Chapter 2: Diversion

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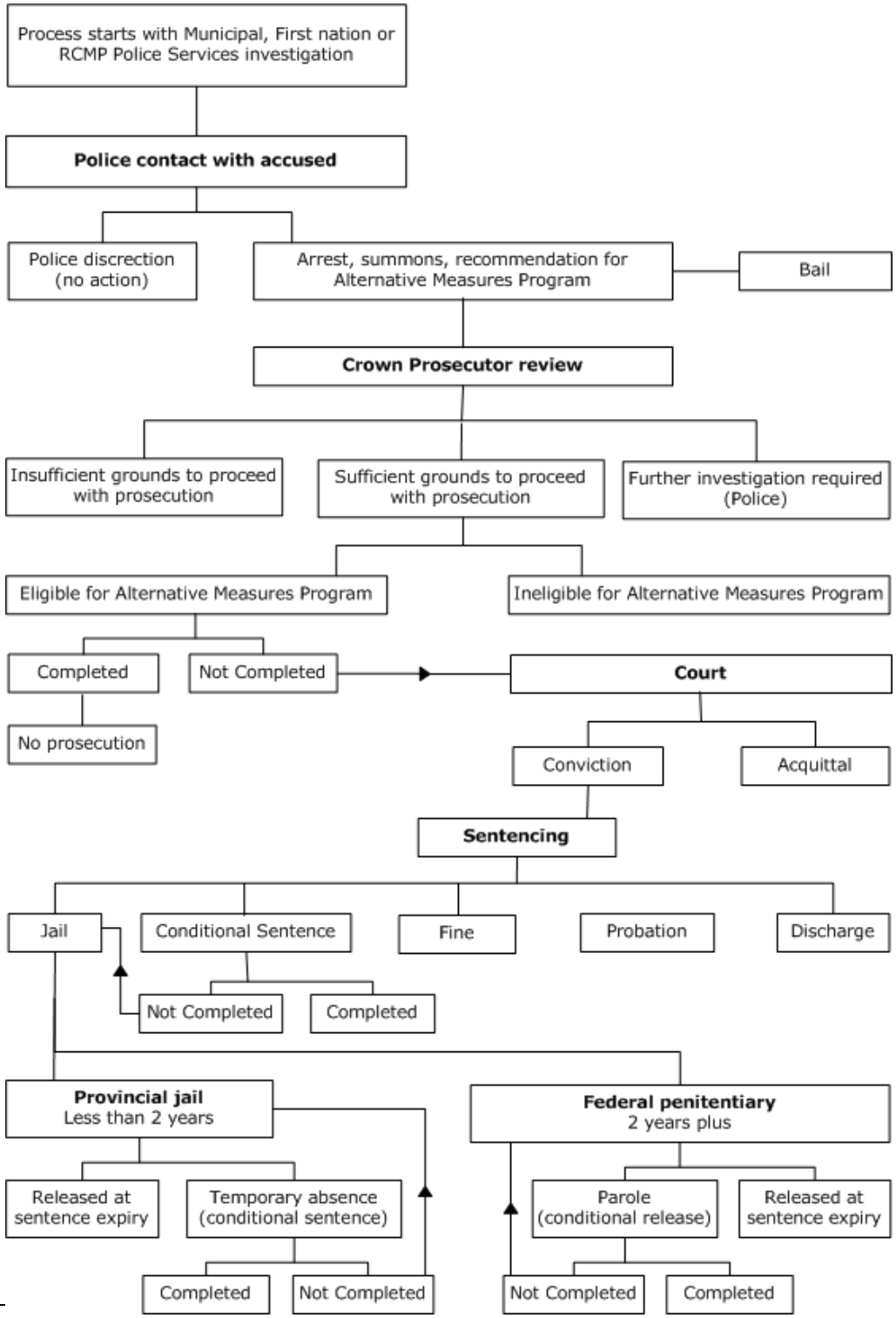
Criminal Justice Process in Alberta (note the various discretion or diversion points):[1]



[1]This flow chart is sourced from Alberta Justice and Solicitor General, "Criminal Justice Process for Adults", online: Alberta Justice and Solicitor General <https://justice.alberta.ca/programs_services/criminal_pros/Pages/process_adults.aspx>. Note that "[t]his chart flows from top to bottom unless indicated otherwise by arrows."

I. Introduction

Mentally disabled offenders may be diverted from the traditional criminal justice system into community programs, mental health facilities and other programs at several stages of the proceedings. A victim may decide not to report the alleged crime to the police. A police dispatcher may elect to give a complaint a low priority. A police officer may choose to examine other options such as civil commitment or placing the mentally disabled person into the custody of friends or family. The prosecutor may decide not to proceed against the offender or may enter into a plea bargain with him/her. Alternative Measures may be used to avoid the mentally disabled offender having a criminal record. The courts may impose a conditional sentence such as house arrest or time spent in a locked psychiatric facility with access to treatment, instead of time spent in a penal institution. In some jurisdictions, there are specialized mental health courts, which will streamline qualified mentally ill offenders through the court system and match them with appropriate resources. Some of these diversion options may be preferable to mitigate the adverse effects of the (sometimes protracted) criminal justice process on mentally disabled persons.

This chapter examines several aspects of the diversion process. First, it considers the factors that influence the choice to divert a mentally disabled person from the criminal justice system into some of the available alternative programs. Many of the factors are beyond the control of the mentally disabled offender because they involve administrative and policy decisions. The diversion policies are not generally well known and vary from department to department and from individual to individual.

Second, this chapter looks at some of the consequences of diverting the client into the civil stream. These consequences will have to be weighed against the effects of a conviction and possible incarceration.

Finally, in some cases, counsel may wish to challenge the prosecutor's exercise of discretion in choosing to proceed with criminal charges against the mentally disabled client. There are some emerging doctrines—such as abuse of process and selective prosecution—that may be useful in seeking to obtain a stay of proceedings or other favourable remedy for the client. The past decade has witnessed several innovations in the form of diversion

and even a few specialized courts for the mentally disordered accused.

II. General Considerations

A. Diversion—Its Scope and Definition

What is diversion and how does it relate to mentally disabled offenders? Diversion occurs after a crime has allegedly been committed and is the result of decisions by the victim or a bystander not to call the police, the exercise of discretion by the police not to lay charges but to deal with the incident in another way, or a decision by the prosecutor to withdraw the charges against the offender.[2] Diversion is quite broad in its scope, purpose and operation. It covers a wide variety of alternatives to the traditional criminal justice process. In the traditional system, there is a complaint to the police, followed by investigation, arrest, criminal charges, a trial and sentencing of the offender. However, in many instances, offenders do not become involved in the traditional criminal justice process.

Diversion is performed by: members of the public, by police officers, by prosecutors and by the judiciary. Diversion may take place at several different stages in the criminal justice process. It may take place before the person enters the process, during the process or once the person has finished her/his trial but before she/he receives the traditional sentence for the crime.

The various ways in which a person may be diverted from the criminal justice system have been described as follows:

> (1) *Community absorption*: individuals or particular interest groups dealing with trouble in their own area, privately, outside the police or the courts.
>
> (2) *Screening:* police referring an incident back to family or community, or simply dropping a case rather than laying criminal charges.
>
> (3) *Pre-Trial Diversion:* instead of proceeding with charges in the criminal court, referring a case out at the pre-trial level to be dealt with by settlement

[2]Law Reform Commission of Canada, "Working Paper on Diversion", in *Studies on Diversion—East York Community Law Reform Project* (Ottawa: Information Canada, 1975) (hereinafter Law Reform Commission of Canada, 1975), at 3.

or mediation procedures.

(4) *Alternatives to imprisonment:* increasing the use of such alternatives as absolute or conditional discharges, restitution, fines, suspended sentences, probation, community service order, partial detention in a community based residence, or parole release programs.[3]

Some items on the above list under "Alternatives to imprisonment" may have at one time been considered to be diversions from the criminal justice system (e.g., community service orders and restitution). However, today they are viewed as part of the criminal justice system. A person may also be diverted through more formalized diversion programs or mental health courts.[4]

When a mentally disabled offender is diverted from the criminal justice system, he/she may find himself/herself being involuntarily committed under the mental health system in his/her province. Alternatively, he/she may be channelled to community resources for counselling or assistance or he/she may be released into the community at large without further follow up.

B. The Actual Extent of Diversion—Its Non-Exceptional Nature

There is a misconception that diversion is exceptional and occurs on a fairly rare basis. Indeed, diversion is quite common. The traditional pattern of complaint, investigation, arrest, charge, trial and imprisonment or fine represents only a fraction of the work of the criminal justice system.

First, the general public has a very important role in bringing criminal offences to the attention of the police. A survey undertaken by the federal government in 1982 indicated

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[3] Law Reform Commission of Canada, 1975, at 4.

[4] For a summary of some developments in this area see Mark Reiksts, "Mental Health Courts in Canada" (2008-2009) 33 LawNow 31 (hereinafter Reiksts). For further information on Alberta's Adult Alternative Measures Program, see Alberta Justice and Solicitor General, "Adult Alternative Measures Program", *Crown Prosecutors' Manual: Guidelines* (Effective: 24 October 2005; Review Date: 6 December 2014) online: Alberta Justice and Solicitor General <https://justice.alberta.ca/programs_services/criminal_pros/crown_prosecutor/Pages/AdultAlternativeMeasuresProgram.aspx>. For more detailed information on mental health courts, see Richard D Schneider, Hy Bloom & Mark Heerema, *Mental Health Courts: Decriminalizing the Mentally Ill* (Toronto: Irwin Law, 2007) (hereinafter Schneider, Bloom & Heerema).

that more than half (58%) of the estimated occurrences involving victims were never reported to the police and only three per cent (3%) of those were discovered as the result of police work.[5] A 2010 report by Statistics Canada also shows that most family related violence and crimes have historically had lower levels of reporting to police as compared to incidents of non-family violence.[6]

There are several reasons why people do not report crimes. These include that they do not feel that the police can do anything about crimes or that the crimes were not serious enough.[7] According to Statistics Canada, other reasons include cognitive impairments, compromised mental health, restricted access to a telephone (for example, individuals without mobile telephone and victims of family violence whose activities are severely restricted) or inability to communicate in English or French.[8] Thus, a significant number of crimes do not even come to the attention of the police.

Second, police dispatchers, complaint officers and phone officers who receive citizen requests decide whether police intervention is required. They too, exercise some amount of discretion.[9] Because of their limited resources, the police must prioritize the requests that they receive and therefore a certain amount of discretion is exercised before an officer is sent to the alleged crime scene.[10]

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[5] Canada, Solicitor General, *Canadian Urban Victimization Survey, Bulletin No 1—Victims of Crime* (Ottawa: Programs Branch, 1983); Canada, Solicitor General, Canadian Urban Victimization Survey, Bulletin No 2—Victims of Crime (Ottawa: Programs Branch, 1983).

[6] According to Statistics Canada, family relationships are defined by the accused person's relationship to the victim through blood, marriage, co-habitation. As such, family violence includes violence committed by spouses, parents, children, siblings, and extended family. Statistics Canada, 'Family violence in Canada: A statistical profile, 2010' (2010) online: Statistics Canada, <http://www.statcan.gc.ca/pub/85-002-x/2012001/article/11643-eng.pdf>; See also N. Bala, "An historical perspective on family violence and child abuse: Comment on Moloney *et al*., Allegations of Family Violence, 12 June 2007.*" Journal of Family Studies.* Vol 14, no 2/3, p 271-278.

[7] Curt Griffiths & Simon Verdun-Jones, *Canadian Criminal Justice* (Toronto: Butterworths, 1989) at 82 - 89 (hereinafter Griffiths & Verdun-Jones).

[8] Statistics Canada, 'Family violence in Canada: A statistical profile, 2010' (2010) online: Statistics Canada, <http://www.statcan.gc.ca/pub/85-002-x/2012001/article/11643-eng.pdf>.

[9] Griffiths & Verdun-Jones, at 89.

[10] Griffiths & Verdun-Jones, at 89. For further background on the role of police officers in the diversion process, see Dorothy Cotton & Terry G Coleman, "Canadian Police Agencies and Their Interactions with Persons with a Mental Illness: A Systems Approach" (2010) 11:4 Police Practice and Research 301 (hereinafter Cotton & Coleman).

Third, patrol officers exercise an enormous amount of discretion and therefore divert a great deal of cases. One extensive community study of all criminal occurrences for one year found that 60% of criminal complaints were left by the police for the community to resolve, 27.2% of the complaints were handled by the police without necessity of a formal charge and only 12.7% resulted in the laying of charges and further processing by the courts.[11] A recent report by the Department of Justice shows that the diversion of cases through informal sanctions have been more influential and cost-effective than formal sanctions in fighting juvenile crime.[12]

These statistics may be surprising because the popular view persists that channelling criminal cases away from the traditional path should be an exceptional procedure that requires justification. To the contrary, the Law Reform Commission of Canada suggested that officials at each step of the criminal process should be required to show why the next more severe step of the traditional criminal justice process should be taken.[13]

Fourth, the prosecutor and the judicial process divert additional individuals from the criminal justice system. The Attorney General's department (Crown prosecutors) decides to proceed with cases, to drop charges, to suspend charges or to enter a stay of proceedings. In the 1975 community study referred to above, 13% of the individuals deemed eligible (by the police) for further processing by the criminal justice system were rejected from the system through withdrawals, dismissals or not guilty verdicts.[14]

Fifth, the judiciary imposes sanctions that have the effect of screening individuals from the prison system. In the same community study, of the small percentage of individuals who were deemed eligible for further processing by the criminal justice system, only two per cent (2%) were sent to the corrections systems. The remaining six and a half

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[11] C Becker, "Discretionary Clearances: Observations on Police Screening Strategies", in Law Reform Commission of Canada, *Studies on Diversion—East York Community Law Reform Project* (Ottawa: Information Canada, 1975) 149 at 165 (hereinafter Becker, 1975).

[12] Department of Justice, Police Discretion with Young Offenders (2012), online: Department of Justice, <http://www.justice.gc.ca/eng/rp-pr/cj-jp/yj-jj/discre/rep-rap.html>.

[13] Law Reform Commission of Canada, 1975, at 3.

[14] Becker, 1975, at 168. See also *R v JO,* [1994] YJ 25 (Yukon Territorial Court) where the court ordered a pre-court enquiry report into the suitability of diversion for the accused who suffered from Fetal Alcohol Syndrome and had an I.Q. in the low 50's. See also *R v TJ*, [1999] No 57 YJ 57, online: QL (CJ).

per cent (6.5%) were transferred back to the community through conditional discharges, absolute discharges, suspended sentences, probation or fines.[15] In an updated survey conducted by Statistics Canada in 2003, out of the 32,007 persons in community and custodial supervision in provincial, federal and territorial programs, 13,632 were given a conditional sentence and 7,974 were given a conditional release.[16]

C. Public Policy Objectives of Diversion

1. Benefits for Offenders, Victims and Society

Diversion away from the traditional criminal justice system may result in benefits to offenders, victims and the community. The benefits for offenders are greater than merely avoiding the negative consequences of an encounter with the criminal justice system and possible incarceration. Diversion to other options may result in meeting the needs of the offender and therefore preventing future encounters with the criminal justice system.[17] The offender may also benefit from diversion because he or she may be instilled with a greater sense of responsibility for his/her actions and therefore may gain a sense of control over his/her life. One example of an activity that may achieve these goals would be a process whereby the offender meets with his/her victim to negotiate a settlement:

> At the same time the role of the offender ought to be viewed differently. Rather than the passive role [,] he is now encouraged to assume in denying total guilt and seeking acquittal on legal grounds, the offender ought to be encouraged to meet directly with the victim in minor cases where the facts are not in dispute, and to accept his share of the responsibility for the wrong done by proposing a fair and equitable settlement. In giving the offender some control over the decisions that affect his life, rehabilitation may be truly effected. Even at trial, the sentence should as far as possible encourage the offender's active participation and encourage him in restoring the harm done. To encourage the offender to accept responsibility and to exercise some power over

[15] Becker, 1975, at 168.

[16] Statistics Canada, *Adult Correctional Services* 2006, 04, 27.

[17] For a discussion on legislative reforms in Texas concerning diversion of offenders and the benefits, see Brian D Shannon, "Diversion of Offenders with Mental Illness: Recent Legislative Reforms-Texas Style" (May-June 1996) 20:3 *Mental and Physical Disability L Reporter* 431 at 431-38.

> his own destiny not only enhances respect for the individual life and well-being but in encouraging a reconciliation of the offender, the victim and the community, greater community protection may result.[18]

Therefore, if offenders are involved in selecting and working on alternatives that are the result of diversion, they may feel more committed to fulfilling the terms of their settlement.

In addition to the general benefits of diversion to all accused persons, there are many who feel that if a person's activities are the result of a mental disability, he/she should not receive criminal penalties. Diversion may result in the offender receiving appropriate treatment or counselling in a setting that is conducive to improving his/her behaviour. The diversion option may be especially appropriate in cases where the violations are of a minor nature.

On the other hand, some are concerned that the process of diversion may not be fair to mentally disabled offenders, because it results in divesting mentally disabled persons of the rights and safeguards that have been built into the criminal justice system—including the right to a fair hearing, the right to make full answer and defence and the right to cross-examine witnesses.[19] These authors are concerned that one alternative to proceeding through the traditional criminal justice system, involuntary commitment of mentally ill offenders, may be more onerous and have a greater impact upon the person's rights. Some of these concerns may have been addressed by recent changes to the laws regarding civil commitment.

Victims of criminal activity may also benefit from diversion. One alternative to the

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[18] Law Reform Commission of Canada, "The Principles of Sentencing and Dispositions" *Working Paper* No 3 (1974) at 19 - 20 (hereinafter Law Reform Commission of Canada, *Working Paper No 3*).

[19] Marc Schiffer, *Mental Disorder and the Criminal Trial Process* (Toronto: Butterworths, 1978) at 26. (hereinafter Schiffer). See also *R v Roy,* [1994] NSJ No 82 (NS Prov Ct.) where the accused was charged with sexual touching but the court recognized his disability and concluded that because he could not read and write he could not effectively "communicate" his defense. In *R v Desmoulin*, [1995] OJ No 4176, the accused was charged with assault, mischief and resisting arrest. As in *Roy*, the court recognized the accused's disability as he could not read or write, hear, speak, lip-read or use sign language. The defence requested a stay on the ground that the accused was unfit to stand trial and unable to be fairly tried. The court allowed this application and held that the accused would not be able to receive a fair trial in his present condition and to proceed with the charges would result in a violation of his right under section 7 of the *Charter*.

traditional system is a mediated settlement. If victims are involved in the settlement process, they could have a direct role in the resolution of the trouble or harm they have encountered. They may feel a greater sense that the offender wishes to make amends for his crime. The adversarial process does not always lend itself to a solution that is mutually satisfactory. Sometimes crime victims need a forum to express their views and feelings. Meeting with the offender may meet this need. A mediated settlement may result in greater satisfaction for the victims.[20]

Finally, the community may also benefit. Because a diversion program would require participation of the community, the community would have greater involvement in the criminal justice process. Another possible benefit to the community is the reduced overall cost of diversion. While it is difficult to accurately assess the cost of diversion, some argue that in the long run diversion will save the community money.

Clearly, it is very expensive to maintain individuals in the prison system. The Correctional Service of Canada (which administers prison sentences of two years or more in 43 institutions of different security levels, 91 parole offices, fifteen community correctional centres and four healing lodges[21]) spent $2.81 billion dollars on correctional operations, programs, inmate services, and management and administration,[22] with 22,935 "offenders under the responsibility of Correctional Service Canada."[23] The average annual cost of keeping a male inmate incarcerated in 2013-2014 was $111,202 while the average cost of keeping a female inmate was $219.884.[24] Thus, it is very expensive to maintain a person in a federal prison. In 1999, the Law Reform Commission emphasised the importance of reducing the number of offenders in prison in order to reduce the costs associated with

[20] Law Reform Commission of Canada, 1975, at 24.

[21] Correctional Service Canada, "Facilities and Security" online: Correctional Service Canada <http://www.csc-scc.gc.ca/facilities-and-security/index-eng.shtml>.

[22] Public Works and Government Services Canada, *Corrections and Conditional Release Statistical Overview 2015*, (February 2016), online: Public Safety Canada <http://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/ccrso-2015/ccrso-2015-en.pdf.> at 21 (hereinafter Public Works and Government Services Canada, 2015).

[23] Public Works and Government Services Canada, 2015 at 34.

[24] Public Works and Government Services Canada, 2015 at 25.

incarceration.[25]

The Law Reform Commission has noted that, although diversion programs may result in the "expenditure of large sums of money in new areas", it will result in "reducing the demand in other parts of the criminal justice system."[26] Since the cost of incarceration is very high, it is quite possible in the long run that diversion will be less expensive. The Law Reform Commission admitted that if diversion programs are implemented, there will be an increased need for community services such as "probation, child welfare, family counselling, manpower training, special education of different kinds, and medical or health services."[27] However, the cost may be well worth the benefit to the community. The Law Reform Commission asserts that "[d]iversion makes it possible for our responses to crime to be more rational, informed, open and selective. Yet it all depends on governments supporting the community and its agencies to make that intelligent response in a timely way."[28]

2. Diversion is Efficient

One benefit of diversion is that it contributes to a more efficient criminal justice system. If all cases of reported criminal activity were the subject of full processing by the criminal justice system, the existing facilities would be seriously overloaded. The currently crowded courts and jails would be completely overwhelmed if charges were proceeded with in more than a minority of all police-investigated cases of criminal activity. Even with diversion, Canada has one of the highest rates of imprisonment in the industrialized world.[29] On a practical level, the current criminal justice system could not operate without a filtering out of the great majority of cases arising out of criminal incidents.

3. The Need for Policy Guidelines on Diversion

While it is evident that diversion is desirable and necessary in our current criminal

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[25] Law Reform Commission of Canada, *From Restorative Justice to Transformative Justice* Catalogue No JL2-6/1999 Discussion Paper, 1999.

[26] Law Reform Commission of Canada, 1975, at 22.

[27] Law Reform Commission of Canada, 1975, at 22.

[28] Law Reform Commission of Canada, 1975, at 22.

[29] Canada's incarceration rate was 106 per 100,000 in 2015. Public Works and Government Services Canada, 2015 at 6.

justice system, some concerns have been expressed about the uncertainty and possible discrimination in the exercise of discretion by police officers and others. Several observers have called for disclosure by police forces of their selective enforcement policies and for procedural guidelines for the exercise of the decision to divert.[30] Indeed, some provinces have implemented this suggestion and published guidelines for diversion by the Crown.[31]

The addition of public procedural guidelines is desirable because the decisions made by police officers and others would become open and accountable.[32] This would protect against any unfairness or discrimination in the exercise of discretion.

III. Diversion of Mentally Disabled Client to the Civil Commitment Process

One way that mentally disabled clients are diverted out of the criminal process is through voluntary or involuntary admission to a mental health facility. The procedures involved in obtaining voluntary or involuntary admission are discussed in Chapter One, Introduction. The focus of the following discussion is the effect of diversion on the individual and some of the techniques used by professionals in order to procure admission to a treatment facility.

A. Civil Commitment

1. Voluntary Patients

A person may be voluntarily admitted to a mental health facility if she/he requests or consents to admission.

It is difficult to gauge under some circumstances whether a person has given voluntary consent to admission to a mental hospital when there is often some persuasion on the part of family or physician.[33] As Robertson notes "[m]ost members of the medical profession view civil commitment as a last resort, and they will normally make every effort

[30] Law Reform Commission of Canada, 1975, at 7; Griffiths & Verdun-Jones, at 91-92.
[31] Law Reform Commission of Canada, 1975, see the discussion under Prosecutorial Diversion.
[32] Law Reform Commission of Canada, 1975, at 21.
[33] Gerald Robertson, *Mental Disability and the Law in Canada, 2nd ed* (Scarborough: Carswell, 1994) at 371 (hereinafter Robertson).

to persuade the patient to be admitted on a voluntary basis."[34] It is very difficult to determine whether or not a person has been coerced into admission. Where the accused has agreed to be voluntarily admitted in lieu of entering the criminal justice system, he/she may have been unduly coerced. If there is strong pressure put on the person, he/she may not be able to canvass properly his/her options and may choose to be admitted for the wrong reasons.

When suggesting to a mentally disabled person that she/he may be diverted from the criminal justice system through voluntary admission to a treatment facility, one must be aware that the person may face some undesirable results in the future. Often, when a voluntary patient expresses the desire to leave a psychiatric hospital, she/he is informed that if he/she insists on leaving, he/she will be committed under the *Mental Health Act*. This often results in the person agreeing to stay.[35]

Although voluntary patients may refuse treatment and may leave the hospital whenever they wish, some authors have expressed concern that voluntary mental patients may not truly be able to exercise their rights. Robertson states that, unfortunately, many people are unaware of the "precise legal limits of a psychiatrist's authority under the *Mental Health Act*."[36] He continues: "on being told that they will be committed unless they agree to enter or remain in hospital, they may well acquiesce in the deprivation of their liberty, believing that they have no choice to do otherwise. Such persons cannot truly be regarded as 'voluntary' patients".[37]

2. Involuntary Patients

If a mentally disabled person refuses to be voluntarily admitted, he/she may be involuntarily admitted. This procedure is sometimes referred to as formal admission or civil

[34] Robertson, at 371-72 [and footnote 30 therein].
[35] Robertson, at 372.
[36] Robertson, at 374.
[37] Robertson, at 374. See: *R v Therens*, [1985] 1 SCR 613, at 644, where the Supreme Court of Canada discussed the concept of "psychological imprisonment" in a different context. Robertson argues that the element of psychological compulsion may make a person feel that he or she has no choice but to cooperate with the wishes of the medical authorities.

commitment.[38] In Alberta, the *Mental Health Act* sets out the procedure and rules for treatment of involuntary patients. In order to issue an admission certificate, a physician must be satisfied that the person is suffering from a mental disorder, that she/he is in a condition presenting or likely to present a danger to himself or others and that she/he is unsuitable for admission to a facility other than as a formal patient.[39]

There are some concerns with the procedures under the *Mental Health Act*. Some feel that the Act protects patients' rights too well and others feel that the Act is open to dangerous abuses.

First, the Act does not expressly provide for the patient or his/her lawyer to examine the initial admission certificate in order to determine whether the examining physician had adequate grounds for recommending involuntary committal. Second, the Act does not specify the degree and type of examination required by the physician who is determining whether the person should be committed. Is a full assessment with a battery of tests required or is an interview sufficient? This point is of concern to both those who feel the Act is too broad in its criteria and those who feel that the Act is not broad enough. For example, if the client is able to hide his/her illness during an interview with the physician, the physician might determine that the client does not meet the Act's requirements, and therefore does not issue an admission certificate. However, that client may indeed be at risk of harm to himself/herself or to others. A more thorough examination may have determined that the client was hiding his/her illness. On the other hand, if an examination is too brief, there is a chance that the physician could incorrectly diagnose an individual and subject his/her to involuntary committal, a very serious situation.[40]

Another potential difficulty with the *Mental Health Act* is that the definition of "mental disorder" is considered to be too broad, very subjective and open to various interpretations. The definition reads:

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[38] Robertson, at 377.

[39] *Mental Health Act*, RSA 2000, c M-13, s 2 (hereinafter *Mental Health Act* or the Act).

[40] T Ford, *Schizophrenia and the Law*, oral presentation, Foothills Hospital, Calgary, January 12, 1992 (hereinafter Ford).

> 1(1)(g) "mental disorder" means a substantial disorder of thought, mood, perception, orientation or memory that grossly impairs
> (i) judgment,
> (ii) behaviour,
> (iii) capacity to recognize reality, or
> (iv) the ability to meet the ordinary demands of life... [41]

Those who are concerned about individual freedoms consider this definition as too sweeping. Some feel that the definition is open to a challenge under the *Charter of Rights and Freedoms*[42] because it may violate section 2, which guarantees freedom of thought.[43] Those who are concerned that the definition is not broad enough feel that the families of people who live on the street or in otherwise unsatisfactory accommodations because of their mental illness should be able to use the *Act* to obtain treatment for them. However, they are often not able to obtain treatment because the person does not qualify for involuntary committal, as these individuals may not meet the test of being likely to harm themselves or others.

A fourth difficulty with the Act is that the "dangerousness" requirement that still exists in a few provincial mental health laws was too vague and may be interpreted too broadly or not broadly enough.[44] This requirement was amended in 2007 in Alberta to "likely to cause harm to the person or others or to suffer substantial mental or physical deterioration or serious physical impairment." The stated purpose of this amendment was to permit earlier intervention before the situation results in imminent danger.[45]

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[41] *Mental Health Act*, s 1(1)(g).

[42] Part I of the *Constitution Act,* 1982, being Schedule B of the *Canada Act 1982* (UK), 1982, c 11 (hereinafter *Charter of Rights*).

[43] Ford.

[44] As of July 2016 no cases were located that successfully raised a Charter challenge on this ground, see *Mullins v Levy,* 2009 BCCA 6, 2009 BCJ No 23 [Mullins] where the court held that physicians decision is made in good faith and that the court ought not lightly interfere with this decision and referred to the language of British Columbia's *Mental Health Act* to be "manifestly" plain as found in *McCorkell v Riverview Hospital (Director)* (1993), 104 DLR (4th) 391, (BCSC) (hereinafter *McCorkell*) See also *Starnaman v Penetanguishene Mental Health Centre* (1995), 100 CCC (3d) 190 (Ont CA) [*Starnaman*] where the Court of Appeal held that sections 15 and 20 of the *Mental Health Act* did not infringe sections 7 and 12 of the *Charter*.

[45] Alberta Hansard, May 1, 2007, Rev. Abbott. Similar amendments have been made in British Columbia: *Mental Health Act*, RSBC 1996, c 288, s 22; Saskatchewan: *Mental Health Services Act*, SS 1984-85-86, c M-13.1; Manitoba: *Mental Health Act*, CCSM c M110, s 8; Ontario: *Mental Health Act*, RSO 1990, c- M.7, s 15;

Once a person is involuntarily committed, there are some potential difficulties. If a person decides that he/she has been wrongly committed, he/she may challenge the Admission Certificates before the Review Panel. However, this places the onus on the patient to show that she/he is competent. In other words, the patient is forced to show that he/she was wrongly hospitalized. This process may also be open to a *Charter* attack, for it may violate section 7.

Section 7 of the *Charter of Rights* provides:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

It may be successfully argued one day that the process of involuntary committal and the requirement that the person prove that he/she was wrongly committed violate this section of the *Charter* and cannot be justified in a democratic society.[46]

Further, if a person is considered incompetent to make treatment decisions, there is a procedure in place to have these decisions made for her/him. He/she may challenge involuntary treatment decisions as being cruel and unusual treatment or punishment under s 12 of the *Charter.*[47] Treatment issues are discussed further in Chapter 13, Mentally Disabled Persons in Prison and Jail.

On the other hand, there are several safeguards built into the Act. These include: the ability to appeal the decision of a Review Panel to the Court of Queen's Bench[48] and the appointment of a Patient Advocate who must investigate complaints from or relating to

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New Brunswick: *Mental Health Act,* RSNB 1973, c M-10, s 8; Nova Scotia: *Involuntary Psychiatric Treatment Act,* SNS 2005, c 42, s 13; PEI: *Mental Health Act,* RSPEI 1988, c M-6.1; Newfoundland and Labrador: *Mental Health Care and Treatment Act*, SNL 2006, c M-9.1; Yukon: *Mental Health Act*, RSY 2002, c 150; Northwest Territories: *Mental Health Act*, RSNWT 1988, c M-10; Nunavut: *Mental Health Act*, RSNWT (Nu) 1988 c M-10.

[46] In *PS v Ontario*, 2014 ONCA 900, the Ontario Court of Appeal held that certain provisions dealing with the process of review of long term involuntary patients' committal violated *Charter of Rights* s 7. For a general discussion on section 7 *Charter of Rights* see also *McCorkell*.

[47] Ford. See also *Starnaman re:* section 12 *Charter* argument.

[48] *Mental Health Act*, s 43.

formal patients.[49]

Although diversion through involuntary committal to a treatment facility may appear more desirable than criminal proceedings, there may be drawbacks to this choice.

B. Adult Guardianship and Trusteeship Act

Some people utilize the *Adult Guardianship and Trusteeship Act [AGTA]* as an alternative to involuntary committal in order to obtain treatment for a relative who is mentally disabled.[50] Under this Act, the court looks at whether a guardian (of the person) or a trustee (of one's assets) needs to be appointed for an adult. In order to appoint a guardian for an adult, the court must be satisfied that the adult lacks the capacity to make decisions about personal matters. These personal matters should be specified in the court order.[51] Also, the Court must be satisfied that less intrusive and less restrictive measures than the appointment of a guardian have been considered and such measures would not have been effective to satisfy the needs of the adult.[52] The Court must examine whether a guardianship order would be in the best interest of the person.[53]

If the court grants a guardianship order, the court must specify over which matters the guardian has control. The powers that may be granted to a guardian include the right to make decisions for the person in one or more of the following areas:

* where the represented adult is to live;
* with whom the represented adult is to live and with whom she is to consort;
* whether the represented adult should engage in social activities and with whom;
* whether the represented adult should work and for whom;
* the represented adult's diet and dress; and
* consent to any health care that is in the best interests of the represented adult.[54]

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[49] *Mental Health Act*, s 45.
[50] SA 2008, c A-4.2.
[51] *AGTA*, s 26(6)(a).
[52] *AGTA*, s 26(6)(b).
[53] *AGTA*, s 26(6)(c).
[54] *AGTA*, s 33(2).

"Health care" is defined in the *AGTA* (subsection 1(r)) and includes examinations, medical treatment and diagnosis, among other procedures.

A guardian agreeing to a dependent adult's mental health treatments differs from involuntary committal under the *Mental Health Act,* where the person must be suffering from a mental disorder and be at risk of harm to self or others before he/she can be committed. Guardians must exercise their authority in the represented adult's best interest. However, use of guardianship powers under the AGTA for the represented adult's mental health treatment may be open to a *Charter* challenge because the detainment may violate the principles of fundamental justice in s 7.[55]

The *Act* is not clear on whether the signature of a guardian is acceptable to admit a represented adult to a mental health facility. Robertson asserts that if a guardian consents to a placement in a psychiatric facility on behalf of the represented adult, the patient may be considered a voluntary patient.[56] This means that the patient could be admitted to a psychiatric facility without meeting the requirements for involuntary committal under the *Mental Health Act.*

Since a guardian is normally viewed as having an unfettered power to determine where the represented adult will live, so long as this decision is in the represented adult's best interest, the guardian may indeed have the authority to place him/her in a mental health facility.[57] However, Robertson rather convincingly argues that the question of whether a guardian can place someone in a mental health facility should not be answered merely by reference to his power of control over the person's care and custody; provincial legislation must be examined to determine whether admission by a guardian is allowed.[58] Robertson further asserts that a distinction should be drawn between facilities designated under the *Mental Health Act* as places where a person may be involuntarily admitted and

[55] Robertson, at 431 (footnote 403 therein).
[56] Robertson, at 152-53.
[57] Robertson, at 153-54. See also: *Clark v Clark* (1982), 40 OR (2d) 383 (Co Ct); *Re Casford* (1983), 43 Nfld & PEIR 240 (PEISC).
[58] Robertson, at 153.

other types of health care facilities.[59] "Voluntary admission" into designated facilities should be interpreted as excluding admission at a guardian's request.[60] An adult who does not or cannot consent to being admitted to such a mental health facility should be viewed as an involuntary patient and therefore the criteria for involuntary committal should be satisfied.[61] This would ensure that the procedural safeguards surrounding committal would be available to these patients and could not be circumvented by a guardian requesting her/his represented adult's admission.[62]

There are safeguards in place under the *Adult Guardianship and Trusteeship Act*. For example, a represented adult or another person may apply to the Court of Queen's Bench for a review of the guardianship order.[63]

C. Advantages and Disadvantages of Diversion from the Criminal Process into the Civil Stream

1. Advantages of Diversion to the Civil Commitment Stream

There are several advantages for the client if he/she is diverted out of the criminal justice system into the civil commitment process. First, the person will not receive a criminal record. There are certain obvious disadvantages to having a criminal record. These include the stigma attached to a criminal record, the possible problems with obtaining employment and other services such as insurance and the possibility of deportation if one is an immigrant. In some cases, persons with a criminal record or a history of violence will not be accepted into treatment or housing facilities intended to assist mentally disabled persons. Second, the person may receive treatment for his/her illness if he/she is civilly committed. This may or may not be an advantage depending upon from whose perspective it is viewed. In some cases, the person will be required to take treatment against his/her wishes, but there are safeguards in place in the current mental health legislation to protect

[59] Robertson, at 154.
[60] Robertson, at 154.
[61] Robertson, at 154.
[62] Robertson, at 155
[63] *AGTA*, s 40 (1).

and advocate the interests of the patient such as the review panel and a Mental Health Patient Advocate.[64]

On the other hand, if a person is sentenced to imprisonment by way of the criminal justice system, he/she cannot be ordered to take treatment by the criminal court, even if he/she has been found not criminally responsible on account of mental disorder. While in prison, he cannot be required to submit to treatment, unless he/she is involuntarily committed to a mental health facility through a transfer from the prison. He/She would have to meet the *Mental Health Act's* requirements in order to be involuntarily committed. There are cases of individuals who have developed mental illnesses while incarcerated, yet do not qualify for involuntary committal because they do not meet the Act's requirements. These individuals can refuse treatment while in prison. They suffer the effects of their illness, sometimes untreated for years.[65] Although treatment for prisoners with mental health problems must be made available in the federal prison system, inmates may refuse it.[66]

Third, the person who is formally committed is protected from the dangers of the street and from ill treatment that he/she might receive in a prison environment. Persons who are mentally ill or mentally handicapped suffer from victimization in the general prison population and may not be able to benefit from the various rehabilitation programs offered in prison. On the other hand, there may be various therapy programs and other community programs available in hospitals that are tailored to persons with mental disabilities.

Fourth, once a person no longer meets the requirements for formal committal, he/she must be released from the hospital. This may be seen as an advantage because the person could be liable to a shorter stay in the mental facility than in prison.

Fifth, although formal committal may be a difficult situation, the possibility of incarceration and the wait for a resolution of the criminal matter can be very stressful for a

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[64] *Mental Health Act,* sections 44 - 47.

[65] Dr. Tweddle, Alberta Hospital Edmonton, Criminal Trial Lawyers Association, *Three Short Snappers and the Post-Sentence Process*, November 21, 1992, Edmonton, Alberta.

[66] *Corrections and Conditional Release Act*, SC 1992, c 20, sections 85 to 88, (proclaimed in force November 1, 1992).

mentally ill person. The stress caused by the nature of the criminal justice system may exacerbate the person's illness and symptoms. For example, if a person is paranoid, he/she may become highly agitated and, while held in a remand facility, his/her condition may deteriorate because of the environment. He/she may feel that the guards are conspiring against him/her and may become very uncomfortable. The guards may or may not be sensitive to and aware of the nature of the person's illness.

2. Disadvantages of Diversion to the Civil Commitment Stream

As previously stated, some of the apparent advantages of diversion to the civil commitment stream may be disadvantages from the patient's point of view. Relatives, psychiatrists and the community may feel that mandated treatment and confinement are desirable. However, the patient may hold a contrary view.[67]

One disadvantage of civil commitment over the criminal justice system is the uncertainty of the duration of the patient's confinement. Although there are review mechanisms in place, if the person is still considered to meet the *Mental Health Act's* requirements, she/he may continue to be subject to civil commitment. On the other hand, with a standard criminal sentence, the accused knows when she/he is entitled to be released from prison or when she/he is no longer serving her sentence for the particular crime. The exception to this currently occurs when the person has been found unfit to stand trial (UST) or not criminally responsible (NCR) on account of mental disorder. The person's duration of stay in a treatment facility under these conditions is uncertain.

A second disadvantage of diversion to the civil commitment stream is the loss of freedom and the stigma attached to being committed. However, with certain criminal sentences, the client would also experience a loss of freedom and could be stigmatized. If the client is charged with a relatively minor offence under the *Criminal Code,* he/she may not be subject to penal consequences.

A third disadvantage of diversion to the civil commitment stream is that it is generally inappropriate for mentally handicapped persons (unless they are diagnosed as

[67] For a discussion of problems associated with diversion and its impact on offenders see Herschel Prins, "Is diversion just a Diversion?" *Medicine, Science and the Law* (1994) Vol 34, No 2 137-47.

also having psychiatric problems). Thus, a mentally handicapped person may be diverted out of the criminal justice system entirely, but there are limited options in the civil stream to deal with a mentally handicapped offender. One option would be to obtain a guardianship order under the *Adult Guardianship and Trusteeship Act.* Other options explored in the United States include job training, drug rehabilitation and counselling as part of a diversion program.[68]

A fourth disadvantage of diversion to the civil stream is that there are certain restrictions that may be applied to the person once she/he is released from the hospital. For example, the person may have difficulty obtaining a driver's licence.[69] The person may also be prevented from migrating to other countries or from holding licenses to practice certain professions (e.g., medical or pharmacy). This may also be the case if the person proceeds through the criminal justice system and is recognized as having a mental disability.

A fifth disadvantage of electing civil commitment is that by proceeding through the criminal system, the accused's case could be dismissed, stayed or otherwise withdrawn. The person might also receive an absolute or conditional discharge. After a finding of not criminally responsible on account of mental disorder, a court or a review panel may discharge the accused also. Under these circumstances, electing to proceed through the criminal justice system may be far less onerous than proceeding through the civil commitment procedure as the person would not be confined in any way.

In some cases, persons placed on probation after a criminal hearing may have imposed upon them certain conditions such as attending treatment facilities. However, if the person is in need of treatment, and he/she receives an absolute discharge, the treatment issue is not addressed. There are those who would argue that it would be more appropriate if mentally ill persons were admitted involuntarily (providing they qualify) because they would then receive the treatment that they require.

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[68] E Wertlieb, "Individuals with Disabilities in the Criminal Justice System" (1991) 18(3) Criminal Justice and Behavior 332 at 337.

[69] See: *Traffic Safety Act*, RSA 2000 c T-6, s 91(1)(b) which allows the Registrar to disqualify a person from driving if the Registrar is not satisfied as to the competency of that person.

D. Consequences of a Criminal Conviction

If an accused is not diverted out of the criminal justice system, he/she may be convicted of an offence. Sometimes it happens that a lawyer and her/his client may decide to enter a plea of guilty to the criminal charges. Alternatively, the client may be found guilty of the offence. Aside from the obvious effects of a conviction—possible incarceration, fine or conditions, there are some other less obvious effects that may have a bearing on a person with a mental disability.

1. Legal Effects

a. Criminal Record

The most obvious effect of receiving a guilty verdict is the accused's criminal record. This may have an impact on him/her if he/she is before the court again as it may be considered in sentencing.

b. Deportation

If the accused is not a Canadian citizen, he/she may be deported under the *Immigration and Refugee Protection Act* if convicted of a serious offence.[70] Permanent residents/ foreign nationals are vulnerable to deportation if they commit an offence punishable by imprisonment for a maximum term of at least 10 years or an offence for which a term of imprisonment of more than six months has been imposed.[71] Dual citizens (i.e., citizen of Canada and another Country) who serve in the army of a group engaged in armed conflict with Canada, were convicted of high treason or spying offences or convicted of serious terrorism offences will also have their citizenship revoked.[72] In addition, foreign nationals -- persons who are not Canadian citizens or permanent residents – such as visitors, persons on work permits, may also be subject to deportation if they have been "convicted in Canada of an offence under an Act of Parliament punishable by way of indictment, or of two offences under any Act of Parliament not arising out of a single

[70] SC 2001, c 27, s 36 (hereinafter *Immigration and Refugee Protection Act*).
[71] *Immigration and Refugee Protection Act*, s 36(1)(a).
[72] *Citizenship Act,* RSC 1985, c C-29 s 10.1(2). Note that this section may be removed by Bill C-6: An Act to amend the Citizenship Act and to make consequential amendments to another Act, 1st Sess, 42nd Parl, 2015.

occurrence".[73]

c. Jury Duty

In Alberta, a person who has been convicted of a criminal offence for which a pardon has not been granted or a person who is currently charged with a criminal offence is excluded from serving as a juror.[74] There are similar provisions in other provinces.[75]

d. Record Suspension (formerly Pardon)

Some of the legal effects of a conviction may be alleviated if the person obtains a record suspension. A record suspension will result in all information pertaining to the conviction being taken out of the Canadian Police Information Centre, and this information may not be disclosed without the permission of the Minister of Public Safety.[76] A record suspension does not erase the fact that the person was once convicted of an offence. It is evidence that the conviction should no longer reflect adversely on one's character. The requirements for obtaining a record suspension are outlined in the *Criminal Records Act*.

2. Social and Practical Effects of a Conviction

The less obvious, yet in some respects equally or more important, effects of receiving a guilty verdict and a criminal record are the social and practical ones.

a. Treatment of Mentally Disabled Offender in Prison

The mentally disabled offender, because of her disability, may be exposed to very harsh treatment and exploitation in the prison setting. This harsh treatment may be committed by other inmates or by those who administer the prisons. For example, the client may be given drugs to assist him/her to function in the prison environment so that he/she is easier to manage. The person may not wish to take certain medication, however, because of its side effects. However, he/she may feel pressured to cooperate under the

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[73] *Immigration and Refugee Protection Act,* s 36(2)(a). See, for example, Nickolas Keung, "Ottawa Defies UN Plea not to Deport Mentally Ill man", *The Star* (Sept 1, 2011).
[74] *Jury Act,* RSA 2000, c J-3, s 4(h).
[75] See, for example Ontario's *Juries Act*, RSO 1990 c J.3, s 4 where a person convicted of an indictable offence may not serve as a juror unless he or she has been pardoned.
[76] *Criminal Records Act*, RSC 1985, c C-47, s 6.1.

prison setting.

Further, the person's mental condition may worsen while incarcerated and he/she may not receive the appropriate treatment. Consequently, the mentally disabled offender may suffer the effects of imprisonment to an even greater extent than the general prison population.

b. Refusal of Treatment and Housing

By far the most far-reaching effect of criminal conviction on a person with a mental disorder is that certain residential housing and other counselling services may be no longer available to him/her, especially if his/her crime involved violence. The entry or exit criteria for some forms of group housing exclude those with a history of violence or criminal record. Even worse, some treatment programs will not take those who have criminal records. This can be devastating for the mentally disabled individual who pleads guilty to a relatively minor offence so as to avoid long-term treatment or incarceration, yet once released from prison is no longer able to receive the needed treatment. Fortunately, there has been an emergence of appropriate facilities that specialize in the housing of past offenders with mental illnesses. Although most of these institutions admit individuals based on an assessment, there are some such as Bedford House located in Calgary, that specify that they will admit violent offenders.[77]

c. Employment

A criminal record may mean that the accused will have difficulty obtaining or maintaining employment in certain occupations.[78] For example, a criminal record can mean that a person may have difficulty becoming bonded. Further, here is no protection in the *Alberta Human Rights Act* if a person is refused a job or let go from a job if they have a

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[77] Correctional Service Canada, "Community-Based Residential Facilities (CBRFs): Prairie Region" online: Correctional Service Canada, http://www.csc-scc.gc.ca/facilities-and-security/001-0005-eng.shtml#Cal_1. Last modified: 2013-10-07.

[78] See e.g. Alberta Learning Information Service, "Tip Sheets: Finding Work With a Criminal Record" online: Alberta.ca https://alis.alberta.ca/ep/eps/tips/tips.html?EK=7374> (hereinafter Finding Work With a Criminal Record); John Howard Society of British Columbia, "Fact Sheet: Crime and Employment: A Guide for Job Seekers" (March 2013) online: John Howard Society of British Columbia http://atom.archives.sfu.ca/crime-and-employment-guide-for-job-seekers-2013-pdf (hereinafter John Howard Society of British Columbia).

criminal record.[79] Under the *Canadian Human Rights Act*, "conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered" is a prohibited ground of discrimination.[80] However, that protection only extends to federally regulated employers.[81]

d. Other Difficulties

People who have been convicted of criminal offences may live in fear that their criminal records will be disclosed, causing them embarrassment or other difficulties. If the record is disclosed, they may suffer invasion of privacy, damage to their reputation, damage to their family's reputation or damage as a result of prejudice. They may also be refused credit or insurance[82] and find it difficult to travel abroad.[83] A record suspension (formerly a pardon) may alleviate some of these issues in the future.[84] However, these significant drawbacks of having a criminal record should be considered and understood when diversion is an option.

IV. Exercise of Discretion by Police Officers

A. General Factors Affecting Discretion of Police Officers

When police officers elect not to lay charges against a person who may have been involved in criminal activities, they are exercising their discretion. Although police officers are limited by department policies, they do possess a fair amount of autonomy in their activities.

In Canada, the authority to use discretion is set out in statutes such as the *Criminal*

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[79] RSA 2000, c A-25.5 (hereinafter *AHRA*).

[80] RSC 1985, c H-6, s 3(1).

[81] Finding Work With a Criminal Record.

[82] Insurance is a public service under AHRA s 4 (see e.g. *Zurich Insurance Company v Ontario Human Rights Commission,* [1992] 2 SCR 321**,** 9 OR (3d) 224 and *Co-operators General Insurance Co v Alberta Human Rights Commission* (1993), 145 AR 132 (CA), leave to appeal to SCC refused, [1994] SCCA No 22). However, as with employment, a criminal record is not a protected ground under that section.

[83] See e.g. The John Howard Society of Alberta. "Fact Sheet – Pardons" online: The John Howard Society of Alberta <http://johnhoward.ab.ca/docs/factsheets/FactSheet110501-Pardons.pdf>.

[84] See e.g. Calgary Legal Guidance, "Records and Pardons" online: Calgary Legal Guidance <http://clg.ab.ca/programs-services/dial-a-law/records-and-pardons/>; John Howard Society of British Columbia.

Code.[85] A person may be arrested if found committing a crime. However, this decision by the police officer is subject to scrutiny by the courts if police officer is found to have abused this authority.[86] The *Criminal Code* seems to encourage the exercise of discretion by police officers, because it provides in s 495 that a police officer may make an arrest where there are reasonable and probable grounds for believing that an offence has been committed. Subsection 495(2) provides that the police officer shall not arrest a person without warrant where the public interest may be satisfied without arresting the person. These subsections appear to give the police "broad discretionary powers".[87]

There are several reasons why police officers have the ability to exercise discretion to divert a person away from the criminal justice system. Mainly, the development of government operated police departments and the increase in diversity and complexity in society have resulted in a broadening of the goals of Canadian police forces.[88] These have also resulted in a broadening of expected functions of police officers. The functions of the police now include: prevention of crime, detection and apprehension of criminals, maintenance of order, control of highway traffic, public education and referral.[89] Referral involves developing alternative dispositions and programs for individuals who come into contact with the police. Diversion is one example of a referral alternative available to the police.[90]

Some persons may be surprised by the relatively small percentage of time that police officers spend in actual crime control activities. Approximately 50 per cent of all time spent by police officers involve administrative activities, such as going to court, serving warrants, and community relations work.[91]

One major source of conflict for police officers is the discrepancy between what

[85] RSC 1985, c C-46 (all references are to this version unless otherwise stated) (hereinafter *Criminal Code*).
[86] Griffiths at 156.
[87] Griffiths & Verdun-Jones, at 91. For more information on police interactions with "persons with a mental illness" see Cotton & Coleman, including the discussion of police discretion at 306.
[88] Griffiths & Verdun-Jones, at 56.
[89] Griffiths & Verdun-Jones, at 56. See also: *Police Act*, RSA 2000, c P-17.
[90] Griffiths & Verdun-Jones, at 56.
[91] Griffiths & Verdun-Jones, at 57-8.

people think that they do (crime control) and the actual requests that the community makes of the police.[92] Because the police were traditionally involved in and trained for crime control activities, they may feel less well equipped to perform functions that amount to social service activities. Some studies indicate that police officers are uneasy in the social service role. Social service activities take a great deal of time and may appear to compromise the authoritative status that the police need to fulfil their commitments to law enforcement and the maintenance of order.[93] Further, there are no tangible criteria to assess an officer's success or failure in the social service role. Therefore, the police cannot evaluate their performance in this role. This is unlike the traditional measures of police performance—clearance, arrest and conviction rates.[94]

If police officers are rewarded primarily on the basis of fulfilling traditional law enforcement roles that emphasize arrests and convictions, they may be less willing to explore diversion alternatives. From this perspective there may be little to be gained from diversion activities that may be tedious, cumbersome or uncertain.[95]

On the other hand, if the officer feels that a conviction is not likely, he/she might feel pressure to avoid engaging the criminal justice system. When faced with such a situation, particularly when the offence is quite minor, the police officer tends not to lay a charge or to refer the person to another agency, but rather to deal with the situation informally. For example, the person may be left in the care of a family member, caretaker or neighbour, or simply brought back to familiar surroundings.[96]

There are varied opinions as to how much discretionary power police officers actually possess and whether or not it should be controlled.[97] Some critics of the current

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[92] Griffiths & Verdun-Jones, at 60-1.

[93] Law Reform Commission of Canada, 1975, at 13.

[94] Law Reform Commission of Canada, 1975, at 13.

[95] E Bittner, "Police Discretion in Emergency Apprehension of Mentally Ill Persons" (1967) 14 Social Problems 278 at 281 (hereinafter Bittner). On the importance of modern approaches to policing, see R Trojanowicz, Victor E Kappeler, & Larry K Gaines, *Community Policing. A Contemporary Perspectiv*e, 3d ed (Cincinnati, OH: Anderson, 2002).

[96] Bittner, at 286.

[97] Griffiths & Verdun-Jones, at 91.

system argue that the exercise of discretion is not properly structured, confined or reviewed.[98] If police discretion is not properly supervised, it may result in discrimination, particularly towards individuals who are members of ethnic minorities or are persons of a lower socioeconomic status.[99] Research by Cotton & Coleman indicates that while many police officers have some training in identifying and responding to persons with mental illness, the quality of that training varies widely.[100] The Canadian Career College provides that all officers receive mental health training as part of the Ontario Police College's training program for new recruits.[101] However, it still remains that officers rely upon their personal experiences and judgments when dealing with various situations, including in their decisions to divert.[102] Whatever stereotypes they have will be reflected in their exercise of discretion.

The justice system also appears to reflect other stereotypes. For example, Samuel Perreault notes that "[a]lthough the proportion of Aboriginal people within the Canadian adult population is just under 4%, Aboriginal people accounted for slightly more than one-quarter (28%) of admissions to sentenced custody in 2011/2012."[103]

Further, empirical studies conducted in Ontario prisons have indicated that black men, women and youth are "massively over-represented" in the prison system.[104] In the Report of the Commission on Racism in the Ontario Criminal Justice System, the commission determined that racial inequality is most likely to occur where there are broad discretionary

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[98] Griffiths & Verdun-Jones, at 91.

[99] Griffiths & Verdun-Jones, at 91.

[100] Cotton & Coleman, 307-308. For a more detailed examination of current training efforts and suggestions for improvement, see Terry Coleman & Dorothy Cotton, "TEMPO: Police Interactions: A Report Towards Improving Interactions Between Police and People Living with Mental Health Problems" (June 2014), *Mental Health Commission of Canada*, online: <TEMPO%2520Police%2520Interactions%2520082014.pdf>.

[101] Canadian Career College (April 2015) "Ontario Police Upgrade Mental Health Training for Police Officers" online http://www.ctsccc.com/ontario-police-upgrade-mental-health-training-for-officers/.

[102] Griffiths & Verdun-Jones, at 91.

[103] Samuel Perreault, "Admissions to Adult Correctional Services in Canada, 2011/2012" (Statistics Canada: 20 March 2014) online: Statistics Canada <http://www.statcan.gc.ca/pub/85-002-x/2014001/article/11918-eng.htm> [footnotes omitted] (hereinafter Perreault).

[104] Monique Conrad, "Blacks 'massively' Over-represented in Prisons", *The Lawyers Weekly* 15:37 (9 February 1996).

powers, and where decisions may be based on criteria such as employment status, fixed address and family or community support. Some of the recommendations are as follows:

- require police to explain decisions to detain;
- provide the police with direction about preparing reports for bail hearings;
- seek alternatives to police charging;
- expand the scope of diversion programs as an alternative to imprisonment;
- make guidelines for the exercise of police discretion to stop and question people; and
- promote systemic monitoring of police practices.[105]

Although there is some controversy as to elements of the exercise of discretion by police officers, Griffiths & Verdun-Jones assert that most persons agree that: "discretion is a necessary element in policing and is likely to remain a vital part of the police officer's role."[106]

B. Police Discretion and Mentally Disabled Offenders

The general observations regarding diversion have particular relevance to mentally disordered offenders. Often, an officer is presented with an individual who may have a problem that is primarily criminal or whose problem may be primarily related to a mental disability. The police generally have discretion to proceed in the following ways when encountered with a mentally disordered individual:

- charge the individual under the *Criminal Code*;
- divert the individual to an informal network (e.g. family);
- send the individual to a voluntary mental health service;

[105] Ontario: Commission on Systemic Racism in the Ontario Criminal Justice System, *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* (Toronto: Queen's Printer for Ontario, 1995) online: Ontario Legislative Library <http://www.ontla.on.ca/library/repository/mon/25005/185733.pdf>.
[106] Griffiths & Verdun-Jones, at 92.

- send the individual to a hospital for an assessment to determine his or her eligibility for involuntary commitment under provincial mental health legislation.[107]

The officer must then decide whether this person is a criminal who has a mental disability or if she is a person with a mental disability that may have induced her involvement in criminal activity.[108]

1. Involuntary Commitment

In Alberta, persons who are involuntarily committed are "formal patients".[109] Involuntary commitment involves diverting a person from the standard criminal processes to a psychiatric facility. When a police officer determines that a person with whom he/she is dealing is mentally disabled, he/she may decide to divert the person from the criminal justice system—either back into the community or to a mental health facility. A police officer has the authority under the *Mental Health Act* to apprehend a mentally disordered individual who is at risk of harm to herself/himself or others, and to transport that individual to a mental health facility.[110]

Sometimes the reasons for choosing to divert a person to civil commitment procedures may appear quite arbitrary. A U.S. study conducted in California examined the extent to which individuals brought by the police to a psychiatric unit and who met the requirements for involuntary commitment also met the technical requirements for arrest on a criminal charge. Thirty percent of individuals brought to the hospital for committal were considered technically subject to arrest for such criminal offences as disturbing the

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[107] "The Mentally Ill and the Criminal Justice System: Innovative Community-Based Programs 1995" (Ottawa: Mental Health Division, 1995).

[108] Julio Arboleda-Flórez & HL Holley, "Criminalization of the Mentally Ill: Part II Initial Detention" (1988) 33 Can J Psychiatry 87 (hereinafter Arboleda-Flórez & Holley, Part II).

[109] For more information on the process to becoming a formal patient and patients' rights, see Alberta Health. "Formal Patients Under The Mental Health Act" online: Alberta Health <http://www.health.alberta.ca/newsroom/mental-health-act-patients.html >. For further background on issues surrounding formal patients, see Gerald B Robertson, "Civil Commitment and the 'Unsuitable' Voluntary Patient" (2010) 19:1 Health L Rev 5. Please refer to flow chart in the appendix.

[110] *Mental Health Act*, s 12.

peace, indecent exposure, assault, burglary or arson.[111] In the same study, thirty per cent of a sample of persons arrested by the same police officers would have technically qualified for involuntary committal.

The officers were interviewed to determine their reasons for arresting the apparently mentally disabled individuals rather than pursuing the civil commitment path where both options were possible. Those officers who decided to arrest rather than pursue civil commitment felt that the mental illness was not sufficiently severe or that it was not their decision not to arrest the individual. Thus, the officers deferred the question of mental illness to the courts. On the other hand, officers chose to pursue committal rather than to arrest individuals in circumstances where the officer felt that the offender lacked the required intent to commit a crime, because the offender had a known prior hospitalization or because the officer felt that the offender needed help rather than incarceration.[112]

Different studies have shown that the police will almost always convey a person to a hospital where there is evidence of a suicide attempt.[113] Knowledge of previous suicide attempts may tip the balance toward taking the person to a hospital.[114] Second, where the individual exhibits signs that he/she has a serious psychological disorder (i.e., very strange expression of emotions, behaviour or appearance) and this is not viewed as a momentary lapse of control, he/she will be conveyed to the hospital.[115] Third, where the person is extremely agitated and shows signs of serious disorder, accompanied by non-trivial acts of violence and the person does not respond to efforts to pacify him/her, he/she may be taken to the hospital.[116] Fourth, the police will convey a person to the hospital when he/she is acting inappropriately, is disoriented or is creating a nuisance, where he/she is in danger of

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[111] J Monahan, C Caldeira & HD Friedlander, "Police and the Mentally Ill: A Comparison of Committed and Arrested Persons" (1979) 2 Int J of Law and Psychiatry 509 (hereinafter Monahan, Caldeira & Friedlander).

[112] Monahan, Caldeira & Friedlander, at 514.

[113] See J Samra, J White & E Goldner, 'Working with the Client who is Suicidal: A Tool for Adult Mental Health and Addiction Services' (Ministry of Health, Mental Health and Addiction, British Columbia, 2007); see also D Jacobs, ed, *The Harvard Medical School Guide to Suicide Assessment and Intervention* (San Francisco: Jossey-Bass 1999).

[114] Bittner, at 283.

[115] Bittner, at 284.

[116] Bittner, at 284.

suffering injury and cannot be taken to a sheltered place or caretaker.[117] Fifth, when a person who is instrumentally related to the individual (e.g., physician, lawyer, teacher, employer, or landlord) calls the police, there is a greater possibility that the apparently mentally disabled person will be taken to a hospital. In cases where the complainant is a family member or friend, it is more likely that the patient will be left in the care of the family or friends with the suggestion that they seek hospitalization for the person.[118]

2. Arrest

There are several factors that may influence a police officer to arrest an apparently mentally disabled offender. Arboleda-Flórez & Holley assert that unfortunately, "when bureaucratic snarls interfere or when a lack of community resources cut off appropriate, non-legal alternatives, police often resort to arrest".[119] Further, where emergency involuntary commitment does not provide the police with an expedient and useful method of removing an individual from the community or obtaining psychiatric care, arrest often provides a more practical alternative. The police officer may feel that forensic psychiatric treatment may be more easily accessed through the criminal justice system.[120] For example, the police could recommend during the judicial interim release hearing (bail hearing) that the individual be psychiatrically assessed.[121] Some forensic experts indicate that the recommendations for psychiatric assessments are warranted in approximately one-third of the cases.[122]

If the person has a prior arrest, this is another factor that may influence whether a police officer decides to arrest an apparently mentally disabled offender. Once the person's behaviour has been labelled as criminal, there is a greater chance that future behaviour will

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[117] Bittner, at 284.

[118] Bittner, at 284.

[119] Arboleda-Flórez & Holley, Part II, at 93.

[120] M Borzecki & JS Wormith, "The Criminalization of Psychiatrically Ill People: A Review with a Canadian Perspective" (1985) 10(4) The Psychiatric J of the Univ of Ottawa 241 at 243 (hereinafter Borzecki & Wormith).

[121] HL Holley & Julio Arboleda-Flórez, "Criminalization of the Mentally Ill: Part I Police Perceptions" (1988) 33 Can J Psychiatry 81 at 84-5.

[122] Cdasky, Alberta Hospital Edmonton, Criminal Trial Lawyers Association, *Three Short Snappers and the Post-Sentence Process* (Edmonton, Alberta, November 21, 1992).

be regarded in criminal and not psychiatric terms.[123] A 2009 study shows that individuals with serious mental illness were more likely than those without mental illness to be in contact with police as suspected offenders, to have a greater number of offences, to reoffend more quickly, and to be formally charged for a suspected offence.[124]

If the offender's behaviour is "public" in nature, the police may be inclined to pursue arrest, especially if involuntary commitment is not available to the person. Where the individual has engaged in behaviour that the police feel that they cannot overlook, he/she may then be arrested if there are no alternatives.[125]

One general factor that affects the decisions made by police officers is the severity of the offender's mental disturbance. A study conducted in Calgary documented the hypothesis that a significant proportion of arrested offenders are identified by police as having at least some degree of mental disturbance. The police identified one quarter of a sample of arrestees as having some degree of mental disturbance. The rest of the arrestees were identified as "normal". After the police officers completed their assessment, factors such as sex, age, length of residence in Calgary, origin, employment status, number and type of offence, medical/psychiatric condition, substance abuse and other features of the arrestees were examined. Interestingly, the group identified by police officers as having some degree of mental disturbance did not differ significantly from the "normal" group.[126]

The authors of the study put forward three possible reasons for the lack of significant differences between mentally disabled and "normal" arrestees. First, they suggested that perhaps more sensitive measures were required. However, based on other studies, they concluded that their criteria were sufficiently sensitive to point out differences between the two groups.[127] Second, they suggested that perhaps police officers were not good at judging mental illness and that they were in need of formal training in order to

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[123] Borzecki & Wormith, at 245.

[124] A Crocker, K Hartford & L Heslop. "Gender differences in police encounters among persons with and without serious mental illness." (2009) 60 (1) Psychiatric Services 86-93.

[125] L Teplin, "Criminalizing Mental Disorder: The Comparative Arrest Rate of Mentally Ill" (1984) 39(7) Am Psychol 794.

[126] Arboleda-Flórez & Holley, Part II.

[127] Arboleda-Flórez & Holley, Part II, at 92.

identify mentally ill offenders. However, the authors concluded that there is little support for the notion that police officers cannot correctly identify mentally disabled offenders.[128] Finally, the authors suggested that the most plausible reason for similarities between the two groups was that a police "triage" system operated to channel mentally ill offenders in need of psychiatric care out of the criminal justice system. This means that the group left behind for the study consisted of individuals who were primarily criminals but who may have had psychiatric illnesses that were secondary.[129]

However, not all police screening procedures are totally effective. In a 1988 study in the Vancouver Pre-Trial Services Centre, approximately 20 to 25 per cent of the admissions to the remand jail (after arrest) were determined to have serious psychiatric symptoms that required immediate treatment or would likely cause prisoner management problems.[130]

Similarly, according to the "Corrections and Conditional Release Statistical Overview", 10% of the federal inmates in 2006/2007 were diagnosed as having serious mental illness at time of admission.[131]

Current screening devices indicate that the levels remain fairly constant. It is interesting to note that Vancouver has a special screening unit in its police department and many of these individuals would have been screened by the police before being remanded.[132]

3. Other Alternatives

Apart from situations that are serious enough to merit transporting a person to a

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[128] Arboleda-Flórez & Holley, Part II, at 93. In fact, police recruits are trained in the recognition and "handling" of persons with mental illness. For example, the Calgary Police Service uses National Mental Health Association, *Aiding People in Conflict* (Louisiana: Mental Health Association, 1988) in its training. This booklet provides basic information on various mental disabilities (e.g., psychosis, mental handicaps, depression) and how to best approach and deal with individuals under distress. See also: EJ Green, *Psychology for Law Enforcement* (Toronto: John Wiley & Sons, Inc, 1976) at 25 - 56 and RJ Wicks, *Applied Psychology for Law Enforcement and Correction Officers* (Toronto: McGraw-Hill, 1974) at 41 - 71.

[129] Arboleda-Flórez & Holley, Part II, at 91-2.

[130] SD Hart, "The Scope of the Problem: The Prevalence of Mental Disorder in Jails" an oral presentation, "Human Rights, Mental Health, and Therapy in a Radically Changing World", Banff, Alberta, 1993 (hereinafter Hart).

[131] Public Safety Canada Portfolio Corrections Statistics Committee. 2007. *Corrections and Conditional Release Statistical Overview: Annual Report 2007*

[132] Hart.

mental health facility or arresting that person, there are many instances where officers exercise their discretion to find other solutions. They may attempt to find a competent person to whom they can relinquish the care of the person or they may return the mentally disabled person to his normal habitat where he/she can presumably manage his/her affairs with some degree of adequacy. This exercise of discretion is limited by police department policy and by availability of alternatives in the community.

4. The American Bar Association's Diversion Policies

The American Bar Association in 1984 published a set of recommended guidelines for police diversion for mentally ill or mentally handicapped individuals.[133] Concerned with the number of persons with mental disorders in the criminal justice system and with the difficulties in the interrelationship between mental health issues and the administration of the criminal law, the American Bar Association (ABA), prepared a lengthy chapter, *A.B.A. Criminal Justice Mental Health Standards*,[134] which deals with many aspects of the mentally disordered in the criminal justice system. The chapter sets out standards and recommendations for the area and has remained highly influential in the United States with respect to the administration of justice for mentally disabled persons. In 2016, the ABA replaced these with the *Criminal Justice Standards on Mental Health*.[135]

Standard 7-2.2 (2016) provides for the development of guidelines regarding the admission of persons in police custody for appropriate evaluation, treatment or rehabilitation. The A.B.A. recommends that these guidelines should be widely disseminated

[133] A similar guide for Canadian police was published in 2004. See Ron Hoffman & Laurel Putnam, *Not Just Another Call…Police Response to People with Mental Illnesses in Ontario* (Sudbury, ON: Centre for Addiction and Mental Health, 2004).

[134] Also known as the 96 "black letter" standards on mental health, the ABA approved this set of 96 standards in August 1984. Additional "black letter" standards were approved in August 1987 and August 1988. All were published in 1989 as *A.B.A. Criminal Justice Mental Health Standards* (Washington, DC 1989), online: American Bar Association https://www.jstor.org/stable/20784327?seq=1#page_scan_tab_contents>. (ABA Criminal Justice Mental Health Standards, 1989).

[135] The official version of the 2016 Standards can be found at CRIMINAL JUSTICE STANDARDS ON MENTAL HEALTH (AM. BAR ASS'N 2016), online: http://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/mental_health_standards_2016.authcheckdam.pdf (hereinafter ABA Criminal Justice Standards on Mental Health, 2016).

to police, mental health, mental handicap and medical facility personnel.[136] One goal of developing guidelines is to increase cooperation between police departments and mental health professionals.

Standard 7-2.2 provides that police policies should stress a preference for voluntary disposition, even where the person might qualify for transmission to a mental health or mental handicap facility. The police officers are encouraged to negotiate a voluntary disposition particularly where the offender does not appear dangerous and is living with others. The standard states that in some cases the police officers should summon the person's friends or relatives and in others, referral to an appropriate community facility may be required.[137]

Standard 7-2.4 provides that mentally disabled persons who are taken into emergency police custody based on minor non-violent criminal behaviour may be transported to a medical, mental health, or mental handicap facility for evaluation or be dealt with by a voluntary disposition. “Minor non-violent criminal behaviour” is not defined in the standard, but the commentary in the 1984 Standard suggests that it embraces violations ordinarily not punishable by confinement or misdemeanours punishable by short periods of detention in a local detention facility.[138]

Where the offender has been arrested for a felony or other serious crime, this person should be processed in the same fashion as any criminal suspect. As soon as possible after the arrest, the police should arrange for a mental health or mental handicap professional to provide evaluation, treatment or rehabilitation.[139] When the accused is initially presented to the prosecutor or the court, the police officer is to reveal those facts that suggest that the arrestee is mentally ill or mentally handicapped and in need of evaluation, treatment or rehabilitation.[140] The police officer should record in writing the facts and observations that he/she reported to the court or prosecutor.

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[136] ABA Criminal Justice Standards on Mental Health, 2016, Standard 7-2.3(a).
[137] ABA Criminal Justice Standards on Mental Health, 2016, Standard 7-2.2(b).
[138] ABA Criminal Justice Mental Health Standards, 1989, at 42, note 9.
[139] ABA Criminal Justice Standards on Mental Health, 2016, Standard 7-2.4(b).
[140] ABA Criminal Justice Standards on Mental Health, 2016, Standard 7-2.4(c).

Once a mentally disabled arrestee has been transferred to custody, the arresting or custodial officers should report to the person in charge of the detention or holding facility any observations that indicate that the person has a mental disability.[141]

Thus, it is clear that the ABA advocates a high level of cooperation between the criminal justice system and the mental health system.

C. Implications for Advocates and Representatives of Mentally Disabled Offenders

In Canada, the factors considered by any individual police officer when choosing to divert an offender out of or into the criminal justice system are largely unpublicized, it is difficult to effectively advocate for a change of procedure during any particular case. The Law Reform Commission of Canada has therefore recommended that stated policies regarding screening of the mentally ill be developed by individual police departments, taking into account a variety of local factors such as the availability of psychiatric facilities.[142] The Law Reform Commission also recommended that when formulating the policies the following should be taken into account:

> (1) whether the nature of the apparent disorder is so serious as to warrant taking the individual into custody;
>
> (2) whether there exist in the community the necessary facilities to deal with the individual;
>
> (3) whether the nature of the offence and the surrounding circumstances are not so serious as to warrant charging;
>
> (4) whether the impact of arrest and charging on the accused and his family would be excessive having regard to the harm done.[143]

Since there are no published policies and since diversion policies will vary from police department to police department and from individual officer to individual officer, it is very

[141] ABA Criminal Justice Standards on Mental Health, 2016, Standard 7-2.4(c).
[142] Law Reform Commission of Canada, *Mental Disorder in the Criminal Process* (Ottawa: Supply and Services Canada, 1976) at 10 (hereinafter Law Reform Commission of Canada, 1976).
[143] Law Reform Commission of Canada, 1976, at 10 - 11.

difficult for advocates to successfully argue that theirs is a case for diversion. This may be especially so if the police officer has arrested the individual and has therefore made a decision.[144] If an advocate is available at the time of the incident and before the formal arrest of the individual, it may be possible to discuss the matter with the police officer, stressing that this person is primarily a patient who engages in criminal activity rather than a criminal who happens to have a mental disability. Second, where the offence is relatively minor, the willingness of an advocate to take the person into his/her own custody (e.g., if one is a parent or relative) may be sufficient to encourage the officer to divert. An officer's awareness of agencies in the community that would take responsibility for an offender may be critical in the decision to divert.

However, if an advocate attempts to influence the victim of the alleged offence not to lay charges or not to proceed with charges against the mentally disabled person, she may encounter charges that she is obstructing justice, a criminal offence.[145] This is particularly the case if the police have decided to proceed with criminal charges against the mentally disabled individual. Consequently, advocates must exercise extreme caution when dealing with alleged victims. Thus, if one intends to attempt to negotiate some type of diversion, it may be advisable to use official channels rather than approaching the alleged victims directly.

It should be noted that, particularly with individuals who are mentally disabled, there are a growing number of advocates who feel that the individual should not be afforded any special treatment because of her mental disability. These advocates argue that for complete normalization the person must be treated just like any offender. However, it is at least equally important to consider the wishes of the offender under these circumstances. Therefore, it is necessary for an advocate to discuss with the offender whether or not she wishes to be diverted from the criminal justice system. Presumably, a "normal" person would utilize any procedure that might result in a satisfactory resolution to

[144] See *Criminal Code,* s 717, which provides for a form of diversion in that it authorizes the court to dismiss a charge without a trial taking place where the accused participates in an "alternative measure" authorized by the province or territory. For further information see "Diversion Programs in Canada" and "Alternative Measures".
[145] See *Criminal Code*, s 139.

her difficulty.

V. Diversion Programs in Canada

A. General

There are formal or informal diversion programs in all provinces and some territories.[146] The nature of diversion programs varies throughout Canada. For example, in 1995, the Nova Scotia Department of Justice launched the province's first diversion project for adults.[147] Nova Scotia's Minister of Justice stated that diversion is a cost-reduced means of resolving cases while at the same time providing an increased community understanding and participation in the criminal justice system.

The program deals with adult offenders (18 years of age and older) who have been charged with either first offences or relatively minor offences (e.g., shoplifting or mischief) and who are diverted from the criminal justice system after charges are laid, but before any court appearance is made. Cases are referred by the police to the Adult Diversion Program, at which time a decision is made as to what steps should be taken next. The options available for resolution are similar in nature to those available under the Alternative Measures Program for Young Offenders which include: restitution, letters of apology, volunteer community service work, or charitable donations. Diversion information on offenders and the outcome of the case is held for five years, assuming there is no re-offence.

British Columbia has an Alternative Measures (Diversion) Program.[148] The diversion program seeks to identify appropriate offenders (e.g., those who are not a danger to the community, who have not committed serious crimes and who do not have a criminal record) and then arranges for those persons to deal with their responsibility in ways other

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[146] For example, Ontario, Nova Scotia, Saskatchewan, Alberta, BC, Manitoba, Quebec, PEI, New Brunswick, Newfoundland and Labrador, Northwest Territories and Yukon.

[147] Donalee Moulton, "NS Launches Court Diversion Program", *The Lawyers Weekly* 14:36 (3 February 1995). See also, Nova Scotia Adult Diversion Program (2013) online: <http://novascotia.ca/just/corrections/_docs/AdultDiversion_000.pdf>.

[148] See: British Columbia, Ministry of Justice, "Alternative Measures" online: < http://www2.gov.bc.ca/gov/content/justice/criminal-justice/bcs-criminal-justice-system/if-you-are-accused-of-a-crime/understanding-charges/alternative-measures>.

than through the court system.[149] If a person enters the diversion program, no charges are laid against that person. If charges have been laid against the person before he/she enters the program, they will be stayed by the Crown.[150]

In Ontario, minor criminal matters are diverted from court under a pre-trial mediation program operated by the Dispute Resolution Centre for Ottawa-Carleton.[151] In 1996, the Attorney General for the province of Ontario stated that the restructuring of the justice system will focus on four core services: prosecuting crime; providing "last-resort" legal services to vulnerable people; providing legal and policy services to government; and assuring that courts are 'fair, timely, accessible and affordable".[152] He stated that non-violent, less serious offences (e.g. property offences with damage or mischief) should be dealt with by alternative mechanisms such as diverting charges to community resolutions. Furthermore, the minister wanted to introduce pre-charge screening and diversion techniques to reduce the case intake and focus the justice system on "serious" crime. Less "serious" crime offences could be diverted from the process if it's a first offence, it's a minor offence, there is no physical injury, and there is no threat involved. In such cases, some sort of community service work could be done to give back to the community.

In Alberta, a number of new alternatives to custody have been introduced for low risk offenders who can safely be supervised in the community. These initiatives have allowed resources to be targeted at higher risk offenders, and are in keeping with existing federal legislative framework and the federal government's focus on serious and violent crime. These programs are being monitored for effectiveness and efficiency and will be

[149] J Williams, "Federal Crown Diversion" (1992) 26(4) The Democratic Commitment 2 (hereinafter Williams).
[150] Williams, at 3.
[151] Adam Szweras, "Minor Criminal Matters Are Diverted From Court Under Pre-trial Mediation Program in Ottawa, *The Lawyer's Weekly* 13:15 (27 August 1993). However, persons who have been diagnosed as having psychiatric impairment or who have been referred for a psychiatric assessment may not be considered for the program (hereinafter Szweras).
[152] Jordan Furlong, "Mandatory ADR, Pre-charge Sentencing Among Proposals Ont. AG. Vows Major Overhaul to Justice System", *The Lawyers Weekly* 15: 37 (9 February 1996).

modified where appropriate.[153]

Also, within Alberta there are two diversion options, formal and informal. Informal diversion is basically when the police officer exercises his discretion not to proceed with the charge against a person. On the other hand, formal diversion comes under the Alberta Solicitor General's Alternative Measures Program.[154]

B. Alternative Measures (Formal Diversion)

In 1995, the *Criminal Code* instituted an "Alternative Measures" program designed to avoid judicial proceedings for offenders 18 years or older.[155]

Section 717 outlines when alternative measures may be used. First, the alternative measures must not be inconsistent with the protection of society. Second, the following conditions must be met:

- the alternative measures must be part of an authorized program;
- the person who is considering whether to use the measures is satisfied that they would be appropriate, considering the needs of the accused person and the interests of society and of the victim;
- the person provides informed consent to the measures;
- the person has been advised of the right to consult counsel;
- the person accepts responsibility for her alleged offence;
- the Attorney General or his agent opines that there is sufficient evidence to proceed with the prosecution of the offence;
- the prosecution of the offence is not barred by the law.

Alternative measures will not be possible where the person denies involvement with or participation in the offence or if he expresses the wish that the court deal with the

[153] See Alberta Justice Website online: <https://justice.alberta.ca/programs_services/criminal_pros/crown_prosecutor/Pages/AdultAlternativeMeasuresProgram.aspx>.

[154] Alberta Justice and Solicitor General, "Adult Alternative Measures Program" online: <https://justice.alberta.ca/programs_services/criminal_pros/crown_prosecutor/Pages/AdultAlternativeMeasuresProgram.aspx>.

[155] *Criminal Code*, s 716.

charges.[156] Therefore, in any case where the accused is asked to admit culpability, his/her counsel should first insist on full disclosure from the Crown to ensure that the Crown has a possible case. It should be noted, however, that no admission, confession or statement of responsibility by a person dealt with by alternative measures is admissible in evidence against that person in any civil or criminal proceedings.[157]

Although the use of alternative measures will not stop criminal proceedings against the person, if the court is satisfied that the person has totally complied with the terms and conditions of the alternative measures, the court must dismiss the charges against the person.[158] The court will also have the discretion to dismiss the charges against the person who has partially complied with the alternative measures program if the court is of the opinion that the prosecution of the charge would be unfair, once the court has looked at the person's circumstances and her performance of the alternative measures requirements.[159]

C. Mental Disorder and Diversion

Traditional formal diversion programs may not be "suitable" for all mentally ill offenders, leaving the police officer with very limited options (to either arrest or use informal diversion). Consequently, mental health diversion frameworks have been developed in some Canadian jurisdictions.[160]

In 2001, the Alberta Mental Health & Psychiatric Services published their 2001-2002 Year End Report,[161] which outlined the details of the Calgary Diversion Project.[162] This was a three-year pilot project funded by Alberta Health & Wellness Health Innovation Fund

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[156] *Criminal Code*, s 717(2).
[157] *Criminal Code*, s 717(3).
[158] *Criminal Code*, s 717(4)(a).
[159] *Criminal Code,* s 717(4)(b).
[160] See: Mental Health Commission of Canada, *Evidence Summary: Mental Health Diversion Frameworks in Canada* (April 2014) (hereinafter Mental Health Commission, April 2014).
[161] Adult Mental Health & Psychiatric Services *Calgary Diversion Project*, 2001-2002 Year End Report, at 151-157 (hereinafter Calgary Diversion Project).
[162] See also Craig Mitton et al, "Calgary Diversion Program: A Community-based Alternative to Incarceration for Mentally Ill Offenders" (2007) 10 J Ment Health Policy Econ 145 (hereinafter Mitton et al).

designed to provide appropriate, community-based care for persons with serious mental illness (SMI) who commit minor, low risk offences. The primary goal of the project was to have eligible SMI clients diverted to receive immediately accessible care and treatment as an alternative to incarceration.[163] Clients would receive referrals from three diversion points: The Arrest Processing Unit, the Crown Prosecutor's Office and the Remand Centre (pre-trial). The project provided a triage assessment within two weeks of referral and an assessment report was produced for the next court date. During this time, charges faced by the client were adjourned for three months, allowing the individual to participate in the Diversion Project. The team included a court/police liaison nurse, community mental health, a therapist assistant, administrative support and a manager. The offenders would receive psychiatric consultation during the duration of the project. The Calgary Diversion Project also offered a three-month follow-up to assist the individual in the transition process and would help the individual establish contacts with valuable services in and around Calgary. The goals of the diversion project were as follows:

> The first was to reduce contacts with the justice system for individuals who were mentally ill and who commited minor, low risk offences through timely and appropriate intervention and follow up by way of linkages to a continuum of community-based treatment and support …. The second goal was to develop and implement effective and efficient strategies that link the Mental Health and Justice systems to appropriately meet the needs and improve outcomes for individuals who, due to mental illness, come into minor conflict with the law …. The final goal was to serve the community appropriately and safely.[164]

Mitton *et al*. reviewed the pilot project and found that "justice system complaints, charges and court appearances to have been reduced between 84% and 91% in those clients that participated successfully in the program."[165] Their study found high levels of satisfaction with the program and improved quality of life in several areas three months

[163] Calgary Diversion Project.
[164] Mitton et al, at 146-147.
[165] Mitton et al, 145.

after joining the program.[166]

In 2006, the government of Ontario released *A Policy Framework for: Mental Health Diversion: Court Support Services,*[167] which includes objectives, principles, and service functions for diversion and court support services to assist in enhancing the goals of diversion: "to help ensure that Ontarians with serious mental illness who commit a minor offence have suitable care and community supports to avoid incarceration."[168] As a result, Ontario has implemented several court diversion and court support programs, such as: Mental Health Court Diversion Program of Halliburton; Kawartha and Pine Ridge; Court Diversion Program of Kapuskasing and Smooth Rock Falls; and Court Diversion/ Court Support Program of Canadian Mental Health Association – Kenora Branch.[169]

In 2007, British Columbia launched a Mental Health Diversion Project.[170] The project resulted in the publication of a best practices guide, a diversion framework, and a report that summarized promising diversion practices from across the province.[171] As of 2014, the diversion framework had not yet been evaluated or applied.[172]

In general, the core of diversion for persons with mental disorders is that wherever possible, persons with mental disorders should be provided with supports and services in the mental health system rather than being processed and punished through traditional criminal justice channels, as these are believed to be inappropriate, ineffective and expensive. Yet, it is still imperative that individuals are held accountable for their actions.[173]

It seems that programs for diversion of persons with mental disorders throughout the criminal justice process and before engagement with the process are in the beginning

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[166] Mitton et al, 145.
[167] Mental Health Commission, April 2014 at 5.
[168] Mental Health Commission, April 2014 at 5-6.
[169] Mental Health Commission, April 2014 at 6.
[170] Canadian Mental Health Association, British Columbia Division, "Mental Health Diversion Project" online: < https://cmha.bc.ca/documents/criminal-justice/>.
[171] Mental Health Commission, April 2014 at 8.
[172] Mental Health Commission, April 2014 at 9.
[173] J. Livingston et al, Criminal Justice Diversion for Persons with Mental Disorders: A Review of Best Practices (BC: CMHA BC Division, 2008) at 4 (hereinafter Livingston).

stages. However, as discussed below, initiatives are being implemented on a fairly regular basis, such as the adoption of specialized mental health courts.

D. Specialized Mental Health Courts

While not part of the pre-trial diversion process, specialized mental health courts have been formed in some Canadian jurisdictions to address those who are not diverted from the criminal system, with the intention of providing holistic approaches.[174] The goal of Mental Health Courts is to provide diversion from the regular justice system to a stream in which they can receive treatment.[175]

Canada's first Mental Health Court (MHC) was opened in Toronto in 1998. It has two main objectives:

1) to deal expeditiously with pretrial issues of fitness to stand trial and
2) to slow down the "revolving door" or reduce the risk of re-offending. [176]

> In addition, "bail hearings, guilty pleas, and 'consent' NCR (not criminally responsible on account of mental disorder) trials may take place in the mental health court in Toronto."[177] The MHC staff includes trained clerks, judges interested in mental health, two dedicated Crown Attorneys, two dedicated duty counsel, eight mental health workers and rotating forensic psychiatrists who perform assessments.[178]

On October 12, 2005 the report of the Street Crime Working Group (SCWG) was released in Vancouver, British Columbia. One of its key recommendations was the creation of a "community court" to deal with the addiction and mental health problems common to chronic offenders in Vancouver. Donald Brenner, Chief Justice of the BC Supreme Court and a member of the Justice Review Task Force stated the following:

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[174] T Dupuis, et al, Current Issues in Mental Health in Canada: Mental Health and the Criminal Justice System (Ottawa: Library of Parliamenr, 2013) at 4 (hereinafter Dupuis). For a broad overview of Mental Health Courts in Canada, see Reiksts. For more in-depth background on Mental Health Courts see Schneider, Bloom & Heerema.

[175] Dupuis at 4.

[176] Schneider, Bloom & Heerema, 97.

[177] Schneider, Bloom & Heerema, 98.

[178] See Schneider, Bloom & Heerema, 168-180.

> Right now, a relatively small number of chronic offenders are responsible for the majority of property crime, putting significant demand on the criminal justice system. A community court would be able to impose a broad range of responses-everything from jail sentences to rehabilitation or a combination with an emphasis on repaying the community for harm done.[179]

According to Elisabeth Burgess, who is chairperson for the Task Force, "[t]he Working Group concluded that current approaches are not coordinated and do not effectively address addictions and mental illness, which are often the underlying factors in repeat criminal behaviour."[180] This proposed community court would offer "social and health supports" to help deal with these "underlying causes" of crime in Vancouver while involving the community in the justice system to assist in dealing with the problems of street crime.[181] According to Ralson Alexander, president of the Law Society of B.C., the report "also urges a stronger connection between the public and the criminal justice system through the creation of a Community Justice Advisory Board that will identify public safety priorities, work with justice system personnel to develop a street crime plan and consult regularly with the judges and staff of the Community Court."[182] The report indicates that addiction and mental illness are significant contributing factors to street crime and also suggests that homelessness contributes to visible disorder. This program is of particular interest to Vancouver residents as the report reveals that approximately 35-40 offenders with symptoms of mental illness appear in the Vancouver Provincial Court each day.[183] This project would promote a more effective system of triage which would assess offenders to determine which ones should go to jail and which ones are willing and appropriate for

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[179] Gary Oakes, "BC task force recommends community court for offenders with mental health problems", *The Lawyer's Weekly, 25:24* (October 28, 2005) (QL) (hereinafter Oakes).
[180] Oakes.
[181] Oakes.
[182] Oakes.
[183] Oakes.

treatment.[184]

In a recent Alberta decision, Provincial Court Judge Dinkel supported the creation of a dedicated mental health court in Alberta, writing at para 65 that:

> Although a Mental Health Diversion Program exists in this jurisdiction for certain offences, the Accused was not eligible because the offences involve violence. If there was a Mental Health Court to deal with individuals who are similarly situated to the Accused, this matter may not have even entered the justice system. As an aside, I find myself engaging in Ad Hoc Mental Health Court-style sentencing on almost a daily basis. I strongly believe it would be to the benefit of all Albertans and especially those suffering with mental health difficulties for such a dedicated Mental Health Court to exist, so as to deal with Accused such as Mr. Keller and avoid warehousing the mentally ill in prison facilities.[185]

VI. Diversion and the Crown Prosecutor

A. General Factors Affecting Diversion by Prosecutors

1. Procedure

Prosecutors are lawyers who act as agents of the Attorney General. Although he/she may do so, the Attorney General generally does not intervene in the cases handled by Crown prosecutors, but may issue broad policy guidelines to them. The general duties of Crown prosecutors include conducting prosecutions of indictable offences, conducting prosecutions for summary conviction offences where the public interest requires, supervising and sometimes taking over prosecutions initiated by private citizens, dealing with the sufficiency of sureties (moneys posted to guarantee appearance in court or some other behaviour), and providing legal advice to justices of the peace.[186] Most authors subscribe to the view that Crown prosecutors are under the control of and are accountable to the Attorney General.[187]

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[184] Oakes.

[185] *R v Keller*, 2016 ABPC 78, [2016] AJ No 330 (QL) at para 65.

[186] Law Reform Commission of Canada, *Controlling Criminal Prosecutions: the Attorney General and the Crown Prosecutor* (Working Paper 62) (Ottawa, Law Reform Commission of Canada, 1990) at 15 (hereinafter Law Reform Commission of Canada, Working Paper 62).

[187] Law Reform Commission of Canada, Working Paper 62, at 16.

The Crown lawyer usually becomes involved in a case after a police officer has arrested the offender, charged him/her with an offence and then appeared before a justice of the peace to swear an information against the person. When a police officer swears an information, he/she presents a formal written document that contains an accusation that an offence has been committed. The hearing is conducted in the absence of the accused and the justice of the peace signs the document. In some jurisdictions, the police lay charges under the direct supervision of Crown lawyers (the prosecutors), while in others, the police only consult with Crown counsel in the most serious cases.[188] Further, the Crown (Attorney General) has the power to lay charges on its own. However, in practice, the Crown rarely does so.

If the justice of the peace determines that the accused should be required to attend court for a trial, he/she may issue a summons that requires that the accused attend for trial on a certain date, and if the offence is indictable, that he/she appear at the police station for photographing and fingerprinting. Alternatively, the justice of the peace may issue a warrant for the arrest of the accused. In some cases, the police officer has already released the accused after the accused has made a promise to appear[189] or the accused has entered into a recognizance.[190] In that case, the justice of the peace decides whether to confirm the arrangements made by the police officer.

Once an information has been sworn before a justice of the peace, the discretion to divert an accused passes to the Crown prosecutors. The prosecutor's role in the criminal process typically commences with scrutiny of the charges and the police officer's notes. Often, this occurs when the offender first appears in court to face the charges.[191] It is from this point that the prosecutor may exercise considerable powers of discretion. These

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[188] Law Reform Commission of Canada, Working Paper 62, at 69-70, reports that in most provinces prosecutors do not control whether an information should be laid. The exceptions are the provinces of New Brunswick, Quebec and British Columbia.

[189] Here, the accused has signed a document promising to appear in court on a specified date.

[190] When an accused has entered into a recognizance, he agrees to appear in court. Failing his appearance, he is subject to a debt to the Crown of up to $500. Sometimes, persons required to enter into a recognizance before the police officer in charge are required to make a deposit that is forfeited if they do not appear.

[191] B A Grosman, *The Prosecutor: An Inquiry into the Exercise of Discretion* (Toronto: University of Toronto Press, 1969) (hereinafter Grosman, 1969).

include the power to withdraw charges, to stay proceedings, to reduce charges and to informally accept pleas and sentence recommendations to be put before the court. Additionally, he/she can decide how to proceed on offences (e.g., to proceed by way of indictment or summary conviction); he/she may restrict the accused person's right to elect the method of trial (with or without a jury) in certain circumstances; he/she can oppose bail; and he/she can decide whether or not to appeal against an acquittal.[192]

2. Ethical Duties and Other Factors That Influence the Exercise of Prosecutorial Discretion

a. Duties of Prosecutor

When exercising his/her discretion at various stages of the criminal proceedings, the prosecutor has certain overriding ethical duties. These have been summarized in the *Federation of Law Societies of Canada Model Code* at 5.1-3 as follows:

> Duty as Prosecutor
> 5.1-3 When acting as a prosecutor, a lawyer must act for the public and the administration of justice resolutely and honourably within the limits of the law while treating the tribunal with candour, fairness, courtesy and respect.
> **Commentary**
> [1] When engaged as a prosecutor, the lawyer's primary duty is not to seek to convict but to see that justice is done through a fair trial on the merits. The prosecutor exercises a public function involving much discretion and power and must act fairly and dispassionately. The prosecutor should not do anything that might prevent the accused from being represented by counsel or communicating with counsel and, to the extent required by law and accepted practice, should make timely disclosure to defence counsel or directly to an unrepresented accused of all relevant and known facts and witnesses, whether tending to show guilt or innocence.

b. Administrative Demands

Although prosecutors have a duty to act fairly and dispassionately,[193] there are

[192] For further discussion of what constitutes prosecutorial discretion see e.g. *Krieger v Law Society of Alberta*, 2002 SCC 65, [2002] 3 SCR 372 (hereinafter *Krieger*) and *R v Anderson*, 2014 SCC 41, [2014] 2 SCR 167 (hereinafter *Anderson*).

[193] See: *Boucher v R,* [1955] SCR 16 at paras 23 - 24. Additionally, damages can be awarded against the Crown if prosecutorial misconduct is proven, even in the absence of malice. See *Henry v British Columbia (AG)*, 2015 SCC 24 at para 138, [2015] 2 SCR 214 (hereinafter *Henry*).

several administrative and social demands upon them that affect their decisions.[194] One administrative pressure is the need to keep the cases before the courts moving as smoothly as possible. Second, the prosecutors and the police officers often develop a relationship of trust that to some extent is necessary to the functioning of the criminal justice system. Pressure from the police to prosecute suspects as charged may be quite strong as a result of the prosecutor's daily contact with police officers. Whether or not a prosecutor can resist these pressures will depend upon her seniority, upon his/her experience prior to joining the prosecutor's department, and upon whether he/she feels more allegiance to the police and law enforcement in general or to his/her legal colleagues.[195]

For example, in one study, the researcher's interviews with prosecutors suggest that younger members of the prosecutor's office felt greater solidarity with police officers and their values than with defence lawyers. On the other hand, those prosecutors who had practiced law before becoming prosecutors seemed more sympathetic to the defence role, and this empathy resulted in greater flexibility during pre-trial negotiations.[196]

Because of administrative pressures, prosecutors must ensure that cases before the court are processed as efficiently as possible without undue delay. In addition to the requirements under the *Charter of Rights* that the accused is entitled to protection from undue delays,[197] there are difficulties with the diminishing availability and enthusiasm of prosecution witnesses as time passes.[198]

These pressures force prosecutors to deal with cases in the shortest possible time. Sometimes this means that prosecutors decide not to proceed to trial because of the unpredictable time requirements. Under these circumstances, often the preferred option is to negotiate reduced charges in return for a guilty plea. This option is especially attractive if the prosecutor perceives that the case is weak. Prosecutors cannot afford to waste courtroom time with doubtful cases. In addition to the time lost, public confidence in the

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[194] Grosman, 1969, at 3.
[195] Grosman, 1969, at 45-49 and 68.
[196] Grosman, 1969, at 68.
[197] See: *Charter*, s 11(b).
[198] Grosman, 1969, at 51.

administration of justice would suffer if the acquittal rate was high. The idea that the police do not arrest and the prosecutors do not pursue cases against innocent people can only be maintained if most of the cases result in guilty pleas or in convictions at trial. Therefore, there is pressure upon prosecutors to sustain their own record and credibility.[199]

It is difficult to predict exactly when and how a prosecutor might exercise his/her discretion to divert a client out of the traditional criminal justice system.

3. Discretionary Powers of Prosecutors

A prosecutor has several options available to his/her when exercising his/her powers of discretion. These include the power to lay charges, to withdraw charges, to stay proceedings, to reduce charges and to informally accept pleas and sentence recommendations to be put before the court. The prosecutor could also ask the court to apply "alternative measures" in accordance with s 717 of the *Criminal Code* dependent upon whether the required conditions have been met.

Prosecutorial discretion was defined by the Supreme Court of Canada in *Krieger* at paras 43 and 46:[200]

> *43* 'Prosecutorial discretion' is a term of art. It does not simply refer to any discretionary decision made by a Crown prosecutor. Prosecutorial discretion refers to the use of those powers that constitute the core of the Attorney General's office and which are protected from the influence of improper political and other vitiating factors by the principle of independence.
>
> ….
>
> 46 Without being exhaustive, we believe the core elements of prosecutorial discretion encompass the following: (a) the discretion whether to bring the prosecution of a charge laid by police; (b) the discretion to enter a stay of proceedings in either a private or public prosecution, as codified in the Criminal Code, R.S.C. 1985, c. C-46, ss. 579 and 579.1; (c) the discretion to accept a guilty plea to a lesser charge; (d) the discretion to withdraw from criminal proceedings altogether: *R. v. Osborne* (1975), 25 C.C.C. (2d) 405 (N.B.C.A.); and (e) the discretion to take control of a private prosecution: *R. v. Osiowy* (1989), 50 C.C.C. (3d) 189 (Sask. C.A.)….

[199] Grosman, 1969, at 63 - 4.
[200] Krieger, at paras 43 and 46.

Prosecutorial discretion was "clarif[ied]" by the SCC in *Anderson*. At paras 44-45, the Court wrote:

> [44] In an effort to clarify, I think we should start by recognizing that the term "prosecutorial discretion" is an expansive term that covers all "decisions regarding the nature and extent of the prosecution and the Attorney General's participation in it" (*Krieger*, at para. 47). As this Court has repeatedly noted, "[p]rosecutorial discretion refers to the discretion exercised by the Attorney-General in matters within his authority in relation to the prosecution of criminal offences" (*Krieger*, at para. 44, citing *Power*, at p. 622, quoting D. Vanek, "Prosecutorial Discretion" (1988), 30 *Crim. L.Q.* 219, at p. 219 (emphasis added)). While it is likely impossible to create an exhaustive list of the decisions that fall within the nature and extent of a prosecution, further examples to those in *Krieger* include: the decision to repudiate a plea agreement (as in *R. v. Nixon*, 2011 SCC 34, [2011] 2 S.C.R. 566); the decision to pursue a dangerous offender application; the decision to prefer a direct indictment; the decision to charge multiple offences; the decision to negotiate a plea; the decision to proceed summarily or by indictment; and the decision to initiate an appeal. All pertain to the nature and extent of the prosecution. As can be seen, many stem from the provisions of the *Code* itself, including the decision in this case to tender the Notice.
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> [45] In sum, prosecutorial discretion applies to a wide range of prosecutorial decision making. That said, care must be taken to distinguish matters of prosecutorial discretion from constitutional obligations. The distinction between prosecutorial discretion and the constitutional obligations of the Crown was made in *Krieger*, where the prosecutor's duty to disclose relevant evidence to the accused was at issue:
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> > In *Stinchcombe*, *supra*, the Court held that the Crown has an obligation to disclose all relevant information to the defence. While the Crown Attorney retains the discretion not to disclose irrelevant information, disclosure of relevant evidence is not, therefore, a matter of prosecutorial discretion but, rather, is a prosecutorial duty. [Emphasis added; para. 54.]

Manifestly, the Crown possesses no discretion to breach the *Charter* rights of an accused. In other words, prosecutorial discretion provides no shield to a Crown prosecutor who has failed to fulfill his or her constitutional obligations

such as the duty to provide proper disclosure to the defence.[201]

Stay

A prosecutor has the discretionary power to stay (suspend) criminal proceedings for any offence. A stay may be entered against an accused at any time after proceedings have commenced and before a judgment is rendered.[202] The prosecutor has complete control over the stay—neither the judge nor the court clerk has any say in the matter. By virtue of sections 579 and 795 of the *Criminal Code*, the Attorney General or his/her agent may stay any proceedings that have been commenced (either indictable or summary conviction offences). The effect of a stay of proceedings is to suspend them rather than to terminate them altogether. For indictable proceedings, the prosecutor can recommence proceedings against the accused within one year of entering the stay.[203] For summary conviction offences, the Crown normally has approximately six months to revive proceedings against the accused.[204] Once the specified periods have elapsed, the proceedings are deemed never to have commenced.

Withdrawal

The prosecutor also has the discretion to withdraw charges.[205] Although, the *Criminal Code* does not expressly grant the right to prosecutors to withdraw charges, the

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[201] *Anderson*, at paras 44-45.

[202] Griffiths & Verdun-Jones, at 253.

[203] *Criminal Code,* s 579(2). It should be noted that there is no general limitation period under the *Criminal Code* for instituting criminal charges for indictable offences. However, once proceedings have been commenced and stayed, they may be recommenced without laying a new information or preferring a new indictment within one year from the entry of the stay.

[204] *Criminal Code,* s 786 provides that no summary conviction proceedings shall be instituted more than six months after the time when the subject-matter of the proceedings arose unless the prosecutor and the defendant so agrees. However, s 795 incorporates s 579 into summary conviction proceedings. Section 579 provides that the limitation is one year or before the expiration of the time within which the proceedings could have been commenced, whichever is the earlier. Since the limitation on commencing summary conviction proceedings is six months, the proceedings should be recommenced within six months of the stay. See also: Griffiths & Verdun-Jones, at 254.

[205] See, for example: JA Osborne, "The Prosecutor's Discretion to Withdraw Criminal Cases in the Lower Courts (1983) 25 Can J Criminology 55 (hereinafter Osborne, 1983).

common law[206] has recognized that they may do so.[207] While the staying of charges results in their suspension, the withdrawal of charges results in their termination.[208] However, a prosecutor may lay new charges against the same accused provided the court does not consider this an abuse of process.[209]

The Crown has the right to withdraw the charges before the accused has entered a plea of guilty or not guilty before a judge.[210] However, the trial judge must grant the Crown permission to withdraw the charges if any evidence has been heard after the accused has entered a plea.[211]

It is difficult to specify under which circumstances a prosecutor may be moved to withdraw charges against an individual. However, some factors that may be influential include: the willingness of victims and witnesses to co-operate; the preferences of the police; the strategies of the accused and her lawyer; the willingness of the judge to remand the case to a later time or date; and the number, condition and type of cases on a particular day's court lists.[212]

Plea Bargaining

The ability to plea bargain or to negotiate with the accused is another form of discretionary power available to the Crown. There are a wide variety of circumstances that

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[206] Law which has developed outside of statutes. Common law relies upon the decisions of judges and their reasons for its authority.

[207] *R v Osborne* (1975), 33 CRNS 211 (NBCA) (hereinafter *Osborne*). This case has had negative treatment. See also: *R v Nixon,* 2009 ABCA 269, aff'd 2011 SCC 34, [2011] 2 SCR 34 (hereinafter *Nixon* (SCC)) [concerning a plea agreement repudiated by Crown].

[208] Griffiths & Verdun-Jones, at 254.

[209] Griffiths & Verdun-Jones, at 255. If one is using the courts for a frivolous, vexatious or oppressive purpose, one may be accused of abuse of process. For a review of the authorities on abuse of process, see: *R v O'Connor* (1995), 103 CCC (3d) 1 (SCC) (hereinafter *O'Connor*); *R v Campbell*, [1999] 1 SCR 565 and *R v M (MW)* (1997), 120 CCC (3d) 46 (Alta CA), *R v Jewitt,* (1985), 21 CCC (3d) 7 (SCC) (hereinafter *Jewitt)*; *R v D(E)* (1990), 73 OR (2d) 758 (CA); DC Morgan, "Controlling Prosecutorial Powers—Judicial Review, Abuse of Process and Section 7 of the Charter" (1986 - 87) 29 Crim LQ 15 (hereinafter Morgan); and J Atrens, *The Charter and Criminal Procedure: The Application of Sections 7 and 11* (Toronto: Butterworths, 1989) at 10-7 to 10-18 (hereinafter Atrens).

[210] Osborne. See also *R v McHale*, 2010 ONCA 361 at para 32.

[211] *Blasko v R* (1975), [1975] OJ No 1239, 33 CRNS 227 (Ont HC). (This case has some negative treatment. See also: Griffiths & Verdun-Jones, at 255). See also *R v Beauchamp*, 2014 ABPC 113 at para 13; *R v McHale*, 2010 ONCA 361 at para 32.

[212] Osborne, at 59 and following.

may be considered plea negotiation in Canada.[213] Usually the Crown seeks a guilty plea from the accused in exchange for some type of concession or benefit.[214] The concessions may result in a reduction of the charges against the person or a withdrawal or stay of other charges (charge bargaining); they may result in proceeding summarily rather than by indictment, in favourable sentence recommendations or in an agreement not to appeal a particular sentence (sentence bargaining); or they may result in a promise not to introduce certain damaging facts (e.g., previous convictions that may affect one's sentence) (fact bargaining).[215] A judge is not bound to accept any recommendations made by counsel.

Unlike the courts in some other countries, Canadian courts do not usually openly endorse plea bargains; however, they are not barred from doing so.[216] If the accused is represented by a lawyer, the judge will usually not inquire into the circumstances behind entering a plea of guilty. Once the accused has entered a plea of guilty, the Crown and the defence lawyer usually make sentencing recommendations. The judge then decides what sentence is appropriate. He is not bound by any such recommendations.

The Federation of Law Societies of Canada and other provincial Law Societies have recognized that plea-bargaining takes place. The *Model Code of Professional Conduct* sets out ethical guidelines for the regulation of plea negotiations.[217] However, other than these guidelines, the practice of plea negotiation is largely unregulated. Some have argued that there need to be substantial controls on plea negotiations in order to protect the interests

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[213] Griffiths & Verdun-Jones, at 260. The issue of plea-bargaining is discussed at length in Chapter Three, Solicitor and Client Issues.

[214] Law Reform Commission of Canada, *Criminal Procedure: Control of the Process* (Working Paper 15) (Ottawa: Information Canada, 1975) at 45. See also: Law Reform Commission of Canada, *Plea Discussions and Agreements* (Working Paper 60) (Ottawa: Information Canada, 1989) (hereinafter Law Reform Commission of Canada, Working Paper 60).

[215] Griffiths & Verdun-Jones, at 260.

[216] Griffiths & Verdun-Jones, at 261.

[217] Federation of Law Societies of *Canada,* Model *Code of Professional Conduct* (March 14, 2017), ch 5 Rule 5.1-7 Agreement on Guilty Plea online: https://flsc.ca/national-initiatives/model-code-of-professional-conduct/federation-model-code-of-professional-conduct/. See also: The Law Society of Alberta, *Code of Conduct* (Law Society of Alberta, 2018), ch 5 (5.1-8.) online: Law Society of Alberta <https://dvbat5idxh7ib.cloudfront.net/wp-content/uploads/2017/01/14211909/Code.pdf> (hereinafter Code of Conduct).

of society, the victim and the offender.[218]

Ethics

The Law Society of Alberta's *Code of Conduct* requires that prosecutors must exercise discretion fairly and dispassionately.[219] Rule 6.3-5 provides that lawyers (including prosecutors) must obey the principles of human rights legislation and must not discriminate against any person.

Historically, the criteria used by the Crown in exercising its discretion were not made known to the public.[220] The Law Reform Commission of Canada, in *Working Paper 62,* recommended that Attorneys General publish guidelines for prosecutors dealing with the initiation of criminal proceedings.[221] In addition to considering whether a successful prosecution is possible, prosecutors were advised to look at whether the public interest could be better satisfied without prosecution.[222] The Working Paper also recommended that while the police should continue to be authorized to lay charges, they should be required to seek advice on the charge document before it is presented to the Justice of the Peace.[223]

More recently, all provincial Departments of Justice and the Public Prosecution Service of Canada publish practice directives/ guidelines on their websites.[224] It is noted that the effect of mandatory minimum sentences provided in 2009 amendments to the *Criminal Code* on judicial and prosecutorial discretion have not been taken into account in the form of amendments to the guidelines.[225] In addition, it has been argued that the criterion of exercising discretion in the public interest appears to be "softening", particularly in the

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[218] Griffiths & Verdun-Jones, at 270. See also: Law Reform Commission of Canada, Working Paper 60.
[219] Code of Conduct, ch 5 (5.1-4 Commentary [1]).
[220] Law Reform Commission of Canada, Working Paper 62, at 77. The authors note one exception, New Brunswick, where published criteria for commencing a prosecution are available to the public.
[221] Law Reform Commission of Canada, Working Paper 62, at 79 - 80.
[222] Law Reform Commission of Canada, Working Paper 62, at 82.
[223] Law Reform Commission of Canada, Working Paper 62, at 73.
[224] M Phillips, "The Public Interest Criterion in Prosecutorial Discretion: A Lingering Source of Flexibility in the Canadian Criminal Process?" (2015) 36 Windsor Rev Legal and Social Issues 43 at 55 (hereinafter Phillips).
[225] Phillips, at 56.

context of mandatory minimum sentences.[226]

4. Challenging the Prosecutor's Exercise of Discretion

In the criminal justice arena, the exercise of prosecutorial powers by the Attorney General and the Crown prosecutors remains virtually uninhibited.[227] Courts generally refuse to review actions taken by prosecutors when exercising their authority.[228] Over the past thirty years, however, the courts have developed some control over the prosecution through the doctrine of abuse of process.[229] Further, the advent of the *Charter of Rights* in 1982 has had some impact on the exercise of discretion; particularly s 7, which guarantees that a person must not be deprived of his right to life, liberty and security of the person except in accordance with the principles of fundamental justice.[230]

Although it is an indirect method of control on the exercise of prosecutorial discretion, the doctrine of abuse of process allows the court to intervene where it feels that the exercise of prosecutorial power has resulted in an unacceptable degree of unfairness to an accused.[231] The court will usually only invoke the doctrine of abuse of process in "exceptional" or "special" circumstances.[232] The factors that the court considers are prejudice to the accused, the prosecutor's motives and the effect on the administration of justice.[233] The court does not attack the decision made by the prosecutor; rather, the court looks at the result of the use of its process.

In *R v Jewitt,* the Supreme Court of Canada recognized the residual discretion of the trial judge to stay the proceedings where compelling an accused to stand trial, "would violate those fundamental principles of justice that underlie the community's sense of fair

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[226] Phillips, at 57.
[227] Morgan, at 16.
[228] Morgan, at 16.
[229] Morgan, at 16.
[230] Morgan, at 17. For further discussion of the impact of the *Charter* on prosecutorial discretion see also *Anderson*, at para 45 as quoted above in the text at note 201.
[231] Morgan, at 35.
[232] Morgan, at 37.
[233] Morgan, at 37.

play and decency and to prevent the abuse of a court's process through oppressive or vexatious proceedings."[234] Although the Supreme Court cautioned that the doctrine of abuse of process should be sparingly applied, it is an available argument in the appropriate circumstances. In *R v O'Connor,*[235] the majority of the Supreme Court held that where the accused claims that his or her section 7 *Charter* rights have been violated because of non-disclosure, the accused must establish that the impugned non-disclosure has, on a balance of probabilities, prejudiced or had an adverse effect on the accused's ability to make full answer and defence. Such a determination requires an inquiry into the materiality of the non-disclosed information.

The Alberta Court of Appeal set down the tests to be applied where the court is asked to reverse a decision of the Attorney General to stay proceedings or where the court is asked to stay proceedings. In the former application, courts are reluctant to interfere with the discretion of the Attorney General in staying charges unless there has been clear evidence of flagrant impropriety. In the latter application, the court would apply the test set out in *Jewitt.*[236]

The argument that there was an abuse of process has been used with mixed success in cases including: entrapment, multiple proceedings, delay, unfairness, repudiated plea agreements and "Mr. Big" confessions.[237]

The consequences when police or the Crown ignores mental illness or mental disability can be severe. *R v Nuttall*[238] provides an illustration of what can occur when diversion is ignored where it may be useful. The defendants were convicted of terrorism charges. The defence alleged entrapment and abuse of process and applied for a stay. The events leading to the charges involved an undercover police operation that started with the

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[234] *R v Jewitt,* [1985] 2 SCR 128, at 31 where Dickson CJC was quoting from *R v Young* (1984), 13 CCC (3d) 1 (Ont CA). More recently, the test for abuse of process was discussed in *Nixon* (SCC) at para 42.

[235] *O'Connor*, at 74.

[236] *Kostuch v Alberta et al.* (1992), 125 AR 214 (CA).

[237] *Jewitt; R v Osborn* (1970), 1 CCC (2d) 482 (SCC); *R v Keyowski* (1988), 62 CR (3d) 349 (SCC); *R v L(WK)* (1991), 6 CR (4th) 1 (SCC); *Nixon* (SCC); *R v Hart*, 2014 SCC 52, [2014] 2 SCR 544.

[238] 2016 BCSC 1404 (hereinafter *Nuttall*).

police receiving a tip about one of the defendants.[239] After the tip, a psychiatric nurse spoke to Mr. Nuttall "and concluded he was not suffering from a mental illness. The nurse also concluded Mr. Nuttall might be developmentally delayed because he spoke slowly and had difficulty understanding what the officer said to him."[240] The police appeared to be well aware of potential psychiatric issues and elected to ignore them.[241] Bruce J found that a stay was justified.[242]

Regarding the defendants' circumstances and mental state, Bruce J wrote at paras 688, 689, 693 and 711 that:

> [688] The police conduct also involved blatant manipulation of the defendants to exploit their dependence upon Officer A and his friendship, as well as their particular vulnerabilities. The defendants were people who lived on the fringe of society; they had no jobs and were entirely dependent upon social assistance. They had few friends and no support from family members after Mr. Nuttall's grandmother moved to the Okanagan in late March 2013. They were recovering heroin addicts who were dependent upon a daily supply of methadone that was delivered to their suite. Their primary activity was playing online video games at home and they rarely ventured outside of a four-block radius from their basement suite. Paintball appeared to be the only outside activity that brought them into contact with other people. The defendants also demonstrated that they were not very intelligent, gullible and quite naïve and child-like. To say they were unsophisticated is generous.
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> [689] There is no expert evidence that Mr. Nuttall had sustained any brain damage during his life or that his brain had been damaged by drugs. However, the many hours of recorded intercepts reveal a person who had *obvious intellectual deficits that should have been apparent to the police.* Mr. Nuttall had rambling and disorganized thought processes, and was unable to stay focused on a single topic

[239] See *Nuttall* at paras 1-4.

[240] *Nuttall* at paras 17 and 40.

[241] See e.g., *Nuttall* at paras 40, 226, 236, 238, 473, 624, 689 and 721.

[242] *Nuttall* at para 836. Note that *Nuttall* relies on the principles outlined by the Supreme Court in *R v Mack*, [1988] 2 SCR 903, 1988 CanLII 24 (SCC) (hereinafter *Mack*) to determine what is and what is not acceptable police conduct. Para 126 of *Mack* is particularly relevant to the conduct of the police in *Nuttall*.

> for any period of time. During scenarios in March, he was observed to have slow speech and then rapid speech. There were also long pauses before he was able to respond to questions or statements made by Officer A. This and other behaviour led the undercover shop to consider a psychological assessment; however, the investigative team did not share their concerns.
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> ….
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> [693] The defendants' unsophistication and child-like nature made it easy for Officer A to manipulate their actions and beliefs. They came to love and trust him completely. Apart from Officer A's promises that they could back out of any plan with impunity, the defendants accepted whatever Officer A said, including what he said about such subjects as jihadist violence, the Islamic faith, politics, and friendship. Moreover, throughout the undercover operation, Officer A repeatedly duped Mr. Nuttall into believing that Officer A's beliefs and ideas were his own.
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> ….
>
> [711] In my view**,** *Officer A capitalized on Mr. Nuttall's psychological frailties* (he was easily manipulated, naïve, gullible, immature, co-dependent, had abandonment issues, and was easily distracted) to further the police investigation. He took advantage of Mr. Nuttall's recent conversion to the Muslim faith, and his acknowledged lack of knowledge concerning its tenets, to secure evidence required to prove the elements of the offences the defendants were ultimately charged with.[243]

In *Nuttall* the police failed to use formal or informal diversion to attempt to redirect the defendants' efforts away from terrorism and toward mental health resources. Instead, they manipulated the defendants' vulnerabilities to police advantage after failing to truly assess and understand the scope and impact of those vulnerabilities.

The advent of the *Charter of Rights* may result in the further development of the doctrine of abuse of process. Section 7 of the *Charter of Rights* provides:

[243] *Nuttall* at paras 688, 689, 693 and 711 [emphasis added].

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

This section guarantees that the individual has the right to "life, liberty and security of the person" and also sets out the right of society to limit the individual's rights "in accordance with the principles of fundamental justice."

The Supreme Court of Canada held in *Operation Dismantle Inc v The Queen*[244] that Cabinet decisions are reviewable by the courts to determine if they are compatible with the *Constitution*, and that the executive branch of the government is bound to act in accordance with Constitutional dictates.[245] Therefore, the exercise of prosecutorial powers is reviewable under the *Charter*.[246]

There is considerable controversy as to the proper scope of s 7 of the *Charter.*[247] However, it is clear that this section has been used to challenge prosecutorial actions and decisions. For example in *R v Stinchcombe,*[248] the Supreme Court of Canada held that for indictable offences, the prosecution has the duty to disclose all relevant material to the defence, whether or not the prosecution intends to use it at trial. Although the prosecutor has the discretion to withhold or delay disclosure in some circumstances, that discretion is reviewable by the trial judge. This case indicates that the exercise of discretion by the prosecution is reviewable, at least in some circumstances.[249]

B. Prosecutorial Discretion and Mentally Disabled Offenders

1. General

Although there are several published studies that provide data about the decisions of police officers to divert mentally disabled offenders, there are few sources that analyse

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[244] [1985] 1 SCR 441 (hereinafter *Operation Dismantle)*.
[245] *Operation Dismantle*, at 447 - 48.
[246] Morgan, at 47 - 48.
[247] Morgan, at 49.
[248] [1991] 3 SCR 326, 8 CR (4th) 277 (SCC).
[249] See *R v La* (1997), 116 CCC (3d) 97 (SCC) for a discussion of s 7 of the *Charter* and prosecutorial discretion in disclosure. Prosecutorial discretion in the context of disclosure is also discussed in *Henry*.

the practices of prosecutors and diversion of mentally disabled offenders. However, this does not mean that prosecutors do not divert mentally disabled offenders.

In addition to the discretion available to prosecutors to withdraw or stay criminal charges, the prosecutor may also refer an accused for a psychiatric examination. Although under the current *Criminal Code* provisions[250] the court may order an assessment of an accused's mental condition under limited circumstances on the application of the prosecutor, it appears that the Crown has obtained psychiatric evaluations of accused persons in the past without benefit of a court order.[251] At the request of the Crown, the psychiatrist approaches the accused before trial to seek an interview at the request of the Crown. The accused may refuse the interview.[252]

Although Crown prosecutors may divert mentally disabled persons out of the criminal justice system, there are no standard criteria for these decisions. The Law Reform Commission of Canada has recognized that prosecutors will divert accused persons when their mental condition suggests that other solutions are more appropriate. In fact, the Commission stated that, "prosecutors are very amenable to having such an offender diverted out of the criminal justice system into the civil health-care system."[253] It is, however, difficult to predict with precision what factors will influence a prosecutor to divert in any particular case.

Some of the general comments on diversion, such as the level of experience of the prosecutor and other administrative pressures, likely apply to the decision to divert a mentally disabled person. In practice, it may be that Crown counsel is less likely to divert for more serious offences or in situations where the accused has been arrested and charged on a number of occasions. If the prosecutor has been supplied with information about the

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[250] *Criminal Code*, s 672.11.

[251] This issue is discussed at length in Chapter Four, Confessions and Statements.

[252] *R v Sweeney (No 2)* (1977), 40 CRNS 37 (Ont CA). See also *Alberta Trial Lawyers Association Seminar* (May 23, 1998) where lawyer Hersh Wolch stated that he believes that there is a bias among provincial psychiatrists towards finding people sane and that clients may be wise to refuse to cooperate. However, if clients refuse to be interviewed by a provincial psychiatrist the court can draw a negative inference. See e.g. *R v McClenaghan*, 2010 ABCA 222, [2010] AJ No 780, at paras 57-61, leave to appeal to SCC refused at 2011 CanLII 2104, [2010] SCCA No 353.

[253] Law Reform Commission of Canada, Working Paper 62, at 83 (note 310).

accused's mental condition, she may be more inclined to divert. Sometimes, the Crown will withdraw charges against a mentally disabled accused on the condition that the accused seek professional help. Further, the Crown may agree to withdraw the charges in exchange for the accused's voluntary civil commitment.[254]

Sometimes, a mentally disabled accused may be at a disadvantage during the process of negotiation with the prosecutor. Prosecutors may have motives other than benevolence when suggesting civil commitment over the criminal stream, especially where the accused would receive a short sentence or probation if successfully prosecuted.[255] Further, the accused's mental condition may render him particularly vulnerable during negotiations with the prosecution. In order to be diverted out of the criminal justice system, the accused may feel pressured to admit guilt. This may be so even where the accused is not aware of the case that the Crown has against her. Further, the admission could be used against the accused in the future. It is therefore essential that the accused be represented by counsel, even during the pre-trial stage.[256]

2. Challenging the Exercise of Prosecutorial Discretion on Behalf of a Mentally Disabled Client

Although it is difficult to challenge the exercise of prosecutorial discretion, a successful challenge is possible. First, one could attempt to challenge the prosecutor's decision to charge a mentally disabled offender based on the argument that there was an abuse of process. However, courts are very reluctant to interfere with charging decisions.[257] For example, the Manitoba Court of Appeal held in *R v Catagas*[258] that the Crown has no constitutional authority to suspend the operation of laws or to dispense with the application of a law in favour of a particular group or race. In that case, it was argued that since the Crown appeared to have the policy of not charging natives with a particular

[254] Law Reform Commission of Canada, *The Criminal Process and Mental Disorder* (Working Paper 14) (Ottawa: Information Canada, 1975) at 26.
[255] Schiffer, at 16.
[256] Schiffer, at 17.
[257] Atrens, at 11-9.
[258] (1977), 38 CCC (2d) 296 (Man CA). Note that this decision has some negative treatment. However, the principle has been accepted in Alberta. See e.g. *R v Kelley*, 2007 ABQB 41, [2007] AJ No 67 at para 71.

offence, it was an abuse of process to charge the accused, who was a native. The Court of Appeal held that it was not an abuse of process to prosecute in violation of that policy because it was unconstitutional to dispense with the application of a law to Indians. Thus, based on this authority, it would be difficult to argue that since the Crown has a policy of not proceeding against mentally disabled persons, it is an abuse of process to proceed in a particular case.[259]

There may be cases where a mentally disabled accused could argue that proceeding against him in a particular fashion is an abuse of process. The accused may argue that the criminal justice system operates in a way that is fundamentally unfair to a mentally disabled person. For example, the prosecutor may be at a distinct advantage in negotiating a plea bargain because the accused is not able to comprehend the process or does not clearly recall the events that led to the charge.

In *R v Shupe*[260] a deaf and mentally handicapped man was charged with sexual assault. He was committed for trial after a preliminary hearing. Before trial, he applied to stay the criminal prosecution and to quash his committal for trial on the ground that he could not effectively participate in or appreciate the nature of the trial process. The accused was not able to communicate in sign language and was incapable of communicating with counsel. Shupe had been through criminal trials three times before. The Alberta Court of Queen's Bench granted a stay of proceedings, holding that it was unacceptable to distinguish between deaf mutes and the criminally insane when laying criminal charges.

The Crown appealed and the Alberta Court of Appeal allowed the appeal and set aside the stay. The Court held that this was not the “clearest of cases” where a judicial stay can be ordered. Further, the chambers judge was premature in granting the stay. It is not an abuse of process to see if the trial process is flexible enough to accommodate a person's

[259] Another possible challenge is that in laying charges, the prosecution is discriminating against the accused because he is mentally disabled. In the United States, this doctrine is called selective prosecution and has been used in cases of gender and race discrimination. See, for example: *R v Smith* (1993), 84 CCC (3d) 221 (NSCA), R. K. Allen, "Selective Prosecution: A Viable Defence in Canada?" (1992) 34 Criminal Law Quarterly 414 (hereinafter Allen); *R v Paul Magder Furs Ltd* (1989), 49 CCC (3d) 267 (Ont CA), leave to appeal to SCC refused, 51 CCC (3d) vii (hereinafter *Paul Magder Furs Ltd*).

[260] (1988), 85 AR 73 (CA); appeal dismissed (1990), 60 CCC (3d) 160 (SCC) (hereinafter *Shupe*).

limitations.[261] More recently, in *R v Power,*[262] the majority of the Supreme Court held that the doctrine of abuse of process should only come into play when there is evidence of improper motives, bad faith or an act so wrong that it violates the conscience of the community such that it would be unfair and indecent to proceed. In such a case, the court should intervene to prevent an abuse of process. Absent an abuse of process, the court should not interfere with prosecutorial discretion.[263]

There are few other cases where the issue of abuse of process was raised before the trial of a person with a mental disability. This may be because a mentally handicapped accused has remedies available to her in the *Criminal Code* such as the defence of not criminally responsible on account of mental disorder or the finding that she is unfit to stand trial. It may be argued that these remedies are sufficient to address any abuses that the mentally disabled accused may encounter as a result of the operation of the criminal justice system. However, these plea options may not be available to all mentally disabled accused, especially those who are mentally handicapped, because of the limited definitions of "mental disorder" and "unfit to stand trial" found in the *Criminal Code*.

Another possible challenge to the exercise of prosecutorial discretion exists under s 15 of the *Charter of Rights.* Section 15(1) provides that:

> 15(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

A mentally disabled accused is protected from the adverse operation of the criminal justice system by s 15(1) of the *Charter of Rights.* The mentally disabled accused client could argue that the exercise of prosecutorial discretion has had an adverse effect on her and was therefore discriminatory. Thus, although the prosecutor does not set out to discriminate against mentally disabled persons, the operation of the criminal justice system has the

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[261] *Shupe*, at 74.
[262] (1994), 89 CCC (3d) 1 (SCC) (hereinafter *Power*).
[263] *Power*.

effect of discriminating against the accused. In other words, the accused suffers from the operation of the system because she is mentally disabled.[264]

An accused with a mental disability was adversely impacted by prosecutorial discretion in *R v Adamo* where the Crown elected to proceed by indictment before becoming fully aware of the scope of Adamo's disability.[265] The prosecutorial discretion had an impact here because proceeding by indictment meant that a mandatory minimum sentence was required.[266] That minimum sentence was found to be a violation of s 15(1) of the *Charter of Rights* in the context of Adamo's circumstances.[267] As such "the reference to 'a minimum punishment of imprisonment for a term of ... in the case of a first offence, three years' as set out in s. 95(2)(a)(i) of the ***Code*** is of no force or effect."[268] However, it was found that the Crown did act in good faith.[269]

A mentally disabled accused could also argue that he was discriminatorily singled out by the police and denied equal protection under s 15(1).

In *Paul Magder Furs Ltd.,* Magder argued that he was discriminatorily singled out by the police and charged with keeping his store open on Sundays.[270] Magder argued that there were several other businesses who also stayed open but who were not charged. In discussing whether Magder was discriminated against, the Ontario Court of Appeal reproduced the United States Ninth Circuit Court of Appeals' test for discriminatory prosecution.[271] In applying this test, the first step is to determine whether others in the

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[264] Arguments along these lines were put forward (in context of professional disciplinary proceedings and the decision to discipline the appellants in the context of addiction) in *Wright v College and Association of Registered Nurses of Alberta (Appeals Committee)*, 2012 ABCA 267, leave to appeal to SCC refused, 2013 CanLII 15573 (SCC)). The Majority was not persuaded by these arguments (see paras 54 and 61-62) and dismissed the appeal, but they were accepted by the Berger J (dissenting) who would have referred the matter back to the Tribunal for further analysis (see paras 125, 126, 133 and 134).

[265] 2013 MBQB 225 at para 155 (hereinafter *Adamo*). Note this case also discusses violations of *Charter* s 7 (para 99) and s 12 (para 92).

[266] See *Adamo* at paras 129, 133 and 158.

[267] *Adamo* at para 159.

[268] *Adamo* at para 161 [emphasis in original].

[269] See *Adamo* at para 155.

[270] *Paul Magder Furs Ltd.*

[271] See: *United States v Ness,* 652 F 2d 890 (9th Cir, 1981), *certiorari denied* 102 S Ct 976.

same position have not been prosecuted. The second step is to determine whether the standard upon which the discrimination is based is permissible.[272] If the prosecutor applies the law in a way that results in unjust and illegal discrimination between persons in similar circumstances, she may be denying equal justice.[273] For example, if only Chinese laundry operators were convicted of operating a laundry in a wooden building, they would be the subject of prosecution based on an impermissible motive.[274]

The Ontario Court of Appeal held that because Magder did not satisfy the court that there was a violation of his equality rights (i.e., he did not provide evidence that the stores that he claimed had illegally remained open had not been prosecuted), the court did not have to consider the element of improper motive.[275]

There are no reported cases where mentally disabled persons argue that they have been selectively prosecuted. However, this argument may be available in the future.

The actions of the prosecutor, as an agent of the government, are subject to *Charter* scrutiny.[276] If an accused could prove that the actions of the prosecutor resulted in discriminatory application or effect of the law, the accused may be entitled to a remedy. The government will rely upon s 1 of the *Charter* in order to justify its actions as reasonable and demonstrably justified in a free and democratic society. If the government is unsuccessful and the exercise of discretion is considered discriminatory, the accused may be entitled to a remedy under *Charter* s 24(1). This section provides:

> 24(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

The remedies from which the court may choose are numerous and include a declaration that a law is of no force or effect, reading the law down, or staying the matter.

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[272] Allen, at 415.
[273] *Yick Wo v Hopkins*, 118 US 356 (1886) ("Yick Wo")
[274] Yick Wo.
[275] Paul Magder Furs Ltd., at 283.
[276] See *Charter of Rights*, s 52.

VII. Conclusion

Diversion is quite broad in its scope, purpose and operation. It covers a wide variety of alternatives to the traditional criminal justice process. Diversion is practiced at all levels—from the initial police officer's contact with the accused to the prosecutor's ability to withdraw or stay charges against him/her.

Diversion can impact the mentally disabled person's contact with the criminal justice system in various ways. The police officer or victim may decide to deal with the matter outside the criminal justice system. The offender may be civilly or voluntarily committed into a mental health facility or placed in a community program. Some jurisdictions provide formalized diversion programs for first time offenders and there is some indication that others may follow suit. Prosecutors may exercise their discretion to withdraw charges, to stay proceedings, to plea bargain with the mentally disabled accused or to make various favourable sentence recommendations on the accused's behalf.

The desirability of diversion from the criminal justice system will depend on the individual offender's circumstances and the effect that diversion will have upon him/her. In any case, the consequences of diversion must be weighed against the consequences of proceeding through the criminal justice system.

It may be necessary to challenge a diversion decision made by the authorities. Some legal doctrines—such as abuse of process or selective prosecution—may be available to contest a prosecutor's decision to proceed against a mentally disabled individual.

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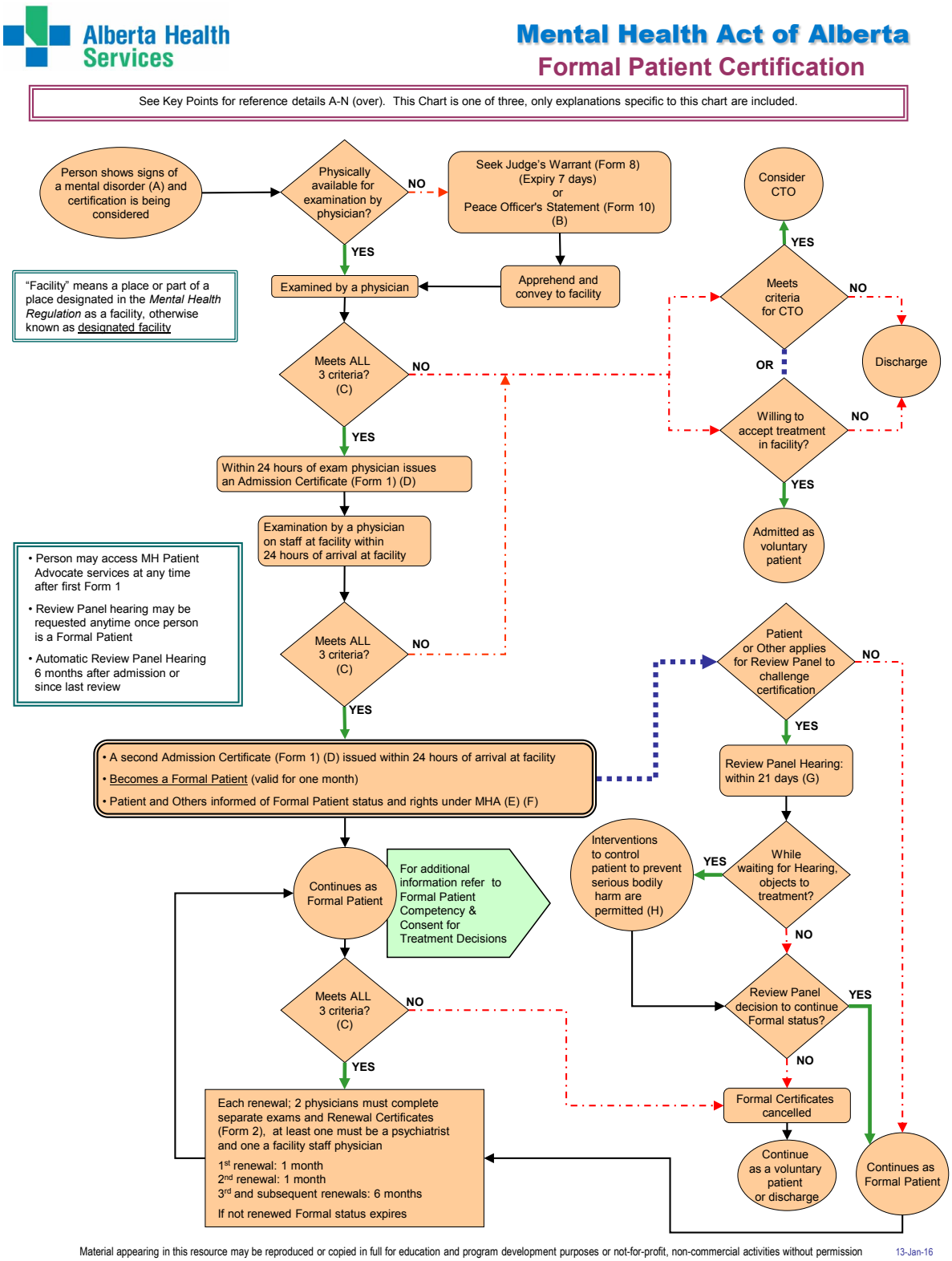
Appendix


Alberta Health Services
Mental Health Act of Alberta
Formal Patient Certification
See Key Points for reference details A-N (over). This Chart is one of three, only explanations specific to this chart are included.
Person shows signs of a mental disorder (A) and certification is being considered
Physically available for examination by physician?
NO
Seek Judge's Warrant (Form 8) (Expiry 7 days) or Peace Officer's Statement (Form 10) (B)
YES
Examined by a physician
Apprehend and convey to facility
"Facility" means a place or part of a place designated in the Mental Health Regulation as a facility, otherwise known as designated facility
Meets ALL 3 criteria? (C)
NO
YES
Within 24 hours of exam physician issues an Admission Certificate (Form 1) (D)
Examination by a physician on staff at facility within 24 hours of arrival at facility
Meets ALL 3 criteria? (C)
NO
YES
• Person may access MH Patient Advocate services at any time after first Form 1
• Review Panel hearing may be requested anytime once person is a Formal Patient
• Automatic Review Panel Hearing 6 months after admission or since last review
• A second Admission Certificate (Form 1) (D) issued within 24 hours of arrival at facility
• Becomes a Formal Patient (valid for one month)
• Patient and Others informed of Formal Patient status and rights under MHA (E) (F)
Continues as Formal Patient
For additional information refer to Formal Patient Competency & Consent for Treatment Decisions
Meets ALL 3 criteria? (C)
NO
YES
Each renewal; 2 physicians must complete separate exams and Renewal Certificates (Form 2), at least one must be a psychiatrist and one a facility staff physician
1st renewal: 1 month
2nd renewal: 1 month
3rd and subsequent renewals: 6 months
If not renewed Formal status expires
Consider CTO
YES
Meets criteria for CTO
NO
Discharge
OR
Willing to accept treatment in facility?
NO
YES
Admitted as voluntary patient
Patient or Other applies for Review Panel to challenge certification
NO
YES
Review Panel Hearing: within 21 days (G)
While waiting for Hearing, objects to treatment?
YES
Interventions to control patient to prevent serious bodily harm are permitted (H)
NO
Review Panel decision to continue Formal status?
YES
NO
Formal Certificates cancelled
Continue as a voluntary patient or discharge
Continues as Formal Patient
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