his right to counsel prior to being subjected to a breathalyzer test and was informed that he had the right to apply for legal aid. At the time of the alleged offence, however, there was available in Halifax no duty counsel system which could provide immediate free legal advice. Following *Matheson*, the Supreme Court of Canada held that section 10(b) of the *Charter* does not impose a constitutional duty on governments to provide free and immediate preliminary legal services upon request. In the words of Lamer J.:

... it is clear that s. 10(b) of the Charter does not, in express terms, constitutionalize the right to free and immediate legal advice upon detention. The right to retain and instruct counsel and to be informed of that right, or in French the right to "l'assistance d'un avocat et d'être informé de ce droit" is simply not the same thing as a universal right to free, 24-hour preliminary legal advice. Moreover, there is evidence which shows that the framers of the Charter consciously chose not to constitutionalize a right to state-funded counsel under s. 10 of the Charter.⁷¹

The *Prosper* case has further been identified as being significant because the Supreme Court of Canada clarified the specific nature of "*Brydges* services" and differentiated *Brydges* services from traditional (full) legal aid representation. The court emphasized the fact that *Brydges* services refer to the provision of temporary, free access to duty counsel or, in the alternative, the opportunity for an accused to obtain "instant"

⁶⁸ *R. v. Matheson*, [1994] S.C.J. No. 73.

⁶⁹ *Ibid.*

⁷⁰ *R. v. Prosper*, [1994] 3 S.C.R. 236.

⁷¹ *Ibid.*

legal information through a toll-free telephone service.⁷² Duty counsel services were contrasted from legal aid services by Lamer J. as follows:

The term "duty counsel" was used to refer to a specific subset of legal services which are provided to persons who have been arrested or detained (i.e., "detainees"). Duty counsel in this context refers to the provision of immediate and free preliminary legal advice by qualified personnel, whether staff lawyers from Legal Aid offices, lawyers from the private bar, lawyers specifically hired for the purpose of fielding calls from detainees, or otherwise. Since the release of Brydges, I note that this service has been called "Brydges duty counsel" to distinguish it from other forms of summary legal advice and assistance which are provided to accused persons, often irrespective of their means, and which typically include plea advice, arranging adjournments, speaking to bail and sentence and negotiating dispositions with the Crown.⁷³

Finally, the relationship between section 10(b) and sections 7 and 11(d) of the Charter in the context of duty counsel services and legal aid was considered by the Ontario Court of Appeal in the case of *R v. Rowbotham*⁷⁴, a case involving ten accused charged with conspiring to import and traffic hashish and marihuana. In that case, Martin, Cory and Grange JJ.A. differentiated between the right to have counsel provided and the right to have counsel provided at the expense of the state:

The right to retain counsel, constitutionally secured by s. 10(b) of the Charter, and the right to have counsel provided at the expense of the state are not the same thing. The Charter does not in terms constitutionalize the right of an indigent accused to be provided with funded counsel. At the advent of the Charter, legal aid systems were in force in the provinces, possessing the administrative machinery and trained personnel for determining whether an applicant for legal assistance lacked the means to pay counsel. In our opinion, those who framed the Charter did not expressly constitutionalize the right of an indigent accused to be provided with counsel, because they considered that, generally speaking, the provincial legal aid systems were adequate to provide counsel for persons charged with serious crimes who lacked the means to employ counsel. However, in cases not falling within provincial legal aid plans, ss. 7 and 11(d) of the Charter, which guarantee an accused a fair trial in accordance with the principles of fundamental justice, require funded counsel to be provided if the accused wishes counsel, but cannot pay a lawyer, and representation of the accused by counsel is essential to a fair trial.⁷⁵

⁷² Verdun-Jones 7.

⁷³ *R. v. Prosper*, [1994] 3 S.C.R. 236.

⁷⁴ *R. v. Robotham*, [1999] O.J. No. 671.

⁷⁵ *Ibid.*

Following the decision in *Rowbotham*, accused in Canada who, for whatever reason, are ineligible for legal aid assistance as per the requirements set out in a particular jurisdiction are now permitted to apply to the court for a remedy. In *Rowbotham*, the unanimous court held that while the findings of legal aid commissions concerning an accused's eligibility for legal aid assistance must be treated with the greatest of respect, there may exist some circumstances (for instance, in long or complicated proceedings) in which it might be appropriate for the trial judge to stay the proceedings until counsel for the accused may be obtained. The factors to be considered in making such a determination were subsequently set out by the Alberta Court of Appeal in *R. v. Rain* and include: the financial background of the accused, the accused's educational background, what the accused knows of the charge, what particulars the accused has been able to obtain from the Crown, what efforts the accused has made to obtain legal aid and with what result, the reasons provided by the legal aid authorities, whether the accused has any other access to a lawyer or agent capable of providing effective defense to the charge and anything else which would help the accused make the argument that he or she cannot fairly meet the charge without counsel.⁷⁶

The Nature of Duty Counsel and Service Delivery Models

With the increase in unrepresented defendants or litigants appearing before Provincial Court judges in Nova Scotia and elsewhere, many jurisdictions have had no choice but to examine ways through which the problem may be addressed. Among other options, governments and Provincial Court officials have considered the introduction and expansion of self-help centers for unrepresented litigants, amendments to legal aid financial eligibility requirements, dial-a-law telephone legal advice services as well as the provision and publication of legal information on governmental and court websites. One further option which has been afforded increased emphasis in recent years has been the duty counsel model through which summary legal advice is provided to unrepresented litigants.

Due to the fact that duty counsel systems vary across the country in structure and in services offered, it is not possible to provide a simple or universal definition of the term. Despite this fact, however, most duty counsel systems exhibit commonalities in purpose and in the basic level of services provided. In general, duty counsel systems, like the one currently employed in the Provincial Court of Nova Scotia are developed and implemented for the purpose of providing free, initial legal advice to persons who are in custody or who would otherwise attend court without advice and representation. In some jurisdictions, like in Nova Scotia, the service is available to all criminal court defendants whereas in other jurisdictions potential users are first subjected to a financial means test. Duty counsel offices are often located within or in close proximity to criminal courthouses. Litigants without representation are usually able to book appointments (and

⁷⁶ *R. v. Rain*, [1998] A.J. No. 1059.

in some instances simply present in person) to receive advice about legal issues pertaining to their case before the court, court procedures and processes, assistance with the completion of obligatory court documents as well as information about referrals to other legal and non-legal persons and agencies.

The duty counsel model employed in Nova Scotia Provincial Courts, based on the British model, is similar in form to systems that currently operate in Australia and New Zealand.⁷⁷ In Nova Scotia, like in many other extra-territorial jurisdictions, the duty counsel system consists of two separate schemes that operate in parallel. One scheme, referred to in Britain as the “police station duty solicitor” and in Nova Scotia as the “cells duty counsel” permits an accused who has been arrested or detained by police to consult with a lawyer in-person or via telephone (or both) while in custody.⁷⁸ In most instances, the first contact by the accused to the cells duty counsel occurs when the police begin to interview the accused in relation to his or her alleged involvement in the commission of a crime.⁷⁹

The second duty counsel scheme is referred to in Britain and in Canada as the “court duty counsel.”⁸⁰ The court duty counsel system is intended to serve litigants proceeding through the court process without representation but who are not in police custody. The first contact between the accused and the court duty counsel often occurs at the arraignment or plea stage of the court process but sometimes later. Often times, the presiding Judge will make the unrepresented litigant aware of the existence and availability of the court duty counsel service in the early phases of the court process and many judges expressly encourage defendants to seek free legal advice from the duty counsel.

Duty counsel systems have been used in Canada and other jurisdictions to assist unrepresented clients in both the civil and criminal law contexts. While it is true that the usage of duty counsel systems in the civil context, especially in family courts, has been expanded in recent years, it remains an undeniable fact that the majority of duty counsel systems currently in operation serve primarily a clientele facing charges in criminal court.. The popularity of duty counsel systems in criminal law, it has been suggested, is a function of the inherent compatibility between criminal law and the provision of summary legal advice. Thompson (personal interview, 2006) has suggested that duty counsel systems have been very successful in the criminal law context because in criminal law the roles of the various players and the rules concerning unrepresented litigants are better defined and more straight-forward than in other areas of law. According to Professor Thompson:

There is a fundamental difference between the criminal and civil law realms in that in criminal law the role of the duty counsel is clear

⁷⁷ Duty Solicitor. Homepage. Wikipedia Encyclopedia. Accessed: 7/26/06. Available at URL: <http://en.wikipedia.org/wiki/Duty_Solicitor>

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*

whereas in family law, for instance, the role is often very poorly defined. The role of duty counsel in the criminal context is clear because of the short term-nature of representation in criminal cases. In criminal law, the roles of the stakeholders are clear and the rules concerning who can and cannot get a lawyer are clear. Provincial Court judges, for instance, are well aware of the ramifications associated with a person not having counsel – he or she can simply say that if counsel is not provided the case will not go ahead. The bottom line is that the hard edge of criminal law makes it very compatible with the duty counsel system.⁸¹

In some respects, the purpose of criminal duty counsel systems may be regarded as being analogous to the ‘triage’ system employed in emergency medicine in North America.⁸² In medicine, triage refers to “the process of sorting people based on their need for immediate medical treatment as compared to their chance of benefiting from such care.”⁸³ Under the triage system, nurses and other healthcare professions sort patients that present at emergency centers based on the type and seriousness of their complaint, the probability of survival and on the establishment of priority for treatment to ensure that the care provided is of the greatest benefit to the largest number of patients.⁸⁴ As suggested by Gordon MacDonald and by others, the duty counsel system in purpose and effect may be described as a “quasi system of legal triage.”⁸⁵ According to this analogy, the duty counsel’s role is similar to that of an emergency room nurse. In a fashion similar to that of the emergency room nurse, the duty counsel is charged with the responsibility of assessing each client’s situation based on his or her own factual circumstances so that he or she may objectively assess what he or she needs in terms of assistance. Once the needs assessment is completed the client is classified based on his or her individual needs. According to MacDonald, duty counsels tend to classify clients into one of three categories. In one category are placed clients who require some form of further assistance such as counseling, mediation, or private counsel.⁸⁶ The second category of clients consists of persons who either require – or are entitled only to – limited summary advice from the duty counsel or an adjournment of proceedings.⁸⁷ In the third category are placed those litigants who require the maximum level of services that may be provided by the duty counsel and the duty counsel system.⁸⁸ In the words of MacDonald:

From the duty counsel and advice lawyer’s perspective, this analogy still holds. As is the case with hospital emergency room teams, duty

⁸¹ Thompson, Rollie. Personal Interview. 28 Feb. 2006.

⁸² MacDonald, Gord and Helena Birt. “Duty Counsel and the Self-Represented Litigant.” Canadian Family Law Quarterly. 19.3 (2001). (QL). 2.

⁸³ *Ibid.*

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*

counsel often work in circumstances in which great numbers of people require (and demand) service in limited time frames. In the medical field, it is unusual to find a heart or brain specialist doing general emergency room work (...) Duty counsel must be able to think quickly and have a broad range of knowledge to call upon on short notice. The main strength of a good duty counsel lawyer is the ability to assess situations quickly and to make the best possible decision.⁸⁹

While it is true that duty counsel systems vary in form and services provided, the majority of duty counsel systems currently employed in North America are of one of two varieties – *per diem* (roster) or staff. The defining characteristic that differentiates the two models is that the staff model provides advice to unrepresented litigants using government-paid (often legal aid) lawyers whereas the *per diem* model contracts the provision of the service out to members of the private bar. Both systems have been identified as possessing their own strengths and weaknesses in their approach to the delivery of legal information and advice. The most often cited advantage of the *per diem* or roster model of service delivery concerns its inherent flexibility.⁹⁰ As submitted by MacDonald and echoed by other academics and practitioners, *per diem* duty counsel systems are attractive in that they tend to be responsive to the needs and demands of the court system.⁹¹ Due to the fact that there are no full-time government-paid lawyers, the number of lawyers assigned can be easily and quickly altered based on the demand for the service at any given time.⁹² The ability to alter supply in reaction to demand, it has been suggested, presumably directly promotes cost efficiency unlike in the staff model where the cost is constant regardless of the actual demand for the service. A further advantage cited by proponents of the *per diem* model is that it takes advantage of the skills and experiences of a large cohort of lawyers with varying skills and experiences.⁹³ Critics of the *per diem* model, on the other hand, submit that management of the system's infrastructure and administrative intervention is more difficult than in staff model systems by virtue of the larger number of lawyers involved in the system.⁹⁴ Critics further suggest that *per diem* models often experience problems related to a lack of continuity of services. Another weakness often cited concerning the *per diem* model is that such systems are vulnerable to variations in the ability and commitment of the private bar to deliver a consistent and high quality service.⁹⁵ Finally, critics of the *per diem* service delivery model sometimes point to potential ethical concerns related to the practice referred to as “bottom feeding” whereby some roster duty counsel “take advantage” of their position to solicit business for their private practice of law. Here it may be noted that different jurisdictions even with Canada have different policies with respect to *per diem* or roster DCs being able to seek or carry out private business with a client in the matter at hand. Some studies (Hann, 2002, Clairmont, 2004) have found that

⁸⁹ *Ibid.*

⁹⁰ *Ibid.* 2.

⁹¹ *Ibid.*

⁹² *Ibid.*

⁹³ *Ibid.*

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*

duty counsel lawyers, whether per diem roster or full-time staff, tend to be the less experienced lawyers and move on when their circumstances permit.

Proponents of the staff model of service delivery often point to the fact that staff lawyers promote and ensure continuity and equality of legal services. Under the staff model, each duty counsel office is usually staffed with one (or in some jurisdictions, a number of) lawyers who deal with all aspects of the summary advice provided to all litigants. According to MacDonald, this is advantageous insofar as it promotes efficiency because a single litigant is usually not required to recite the same story to several lawyers.⁹⁶ In addition, it has been suggested that continuity helps to ensure that the legal advice provided is both of high and similar quality amongst litigants.⁹⁷ Finally, proponents of the staff system point to the model's ability to demonstrate "some influence on the court system itself."⁹⁸ Under this heading, proponents submit that the constant presence of staff lawyers contributes to the functionality of the court's daily routine. In the words of MacDonald: "... the noticeable presence of staff duty counsel is a statement of accountability and commitment toward improvement of service for litigants and the system of justice"⁹⁹ Critics of staff duty counsel systems, on the other hand, often submit that the quality of service provided to litigants under the staff model may be inferior to service provided under the *per diem* model based on the limited availability of resources.¹⁰⁰ Some suggest that staff duty counsel, unlike private lawyers under the *per diem* model, are not independent of the justice system and some go as far as to describe them as an extension of the arm of the court.¹⁰¹ To support this submission, some critics point to Canadian research that shows that staff lawyers tend to plead clients guilty more often than private bar lawyers.¹⁰² Finally, critics often cite the increased types and incidences of conflict problems that arise in staff systems as compared to the *per diem* models. This problem – largely, though not entirely, found in the family court system - was well summarized by MacDonald who stated:

There is no simple answer for conflicts in a staff model. How can two staff from the same office represent both sides of a case? Unless the concept of conflict is re-defined or there is a level of acceptance for professional distance between two staff, this model is limited in the number of litigants it can serve."¹⁰³

The specific role and function of a duty counsel lawyer in Canada is dependent on the model of service delivery employed in a given jurisdiction and the level of service provided. Generally speaking, Canadian criminal duty counsel lawyers serve three primary functions: to provide legal advice and legal information, to represent clients at

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*

¹⁰⁰ Currie, Ab. Legal Aid Delivery Models in Canada: Past Experience and Future Developments. Ottawa: Department of Justice Canada, Research and Statistics Division, 1994. 4.

¹⁰¹ *Ibid.* 5.

¹⁰² *Ibid.*

¹⁰³ MacDonald. 2.

court and to serve systemic roles. It is important to note, however, that not all duty counsel lawyers serve each of these three functions.

Concerning legal information and legal advice, criminal duty counsel often provide clients with advice concerning court procedures and processes, case management, the law, the need for counsel and, undoubtedly less often, the existence of external governmental and community support agencies. Duty counsel often explain to clients the importance of obtaining full representation if that is possible and often refer clients to the legal aid system or to private lawyers.¹⁰⁴ Many duty counsel assist clients in completing paperwork and with the filing of court documents and, in some jurisdictions, duty counsel are permitted to draft and prepare documents such as guideline support applications and answers, support variation motions, etc.¹⁰⁵

In many jurisdictions, such as in Halifax, duty counsel lawyers are scheduled to appear with clients at court proceedings. In jurisdictions where duty counsel attend court hearings they often attend with litigants for the purpose of requesting adjournments, they argue motions, enter a plea and speak at sentencing hearings. The level of representation and service provided by the duty counsel often varies based on the jurisdiction in question, the type of charge involved and the point in the process at which the unrepresented litigant retained the duty counsel.¹⁰⁶ Generally, duty counsel lawyers do not “do trials”.

Under the heading of “systemic functions” MacDonald has suggested duty counsel, in performing client-related functions, affect the performance of the aggregate judicial system.¹⁰⁷ Specifically, he suggests that duty counsel do so in four ways: by enhancing access to justice, by acting as social/behavioral filters, by promoting efficiency and by performing the role of a communication nexus.¹⁰⁸ On the issue of access to justice, it has been suggested that duty counsel systems, by providing summary legal advice about the issues arising in disputes and exploring with clients potential alternatives (e.g. in Nova Scotia, the adult diversion program), represents an effective and non-threatening means for unrepresented litigants to access justice.¹⁰⁹ On the social and behavior filter role, MacDonald points out that self-represented litigants often attend court with “unrealistic expectations” concerning what the court can do and concerning what outcomes are reasonable on the facts of the case.¹¹⁰ Duty counsel, suggests MacDonald, are helpful in that they provide unrepresented litigants with “a realistic assessment of their proposed course of action or argument. If unsuccessful in dissuading a party from pursuing a goal or process that is doomed from the outset, duty counsel and advice lawyers can prepare the person to face a result he or she might not have anticipated or have been willing to accept.”¹¹¹ On the issue of efficiency, some

¹⁰⁴ *Ibid.* 3.

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.* 4.

¹⁰⁷ *Ibid.* 5.

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*

academics have suggested that the duty counsel system is significant in that it moves matters along in court and reduces the number of adjournments which consequently often reduces the overall number of litigants in court and the amount of time required per case.¹¹² Finally, duty counsels serve as an important liaison between the litigant and court officials. In the words of MacDonald:

Duty counsel and advice lawyers also perform a role as communication switchboard relaying information between the court administration, the local legal aid office, and the private bar. This is particularly noticeable in areas where there are full-time duty counsels or where *per diem* duty counsels are available each day.¹¹³

A significant challenge faced by many duty counsels is the lack of information held by other court players about the duty counsel system and its role. Studies conducted in Ontario and in other jurisdictions report that most judges, for instance, receive little if any formal education or literature about the existence of the duty counsel system. Instead, what education and knowledge they do receive tends to be on an “ad hoc” basis from the duty counsel lawyer himself or herself or from litigants who reference the service in the court room.¹¹⁴ One of the most common misconceptions held by judges often concerns the scope of the duty counsel role.¹¹⁵ Some judges, it seems, are of the erroneous opinion that duty counsel are able to assist all litigants with all aspects of criminal law cases. In reality, however, some issues are either too complex to be handled by the duty counsel and other matters may fall outside of the services offered by legal aid. Further, many judges, according to the literature, are unaware of conflict of interest problems that sometimes arise. In fact, in the family division, some judges despite knowing that one party to the dispute already sought advice from the duty counsel nonetheless refer the adverse party to the duty counsel as well. Finally, in jurisdictions that employ financial means tests to determine litigant eligibility, many judges are unfamiliar with the requirements and erroneously heighten the expectations of clients who are ineligible for summary advice assistance.¹¹⁶

Members of the private bar also commonly hold erroneous views concerning the role of duty counsel. As discussed by MacDonald, this may be attributed to a traditional view which saw the role of duty counsel as simply assisting litigants to obtain legal representation (whether it be private or public) and to assist them in obtaining an adjournment to facilitate that.¹¹⁷ According to MacDonald, the traditional view held that “acting as a duty counsel lawyer meant that a lawyer would not perform services that a ‘real lawyer’ would.”¹¹⁸ The perpetuation of this view by some members of the private

¹¹² *Ibid.*

¹¹³ *Ibid* 6.

¹¹⁴ *Ibid* 7.

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid.*

bar, it may be suggested, has created a situation whereby the duty counsel system and duty counsel lawyers are afforded less legitimacy than they are perhaps entitled to expect.

Finally, unrepresented litigants themselves often lack sufficient knowledge about the duty counsel system. In many instances, litigants proceeding through the criminal court system are unaware of the existence of the service until it is expressly brought to their attention by a court officer. Once made aware of the service, many clients still do not fully comprehend the scope of the summary advice lawyer's role.¹¹⁹ Some defendants are of the erroneous assumption that, once engaged, the duty counsel lawyer will "take over" the file and follow it through the various phases of the court process.¹²⁰ Further, some clients in jurisdictions that provide advice but not representation nonetheless expect that the lawyer will attend at court hearings. At the other end of the spectrum, some clients simply regard the duty counsel "as another hurdle to leap over in the course of getting before a judge so that they can tell the judge 'what really happened.'"¹²¹ The bottom line is that the vast majority of clients presumably do not understand the limitations placed upon the role of the duty counsel without first being properly educated and informed.

¹¹⁹ *Ibid.*

¹²⁰ *Ibid.*

¹²¹ *Ibid.*

The 2004 Study: “The Unrepresented Defendant and the Unbundling of Legal Services”

In 2004 the Atlantic Institute of Criminology produced a report entitled “The Unrepresented Defendant and the Unbundling of Legal Services” for the Justice Subcommittee of the Nova Scotia Barristers’ Society.¹²² The study aimed at describing the crucial parameters of the unrepresented person situation in criminal court through a complex of research strategies that included analyses of secondary data, observation, one-on-one interviews with court role players and telephone interviews with unrepresented defendants. As in other studies, it was found that judges, crown prosecutors, NSLA and private counsel considered that the phenomenon was growing and causing major problems for all concerned, especially the defendants and the court process. Court role players throughout the province agreed that the problem was largely confined to HRM. It was found that approximately 35% of the defendants at final appearance were without legal counsel. The 2004 research identified the key offences where self-representation was common, namely criminal code motor vehicle offenses, possession of soft drugs, and domestic violence cases; minor theft cases also contributed many unrepresented defendants. The widespread explanation for defendants being unrepresented was the conventional one, namely that such people typically were ineligible for Legal Aid for reasons of income (and sometimes offence type) and could not afford private counsel. The recommendations for coming to grips with the unrepresented phenomenon were to either increase eligibility for Legal Aid or adopt some form of duty counsel program for adult “walk-in”, non-custody cases since in HRM, though not in Sydney, there was a well-regarded cells duty counsel program in effect.

One important focus of the study was to better appreciate the inconsistencies between expert (judges, crowns, academics and so on) views that being unrepresented has negative implications for the defendant and for the court process and the empirical patterns showing that unrepresented persons have been less likely to be convicted, to be jailed, to have fewer not more court appearances and so forth (Hann, et al 2002). The inconsistencies while reported in the literature were not adequately accounted for. The 2004 study used comprehensive court data (JEIN) and controlled conviction rates, for example, by the defendants’ age, offence type, number of charges, and repeat offender status. It was found that when these controls were implemented, conviction rates for unrepresented defendants were indeed usually higher than for Legal Aid represented defendants and much higher for those represented by private counsel. The data indicated strongly that Legal Aid representation was associated with higher rates of conviction then largely because, almost by definition, Legal Aid is directed at serious repeat offenders who generally have low earned income and would be more likely to be facing incarceration if convicted. Overall, the, the inconsistencies reported in the literature become much clearer. When the likelihood of charges being dropped or reduced and

¹²² Clairmont, Don. The Unrepresented Defendant and the Unbundling of Legal Services. Halifax: Atlantic Institute of Criminology, 2004.

sentences being ameliorated (e.g., fine surcharge being waived) are also taken into account, it is clear that unrepresented defendants do not fare well.

The 2004 research also focused on obtaining an adequate sample of unrepresented defendants in order to explore further why persons go unrepresented. Virtually all previous research accessed, including the nation-wide study by Hann and Associates (2002), provided expert views on why they do but did not interview the unrepresented persons themselves. The 2004 carried out extensive courthouse observation and also conducted over 100 telephone interviews with defendants (securing their cooperation for such interviews from contacting them at the courthouse). It was found that while these defendants also generally articulated the “can’t get legal aid and can’t afford private counsel” motif, many were employed and it was unclear whether their reluctance was a matter of choice; also, many among the unrepresented defendants considered that their case was straight-forward, that they were guilty and they wanted to plead and get it over with; a smaller percentage wanted the opportunity to explain in court the circumstances under which their offence occurred, sometimes explicitly acknowledging that their comments were not legally relevant.

During the final phase of the 2002-2004 study, it was announced by Nova Scotia Legal Aid that a full duty counsel system was being implemented under federal funding for two years for adult non-custody cases in the provincial criminal courts of Halifax and Dartmouth and a cells DC initiative in Sydney (for adults and youth). Based on the findings of the report, it was expected that the system would be well-received by criminal justice system officials of all stripes and by unrepresented accused. The twin initiatives in HRM and Sydney appeared to represent excellent targeting of scarce resources by NSLA. The announcement was also regarded as a politically astute initiative due to the fact that the non-custody initiative could be restricted to metropolitan Halifax without causing discontent elsewhere in the province and also, of course, because it avoided the perhaps more costly alternative of changing Nova Scotia Legal Aid eligibility requirements which, presumably, would have to have been province-wide. The introduction of the system, it was suggested, also placed Nova Scotia in the same ballpark as the leading provinces in Canada by in ensuring access to justice for ordinary citizens, and, as well, by perhaps streamlining court processes in criminal court.

Despite the fact that the introduction of a full duty counsel service for non-custodial cases represented a significant step forward in addressing the unrepresented accused problem, the 2004 report cautioned that it ought not to be regarded as a ‘gold bullet’ solution to the phenomenon. A number of significant criticisms have been raised in the literature concerning the quality of the duty counsel service; Hann et al, 2002 suggest the problem may have been transformed from “unrepresented” to “under-represented” given the quality and quantum of the counsel provided. There have also been suggestions in the literature that a duty counsel system too accommodative to pressures of court process might lead to the encouragement of premature guilty pleas. Other studies including the 2004 research being discussed here have suggested that a per diem or roster duty counsel system might lead to some ethical issues if, as is often the case. The duty counsel can seek private business from clients in the matter at hand. In

sum, then, the introduction of a full duty counsel system does not necessarily remedy all concerns relating to the quality of the access to justice provided, the potential unintended pressures for guilty pleas driven by such implicit forces as the desire to “make the system run”, uncertain outcomes regarding the continued prevalence of unrepresented accused at plea or beyond (even in a full duty counsel system, typically the duty counsel does not following the file beyond plea and sometimes not to plea) and the potential effect of the system’s introduction on the business of the Private Bar. It was suggested, therefore, that the introduction and operation of the system ought to continue to be monitored and assessed in order to address these concerns and other concerns that might arise in the future.

CONTEXT AND CHRONOLOGY OF THE NON-CELL DUTY COUNSEL PROJECT

In HRM duty counsel services were only available for custody cases until 2004. The non-cell or walk-in DC project began in Halifax provincial criminal court in October 2004 with the NSLA engaging a full-time, staff duty counsel who received modest orientation and “field training” by shadowing the veteran cell DC for a few weeks. A few weeks later a full-time staff DC was hired for “walk-in” legal counsel in the Dartmouth provincial criminal court and she spent a few weeks “learning the ropes” by shadowing her Halifax counterpart DC. The federal program which permitted these initiatives provided for a three year funding opportunity but was already a year and half spent before the NSLA initiative was launched. The federal funding was to run till the end of fiscal 2005-2006 but the duty counsel initiative was nevertheless renewed for 2006-2007. The Dartmouth staff DC resigned her position after some seven months and was replaced by another staff DC there who resigned after six weeks; thereafter a roster system for non-custody duty counsel was employed at the Dartmouth court and continues to this day. In Halifax the staff DC for non-custody cases continued in her position for roughly fifteen months, resigning at the end of January 2006. This DC service in Halifax is now also operating with a roster of per diem lawyers who are compensated on a half-day or full-day basis, the wages roughly equivalent to the salary of a junior NSLA staff lawyer if the person were to be engaged on an everyday, full-day basis.

Until 2004 the Sydney criminal court did not have a special duty counsel service for either custody or walk-in defendants. Legal counsel was provided to both categories of defendants by regular NSLA staff. In Sydney there still is no duty counsel service for non-cell or walk-in defendants, basically because the unrepresented defendant has been considered much less common a problem there than in HRM. However, a cell DC was hired full-time in June 2004 (also funded by the federal program noted above) while a DC for youth – basically doing cell cases and breaches under the deferred custody program – was seconded from the prosecution service in 2005-2006. Since April 2006 the position for youth custody cases has been re-defined as a part-time, per diem role but the full-time staff DC for adult cell cases remains so engaged.

At present NSLA offers a wide array of duty counsel programs. In addition to the above, there is (1) a day time duty counsel program whereby staff lawyers by telephone from the legal aid offices provide criminal law advice for persons under arrest or detention; (2) an after hours Brydges telephone duty counsel program whereby staff lawyers, who volunteer for the duty, provide a fee for service duty counsel; (3) adult custody duty counsel programs in Halifax (provided by a staff lawyer) and Dartmouth (contracted out to a law firm which coordinates the service); (4) a youth custody duty counsel program in Halifax for all HRM youth cases which is provided by an NSLA staff member. There are, also, full-time, staff duty counsel (or summary advice counsel) lawyers for the Family Division courts in Halifax and Sydney. The former, which has been funded from NSLA’s annual grant, began in October 2003, while the latter, launched in collaboration with (and funded by) the Nova Scotia Department of Justice,

began in April 2004. Both Family Division summary advice counsel initiatives have been well implemented and very much appreciated by the litigant clients and also by judges and other court officials (see Clairmont and Joyce, 2006).

The duties or services provided by the non-custody duty counsel service in Halifax and Dartmouth are as specified in the appended information sheet (Figure A) which was posted on the docket board and in the waiting room at the Halifax provincial court. Basic information about the program is also available on line at <http://www.legalinfo.org> and www.courts.ns.ca. The DC service targets defendants who are unrepresented and is available free of charge. Data were obtained from NSLA that detail the duty counsel's activities in the case of these two staff DCs in Halifax and Dartmouth. The Dartmouth DC's files for the period January to June 2005 (there was little recorded activity for this person after June 2005) indicate that roughly 30% of her clients were charged with common assault and another roughly 20% with "theft under" and possession of stolen property. Nine percent faced charges of criminal code motor vehicle offenses. Overall, then, these three categories of offenses, which the 2004 research showed were most likely to feature unrepresented defendants, accounted for 60% of the DC's clients' cases. The records indicate that almost 75% of the client contact occurred at the arraignment stage and about 15% of the contacts took place as the defendant was appearing for trial, sentencing or on an application. The data were quite unclear with respect to the precise frequencies of the DC service provided and complicated by the fact that multiple services could be provided to clients, but it was recorded that in some 43% of the contacts, summary legal advice was provided, in 14% of the contacts disclosure was obtained and reviewed with the client, in 13% of the contacts there was adjournment for the client to contact NSLA, trial dates were set in another 10% of the contacts, in 8% of the contacts arrangements were made for the client to be referred to adult diversion, and, in an uncertain number of cases but perhaps as many as 18%, it appears that the DC may have assisted when a guilty plea was entered and a sentence rendered. The full-time staff Dartmouth DC for non-custody cases averaged some 46 cases per month. Overall, the data suggest that the DC had a modest caseload, did indeed provide services to clients in the offence "fields" where unrepresented defendants tend to be common, and that the central services provided were summary legal advice and arranging adjournments for one reason or another. One suspects that there has been a considerable underreporting of "providing summary legal advice". It is interesting that obtaining and then discussing disclosure with clients happened so infrequently.

The records for the Halifax non-custody staff DC were complete for the full year 2005 (the DC resigned at the end of January 2006). The caseload for the Halifax DC was slightly greater than for her Dartmouth counterpart, ranging from lows of 29 and 22 "closed cases" in May and July to highs of 111 and 91 in June and November; the median monthly caseload was a comparable 47 cases. It may be noted that the Halifax DC had roughly 20% more cases in the last half of 2005 as in the first half (i.e., 379 to 312), testimony perhaps to the increasing penetration of the service among the unrepresented defendants. The offenses charged against the DC's clients followed closely the pattern described for the Dartmouth DC. Common assaults and "theft under" (including

possession) applied to almost 50% of the clients and here they were almost exactly equal in number. Eleven percent of the clients were facing criminal code motor vehicle charges and drug possession accounted for about 3%. So, fairly similar to the Dartmouth DC caseload, more than 60% of the clients were in offence fields where unrepresented clients were common. As in the case of Dartmouth, roughly 75% of the client contacts occurred at the arraignment stage; 20% of the contacts took place as the defendant was appearing for trial, sentencing or on an application. The frequency of the various services provided clients, when expressed in percentage terms, generally followed the Dartmouth pattern though more services were recorded. The Halifax DC files indicated that summary legal advice was given in 58% of the contacts while adjournments for trial dates or for contacting NSLA were assisted in over 25% of the cases. In Halifax the DC reported obtaining and discussing disclosure with clients in almost 20% of the cases. In 6% of the contacts, arrangements were made for the client to be referred to adult diversion, and, in an uncertain number of cases but perhaps as many as 18%, it appears that the DC may have assisted when a guilty plea was entered and a sentence rendered. Overall, the patterns in Halifax's DC activity were quite comparable to those of the Dartmouth DC save that there were more cases and more activities recorded across most items. In both milieus the main thrust of the DC's work was providing summary legal advice to unrepresented clients whose offenses were of the kind most characteristic of unrepresented defendants. Other significant activities including arranging adjournments so clients could contact NSLA, obtaining and discussing disclosure with clients, assisting in guilty pleas and at sentencing, and in arranging referrals to adult diversion. The workloads were modest in both settings but only in Halifax could a trend be clearly detected towards greater penetration of service among the pool of unrepresented defendants.

In considering the impact of the non-custody duty counsel initiative in HRM it is useful to determine its implication for representation at final appearance or sentencing. Table A indicates the distribution of types of legal representation at final appearance for the fiscal year 2005-2006. These data were derived from the provincial criminal court administration system, JEIN. It can be seen that there is no recorded category for duty counsel but interviews with court recorders indicated that if a duty counsel spoke to the sentence or at final appearance, the engagement would be recorded, presumably, as Legal Aid. It is interesting then to note that compared to the findings in the 2002 -2003 period (Clairmont, 2004) where 35% of the JEIN cases involved self-represented defendants, the figure for 2005-2006 was only 18%, a very significant drop. Indeed, the proportion self-represented in HRM, according to these JEIN data, is now less than in the Sydney criminal court where court role players interviewed in both 2003 and 2006 indicated that the unrepresented defendants did not constitute a major problem.

These analyses, carried out with the very limited secondary data, do suggest that the non-custody DC initiatives in HRM have been implemented as planned, that the targeted population has been reached and that there has been a positive impact on the unrepresented defendant problem. The DC program has evolved in terms of structure (i.e., becoming a roster delivery system) and in terms of penetration among the targeted

population. The workload for the DCs has been modest, and the services delivered multifaceted and of limited depth.

In the Sydney adult custody DC program, data, for the period April 2005 to January 2006 inclusive, indicate that the caseload has averaged 40 clients per month, with significant variation by month but no overall discernible trend. The clients' offenses have involved significant person violence (41% of the cases), breaches of probation or court orders (24%) and property offenses (22%). The single most common charge has been the breach. The large majority, 85%, of the roughly 400 clients have been charged and held by the police while another 14% have been seized on a warrant for "failure to show". The duty counsel service largely focuses on bail and release issues. The records indicate that while negotiating release and linking the client to NSLA were the major DC activities, there were also formal bail hearings, consolidation of charges, setting dates for election or trial, negotiated, arranging for assessments of fitness for trial, and in roughly 10% of the cases assistance at guilty pleas and sentencing. Outcomes for clients could be multiple of course and that fact was reflected in the DC statistics. The data indicate that trial and preliminary appearances dates were set for 58% of the clients, that clients were released to contact NSLA in 47% of the cases, that clients were not released but advised (and assisted) to contact NSLA in 25% of the cases, and that clients were simply released 7% of the time. Other outcomes included assisting at guilty pleas and sentencing in 10% of the cases. The custody DC's task was basically to deal effectively and quickly with release and bail issues and then close the file – where bail was denied a letter was provided the client informing him or her that the DC participation has been concluded and instructing the person with respect to contacting NSLA from the Cape Breton Correctional Centre, and where bail was granted a letter was exchanged notifying the client that "the file at this office is now closed" and if further legal representation was desired, the person should contact NSLA. As in the case of the non-custody DCs in HRM, the availability of the staff DC in this instance also meant that the lawyer was called upon on occasion to act as a friend of the court providing specific legal advice to unrepresented defendants at trials or applications for variance; apparently, the DC as in HRM readily cooperated with these requests.

FIGURE A: THE DUTY COUNSEL NOTICE

NOVASCOTIA LEGAL AID

DUTY COUNSEL LEGAL ASSISTANCE

Duty Counsel assists people who do not have a lawyer and need legal advice or assistance in dealing with criminal matters. Duty Counsel is a lawyer and a practicing member of the Nova Scotia Barristers' Society. Duty Counsel is knowledgeable about criminal practice and procedures. Duty Counsel services are available to all persons appearing in the Provincial Court, whether or not they are financially eligible for Legal Aid.

Duty Counsel will assist people, free of charge, by providing a range of legal services, including:

- Providing summary legal advice;
- Obtaining and reviewing disclosure provided by the Crown Prosecutor;
- Speaking to the Crown Prosecutor on the client's behalf;
- Assisting with referrals to the Adult Diversion Program or the Fine Options Program;
- Providing legal advice on how to conduct a trial, address the court, subpoena witnesses and give evidence in one's own defense;
- Entering pleas and speaking to sentence should a guilty plea be entered by the client;
- Assisting clients in making "level" election", i.e. which level of court they choose to have their trial take place;
- Setting trial or preliminary hearing dates;
- Assisting clients in making an appointment with the Nova Scotia Legal Aid Office;
- Consolidating outstanding criminal charges;
- Negotiating terms of release and assisting with bail hearings.

Duty counsel services are available every morning from Monday to Friday at Halifax Provincial Court. Please inquire at front desk at the Provincial Court for directions as to where to locate duty counsel on site at the Provincial Court. Duty counsel can otherwise be reached at 420-6595.

TABLE A

Comparison of Legal Representation for Adult Closed Cases, HRM and Sydney Justice Centers, 2005-2006, JEIN

Legal Representation Type	HRM (N = 9115) % (Number)	SYDNEY (N = 3667) % (Number)
:		
Self-Represented	18% (1603)	20% (739)
Legal Aid	52% (4790)	50% (1808)
Private Counsel	28% (2561)	28% (1099)
Lawyer Type Unknown	-% (45)	-% (6)
Missing	1% (116)	1% (15)

COURTROOM OBSERVATIONS

One dimension of this project focused on courtroom observations over the period late summer 2005 to fall 2006. There were thirty-eight observation periods at the Halifax provincial court, all but a handful by the same research assistant. In addition, there were three observation sessions at the Dartmouth court. The observers' tasks were to describe the interaction of duty counsel and other court personnel, and the interaction between duty counsel and the defendants. Virtually all observations pertained to arraignment but in a number of instances a plea was rendered and a sentence given. All told, six roster and one staff duty counsel – all non-cell DCs - were noted in the observations at the Halifax court. The observations break down into three period, namely (a) in the period late July 2005 to January 2006 when there was a staff DC in Halifax and roster DCs in Dartmouth and all but three observations were at the Halifax court; (b) from late January to May 2006 when observations were made of the roster DC system at the Halifax court; (c) a two week period around the beginning of November 2006 of the roster DC model at the Halifax court.

Perhaps the most notable pattern since the launching of the program in the fall of 2004 in Halifax, has been the evolution of the duty counsel role. It was introduced without much fanfare, with neither the service nor the duty counsel herself having a high profile. Until the late summer of 2005, duty counsel in the Halifax courthouse appeared somewhat marginal to the court process, often sitting in the gallery with others and interacting more with, and seemingly depending more on for information about individuals at arraignment, the sheriff's staff than on judges or crowns. Many judges in this period – the program had been operative for ten months – did not draw attention to the presence of the duty counsel nor did duty counsel reportedly make regular pronouncements about the availability of the service in open court. A major activity for the staff duty counsel during the early period was approaching the unrepresented person, and making appointments for defendants to meet with Legal Aid. Duty counsel approached individuals who were unrepresented and rendered summary advice with few refusals of the brief consultation on the part of the defendants. The DC also responded always when the judge directed a defendant to seek duty counsel. A few judges were quick off the mark in making unrepresented persons aware of the service and in engaging the duty counsel more in the court processing. By January 2006, when the staff DC resigned the position, the duty counsel role was much more integrated with the court system – more judges regularly drew attention to the service, the duty counsel frequently sat in the well of the courtroom, at the counsel bench, and the duty counsel was speaking more often for defendants at sentencing and even assisting occasionally in special cases where matters arose for unrepresented defendants concerning variations in undertakings and so on. In addition, by this time, the duty counsel had secured a room at the courthouse where clients could be interviewed away from the bustle of the court corridors.

Observations indicated that increasingly the duty counsel was contributing to the efficiency of the court process. In a number of instances, the defendants at arraignment or

plea were observed to be referred to the duty counsel then come back into the court and plead guilty with the duty counsel speaking to the sentence. All such cases involved minor offenses and there were no cases of duty counsel pressuring a person to plead guilty; indeed, more often than not the duty counsel advised against a guilty plea. Where the defendants wished to, and/or was recommended by the duty counsel to, plead not guilty or secure legal counsel, duty counsel was able to determine if the person was eligible for legal aid and, in a few cases, especially where there was a staff duty counsel, to schedule a legal aid appointment; roster DCs also did this but the staff DCs appeared to do this more frequently). Such practices facilitated the court process (e.g., eliminating the stage where the defendant returned to the court at later date only to inform the judge that he or she did not qualify for legal aid). There was however considerable variation among roster lawyers and among judges with respect to these issues. For example, not all duty counsel lawyers provided an assessment of eligibility for legal aid and not all judges recommended the service of the duty counsel to defendants seeking or wondering about legal aid. With respect to the duty counsel, it was observed that some DCs simply provided the unrepresented defendant with the address and phone number of the legal aid office while a few not only telephoned NSLA and scheduled an appointment for the client but also faxed the disclosure to the NSLA office (this seemed to be more common where the court was seeking a trial date). As for the judges, even as project observations ended, they were about evenly divided in terms of whether or not they consistently referred to and recommended the duty counsel service to unrepresented defendants.

There was much variation among the duty counsel lawyers (all but one being roster DCs) with respect to their assertiveness in the courtroom. A few operated at the “extremes”, either very assertive (announcing themselves, approaching almost every defendant without counsel) or barely assertive (often waiting for the judge to mention the duty counsel service and basically reactive regarding obtaining potential clients). The majority were “in the middle”, usually but not consistently being proactive in communicating their availability and reaching out to the unrepresented defendants. It does appear from observations that the more one serves as duty counsel the more assertive one becomes, perhaps reflecting the importance of being comfortable in the role and being fully acknowledged as such by the other court players, especially of course judge and prosecutor. There did not appear to be – during the observation days at any rate – a hectic workload for the duty counsel. Most interactions with clients that were witnessed were quite brief, about five minutes or so on average. On a busy day, there were at most two defendants waiting for their turn with the duty counsel who was assisting another defendant. Once, on a very busy day, two duty counsel lawyers were available. A consideration that must always be borne in mind is that to some degree the number of clients seeking duty counsel advice is always a function of the judge’s calling attention (and how this is done) to the service and to the assertiveness of the duty counsel.

The crown prosecutors also varied considerably in their approach to the duty counsel. There were a few instances where the crown attorney informed the defendant about the duty counsel service and urged the individual to access the service. In a few instances there seemed to be some enmity between prosecutor and duty counsel. The

introduction of the early resolution (ER) initiative, whereby a senior crown in the Public Prosecution Service presents, in a sheet of paper attached to disclosure, the crown's recommended sentence if the defendant makes a guilty plea, seemed to limit prosecutor – duty counsel engagement since the process does not allow for negotiations about a sentence – the defendant is given a certain amount of time to accept or reject the deal and no variation may occur without discussion with the ER official who is not at the courthouse; during the study time frame no duty counsel contacted that official. Overall, the crown prosecutors were much less salient for the duty counsel service than the judges.

There were interesting patterns noted when the duty counsel was not present in the court room but engaged with a client in the halls or interview room. At times the judge, expecting the duty counsel to return shortly, advised the defendant to wait for his/her return; almost invariably, things worked out smoothly as the duty counsel soon came back and linked up with the defendant. In a very few instances the judge would request that the sheriff assist the defendant in finding the duty counsel. More commonly, the judge simply told the defendant some variation of “he/she is around the courthouse somewhere, find him/her”. A major problem here was that the defendants had no idea where to look or what the duty counsel looked like. A few defendants were observed to walk out of the courtroom, make a perfunctory attempt to locate the duty counsel, and then walk out of the courthouse. While the sheriff staff people were friendly and willing to help the defendants, they often did not know where the duty counsel was or even who the duty counsel was for that day. Of course, one would expect that, unless there was significant turnover among the roster duty counsel lawyers, these kinds of problems would diminish over time.

Most defendants appeared to be appreciative of the duty counsel service but few expressed intense gratitude about it. Observers attributed this to the general attitude that defendants had about the court “ordeal” (i.e., it was not a happy occasion) rather than the quality of the service provided. There was no case where the defendant refused to talk with the duty counsel upon being approached by the latter. There were a number of instances though where defendants rejected a judge's advice to talk with the duty counsel, generally on the grounds that they did not need assistance since the matter at hand was simple or because they just wanted to plead guilty and get it over with. Some judges, in response, would then strongly advise the defendant to make use of the service while others accepted the refusal and carried on with the case.

As noted earlier, the only advertising available to the defendants concerning the duty counsel service has been a piece of paper – with the duty counsel's range of service and its availability to all who are unrepresented – attached to the docket board. No one appears to have noticed it; indeed, the chief project observer did not notice it for five months and then a quick glance led him to believe it was a posting for legal aid, not the duty counsel program. Since January 2006 it has become commonplace for the roster DCs to announce their presence in the courtroom while everyone is waiting for the judge's entry. Occasionally the court's clerk has made an announcement about the service. Once the court opens, the judge frequently recommends the duty counsel service to the defendants. Given the paucity of promotion regarding the duty counsel service and

the inconsistencies with respect to it being highlighted by the judges in court, the onus falls upon the duty counsel to make unrepresented defendants aware of the service. And given the inconsistencies in the latter doing so, the penetration rate (i.e., the extent to which the service reaches its intended users) could be improved, especially among first-time defendants. Observers noted many instances where seemingly “at-sea” defendants did not know about the duty counsel service nor appreciate the possible advantages of accessing it. Observation would suggest that the most efficient way of dealing with the shortfall would be to have the judge always highlight it at the outset of court proceedings. This is because the judge is always in the courtroom, unlike the duty counsel, and when the judge talks, the defendants are always listening. Where the duty counsel announced the service just before the court proceedings, not all defendants were present in the courtroom and the announcement often appeared to receive little attention. Other suggestions that flow out of analyses of client interviews and stakeholders’ views will be discussed below.

In sum, then, the duty counsel service has evolved in an appropriate direction given its objectives. The duty counsel lawyers have become more assertive and the service itself more efficient. The penetration rate, based on observation, has improved. Still, there remain many defendants who apparently have been unaware of the program.

SPECIFIC OBSERVATIONS

The first set of courtroom observations took place over the period August 2005 to late January 2006. There were twenty-six observation periods in Halifax and in all cases the DC was a full time staff DC. Perhaps the most common activity noted in the earlier observations was the DC linking up an unrepresented defendant with NSLA and facilitating court scheduling. In one August session, for example, an unrepresented person told the judge that he had a specific legal aid appointment for that day but the knowledgeable judge replied “you must have mixed up the date since legal aid does not schedule appointments for this day so phone up and check it out”; without being asked, the DC, sitting in the gallery, got up and accompanied the man out of the courtroom, making the call on his behalf and subsequently informing the judge that he was indeed correct and the defendant’s appointment was for next month; the accused was then asked to return after that date. At the same session, another unrepresented defendant was asked by the judge if he wanted to speak with a lawyer, adding, “The duty counsel lawyer is here and can speak to you free of charge if you like”. The defendant expressed no interest but the judge then stated, “Well, if you want legal aid, go and book an appointment”. At that point the defendant left the courtroom. The DC followed him and talked with him in the corridor. Later both returned to the courtroom and the DC reported to the judge that an appointment date with NSLA had been set but conflicted with the accused’s next appearance date; the judge then granted a request for rescheduling the next appearance. There were many other examples of this “expeditiously linking the defendant up with NSLA” DC function; for example, on another occasion, the judge inquired whether the unrepresented person planned to go to legal aid and when the defendant answered “yes”, he said, “Ms McConie [the DC], can you see her and we will determine where to go from

here”, adding, “Ms McConie is a legal aid lawyer and will speak to you free of charge”. The DC and defendant left the courtroom, had a consultation, and then upon return the DC indicated that she was representing the defendant and had booked an appointment for her with NLSA. The judge then adjourned the matter until a time after that appointment. Throughout the first observation period some judges frequently referred to the DC to assist the defendant in scheduling the NSLA appointment and so facilitating the setting of the next appointment or trial date; some judges never made an explicit reference though the DC may nevertheless have assisted the defendant. The gain to court processing was quite evident compared to the pre-DC situation where observations indicated there was more delay and usually an additional court appearance required when the defendant was on his or her own in booking an NSLA appointment.

The above episodes also illustrated the DC’s approach, namely exercise initiative and carry out the DC responsibilities without fanfare (i.e., without asserting herself in the courtroom). The DC always cooperated with a judge’s request and also with the observed crown prosecutor’s request to assist an unrepresented defendant. In one October observation session, for example, the defendant had a severe hearing loss and the prosecutor approached the DC, then stated to the defendant in court that the DC “can meet with you to discuss these charges”; the judge then stated, “Ms McConie, the duty counsel, is able and willing to meet with you. She can speak with you now. She has a place where she can talk with you”. In another case the same day, an unrepresented defendant charged with assault commented, ‘I am a single parent. I am going to go through as much of the process as possible without a lawyer’. After receiving disclosure the judge asked the defendant if he had contacted NSLA and he answered that he was not eligible but was saving his telephone call via the lawyer referral service until he could receive maximal benefit from it. The prosecutor then intervened and stated to the court, “If the accused is willing to wait a few minutes, I would be happy to introduce him to [the duty counsel]”. The judge then requested that the defendant take a seat and wait for the DC to return to the court which he did. Throughout the whole period, even where the request did not specifically deal with a legal matter (e.g., a defendant seeking the return of her ID from the police) the DC cooperated with the request from other court officials (in that example from a judge who regularly also called upon the DC for assistance in scheduling trial dates) and assisted the defendant. As time went on, the DC also became more assertive in the courtroom. While never observed announcing her services to those assembled in the gallery, the DC was observed springing into action in different court circumstances; for example, in a session at the end of October 2005, an unrepresented person entered a guilty plea and the crown prosecutor announced he was prepared to proceed “this morning” with sentencing. The judge indicated that he was prepared to adjourn the matter, if the accused so wished, so that he could obtain legal representation. At that point the DC rose from her seat and approached the prosecutor. Subsequently, the judge stated, “Ms McConie will speak with you. She is a duty counsel lawyer who helps out people who don’t have counsel”. The DC then exited the courtroom with the defendant, returning ten minutes later and requesting an adjournment so that she could review matters with the defendant, and confirming that she would be representing the person at the sentencing; in an aside to the defendant, she said, “Please phone me a week

before your sentencing and we will go through things”. In other instances the DC approached persons identified as unrepresented defendants and offered her assistance.

The DC provided consultation often in cases where the defendant had planned to plead guilty. In the early observation sessions no cases were observed (in this limited sample) where subsequent to the consultation there was a change to a not guilty plea. In some instances when the defendant returned to the courtroom and the guilty plea was accepted, the DC spoke to the sentencing and in one instance the DC, while not formally speaking to the sentence, intervened when the defendant (with whom she had a brief consultation) was having difficulty expressing why the victim surcharge should not be imposed; the DC provided an acceptable rationale (“he is not working, he lives with his dad and he is going back to school this fall”) and the judge did not impose the surcharge. While ‘speaking to the sentence’ by the DC was almost always ‘on the spot’ and involved a minor crime, there was at least one case during this first set of observations, where, when the crown wanted sentencing postponed for some reason, the DC requested a pre-sentence report. There were also situations where, after the DC consultation, the defendant returned to the courtroom, entered a guilty plea but the DC was not present. In other words, the whole spectrum of possibilities concerning the DC presence at sentencing was exemplified.

Where the unrepresented defendants indicated they were going to plead not guilty, the judges, often but not always, asked whether they wanted to speak with the DC. In the observations, such consultations that took place were short (i.e., ten minutes maximum) and where the defendants’ trial took place the same day, appeared to be of limited value for the defendants conducting their own trials (e.g., in one case after the prosecution’s presentation of evidence, the defendant rambled on and when he finished the judge, finding the person guilty as charged, replied, “You have not provided a defence. You have confirmed everything the crown said and there is nothing in dispute.”). The DC never did trials no matter how minor (e.g., creating a disturbance by holding a noisy party) and given the brevity of the consultation, the defendants were essentially dependent on whatever experience and skills they brought to the situation. During the first set of observations, the DC never spoke to the sentencing where there had been a trial. Apart from cases where the unrepresented defendant had indicated in advance what his or her plea would be, there was no clear pattern for a DC consultation to lead subsequently to a not guilty versus a guilty plea.

The availability of the full-time, staff DC was utilized in a few instances by concerned judges to provide other legal advice to unrepresented persons. For example, one person was requesting a variance and the crown wanted to talk with him privately before proceeding. The judge asked the accused if he was agreeable to that and when the latter said that he was, the judge cautioned, “He [the Crown] is not your lawyer. Be careful what you say. It could come back on you later. If you want, you can talk to Ms McConie [the DC] first”; the accused and the DC immediately exited the courtroom for a consultation. Over time this activity, perhaps a stretch of the formal DC mandate, increased modestly. Several such instances for example took place in January 2006, the final month for the staff DC. In one case a woman charged with assault wanted to vary an

undertaking and both crown and judge indicated that they were agreeable to the prosecutor phoning the husband to confirm his views but the prosecutor also suggested that the defendant speak to the DC about the matter. In another case, the defendant was perhaps more appealing a judicial decision that requesting a variance. The judge agreed with the crown prosecutor who argued that “this court does not have jurisdiction on this matter” and advised him to consult with the DC on the matter. In still another instance, the DC took the initiative when a defendant sought a variance (enabling him to return to his girlfriend’s apartment), meeting with the defendant then negotiating with the crown on his behalf to reach a consensus that the variance would be granted but two new safeguard conditions added. Some provincial court judges who consistently referred defendants to the DC to facilitate the scheduling of NSLA appointments and trial dates, as well as to obtain summary legal advice, also appeared to consider the DC as the provider of general assistance to the unrepresented and either directly requested the DC to assist the person who was befuddled about some matter tangential to the case or advised the latter to seek out the DC.

DIAGRAMS, DUTY COUNSEL (McCONIE) COURTROOM LOCATION

Figure One

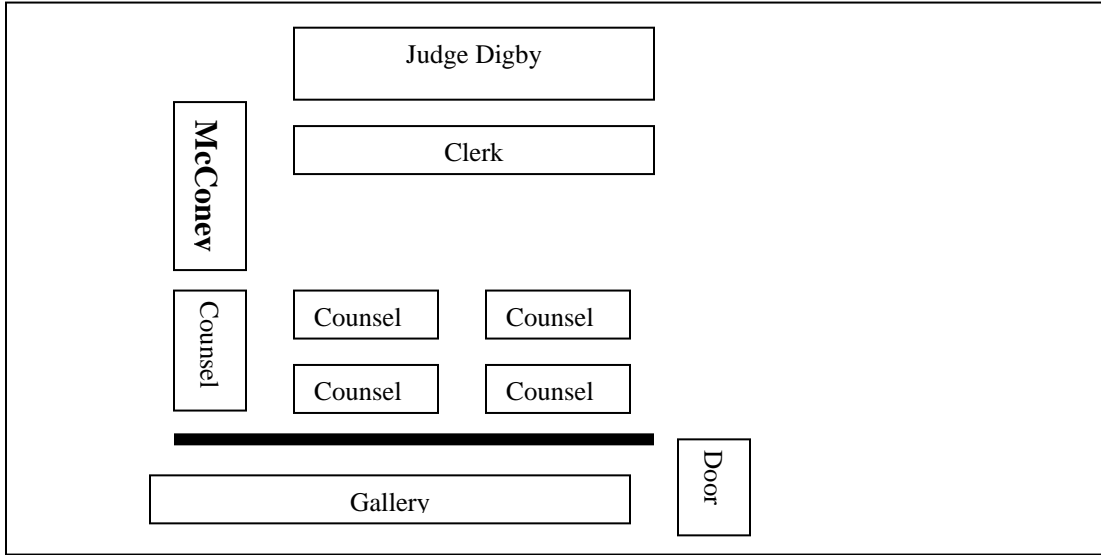
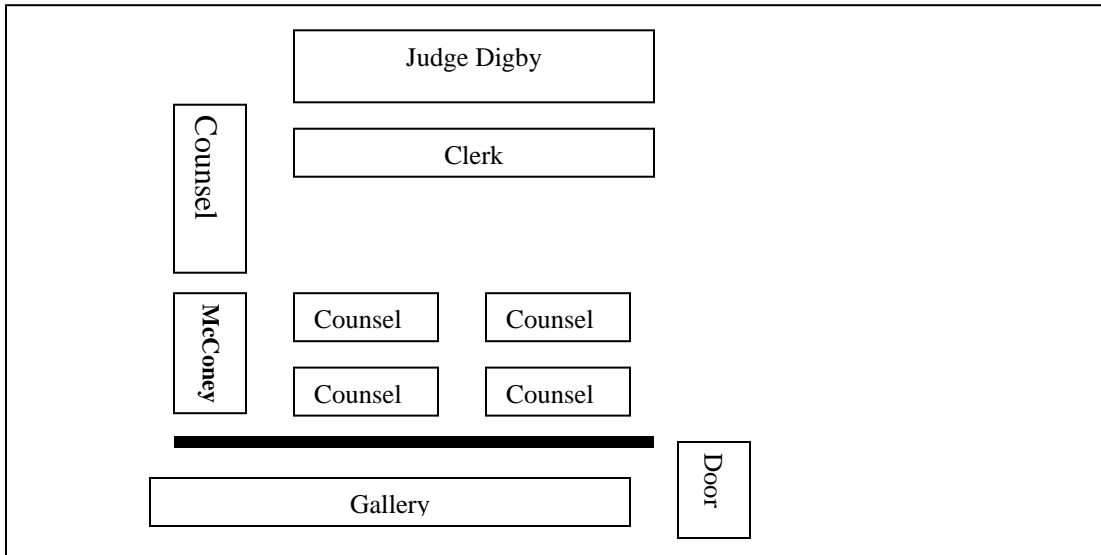


Figure Two



It was interesting to observe the location of the DC in the courtroom. The DC moved around quite a bit as seen in the enclosed diagrams. For several months the DC only went into the well if a defendant was using the DC service. Subsequently a judge recommended that she sit at one of the counsel tables. Sitting in the well or at the counsel table when not having a client on the stand seems to have some merit (e.g., reinforcing the DC presence in the court process) but also means restricted opportunity to talk with unrepresented persons prior to their being called (e.g., some such persons would be reluctant to approach the DC sitting in the well and indeed it might be inappropriate for them to do so). The latter problem is particularly notable in the Diagram A seating arrangement which subsequently was replaced by the more accessible Diagram B arrangement or simply being in the gallery or in the hall outside the courtroom when a client was not on the stand. Later on, the DC also had the option of talking with clients in her shared office in a location which was quite removed from all the courtroom action and unknown to most court officials apart from the sheriff's staff. The problem with using the office, or even talking to a client in the corridor for that matter, was that opportunities or demands for service that arose in the courtroom might be missed. Unrepresented defendants advised by the judge to see the duty counsel usually did not recognize her if she was not pointed out in the courtroom, and sometimes, too, the defendants on leaving the courtroom kept on going right out of the courthouse.

The variation among judges in calling attention to the DC service was quite evident in the early observation periods. For example, in one instance the unrepresented defendant, asked by the judge if he had contacted a lawyer, replied "No, I just want to deal with it". The accused then pleaded non-guilty to two assault-related charges and the judge asked, "Will you be represented by a lawyer or will you be representing yourself"? The accused stated he would be representing himself at which point the judge said, "Come to court on the day of your trial prepared to present any evidence that you have"; no mention was made about the availability of the DC service and the DC was not in the courtroom at the time. On the other hand, another judge routinely stated in open court, "If there are any persons in the courtroom today who are unrepresented and would like some free legal advice, Ms McConie, sitting to my right (see Diagram A) in the blue top, is the duty counsel lawyer. It is her job to provide that advice. If you would like advice please see her".

The inconsistency with respect to the judges' bringing the DC service to the unrepresented defendants' attention continued throughout this first period of observation. Some judges routinely advised a person who intended to seek legal aid to consult with the DC and set up an NSLA appointment while others never did. Having the DC intervene with the NSLA arrangement was frequently expressed by the judge as "We need to set a trial date today". The range of judicial thrusts on this matter was evident in one November session where the actions were different in the three instances where the defendant was unrepresented. In one case a person stated that he was unable to get legal representation because he made too much money for legal aid but not enough to engage a private lawyer; the judge introduced him to the DC service. In the second case, the defendant indicated that she was uncertain about being able to get legal counsel so the

judge told her to defer her plea and scheduled a new appearance date; he encouraged her to check with NSLA but never mentioned the DC service and the DC was not in the courtroom at the time. In the third case, a defendant had not attempted to consult a lawyer since his last appearance and the issue came up of whether he would be eligible for legal aid; the judge asked an NSLA lawyer present in the courtroom to give the person a quick assessment of his eligibility but made no mention of the DC service. On other occasions in late November 2005 the judge did not mention the DC service in contexts where other judges routinely did so. For example, in one case the unrepresented defendant pleaded guilty to several breaches and was sentenced all in a matter of minutes but was never asked about or made aware of the DC service. At another November 2005 session, an unrepresented defendant, charged with breaches, asked if he wanted to see a lawyer, replied “no”, after which he was asked whether he was ready to plea; whereupon the defendant said, “Yes, guilty”; the judge gave the person an opportunity to speak to the sentence and then rendered the sentence – the whole episode lasted few minutes and no mention at any point was made of the DC service. In the same session, two other unrepresented defendants said “no” when asked if they wanted to see a lawyer. Both defendants were then handed the ER package by the crown prosecutor. One, pleading guilty, responded no to the judge’s inquiry whether she had anything to say and was then sentenced, while the other who pleaded not guilty was advised by the crown prosecutor to “speak to a lawyer right away”; in neither case was the DC service referred to.

More and more though, in the observation period, if a defendant was unrepresented and not seeking counsel, he or she was advised to consult with the DC. This was especially the case if the DC was present in the courtroom. There were red flags too for the judges; for example, where the unrepresented defendant expressed uncertainty about his course of action (e.g., “Yes I will be seeing legal aid” followed by “Maybe I’ll just pay the fine”) the judge advised the person to get disclosure and meet with the DC, and where at a sentencing hearing the unrepresented defendant reported that he was unable to get a lawyer, the judge usually brought up the possibility of DC assistance.

It may be noted that in the early observation period when the judge drew attention to the DC service it was largely unpredictable whether the defendant would then see the DC or not. Frequently the defendant, despite a judge’s urgings, refused the service as illustrated in the following case. The judge in an assault case asked the defendant whether he had spoken with a lawyer and the defendant said he had not. The judge then asked if he wished to speak with one, and the defendant said “no, I do not qualify [presumably for NSLA]”. The judge then stated, “You do not need to qualify. The duty counsel will speak to anyone. Do you wish to speak with her”. The accused said, “No”. The judge asked again, “You want to represent yourself?” and the accused said, “sure”, at which point the judge then set a trial date and explained about disclosure, the defendant’s responsibility for bringing his witnesses and other court procedures. In the courtroom observations – the reader is reminded that the sample is small – the cases where a defendant wanted to plead not guilty and also refused the DC service were usually assault cases. Refusing the DC service seemed to be more common where the unrepresented defendant wanted to plead guilty. Some judges went to some lengths in urging the person to meet with the DC; in one instance for example, the defendant rejected the judge’s invitation to see the DC for

free legal advice but the judge directed her to take a seat and wait for the DC to return to the courtroom. When the DC returned she asked the defendant if she wanted to talk and the two left the courtroom. Later that day, the defendant entered her guilty plea and the DC spoke at the sentencing.

At the end of the first observation period it was evident that the staff DC system in Halifax was being well utilized by all parties. A few defendants specifically asked to see the DC when appearing before judge and the DC had a number of clients contacting her by phone. On some occasions there were small line-ups to meet with the DC and there was more use of the DC office to hold somewhat longer consultations. The DC also spoke more to the sentencing of the unrepresented persons. At the same time there were many unrepresented defendants who were arraigned, made their pleas and were sentenced without any DC engagement. To some extent, the success of the DC may have been a factor since more and longer consultations took the DC away from the courtroom. A crucial factor was how persistent the judge was in urging the unrepresented person to obtain the DC's legal advice; some judges were very persistent and some readily accepted an unrepresented defendant's position that he or she did not want any legal counsel or legal advice from the DC. In the few cases observed where the defendant was unrepresented and the crown was recommending a jail term, the judges were persistent in recommending that the person consult with the DC. For example, in one case, a person wanted to leave immediately for Vancouver and also repeatedly said he did not want legal counsel since earlier legal counsel recommended he plead guilty whereas he believed he was innocent. The judge strongly stated that the fact is that the crown is seeking jail time and that makes it necessary for the defendant to at least speak with the DC first; the judge then adjourned court until the person had spoke with the DC. When unrepresented defendants, who had been adamant in saying that they did not want legal counsel, were approached in the corridor after pleading guilty and being sentencing and asked whether they were aware of the DC service, most indicated that they were not; however, asked if in retrospect such awareness would have led them to use the service, most such persons said no, they had already made up their mind on the matter. It should be noted that in none of these cases did the defendant receive a jail term.

The second phase of observation, six different days at the Halifax court and two at the Dartmouth court, occurred over the period February to July 2006 when the staff DC resigned and was replaced by a roster system. On almost every occasion some court official, whether judge, court clerk or DCs themselves, informed the defendants in the gallery that a DC was available to speak to anyone without a lawyer and judges usually mentioned the DC option to any unrepresented defendant standing before them who reported that he or she did not have an appointment to see a lawyer. There did appear to be some scheduling issues as on two occasions Halifax court defendants were looking around for a DC but none was available. The sheriff's staff in both Halifax and Dartmouth courts did not have a schedule for DCs and often reported that they did not have any idea who the DC would be or when the DC would arrive. Certainly in both courts the sheriff's desk was a hub where lawyers, DCs and defendants asked questions and relayed information. It was interesting that the sheriff's staff frequently took some initiative either in volunteering to go and find the DC or in identifying the DC for the

court; for example, on one occasion in the Halifax court an unrepresented defendant who had gone through three lawyers asked the judge for a break so he could talk with the DC; the judge replied, "I have no idea who it is today because it's always changing everyday", whereupon, after a moment of silence, the sheriff staffer stood up and informed the court who was the day's DC. On the few occasions where the research observer was at the Dartmouth court, the DC was busy dealing with a small lineup of unrepresented defendants in the crowded court hallway (there was no designated DC office for consultation); on one such occasion a unrepresented defendant who was dissatisfied with the brevity of the encounter, quipped, "Just one guy who has to speak to ten people within twenty minutes". In the Halifax court the atmosphere appeared to be less hectic, perhaps because of the lay-out of the courtrooms (i.e., not as bunched together as in Dartmouth). A roster DC in Halifax reported that he usually stands up and asks those in the gallery whether there is anybody there who does not have legal counsel but wishes to talk to a duty counsel; at times, he said, nobody says anything (as was the case on the day in question) while at other times he has five or six persons stand up to seek his assistance.

The roster DCs generally did take quickly to the role and were quite assertive, standing up and offering to help unrepresented defendants prior to the judge raising the DC option or directing the defendant to it. There were occasions when the DC upon entering the courtroom and seeing an unrepresented person on the stand immediately took the initiative and had the defendant come with him to discuss the case. There were several instances, too, where an unrepresented defendant initially told the judge he / she wanted to plead guilty but, after consulting briefly with the DC upon the judge's advice, changed that position and had the DC enter a not-guilty plea for him. Several times when a judge advised an unrepresented defendant to contact NSLA, the DC stood up and told the court that he would assist the defendant in doing so and was thanked by the judge for the initiative. There were a few occasions when the DC spoke to the sentence. The DCs understandably were constantly in and out of the courtroom and this behaviour was once criticized by a crown prosecutor (never by a judge) in court, whereupon the young DC stood and replied that while he did not intend to interrupt the crown prosecutor in any way, "it is required for a duty counsel to walk in and out to do the job properly".

The last phase of court observations – four sessions - occurred in the two week period around the beginning of November 2006. The roster duty counsel system was still in place and two new duty counsel lawyers had replaced two who had left. The DCs indicated that there was no current talk ("scuttlebutt") of reverting to the staff DC model. The small scarcely noticeable sheet describing the DC service was still posted on the docket board but it was updated and more detailed with respect to the DC services and how to reach the duty counsel. There was much evidence that the DC role was fully institutionalized in the provincial criminal court system. On all occasions the DC announced his/her availability in open court, using some variant of "Does anyone who doesn't have a lawyer want to speak to the duty counsel"? If a defendant was without counsel at the time but was in the process of obtaining it, whether legal aid or private counsel, the judge and the crown prosecutor never referred the person to the DC; otherwise the possibility of consultation with the DC was invariably raised. The judges usually did not accept an unrepresented defendant's guilty plea until the latter had either

spoken to the DC or insisted that he/she did not want to do so. The sheriff staff reported that each court day there were some usually four or five accused persons coming to their desk and asking for the DC. Small line-ups early in the morning to see the DC were commonplace. There was much awareness by all court officials of the DC role, where to quickly locate them and so on. Few unrepresented defendants rejected having a brief consultation with the DC. The DC usually sat in the “well of the court”, at the counsel table, but there was much coming and going as he/she left the courtroom to consult with clients. While the DC-defendant interaction was still of short duration, there were more instances of more in-depth, thirty minute consultations observed and reported. The DCs usually – though definitely not always – had access to disclosure and the ER recommendation of the prosecution so they could advise the unrepresented defendant more thoroughly on the case and the possible consequences but the pattern remained of not providing an in-depth analysis of the disclosure and not negotiating with the crown prosecutor on the possible sentence (as noted elsewhere the ER is either accepted or rejected and any negotiation about it must be done with the ER official at PPS).

In one session, two unrepresented defendants (different cases) initially submitted a guilty plea but the judge told them to speak to the DC first; after consulting with the DC, both defendants entered a plea of non-guilty. In two other instances, the unrepresented defendant emphatically stated the desire to plead guilty and not consult with the DC. In both these cases the judge recommended twice that the defendant should see the DC but to no avail. In another instance, after repeated recommendations for DC consultation, the judge acquiesced and, after having the crown read the charges, asked the man for his plea. The defendant pled guilty but then said “But I can explain”. The judge, perhaps in exasperation, told him, “You can’t plead guilty and then right away say that I am not guilty”; the judge then rejected the guilty plea and a trial date was set. In another session, when the judge asked an unrepresented defendant if he had a lawyer, the man replied “no, I just want to plead guilty and settle it”. At that point the crown stood up and suggested that the defendant consult with the DC about some issues in the ER. After this consultation, they returned to the courtroom (other proceedings had taken place in the interim) and the DC spoke for the defendant, advising the judge that the defendant would still like to plead guilty and that he accepts the conditions specified in the ER. There were a number of instances in the four sessions where, subsequent to the DC-defendant consultation, they re-entered the courtroom and the DC informed the judge that the defendant pleads guilty and accepts the ER offer.

In sum, then, the duty counsel service has evolved in an appropriate direction given its objectives. The duty counsel lawyers have become more assertive and the service itself more efficient. There seems little doubt that the DC initiative has improved the efficiency of the court processing of cases as well as assisted defendants in a variety of ways. There remain differences among judges in their calling attention to, and in their persistence in recommending, the duty counsel service. The DCs were busy with, but not overwhelmed by, clients. The penetration rate, based on observation, has improved. The basic DC service appears to have become a routine part of the criminal court process at HRM. It is achieving its specified objectives in providing summary legal advice and NSLA contact for unrepresented defendants. There remain a small number of

unrepresented defendants who are adamant in wanting to settle the matter quickly and plead guilty. Few cases were observed over the entire observation period of an unrepresented defendant who rejected the DC counsel because he or she wanted to defend themselves on a not-guilty plea. Perhaps the only shortfall emerging from the observations is that when judges and even DCs mention the service to the potential clients they usually do not explain it in any detail, assuming that the defendants know something about it which was often not the case. Another consideration emerging from the observations is that short of a brief discussion with the DC about the case – the disclosure, the ER, possibilities regarding reducing charges and any fines to be assessed – the unrepresented defendant may misunderstand the charges and also not appreciate some options or issues in the sentencing. There is still considerable and predictable lack of awareness on these matters as well as a widespread sense that the DC's assistance is basically focused on ultimate guilt or innocence and connecting the person with NSLA. Much more could be done in educating defendants on the nuances of court processing and the DC services.

PROVINCIAL COURT JUDGES' PERSPECTIVES

In exploring the opinions of judges concerning the issue of the unrepresented defendant in criminal court, the 2004 study drew on a sample of eight Provincial Court judges, five of whom were located in the Halifax Regional Municipality and three of whom were located outside of the Province's Capital city; namely, in Amherst, Sydney and Truro. Interestingly, judges in Halifax gave more emphasis to the unrepresented issue and regarded it as constituting a more serious problem than judges in the other communities. In Halifax, all of the five judges interviewed described the unrepresented litigant phenomenon as constituting both a "significant" and "growing" or "possibly growing" problem which presented the administration of justice with an array of known difficulties. These difficulties, submitted the judges, included causing considerable discomfort to all court officials, including judges, when dealing with an unrepresented accused, the detrimental impact on efficiency that resulted from having to explain basic criminal procedures to the unrepresented accuseds, the fact that many unrepresented accuseds pursued or prolonged matters even though there was no merit in so doing, and the lack of a liaison (a lawyer) between the court and the Bench.

On the issue of the socio-demographic characteristics of the unrepresented accuseds, the consensus among the judges was that, with some minor though difficult exceptions, these individuals were of low socio-economic status, many of whom could be classified as members of the "working poor." It was suggested that a large proportion of unrepresented litigants were "caught in the middle", income-wise, ineligible for Nova Scotia Legal Aid services but unable to afford the services of a private lawyer. It was also submitted that unrepresented litigants were likely to be first-time offenders who lack awareness of the court process, although it was noted that many second- and third-time offenders also appeared before Provincial Courts without representation. On the issue of potential solutions to the unrepresented accused problem, the judges generally held that, while "unbundling" ought to be considered as part of the aggregate remedy, more must be done. Specifically, they advocated an "upping" of the Nova Scotia Legal Aid threshold so that more individuals could be made eligible for those services, and the consideration of implementing a duty counsel system for the "walk-in" cases in HRM and cell cases in Sydney.

Nine provincial court judges were interviewed in person in 2005 and 2006 (several a second time by e-mail), seven in HRM and two in Sydney. As noted the DC in both Halifax and Dartmouth courts were full-time, staff DC, employees of NSLA until the roster system was adopted in the summer of 2005 in Dartmouth and in January 2006 in Halifax. . The HRM judges, with two exceptions, indicated that they were not well-informed concerning the introduction of the duty counsel system or the mandate associated with the role. All held that the implementation was quite "low key"; accordingly, in the judges' view, it took some time for most judges to fully appreciate the dimensions of the duty counsel services, and, indeed, some time for staff duty counsel to assert themselves in the court process. Several judges were aware that the Halifax duty counsel was tutored for a short while by the well-respected, veteran duty counsel responsible for the cell traffic and believed that was a good idea, but they contended that

the duty counsel, for whatever reasons, for several months, seemed intimidated and reactive rather than taking the initiative. That style of service delivery, in conjunction with the paucity of information given judges about the DC role, created some puzzlement in the court. Most of the judges indicated they would have preferred a more proactive duty counsel role where the DCs communicated their availability with the judicial assistants and announced themselves in the courtroom prior to the judge entering it. Most Halifax judges, however, also reported that the staff duty counsel grew in the role and certainly by the end of 2005 was well-known, sat the counsel table (as one said, “sat in the well rather than outside it with the public and others”), and comfortably asserted the DC role. From the very beginning, the duty counsel when asked by the judges to deal with defendants on some matter was seen to do so in a willing and competent way.

In the Dartmouth provincial court, where the staff model was in effect only for seven months (and there was turnover in that position) and ended before this research began, the uncertainties about the duty counsel role were reinforced by the inconsistencies in the role performance provided under a roster model. Some DCs there announced their presence in the courtroom while others initially waited upon others (judge and crown) to do so, and some DCs were more available than others for other court contingencies. Some of the ambiguity related to the fact that in the roster model the same individual taking the duty counsel role might also take on other defense counsel roles, sometimes on the same day. One judge in the Dartmouth court indicated that there was occasionally some confusion on his part as to whether the roster lawyer was providing representation as private counsel or duty counsel. Still, whether in Halifax or Dartmouth, the judges reported that there had been little preparatory discussion of the DC mandate (as one judge commented: “no discussion but I considered it as ‘do your best for your client short of trials”). Perhaps it is not surprising then that one judge, in early 2006, more than a year after the duty counsel system was introduced in the Halifax court, still wondered whether the service was available only to those eligible for legal aid.

The low-key introduction was linked in the judges’ views to an absence of any formal marketing of the service (basically, in the Halifax courthouse, there was one nondescript sheet of paper describing the service, on the bulletin board with all the court docket information) with the result that few defendants knew about the DC service or where to find the duty counsel. There was much variation too among the judges in the Halifax court with respect to notifying unrepresented defendants, whether at the outset of court and upon appearance, of the DC service; this variation continued well into 2006.

All the judges considered that the duty counsel initiative was very helpful to all the court players, from judges to defendants. The benefits for the judges reportedly have included a better flowing court process plus a confidence that the rights of the accused received adequate protection, while, in the judges’ views crown prosecutors presumably were able to avoid conflicts of interest situations, and clients’ anxieties were reduced by timely, on-the-spot legal advice. One Dartmouth judge, while acknowledging the above benefits added that she still advises a person who seen a duty counsel the same as if he/she were unrepresented, testimony perhaps to the fact that where the defendant simply sees the duty counsel for several minutes, one can only assume limited legal knowledge

and advice has been provided. Still, the benefits of the DC initiative were well appreciated. One Halifax judge, stating a common view, commented:

“Benefits, yes, they are significant for me. I can be confident that a person’s legal rights are being addressed and that is important since I have that obligation to protect a person’s Charter Rights”. . [What about when an unrepresented person asks you something or to explain something?] “Yes, that is also a huge help if I can say, go see the duty counsel. [Is there a downside to the duty counsel service?] ... well, perhaps that she is often not available”.

Another judge contended that a strong objective of his has been to reduce the delay in processing cases and to have a trial date within 30 to 60 days of the information being laid, and the DC initiative has been an important tool in realizing that objective. A senior HRM judge emphasized how, with the DC initiative, there has been “some increase in the justice of the justice system, helping people”. He thought that with the DC system the metro HRM area would be brought up to the level of justice for defense that exists elsewhere in Nova Scotia where legal aid services were less pressed and there was more ready contact for the defendant with both defense lawyers and crown prosecutors.

There was some ambivalence among judges as to what objectives measures might capture the impact of the DC on court proceedings. There was a tendency to agree with the suggestion that useful measures perhaps could be whether there have been more guilty pleas (“cases resolved”) at first appearance, or perhaps a compression of case processing through fewer appearances and adjournments (as a result of early resolution, faster determination of legal aid eligibility etc), but there was no strong endorsement of either measure since the judges considered that the DC impact in each matter “could cut both ways”. Judges typically agreed that the duty counsel, whether staff and roster in Halifax or simply roster in Dartmouth, were carrying out the mandated court tasks even though as one expressed it, “duty counsel were slow to get up to speed”. From the judges’ perspective it was difficult to assess the duty counsel’s effectiveness in expediting the processing for legal aid but there was little doubt that the duty counsel service was being used. Several judges observed that there were occasionally line-ups to talk with the DCs. A Dartmouth judge, very positive about the DC service, noted that the roster DCs there “have spoken to sentencing and adjournment requests in a much more effective manner than many people can on their own”, and went on to point to the additional value of the DC in that judges may occasionally refer litigants to them when something unexpected comes up during a court appearance or when the consequences of pleading guilty to a charge seem not to be appreciated by the defendant (the judge related a rather complex real case example where the defendant needed to understand the difference between summary and indictable and the technical advantages in this instance of his refusing to consent to summary proceedings). A Halifax judge, commenting on the staff duty counsel there just prior to the latter leaving the position in January 2006, reported that “now she is doing pretty much all the mandated activities and then some”. He noted that there was a fair amount of use of the DC when people were seeking release from an undertaking (i.e., a variance). He also noted that several times in a trial or in such a request for a variance, he would look around and see who might be available to provide legal advice and the DC

has sometimes been called in to advise the defendant. Certainly the DCs over time increasingly began speaking to sentencing (always where the charges are minor according to the judges) and the Halifax staff duty counsel, reportedly, occasionally would answer affirmatively when asked by the judge if she would be returning on the case the next day or so. Judges were uncertain whether one of the DC's mandated task – consolidating charges – was ever being accomplished and one suggested that “getting the different charges together may be more a delay or problem at the crown level”.

In general, the judges' comments on the mandate of the duty counsel role underlined the causal factors of the judge's own approach to the service, the availability of the DC, and the style of the DC in carrying out the functions. While some judges readily utilized the duty counsel under a variety of circumstances, others saw a more limited mandate (even if they may have wished for a more expansive one). The availability of the DC and his/her personal style seemed also to be significant consideration for judges' response. Clearly, a more senior, proactive and always on-hand duty counsel would fit better into the court processing system and from the perspective of those most responsible for the system, contribute even more to it.

There was virtually perfect consensus among the judges that the staff model of service delivery was superior to the roster model. A Halifax judge who was observed to be quick off the mark in using the services of the staff duty counsel and who regularly brought the service to the attention of unrepresented defendants, observed “using different people every day is not going to work”. In his view, the staff model yields better knowledge of all the courtroom players and quick recognition by the defendants, many of whom were “repeaters”. The same judge, asked about his views ten months later in October 2006 when Halifax like Dartmouth had the roster system, noted that his earlier concerns were reduced because the roster was fairly stable. Still, he had some concerns about turnover in the roster system and about the fact that no schedule was available to himself or the court clerk. Several judges commented that the problem of course with the roster model is largely one of recognition, recognition by the other court players (judge, crown etc) and recognition by the potential clients. It was also observed that there is a fairly steep learning curve since everything has to be done in a very short period of time so clearly keeping the turnover low and having competent, “self-starters” would be crucial to the success of the roster system.

There was also some concern lest, in the roster model, the DC service become a training grounds for young lawyers; one judge commented that “you want competent lawyers with experience who know the players (e.g., know the different prosecutors' approaches, know the repeat offenders)”. None of the judges appeared to consider that the roster duty counsel model raised concerns of ethics insofar as the roster lawyer might secure clients for their private practice by needlessly dragging out a case (i.e., encouraging to defendant to continue on and select himself as the defendant's post-DC private counsel). Several judges acknowledged that the possibility existed, but held that any DC engaging in such practices would soon be exposed since the local court scene is relatively small and the players know one another; also it was suggested that if one made stringent rules to avoid such a conflict of interest, good prospects for the DC roster could

be lost. It was frequently mentioned that a duty counsel “is only as good as the individual lawyer acting in that capacity” and most judges agreed that “the current rotation of counsel tends to create significant unevenness in the service provided”. One Dartmouth judge expressed that view in a somewhat qualified manner in referring to the six month period between February and September 2006.

Interviewer: “How has the Duty Counsel worked out since our first interview in February”?

Judge: “I’m hesitant to say there has been a decline, however the fact that different individuals appear from day to day leads to a differing level of service from day to day. Sometimes the duty counsel assigned to deal with those in custody on bail issues also has the added responsibility to act as the duty counsel for non-bail matters. This can lead and does in fact lead to a lesser level of service on at least some of such days where that dual responsibility occurs. It might not be fair to say the roster model is limping along, but the staff model might provide a more predictable level and quality of service. On the other hand if the staff model provided a less than satisfactory person acting as duty counsel, the quality of service might always, or at least more regularly, be low, which would be worse than what now is the case”.

That view was also expressed by another Dartmouth judge who suggested in August 2006 that the comparative weakness of the roster DC model might be balanced by some subtle advantages:

“Right now, in Dartmouth, it is contracted out with young/newer Criminal Lawyers sharing the duties. Sometimes there is not a lot of continuity from week to week when there are different lawyers, but that is a relatively small problem given the overall assistance to the Court that exists. I find the lawyers that are doing the work now have a certain practice where they are more solicitous of the public than maybe the staff DC lawyer was”.

There were some suggestions for changes to add value to the DC service. If the roster model were to continue, it was suggested that the numerous requirements of the person acting as duty counsel need to be incorporated in a protocol or job description so that everyone operates with the same expectations. It was also suggested that perhaps the duty counsel could review legal aid eligibility with defendants and advise them on that score, thereby sometimes saving a trip to legal aid and in that way speeding up court processing. These are modest suggestions and both, to some extent, have been done in the past, the latter especially when the DC role was carried on by a staff NSLA lawyer. And they are not without controversy; a senior judge held that a secretary at the courthouse could help NSLA determine eligibility matters so for him the main thrust and objective of the DC role should be to directly impact on the quality of justice for defendants. Another judge rejected a too specific formalization of DC duties, contending that maybe a detailed

delineation of duties would “reduce the discretionary initiatives of some very good ones (DCs), such that the role would be defined to suit the lowest common denominator”.

There appeared to be consensus that the initiative could have introduced better and definitely marketed much better. And even in the fall of 2006, judges offered suggestions for improving the service delivery. A Dartmouth judge noted that since two courtrooms have arraignment on the same day there, and since the duty counsel cannot be in both places at once, a protocol should put in place. It was also suggested that it should be regular practice – especially now that there is a roster model in both Dartmouth and Halifax – to permit the duty counsel to identify themselves at the beginning of arraignment and tell those present how to make contact; anyone leaving the courtroom for that purpose should identify themselves to a sheriff’s officer who could advise the court if the person is called. Some judges wondered if there could not a schedule of roster DCs made available to court officials. Perhaps the most common general suggestions advanced by the judges was that they be better informed about the whole initiative since several worried about rumors that the program would be cut for financial reasons. As one judge commented, “If I had another complaint, I guess it would have to be, on reflection, not knowing what is going on with the program. Better communication about the program would be good”.

The bottom line for all judges was that the duty counsel initiative was very beneficial for the court and there was real concern that it might be terminated. One Halifax judge commented that “If the duty counsel system were shut down, there would be a big adjustment necessary and it would be necessary to refer to the staff Legal Aid person and some of these [NSLA lawyers] are very cooperative and some not”. One Dartmouth judge, after noting some shortfalls in the roster service being provided, expressed this common viewpoint as follows: “I still strongly favour the duty counsel system, however it is provided, over the absence of such a system. It is a valuable addition to the court system”. A Halifax judge captured the consensus in the following comments:

“Duty Counsel is a necessary and invaluable service to the public and to the administration of justice. I hope that this service will continue ... there isn't a day that goes by that I don't advise an accused person to take some time to speak with duty counsel. In many cases duty counsel are instrumental in a quick resolution of the matter before the court, but more importantly, the accused leaves with a better understanding of the process and I suspect in many cases a better sense of fairness within the justice system”.

A Dartmouth judge echoed those views:

“I can say that now that we have been spoiled with duty counsel, if we were to lose it, I would be disappointed. There are so many people who are at a loss who cannot afford to pay for a lawyer and who do not qualify for legal aid, as you well know. The process can be very daunting for them and a great number do not have

the literacy skills or life skills to do an adequate job of representing their interests”.

In the case of Sydney, the judges were very pleased to have a staff DC for the cell cases. They had acknowledged no major problem of self-represented accused persons in the “walk-in” cases but dealing fairly and efficiently with the custody cases had always been a major complaint so in their view, the cell DC initiative has been “a major gain”. One judge observed that “before persons would often have to be put over for another day and, if it was Friday, perhaps remanded for the weekend”. Another judge commented that the initiative has been a major success – “absolutely” he opined! He added, “Before, there was chaos very Monday” when his court held arraignment and / or plea. There was no question in their mind that the staff cell DC has made the court process more efficient and created a smoother court continuity (“no more half-hour breaks” one said, as the NSLA lawyer visited clients in the cells). It was estimated that 90% of the cell DC’s effort dealt with release and bail issues. The judges readily identified benefits of the DC initiative for clients and for other court role players including themselves. One judge listed the main benefits of the cell DC as, “providing proper legal advice up front, facilitating appointments with legal aid, and helping the court by providing advice to clients where opportune and where the judge may be asked something legal by the defendant”. The cell DC, they held, gave the other NSLA lawyers more time to work with their cases but most importantly there could be focus on the priority group, namely the accused persons locked up. It was also observed that the availability of a staff DC has meant that he could be called upon occasionally as a friend of the court to advise an unrepresented person in a trial or related contexts.

The judges did not think that the DC involvement had appreciably increased the frequency of guilty pleas at bail hearings. One judge thought that there may now be a few more guilty pleas but noted that a victim impact statement is now mandated and would be usually unavailable, and that for that and other reasons, no profound change has occurred. Another judge reported that a plea occurs only in a small minority of release/bail hearings and usually when the person is picked up on a breach. The judges considered that release and bail issues were not overly complicated save in the case of youth as a result of the YCJA in 2003. The judges appeared to be of the view that the cell DC initiative had solved the lion’s share of the self-represented problem for the Sydney criminal court. Both judges held that there was only a very small proportion of defendants who were self-represented at trials and that this problem could be further reduced either by more utilization of the cell DC or by more use of the NSLA certificate program. With respect to the cell DC initiative, the bottom line for the Sydney judges was unambiguously stated by one judge with his comment, “I couldn’t be more pleased and would hate it if it stopped”.

In sum, then, the following are the key findings from the judges’ perspective:

1. The DC service was introduced in HRM with minimal fanfare and little formal communication of the DC’s mandate to the judges.

2. It took some time in the judges' perspective for the staff DC in Halifax to realize the full mandate of the role – something they attributed to the way the service was introduced, a normal period of 'fitting in', and the personal style of the DC – but the service was functioning quite well by the time she left the position in January 2006 after roughly 14 months on the job and was replaced with a roster DC. The staff DC in Dartmouth was in operation for only half that time and had been replaced by a roster approach before this research began; there was little sense of evolution in the implementation of DC role or any comparison between the staff and roster approaches drawn by the Dartmouth judges.
3. The judges in HRM were quite appreciative of the DC service whether in the staff or roster model of service but their preference was clearly for the staff model since it offered more consistency in service and integrated the service better in the court process.
4. The main beneficiaries of the DC service in the judges' views were the unrepresented defendants, the judges themselves, and the court process itself (better flow, higher quality justice product).
5. Several judges held that the duty counsel could be more proactive in seeking early resolutions and several also suggested that the DC might attend for the defendants, matters such as "voir dire" and "changes in undertaking".
6. The judges have accepted the roster system and believe that with a few modest changes and hopefully limited turnover, it can provide significant benefits for clients, court officials and the court process.
7. The judges have a major responsibility when dealing with unrepresented or self-represented defendants as is evidenced in Statement of Principles on Self-Represented Litigants and Accused Persons issued by the Canadian Judicial Council in 2006. They appreciated that the new programs directed NSLA resources exactly where they were needed. Accordingly, they expressed much satisfaction with the DC initiatives, whether it was "walk-in" or cell focused.

CROWN PROSECUTORS' PERSPECTIVES

In the 2004 study, fourteen Crown Attorneys were the subject of detailed in-person interviews. Of the fourteen interviewees, eight worked as prosecutors in the Halifax Regional municipality with the remaining six working in regions outside of Halifax. There existed no consensus amongst Crown attorney interviewees about the magnitude of the unrepresented litigant problem in provincial courts. In Halifax, although a number of those interviewed stated that it is preferable, in many regards, for an accused to be represented at court by a lawyer, most refused to go so far as to suggest that representation is always necessary. Several of the interviewees further suggested that although unrepresented litigants do pose a problem of sorts to the functioning of the courts and, perhaps, to the administration of justice, the unrepresented litigant issue falls short of representing a “huge” problem. Five of the six Crown Attorneys who practice outside of Halifax submitted that the unrepresented litigant problem is neither “major” nor “growing. Most interviewees stated that current legal aid eligibility requirements necessarily prohibit many accused persons from obtaining professional legal assistance. In the words of one Crown Attorney the problem is “... largely because of the tough eligibility rules for NSLA and the fact that income limits have not been altered in such a long time.” Other interviewees pointed to the lack of funding that Nova Scotia Legal Aid receives and its consequential lack of adequate staffing. Another interviewee held that the unrepresented litigant problem has been further compounded by the inherent complexity of many criminal cases since the introduction of the *Canadian Charter of Rights and Freedoms* in 1982 and the increased popularity of Rowbotham applications.

Crown Attorneys submitted that the ‘typical’ unrepresented accused is of a relatively low socio-economic status. Many of these individuals, they submitted, do not qualify for legal aid and are unable to finance private legal services. It was suggested by at least one Crown Attorney that some accused appear unrepresented for alternative reasons – for instance, some accused simply prefer a ‘do-it-yourself’ approach and others may be delusional – but it was admitted that these cases tend to represent a very small proportion of all unrepresented accused cases. Crown Attorneys further indicated that most unrepresented accused appear before the court on summary offence or dual procedural offence charges, such as domestic assault or *Criminal Code of Canada* driving offences.

When queried about the effects of the unrepresented accused problem, Crown Attorneys generally suggested that they can be examined under three lenses – as problems to the accused himself or herself, impact on the court process and effects on court players. On the issue of problems to the accused, some Crown Attorneys suggested that some unrepresented accused make poor decisions and act irrationally, often out of ignorance and fear. This, it was submitted, creates a variety of problems for the accused including the premature entering of guilty pleas and the court process being prolonged unnecessarily. It was further suggested that unrepresented litigants detrimentally affect the court process in general in that unknowledgeable litigants “slow down” the system. Finally, interviewees suggested that unrepresented litigants cause problems for other court players and create a certain feeling of tension or “discomfort”. Some Crown

Attorneys suggested that many court players exercise extreme caution when dealing with unrepresented accused. In the words of one interviewee, "... in the past the Crowns would talk with the unrepresented about the case but a flood of complaints has caused this practice to decline and Crowns are now very reluctant to confer without a witness." On the issue of proposed solutions, almost all interviewees advocated expanding the Nova Scotia Legal Aid program so that more individuals will be eligible and many interviewees further advocated the implementation of a non-custody duty counsel system, similar to that which has been used for custody matters in Halifax courts.

Seven crown prosecutors were interviewed in 2006 and asked their views about the duty counsel system that had been initiated. By this time there was only a roster system in place in both Halifax and Dartmouth provincial courts. All the crown prosecutors were enthusiastic about the DC system, using positive expressions such as "It is indispensable", "a valuable service", and "It plays an essential role". It was noted that there are many risks of defendants being unrepresented, risks to themselves, to the prosecutors and for the court process. The prosecutors all appreciated that the DC system made it possible for themselves to avoid the "tricky situations" that might develop when they provided legal information / advice to the unrepresented defendants; avoiding such interaction was deemed important and there was reference to the possibility of selective recall on the defendant's part about what was discussed and "offered". One crown prosecutor, referring to how having a DC made his job easier, gave a detailed personal example of his own trying experience when he dealt directly with an accused and subsequently faced challenges in court over ensuing conflicting interpretations of that conversation. Generally, all the respondents supported the contention that the DC system has reduced the length of court processing time by leading to fewer adjournments, effecting the early resolution of some cases, and resulting in fewer frivolous applications for variances that the prosecutors had to respond to. At the same time they could cite no data supporting these assumptions but expressed an interest in the research yielding such information; unfortunately this was not possible.

As for the benefits of the DC system for unrepresented defendants, they reportedly occurred at all levels, namely understanding their disclosure, having a knowledgeable person speak to the sentence, obtaining specific advice about applications for variances and so on. Some prosecutors thought that veteran or repeat defendants might benefit less from the DC service but even those willing to hazard an opinion on this issue of which defendants might benefit the most, quickly qualified it by noting that there may be many factors at play. The prosecutors were unanimous in the view that the judges would enjoy more comfort seeing that the unrepresented defendant had some legal counsel and not having themselves to provide it or look after that aspect. Among the benefits to all parties, according to several prosecutors, was that the DC's intervention occasionally resulted in the matter being referred to adult diversion (e.g., "The DC reviewed the situation with his client and then approached me and said the client accepted full responsibility and thus the case could be diverted"), saving all court officials some work and the defendants' avoiding a criminal record.

In general the respondents identified the three activities of providing summary legal advice (including reviewing disclosure with clients), interacting with the prosecutor on behalf of the clients, and linking clients to NSLA, as constituting the major DC core role. The prosecutors typically noted that over time there has been more “speaking to the sentence” by the DC, whether in Halifax or Dartmouth court. As well, they noted the DC is occasionally called upon to advise an unrepresented defendant with respect to applications for variance and sometimes in trials. One prosecutor reported getting the DC to respond to “a couple of quick questions” from the unrepresented defendants in these situations. Another respondent reported that a judge, in the midst of a trial, might direct an unrepresented person to talk to the DC about a specific issue (e.g., evidence, engaging a witness). In both these latter cases, apparently “it is a hit or miss situation” basically because the DC is usually not available, especially now that all are roster DCs and may only work half-day. Generally the crown prosecutors saw the DC role ideally in a more expansive way, as advancing justice in a broad sense, not just providing summary advice and linking the defendants to NSLA.

As noted above, a common crown prosecutor view was that, until the recent past, virtually all the DC work, including advising defendants in applications for variance, was handled by regular NSLA staff lawyers. The restrictions on regular NSLA engagement presumably have meant that more and more defendants have been falling between the cracks, not eligible for legal aid and not able to afford a private lawyer; the result has been a problematic situation for everyone, defendants, judges and the crown prosecutors. In that context then it is not surprising that they have been positive about the DC initiative and shared the view of a top PPS official, namely “We welcome the duty counsel initiative and want to see it publicized and marketed even more, become more visible”; in his mind it would be useful to give the program some publicity via newspapers and other media. One senior prosecutor in January 2006, more than a year after the DC project was launched, held that the DC initiative should be “more out front, even having a desk in court, eye-catching signs and generating the view that ‘we’re there for them [the defendants]’”. Another respondent argued, “It [use of the DC service] should not depend on the personality of the duty counsel or the judges’ acknowledging it”. There was some diversity with respect to the crown’s responsibility to publicize the DC availability. One senior crown held that crowns too should also alert unrepresented defendants to the DC option while another senior crown noted that while he suggests it sometimes or may even raise it in court, he does not see his role as making people aware of or calling attention to the DC; rather, the judge should be the one in open court who might suggest a defendant see the DC.

Aside from the visibility issue, a senior PPS official reported that he has never heard a crown prosecutor say anything negative about the DC initiative. There were opinions expressed as to the competency of the DCs. Here the crown prosecutors referred as much to personality and interactional style as to legal competency. Suffice it to say that while all the DCs passed the minimum threshold of adequacy from the crowns’ standpoint, only a few were rated as very good in the role. The respondents did note that reviewing disclosure with clients and negotiating with themselves over charges and sentences was limited with little fault to the DCs. In the case of disclosure, for example,

they appreciated that the DCs in the few minutes available could hardly carry out an in-depth analysis of the material, save in minor matters such as shoplifting; moreover, they reported that for a variety of reasons, the crowns may be reluctant to pass along the police files as is (i.e., without some editing on their part). The respondents also observed that the early resolution (ER) format limited any courthouse “wheeling and dealing” over possible sentencing. The ER was introduced solely in the Halifax court in September 2005, roughly eleven months after the non-cell DC initiative was launched there. The PPS official (a senior prosecutor) in charge of the ER project reviews all incoming files and after winnowing out those that will not go forward, provides an ER offer with the disclosure available when the defendant attends arraignment. The ER is completed for at least 98% of the files and presumably indicates the bottom line, lowest sentence that the PPS is willing to offer in return for a guilty plea. There is a fixed date of two months for the defendant to accept and after that the defendant must take the matter up with the chief prosecutor at PPS should he/she want to accept the deal. Part of the ER’s rationale is to save all parties time and resources, and part is to “take the pressure of negotiation off the crown prosecutor who has the file”. The defendants or their legal counsel can directly contact the ER official and discuss the ER sentence, introducing some considerations and perhaps negotiating a new ER. Interviewed twice in 2006 the ER official indicated that there have been a few contacts by private counsel or NSLA staff lawyers but none by non-cell DCs, whether staff or roster. While it might well be expected that the combination of the ER and duty counsel initiatives would result in more early case resolutions, that may not be the case since both NSLA and DC lawyers considered the ERs to render sentences on the high side and, accordingly, often advised against acceptance and considered it a challenge to secure a lesser sentence for clients. The proportion of defendants who have accepted the ER offer is not known nor what the success rate has been for defendants (and their legal counsel) who have rejected it and subsequently were either acquitted or received a lesser sentence that laid out in the ER.

All respondents indicated that the DC initiative had been introduced with minimal fanfare (“a low-key approach” one said) and, further, acknowledged that all court parties were learning by experience about the possibilities of the DC role. Senior crowns in both Halifax and Dartmouth reported that little attention was drawn to the DC initiative and there were neither PPS directives nor formal staff meetings on the topic; for example, one senior crown in Dartmouth specifically observed that as far as he was aware there never was a PPS memo about the DC initiative and later in the interview (late winter 2006) expressed his chief recommendation as the hope that the DC mandate would be expanded to include consolidating charges from other courts – something that was already part of the DC mandate. Asked how he came to know about the staff DC in the Dartmouth court in 2005, this respondent said “Well I saw a new face and got the point that she was there for matters of adjournment and sentencing. By asking I understood that the mandate did not extend to doing trials”. The prosecutors reported an evolution of the DC role and court presence. On the latter front, they reported that the roster DCs now sit at the counsel table and that the DCs often make an announcement at the beginning of the court session. It was noted that the staff DC in Halifax, until vacating the position in January 2006, had become more assertive in the role as time went on. It was also noted by several crowns that there is more judicial recognition and referral of the unrepresented

to the DC but as one stated, “While some judges took the bull by the horns as it were, others scarcely acknowledged the duty counsel so it has been a mixed bag”.

The crown prosecutors on the whole did not accept that the DC role might result in more premature guilty pleas as the DC became more and more a part of the court system and they allegedly experienced pressure to facilitate a faster court processing of cases or that roster DCs might have conflicts of interest related to their business interests. A senior PPS official seemed surprised at the questions and took the position that “It’s not hard for a competent lawyer to assess whether there is sufficient evidence for a conviction”. One senior prosecutor expressed nuanced views, noting that, while conflicts of interest might be possible (here he observed that a DC told him that he had got clients associated with his DC work), that was true in most lawyer-client relationships, that most unrepresented defendants could not afford private counsel, and that he did not think a DC would respond differently to a person who could afford it (i.e., encourage or abide with a guilty plea in the one instance and urge a fight in the other). However, one other senior crown was much less sanguine about the conflict of interests, ethical situation. He described as “bullshit” the argument that violations of ethics by “bottom-feeding” would not occur or would be readily exposed by the court community; in his view “the DC role currently is low pay and low status so people go into it for experience or to hustle business” and hence it would be naïve to think that the part-time roster DCs would not have to wrestle with some ethical pressures.

Overall, then, the crown prosecutors welcomed the DC initiative. Their preference – as with other court groupings – would be for a staff DC for the usual reasons of continuity and greater recognition by all parties including potential clients, but also because staff DCs would be more generally available at the courthouse and thus could be occasionally called upon for assistance to the unrepresented defendants beyond their core mandate (e.g., applications for variance, specific issues in the midst of a trial). Still, they valued the initiative even if it remained in the roster model. One crown prosecutor even contended that the roster model might have the advantage of “exposing more young lawyers to criminal court and thus get new blood into the system”, though he immediately qualified his praise for the roster system by noting its greater potential disadvantage for the clients and the court process (i.e., less continuity, questionable effectiveness of the linkage with NSLA). There was little clamor from the respondents for a formal expansion of the DC mandate such as becoming more engaged in minor trials and being available for emergency requests from judges and crowns at trials of the unrepresented; while these DC activities were appreciated when they did occur, the respondents did not believe there was need or practicality in adding to the formal DC mandate. The crown prosecutors’ recommendations basically were two-fold namely (a) increase the visibility and institutionalization of the role through better publicity, facilities for the DC, “buy-in from court officials and so forth; (b) enhance the stature of the DC position by raising the pay and having experienced defense counsel occupy the role. As one senior crown prosecutor stated, “the DC system should be more formalized with sharper and more experienced lawyers to deal with both crafty accuseds and sharp prosecutorial opponents”.

In Sydney where the duty counsel project was focused on the cells, something that has been common in HRM for a number of years, the crown prosecutors also were very positive about the initiative. They noted that prior to the initiative there were significant delays in court processing (i.e., the court literally came to a halt and recessed) while NSLA staff consulted with clients in the cells, generally on bail issues; with the DC system, bail issues have been settled more quickly and the cell defendants linked with NSLA more expeditiously (the PPS managers have depended themselves on per diem prosecutors to deal with the cells). A senior crown stated that the cell DC initiative has represented a 100% improvement in court processing with fewer court recesses and fewer adjournments; he added that the cell DC like his celebrated counterpart in Halifax “knows how to talk with the cell people”. The Sydney provincial court does not have duty counsel services for non-cell or walk-in defendants and it was considered that adding such responsibility to the cell DC would create too heavy a load. Moreover, there was the view, as noted in the introduction, that NSLA is more readily available (even responding in breathalyzer cases) and that there is much more informality and collaboration among judges, crowns and defense counsel in the Sydney area than in HRM, with the consequence that the unrepresented walk-in defendant does not constitute a significant problem. Sydney, like HRM, did have a youth court duty counsel until April 2006 where the DC was largely (75% of his workload) dealing with the cells and release issues, and also with variances and matters of deferred custody (analogous to conditional sentences for adults). As one crown observed, “the YCJA has greatly complicated issues of bail and release for youth and it is a complex field of law now, more so than in the case of adults”. While the cell DC for youth was also valued highly by crown prosecutors, it was discontinued by NSLA – and replaced with per diem or part-time lawyers – presumably because the workload did not justify a full-time dedicated DC and the federal funding for the project had terminated.

In sum, the crown prosecutors in 2004 varied in their views about the magnitude of the unrepresented defendant problem in provincial criminal court in Nova Scotia. There was consensus throughout the province that the problem was more serious in HRM than outside the metropolitan area but, even in the HRM context, not all crowns considered that the problem was “major and growing”. The most important cause of the unrepresented phenomenon was deemed to be the gap between not being eligible for NSLA and not being able to afford private counsel, but other causes were also advanced. The two chief solutions offered by the crowns in 2004 were to make NSLA more accessible and / or to provide duty counsel service for non-custody unrepresented defendants. In 2006 the crown prosecutors interviewed all considered that the DC system implemented, whether the cell or the non-cell DC, was a valuable, useful service. They readily identified the benefits that it has yielded for clients, court role players such as judges and themselves, and for the court process. In their view the DC role chiefly entailed three activities, namely providing summary legal advice, interacting with the prosecution on behalf of their clients, and linking clients up with regular legal aid services; at the same time they indicated much appreciation for other interventions of the DC as a friend of the court explaining legal matters to the unrepresented defendants. In both HRM and Sydney, the prosecutors reported that, over time, the DC service had evolved well. The main benefits they identified the DC initiative providing the clients

were some understanding of their disclosure and having a knowledgeable person speak for them in court. The crown prosecutors strongly preferred the staff DC model over its roster counterpart for predictable reasons but they were appreciative of the DC service, whatever its guise. The limits they identified with respect to the non-cell DC program such as very modest assessment of disclosure and little negotiation were seen to be integral to the DC initiative and not the fault of those providing the duty counsel work. All crown prosecutors in HRM did hold that the DC program needed much better promotion.

NSLA AND PRIVATE COUNSEL PERSPECTIVES

In the 2004 study ten employees of Nova Scotia Legal Aid were interviewed, eight in Halifax and two in other regions in Nova Scotia. On the issue of the seriousness of the unrepresented accused phenomenon, all but one of the interviewees described it as a “major” and “growing” problem. One senior Nova Scotia Legal Aid official suggested that the unrepresented accused problem represents the most common complaint he receives from judges. Another legal aid lawyer stated that the problem continues to grow despite conscious attempts by many lawyers to stretch existing Nova Scotia Legal Aid eligibility requirements. On the issue of causation, most interviewees stated that the unrepresented accused problem is major and growing as the result of restrictive Nova Scotia Legal Aid eligibility policies and macro-level factors which presumably have led Nova Scotia Legal Aid to expend more resources on fewer cases. In addition, some interviewees cited the increasing costs associated with retaining private counsel. Most Legal Aid officials described the ‘typical’ unrepresented accused as being a member of the “working poor” or lower middle class who is ineligible for Nova Scotia Legal Aid but, at the same time, unable to afford the services of a private lawyer. On the issue of offences, it was suggested that most unrepresented accused appear before for court for relatively minor offences but it was conceded that some such cases have involved more serious charges.

All interviewees suggested that a lack of representation does pose problems for the accused, for other court participants and for the system in general. This cohort of interviewees afforded additional emphasis to the proposition that a lack of representation results, in many instances, in situations of inequity and injustice for the accused. Interviewees further reported that the problems created by unrepresented accused extend to all three pivotal players – judges, Crown attorneys and Nova Scotia Legal Aid lawyers, suggesting that most representatives of all three groups dislike dealing with unrepresented litigants because they complicate their roles in the criminal justice system which, presumably, affects the macro-operation of the system. On the issue of proposed solutions, interviewees placed priority on changing Nova Scotia Legal Aid eligibility criteria, such that more individuals would be eligible for the service, as well as on the introduction of a duty counsel system.

The 2004 study sought the opinions of ten private criminal lawyers. Each of the lawyers interviewed held that the unrepresented accused issue represents a major and increasing problem for the criminal justice system. One interviewee suggested that “a crisis is brewing and the players in the criminal justice system need to acknowledge that and adjust to it.” Another lawyer, who practices exclusively in the domain of criminal litigation, stated that as many as 50% of the criminal cases he carries involve an unrepresented litigant. On the issue of causation, interviewees echoed the factors posited by other interviewee cohorts. They suggested that many accused are forced to appear unrepresented because they do not qualify for legal aid and because they are unable to afford private counsel. Other interviewees pointed to the fact that laws have become more complex, and to the fact the *Charter* has added an extra layer of complexity, the combined effect of which has been an additional strain on the finite resources available to

unrepresented litigants through legal aid programs. Interviewees suggested that the ‘typical’ unrepresented accused is an individual charged with domestic assault or with impaired driving. The majority of these persons, it was suggested, were the working poor caught between Nova Scotia Legal Aid eligibility and costly private defense services. Many of the interviewees reported previous experiences in which unrepresented litigants visited their office and subsequently “walked away” as they found the retainer and projected cost of the litigation to be too expensive. The interviews lacked consensus on the “unbundling” approach as a partial or full solution. There was significant support, however, for revising Nova Scotia Legal Aid eligibility requirements to enable more individuals to be serviced by that program, as well as for the implementation of a full duty counsel model.

In this research five NSLA lawyers and three private counsels were interviewed. The NSLA officials acknowledged that the DC initiative was launched with little fanfare, more of an osmosis approach, basically because “we’re a small office”. There were reportedly informal conversations with the chief justice of the Halifax provincial court and also with the senior two staff members of the PPS where these parties were informed about the DC project. Since the NSLA is by tradition and protocol independent from the court and has a formalized institutionalized relationship with judges and crown prosecutors, it was considered that it was up to the judicial leadership and PPS managers to communicate with their members. NSLA officials indicated that they did also notify the sheriff’s office, put up posters (i.e. a sheet of paper with the details of the DC service specified and a contact phone number) where they were most likely to be seen, and informed the office of the Public Legal Information Society which links persons needing legal advice to lawyers for quick assessments (the lawyer referral system). A Bar Society official reported, “I was aware of something happening but consulted is too strong a word”. In his view the implementation was a “soft sell” which reflects the NSLA’s low-keyed, self-effacing and practical orientation. The private lawyers interviewed were critical that there had been presumably no communications about the DC initiative with the Bar Society or defence lawyers since in their view there clearly could be implications for private counsel; one veteran lawyer noted that all the information he received was from reading the sheet posted on the docket board, adding “Who is ever going to notice that”.

NSLA officials also reported that the format of having the new staff Halifax DC learn by example, shadowing the veteran cell DC for several weeks, and then having the Dartmouth staff DC work with her Halifax counterpart in the same fashion for about the same length of time, was considered quite appropriate and congruent with the professional approach at NSLA where staff lawyers exercise professional autonomy. Other private respondents described the implementation process as reflecting NSLA’s emphasis on workload and practical issues, not the bigger picture of justice. In terms of the credentials for the staff DC position, it was indicated by NSLA officials that the desired person should of course be very competent but also be someone veteran enough to know the nuances of the court yet perhaps fresh enough to still have a lot of idealism. While the salary offered the staff DC was modest – in the \$70,000 range – the private

counsel's typical assessment of the salary was "not bad and she does not take anything home with her".

The respondents were generally positive about the DC initiative but virtually all also reported that they had limited knowledge of how it has worked out. One NSLA lawyer said simply, "There are no negatives, only positives". A Bar Society official interviewed in late 2005 when the staff DC was still engaged in Halifax and Dartmouth had the roster system, reported that he has heard that it has been a smashing success and had been told by a judge, "What would we do without it". NSLA officials expressed the view that a positive evolution of the DC service had occurred over time in the staff DC role in Halifax. The NSLA lawyers indicated quite clearly that having the DC role staffed not only provides needed assistance for unrepresented defendants but is beneficial for themselves, relieving them of some burdens; one said, "The front end trench work is now handled by others [now that there is non-cell DC service as well as the cell DC service] and that gives me more time to do law". An NSLA lawyer commented, "The duty counsel is filling a void, not stealing cases from us". All respondents preferred the staff model over the roster version for continuity, recognition by clients and court officials, and status (i.e., the DC's level of influence) reasons. At the same time, it was noted that there is little contact between with the DC and the front-line NSLA lawyers; as one said, "Once in a while the duty counsel might pop in and say that "a defendant has specifically asked for you" for the legal aid service but that's about it. They are two different worlds". Other non-NSLA lawyers also held that the staff model of DC service would be preferable to the roster approach for essentially the same reasons. A Bar Society official commented, "The staff model means that the person is around a lot and is more engaged with the players and more accessible to the defendants ... the roster DCs do not hang around when the docket is completed, I am sure of that".

Asked what measures might be focused on in attempting to assess the DC initiative, the defence lawyers were quite uncertain. One senior NSLA lawyer answered, "Well it should not be the number of files moved, the number of appearances for DC clients or the hours spent on the cases". While acknowledging that perhaps faster NSLA appointments and early legal advice might well be expected to speed up court processing and result in fewer appearances, NSLA officials also cautioned that a recent study by the Nova Scotia Department of Justice has indicated that, despite significant new resources in recent years, the court process is taking even longer for the average defendant. Many reasons were said to underlie this anomaly; for example, one NSLA officials considered that possibly lawyers are trying to delay so that the defendant can get "his or her act together" and thereby make a better case for a conditional sentence. While there was an interest at NSLA in whether or not the DC initiative has resulted in quicker closure of cases, the overriding concern was that no one should be jailed without being able to access a lawyer. Clearly, to assess the issue adequately one would require access to court records (e.g., the number of appearances, type of legal representation, disposition and sentence) and also be able to control for type of offence and the defendant's criminal record. As noted in the section on courtroom observations, it does appear that DCs frequently have made NSLA appointments for clients and also reported almost immediately back to the judge thereby facilitating the scheduling of effective appearance

dates or trial dates, and in this manner presumably reducing the number of appearances that might otherwise have been required.

The respondents usually did not believe that the DC system would take away business from private criminal lawyer. They rejected the applicability of Director's Law (i.e., that the "better off" would be more likely to switch to the free DC service rather than use private counsel) in this case, suggesting that those defendants who are better off financially would continue to use private counsel. An NSLA lawyer noted that about a third of the criminal code dealt with issues such as the breathalyzer issues and if the middle and upper income people wanted counsel they could afford it. An official with the Bar Society shared the view that the DC initiative would have little impact on the private counsel's business, noting "There is little business there anyways; there are no lawyers lining up, passing out their cards at the provincial criminal court". On the other hand, two private lawyers who continue to do much criminal law were less certain about the impact for private business. One veteran lawyer claimed to have obtained a few client referrals through his contacts with the DC roster lawyers but considered that the tendency would be strong for the roster lawyers to garner most of their clients' subsequent "lawyer business" themselves. Another veteran lawyer complained that, while he gave his card to the DC and indicated that he was open for business should the DC want to refer anyone, he has never been contacted, "zero, I can tell you that". Both lawyers expressed an interest in whether private lawyers are referred to by the DCs and if not, why not? They also raised the question, "How many times does the DC subsequently get some business bearing on the case from the client"?

The NSLA respondents did not think that the two issues of (a) pressures on the DC to help drive the court process by encouraging guilty pleas, and (b) conflicts of interest if roster DCs could secure future business from a client on the same matter, would be significant problems. With respect to the "pressures" issue, a senior NSLA lawyer commented in words rephrased by the interviewer as follows

He was confident that DC lawyers would not focus on flow or be "diverted" by such considerations but also said that might depend on whether they were overloaded [with clients] or not. In his view NSLA, now 33 years old in Nova Scotia, is better funded and there is less pressure to hurry guilty pleas. The thing in this process is that the judges generally push the "what do you want to do" question and this can be a pressure if the duty counsel is pressed for time and has little information as might well be the case. That's why, he added, that judges like the cell duty counsel area since there the defendants are under more pressure to answer that question.

The views on the conflict of interest issue often echoed that of the other court players, namely why not allow the roster DCs to get some business, and that otherwise any blatant bias (needlessly encouraging non-guilty pleas) would become obvious and quickly corrected. One successful private counsel disagreed on both fronts, suggesting that there well could be much tension between emphasizing the goal of court flow and going all out in fighting the charge, and that "young and inexperienced lawyers would do roster work

and would likely have their own agendas”. Another successful, veteran private criminal lawyer emphatically raised the issue of whether roster DCs are referring clients to private counsel or garnering that business for themselves.

In the case of Sydney, the interviewed NSLA lawyers agreed that the DC initiative for cell or custody cases has been very positive. Recalling that prior to this, when regular NSLA staff were responsible, the court would have to recess and the judge and clerks would be cooling their heels while the NSLA lawyer visited the cell cases, they echoed the views of one official already quoted, namely that “it was an inefficient process with lots of interruptions and then the necessity for quick response. Everyday was like that!” The cell DC was seen then as beneficial for all concerned, namely clients, other NSLA staff, judges and clerks. It was noted that the consolidation of all regional courts in Sydney has resulted in a large number of cell cases to be dealt with, with dispatch. Disclosure required serious consideration and was said to be usually available for bail hearings. The consensus was that a staff DC cell lawyer was preferable since caseload was hard to predict for an efficiently organized per diem position. At the same time there was an appreciation that the youth custody cases were much fewer and there a per diem approach would be viable.

Overall, then, the respondents from both NSLA and the private law sector agreed that the non-cell DC initiative in HRM was introduced in a low-keyed fashion but they disagreed about the adequacy of such an implementation. The private law grouping appears to have preferred a more publicized implementation where there may have been educational side benefits. For example, one respondent argued that there are two dimensions to the DC role, a principled one (e.g., no one should go without counsel) and a practical one (e.g., workload, smooth court processing etc) and that both are equally important; in his view, the DC implementation would have been a great opportunity to inform defendants and others about the criminal justice system but he did not believe that this had happened. Whatever the view about the implementation process, all the respondents whether in HRM or in Sydney considered that the DC initiatives yielded benefits for all the players and have been a valuable addition to NSLA offerings; they have filled a critical gap for the unrepresented defendants. They also all agreed that the staff DC model would generally be preferable to the roster or per diem system. There was modest divergence about the pressures for encouraging hurried guilty pleas and the potential for conflict of interests in the roster DC model. There was little discussion about the specifics of the DC role but no problems or issues were identified and all respondents understood that the DCs do not deal with major offenses and do not do trials.

DUTY COUNSEL LAWYERS' PERSPECTIVES

All told, there have been to date ((November 2006), six full-time staff duty counsel (two of whom in Cape Breton and one in Halifax who were cell duty counsel), and thirteen lawyers on the roster system, all in HRM; four of the former and three of the latter grouping have left the position. The sample for this research includes eight duty counsel, four staff duty counsel and four roster duty counsel; all but one person in each grouping had practiced law for more than ten years. The roster lawyers earned approximately \$60 per hour or \$300 per day, on a par, annualized, with the salary provided a junior NSLA staff member. None of the roster DCs in the sample worked anywhere near a staff schedule and, with one exception where the information was lacking, all expressed an interest in getting more hours or days. The roster DCs usually did both cell and non-cell (“walk-in”) duty counsel, and usually worked both the Halifax and Dartmouth provincial courts. The practice of the NSLA person responsible for coordinating the DC roster was “spreading around the work” and he observed that recruitment for the roster has not been a problem. Indeed, several roster DCs indicated that, as one said, “I depend on that work at the moment”. The significant turnover as it turned out was among the staff DCs, basically it appears because more secure and better opportunities beckoned or because the staff member had intended the role occupancy to be short-term. There were no complaints among the DCs of being over-worked (this is consistent with the views of the NSLA oversight DC) and, while one former staff DC reportedly, and surprisingly, considered that the job was boring, most DCs expressed positive, if modest, job satisfaction. Two of the four roster DCs in the sample expressed much interest in applying for a staff DC position should one became available.

The duty counsel lawyers, whether staff or roster, agreed that there had been virtually no training or fanfare associated with their assumption of duties. A full year after assuming a full time staff position, one DC reported that there had been no meeting as yet with the chief of the Halifax judiciary and while several judges acknowledged her availability regularly in court, other judges did not. No DC reported having discussions with judges or crowns about the DC role and mandate. The DCs, at least until 2006, did not know much about adult diversion either (i.e., specifics about eligibility, the identity of the adult diversion coordinator in HRM). The senior DC observed, “Even now, [May 2006] few people know that the duty counsel has an office under the stairs in the court building”, an assertion borne out by interviews with judges and crowns. The presumption associated with the introduction of the program appeared to be that the lawyers selected would be competent professionals and not require any special orientation. One DC, occupying an oversight role to some extent, commented “it would be an exaggeration to say that I trained any of the DCs but I was always around and available for consultation”. The DCs did not criticize this “osmosis approach”, generally holding that no special training or formal introductions were necessary. One roster DC commented, “Nobody should need [it] as it is simply giving quick, necessary legal advice to defendants lacking legal representation and assisting the defendant in communicating with the judge and the crown in the court room”.

In the lobby of the courthouse and in the waiting room, a single piece of paper is tacked onto the bulletin board announcing the services provide free to all defendants by the duty counsel. The sheet had been prepared by the first staff duty counsel. It emphasizes that the DC services are free of charge and available to people who do not have a lawyer and need legal advice or assistance in dealing with criminal matters. The list of services that could be provided is actually quite long and, apart from the predictable services (e.g., summary legal advice, obtaining and reviewing disclosure, speaking to the prosecutor on the client’s behalf, assisting in securing a NSLA appointment), also includes assisting in referrals to Adult Diversion or Fine Options programs, exploring consolidation of charges, entering a guilty plea and speaking for the defendant at sentencing. The basic common DC activities appear to be three-fold, namely providing summary advice especially with respect to procedure, referring the defendant to NSLA, and interacting with the crown prosecutor on the client’s behalf. One roster DC noted that “90% of the clients are referred to NSLA” while another reported that he works closely with NSLA, phones over for clients, hands out NSLA applications and advises on eligibility. In the first several months of the staff DCs’ tenure in Halifax and Dartmouth both court officials interviewed and research observers took note of the DCs often phoning over to NSLA to schedule meetings, an activity that continued but did not seem as paramount in defining the DC role as time went on and the DC role evolved. As for reviewing disclosure, observations and interviews indicated that it was common but somewhat limited. One staff DC indicated that in actuality “reviewing disclosure cannot be done by duty counsel on complex files but at least the duty counsel can give a general heads-up”, while a roster DC reported “there is no time to review disclosure” (presumably aside from minor charges such as shoplifting); another roster DC reiterated that view, adding that he does read the synopsis and reviews the early resolution statement (ER). The ER states the PPS’s recommended disposition or sentence if the defendant renders a guilty plea (or takes responsibility in the case of diversion) within a specified time frame. A third DC, noting that he has never fully reviewed disclosure with the client, indicated that it is usually a bulky document and is sometimes not available, adding that in some few instances he would arrange to meet with defendants on another day and after they looked over their disclosure or thought more about the charges.

Entering pleas and speaking to the sentence should a guilty plea be advanced were not uncommon DC activities. In the case of the first non-cell, staff DC in the Halifax Court these activities became more frequent with her tenure in the role – “yes I am speaking to the sentence more and more and sometimes I got a better sentence from the judge than was offered in the Early Resolution (i.e., the PPS position on sentencing is included with disclosure)”. Some roster DCs quickly asserted themselves at plea and sentencing but there was significant variation here among the DCs. In any event, by far the most typical circumstance where this occurred was for the DC to speak to the sentence right there and then, “on the spot” and “off the top”, as it were. A staff DC commented, “Yes, that happens 90% of the time but in about 10% of the cases there is a postponement so I can prepare more and sometimes get a pre-sentence report”.

The DCs frequently went beyond the required tasks in responding to requests from judges and crown prosecutors to assist defendants in trials and trial preparation. For

example, one young DC noted with pride that he has several times acted as “a friend of the court”, rather than as the designated lawyer for the accused, in trials; indeed, he talked about his success in one such case where he “won an objection”. A staff DC reported that she has responded on several occasions when crown prosecutors sought DC help in explaining some legal issue (e.g., voir dire, reviewing evidence) to the unrepresented defendants in a trial. A senior staff DC noted that judges (and to a lesser extent crown prosecutors) have not been shy in getting the DCs involved, where a defendant is without representation, even in the midst of a trial, adding “I have stayed with a trial for a whole day trial”.

As judges and others have indicated, there is a personality dimension to the work of the DC since much depends on the DC taking the initiative in approaching the unrepresented defendant and, then, on the DC’s communication style. While judges over time have increasingly referred the unrepresented defendant to the DC, in some instances that does not happen, especially where the defendant appears adamant about wanting to proceed without delay and where the offense may be minor and without apparent complexity. The DCs typically stated that the chief way they get clients is by introducing themselves to them and secondly, and less so, by referrals from the judges; less commonly, a client may be referred to the DC by crown prosecutors or by NSLA. A senior staff DC commented that being a DC may require a certain type of personality since “it is important to have the goal of having more touches”, presumably meaning that the DC has to reach out to the potential clients if he/she is to have a good penetration rate. The DCs exhibited quite different levels of assertiveness in approaching unrepresented persons, in announcing their presence in the courtroom and in getting the judge’s attention when the latter was questioning an unrepresented defendant about his/her lack of counsel and intentions in that regard. Where the DCs position themselves in the courtroom varied much as well (see diagram A). One staff DC in her first months on the job remained apart from the “well” of the courtroom or the counsel table until advised to move there by a judge. Some roster DC sat at the counsel table and some did not. Aside from being at the counsel table when entering a plea or speaking to the sentence, the advantage of that location would be easy contact with an unrepresented defendant standing before the judge; however providing summary advice and reviewing disclosure etc with the clients takes the DC out of the courtroom in any event so it could be argued that unless there is a specific reason to be at the counsel table or unless business is slow, the DC would be more efficient, as some DC stated, in the corridor or in the DC office talking with clients.

Personality differences were obvious as well in the DCs communication with potential clients though it is not clear what the correlates or implications are of these differences. There does seem to be an expectation on the part of the DCs and from other court officials (judges and crown prosecutors) that the DCs would help separate the wheat from the chaff and introduce a dose of realism into the sometimes unreasonable expectations or premises of defendants. Then, too, as the DCs noted, many defendants do not appreciate the limited mandate of the DC. How a DC handles that situation varies quite a bit. One roster DC suggested to the interviewer that he may have a poor reputation among defendants because he is brusque in informing them that “I do not do trials and

really don't care to hear every detail of the case since I don't have time for it and do not need to know as a duty counsel lawyer”.

It is difficult to assess the penetration rate or level of the duty counsel service since secondary court data are unavailable and the DCs all indicated that they do not record names and contact information for those persons who refuse the service (“time does not allow for this” was the standard response). Several DCs reported that only about 10% of the defendants they talk with refuse the DC service. This figure is somewhat lower than the research’s courthouse observations indicated but sometimes it is not clear what accepting the service referred to (e.g., a person might talk for a few minutes with the DC and then go back into the court and plead guilty on his own as he said earlier he was going to do; is this accepting or rejecting the DC service?) and, moreover, the observation days constituted only a small sample of DC activity. Courtroom observations (i.e., thirty-five days) indicated great variation in the demand for DC services but it was also true that on many days there was a line-up of several defendants waiting to see the DC and on some rare occasions two DCs were working.

Two issues, frequently cited in the literature as potential drawbacks with the duty counsel system have been (a) pressures on the duty counsel, whether roster or staff, to encourage guilty pleas – early case resolution? – in order to speed up the court process and facilitate smooth court flow; and (b) ethical issues if the roster DC was to encourage the client to plead non-guilty and suggest his/her own availability then as private counsel – some lawyers have characterized the latter as “bottom feeding” and a potential conflict of interest. All DC respondents disputed any pressures to have a client enter premature guilty pleas. Concerning the former, a staff DC commented, “Well, I wouldn’t allow myself to do it”, adding that the greatest pressure for “plead and go” comes from the defendants themselves. A roster DC commented that he did not encourage guilty pleas to speed up case processing but rather his concern was to make sure that the person knew what the case was, the significance of the evidence, to advise about getting a lawyer and explain about NSLA eligibility. Another roster DC commented,

“Sometimes a person will just want to plead guilty and I might say, “well you might want to wait, review the disclosure and then plead guilty later, that’s okay too”.

Interviewer: Is there a pressure to move things along and so get the defendants to plead guilty?

“Well only if the defendant is being offered a good deal by the crown! If a duty counsel isn’t involved some crowns won’t reduce the charges a person would plead guilty to, where a duty counsel would almost always get some charges dropped. Sometimes if I think a person is pleading guilty despite protestations of innocence, I will have the person “sign off” on a sheet where I say I recommend against a guilty plea”.

This general viewpoint of the DCs, about not encouraging hasty guilty pleas is quite congruent with the research's courthouse observations and also with the client interviews discussed below; indeed there were several instances where the interviewed clients reported that the DC was upset when the accused, despite DC advice, remained adamant to "plead guilty and get it over with". It may be noted too that while some court officials did express the wish that DCs would facilitate early resolution, their targets were first, reducing delays in the defendant's securing legal advice and entering a plea rather than a guilty plea per se, and, secondly, avoiding what they deemed to be frivolous contention; the latter was considered less a priority since it was often presumed that such defendants would not heed the DC's advice in any case.

DC respondents also rejected the conflict of interest argument. The oversight DC acknowledged that some roster lawyers accept the DC work because of anticipated business opportunities but he did not see this as "bottom feeding" since the concept of a voluntary roster was "pie in the sky" ("a volunteer lawyer would be welcomed at any time") and if there were strict rules against securing subsequent work on the case as private counsel, the program – in its roster format - might well falter. Indeed, in his view, more "unbundling" of legal services is generally desirable in criminal court (and perhaps more so in family court) and the roster model might well encourage that to happen. That standpoint concerning the unfeasibility of a voluntary roster and the additional carrot of future business prospects was shared by all DCs interviewed. All roster DCs, who had a private practice, reported that some clients, whom they assisted as DC, subsequently became clients in their private practice, usually on the matter in question. One roster DC commented that he has secured a fair amount of private business in this way and added, "I would not work as a duty counsel if I did not get any clients for my practice through it; working as a DC does not bring enough profit". Another roster DC, asked whether there should be rules to guard against such potential conflicts of interests as illustrated in an example the researcher gave from Hamilton, Ontario, gave the common response

"I don't think there is a problem and if abuse occurred, the other court people (judges, prosecutors) would report me. There's no need for a Hamilton type arrangement prohibiting a per diem duty counsel from handling the same matter later on a private basis".

Certainly then the consensus view is that it is not improper for roster DCs to seek subsequent business as private counsel in such cases. Recall, too, that the part-time, roster DCs could not survive just on the limited duty counsel work available to them. There is no evidence, as will be seen in the client interviews, that any accused felt pressure to hire the DC on a private basis to pursue the case or in fact did so. As noted above judges and prosecutors also expressed no special concern over the potential problem though the two private counsel interviewed were not as quick to dismiss the possibility.

The DCs readily identified the benefits of the duty counsel service for clients, judges, crown prosecutors, and for NSLA. As one roster DC commented, "The duty counsel makes possible more efficient resolution and movements of the court process for everyone involved". With respect to clients, it was reported that benefits include

clarifying the actual charges (“The unrepresented often misunderstand what they are pleading guilty to as the charge may sound similar to what they think they did when it actually is quite different”), assistance in reducing charges, better sentences than called for in the ERs, and reduction of the fine assessed, especially getting the victim surcharge dropped. The proof of the pudding is presumed to be that few defendants turn down the DC’s offer of help. One roster DC commented, “Clients are appreciative of the service as I move the court process along for them, advise them about NSLA and provide legal advice such as about the ER deal”. Another roster DC put the benefit in more personal terms, “I like best being there as immediate counsel to those in need; being able to provide relief to those in a highly stressful situation”; the comment about some clients being terrified by the court experience was echoed by other DCs. The DCs usually did not speculate or comment on whether their services were received differently by defendants of different gender or race/ethnicity but several, staff and roster, allowed that there may be differences by type of offense and whether the defendants were repeat or first time offenders.

The DCs considered that judges are grateful for the DC presence since it does address their difficult formal responsibilities to unrepresented defendants; as one staff DC commented, “Some [judges] use it readily whenever they deal with unrepresented people and there would be an outcry if the DC program were ditched though it would be short-lived”. The DCs also considered that their service benefits the crown prosecutors though here it was reported that there has been variance among the crown prosecutors with respect to attitudes towards and interaction with the DCs. One senior staff DC reported that while there have been no complaints from the judges but there have been a few from the crowns. At the same time, most DCs indicated that they have been approached by the prosecutors to assist an unrepresented defendant at trial. One roster DC commented, “The DC presence makes things easier for the crown prosecutors as it makes it possible for the crowns to avoid talking with an unrepresented person. This is very good for the crowns as they do not like talking to a person lacking legal representation”. The DCs typically then considered that the DC service creates “a comfort zone” for judges and crown prosecutors. The DCs had little doubt that there have been benefits too for NSLA, contending that by advising people concerning their eligibility and facilitating scheduling of appointments, they have eased the NSLA burden. One roster DC, for example, commented, “The DC allows for clients to have their first meeting with some lead legal advice, making it easier for the legal lawyers”.

The DCs were also asked about their preference for cell or non-cell work and the impact of the ER initiative on their work. The general view appeared to be that the cell DC work is more taxing because of the defendants involved and because of the circumstance. Concerning the former, it was suggested that cell defendants typically have had much experience in criminal court and can be quite demanding; besides as one said, “They are in jail and want to get out”. Another DC observed that “Meeting people directly after their arrests is difficult since they are often emotionally frustrated and confused and / or “under the influence”. The common view was that cell work is interesting and more challenging, since as one DC expressed it, “ You have to think on your feet; getting people released is tricky and one has to know a lot of law”. Still another

DC indicated that he prefers non-cell since there are breaks and the work is more flexible so he can maintain his practice. Most DCS indicated that the non-cell milieu is more positive and the clients more thankful. As for the ER impact, the DCs indicated that while there may be much promise in it for early resolution, there are two major flaws namely that the protocol does not allow for discretion by courthouse crown prosecutors (e.g., “They have little leeway”) and that the sentences proposed in the ER for the plea bargain are “too tough”, “on the high side”. To some extent the ER has become a challenge for the DCs to better. Several DCs, with some pride, indicated that they were able to get more favorable sentences for their clients at sentencing and noted that it was not uncommon for judges to give lesser sentences. Only one DC reported that he had ever tried to negotiate the ER recommended sentence with the ER official at the PPS office, as provided for in the protocol.

The two staff DC in the Sydney court both dealt specifically with cell cases, one handling adult defendants and the other young offenders; both DCs focused on bail or release. In the case of the DC for youth, approximately 75% of the workload involved those matters and the remaining time was spent handling variations (even where the youth was otherwise represented by LA) and matters of deferred custody (deferred custody can be likened to conditional sentencing for adults so the DC dealt with breaches). Apparently there were “a fair number” of youth held in the cells and the YCJA has greatly complicated issues of youths and bail / release: as one DC commented, “It’s a complex law field now, much more so than in the case of adults”. Being a full-time staff member, the youth DC was also available to respond sometimes to specific requests and help out occasionally even with respect to adult cell cases.

The unrepresented adult defendant generally has been much less of a problem in the Sydney criminal courts than in HRM, presumably because Legal Aid is more available and for example may be accessed even in breathalyzer cases; moreover, the judges, according to the DCs, have been perhaps more “laid back” and accommodating in the Sydney criminal courts. The problem with adult defendants in Sydney courts then used to largely focus around the cell cases. Previous to the adult DC initiative in Sydney, Legal Aid lawyers – on a rotation basis as in HRM prior to the institutionalization of the duty counsel role there for custody matters - had to shuffle between the cell and the non-custody defendants with the result that there were delays and frequent “dead times” in court processing. The interruptions meant that the judges and crowns were often left “cooling their heels”, and as one DC commented, “Every day was like that”. With the introduction of the cell DC, there has been more routinization. The adult DC has been reasonable busy handling some forty files a month and, since there are many repeat adult offenders in custody, has had a more in-depth understanding of the clients’ circumstances. At the same time, the adult cell DC reported that he did occasionally help out where there was a trial involving an unrepresented person, acting as a friend of the court when available and requested by judge or crown prosecutor. In addition, prior to the secondment for the youth DC position in fiscal 2005-2006, the adult DC also looked after the release issues for some youth in custody.

The mandate of the adult court DC clearly is focused on bail and release but there has been some consolidation of clients' charges and some speaking to a guilty plea. Apparently it has not been uncommon for a custody defendant to plead guilty at release hearing and be sentenced right then and there but that it is less common than it might be because a victim impact statement is mandated and the crown is usually not ready with that. The adult DC interacts much with the per diem crown designated for cells in negotiating on release issues. Most of the clients – 90% - reportedly would be eligible for Legal Aid. The time spent varies with clients and the workload for that day. As was the view of the DCs in HRM, the DCs in Sydney considered that being an effective cell DC was a tough job, requiring much legal knowledge and the right personality. There was on the part of the respondents an appreciation of the argument that older experienced lawyers are needed for the work, particularly those who can have good rapport with the accused persons.

Both DCs indicated that they enjoyed their work and had no doubt that the duty counsel service was much appreciated by clients and by court officials, especially judges. The workload for youth cell cases was deemed by NSLA not to require a full-time staff DC so in fiscal 2006-2007 that position ended, the seconded lawyer returned to the prosecution service, and a per diem or part-time model was adopted. PPS has a per diem crown handling all cell work (youth and adults) and it would appear that one person could also handle both on the duty counsel side as well.

In terms of recommendations, there was virtual unanimity among the DCs interviewed that the program should be maintained and also their own role within it. Apart from that, most recommendations discussed here apply basically to the HRM area and the duty counsel service for “walk-in” self-represented defendants. The DCs highlighted the importance of routine announcements about the availability of the DC service and its value and its being free for unrepresented persons; typically, they emphasized too the need for better marketing of the service. Several DCs, for example, specifically referred to better marketing of the service, a more active sheriff role with respect to identifying the DC and steering people to the DC, and better facilities for meeting clients. Some younger, less experienced DCs desired more opportunities to expand their court experience, calling for a mandate which would include opportune involvement in trials; one young DC commented, “I would hope that if I had free time and a trial was going forward where the defendant was unrepresented and could use the help [I could be involved]”. Other more senior lawyers were hesitant if not negative about such an elaboration of the DC role; as one commented, “no, doing trial trials would be inappropriate as we just don't have time for that”. The DCs at the Dartmouth court particularly emphasized the need for “a permanent office that nobody else can use”; one observed, “So far for each client, I have to “kick around” the courthouse looking for an empty room”. The DCs, staff or roster, generally considered that the staff model was preferable for continuity but several noted that, over time, regular roster work can achieve that same result; as one DC with a year of experience in the roster role stated, “I have fitted in well. The judges and sheriffs know me and I have no problem of identification or court recognition”. Still, the staff model was seen as preferable to roster basically because of continuity, knowing the system and the other role players etc. The

DCs did not believe that the two possible models, roster or staff, would differ much on costs. As for the argument of the roster being a good learning experience, most DCs quickly responded “at whose expense”? They thought even less of the idea of having a voluntary roster with the carrot of possible subsequent business with the client.

In sum, the DCs interviewed reported that they were generally satisfied with their engagement and believed that they were delivering benefits to clients, other court officials, NSLA and the court process itself. Most were roster DCs and they were interested in securing more assignments and possibly becoming a staff DC should such a position become available. They all reported having received very little in the way of training or orientation for the job but at the same time they did not particularly see that as a shortcoming, holding as NSLA apparently does, to a professional model of the “lawyering” entailed. They identified three major facets of their role, namely providing summary legal advice (including procedural knowledge) to the clients, facilitating the client’s linkage to legal aid, and interacting with the crown prosecutors in court on behalf of the clients. Most, but not all, DCs indicated that they occasionally went beyond their mandated tasks if available and requested to do so by the judges or prosecutors. The DCs indicated that they obtained most clients on their own by introducing themselves one way or the other; in other words perhaps by being a “self-starter”. The main other way they secured clients came via referrals from judges. It was clear in the interviews – and consistent with courtroom observations – that the DCs varied considerably in their personalities and styles of interacting with the clients but in their reports (also consistent with observations) they all indicated that few unrepresented defendants turned down their offers of assistance; where the differences manifested themselves were more at the level of how compartmentalized or business-like they were with clients and other court role players. While acknowledging that cell DC work may be more challenging, they all preferred duty counsel work for the “walk-in” defendants.

The DCs indicated that in general the main benefits the DC initiative provided clients were clarifying the charges they were accused of and reducing the number of charges they faced. For judges and prosecutors the main benefits they identified focused on providing “a comfort level” and enabling them to avoid conflicts of interests in dealing with unrepresented defendants. There was little doubt in the DCs’ minds that their role has increased the efficiency of the court process. On the two major potential criticisms of the DC role cited in the literature, all DCs rejected any problem. On the first, possibly encouraging premature guilty pleas to facilitate court processing, their view was that any pressure to “plead and go” would come from the defendant, not from them. On the second issue, possible conflict of interest by dragging out a case, they all reported that there was no conflict of interest and that seeking private business on the case was not improper and would not be done at the expense of appropriate early resolution. The chief recommendations included maintaining the DC program, better marketing of the DC role, greater presence of the DC role in the courthouse, and better facilities for their meeting with clients.

THE UNREPRESENTED DEFENDANTS AND THE DUTY COUNSEL SYSTEM

There were two categories of interviews with unrepresented clients and users of the non-cell duty counsel service. The first – Interview Set A - consisted of a sample of twenty-eight defendants who were interviewed either at the courthouse or by phone during the period February to April, 2006. Here the research assistant approached defendants outside the courtroom, who were unrepresented at their appearance or who had seen the DC, and either conducted a brief interview or arranged to do so by telephone. Almost all of this research took place at the Halifax provincial court but a handful of interviews were done with defendants accessed at the Dartmouth provincial court. Most interviews were done by telephone and there were many instances of incorrect or inoperative phone numbers as well as “no answer”, though few actual refusals. Roughly eighty persons were contacted and twenty eight usable interviews completed using the interview guide appended to this report (i.e., Appendix A).

The second interview set was based on a sample culled from the JEIN data base of all HRM defendants whose court cases were closed between October 2004 (when the DC project began in HRM) and January 2006 inclusive. The data set which was made available to this researcher after months of unexpected delay was initially expected to facilitate secondary data analyses of the impact of representation type (i.e., self, NSLA, duty counsel and private counsel) on appearances and case disposition conviction and other variables. It would have enabled follow-up research to the secondary data analyses carried out by the researcher on the impact of representation prior to the implementation of the DC initiative in 2004. Unfortunately the data omitted the key variable of representation type and was useless for the purpose intended. The data set was then used to generate a sampling frame for telephone interviews. This strategy took months to complete since the JEIN system provides names and addresses but no telephone addresses; in addition the addresses were often poor guides for obtaining telephone numbers since there has been much geographical mobility among defendants and the addresses in the first place were frequently unreliable or too general (e.g., they may refer to Halifax rather than a designated street address). There were over 19,650 charges in the JEIN data set provided for HRM adults. These 19,650 charges were associated with 4844 distinct persons. After painstaking tracking down phone numbers from the names and addresses provided in the JEIN file, 152 telephone interviews were conducted over the period March to June 2006. There were few actual refusals. The instrument used for the interviews is appended as Appendix B. Since some 446 persons in the data set appeared in court prior to October 2004 when the DC project began, they would be less likely to have had an opportunity to consult with the duty counsel. Taking this factor into account but then adjusting for recidivism rates which would have mitigate the effect, it is estimated that the interview data presented below may slightly understate the level of usage of the DC service by defendants. The 152 cases, for some purposes, were merged with 20 interviews from Halifax court contacts carried out during the same period.

SET A INTERVIEWEES

With five exceptions all the unrepresented defendants were contacted at the arraignment or the election / plea stage of the court process. A number of persons pleaded guilty at arraignment and the DC frequently spoke to the sentencing. The defendants were overwhelming male (22 of 28 or 78%) and, not surprisingly in a society where visible minorities are less than 10% of the population, Caucasian (85%), and generally in their twenties (60%). There was more diversity with respect to educational level, with half not having completed high school and equal numbers in each of the categories, completed high school, and some college or university. Occupations varied considerably but 40% were unemployed. The respondents typically had been in court before on other charges (75%) and then had been represented by counsel (77%). Two-thirds of the sample reported that they had very little knowledge of the court process and, with four exceptions, all respondents indicated that there was no part of the court process where they had much knowledge. One respondent, a 46 year old tradesman with no previous court appearance, conveyed the general position with his remark that “No, everything at court seemed like a foreign language”. A 21 year old male with a significant criminal record colorfully expressed the problem of being without legal counsel as follows, “Not having a lawyer is like a cat running around in a dog’s cage. Everything’s way over your head”. He added that he did well in the high school’s law class but when he was in court, he really did not understand anything. Two of the four exceptions expressed much confidence that they could represent themselves better than a lawyer could, at least in relation to the specifics of the case at hand. Prior to arraignment, few of the unrepresented defendants consulted with a private lawyer (six), contacted the PPS for their disclosure (three), phoned the lawyer referral service (one) or inquired about adult diversion (none). In the case of NSLA, only four persons had made contact but over 60% reported that they did not because they already knew about their eligibility.

Seventy-five percent of the sample reported that they had had contact with the duty counsel (though two did not understand that they had in fact consulted the DC). Half of the contacts were occasioned reportedly at the direction of the judge and the rest came essentially at either their own or the DC’s initiative. While all these respondents understood that the DC service was free, only half of the users reported that it was clear to them what services the DC could provide. One respondent, charged with sexual assault, commented, “I just assumed it was to speak to the judge. The duty counsel did not indicate what he does. He just spoke about the disclosure and that I should get a lawyer”. Several defendants expressed surprise that the duty counsel could speak for them at sentencing. Other respondents conflated legal aid and the duty counsel as reflected in the comments of one, “[The DC] is a kind of legal aid lawyer who was just there”.

The respondents rated the specific DC services received quite differently. Those who reported that a service the DC provided was assisting the defendant in the courtroom, basically advising on what to tell the judge, getting adjournments for one reason or other, etc were quite appreciative of that service. Defendants reporting that the

DC assisted them chiefly with respect to obtaining legal aid were usually less impressed with that particular DC service (e.g., “I just received the NSLA form”, “Just the address”, “I didn’t want [or need] legal aid”), but one female defendant, a multiple repeat defendant, who was positive, observed that the DC got her an appointment with Legal Aid more quickly than she could have done herself. The DC service most commonly acknowledged was that the DC advised the respondent on the plea, followed by the DC facilitating convenient adjournments. It was clear from the interviews that the DCs frequently recommended that the defendant get more legal advice and that a number of the defendants rejected this advice and pled guilty. For example, one middle class female defendant reported that the DC advised her not to plead guilty and also told her that she would not be eligible for legal aid as she makes too much money. However, she did not think she could afford a lawyer so she pled guilty against this advice; she said that she appreciated that the DC still assisted her at sentencing and got the court to lower the fine recommended in the ER. Only a few unrepresented defendants reported that the DC spoke to the crown prosecutor on their behalf or spoke to their sentencing but it must be recalled that some respondents had yet to enter a plea or to have a trial when interviewed. Most defendants who consulted with the DC did so for less than ten minutes and only on one occasion. Five indicated that they had spoken with the DC for as much as twenty minutes (one said forty-five minutes) and on two occasions; one not only spoke to the DC on two separate occasions but also received a follow-up phone call. The defendants were twice as likely to have had their consultation in the DC’s office as they were to huddle with the DC in the court corridor.

Only five defendants who consulted with the DC did not report it as helpful; one 27 year old tradesman charged with assault, commented, “I don’t see the need. I could speak myself. I don’t know if it is frowned upon to speak to the judge”. A young female, A self-confessed drug addict with a long record, who was heavily medicated, indicated that she was confused and intimidated and rushed into a guilty plea. The interviewer described her comments as follows, “Ms. X indicated that the DC handed her a ‘wad of papers’, but she was unaware that this was her disclosure. She told me that the DC did not go through them and explain them very well. She felt confused and intimidated. He told her to plead guilty and that she would be doing herself a favour. The DC also had her sign some sort of form agreeing to the sentencing. When she was approached to provide DNA, a stipulation of the sentencing contract she had signed, she felt she had been coerced by the DC. She did not like the idea of giving her DNA, though she did eventually”.

The majority of respondents, however, appraised the consultation as “very helpful”. One 56 year old retiree who was deemed not eligible for legal aid on his impaired driving charge, commented, “Yes, helpful especially to those who are down and out and do not have the financial ability to afford private legal advice”. Asked “what was the best thing about the DC service for you”, the spontaneous responses were diverse but the most common in this small sample were variants of “helping me say the right things to the judge”, “advising me to plead not guilty” and “having someone to talk to about your case”. In referring to the DC advising them against entering a guilty plea, several respondents noted that the DC advised them against accepting the plea bargain (i.e., the

ER) on the grounds that they could probably do better at sentencing; one respondent commented, “Best thing? Well, if it wasn’t for the DC I would have agreed to the plea bargain”. While the DCs generally were of the view that the ER was ‘on the high side’ in terms of the sentence proposed, their views were nuanced as indicated in another example of a defendant’s answer to the “best thing” question. A newly landed immigrant male in his late 40s, charged with an indecent act, cited as the “best thing” that the DC advised him to plead guilty and accept the ER; in his account, the DC told him that if he pleads guilty the sentence would not give him a criminal record (presumably the sentence would allow for a conditional discharge) whereas if he pleads non-guilty there will be a trial and possibly a criminal record; the defendant wanted to get the matter over with and considered it crucial that as an immigrant he does not get a criminal record so he pled guilty despite some reservations.

Few respondents identified anything when asked “what was the poorest thing about the DC service for you”, but a couple suggested that more could have been done arranging contact with NSLA. One 25 year old female who reported many previous convictions made an unusual comment namely that she felt that the judge did not take the DC seriously, as compared to a private/legal aid lawyer that knew her case better; in her view, the judge rarely made eye contact with the male DC in particular (on separate days she had different DCs) and basically ignored him, speaking directly to her while she was on the stand instead of the DC.

Most defendants who met with the DC rated most aspects of the DC service as fine and not requiring any change. A few respondents did suggest that there was a need for better facilities since they did not appreciate talking about their case in the corridors. Given that the DC did have an office in the Halifax courthouse, there may have been reasons (perhaps a line-up) not communicated to the clients for meeting close to the courtroom. The defendants were divided on the issue of whether they had adequate time with the DC to discuss disclosure and decide on a plea, half saying no and half saying yes. Yet when specifically asked moments later about their recommendations to improve the DC service, only a few defendants agreed that an important change would be the opportunity to meet longer and more often with the DC; several persons, as noted above, were still anticipating that they would obtain legal aid services. Perhaps too their view on the “time with the DC” issue was captured in the comments of one female defendant, “Once you see the duty counsel it is fine; it’s just whether or not you see them that is the issue”. There did seem to be an appreciation among a good number of the defendants that the DC properly could provide only quick advice and modest consulting time.

A large majority did agree that there should be better publicity and marketing of the DC service and that the duty counsel should have a higher profile at court; one respondent who emphasized the latter, commented, “I had never heard of the duty counsel program until Legal Aid told me and I have been to court before and still knew nothing about it” while a female defendant commented that increased awareness might be a good idea, as she herself only became aware of DC program the day of her arraignment. The defendant before her was referred to the DC by the judge and this was the first time

that she had heard anything about it. Another female defendant, very experienced at being a defendant in court, reported that the bailiff told her about the DC program and commented, “People need to be more aware that the program is available. When people first come to court they are terrified and it would be nice to know that help is there”. She indicated that she just happened to ‘stumble across’ the DC program and that this was not adequate. What if she had not had this luck? Another respondent commented that he would have liked to have known about it earlier especially that it is free, adding “they should teach about it in law class in high school”. A few respondents contended that the DCs should reach out more to the unrepresented, approach them and not rely on general announcement of their availability or referrals from the judges.

It can be noted here that six of the seven respondents in this sample who did not use the DC service, indicated, once it was explained to them, that they would have used the service had they known about it. Several reported that they came to arraignment intent on pleading guilty and getting the matter over with and that is what they did. In another case the person subsequent to his appearance for election and plea made an appointment with NSLA and given his unemployment and serious prospect of jail time (he was a multiple repeater charged with trafficking and a weapons offense) was quite likely to obtain legal aide.

Overall, then, the following major points emerged from the small courthouse generated sample of unrepresented defendants:

1. Most respondents were young adult Caucasian males.
2. The large majority professed to have little knowledge of the court process or any aspect of it.
3. Prior to arraignment only a small minority indicated that they had done anything with respect to securing legal advice or seeking legal counsel.
4. Over three-fourths did have contact with the duty counsel, most often at the suggestion / direction of the presiding judge.
5. The respondents were especially appreciative of the DC service with respect to assisting them in the courtroom.
6. Those indicating the primary DC service they received was assisting them concerning legal aid were much less appreciative of that particular DC service.
7. The major DC service that respondents acknowledged was advising them on plea, followed by the DC arranging convenient adjournments and subsequent court appearance dates for them.
8. Most consultations with the DC reportedly lasted less than 10 minutes and took place at the DC’s office.
9. The large majority of defendants who accessed the duty counsel service reported that it was very helpful.
10. The spontaneously rendered “best thing” about the DC service was helping them say the right things to the judge, advising them not to accept the plea bargain or plead guilty, and providing social support.

11. Duty counsel reportedly did exhibit nuance, reflecting the specifics of the case and did not always urge not guilty pleas or rejections of the ER provided by the prosecution.
12. Respondents usually did not think much change was required in the DC service, whether it be more consultation time or better meeting milieus. They often conveyed an appreciation of the limited parameters of the DC role.
13. The large majority of respondents did contend that there was a need for greater promotion and marketing of the DC role, and a higher profile for the DC at the courthouse.
14. Virtually all respondents, including those who did not access the DC this time, would use the DC service in a future court appearance as a defendant.

SET B INTERVIEWEES

Table 1 provides an overview of the court representation experiences of the 152 persons who were defendants in a court case that was closed sometime between October 2004 and January 2006. Where individuals had more than one case closed during that time interval the most recent case was the focus of interest. In the tables and in the write-up, unless otherwise specified, the bracketed number refers to the base for the percentage calculation. The percentages in the total sample who reported legal representation at the four levels of arraignment, plea, trial and sentencing were 46% (150), 62% (146), 65% (134) and 64% (132) respectively. The sample was made up mostly of males (82%) , Caucasians (88%) though Blacks were over-represented at 10%, and 72% were over 30 years of age; the latter finding is quite different from the small courthouse sample, perhaps related to the greater availability of older respondents for unscheduled telephone interviews. A plurality of the defendants (30%) was charged with motor vehicle offences and, overall, 90% were facing charges on minor offences. The median level of education achieved was “completed high school” but 26% of the defendants had either some university or had graduated with one or more degrees. Among the defendants interviewed, some 25% were unemployed and the largest single occupation category was tradesmen/self-employed who made up 22% of the sample. 60% of the sample was the chief income earner in their household.

Table 1 indicates that 68% of the respondents did have some representation at some point in the court processing of their case. Among this latter grouping, the level of representation was lowest at arraignment (67%) and highest at trial and sentencing (95%) but the crucial tipping point for representation clearly happened at the plea stage and there 90% reported having legal counsel. The percentages for trial and sentencing may not be nearer 100% since the few representations recorded for the duty counsel would be only at arraignment and plea. In any event, a slight majority (54%) indicated that their representation was provided by private counsel. The represented respondents were generally satisfied with the legal counsel services (i.e., 82% considered it at least adequate). Asked what was best about their representation, the most frequent type of

response was to emphasize the support the legal counsel provided as reflected in comments such as “having someone to speak on your behalf”, “worked with me to improve the experience and make life manageable”, “a sense of security because the lawyer looks out for you and knows the system”, “gave really good advice and provided a number for women’s services”, and “judges and crowns respect you when you have counsel”. Others liked best the outcome achieved as reflected in comments such as “I was found not guilty”, “There was no jail time”, “He got my fine reduced” and “I got less probation time”. Still others pointed to the experience of the legal counsel and the information he/she provided them (“He was knowledgeable about the process, the system and the language and explained it all to me”, “The lawyer told me the crown had an iron case and saved me money and time”, and “He was willing to communicate and try as hard as he did”). Among the minority claiming their legal counsel was inadequate, the criticisms ranged from outcomes to costs but the two most frequent criticisms focused on the perceived negative outcome of the case (“He said expect 14 days but I got 90”, “I was not happy with the plea bargain”) and the perceived shortfall in effort (“There was no cross-examination and he did not questions the problems in the crown’s case”, and “He did not try hard enough”). More than half of these respondents (53%) had previous court appearances as defendants and in that instance they were usually (80%) represented by legal counsel.

The table also indicates that 48 persons (32%) reported having no legal representation at any stage in their court case. Many of these persons apparently did not want legal counsel or at least were not prepared to spend money for it. Only 27% reported that they wanted to be represented and fully 68%, answering a separate question, indicated that they wanted to present their own case before the court. A majority (56%) reported that they could have afforded private counsel. Somewhat incongruently, half the respondents (50%) acknowledged that “It was important to have a lawyer to represent me”. A large minority of the unrepresented (44%) did agree that costs influenced their decision not to have counsel and only 24% considered that they were eligible for legal aid. About one third (36%) reported that they were aware that one could access free legal advice from a duty counsel. Asked “what was the chief reason you chose not to get a lawyer”, the most frequent spontaneous response (44%) was an expression of their perceived certainty of being found guilty and/or their desire to plead guilty, usually associated with the perception that the matter was a minor offence (“The case was not serious and I was obviously guilty”, “It was a simple matter and I just wanted to plead guilty; it was not worth a fight over it” and “You can’t beat a DUI so no point spending money on a lawyer”). About 20% identified the classic “can’t afford private counsel and ineligible for legal aid” gap, and a roughly equal proportion pointed to their confidence in representing themselves (“These were unnecessary, silly charges and easy to defend”, “It’s better to represent yourself. I had an expensive lawyer for divorce and didn’t win”, “Because I know my rights. I am a navigator and knew exactly what I was doing”).

It would appear that there are two chief types of unrepresented defendants, namely (a) those who do not obtain legal counsel because they are ineligible for legal aid and cannot afford private counsel, and (b) those who are influenced by costs but primarily driven by a desire to take responsibility and want either to get the matter over

with quickly or explain the circumstances to the judge (the “guilty but” grouping). Type B appears to dominate where the offenses are of a more minor nature and do not generally entail jail time. Table 1 indicates too that the unrepresented were less likely than those with representation to be repeat defendants (37% to 53%) and especially less likely to have had legal counsel in the previous situations (30% to 80%); these differences suggest that personality differences may also be a factor in differentiating between those who secure legal counsel and those who do not.

Table 2 explores the differences between those who had legal representation and those who did not. It can be noted that defendants who had legal counsel reported much more pre-arraignment activity, inquiring about legal aid, consulting with private counsel and even contacting the lawyer referral service or asking about adult diversion. They were also almost twice as likely to seek disclosure from the PPS. The greater pre-arraignment activity is congruent with having legal counsel and also with the assumption made immediately above that the unrepresented for whatever reason decided early that they were going to tough it out either by pleading guilty or arguing the justice of their actions. There was little difference between the two categories of defendants with respect to their confident sense at plea of the crown’s case, how the prosecution was going to proceed and what sentence the crown would be recommending. This lack of difference could not be due to the ER initiative since the PPS-introduced early resolution option was only in effect for the last four months of the fourteen month span of this data set. The lack of difference in these perceptions at plea would seem to underline the differences in the way defendants in the two categories approached their court case.

Table 2 also provides sheds some light on other differences between the represented and the unrepresented. The latter were twice as likely as the represented to be accused of a motor vehicle or “other” criminal code offence (i.e., not a violent crime or a property offence), less likely to have previously been a defendant (i.e., 37% to 53%) and much less likely to have had legal counsel then (30% to 80%). They were also somewhat older than their represented counterparts (only 23% under 30 years of age compared to 30%) and half as likely to be unemployed (15% to 30%). The two groupings had similar levels of post-secondary education and chief household earners. Type of offence, age, employment and previous experience (lack thereof) appeared to correlate with differences between the represented and the unrepresented in terms of how they dealt with their charges. Unemployment, criminal record and eligible offence (i.e., one where jail is a real possibility and/or is accepted by Legal Aid) were more associated with having legal counsel.

Table 3 isolates those respondents who were unrepresented and also had no duty counsel contact, presumably the most problematic category of defendants for the issues underlying this assessment project. The table indicates, quite expectedly, that most of these defendants were male and Caucasian. Typically they were first time offenders and the significant minority of persons (39%) who had previous court experience as an accused person had not availed themselves of legal counsel then (11%). All – 100% - were charged with minor offences in the matter at issue and almost half faced motor vehicle charges (e.g., impaired driving). These defendants were generally over 30 years

of age (77%), were employed (86%) and frequently engaged in middle status occupations (47%). Some 23% reported that they were aware of the duty counsel but none used it. These data suggest that the availability of legal counsel resources was not a daunting problem for these unrepresented defendants. While most were ineligible for legal aid apparently both on income and eligible offence grounds, it appears that most could have afforded private legal counsel though perhaps with some pocketbook pain. Certainly too the fact that 100% were charged with minor offences indicates that legal aid services (regular and duty counsel) have not missed serious offenders, at least as far as this sample is concerned.

Table 4 explores the use of the duty counsel service among those defendants who were aware of its availability. It can be noted that 55% (35 of the 63) of the grouping did use the duty counsel service. There was little difference between the two subgroupings of users and non-users with respect to the % male (83% and 82%), % Caucasian (85% and 86%), % Black (12% and 11%) who were overrepresented in each category, and the % who were the chief income earners in their household (60% and 59%). There were significant differences by age, employment status and whether or not the respondent had previous court experience as an accused person. Those who did not use the duty counsel service were more likely to be over 30 years of age (64% to 46%) and less likely to be unemployed (18% to 42%), less likely to have been charged with a major offence (7% to 17%) or to have been a repeat accused (40% to 54%). Other more modest differences were that those who did not use the duty counsel were more likely to have had some legal counsel (64% to 56%) and to have less post-secondary education (34% to 39%). Clearly the main factors differentiating among users and non-users, all of whom were aware of the duty counsel service, were age and employment status – the non-users were older and employed - followed by predictable factors such as the significance of the charge and whether the person had no other legal counsel, both of which increased the likelihood that duty counsel services would be used. When the non-users were asked why, given their awareness, they did not use the DC, the most prominent answers were that they were pleading guilty and saw no need to talk with legal counsel (e.g., “It was an open and shut case. I was obviously guilty and there was nothing to be gained by talking to a lawyer.”), or that they had legal counsel (e.g., “It was quicker, easier and less time consuming to go private and my income was too high for legal aid”).

Table 5 refers to the contacts and meetings that the respondents who used the service had with the duty counsel. It can be noted that the largest single agency (39%) for the contact was the referral from the judge (in a few cases from the crown prosecutor), a finding consistent with courtroom observation. Interestingly, respondents frequently used the phrase, “directed by the judge” which suggests more the respect they had for the judiciary rather than the forcefulness of the judge’s words. Whether in the other cases the duty counsel approached the client or vice versa often depended on how the respondent framed the contact; for example some respondents characterized a DC’s announcement in court that he/she was available for free legal advice to which they responded, as the DC “approaching” while others highlighting their response to the announcement characterized it as themselves “approaching”. About two-thirds of the respondents reported that they did understand what services the DC could provide but it is apparent

from the subsequent answers to specific services that this figure was exaggerated; for example, only 40% were aware that the DC could speak to the sentencing. When asked what the DC in fact did in their case, using a list of possible services, the mostly commonly cited service was that the DC discussed the possible plea (58%), following closely by “discussed the disclosure” (54%) and “assist in arranging Legal Aid” (48%). Over a third of the respondents reported that the duty counsel did speak to the crown prosecutor on their behalf and a similar number noted that the duty counsel spoke at their sentencing (the latter was less evident in the courtroom observations). Several respondents were quite specific in their answers; for example, a few reported that “The duty counsel got me an adjournment”. Only one respondent reported that the duty counsel had connected him with private counsel. About half the respondents (48%) indicated that the duty counsel helped them to understand the legal issues in their case. Congruent with observations, these users of the DC service reported that their consultation with the DC was brief; 84% claimed the consultation took less than 20 minutes and 45% said it was less than 5 minutes. The majority of the meetings apparently took place in the DC interview room or office but nearly half the time the DC discussed matters with the clients in the corridors outside the courtrooms. No respondent reported any contact outside the courthouse or by telephone; though it is known that a very few did phone the DC to make an appointment and that the DC did, in rare circumstances, phone the defendant to check on matters, none of this activity was evidenced in the sample interviewed here.

Table 6 provides some information on the assessment of the DC service by those who used it. It can be seen that the large majority of the users were quite positive about the DC service and found it very useful. There were many slight variants of the following comments, “helped me to understand the issues and the process”; “assisting with legal aid, was very helpful”; Asked what they liked best, the two dominant responses pointed to either the personal style of the DC (e.g., provided needed support) or the specific help they received from the DC (e.g., obtained an adjournment). One 45 year old male immigrant commented, “The duty counsel represented me in court. It is important to have as much support as possible in Canada”. A 21 year old employed high school graduate, male stated, “She came to my rescue. I thought the court process would be simple but it was not. She made it simple”. In the same vein, a 24 year old unemployed, high school graduate male, reported, “The duty counsel was approachable and brought down my nerves about my appearance”. Examples of specific assistance include the comments of a male 55 year old disabled high school graduate, “The duty counsel provided guidance, answers about where to go and who to talk to. He was very clear and definite about his answers too, which I liked”, and the statement of a male 35 year old manager, “The duty counsel listened to me and made sure that I was aware of conflicts between the Crown’s version of the story and mine”. Several respondents mentioned here that the duty counsel advised them to plead not guilty or not to accept the plea bargain offered by the prosecution. Perhaps the most common criticism rendered by a few respondents was some variant of that given by a 20 year old unemployed man, namely “It wasted my time. I talked to her then came back and entered a plea when I could have just entered the plea in the first place”; a few respondents did not like the personal style of the duty counsel. Despite reporting that they had spent little time in consultation with the DC, over 80%

considered that they did have enough time, a judgment that appears to reflect both the lack of complication in the matter at hand (i.e., a straight-forward charge situation) and the appreciation respondents had of the limits on the service that the DC could provide. Only two respondents reported that they felt under any pressure to quickly decide on a plea.

The defendants were asked to respond to a variety of possible changes in the DC, indicating their agreement or disagreement. That format of questioning generally leads to more acknowledgement – perhaps inflation – of recommendations. Here, as is consistent with the views of other groupings of defendants as well as other stakeholders, the most frequently agreed to possible change was that the duty counsel should be better advertised and promoted (81%). One respondent, a male, 35 year old community college instructor commented, “The duty counsel service should be better advertised. I was doing research in preparation to defend myself in court and found no mention anywhere of this service. I only became aware of it when she announced herself in court”. Another college educated defendant echoed that view in a simple statement, “The public must be aware of its existence”. Several respondents in particular emphasized the need for more publicity about the fact that the service is free and open to all; as one person commented, “People should know that they don’t need to be eligible for legal aid to meet with the duty counsel”. A large proportion (70%) also considered that the duty counsel should have a higher profile at the courthouse. Some who espoused that view considered that the DC should be accorded more visible status; for example, one respondent commented, “The duty counsel lawyers are good and dedicated. They should be treated with more respect by the court and given the recognition they deserve”. Half the respondents, in this context, agreed that more time should be available for the DC consultations; for example, one Black university educated outreach worker commented, “It would have been better if they were not so overworked so that they could spend more time with the clients”. Only 33% considered that the facilities for these consultations should be different; here it was mostly respondents whose consultation took place in the corridors who wanted a more private and less hectic milieu to discuss the specifics of their case.

It is not surprising in light of the above comments that the vast majority of defendants utilizing the duty counsel would use it again if faced with a court case in the future. What about those who did not use the DC service? Of the 124 such cases, drawn from both the courthouse interviews and the JEIN-derived interviews, 104 or 84% allowed that indeed now they knew about the service they would use if they were ever defendants again in criminal court. The most common reason given was financial (e.g., “It’s free so why not”), followed by some variant of taking advantage of being able to access the expertise and experience of defense counsel. One respondent, a trucker with some college education, commented, “I wish I had known about the service earlier. I only hired a private lawyer for peace of mind and I could have saved myself thousands”. The minority who stated they would not use the DC service in a future case usually stressed that they preferred private counsel and someone representing them from start to finish; for example, one 56 year old male commissionaire commented, “You need someone there to help you the whole time, brief advice is not enough”, while a 33 year old longshoreman noted, “It is better to have a full-time personal private lawyer. There is too

much risk associated with a criminal charge to take a chance [on the skill of a duty counsel]”.

Overall, then, the following chief themes emerged from the analyses of the JEIN-derived sample of 152 persons whose court cases were closed between October 2004 and January 2006 inclusive:

1. 46% of the sample was represented at arraignment, 62% at plea, 65% at trial and 64% at sentencing.
2. The sample consisted of mostly male Caucasians, people over 30 years of age and of quite varied educational and employment attainment.
3. 90% of the respondents had been charged with minor offences and 30% with motor vehicle offences (e.g., impaired driving). 53% were repeat defendants.
4. 68% of the sample had had representation at some stage, if not at all stages, in their most recent court case during the sample's time frame. Of this grouping, 95% reported having legal counsel at trial and at sentencing.
5. The respondents who had legal counsel were generally quite satisfied with the legal services received. As benefits, they highlighted the support function as well as the outcomes realized. The minority who reported themselves dissatisfied with their legal counsel primarily focused on the outcomes as the reason for this assessment.
6. Among the 32% who reported having no legal counsel at any stage in their court case, there were two basic types identified, namely those who indicated the reason was the familiar gap between ineligibility for legal aid and lack of affordability of private counsel, and **those articulating a reason that had more to do with their wanting to take responsibility and/or explain the circumstances in court. The latter category seemed to be most common among this unrepresented grouping.**
7. Compared to those who had had at least some legal counsel, the unrepresented did little pre-arraignment activity salient to the presentation of their case but were as confident as the represented defendants were in terms of how they saw the crown's likely activities and recommended sentence.
8. Compared to those who had at least some legal counsel, the unrepresented were more likely to be facing charges for motor vehicle and “other” criminal code offences, first time offenders, older and less unemployed. Those with representation on the other hand were more likely to have been unemployed, have a criminal record and to have committed an offence eligible for legal aid.
9. Focusing on those defendants who were unrepresented and also did not have any contact with the duty counsel, they were male Caucasians, first time offenders (61%), all charged with minor offences and half with motor vehicle – related offences such as impaired driving. They were mostly over 30 years of age (77%), employed (86%) and in middle

status occupations. It would appear that the large majority could have afforded legal counsel. . **The evidence suggests then that the “system” is working at least in the sense that people charged with significant offences who want legal counsel but cannot afford it are uncommon in this sample.**

10. Comparing users and non-users of the duty counsel services, all of whom indicated an awareness of the DC service, it was found that non-users were older and more likely to be employed. Other less differentiating factors were predictable, namely the seriousness of the charge they faced, whether they accessed other forms of legal counsel and so forth.
11. Users of the DC service frequently indicated that the judge was crucial in referring them to the duty counsel services. A majority claimed that they did understand the range of services provided by the DC but, upon being asked about specific DC services such as speaking to the sentence, it was clear that confidence was exaggerated. The three major DC services accessed were, in order, discussions about the plea, discussions about the disclosure, and assistance in arranging contact with Legal Aid. The DC benefit most frequently cited was greater understanding of the legal issues involved in the case. The large majority of those using the DC reported their consultation took less than 20 minutes. No contact by telephone or outside the courthouse was reported.
12. The large majority of DC users assessed the service in positive terms and reported finding it very helpful. In their spontaneous responses about its best features they pointed most frequently to the social support provided and then to specific items such as securing adjournment. **Somewhat surprisingly in light of the length of their DC consultation, the large majority held that they had had enough time, perhaps reflecting their appreciation of the constraints on the DC role.** The major changes recommended were few, basically calling for a better advertised and promoted DC service, and for a higher profile or presence for the DC at the courthouse.
13. Not surprisingly, the users of the DC service indicated that if there was a next time for themselves in criminal court, they would access the DC service. Of the 124 respondents who did not use the DC service, over 80% indicated that they would use it the next time if there was a next time as defendant. The chief reasons for this view were financial (“it’s free so why not”) and being able to access quick, on-the-spot legal counsel.

Table 1

Court Experiences, Closed Cases, November 2004 to January 2006 (N=152)

Representation Experience	#	% Yes
Represented at Any Time in Proceedings:		
Yes	104 (152)	68%
Where the Defendants Were Represented		
At Arraignment	69 (103)	67%
At Plea	91 (102)	90%
At Trial	87 (91)	95%
At Sentencing	85 (88)	95%
Represented By:		
Legal Aid	43 (104)	41%
Duty Counsel	5 (104)	5%
Private Counsel	56 (104)	54%
Considered the Representation Adequate	85 (103)	82%
Previous Appearance as Accused	55 (103)	53%
Represented in Previous Case	41 (52)	80%
If Unrepresented at All Stages:		
Did You want to be Represented?	13 (48)	27%
Did You Want to Present Your Own Case?	32 (47)	68%
Did You Think it Important That you have a Lawyer?	23 (46)	50%
Would you have been able to Afford Private Counsel?	26 (46)	56%
Did Costs Influence Your Decision Not to Have Counsel?	20 (46)	44%
Were You Eligible For Legal Aid?	10 (42)	24%
Aware That You Could Access Free Legal Advice from a Duty Counsel?	17 (47)	36%
Spontaneous Reasons for Not Retaining Counsel		
The Legal Aid/ Private Counsel "Gap"	9 (45)	20%
Confidence in Self-Representing	8 (45)	18%
Perceived Certainty of Guilt/ Desire to Plead Guilty	20 (45)	44%
Other	8 (45)	18%
Previous Experience as Accused	14 (38)	37%
Represented in Previous Case	4 (13)	30%

Table 2**Comparison of Those with Representation and Those without Representation,
Closed Cases (N=152)**

Feature	Represented (N=104) % Yes	Unrepresented (N=48) % Yes
Pre-Arrest Activity:		
Consulted Private Counsel	48%	25%
Contacted Crown for Disclosure	35%	20%
Phoned Legal Referral Service	18%	6%
Inquired About Legal Aid	45%	15%
Inquired About Diversion	15%	10%
At Plea:		
Had a Good Sense of the Crown's Case Against You	82%	89%
Had a Good Sense of How the Crown Was Going to Proceed	65%	66%
Had a Good Sense of the Sentence Crown Would be Recommending	74%	66%
Motor Vehicle or 'Other' Criminal Code	25%	52%
Under 30 years of Age	30%	23%
Post-Secondary Education	50%	48%
Unemployed	30%	15%
Chief Household Earner	60%	62%
Been a Defendant Previously	53%	37%
Were you Represented Then?	80%	30%

Table 3

Characteristics of Those Who Were Unrepresented and Also Had No Duty Counsel Contact

Feature	% Yes (N= 44)
Male	89%
Caucasian	89%
Previous Appearance as Accused	39%
Had Legal Counsel Before	11%
Accused of Minor Offense	100%
Facing Motor Vehicle Charge	47%
Over 30 Years of Age	77%
Post-Secondary Education	51%
Unemployed	14%
Managerial/Executive/Professional/Self-Employed	47%
Chief Income Earner	67%
Aware of Duty Counsel Program	23%

Table 4

Characteristics of Users and Non-Users among Those Aware of the Duty Counsel Option

Feature	Used (N=35) %	Did Not Use (N=28) %
% Male	83%	82%
% Caucasian	85%	86%
% Black	12%	11%
% Over 30 years old	46%	64%
% Post-Secondary Education	39%	34%
% Unemployed	42%	18%
% Chief Income Earner	60%	59%
% Charged with Major Offence	17%	7%
% Repeat Accused	54%	40%
% Represented by Lawyer at Any Stage	56%	64%

Table 5
Users of Duty Counsel Services: Contact and Meetings

Item	% Yes (N=35)
How Contacted:	
Directed by Judge/Crown	39%
Approached by Duty Counsel	32%
Approached Duty Counsel	29%
Understood the Service Duty Counsel Could Provide	67%
Aware Duty Counsel Could Speak to Sentence	40%
Did Duty Counsel Assist You in Arranging] Legal Aid?	48%
Did Duty Counsel Discuss Disclosure with You?	54%
Did Duty Counsel Discuss Your Plea?	58%
Did Duty Counsel Speak at Your Sentencing?	36%
Did Duty Counsel Connect you with Private Counsel?	3%
Did Duty Counsel Speak to the Prosecutor for You?	39%
Did Duty Counsel Introduce You to Diversion?	12%
Did Duty Counsel Help You Understand the Legal Issues in Your Case?	48%
For How Many Minutes Did You Speak with the Duty Counsel?	
< 5 Minutes	45%
6 – 20 Minutes	39%
> 20 Minutes	16%
On How Many Different Days?	
Just One Day	66%
Two or More Days	34%
Where did the Meeting Occur?	

Halls/ Court Room	35%
Interview Room/ Office	55%
Multiple Places	10%

Table 6

Users of Duty Counsel Services: Assessment of the Service

Item	% Yes (N=35)
Found the Duty Counsel's Advice Helpful	88%
Found Best About Duty Counsel ¹²³	
Personal Style	40%
Specific Help in Court	40%
Other	20%
Enough Time to Talk with Duty Counsel?	81%
Felt Pressured to Decide on Plea?	6%
Should Duty Counsel be Better Advertised or Promoted?	81%
Should the Duty Counsel have a Higher Profile at the Court House?	70%
Are Different Facilities Required?	32%
Should More Time be Afforded to Duty Counsel Contacts?	50%

¹²³ The percentages are based on the number of persons who answered the question. A handful said that they had such brief exposure that they could not answer the question.

SUMMARY AND FUTURE DIRECTIONS

This research has examined the duty counsel initiatives launched by NSLA in 2004. The major research focus has been on the impact of the non-cell duty counsel on issues related to the unrepresented defendant in provincial criminal court in Halifax Regional Municipality. In addition, a more cursory examination was undertaken of the cell duty counsel initiative in Sydney. A variety of research methods have been employed including literature review, secondary data analyses, courthouse observations, in-person interviews with judges, crown prosecutors, NSLA and private sector lawyers, and the duty counsel lawyers. A substantial effort was expended to obtain the views of the users and potential users of the duty counsel service and this resulted in two samples, one based on courthouse contacts and the other based on using court records (JEIN data) which yielded names and addresses but not telephone numbers; all told, over 180 telephone interviews were carried out with defendants.

The duty counsel initiatives in HRM and in Sydney have been described and their changes over time have been noted. The major change was the shift to a roster duty counsel system in HRM and a shift to a per diem, part-time model for the youth custody cases in Sydney. The former was induced largely by the resignation of staff duty counsel whereas the latter appeared to be a consequence of limited workload. In the few pages below the chief findings of the various research methods are detailed; there is some repetition of the text above as this section is intended as a stand-alone for the convenience of the reader. Subsequently there is a brief section on future directions.

SUMMARIES

ANALYSES OF SECONDARY DATA

These analyses, carried out with the very limited secondary data, do suggest that the non-custody DC initiatives in HRM have been implemented as planned, that the targeted population has been reached and that there has been a positive impact on the unrepresented defendant problem. The DC program has evolved in terms of structure (i.e., becoming a roster delivery system) and in terms of penetration among the targeted population. The workload for the DCs has been modest, and the services delivered multifaceted and of limited depth.

COURTROOM OBSERVATIONS

All courtroom observation focused on the “walk-in” duty counsel and with three exceptions took place at the Halifax provincial court on Spring Garden Street. There were three sets of observations, involving forty-one sessions, over a sixteen month period ending in November 2006. The assessments of the observations indicated that the duty counsel service has evolved in an appropriate direction given its objectives. The duty counsel lawyers have become more assertive and the service itself more efficient. There

seems little doubt that the DC initiative has improved the efficiency of the court processing of cases as well as assisted defendants in a variety of ways. There remain differences among judges in their calling attention to, and in their persistence in recommending, the duty counsel service. The DCs were busy with, but not overwhelmed by, clients. The penetration rate, based on observation, has improved but could still be much greater. The basic DC service appears to have become a routine part of the criminal court process at HRM. It is achieving its specified objectives in providing summary legal advice and NSLA contact for many unrepresented defendants. There remain a small number of unrepresented defendants who are adamant in wanting to settle their matter quickly and plead guilty. Few cases were observed over the entire observation period of an unrepresented defendant who rejected the DC counsel because he or she wanted to defend themselves on a not-guilty plea. Perhaps the only shortfall emerging from the observations is that when judges and even DCs mention the service to the potential clients they usually do not explain it in any detail, assuming that the defendants know something about it which was often not the case. Another consideration emerging from the observations is that short of a brief discussion with the DC about the case – the disclosure, the prosecution’s early resolution offer (ER), possibilities regarding reducing charges and any fines to be assessed – the unrepresented defendant may misunderstand the charges and also not appreciate some options or issues in the sentencing. There is still considerable and predictable lack of awareness on these matters as well as a widespread sense that the DC’s assistance is basically focused on ultimate guilt or innocence and connecting the person with NSLA. Much more could be done in educating defendants on the nuances of court processing and the DC services.

THE JUDGES’ PERSPECTIVES

In all, nine judges were interviewed, seven in HRM and two in Sydney; most of the HRM judges were interviewed in the winter of 2006 and then re-interviewed or re-contacted by e-mail in the late summer of 2006. The following are the key findings with respect to the DC initiatives from the judges’ perspective:

8. The DC service was introduced in HRM with minimal fanfare and little formal communication of the DC’s mandate to the judges.
9. It took some time in the judges’ perspective for the staff DC in Halifax to realize the full mandate of the role – something they attributed to the way the service was introduced, a normal period of ‘fitting in’, and the personal style of the DC – but the service was functioning quite well by the time she left the position in January 2006 after roughly 14 months on the job and was replaced with a roster DC system. The staff DC in Dartmouth was in operation for only half that time and had been replaced by a roster approach before this research began; there was little sense of evolution in the implementation of DC role or any comparison between the staff and roster approaches drawn by the Dartmouth judges.
10. The judges in HRM were quite appreciative of the DC service whether in the staff or roster model of service but their preference was clearly

for the staff model since it offered more consistency in service and integrated the service better in the court process.

11. The main beneficiaries of the DC service in the judges' views were the unrepresented defendants, the judges themselves, and the court process itself (better flow, higher quality justice product).
12. Several judges held that the duty counsel could be more proactive in seeking early resolutions and several also suggested that the DC might attend, for the defendants, matters such as "voir dire" and "changes in undertaking".
13. The judges have accepted the roster system and believe that with a few modest changes and hopefully limited turnover, it can provide significant benefits for clients, court officials and the court process.
14. The judges have a major responsibility when dealing with unrepresented or self-represented defendants as is evidenced in Statement of Principles on Self-Represented Litigants and Accused Persons issued by the Canadian Judicial Council in 2006. They appreciated that the new programs directed NSLA resources exactly where they were needed. Accordingly, they expressed much satisfaction with the DC initiatives, whether it was "walk-in" or cell focused.

THE CROWN PROSECUTORS

In 2004, the crown prosecutors varied in their views about the magnitude of the unrepresented defendant problem in provincial criminal court in Nova Scotia. There was consensus throughout the province that the problem was more serious in HRM than outside the metropolitan area but, even in the HRM context, not all crowns considered that the problem was "major and growing". The most important cause of the unrepresented phenomenon was deemed to be the gap between not being eligible for NSLA and not being able to afford private counsel, but other causes were also advanced. The two chief solutions offered by the crowns in 2004 were to make NSLA more accessible and / or to provide duty counsel service for non-custody unrepresented defendants. In 2006 the crown prosecutors interviewed – five in HRM and two in Sydney - all considered that the DC system implemented, whether the cell or the non-cell DC, was a valuable, useful service. They readily identified the benefits that it has yielded for clients, court role players such as judges and themselves, and for the court process. In their view the DC role chiefly entailed three activities, namely providing summary legal advice, interacting with the prosecution on behalf of their clients, and linking clients up with regular legal aid services; at the same time they indicated much appreciation for other interventions of the DC as a friend of the court explaining legal matters to the unrepresented defendants. In both HRM and Sydney, the prosecutors reported that, over time, the DC service had evolved well. The main benefits they identified the DC initiative providing the clients were some understanding of their disclosure and having a knowledgeable person speak for them in court. The crown prosecutors strongly preferred the staff DC model over its roster counterpart for predictable reasons but they were appreciative of the DC service, whatever its guise. The limits they identified with respect

to the non-cell DC program such as very modest assessment of disclosure and little negotiation were seen to be integral to the DC initiative (or the ER program) and not the fault of those providing the duty counsel work. All crown prosecutors in HRM did hold that the DC program needed much better promotion.

NSLA AND PRIVATE COUNSEL

Five NSLA lawyers and three private lawyers were interviewed, one on one. Overall, the respondents from both NSLA and the private law sector agreed that the non-cell DC initiative in HRM was introduced in a low-keyed fashion but they disagreed about the adequacy of such an implementation. The private law grouping appears to have preferred a more publicized implementation where there may have been educational side benefits. For example, one respondent argued that there are two dimensions to the DC role, a principled one (e.g., no one should go without counsel) and a practical one (e.g., workload, smooth court processing etc) and that both are equally important; in his view, the DC implementation would have been a great opportunity to inform defendants and others about the criminal justice system but he did not believe that this had happened since the focus was on the practical side. Whatever the view about the implementation process, all the respondents whether in HRM or in Sydney considered that the DC initiatives yielded benefits for all the players and have been a valuable addition to NSLA offerings; they have filled a critical gap for the unrepresented defendants. They also all agreed that the staff DC model would generally be preferable to the roster or per diem system. There was modest divergence about the pressures for encouraging hurried guilty pleas and the potential for conflict of interests in the roster DC model. There was little discussion about the specifics of the DC role but no problems or issues were identified and all respondents understood that the DCs do not deal with major offenses and do not do trials.

DUTY COUNSELS' VIEWS

Eight duty counsel lawyers were interviewed in person, equally split between staff and roster DCs; two of the four staff DCs were in the Sydney court system. Overall, the DCs reported that they were generally satisfied with their engagement and believed that they were delivering benefits to clients, other court officials, NSLA and the court process itself. In HRM most were roster DCs and they were interested in securing more assignments and possibly becoming a staff DC should such a position become available. All DCs reported having received very little in the way of training or orientation for the job but at the same time they did not particularly see that as a shortcoming, holding as NSLA apparently does, to a professional model of the “lawyering” entailed. They identified three major facets of their role, namely providing summary legal advice (including procedural knowledge) to the clients, facilitating the client’s linkage to legal aid, and interacting with the crown prosecutors in court on behalf of the clients. Most, but not all, DCs indicated that they occasionally went beyond their mandated tasks if available and requested to do so by the judges or prosecutors. The DCs indicated that they obtained most clients on their own by introducing themselves one way or the other; in other words perhaps by being a “self-starter”. The main other way they secured clients

came via referrals from judges. It was clear in the interviews – and consistent with courtroom observations – that the DCs varied considerably in their personalities and styles of interacting with the clients but in their reports (also consistent with observations) they all indicated that few unrepresented defendants turned down their offers of assistance; where the differences manifested themselves were more at the level of how compartmentalized or business-like they were with clients and other court role players. While acknowledging that cell DC work may be more challenging, they all preferred duty counsel work for the “walk-in” defendants.

The DCs indicated that in general the main benefits the DC initiative provided clients were clarifying the charges they were accused of and reducing the number of charges they faced. For judges and prosecutors the main benefits they identified focused on providing “a comfort level” and enabling them to avoid conflicts of interests in their dealing with unrepresented defendants. There was little doubt in the DCs’ minds that their role has increased the efficiency of the court process. On the two major potential criticisms of the DC role cited in the literature, all DCs rejected any problem. On the first, possibly encouraging premature guilty pleas to facilitate court processing, their view was that any pressure to “plead and go” would come from the defendant, not from them. On the second issue, possible conflict of interest by dragging out a case, they all reported that there was no conflict of interest and that seeking private business on the case was not improper and would not be done at the expense of appropriate early resolution. The chief recommendations advanced by the DCs included maintaining the DC program, better marketing of the DC role, greater presence of the DC role in the courthouse, and better facilities for their meeting with clients.

THE DEFENDANTS’ VIEWS

There were two sets of adult defendant interviews, virtually all of which were telephone interviews. Set A was a sample of twenty-eight defendants interviewed through contact at the courthouse where the telephone interview was arranged. Set B was a sample of one hundred and fifty-two defendants whose cases were closed over the fourteen month period between October 2004 and January 2006; this entire sample was drawn from the JEIN data system. Overall, the following major points emerged from the small courthouse-generated sample of unrepresented defendants:

15. Most respondents were young adult Caucasian males and persons who professed to have little knowledge of the court process or any aspect of it.
16. Prior to arraignment only a small minority indicated that they had done anything with respect to securing legal advice or seeking legal counsel.
17. Over three-fourths did have contact with the duty counsel, most often at the suggestion / direction of the presiding judge.
18. The respondents were especially appreciative of the DC service with respect to assisting them in the courtroom.

19. Those indicating the primary DC service they received was assisting them concerning legal aid were much less appreciative of that particular DC service.
20. The major DC service that respondents acknowledged was advising them on plea, followed by the DC arranging convenient adjournments and subsequent court appearance dates for them.
21. Most consultations with the DC reportedly lasted less than 10 minutes and took place at the DC's office.
22. The large majority of defendants who accessed the duty counsel service reported that it was very helpful.
23. Their spontaneously rendered "best thing" about the DC service was helping them say the right things to the judge, advising them not to accept the plea bargain or plead guilty, and providing social support, in that order of frequency.
24. Duty counsel reportedly did exhibit nuance, reflecting the specifics of the case and did not always urge not guilty pleas or rejections of the ER provided by the prosecution.
25. Respondents usually did not think much change was required in the DC service, whether it be more consultation time or better meeting milieus. They often conveyed an appreciation of the limited parameters of the DC role.
26. The large majority of respondents did contend that there was a need for greater promotion and marketing of the DC role, and a higher profile for the DC at the courthouse.
27. Virtually all respondents, including those who did not access the DC this time, would use the DC service in a future court appearance as a defendant.

Overall, the following chief themes emerged from the analyses of the JEIN-derived sample of 152 persons whose court cases were closed between October 2004 and January 2006 inclusive:

14. 46% of the sample was represented at arraignment, 62% at plea, 65% at trial and 64% at sentencing.
15. The sample consisted of mostly male Caucasians, people over 30 years of age and of quite varied educational and employment attainment.
16. 90% of the respondents had been charged with minor offences and 30% with motor vehicle offences (e.g., impaired driving). 53% were repeat defendants.
17. 68% of the sample had had representation at some stage, if not at all stages, in their most recent court case during the sample's time frame. Of this grouping, 95% reported having legal counsel at trial and at sentencing.
18. The respondents who had legal counsel were generally quite satisfied with the legal services received. As benefits, they highlighted the support function as well as the outcomes realized. The minority who

reported themselves dissatisfied with their legal counsel primarily focused on the outcomes as the reason for this assessment.

19. Among the 32% who reported having no legal counsel at any stage in their court case, there were two basic types identified, namely those who indicated the reason was the familiar gap between ineligibility for legal aid and lack of affordability of private counsel, and **those articulating a reason that had more to do with their wanting to take responsibility and/or explain the circumstances in court. The latter category seemed to be most common among this unrepresented grouping.**
20. Compared to those who had had at least some legal counsel, the unrepresented did little pre-arraignment activity salient to the presentation of their case but were as confident as the represented defendants were in terms of how they saw the crown's likely activities and recommended sentence.
21. Compared to those who had at least some legal counsel, the unrepresented were more likely to be facing charges for motor vehicle and "other" criminal code offences, first time offenders, older and less unemployed. Those with representation on the other hand were more likely to have been unemployed, have a criminal record and to have committed an offence eligible for legal aid.
22. Focusing on those defendants who were unrepresented and also did not have any contact with the duty counsel, they were male Caucasians, first time offenders (61%), all charged with minor offences and half with motor vehicle – related offences such as impaired driving. They were mostly over 30 years of age (77%), employed (86%) and in middle status occupations. It would appear that the large majority could have afforded legal counsel. . **The evidence suggests then that the "system" is working at least in the sense that people charged with significant offences who want legal counsel but cannot afford it are uncommon in this sample.**
23. Comparing users and non-users of the duty counsel services, all of whom indicated an awareness of the DC service, it was found that non-users were older and more likely to be employed. Other less differentiating factors were predictable, namely the seriousness of the charge they faced, whether they accessed other forms of legal counsel and so forth.
24. Users of the DC service frequently indicated that the judge was crucial in referring them to the duty counsel services. A majority claimed that they did understand the range of services provided by the DC but, upon being asked about specific DC services such as speaking to the sentence, it was clear that confidence was exaggerated. The three major DC services accessed were, in order, discussions about the plea, discussions about the disclosure, and assistance in arranging contact with Legal Aid. The DC benefit most frequently cited was greater understanding of the legal issues involved in the case. The large majority of those using the

DC reported their consultation took less than 20 minutes. No contact by telephone or outside the courthouse was reported.

25. The large majority of DC users assessed the service in positive terms and reported finding it very helpful. In their spontaneous responses about its best features they pointed most frequently to the social support provided and then to specific items such as securing adjournment.
Somewhat surprisingly in light of the length of their DC consultation, the large majority held that they had had enough time, perhaps reflecting their appreciation of the constraints on the DC role. The major changes recommended were few, basically calling for a better advertised and promoted DC service, and for a higher profile or presence for the DC at the courthouse.
26. Not surprisingly, the users of the DC service indicated that if there was a next time for themselves in criminal court, they would access the DC service. Of the 124 respondents who did not use the DC service, over 80% indicated that they would use it the next time if there was a next time as defendant. The chief reasons for this view were financial (“it’s free so why not”) and being able to access quick, on-the-spot legal counsel.

FUTURE DIRECTIONS

The research has established that the new duty counsel initiatives embarked upon by NSLA have been quite successful. Significant gaps in society’s responding especially to the justice needs of the “not so well off” defendants, have been targeted and NSLA has expended its scarce resources well. As summarized above, the initiatives have been much appreciated by the unrepresented persons who accessed them, by the judges and crown prosecutors who have worked with them, and by the regular NSLA staff lawyers. The initiatives have improved the efficiency of the court process and yielded a higher quality of justice. Despite the fact that the typical DC consultation with clients in HRM has been one meeting of roughly ten minutes, and despite the fact that the clients often would have preferred more time, over 80% of them considered that they at least had enough time. These clients, as well as those interviewed defendants who reported no contact with the DCs, indicated that they would use the service (again) if they were defendants in another matter. The DCs’ focus has been on the three facets of providing summary legal advice, facilitating linkages to conventional legal aid and interacting with the crown and judge on the clients’ behalf, short of becoming a trial lawyer. In these respects the DC systems have been implemented as planned. The major difference between design and implementation has been in HRM where the staff DC personnel resigned for one reason or another and the DC system became completely a roster model, a model which up to the end of 2006 has seen quite modest turnover and yielded few complaints. For the most part, the DCs have been self-starters, securing their clients through announcements and by presenting themselves to unrepresented defendants. Judges have been a major source of referrals and, perhaps surprisingly, the sheriff’s staff has been important in directing unrepresented defendants to the DCs.

Much has been discussed in the DC literature about possible pressures on the DCs to become caught up in the objective of smooth court processing and unintentionally encouraging premature guilty pleas to effect early resolution of cases. On the basis of all the interviews with DCs, other court players, and the defendants themselves, that does not appear to have happened in these initiatives. The other criticism one finds of potential conflict of interest between the client and the defense lawyer, when there is a roster DC model and the DC can seek private business in the matter at hand, is more complicated. The roster DCs have reported obtaining such private business but neither they nor other court officials (judges, crowns, NSLA officials) find that problematic because they are confident that the DCs will not abuse the situation and since the possibility of securing such business may be an important incentive in the hiring of roster DCs.

All the above is not to argue that the DC system could not be improved upon. The penetration level of the “walk-in” DC system in HRM can definitely be increased. It has been virtually impossible in this modest project to obtain good data on the matter but the limited secondary data (JEIN and staff DC records) do point to increasing penetration of the service vis-à-vis the targeted pool of unrepresented defendants. Observations and interviews with defendants indicate that more unrepresented defendants do not consult with the DC than do consult, though it appears safe to say that the DC system has contributed positively to the NSLA objectives of having no defendant, facing serious charges and / or a possible jail term, go without some legal counsel. Most respondents, whether court role players or defendants held that the DC system should be promoted better and that the DC should have more presence at the courthouse. The time available for the DC consultation scarcely allows for a careful examination and discussion of disclosure. This does raise the question of the adequacy of the DC consultation, of “under-representation” which is a criticism of the duty counsel approach frequently cited in the literature; but it is not clear in any event whether that would be feasible under the present DC arrangements and it would raise the issue of how far can, and indeed whether, the elaboration of the DC system be encouraged. There does appear to be some pressure on the disclosure issue (i.e., more emphasis on the DCs giving it full attention) from judges and crowns perhaps seeking proactive early resolution and from defendants seeking more detailed, substantive legal advice. The impact of the PPS’ ER initiative on early resolution (i.e., quicker guilty pleas) and on the DC consultation would merit some study but in this research it was found that there was little contact between the DCs and the ER official concerning possible amendments to the ERs and that the general DC view was that the ER gave too little in return for a quick guilty plea.

As was evident in the summaries provided above, there were many other specific recommendations advanced by the different court players. Judges asked about the practicality of having schedules for the roster DCs available to the court clerk or to the sheriff. Some court officials mused about the possibility of expanding the role of the DC to include assisting unrepresented defendants at hearings on undertakings (something which happens informally on occasion now) while others wondered about the possibility of the DCs taking on an educative function and also being able to refer unrepresented defendants to non-legal support services. The DCs themselves offered up more practical suggestions that included more guaranteed working hours, better facilities at the

courthouse and better liaison with the sheriff's desk. Virtually all the court role players interviewed indicated that the staff model would be preferable to the roster model for predictable reasons (continuity, recognition, availability for non-mandated tasks as a friend of the court) but observations and interviews also showed that a stable DC roster system could also satisfactorily achieve some of these goals; moreover, there may be unanticipated advantages in the roster model in that the perhaps greater marginality of the roster DC may mean that the DC focus remains more exclusively on the defendant and much less on the court system per se.

It would be unwise to conclude that the unrepresented defendant problem in provincial criminal court has been resolved as a result of these initiatives in HRM. JEIN data for 2005-2006 indicate that in roughly 18% of the cases the defendant was unrepresented at least at final appearance; still, that figure represents a significant decline from the counterpart figure of 35% found in 2002/2003 (Clairmont, 2004). As noted above, some 32% of the closed cases telephone sample reported that they had no legal counsel at any stage in the court process but the representativeness of that sample can be challenged, and, in addition, the percentage would overstate the lack of legal counsel since 10% of these closed cases had court appearances prior to October/November 2004 when the non-cell DC system was just getting off the ground in HRM. One might well expect that fewer defendants would have been without any legal counsel (including duty counsel) over all stages in their case and, as well, at final appearance since the DCs frequently speak to the sentence as noted earlier. Even fewer would be without such legal counsel in subsequent years as the duty counsel system becomes more well-known and better utilized. The penetration rate for the DC service at least should improve.

The question of "under-representation" as contrasted with lack of representation is obviously more complex. The expert interviewees appear to differ among themselves on how adequate they considered the DC consultation to be, focusing perhaps more on its at least taking place. Most defendants considered the DC consultation to have been quite adequate but one could argue perhaps that their expectations were quite modest. It does appear too from the interviews that we have carried out with several hundred unrepresented defendants over the past few years that some persons are quite determined to plead guilty and get it over with, so they reject seeking legal counsel; if such cases of unrepresented defendants are the increasingly common face of the unrepresented phenomenon, then many officials might well agree with the senior prosecutor in the PPS who commented, "What is wrong with that"? Similarly, some defendants will want to make their own arguments even if they are not legally relevant; the unrepresented defendants, it may be recalled, are concentrated in certain offenses such as criminal code motor vehicle offenses and domestic assaults where these standpoints seem particularly common. It would seem that the crucial consideration for justice policy is that at least some access to legal counsel is available for all and that accessibility is not tied to socio-economic status or mental well-being. The NSLA's DC initiatives have gone a significant way in realizing those objectives. Perhaps now that the unrepresented defendant phenomenon has been tackled, incremental improvements can be effected with respect to penetration and quality of the service while specialty courts and the therapeutic jurisprudence movement can be the next frontier in Nova Scotia justice.

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Appendices

APPENDIX A: INITIAL INTERVIEW GUIDE
Atlantic Institute of Criminology
Duty Counsel Project

<i>Initial Interview Summary</i>

Date	
Time	
Courtroom Number/Judge	
AIC Volunteer Name	
Name of the Interviewee	
Stage of Process (i.e. Arraignment, plea, trial, sentencing, etc.)	
Phone Number	
Charge	
Disclosure Provided?	
Notes	

The following details the areas to be explored and types of questions to be asked but the wording will have to be adjusted to the particular circumstances of the interview situation. In the preamble, mention that this we are a university-based group doing research on how well the new duty counsel program for regular, non-cell defendants in provincial court has been working. That is why we would like to talk with the person about his/her experiences in court. It should be made clear to all possible participants that we are not lawyers, that we are not interested in the details of their specific case, and that confidentiality and anonymity is guaranteed.

General Observations/ Comments

BASIC INFORMATION AND THEMES: DUTY COUNSEL INTERVIEWS

1. BASIC DESCRIPTIVE INFORMATION

GENDER / AGE / RACE-ETHNICITY / EDUCATION, EMPLOYMENT TYPE OF SELF AND/OR CHIEF FAMILY EARNER)
 Sometimes it might be best to ask these questions at the end because they may emerge naturally from the interview but please remember to get this information.

CHARGE(S) FACED (MORE DETAIL IF POSSIBLE):

2. STAGE AT WHICH PERSON IS WHEN INTERVIEWED
(ARRAIGNMENT, PLEA, TRIAL, SENTENCING, CASE CLOSED)

3. ANY PREVIOUS APPEARANCES I N COURT?

IF DEFENDANT, REPRESENTED BY COUNSEL? WHO (legal aid or private counsel)?

WHETHER OR NOT REPRESENTED, HOW DID IT GO (THE EXPERIENCE, OUTCOMES)?

IF BOTH TYPES OF EXPERIENCES, REPRESENTED AND NOT REPRESENTED BY COUNSEL, HOW DIFFERENT WAS IT WHEN UNREPRESENTED REGARDING THE PROCESS AND THE OUTCOME?

4. HOW WOULD YOU RATE YOUR KNOWLEDGE/AWARENESS OF THE COURT PROCESS FROM ARRAIGNMENT AND PLEA TO TRIAL AND SENTENCE?

ANY SPECIAL AREAS WHERE HAVE MUCH AWARENESS?

ANY SPECIAL AREAS WHERE HAVE LITTLE AWARENESS?

5. WHAT'S YOUR SENSE OF HOW THIS CASE HAS PROCEEDED? (AS EXPECTED? SATISFIED? FAIR? , FROM YOUR POINT OF VIEW?

THE DUTY COUNSEL PROGRAM: (now there is a duty counsel available at court to provide free legal advice to all defendants prior to their entering a plea)

6. HAVE YOU HAD ANY CONTACT WITH THE NON-CELL DUTY COUNSEL AS YET? (please describe) IF NO, GO TO QUESTION 10

7. IF YES, THEN ASK SPECIFICALLY ABOUT: (ask each)

a) HOW DID YOU GET IN CONTACT? (directed to by judge or crown, approached by duty counsel, approached duty counsel; other)

b) DID YOU UNDERSTAND THAT THE SERVICE WAS FREE?

c) WAS IT CLEAR WHAT SERVICES THE DUTY COUNSEL CAN PROVIDE? (see if the person knows it is up to and including speaking at sentencing on your behalf)

d) WHAT DID THE DUTY COUNSEL DO FOR YOU? (refer to all in questioning)

ASSIST YOU IN ARRANGING FOR LEGAL AID?

DISCUSS YOUR DISCLOSURE (charges and evidence)?

ADVISE YOU ON A PLEA?

SPEAK TO THE COURT AT SENTENCING?

OTHER? (speak to the prosecutor for you? Advise you about diversion? Clarify some point of law raised in court? Other?)

e) HOW LONG DID YOU TALK WITH THE DUTY COUNSEL ON ANY ONE OCCASION? (roughly, the number of minutes)

- f) ON HOW MANY DIFFERENT DAYS DID YOU SPEAK WITH THE DUTY COUNSEL FOR THE SAME CASE?
- g) WHERE AND HOW DID YOU TALK WITH THE DUTY COUNSEL? (in the corridor? In her office at court? On the telephone?)

8. DID YOU FIND THE DUTY COUNSEL CONSULTATION HELPFUL?
(please describe)

WHAT WAS THE BEST THING ABOUT THE DUTY COUNSEL SERVICES FOR YOU?

WHAT WAS THE POOREST THING ABOUT THE DUTY COUNSEL SERVICES FOR YOU?

DID YOU HAVE ADEQUATE TIME WITH THE DUTY COUNSEL TO DISCUSS DISCLOSURE AND DECIDE ON A PLEA? (did you feel pressed to decide on a plea?)

OTHER COMMENTS?

9. ARE THERE ANY WAYS THE DUTY COUNSEL SERVICE COULD BE IMPROVED IN YOUR VIEW? (please describe) (after asking the rest of question 9, go to question 12)

DO YOU THINK CHANGES SUCH AS THE FOLLOWING ARE NEEDED? HIGH PRIORITY? (please give both answers to each issue raised below)

MORE PUBLICITY / BETTER MARKETING OF THE SERVICE?

A HIGHER PROFILE AT COURT?

DIFFERENT FACILITIES AT COURT FOR MEETING WITH DUTY COUNSEL?

OPPORTUNITY TO CONTACT THE DUTY COUNSEL LONGER AND MORE OFTEN

10. IF YOU HAVE NOT HAD ANY CONTACT WITH THE DUTY COUNSEL, WERE YOU AWARE OF THE DUTY COUNSEL PROGRAM FOR REGULAR, NON-CELL DEFENDANTS? (probe what did they know about it? From what sources?)

DID YOU KNOW THAT

THE DUTY COUNSEL PROVIDES FREE LEGAL ADVICE FOR DEFENDANTS?

THE DUTY COUNSEL CAN ASSIST IN ARRANGING LEGAL AID?

THE DUTY COUNSEL CAN ADVISE YOU ON DISCLOSURE? (charges and evidence)

THE DUTY COUNSEL MAY SPEAK TO THE PROSECUTOR ON SOME OF YOUR CONCERNS?

THE DUTY COUNSEL CAN SPEAK FOR YOU AT SENTENCING IF YOU PLED GUILTY?

11. WAS IT BROUGHT TO YOUR ATTENTION THAT YOU COULD HAVE USED DUTY COUNSEL SERVICES? (by whom, how?)

IF YES, WHY DID YOU NOT USE THE SERVICES? (explore in depth)

DID YOU NOT USE IT FOR ANY OF THE FOLLOWING REASONS:

HAD A PRIVATE LAWYER OR PLANNED TO CONTACT LEGAL AID?

DID NOT UNDERSTAND THE DUTY COUNSEL SYSTEM
(e.g., that it was free or could provide legal advice etc)

WANTED TO REPRESENT YOURSELF (probe, why was that?)

JUST WANTED TO GET IT OVER WITH AND PLEAD
GUILTY?

IF NO, WOULD YOU USE THE DUTY COUNSEL NOW SHOULD
YOU EVER APPEAR IN COURT IN THE FUTURE? (why or why not?)

GENERAL QUESTIONS ABOUT APPEARING IN COURT

12. BEFORE ARRAIGNMENT DID YOU DO ANY OF THE FOLLOWING:

- A) CONSULT WITH A PRIVATE LAWYER?
- B) CONTACT THE PUBLIC PROSECUTION SERVICE FOR DISCLOSURE?
- C) PHONE THE LEGAL REFERRAL SERVICE?
- D) INQUIRE ABOUT ELIGIBILITY FOR LEGAL AID?
- E) INQUIRE ABOUT THE POSSIBILITY OF THE CASE BEING REFERRED TO ADULT DIVERSION?

13. AT THE PLEA STAGE,

DID YOU THINK YOU HAD A GOOD SENSE OF THE CROWN'S
CASE?

OF HOW THE CROWN WILL PROCEED?

OF WHAT KIND OF SENTENCE THE CROWN WOULD
RECOMMEND IF YOU PLEAD OR ARE FOUND GUILTY?

THANK YOU VERY MUCH FOR PARTICIPATING IN THIS RESEARCH.

INTERVIEWER'S COMMENTS

Atlantic Institute of Criminology
Duty Counsel Project

APPENDIX B: TELEPHONE INTERVIEW INSTRUMENT FOR CLOSED CASES

Client's Name (Last Name, First Name)	
Client's Gender	
Client File Number	
Interviewee's Contact Information	
Interviewer	
Interview Date	
Interview Format (Phone/In-Person)	

Interviewer's Introductory Remarks if Phone Call Answered

[Brief Introduction]

Hello, my name is _____ and I am calling from the Atlantic Institute of Criminology at Dalhousie University. We are conducting, for the Department of Justice, an evaluation of legal services offered at Provincial Courts. It is my understanding that you went through the court process in 2005. I was wondering if you have a few minutes so that we can seek your feedback concerning your experience and any suggestions that you might have. The information that you provide will be used to improve legal services for people in the future.

[If Individual Expressed Any Confidentiality-Related Concerns]

We are not concerned about the particulars of your individual case. Instead, we are interested in your opinions concerning the availability and quality of court services currently available. Your contact information was obtained from the public docket.

[Voice Message]

Hello, this message is for _____. My name is _____ and I am calling from the Atlantic Institute of Criminology at Dalhousie University. Could you please give me a

call at your convenience at (902) 494-6758 and quote file number _____. Thank you very much – have a good day.

General Information and Themes

1. Were you represented during at any time during your court proceedings by a lawyer? Yes No

[If represented proceed to question 2; if unrepresented at all stages proceed to question 4.]

If Represented:

2. Could you please indicate, by saying yes or no, whether you were represented by a lawyer at any of the following stages of your court case:

- (a) Arraignment Yes No
(b) Plea Yes No
(c) Trial Yes No
(d) Sentencing Yes No

3. Were you represented by: Legal Aid, by Duty Counsel or by Private Counsel?¹²⁴

If Unrepresented at All Stages

4. Did you want to be represented by a lawyer during this proceeding?

Yes No

5. Was it your desire to present your own case before the court?

Yes No

6. Would you have been able to afford a private lawyer?

¹²⁴ Be prepared to explain/define “duty counsel.” Through the duty counsel service, introduced last year at the Halifax and Dartmouth locations of the Provincial Court of Nova Scotia, government paid duty counsel lawyers provide litigants with limited free legal advice and assist them, where possible, in securing further legal assistance and advice.

Yes No

7. Did you think that it was important to have a lawyer to represent you?

Yes No

8. What was the chief reason why you chose not to get a lawyer?

9. Did the cost of retaining a lawyer influence your decision not to get one?

Yes No

10. Were you eligible for legal aid?

Yes No

11. Were you aware of the fact that you could have accessed free legal advice from an in-house duty counsel lawyer?

Yes No

If Represented at Any Stage

12. Do you feel that the representation provided by your lawyer was adequate and sufficient?

Yes No

IF NO:

- (a) Why not?
- (b) Was representation available to you at all stages of your proceeding? Yes No
- (c) Was the role of your lawyer in your proceeding too limited?
 Yes No

IF YES:

- (d) What would you describe as being the best thing or best things about your legal representation?

13. Prior to this matter had you ever previously appeared before a court?

Yes No

IF YES

- (a) Were you the defendant in that previous matter?
 Yes No
- (b) Were you represented by counsel in that previous matter?
 Yes No
- (c) Were you represented by:
 - Duty Counsel?
 - Legal Aid?
 - Private Counsel?

Experience With Non-Cells Duty Counsel

[If interviewee reported no experience, proceed to question 42]

14. Have you ever used the duty counsel service which provides free legal advice?

Yes No

If Interviewee *Did* Use Duty Counsel Service

[Note: Questions 15 through 31 are crucial in this section. Questions 32 – 41 may be afforded less importance if the interviewee is pressed for time.]

15. How did you come into contact with the duty counsel lawyer?

- (i) Directed by Judge or Crown
- (ii) Approached by duty counsel
- (iii) Other. Specify: _____

16. Did you understand what services the duty counsel could provide?

Yes No

17. Were you aware of the fact that the duty counsel lawyer could represent you up to and including the sentencing phase of your proceeding?

Yes No

18. ** Did the duty counsel assist you in arranging for legal aid?¹²⁵

Yes No

19. ** Did the duty counsel discuss the Crown's disclosure file with you?¹²⁶

Yes No

¹²⁵ Important Question

¹²⁶ Important Question

20. Did the duty counsel talk to you about how you should plea?
- Yes No
21. Did the duty counsel speak on your behalf at your sentencing hearing?
- Yes No
22. Did the duty counsel lawyer help connect you with a private lawyer?
- Yes No
23. Did the duty counsel lawyer speak to the prosecutor for you?
- Yes No
24. Did the duty counsel introduce you to the diversion process?
- Yes No
25. Did the duty counsel lawyer help you to understand legal issues that came up during your court proceeding?
- Yes No
26. Is there anything else that the duty counsel lawyer did for you?
27. For how long, in minutes, would you say you spoke with the duty counsel?
- ___ minutes.
28. On how many different days did you speak with the duty counsel for the same case?
- ___ Days
29. Where did you talk to the duty counsel? _____
30. Was your contact in person or over the telephone?
- Person Phone

31. Did you find the duty counsel consultation to be helpful? (Please describe)

Yes No

32. What would you say was the best thing about the duty counsel service?

33. What would you say was the worst thing about the duty counsel service?

34. Do you think that you were given enough time to discuss with your duty counsel the Crown's disclosure file and your plea?

35. Did you feel pressed to decide on a plea?

Yes No

36. In what way or what ways do you think the duty counsel service can be improved?

37. Do you think that the duty counsel system should be better advertised or promoted? Yes No. Do you think that this should be given high priority? Yes No

38. Do you think that the duty counsel lawyer should be given a higher profile or made more visible or approachable at the courthouse? Yes No. Do you think that this should be given high priority? Yes No

39. Do you think that there should be different facilities or a different place in the court house for duty counsel to meet with clients? Yes No. Do you think that this should be given high priority? Yes No
40. Do you think that clients should be able to meet with the duty counsel lawyer for longer periods of time and/or on more occasions? Yes No. Do you think that this should be given high priority? Yes No

If Client Reported *No Dealings With Duty Counsel*

41. Were you aware of the existence of the duty counsel service for regular, non-cell accused? Yes No

IF YES:

(a) How did you know about it?

42. Did you know that the duty counsel service provides free legal advice to accused?
 Yes No
43. Did you know that duty counsel can assist in arranging for legal aid?
 Yes No
44. Did you know that the duty counsel can advise you on the Crown's disclosure file?
 Yes No
45. Did you know that the duty counsel can speak to the Crown prosecutor about your concerns?
 Yes No
46. Did you know that the duty counsel can speak for you at sentencing if you plead guilty?
 Yes No
47. Was it brought to your attention that you could have used the duty counsel service?

Yes No

IF YES:

[If no, proceed to question 49]

(a) By whom and how?

(b) Why did you choose not to use the duty counsel service (explore in depth)

(c) Did you choose not to use the duty counsel service for any of the following reasons?

(i) You had a private lawyer or planned to contact legal aid?

Yes No

(ii) You did not understand the duty counsel system?

Yes No

(iii) You wanted to represent yourself? (Probe re: why)

Yes No

(iv) You just wanted to get the matter over with and plead guilty?

Yes No

IF NO

49. Should you appear before the court again in the future do you think that you would use the duty counsel service? Yes No

(a) Why or why not?

General Questions About Appearing in Court in 2005

[Note: Questions 48 and 49 may be given lesser priority if the interviewee is pressed for time.]

48. Before arraignment, did you do any of the following?

- (a) Consult with a private lawyer? Yes No
- (b) Contact the public prosecution service for disclosure? Yes No
- (c) Phone the legal referral service? Yes No
- (d) Inquire about eligibility for legal aid? Yes No
- (d) Enquire about the possibility of the case being referred to adult diversion?
 Yes No

49. At the plea stage did you:

- (a) Have a good sense of the Crown's case against you?
 Yes No
- (b) Have a good sense of how the Crown was going to proceed?
 Yes No
- (c) Have a good sense of the sentence the Crown was going to recommend if you plead or were found guilty?
 Yes No

Basic Descriptive Information

50. For statistical purposes only, could you please tell us:

- (a) Your age: ____ years
- (b) What were you charged with? _____

- (c) Your race or ethnicity: _____
- (d) The highest level of education that you have successfully completed? _____
- (e) Your current type of employment: _____
- (f) Are you the chief income earner in your household?
- Yes No.

IF NO:

- (g) What is the occupation of the chief income earner in your household? _____

Thank you very much for participating in this evaluation.

Interviewer's Comments: