

**THE UNREPRESENTED DEFENDANT AND THE
UNBUNDLING OF LEGAL SERVICES**

**PREPARED FOR THE ADMINISTRATION OF JUSTICE SUB-COMMITTEE,
NOVA SCOTIA BARRISTERS' SOCIETY**

NOVEMBER 2004

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Table of Contents

FOREWORD	3
OVERVIEW	4
INTRODUCTION	18
THE PROBLEMATIC AND RESEARCH OBJECTIVES	18
RESEARCH STRATEGIES.....	20
BACKGROUND CONSIDERATIONS.....	21
THE ONTARIO COMPARISON: A BRIEF EXPLORATION	30
SECONDARY DATA ANALYSES	38
THE JUDGES.....	50
CROWN PROSECUTORS	53
DEFENSE COUNSEL.....	59
OTHER CJS ROLE PLAYERS	72
THE SELF-REPRESENTED DEFENDANT	74
SAMPLE DESCRIPTION.....	74
PATTERNS IN BACKGROUND CHARACTERISTICS	75
PARTICIPANTS' THEMES.....	77
CATEGORY A.....	77
CATEGORY B.....	80
SOME OBSERVATIONS ON THE PARTICIPANT'S VIEWS.....	83
DETAILED PARTICIPANTS' VIEWS: CATEGORY A.....	89
DETAILED PARTICIPANTS' VIEWS: CATEGORY B.....	106
APPENDICES	124

FOREWORD

While this report was written entirely by Don Clairmont who accepts full responsibility for its contents, it was accomplished with the excellent collaboration of a number of persons including Paul Smith who made JOIS data available in suitable format for research, Jim Clairmont who carried out the interviewing and observation in Toronto and Hamilton, Ian Joyce who carried out the majority of the interviewing of the unrepresented defendants and coordinated the remaining interviews done by a small group of active volunteers. These latter included Adam McCulley who was responsible for many interviews, Shi-Eun Kim, Darryl MacPherson, Michelle Winchester, “Alex” Nelson, Danielle Dawe, and Shannon Richardson. The cooperation and patience of the Nova Scotia Bar’s Administration of Justice Subcommittee, especially Frank Hoskins and Stan MacDonald, was much appreciated, as was that of the judges, crown prosecutions, defence counsel and unrepresented defendants.

OVERVIEW

This project has been focused on contributing to an appreciation of the unrepresented defendant phenomenon in Halifax provincial criminal court and to the examination of possible solutions, including the strategy of a more formal and explicit marketing of “unbundled” legal services. While emphasizing local data, whether that be analyzing secondary data sets or interviewing local CJS officials and unrepresented litigants, some effort has been expended to place patterns in the larger Canadian context through literature review and direct, if limited, examination of similar issues in the Toronto area.

SPECIFIC RESEARCH STRATEGIES

There were five basic research strategies adopted for this modestly-resourced study, namely

1) A modest review of the Canadian, especially Nova Scotian, literature featuring the unrepresented litigant in criminal court and the appropriateness and marketability of a formalized system of unbundled defense counsel services there. Essentially that review is summarized in the section 'Background Considerations.'

2) A brief examination of the issues of unrepresented litigants and unbundled defense counsel services in the Toronto-Hamilton area of Southern Ontario. Here, especially in Toronto where there is a significant duty counsel system in place, a number of (eight all-told) CJS officials were interviewed.

3) Analyses of secondary data drawing on the provincial Justice Oriented Information System (JOIS) court data. Two samples were taken, first a small sample covering the period 1999 to 2001 initially drawn for a different research project and, secondly, a large sample of 23,000 cases specifically drawn for this project. Between 1999 and 2001, JOIS data frequently did not record the presence or absence of defence counsel but more strict guidelines were introduced in 2002. The large sample of 23,000 entries dealt with all adult court cases recorded in JOIS for 2002. These two data sets were examined in order to develop profiles of the

unrepresented defendant and to assess the implications of being unrepresented. An especial interest was to explore the rather anomalous findings in the literature cited above, namely that unrepresented or self-represented litigants appeared to fare much better in court than suggested by the informed views of court officials.

4) In-depth, one-on-one interviews were carried out with forty-eight CJS officials - judges, crown prosecutors and defence lawyers. Most of these officials lived and worked in metropolitan Halifax but a handful were interviewed from beyond metro - the Sydney, Truro and Amherst areas - in order to get some indication whether issues of unrepresented litigants and unbundled defence counsel services were largely confined to the metropolitan area. Given the lack of detail in the project's objectives, members of the Bar Society's special subcommittee on the administration of justice were especially contacted for interviews. The interviews were open-ended, organized around themes, namely the scale and trends regarding number of unrepresented defendants, the types of charges involved, the difficulties that dealing with unrepresented persons may cause for CJS role players and the court process, the implications of being unrepresented for the defendants, possible solutions to the putative problems, and, especially, views concerning the feasibility and appropriateness of more explicitly offering unbundled legal services.

5) One-on-one interviews with unrepresented defendants initially identified as unrepresented through courtroom observation and then directly contacted outside the courtroom. The format followed in approaching such defendants and the themes explored in these interviews are detailed in section 5 of this report. Over 100 interviews were carried out and in some instances additional, follow-up interviews were conducted.

BACKGROUND MATERIALS AND THE TORONTO-HAMILTON SITUATION

The modest review of the literature concerning unrepresented defendants and marketing unbundled defence counsel services scanned the literature but highlighted local studies. Both issues were acknowledged in the national and local literature but the sources provided an ambiguous assessment. The unrepresented phenomenon in criminal court was discussed primarily as an access to justice problem but significant attention was devoted to the negative implications for the court process and for the judges and crown prosecutors. Being unrepresented was depicted, by researchers and by the CJS officials interviewed in these studies, as producing

many problems and shortcomings for the court process and for the defendants themselves, Surprisingly, the secondary data presented on court time, number of appearances and even conviction rates did not strongly support these views and frequently contradicted them. Moreover, virtually no unrepresented defendants were actually interviewed. The most extensive and most recent national study of the unrepresented indicated that there was significant variation in the scale of the unrepresented phenomenon across the country (Nova Scotia was among the provinces with the highest proportion of unrepresented defendants at final appearance) and that increasingly the issue was less "no representation" and more "under-representation" (e.g., the quality of the duty counsel intervention, the possibility of net-widening in the sense of guilty pleas being perhaps too hastily taken). The national nine-site study, overall and in the specific sites examined, hardly mentioned the encouragement of marketing unbundled defence counsel services as a solution to any of the issues addressed. Even the local site study for the national study, while identifying the unrepresented defendant phenomenon as a significant multi-dimensional problem, did not make any reference to unbundling in its discussion of suggested improvements. In other literature unbundling was referred to but again its significance in relation to the unrepresented problem was unclear. Generally, the literature advanced conventional solutions - essentially more of the same - but there were references to a projected future court processing system where the orientation would be more "client-centered" featuring a mix of self and professional defence strategies where the unbundling of defence counsel services could well be extensive.

Interviews conducted with judges, prosecutors and defence counsel (duty counsel and private counsel) in Toronto and Hamilton indicated a consensus that the duty counsel systems put into place there have made a huge difference with respect to the "unrepresented litigant" issue. All respondents appreciated that the duty counsel system provided valuable service to both the defendants and the other CJS role players, and "made the system run", as one informant put it. There was some consensus the unrepresented defendants were confined basically to the less serious criminal cases and to first time or infrequent defendants. The small sample of respondents did not report lack of representation as a major problem though there were concerns expressed about "under-representation" and the quality of the access to justice provided. In these connections, respondents providing defence counsel services were most likely to perceive a

major, even growing problem. Various policy issues were raised concerning improving the duty counsel system and also elaborating it in such a way (e.g., the public defender role) that it might seamlessly merge into the staff or certificate-based, typical legal aid full-service system. There was little mention of, and very little enthusiasm expressed for, the concept of a more explicit, formal marketing of unbundled defence counsel services for routine criminal court cases. Despite the differences between Hamilton and Toronto in terms of how the duty counsel system was structured (i.e., contract and staff positions), the CJS officials' views on the unrepresented defendant and unbundling were similar in the two areas. Interesting, too, there did not appear to be much focus on advocacy on the part of the duty counsel for unbundled defence services as regards subsequent court phases for their clients.

THE SECONDARY DATA ANALYSES

Secondary data analyses of JOIS samples provided descriptive detail on the "unrepresented defendant" phenomenon and explored the impact of being unrepresented. The former focus highlighted the frequency of being unrepresented and the charges and cases where unrepresented defendants were most likely to be found (e.g., c.c.driving offenses). The latter focus (i.e., the impact) was limited in that the JOIS data were not amenable to an examination of the implication of type of representation for whether charges were dropped or the kind of sentence that followed conviction. Accordingly, the analyses dealt solely with conviction. Fortunately, that, too, has been the emphasis of the other studies so comparisons can be drawn.

Overall, analyses of the JOIS data do not yield the same results as the national studies. JOIS data indicated a high level of unrepresented cases at final appearance, especially for certain offenses and especially among adults aged thirty-two or older. The unrepresented litigants, in the JOIS sample, did not do better than the represented in terms of conviction rates. Private counsel appeared to make a significant difference, compared to NSLA and self-represented categories, in terms of reducing conviction rates. And NSLA rates of conviction may on the surface compare no better than those of the self-represented, and unfavourably vis-à-vis private counsel, at least in part because of workload selection effects - NSLA deals more with defendants who are facing a higher number of charges per case and who have higher levels of recidivism (i.e., more significant criminal records). And that is the case even in the analyses made which were limited

to a truncated definition of recidivism (i.e., only dealt with cases within a two-year time span). The self-represented cases were especially likely to involve "one-timers" but even here, in, for example, c.c.driving cases, the conviction rate was greater than for NSLA or private counsel cases. Of course the impact and benefits of representation apply to much more than simply conviction rates. As can be seen below in the section dealing with the views of the self-represented defendants, representation may provide information and reduced stress even among "veteran" defendants, not to mention for other CJS role players. Among other benefits, more charges may be negotiated down or away through representation and non-custodial sentences may be greater. There was some indication of the former in these JOIS data but no analyses have been made concerning the latter. It is clearly conceivable that judges might compensate for the lack of representation and, accordingly, comparative conviction and sentencing could be affected by this judicial concern for fairness; however, such an argument merits study and certainly should not be presumed as many studies of judicial decisions and defendants' socio-economic status have shown that alleged sympathy for class-based impediments does not translate into lesser sentences for the disadvantaged.

LOCAL CJS INTERVIEWS

Local CJS interviews indicated that these officials in the metro area did indeed, typically, see the unrepresented defendant phenomenon as a significant and growing problem in provincial criminal court. There was however not complete consensus on this score, with more diverse views especially among the crown prosecutors. There was also much agreement about the characteristics of the unrepresented and the key offenses involved (e.g., financially-pressed, c.c. driving infractions, common assault) but a number of informants expressed some scepticism that defendants could not muster some financial resources if they wanted to pay for legal services. Outside the metropolitan Halifax area, CJS officials were much less inclined to perceive the unrepresented defendant phenomenon as either a significant or growing problem, typically suggesting that NSLA eligibility was quite accessible in their area and/or that there was more ready interaction between defendants and prosecutors.

There was much more diversity in the views of the local CJS officials concerning the greater encouragement of unbundled defence counsel services, whether as a partial solution to

the problems of unrepresented defendants or in its own right. Most interviewees readily acknowledged the value and indeed the necessity of defence counsel occasionally providing specific services at certain phases of court processing in complex cases but many balked at a more general marketing of unbundled services in routine criminal court cases. Insofar as there was any enthusiasm about extensive "unbundling", the consensus was that it might be at the "front-end", reviewing disclosure with the defendant and perhaps engaging in discussions with the crown prosecutors concerning the latter's intentions in the case and possible options regarding charges and sentences. It may be noted that this kind of "front-end" activity is essentially what is provided in many duty counsel systems so perhaps, to some extent, generalized unbundling was seen as a fall-back. Certainly there is no doubt that the major preferences of local CJS officials - including defence lawyers - were for either extending NSLA eligibility and / or adopting a duty counsel model. CJS officials outside metropolitan Halifax gave short shrift to the idea of routine unbundling of defence counsel services. It may be noted that the uncertainty that emerged, overall, from the CJS interviews over the court rules or protocols - perhaps better the norms since there did not appear to be formal guidelines - for defence counsel providing just specific services (e.g., timely notice? lawyer of record?) apparently contributed much to the general reluctance regarding "unbundling".

Overall, the judges in metro, unlike their counterparts elsewhere in the province, held that the unrepresented defendant constitutes a serious and growing problem in provincial criminal court. The problems they cited were those typically noted in the literature and in previous local research. The growth of the phenomenon was considered by most metro judges, with one judge wanting more hard evidence, to be the result of restricted access to NSLA, itself the result of many factors such as higher standards, more complex cases and perhaps more demand for NSLA services. The judges generally advanced solutions based on upping the NSLA thresholds and/or mounting a duty counsel system under NSLA auspices. While not opposed in principle to a more elaborate system of unbundled defence services, there was little enthusiasm for it, except perhaps at the "front-end" if no duty counsel program was initiated.

Overall, the prosecutors' views varied significantly but most did not think that the unrepresented phenomenon was a major and growing problem. The common position was however that it did generate problems for the court system and crowns and judges, as well as for

the defendants themselves. The unrepresented were seen to be largely the financially pressed, ineligible for NSLA and not reasonably able to afford private counsel, though the crowns did draw attention to the diversity of characteristics among the unrepresented. The chief types of charges they faced were minor assaults and c.c.driving offenses. The metro crowns were not usually opposed to the idea of unbundling but they did have their reservations about it in principle and some scepticism concerning its feasibility. In their view the key to dealing with the "unrepresented" problems and issues was to have a more generous NSLA eligibility and especially a duty counsel program. Outside metropolitan Halifax the small sample of crowns generally did not think that the unrepresented phenomenon was especially problematic and held that extensive marketing of unbundling was "neither here nor necessary". In their view given the different social realities and characteristic life styles, the relationships among CJS officials and defendants were quite different in metropolitan Halifax than in their area and a duty counsel system could be very valuable in the Halifax area for all parties and the court system as a whole.

Overall, the NSLA respondents in metro Halifax, held that the unrepresented defendants constituted a major and growing problem, largely because of the combination of restrictive NSLA eligibility policies and macro-level factors which presumably have led NSLA to expend more resources on fewer cases and private counsel to become very expensive. The unrepresented defendants were seen to be the working poor, perhaps including the lower middle class, who were squeezed by these developments. The offenses involved were acknowledged as usually minor but sometimes the implications could be serious, quite apart from whether a person was convicted or not. For these respondents, the unrepresented phenomenon raised problems concerning equity in access to justice and caused significant problems for judges and crowns as well as for themselves. In their suggested solutions, priority was accorded to changing NSLA eligibility thresholds so that more defendants could access the service, and instituting a duty counsel system along lines similar to the one that exists for custody cases. There was little enthusiasm for encouraging "unbundling" as most respondents questioned its value and its feasibility.

Overall, the private defence counsel considered that the unrepresented defendants constituted a serious problem that could be described as a crisis for the criminal justice system. They especially conceptualized the problem as one of inequity in access to justice and focused

on the problems entailed for the defendants who they generally characterized as vulnerable, deserving, ordinary citizens. The latter were seen as squeezed between restrictive NSLA eligibility and the high costs of legal services. The latter factor was seen to be primarily a function of more complex laws and higher standards and not fees per se. Their views regarding the possibilities of unbundling as a solution to the unrepresented problem were varied and quite nuanced. There was a broad consensus that unbundling could be beneficial for all parties, especially at the "front-end", but many concerns and reservations were also expressed. There was much support for adopting more generous NSLA eligibility criteria and for a full duty counsel model.

THE UNREPRESENTED DEFENDANT SAMPLE

Over a hundred defendants, unrepresented at the time of initial interview (usually but not always at first or second court appearance), were interviewed one-on-one. The following is an overview assessment of these interviews which are dealt with at length in section 5 of the report. Category A respondents were those facing charges of domestic violence or c.c.driving or simple marihuana possession (offenses highlighted by CJS officials as especially likely to be associated with lack of representation). Category B includes all other types of offenses.

SOME OBSERVATIONS ON THE PARTICIPANT'S VIEWS

1) There were significant differences between the two categories of defendant charges, as those in category A (the highlighted offenses) were clearly less likely to engage defence counsel because of ineligibility for NSLA. While they were better educated and more often employed, they were either unable or unwilling to afford private counsel and more likely to consider that having defence counsel would make no difference.

2) Knowledge and awareness of the court process varied within and across categories A and B. Defendants in the latter category, B, reported more familiarity and knowledge of how the "system" works. Generally, reported knowledge/awareness depended more on experience with the court process than on age or educational background - young, ill-educated. multiple repeat offenders in category B were most likely to claim much knowledge and awareness. Having much knowledge/awareness appeared in turn to be correlated with stressing the importance of having

legal counsel for an adequate defence in court, but there were a few instances where persons identifying themselves as very knowledgeable believed also that they could best mount their own defence.

3) Across all categories and sub-groupings of defendants, with the exception of those charged with simple marihuana possession, there was a common pattern of reporting that, for the case at hand, counsel was needed, that private counsel was too expensive and that NSLA eligibility was sought. In the category A grouping of c.c. driving charges and domestic violence charges, this view of the costs of obtaining private counsel seemed to have more of a foundation in the defendants' experience, that is, it was more often based apparently on actual contact with private lawyers.

4) Generally, many of the defendants contacting NSLA had had previous, and usually positive, experiences with NSLA. This was especially true for simple and multiple repeat offenders in category B. There was little contact reported with private lawyers across the entire sample. At the same time, the view was widespread that not only was private counsel not affordable but also that it was better than NSLA representation typically, reportedly, in one or both of two ways, namely providing quicker access for the defendants and more focus on their case. A number of defendants who held these views considered that NSLA lawyers were "over-worked and under-paid".

5) There was a large proportion of defendants who challenged the legitimacy of the charges they faced. This was most true of those in category A but not uncommon among those category B persons charged with assault. These persons, again apart from those charged with simple possession, appeared to exhibit the most stress and anxiety about the progression of the case in court. A number of these persons - as well as a few who seemed just fed up with "slowness" of the process - indicated that they were inclined to "throw in the towel" and plead guilty. There was another grouping of defendants who emphasized their guilt and typically their inclination to quickly and without defence counsel resolve the matter by pleading guilty. A few defendants seemed destined to be without legal counsel primarily because of inertia, apparently just not getting around consulting with anyone. On the whole, the researchers were surprised at the significant number of defendants who projected a vulnerability to a quick plea of guilty for one reason or another.

6) The vast majority of the respondents interviewed at arraignment indicated that they had not bothered about representation, whether NSLA or private counsel, at this stage in their court involvement. This was true of both categories A and B, and held also for first-time and veteran defendants (a few of the latter indicated that they purposely delayed taking any action for personal reasons). It was rare for anyone to report that he or she had consulted with any lawyer or accessed any legal services. It was quite uncommon for anyone to report contacting the lawyer referral service (or even knowing anything about it) but a few did so, in several cases to much benefit (e.g., reportedly providing information on diversion, on lawyers' fees etc). Most defendants reported no contact with the crown prosecutors and few had accessed disclosure at the time of their interview (indeed the majority seemed unaware of what disclosure was and that it was accessible, though courtroom observation was that sometimes disclosure was made available at court). The vast majority of the defendants indicated that they had no contact with other officials or other role players at the court house but a few females mentioned the Coverdale court worker and a few had obtained basic information from court administration staff.

7) Most defendants exhibited a very limited sense of the defence counsel's role, focusing exclusively on conviction matters and paying scant, explicit attention to issues of due process and sentencing. Thus, it was not unusual to hear a defendant report that "I am in the wrong so why should I get a lawyer" or "they got me dead to right so why should I get a lawyer". A few more experienced defendants did highlight that their concern was more on sentencing than on whether or not they would be convicted.

8) Once it was explained to them, there was a strong interest expressed among defendants in the option of engaging unbundled defence counsel services. Among specific unbundled services, most defendants identified the trial phase as especially requiring legal counsel and the plea phase as the least ("I can do that myself"); aside from these polar views, defendants emphasizing the priority of having counsel services at the pre-plea phase (i.e., disclosure analyses and discussions with the crown prosecutor) were matched in number by those emphasizing the priority of defence counsel for post-plea phases. However, the single most frequent response by defendants to the question about unbundled services was to emphasize the need to have counsel for all phases/stages save plea; among the multiple repeat offenders it was most common to contend that one needed legal counsel to be there for the entire process.

The drawback in these data concerning unbundled defence services is that many defendants did not grasp the idea of unbundling as an alternative to conventional representation (clearly too that failure relates to the inadequacy of our communication) and/or did not reflect on whether they could and would meet the expense of such representation. A number of respondents indicated that they did not believe that could afford any private services whatsoever. Several others indicated that in consultation with private lawyers they had not been offered such an option and still others questioned the interviewers about where they might find lawyers who would offer such unbundled services. In other words, then, it was not clear that respondents grasped the concept or that they perceived it as an available option or that they would use it if it was an available option.

9) Among the dozen or so defendants (thus far in this study) who were asked whether a duty counsel system (again explained by the researchers to include disclosure and discussions with the crown prosecutor) would be a valuable initiative, there was much enthusiasm for such a project. Generally, defendants considered that it would reduce stress and expedite the court process by giving the defendant a better sense of where she/he stood and what the options were. The few reservations articulated dealt with whether there would be "hasty decisions" made, and how much value it would yield for those committed to their innocence. Somewhat surprisingly, from the researchers' perspective, defendants facing domestic violence charges were also quite positive about being able to access duty counsel, for reasons similar to the ones just cited. Taking these views in conjunction with the views expressed throughout the sample, especially the not uncommon reporting that discussions with the crown provided relief to some defendants, it would seem that a duty counsel system could have a significant impact. It is unclear whether it would lead to many more and earlier guilty pleas (most probable) or whether it would encourage a higher amount of representation whether by NSLA or private counsel. As noted above, many defendants appeared quite vulnerable to pleading guilty just to get things over with, so the stance and views of the duty counsel would undoubtedly be very important.

CONCLUSIONS AND FUTURE DIRECTIONS

This study has found that there is a high percentage of provincial criminal court defendants in the metropolitan Halifax area who are without representation throughout their

court process, including final appearance. The unrepresented defendant phenomenon is considered a major problem for the court process by the various role players and parties, especially by the judges and defence counsel lawyers and, to a lesser extent, by the crown prosecutors. The problems entailed by it especially affect the roles of the judge and prosecutor but also NSLA staff. There are clear negative implications for the defendants of being unrepresented as attested to by CJS officials, the unrepresented themselves and the analyses of court statistics carried out for this study. The congruent finding from all the interviews with CJS officials and the interviews with, and information provided by, the unrepresented defendants, is that the unrepresented are largely caught in a squeeze between ineligibility for NSLA and being hard-pressed to pay for the high costs of private legal services. It appears quite evident that, overall, for these defendants, there is a valid issue of access to justice, despite the fact that not all such defendants have similar socio-economic characteristics and face substantial hardship, and despite the efforts of the judges and crown prosecutors to acknowledge the situation of such defendants. The problem of the unrepresented defendant in provincial criminal court appears to be essentially a problem for metropolitan Halifax, not for the whole of Nova Scotia.

The preferred solution to the problem of the unrepresented defendant, advanced by the majority of CJS officials, whether judges, crown prosecutors, NSLA staff or private defence counsel, involved a combination of making NSLA eligibility less restrictive and instituting some form of a duty counsel system for non-custody criminal cases. Typically, too, the respondents, across the board, called for a full duty counsel system along the lines developed in the Hamilton-Toronto area, but a minority of respondents appeared satisfied with having either a combination of paralegals and limited duty counsel or a triage-type model staffed by a lawyer (limited duty counsel role where the lawyer provides "generalized advice", not in-depth assessment of disclosure etc). There was no enthusiasm for a pro bono roster of private counsel providing a limited duty counsel function. Other possible initiatives such as more court workers, a kiosk arrangement staffed by paralegals, and enhancement of the lawyer referral service were identified but none was seen as central to the solution of the unrepresented defendant problem. The unrepresented themselves emphasized also the combination of more generous NSLA eligibility and some initiatives akin to a duty counsel system. When the latter option - including assessment of disclosure and discussion of options with the prosecutor - was explained to these

defendants, at interview, most indicated that it would have resolved their concerns if it had been accessible.

The unbundling issue was more complex. Among all categories of CJS officials there was a view that some acceptable system of unbundling could be developed in conventional criminal court cases, especially at the "front-end" or pre-plea phase. But there was little enthusiasm expressed even by defence counsel and many reservations and critiques advanced. The unrepresented defendants overwhelmingly were unaware of the possibilities of securing unbundled defence services and virtually none of those who had contacted private counsel, indicated that such an option was ever presented to them. Like the CJS role players, the widely-held view among the unrepresented, was that one should have defence counsel for the entire case processing. It was not clear whether the defendants interviewed would have engaged defence counsel in an unbundled fashion; while a number of them appeared interested in such an option, more were uncertain or stated that they could not afford private counsel, period!

As this research project was concluding, it was announced by NSLA that a full duty counsel system was being implemented, under federal funding for two years, for non-custody cases in the provincial criminal courts of Halifax and Dartmouth. In light of the above remarks, it can be expected that it will be well-received by CJS officials of all stripes and by the defendants. It is also, seemingly, a politically astute initiative since it can be restricted to metropolitan Halifax without causing discontent elsewhere in the province and also, of course, it avoids the perhaps more costly alternative of changing NSLA eligibility which, presumably, would have to be province-wide. It also puts Nova Scotia into the same ballpark as the leading provinces in ensuring access to justice for ordinary citizens, and, as well, in perhaps streamlining court processes in criminal court.

At the same time, the evidence from Hamilton and Toronto is that even a full duty counsel system is not a magic solution. There may still be concerns about the quality of the access to justice provided, perhaps unintentional pressures for guilty pleas driven by such implicit forces as the desire to "make the system run", and uncertain outcomes regarding the continued prevalence of unrepresented defendants at plea or beyond (even in a full duty counsel system, typically the duty counsel does not follow the file beyond plea and sometimes not to plea for non-custody cases) and for the business of the private Bar. Concerning the latter,

knowledgeable informants in this project were uncertain about the effects of such a duty counsel system since, on the one hand, clearly the system could be and would be used by people who otherwise could afford private counsel, while, on the other hand, the intervention of the duty counsel could lead to defendants seeking out (perhaps encouraged by the duty counsel) private counsel for the rest of, or even aspects of (unbundling), their case. Those respondents who offered an opinion were inclined, as this author is, to think that it would reduce business. There is, in the social welfare field, a principle called Director's Law, which essentially states that welfare-type program, save direct cash transfers, get utilized more by the well-off than by the poor. Even in the face of intentions to prioritize, Director's law is hard to overcome; accordingly, some reasonably, well-off defendants, faced with the minor charges, could be expected to take advantage of the free duty counsel advice rather than pay for private counsel. On the other hand, if the duty counsel intervention encouraged subsequent use of counsel, that of course would increase business opportunities for the private Bar but that does not appear to have happened in Hamilton and Toronto. It is then, at the least, unclear how the new duty counsel program will impact on the defendants and on the private Bar (and on unbundling). While the impact for judges and crown prosecutors appears less problematically positive, it is conceivable that it could lead to more unrepresented defendants at the trial stage, but there is little evidence that this has happened in the Hamilton-Toronto area. It will be important to monitor this new initiative in order to address these concerns and uncertainties.

INTRODUCTION

THE PROBLEMATIC AND RESEARCH OBJECTIVES

While no detailed objectives were formally set forth for this project, meetings with the co-chairs of the sponsoring body ("The Administration of Justice Subcommittee of the Bar Society of Nova Scotia"), and subsequently with other subcommittee members, established that there were two major concerns to be addressed. One dealt with providing a full picture of the unrepresented litigant in provincial criminal court, highlighting the numbers and types of defendants and charges entailed, the impact of "being without legal counsel" for the court process and of course for the litigants themselves, and exploring the reasons for lack of representation and possible solutions to the perceived problem. The second concern, equally important to some subcommittee members, was the extent to which the marketing and provision of unbundled private defence counsel services might be a realistic, appropriate and effective, partial solution to the problem of unrepresented litigants. Is there a market for unbundled legal services among those not eligible for legal aid (NSLA) and not represented either by private counsel? If so, how might that market be developed, taking into account the concerns of the defendants and the criminal justice system's (CJS) role players?

There were several key premises apparently deeply-shared by virtually all subcommittee members. One was that unrepresented defendants in criminal court are, in large measure, the working poor who are without much financial wherewithal and whose alleged offence is typically minor, thereby causing them to be ineligible for legal aid, yet, arguably, unable to afford private counsel as currently delivered and costed. It was clear that the focus of the project should be on this rather mundane slice of the court activity rather than on those spheres involving special issues of representation related to more complex cases (e.g., Charter issues, "Rowbotham"). Another widely shared premise, among the judges, prosecutors and varieties of defence counsel on the subcommittee, was that no strategy or solution advanced to deal with the perceived problems of the unrepresented defendants should impact negatively on resources

currently available for legal aid; in other words, new, additional resources would have to be directed to any new initiative rather than having the latter constitute a drain on an already, presumably pressed legal aid service. Additional, though perhaps less consensus-based, articulated premises included the imperative of avoiding any undue emphasis on voluntary service by defence counsel (many of whom already provide significant pro bono services) and the desirability of having qualified legal professionals, as opposed to law students and paralegals, be the cornerstone of any new initiative. While all subcommittee members defined the problem as one of access to justice in the broadest sense, some emphasized fairness and equity issues, some stressed issues of efficiency in the court process, and some highlighted business and marketing issues.

The major concerns underlying the project were especially apt in the case of the metropolitan Halifax area criminal courts where there was a strong perception among CJS officials that the number of unrepresented defendants was significant and increasing. At the project's beginnings, there was only duty counsel available for those in custody where the task of the duty counsel (one in Halifax court a staff member of NSLA, and one in Dartmouth court on contract with NSLA) was largely, though definitely not only, focused on bail issues. There was no significant presence of court workers either, though the Coverdale organization was available to comfort and advise female defendants. Clearly, too, the concerns held by members of the Administration of Justice subcommittee, about the extent of the "unrepresented defendant" problems and the optimum solutions to these problems were echoed throughout Canada. There was much attention centred on the increasing restrictions for accessing legal aid and the increasing costs of private counsel, presumably associated with higher standards for assessing the adequacy of defence services, and the increasing complexity of the law. At the same time, there appeared to be much variation in the country on both issues so a project exploring them could be informative as well as timely. As this project was concluding, a new initiative - an extended duty counsel system serving non-custody cases and comparable to duty counsel programs in Southern Ontario - was launched under the auspices of NSLA, drawing upon special multi-year federal funding. Its implications for both major concerns highlighted above can be expected to be considerable and will be discussed in the Conclusion and Future Directions section of this report.

In sum, then, this project has been focused on contributing to an appreciation of the unrepresented defendant phenomenon in criminal court and to the examination of possible solutions including the strategy of a more formal and explicit "unbundling" of legal services. While emphasizing local data, whether that be analyzing secondary data sets or interviewing local CJS officials and unrepresented litigants, some effort has been expended to place patterns in the larger Canadian context through literature review and direct, if limited, examination of similar issues in the Toronto area.

RESEARCH STRATEGIES

There were five basic research strategies adopted for this modestly-resourced study, namely

1) a modest review of the Canadian, especially Nova Scotian, literature featuring the unrepresented litigant in criminal court and the appropriateness and marketability of a formalized system of unbundled defence counsel services for routine criminal cases there. Essentially that review is summarized in the next section on Background Considerations.

2) a brief examination of the issues of unrepresented litigants and unbundled defence counsel services in the Toronto-Hamilton area of Southern Ontario. Here, especially in Toronto where there is a significant duty counsel system in place, a number of (nine all-told) CJS officials were interviewed and there was a one-day period of observation.

3) analyses of secondary data drawing on the provincial Justice Oriented Information System (JOIS) court data. Two samples were taken, first a small sample of roughly 3500 records covering the period 1999 to 2001, initially drawn for a different research project and, secondly, a large sample of over 23,506 records specifically drawn for this project. Between 1999 and 2001, JOIS data frequently did not record the presence or absence of defence counsel but more strict guidelines were introduced in 2001/2002. The large sample of 23,506 entries dealt with the charges recorded in JOIS for 2002 and 2003. These two data sets were examined in order to develop profiles of the unrepresented defendants and to assess the implications of being unrepresented. An especial interest was to explore the rather anomalous findings in the literature

cited above, namely that unrepresented or self-represented litigants appeared to fare much better in court than suggested by the informed views of court officials.

4) in-depth, one-on-one interviews were carried out with forty-eight CJS officials - judges, crown prosecutors and defence lawyers. Most of these officials lived and worked in metropolitan Halifax but a handful were interviewed from beyond metro - the Sydney, Truro and Amherst areas - in order to get some indication whether issues of unrepresented litigants and unbundled defence counsel services were largely confined to the metropolitan area. Given the lack of detail in the project's objectives, members of the Bar Society's special subcommittee on the administration of justice were especially contacted for interviews. The interviews were open-ended, organized around themes, namely the scale and trends regarding number of unrepresented defendants, the types of charges involved, the difficulties that dealing with unrepresented persons may cause for CJS role players and the court process, the implications of being unrepresented for the defendants, possible solutions to the putative problems, and especially views concerning the feasibility and appropriateness of more explicitly offering unbundled legal services.

5) one-on-one interviews with unrepresented defendants initially identified as unrepresented through courtroom observation and then directly contacted outside the courtroom. The format followed in approaching such defendants and the themes explored in these interviews are detailed in section 5 of this report. Over 100 interviews were carried out and in approximately 20% of the cases additional follow-up interviews were conducted.

BACKGROUND CONSIDERATIONS

Significant, major social movements appear to be changing the landscape of the criminal justice system (CJS) in recent years. Aboriginal justice initiatives (e.g., the Gladue court), problem-solving courts (e.g., mental health courts, drug treatment courts), and the resurgence of the restorative justice approach, to name but a few such movements, may presage a complex, fragmented but perhaps more efficient and effective post-modern CJS. These social movements within the justice system represent, in part, broader social forces and movements that have been

aimed at a more substantive social equality as least as much as they are a product of concerns for efficiency and effectiveness. It could be argued, however, that attention may be diverted, unintentionally and inappropriately, from one of the most pressing concerns of mainstream twentieth century Justice, namely access to justice for all citizens regardless of socio-economic status, gender, race/ethnicity and other social characteristics and circumstances. There is much concern that, while funding and other resources are being provided for worthwhile special initiatives, state-provided legal assistance may be increasingly restricted to fewer needy defendants by stringent income and offence eligibility criteria. For example, frequent reference has been made of late in Nova Scotia to the high proportion of defendants appearing in court without legal aid (NSLA) or private counsel representation. It has often been noted throughout Canada that the costs of legal representation, whether in family or criminal court, have increasingly put it beyond the reach of ordinary Canadians who are ineligible for legal aid services either because of their modest incomes and assets or because their crimes are minor and criminal record non-existent or limited, thereby sharply reducing the likelihood of custodial sentences. Other concerns include the worry that limited legal aid funding may encourage low quality access and hasty, unwarranted guilty pleas.

Being unrepresented in criminal court is generally seen as a problem in "access to justice" and, sometimes, access to justice in a quite specific characterization. MacDonald (1992) has observed, in his work on legal aid in Quebec, that "legal professionals are not the indispensable agents of justice for litigants but they are for officials, their role being to legitimate the substantive results of the litigation process". He likened legal professionals to ancient oracles and priests who "control the way people talk about legal outcomes not by claiming a universal standard but by controlling the way in which people talk about legal inputs". Aside from the impact for the defendants themselves, the absence of professional defence counsel thus poses significant challenge for crown prosecutors and judges, forcing them, to some extent, to take on a more complex role, namely one of substantive justice, a role that MacDonald contends is normally simply displaced. Typically, as a consequence, then, there are re-equilibrating pressures for solutions "confirming the centrality of the system, emphasizing the need for professional legal services and more recourse to official law". According to MacDonald, "enhanced accessibility [thus] promotes monist legal justice at the expense of pluralist bureaucratic justice".

The focus is on issues of cost, delay, complexity etc and much less on the impediments of age, intellectual capacity, psychic confidence, class confidence. and socio-economic background, in the perception and formulation of a legal grievance.

Concerning these impediments, other scholars, for example, have observed that there is a major difference between powerful (e.g., professionals, business people) and powerless (e.g., the poor and the uneducated) self-represented defendants in terms of their being perceived in court as authoritative and credible. The former, according to Conley and O'Barr (1990), have a rule orientation approach while the latter more a relational approach and "organize their legal arguments around concerns that the courts are likely to treat as irrelevant". The authors argue that, when a matter enters the legal system, lawyers, if utilized, listen to the defendants' stories and decide which parts to include within the bounds of the case and they reformulate the "accounts". Whether self-represented (i.e., irrelevant stories presented by the defendant) or not (i.e., truncated, reformulated stories presented by legal counsel), then, it is understandable that the most common complaints of litigants, according to Conley and Barr, were that they were not able to fully inform about their situation and that the judge did not get to the real facts about their case.

It would appear unlikely that the system or court process itself would be subject to radical change in discourse and ambience, and it is not clear how profoundly changes could be effected which enable defendants to learn how to speak and perform like lawyers; therefore, the issue of access to justice remains essentially one of the allocation of professional legal services. Recently, however, in British Columbia for example, there has been much effort expended in "developing models for coordinated services for self-representing litigants" (Reid, Senniw and Malcomson, 2004). Citing decreased funding in legal aid, the high cost of professional services in conjunction with increasing complexity of issues, and the availability of on-line and other public legal education services, Reid et al contend that "the self-representing litigant is going to stay" and, that being the case, these persons "need explanations of both procedural and substantive law". The authors are not inclined to draw any inference from these trends that many defendants want to represent themselves (some sources such as (Thompson, Family Law Quarterly, 19.3) distinguish self-represented - vis-à-vis the unrepresented - as those content to be without defence counsel and even eager to proceed on their own). The self-represented are seen by the Reid et al

to be, essentially, people with limited choice because of their financial situation and to be overwhelmed by the unfamiliar and complex procedures of the court process; thus, the authors emphasize the development of coordinated services via "how to" publications and clinics. Interestingly, the authors also refer to "a progressive trend towards the unbundling of legal services where a lawyer performs discrete legal tasks and leaves other tasks to either the client or others". It is noted, too, that duty counsel systems, of diverse scope, and some basically voluntary, have been developing; here the authors cite one duty counsel for commenting, "there is a bit of problem with the bunch who do have the means to retain counsel and choose not to, and choose to see what they can get out of the system. But we do our best to help".

Some Bar associations have emphasized in their publications that a comprehensive solution to the "access to justice" issue involves all three themes noted above, namely "get them lawyers", "make them lawyers" and "change the system" (Brown, 2003). In that mix, duty counsel systems, unbundled defence counsel services and informed litigants, who possibly could, in effect, impact on the discourse style of the courtroom, all would play a significant part. Still, the Canadian Bar has emphasized the cruciality of greater funding and availability of legal aid, and the formal responsibility and commitment of the federal government to facilitate appropriate national standards (1972 was the start of federal/provincial cost-shared legal aid). Decrying the rise of unrepresented litigants in criminal court and the entailed implications for higher levels of convictions and wrongful conviction, as well as the impact for a person of having a record, the Canadian Bar, in a recent newsletter (CBA.ORG, 2003), noted, "legal aid is an essential feature of Canadian democracy ... our system of justice works best when able and well prepared counsel on both sides make their presentations to an impartial arbiter". Related publications (CNEWS CANADA, 2003) have called attention to the rise of self-representation, especially in family court, and cited research reporting that "fewer than 10% of Canadians can afford the cost of litigation". Thus, an emphasis has been upon the need to increase access to legal services for "middle-income" earners who do not qualify for legal aid but also cannot afford legal representation. The Canadian Bar also has contended, through its newsletters, that the theme for the future will be a client-centred approach which invites both legal and non-legal collaboration, including a mix of options such as duty counsel, supervised paralegals, legal clinics and so forth (Buckley, 2000). Reference has been made to an expanded duty counsel model (i.e., a disposition

model of duty counsel where the latter tries to dispose of as many cases as the workload permits, pre-trial) as well as to "assisted self-representation" which combines public legal information with summary advice and limited legal assistance; clearly the concept of unbundled defence counsel services would seem salient to this latter approach.

There is a significant amount of literature available on the issue of representation whether in family or criminal court and sometimes the theme, in discussions of criminal court practice at least, is connected with the concept of unbundling defence legal services. Representation (i.e., with counsel) for specific phases or issues - unbundling - has apparently become more commonplace as a result of Charter challenges, legislation concerning the proceeds of crime, and, in general, the increasing complexity of the law (e.g., *Regina v. Rowbotham et al*). Still, there does not appear to be much literature concerning the benefits and shortcomings of formalized, explicit unbundling, and how it is perceived by the public, attorneys, judges and other court officials, in respect to routine, conventional, criminal court case processing (Coughlan, 2002). The concept of unbundling does not appear to arise as often as one might have thought in the context of "the practicalities of access". Impaired driving cases for example have generated representation issues such as temporary access to duty counsel or instant legal information through 1-800 telephone service, both free of charge, (e.g., Brydges Duty Counsel Services) but there seems to be little reference in that literature to the concept of unbundling.

The above patterns are manifested in a recent comprehensive, nation-wide study of adult unrepresented accused in nine provincial criminal courts (Court Site Study, 2002). The research, at all sites, featured a sophisticated methodology of direct courtroom observation, in-depth interviews with court officials (plus a handful of unrepresented litigants) and analyses of secondary data (especially samples of "disposed cases"). The study found that, over the different court sites, the percentage of unrepresented accused at first appearance ranged from 5% to 61% and from 6% to 46% at final appearance. The unrepresented were largely described as poorly educated persons living rather disordered lives and clearly with limited financial resources, although hardly any unrepresented persons were actually interviewed. The study found that interviewed court officials, in congruence with the findings of relevant literature, identified the front-end (i.e., pre-plea) stage of the criminal justice process as of key importance. These same informants highlighted the negative impact of being unrepresented for the clients (e.g., crowns

often do not like to bargain with the unrepresented so the latter miss out on reduced or dropped charges), for the crowns and judges' roles (e.g., the complications of dealing with unrepresented defendants) and for the court process itself (e.g., taking up more court time). Interestingly, the researchers' analyses of the "disposed cases" data did not support the claims that unrepresented cases took up more court time or resulted in more court appearances for the defendants. The researchers provided a long list of "solutions" to the problem of the unrepresented or the self-represented, focusing on more generous legal aid eligibility standards, enhancement of duty counsel services, and more education/awareness programs regarding legal services for the unrepresented. There was scant mention of the idea of a more formal, explicit unbundling of defence counsel services in these typically routine criminal cases.

In one of the case studies, the Scarborough Ontario criminal court, there was a six person duty counsel team and police routinely provided a copy of disclosure to the accused at first appearance. Here there were very few unrepresented accused - the disposed case analysis indicated that only 1% of the accused were unrepresented over all appearances. This fact certainly suggests that the duty counsel system had a very high penetration rate as the highest incidence (i.e., 16%) of being unrepresented occurred at final, not first, appearance. The study otherwise reproduced the overall findings of the national-level report cited above (e.g., the court officials interviewed highlighted the negative impact for court processing, and for unrepresented defendants in terms of fewer charges dropped, high conviction rates and harsher sentences). Assault and c.c. driving offense were the major offenses noted, with the former producing the largest number of unrepresented cases and the latter offenses producing the largest proportion of unrepresented cases. The Scarborough site's disposed case analyses, as the overall national results, also was inconsistent with the informants' assessments in several key respects - the unrepresented subcategory accounted for no greater number of appearances per case and no greater time lapse between arraignment and final appearance; as well, it was actually associated with fewer guilty pleas and fewer convictions and custody sentences than the categories of cases where there was legal aid or private counsel. The researchers provided no explanation for these rather startling findings and did not employ statistical controls that might have accounted for such anomalies (e.g., controlling for the seriousness of the offence and the criminal record of the defendant). As in the national overview, in discussing solutions to the problems of

representation, the Scarborough study emphasized the need to improve and expand the regular duty counsel system, increase eligibility for legal aid and institute an "advice duty counsel" system. There was no mention whatsoever of a significant role for unbundled defence counsel services.

The provincial criminal court at Halifax was one of the nine national sites for the study of the unrepresented accused. Similar methodologies were employed here - about a score of interviews with court officials, direct courtroom observation, disposed case analysis and so forth. The Halifax study reported that the court was facing a serious backlog problem while NSLA policy has been to try to see accused persons within three weeks of arraignment. It described the additional current services for defendants (e.g., duty counsel solely for accused in custody, Coverdale services for women). Analyses of the disposed cases sample (i.e., 509 cases disposed between September 2001 and May 2002) indicated that the accused was unrepresented at all appearances in 12% of the cases. In 23% of the cases the defendant was unrepresented at final appearance. The 'unrepresented litigant' cases were reported to have "usually involved summary and minor property offenses, minor assaults, domestic violence and impaired driving". While no direct data concerning the accused were presented, the researchers reported that the unrepresented defendants were typically the working poor with limited education. The research reported similar findings to the national and Scarborough accounts noted above; for example, interviewed court officials emphasized the negative impact of lack of representation for court process delay, and greater defendant vulnerability to conviction and custody, and pointed to early pre-trial phases as where representation was most needed.

In the Halifax study, the disposed cases sample yielded quite similar results to Scarborough and other sites. Conviction rates at final appearance were similar (i.e., circa 60%) for the Halifax defendants whether unrepresented, NSLA-represented, or private counsel represented. The proportion of cases that ended in custodial sentences was much less among the unrepresented (e.g., 10% to 39% for NSLA cases and 26% for cases where there was private counsel). As in the other research, there were no effective controls for seriousness of the offence or criminal record of the defendant so perhaps the most important findings were that there were many unrepresented litigant cases both at first and final appearance and that some of these cases did result in custodial sentences. As in the other sites' studies, there was no support in the

statistical analyses for the court officials' views that "unrepresented" cases involved more appearances and took up more court time. The Halifax report essentially advanced recommendations / solutions similar to those of the other sites, namely redraw NSLA eligibility criteria (e.g., have higher income cut-off levels, include loss of livelihood as a criterion justifying NSLA), make special allowances for first-time defendants, develop an enhanced duty counsel program, have an "advice only lawyer" at court, expand diversion, and focus on the early pre-trial phases. Again, too, there was no reference to encouraging the use or marketing of unbundled defence counsel services.

Concurrent with the national study of nine provincial criminal court sites, the Nova Scotia Department of Justice launched a court study dealing with unrepresented litigants and focusing more on family court (Department of Justice, Nova Scotia, 2003). The researchers interviewed some 40 judges and, whether, in one-on-one or group sessions, roughly double that number of court staff. These latter respondents reported that unrepresented litigants did consume significant court staff resources (especially at family court), requesting both legal information and legal advice (of course, court staff are only empowered to provide information) and exhibiting much dependency with respect to issues of case preparation and rules of evidence. The court staff suggested the preparation of videos and brochures and the creation of a self-help centre at the court house (see the British Columbia project mentioned above). The judges reported a strong preference for defendants to have legal representation and suggested that, as it was, the unrepresented lacked confidence, took up undue court time, and especially (according to 92% of the interviewed judges) exhibited much lack of knowledge of the rules of evidence - this latter consensus underlines the point made above concerning the clash between everyday and legal discourse and the idea that the "stories" of the unrepresented are usually deemed to be mostly irrelevant in the court system. At the same time, many judges indicated that they do try to compensate for the disadvantages of the unrepresented litigants such that the case outcomes may not be worse than for the represented litigant.

Finally, a recent study by Coughlan (2002) for the Bar Society of Nova Scotia, specifically addressed the issue of unbundling defence counsel services for the unrepresented litigants whether in family or criminal court. The author pointed to the many possible benefits of unbundling for the clients, the court system and the Bar, and identified the importance of

educating the public with respect to the concept of engaging unbundled defence counsel services. Coughlan also emphasized the importance of getting the judges on side and certainly consulting with judges with respect to any special demonstration projects in marketing "unbundling". In the case of provincial criminal court, he suggested several possible pilot projects such as extending the current duty counsel program for custody cases to all those unrepresented on first appearance, and a pilot project where legal advice is provided in less rushed circumstances (e.g., before the accused's first scheduled court appearance); providing more comprehensive information (as in the case of the British Columbia approach discussed above), perhaps kiosk-style, was also suggested.

THE ONTARIO COMPARISON: A BRIEF EXPLORATION

In order to place the issues involving the unrepresented (or the self-represented) defendant in criminal court in some context, it was decided to briefly examine the phenomenon in the Toronto- Hamilton area. The examination was limited to interviewing six persons concerning the Toronto situation (a judge, two crown prosecutors, and three lawyers involved with delivering duty counsel) and three persons in Hamilton (a judge, a duty counsel lawyer and a criminal-law lawyer); additionally there was a one-day observation of the Toronto criminal court.. The Ontario Legal Aid Plan began in 1967 and with it came a duty counsel system where the practitioners were per diem counsel. In 1979 staff duty counsel came on the scene. The province is still mainly served by per diem duty counsel even though there has been a significant increase in staff duty counsel especially, it appears, in metropolitan Toronto but a similar trend was reported in other large urban centres. Aside from the duty counsel system, Legal Aid in this area apparently operates on much the same eligibility basis as in Nova Scotia, being usually limited to those who could be facing incarceration and who have very limited financial resources available to them. Unlike Nova Scotia, Legal Aid Ontario basically utilizes not full-time staff lawyers but private lawyers who take legal aid certificates. Typically these latter lawyers are the younger and less experienced criminal bar but, reportedly, senior members of the bar do occasionally take legal aid certificates for high profile cases, as well as for other reasons no doubt. Pro bono legal service, of course, has a long history in Ontario and great defence lawyers such as Robinette had stellar reputations in that regard. A recently retired senior Ontario prosecutor commented that in the Toronto area there are essentially two pools of criminal defence lawyers, namely pool B lawyers who depend on legal aid certificates and pool A lawyers who do not need that type of work in order to survive; it was his sense that, as lawyers in pool B increase their experience and their contacts, they move into pool A.

Legal Aid Ontario has four offices in Toronto where people can apply for legal aid through an “applications officer”, who will visit those in custody as needed. It also operates “a Brydges Hotline” on a 7/24 basis, where persons arrested can contact a lawyer via a call center managed by a private company. With respect to the duty counsel system, in the Toronto area there are staff duty counsel who are involved in both arraignment and plea court and who

reportedly have full access to disclosure in the cases under their mandate (i.e., they do not normally handle the more serious cases). Reportedly, the duty counsel is provided with the Crown's intentions in the case at hand so there can be a full assessment of disclosure and prosecution views. This pattern is especially true for non-custody cases because there the time lapse between arrest and arraignment facilitates the completion of police reports and crown review. In the main courthouse in Toronto there are usually 'inside' and 'outside' crowns available to handle the various discussions that go on with duty counsel. The staff duty counsel, all respondents agreed, tend to be relatively young and low-paid (the basic pay is \$57,000. per year) and face a pressure-cooker work milieu, with the result that there is much reported turnover, whether going into exclusively private practice or being recruited into the crown prosecutor role. Certainly the limited observation of the duty counsel in action at the main Toronto courthouse witnessed a very demanding role - there was continual person and telephone interruptions while in the office, lunch usually taken at the desks with an hectic atmosphere outside the court, and then a revolving door in court where usually the duty counsel held hurried consultations with defendants and frequently sought an adjournment. The volume of traffic was considerable and the duty counsel lawyers were offering their services and explanation of issues to all defendants. At plea court the duty counsel shared the spotlight with private counsel (i.e., about a fifty-fifty split in terms of types of counsel present) but their clients appeared more likely to be economically challenged and to require interpreters.

In Toronto the duty counsel system operates in six courts five days a week and there are two bail courts also open on the weekends. The volume of cases reportedly has been so great that access to a definitive bail hearing stretches well beyond the desired (mandated?) 24 hours to as much as twelve days*. Duty counsel are always available and offer their services to anyone regardless of their financial status though defendants can opt for their own counsel and duty counsel may indeed encourage persons to use private lawyers in order to lessen their considerable workload. Full bail hearings are offered regardless of income. Once released, persons may apply for legal aid and face the eligibility rules noted above. In non-custody cases, the duty counsel often approaches defendants without counsel, or without a note from an absentee counsel, to offer legal services. Duty counsel cannot do trials for any defendant. They can be involved in a custody defendant's guilty plea while, for anyone out of custody, the duty

counsel apparently can only give advice but cannot represent an adult on a guilty plea, though there is some flexibility allowed the duty counsel. Essentially, in non-custody cases, the defendant is referred on to legal aid (and its tough eligibility rules) or to pro bono programs offered by student law societies or encouraged to seek diversion. Duty counsel do not have a list of lawyers for unrepresented defendants to possibly contact whether for legal aid or for private counsel, There are reportedly some 5000 lawyers taking certificates under Legal Aid.. The senior legal aid official commented that “the worse you are as an offender the more likely you are to qualify for legal aid”. He also observed that the majority of routine criminal cases typically do not go “much further into the system” subsequent to their interaction with the duty counsel; rather, “they would plead guilty since they do not have legal advice”.

The senior legal aid official held that a major problem with Legal Aid is that the criteria exclude people who are likely to be very negatively affected by a conviction but not facing any jail time (e.g., impaired driving)**. He also observed that another major problem is the court delay occasioned by unrepresented defendants since they must satisfy the judge that their defence is complete and that they are not pleading guilty just to get it over with. It would appear that the duty counsel system does contribute substantially to an efficient court process (“making the system run”), in the face of a restrictive legal aid eligibility and an inadequacy of financial resources on the part of defendants, which in combination yield many unrepresented defendants. As respondents indicated, the duty counsel speed up the court process - and see this as a major role responsibility - by “assuring” the judges that the defendant have had access to a legitimate defence; additionally, they assist other, private counsel in a variety of ways, such as by relaying in court instructions from the accuseds’ lawyers. The young duty counsel indicated that the major problem for the duty counsel system is the large volume of cases to contend with.

Both the senior legal aid official and the young duty counsel considered that the number of unrepresented defendants ”is increasing everyday” and the unrepresented, by far and away, are “the working poor”. In their view, notwithstanding the great value of the duty counsel system, the unrepresented phenomenon puts much pressure on the court system and they contended that judges in particular want, as they do, more duty counsel. The supervisory crown prosecutor reported that, while unrepresented litigants are “always a problem”, there has been no noticeable increase in the numbers in recent years. This position was also taken by another

senior-level, recently retired prosecution official and by a senior judge in the main Toronto criminal courthouse. All three latter respondents held that the unrepresented are essentially persons, usually first-time offenders, charged with minor offenses, frequently impaired driving. The prosecutor, upon elaboration, noted that the unrepresented “are not really a problem since most of these cases are simple. The unrepresented do not file a factum and there are minimal front-end problems”. The judge indicated that “Legal Aid can provide ‘contributory certificates’ to secure counsel depending on the seriousness of the charge and, otherwise, the accused can opt to make monthly payments if they wish representation”. The judge added that generally the police work is fine, the defendants are guilty, “so don’t build up the costs”. Both judge and prosecutor also appreciated very much the availability of duty counsel noting that he/she discusses disclosure with the defendant and along with the other officials make sure that every appearance in court is a meaningful one. The other prosecutor, while acknowledging the assembly-line character of the case processing, commented, “It is hugely in the public interest to do it that way provided the accused has reliable information”.

The two defence lawyers, one duty counsel and the other a senior Ontario Legal Aid staff member, were lukewarm at best about the idea of unbundling. The young duty counsel indicated that she had no strong opinion on the subject and could see some advantage for those defendants with limited means but felt that people would prefer to have one counsel handle their entire case. The senior Ontario Legal Aid lawyer fretted that unbundling could lead to “prejudging a case”, and that lawyers would still be required to fully investigate so they would be uncomfortable at not being a full lawyer and conflicted regarding “lawyer responsibility”. Also, he noted that currently duty counsel cannot refer clients to specific private lawyers and that might turn into a slippery slope if an elaborate unbundling system were to come to pass.. He advocated instead a more “properly funded legal aid system” with more generous eligibility rules (e.g., higher financial thresholds, potential loss of livelihood being considered along with possibility of incarceration etc) and the building up of more staff-based programs. The senior crown prosecutor was not enthusiastic about an unbundling system, contending that it would be preferable to have in-house staff, especially “special duty counsel” to assume more elaborate defence counsel roles. The other prosecutor and the judge had deep reservations about unbundling, both referring to direct competition with duty counsel and/or potential conflict of

interest issues. Noting that “a duty counsel today can be a private guy tomorrow (“there’s big turnover and it’s a burn-out position”) and, as soon as the private Bar gets into an unbundling model, there is a conflict of interest”, the judge believed that the private Bar views the duty counsel in part as “taking money from their pockets”. She contended that the Crown may not offer a discount at an early plea and also there may not be in unbundling any incentive for a guilty plea because the private Bar “may string it out for a larger fee”. In her view, “hard decisions are often not made until the last minute, generally when everyone is looking each other in the eye”. The judge reported a preference for more duty counsel engaged in handling virtually all pre-trial work.***

In the Hamilton area there is a different system than in Toronto. Here there is a full-time “supervising duty counsel”, an employee of Legal Aid Ontario, who tends to a duty counsel panel consisting of some 75 local lawyers. In the roster the signed-up lawyers are listed alphabetically and selected on a rotating basis for approximately two duty counsel days per week at a fee of \$73 per hour. Currently at the Hamilton criminal court (Hamilton unlike Toronto does not have a separate plea court) there are three duty counsel assigned per day. No training is provided for these duty counsel and there is no specific individual contract with the province; rather, the Hamilton group constitutes an independent bar which contracts with the province. It was reported that there is a rule which states that once a duty counsel sees a client he/she cannot represent them at any further stage without the formal permission of the supervising duty counsel and even then no more than five times a year can such a request be made. Interviewees in Hamilton indicated that usually the duty counsel have limited knowledge of the defendants and “try to make the best of a bad situation” by seeing as many clients as they can in a day, “ensuring that people are not just running around through the system”, and “keeping the court process flowing”. As in Toronto, the duty counsel take cases up to and including guilty pleas but, as well, according to these informants, the duty counsel assist the court considerably by providing background information to the court and ensuring that the person appears in court. According to all the CJS persons interviewed, the duty counsel lawyers also typically have a good working relationship with the crown prosecutors.

Only one of the three Hamilton respondents, a lawyer combining duty counsel and private practice, indicated that, aside from “big case management (indictable offenses) which automatically entail legal aid eligibility, unrepresented defendants are creating a problem, arguing that their numbers continue to grow because of restrictions in Legal Aid eligibility. The criminal lawyer, on the other hand, disputed this, claiming there were few unrepresented defendants and virtually none beyond plea (“they usually all plead guilty”). He added that the unrepresented usually come from a minimum wage background and that few would be career criminals; elaborating on the latter point, he said, “the career criminal is someone who is working between crimes, who knows the system and can get legal aid; new criminals, if required to spend a few days in jail, will be coached by more seasoned criminals on how to get through the system”. The judge, unfortunately for this study, was a judge with the superior court and he had had little experience with unrepresented litigants. He did contend that in such cases the judge has special responsibility to “ensure balance”, to instruct the defendant with respect to matters such as “rules of evidence” and jury selection and, as well, to monitor the crown’s behaviour to ensure full disclosure; he noted “lay litigants must be protected” and he would not like to be faced with “a pauper’s appeal”.

At the same time, there was little enthusiasm expressed for a more extensive and formalized “unbundling” of defence counsel services. Rather the view (reportedly shared by judges, crowns and defence lawyers in the area), was that the duty counsel system should be expanded and elaborated. A veteran duty counsel lawyer in expressing his dislike for unbundling retorted “give me the ball and I’ll carry it”. Another lawyer commented also that going beyond the current duty counsel role would require a full-time position - “all duty counsel have a private practice and they just do not see having to take on a case full-time when there is no advance notice and their calendars are set so it would be best to assign full-service legal aid on an independent basis and negotiate the hours”. The private criminal lawyer was quite opposed to unbundling, referring to it as “a whoring of the system”. Here he added that guilty pleas predominate with private counsel who provide context and character references which mitigate the sentences, all this being a defence counsel role much appreciated by judges and court officials since it assists in there not being a trial. But he did contend that there should be more referrals from duty counsels to private lawyers via a list made available to all unrepresented

people. At the moment, in his view, the marketing of specific private counsel is through “criminal to criminal word-of-mouth, currently the best method for getting work”. The judge, on the other hand, while not enthusiastic, reported that he would not oppose unbundling or a limited retainer in his courtroom.

Overall then, the modest examination of unrepresented litigants and unbundling in the Toronto-Hamilton area indicated that there were quite mixed views about the extent to which unrepresented defendants constitute a serious and growing problem. Those respondents providing defence counsel were more likely to adopt that viewpoint. There was consensus that, to the extent that there are problems, these are confined basically to the less serious criminal cases and to the first time or infrequent defendants. How problematic one viewed the unrepresented defendant phenomenon seemed to center around how one felt about / considered the guilty pleas commonly made by defendants subsequent to their interaction with duty counsel, and how one sorted out for oneself the various objectives of justice. Certainly, all respondents appreciated that the duty counsel system provided valuable service to both the defendants and to the other CJS role players, and “made the system run” as one informant put it. Among all respondents there was little enthusiasm for a more extensive, formalized program of unbundled legal service in routine criminal cases; rather, they preferred dealing with any shortcomings in access to defence services by more generous governmental funding of legal aid and more elaboration of the duty counsel system in terms of more personnel and enhanced role responsibilities. Pilot projects were afoot in Brampton and Ottawa under the auspices of Legal Aid Ontario featuring a public defender model.

*Among these Toronto respondents there was much animation concerning bail practices. The senior Legal Aid lawyer noted that, while duty counsel are available to all defendants and full bail hearings are offered regardless of financial status, bail hearings may sometimes take up to twelve days. The senior Crown prosecutor agreed that bail could take up to twelve days for a host of concomitant reasons (i.e., any combination of a lawyer being occupied elsewhere, waiting for sureties, interpreter required, aboriginal status, judge-shopping and defendants’ wish to build up credits against a jail term) but that an impressive system of supports is in place (e.g., early police disclosure, a bail bond program for the homeless etc) and earlier morning hours for crown prosecutors to examine the information files. The senior judge took the position that the presumed long delay for bail was “bullshit”. She noted that if there is any delay the judge will set a date and if the accused does not have a lawyer and there are no disclosure issues, a final attempt at resolution will be made. Often, if not very usually, everything is resolved on the one day. There is however, she added, a high volume of cases and sometimes the defendants in custody do not want quick trial dates in order to build up credits; for example, if one is remanded to the notorious Don Jail then the person is credited on a 3 to 1 basis for any subsequent jail sentence (i.e., on a 30 day sentence one would serve but 15 days if one spent five days on remand at the Don).

** Interestingly, one sees in the Toronto-Hamilton area many billboard signs where an organization called XPOLICE advertises for business among those charged with driving offenses, whether moving violations (where the former police officers presumably handle the cases) or c.c. driving offenses where the organization's lawyers are engaged. The claim is made that in both types of cases the organization has a very good record in achieving non-convictions for clients.

*** The respondents in referring to unbundling were addressing routine criminal cases not special, complicated Charter defences or other voir dire interventions. Interestingly, it was reported that a major reason for criminal cases taking so much time to be resolved nowadays has been because of Charter challenges in pre-trial or voir dire motions. And, interestingly again, it was reported that these have happened much in impaired driving cases (e.g., has the defendant's constitutional right against self-incrimination been violated?).

SECONDARY DATA ANALYSES

How extensive is the unrepresented defendant phenomenon in Nova Scotia and what is the impact for the defendants of having neither legal aid nor private counsel? In this section some answers will be advanced though still only in a limited way. For example, ideally it would be useful to examine how type of representation impacts on “dropped charges”, conviction rates and sentence type (especially custodial sentences) but here analyses are restricted to conviction rates. Two data sets, both drawn from the Government of Nova Scotia’s Justice Oriented Information Statistics (JOIS), were examined in order to shed light on the Nova Scotian patterns for cases of unrepresented defendants in criminal court and to explore the issues raised above concerning the surprising findings yielded by other studies in terms of conviction rates.** The first data set was a modest-sized sample drawn for another study where all defendants had faced at least one drug charge among any other charges. The data, shown in Table One, were for the years 1999, 2000 and 2001 and the sample sizes were 3831, 2942 and 3535 respectively. Representation by legal aid (NSLA) accounted for the largest proportion of cases (averaging 37% over the three years) while representation by private counsel averaged 31%. The table shows that in each of the years the percentage of defendants without representation at final appearance ranged from 16% to 19%. In 2001 and thereafter, new JOIS policy emphasized the recording of information on “representation” and, consistent with that imperative, the proportion of instances where representation was listed as “unknown” declined to 9%. The second part of the table depicts the outcomes by representation for the single year 2001, the year for which the data in this data set were most adequate. It may be noted that, unlike in the national surveys, here those defendants without legal representation had the highest level of conviction, namely 50%, significantly higher than those defendants with NSLA (i.e., 40%) and twice as great as those represented by private counsel (i.e., 25%). Analyses of the conviction rates for 1999 and 2000 yielded the same overall comparative results though the differences among the types of representation were more modest, ranging from 50% for no legal representation to 45% for NSLA and 41% for private representation.

In order to provide greater depth of analyses, a large sample (i.e., N=23,506) was drawn from JOIS for the years 2002 and 2003. This sample was drawn without any criterion being specified and thus, more effectively than the sample discussed above, represents all charges and cases processed in provincial criminal courts. Overall, too, the JOIS records were better and more complete than in previous years. Table two and subsequent tables show the results. Table Two provides an overview of the sample, identifying by charge and by case, the age, offence, type of representation and case disposition. JOIS records are charge-based so in order to examine convictions it is clearly important also to create a case-based variable where a case is defined as constituting all charges listed for the same defendant in the same day at the same court. Such a procedure yields 11,751 cases in this sample. Age was operationalized in terms of youth (12 to 17), young adults (18-31) and other adults (32+ years of age) since it was expected that young adult defendants might differ from the older ones in terms of record and financial resources. Virtually all youth were represented, predominantly by NSLA. The literature and interviews with CJS officials had indicated that type of offence is crucial to appreciating the unrepresented litigant issue so a minimal distinction was made, differentiating among serious “person offenses”, criminal code driving offenses, and the broad category of other offenses. Disposition was distinguished by conviction versus acquittal/dismissal/withdrawn. Representation data are with reference to final appearance. Table Two indicates that 82% of the charges and 83% of the cases involved adults. Serious person and c.c. driving offenses accounted for - in fairly similar proportions - 32% of the charges and 28% of the cases. NSLA representation occurred in 51% of the charges and 44% of the cases while, surprisingly perhaps, self-representation (i.e., neither NSLA nor private counsel) surpassed private representation in both charge incidence (26% to 23%) and case incidence (35% to 21%). As might be expected given the definition of a case, and given the fact that often some charges in common multi-charge arraignments are dropped, the conviction rate for charges is significantly lower than that for cases, namely 49% to 60%. Interestingly, though not shown in the table, all the depicted variables vary by charge within a case; for example, second and fourth charges are associated with lower conviction rates (40%), fewer c.c.driving offenses (just 5%), and greater NSLA representation (i.e., 68%). In sum, then, Table Two, indicates that adults made up the bulk of defendants, that 30% of the cases involved serious person and c.c.driving offenses, that the “self-represented” accounted for more than one-

third of all cases at final appearance, that NSLA representation was more likely where defendants faced multiple charges and that in 60% of the cases the defendant was convicted.

Table Three examines the sample with respect to charges faced by adults, distinguishing between those aged 31 or under and those aged over 31 years. It can be seen, predictably, that younger adults were more likely to face serious person charges (i.e., 28% to 16%) and less likely to face c.c.driving charges (i.e., 12% to 20%). Older adults were more likely to be either self-represented (i.e., 30% to 25%) or represented by private counsel (i.e., 28% to 21%). The table also shows that, while, overall, NSLA representation was most common, a majority (i.e., 56%) of those facing c.c.driving charges were without representation. There was little overall difference in the charge data concerning disposition by type of representation but private counsel had the lowest rate of conviction (i.e., 47% to 51% for each of the alternatives). These same charge data are then analysed for the relationship between type of representation and disposition controlling for type of offence and age, the results seen in Table Four. With one exception, namely charges involving serious person offenses by young adults, those represented by private counsel have a lower conviction rate and in two of the six comparison tables the differences in levels of conviction by representation type, favoring the private counsel, are statistically significant. NSLA and self-representation are quite comparable with respect to disposition by charges.

In Table Five, the above analyses are repeated for cases as opposed to charges. This table shows a stronger, more consistent pattern for those represented by private counsel to be less likely to be convicted. Of course, usually, more than half of these defendants were indeed convicted; as noted earlier, it would be expected that conviction per cases, as defined here, would be higher than conviction rates per charges. The differences between NSLA and self-representation vary by age and offence category. Interestingly, both NSLA and private representation, especially the latter, were associated with fewer convictions even for c.c.driving cases. The highest rate of conviction by offence was for c.c.driving offenses among self-represented defendants.

As noted above, a minimal control variable in any analysis of conviction would be previous record. The JOIS data did not permit a thorough consideration of recidivism on the relationship between type of representation and conviction, which was unfortunate since a

reasonable expectation would be that the conviction rate for the unrepresented defendant may seem comparable to that of NSLA , largely because the unrepresented litigant faces fewer charges and is less likely to be a repeat offender (i.e., have more than one case). Indeed, such considerations may also account for much of the difference between private counsel and NSLA rates of conviction. The JOIS data did at least permit the creation of a useful recidivism variable, namely a distinction among those with only one case during the 2002-2003 period, those who were single repeat defendants (i.e., two cases in that time period) and those who were multiple repeat defendants (i.e., three or more cases during that period). The descriptive information for recidivism is shown in Table Six. These data indicate that young adults and males - proportionately more likely to be under NSLA representation - were more likely to be multiple repeat defendants than older adults and females.(i.e., 10% to 6% and 9% to 6% respectively). Cases involving c.c.driving offenses - where the majority of respondents as noted earlier were self-represented - were least likely to involve repeat defendants, never mind multiple repeat defendants (from 1332 “one timers” to but 18 multiple repeaters). The onus on NSLA of representing, by policy imperative, persons most likely to have significant criminal records and to receive custodial sentences is indicated very clearly in Table Six. It shows that those receiving NSLA representation accounted for 39% of the “one timers”, 51% of the single repeaters and fully 68% of the multiple repeaters. The self-represented, on the other hand, at final appearance, made up 48% of the “one timers’ but only 13% of the multiple repeaters. Even private counsel representation declined, slightly but consistently, from “one timers” to multiple repeaters (i.e., 23% to 21% to 19%). The impact for the ‘conviction by representation’ relationship is evidenced by the same table which shows that conviction rate increases with level of recidivism, going from 56% to 69%. And the reader should recall that the measure of recidivism used here is a limited one; this researcher would expect that, if the measure were based on a longer period of time, the heavy involvement of NSLA with repeat defendants would be even more striking.

Additional analyses were carried out which are not presented in table format. When cases solely involving multiple repeat defendants were selected out, those represented by private counsel had the lowest rate of conviction (i.e., 61% while NSLA and the self-represented were 70% and 68% respectively). When only “first-timers” were considered, those represented by private counsel were significantly less likely to have been convicted (i.e., 53% to 62% and 63%).

In other words, the same basic patterns as noted earlier for convictions overall, also held up when examined for different levels of recidivism. This finding would suggest that the difference between NSLA conviction /non-conviction outcomes and those of the other types of representation may be accounted for chiefly by the weighting of recidivism cases in the overall caseload. It was also found that in the cases where there was no conviction, those where there was only self-representation were most likely to have been disposed by the case/charges being withdrawn (i.e., 64% compared to 60% of such cases where there was NSLA representation and but 48% where there was private counsel involved). It is unclear what types of offenses were especially likely to lead to 'withdrawal'; it could be common assault and domestic violence cases but perhaps "withdrawal" was where that "diversion" cases are recorded. Also puzzling at this point is the finding that the "other" category of disposition (that is neither a conviction nor a pending disposition but also none of acquittal or dismissal or withdrawal), looms large in the self-represented cases but much less so among the NSLA or private counsel cases (i.e., 510 cases compared to but 75 in the NSLA caseload and 94 for private counsel. The relative high proportion of such dispositions (i.e., "withdrawal" and "other") would suggest that many of the self-represented cases were quite minor.

Overall, then, analyses of the JOIS data do not yield the same results as the national studies. These data indicate a high level of unrepresented cases at final appearance, especially for certain offenses and especially among adults aged thirty-two or older. The unrepresented litigants did not do better than the represented in terms of conviction rate. Private counsel appears to make a significant difference, compared to NSLA and self-represented categories, in reducing conviction rates. And NSLA rates of conviction may on the surface compare no better than those of the self-represented, and unfavourably vis-à-vis private counsel, at least in part because of the workload selection effects - NSLA deals more with defendants who are facing a higher number of charges per case and who have higher levels of recidivism (i.e., more significant criminal records). And recall that the above analyses were limited to a truncated definition of recidivism (i.e., only dealt with cases within a two-year time span). The self-represented cases were especially likely to involve "one timers" but even here, in for example c.c.driving, the conviction rate was greater than for NSLA or private counsel cases. Of course the

impact and benefits of representation apply to much more than simply conviction rates. As can be seen below in the section dealing with the views of the self-represented defendants, representation may provide information and reduced stress even among “veteran” defendants, not to mention other CJS role players. Among other benefits, more charges may be negotiated down or away through representation and non-custodial sentences may be greater. There is some suggestion of the former in these data but no analyses have been made concerning the latter. It is clearly conceivable that judges might compensate for the lack of representation and, accordingly, conviction and sentencing could be affected by this judicial concern for fairness; however, such an argument merits study and certainly should not be presumed as many studies of judicial decisions and defendants’ socio-economic status have shown that alleged sympathy for class-based impediments does not translate into lesser sentences for the disadvantaged.

**Data provided by the Legal Information Society of Nova Scotia was also useful. The Society provides callers with information and access to the Lawyer Referral Service whereby one can contact any of a large list of lawyers (who have signed up with the Society) for brief legal advice for a nominal amount of money. For fiscal 2001-2002 and 2002-2003 there were some 8589 and 10,297 calls respectively, and this despite the limited hours where the phone-lines are staffed.. Criminal court matters were the focus in roughly 10% of the calls in each fiscal year while family court matters accounted for 50% in each period.. The Society’s callers were frequently referred there by NSLA and private lawyers and, in turn, the Society’s callers were frequently referred to Lawyer Referral (36% in 2001-2002 and 30% in 2002-2003) and NSLA (6% and 10% in the two years). A special random sample of 100 callers in 2002 indicated that most callers were female (60%) and their calls had to do with family court matters (50%). The callers represented well the main minority groupings in Nova Scotia (4% were Blacks and 3% were Aboriginals). Two-thirds reported personal incomes of less than \$25,000 a year. Half the callers had already contacted either NSLA or a private lawyer and almost half of the one hundred callers were referred to Lawyer Referral by the Society’s staff. Overall, then, the Society’s data would suggest that many Nova Scotia are indeed seeking legal information and advice, that there is much re-routing among NSLA, Lawyer Referral and the Society, and that the majority of the callers are women, with incomes under \$25,000 seeking advice on the kinds of issues usually dealt with in family court.

Table One

JOIS Samples, Representation

Representation	1999		2000		2001	
	#	%	#	%	#	%
No Legal Rep.	663	17	482	16	666	19
NSLA	1507	39	1053	36	1316	37
Private	1144	30	831	28	1246	35
Unknown	517	13	576	20	307	9

JOIS Sample, 2001* Outcome by Representation

Outcome	Representation					
	No Legal Rep.		NSLA		Private	
	#	%	#	%	#	%
Conviction	329	50	520	40	311	25
Acq/Dism/With'd	173	27	470	35	487	39
Pending	154	23	323	25	447	36
Total	666		1313		1245	

* In 1999 and 2000 the conviction rates followed the same rank order but were much less variant, ranging from 50% for 'No Rep.' to 45% for 'NSLA,' and 41% for 'Private.'

Table Two
Descriptive Statistics, JOIS
2002, 2003

Feature	Charges*		N (Case)**	
	Number	%	Number	Percent
<i>Age</i>				
12-17	3990	17	2024	17
18-31	9996	42	4813	42
32+	9520	40	4915	41
<i>Offence</i>				
Serious-Person	4200	18	1657	14
Other (Save MV)	16107	68	8490	72
CC Driving	3199	14	1605	14
<i>Representation</i>				
NSLA	11 501	51	4839	44
Self	5756	26	3839	35
Private	5132	23	2345	21
<i>Disposition</i>				
Convicted	11 107	49	6596	60
Acq/Dism/With'd	11 542	51	4397	40

* Total # charges in data set is 23 506

** The total number of N=1 cases is 11 751. It is possible that offences and dispositions and even representation vary by charge within a case as well as by the number of case charges. Second and fourth charges are associated with lower conviction rates (e.g. 40%), fewer CC driving offences (e.g. 5%) and greater NSLS representation (e.g. 68%).

Table Three
Cross Tabulations, JOIS
2002, 2003, Charges

	Age	
Feature	18-31	31+
<i>Offence Type</i>		
Serious Person	1837 (28%)	1478 (16%)
Other	6964 (60%)	6121 (66%)
CC Driving	1195 (12%)	1921 (20%)
<i>Representation</i>		
NSLA	5007 (54%)	3896 (42%)
Self	2457 (25%)	2680 (30%)
Private	2057 (21%)	2528 (28%)

	Offence Type		
Representation	Serious Person	Other	CC Driving
NSLA	2224 (54%)	8654 (57%)	623 (20%)
Self	435 (11%)	3550 (20%)	1771 (56%)
Private	1397 (35%)	2972 (23%)	763 (24%)

	Representation		
Disposition	NSLA	Self	Private
Convicted	5800 (51%)	2697 (51%)	2392 (47%)
Acq/Dism/With'd	5567 (49%)	2520 (49%)	2628 (53%)

Table Four
Cross Tabulations, JOIS
2002, 2003 Charges
Representation and Disposition Controlling for Category of Offence and Age

Disposition	Representation					
	NSLA		Self		Private	
1. Serious-Person Offence						
18-31 Defendant*						
	#	%	#	%	#	%
Convicted	461	48	92	46	311	54
Acq/Dism/With'd	502	52	109	54	265	46
2. Property/Other						
18-31 Defendant*						
Convicted	1899	51	826	58	571	46
Acq/Dism/With'd	1836	49	590	42	660	54
3. CC Driving						
18-31 Defendant						
Convicted	128	51	369	52	108	49
Acq/Dism/With'd	121	49	336	48	110	51
4. Serious-Person Offence						
32+ Older Defendant*						
Convicted	289	48	86	46	257	40
Acq/Dism/With'd	309	52	104	54	380	60
5. Property/Other						
32+ Older Defendant						
Convicted	1374	48	592	49	612	47
Acq/Dism/With'd	1557	52	604	51	679	53
6. CC Driving						
32+ Older Defendant						
Convicted	161	52	551	52	252	47
Acq/Dism/With'd	141	48	499	48	284	53

* These results are statistically significant at less than 0.5

Table Five

**Cross Tabulations, JOIS
2002, 2003 Cases**

Representation and Disposition Controlling for Category of Offence and Age

Disposition	Representation					
	NSLA		Self		Private	
<i>7. Serious-Person Offence</i> 18-31 Defendant						
	#	%	#	%	#	%
Convicted	232	61	61	61	112	57
Acq/Dism/With'd	148	39	37	37	84	43
<i>8. Property/Other</i> 18-31 Defendant*						
Convicted	1041	68	667	67	313	57
Acq/Dism/With'd	479	32	342	33	242	43
<i>9. CC Driving</i> 18-31 Defendant						
Convicted	63	65	256	69	65	58
Acq/Dism/With'd	34	35	112	32	48	42
<i>10. Serious-Person Offence</i> 32+ Older Defendant*						
Convicted	149	62	54	60	92	49
Acq/Dism/With'd	89	38	36	40	96	51
<i>11. Property/Other</i> 32+ Older Defendant*						
Convicted	806	64	472	55	377	53
Acq/Dism/With'd	442	36	394	45	325	47
<i>12. CC Driving</i> 32+ Older Defendant*						
Convicted	86	61	387	70	161	58
Acq/Dism/With'd	55	39	171	30	113	42

* These results are statistically significant at less than 0.5

Table Six
Recidivism Analysis, JOIS

2002, 2003 Data

Feature	One Timer		Single "Repeat Offender"		Multiple Repeat Offender		Row Totals
	#	%	#	%	#	%	#
<i>Gender</i>							
Female	1524	22	167	15	114	16	1805
Male	5227	78	879	85	596	84	6702
Total	6851		1046		710		8507
<i>Offence</i>							
Serious Person Violence	821	12	163	15	131	18	1115
Other Crimes	4651	68	794	76	561	79	6006
CC Driving Offences	1332	20	93	9	18	3	1443
Total	6804		1050		710		8564
<i>Age</i>							
18-31	2653	46	453	52	324	58	3430
32+	3143	54	411	48	235	42	3789
Total	5796		864		559		7219
<i>Disposition</i>							
Convicted	3499	56	641	63	489	69	4629
A/D/W	2727	44	394	37	220	31	3341
Total	6226		1035		709		7970
<i>Counsel</i>							
NSLA	1812	39	520	51	480	68	2812
Self-Rep	2984	48	288	28	93	13	3365
Private	1438	23	224	21	132	19	1794
Total	6234		1032		705		7971

LOCAL CJS OFFICIALS: THE UNREPRESENTED AND UNBUNDLING

Some forty-eight CJS officials were interviewed concerning their views on the unrepresented defendant phenomenon and also about the value of a more extensive, formal offering of unbundled defence counsel services. Most were engaged in the metropolitan Halifax area courts but a few were employed elsewhere in the province, especially in one of Sydney, Truro and Amherst. There were eight judges, fourteen prosecutors, twenty defence counsel (equally divided between NSLA and the private sector) and six other CJS role players.

THE JUDGES

The five metro Halifax judges, though diverse in rank and experience, were all of the view that the unrepresented defendant constituted a significant and growing problem (one preferred the more qualified "possibly growing") for the Halifax criminal courts. One judge conveyed a common theme with his comment that "even though the label - unrepresented - mostly applies to minor offenses and first time offenders, the consequences can be quite meaningful". Another judge in emphasizing the seriousness of the problem contended that some unrepresented defendants could and indeed have ended up in jail. The unrepresented were depicted as largely first time offenders with minimal experience or awareness of court procedures and processes. One judge added, however, that second and third time defendants charged with minor offenses such as shoplifting were also a pool for the unrepresented. The unrepresented were seen as largely having low socio-economic status, the working poor, who were ineligible for NSLA, but, with incomes of less than \$25,000 annually, were hard-pressed to afford private counsel. All but one of the judges did however qualify that description by commenting that "not all unrepresented accuseds fit that characterization" and that there are some unrepresented defendants who might well be able to afford counsel but simply are unwilling to do so (i.e., "you can overdo the hardship point"). The judges did not see the "recreational litigant", the defendant who took it as a challenge to outfox the prosecutors and maybe even the judges, as a serious problem at least from the point of view of being frequent.

The offenses most likely to produce unrepresented defendants were seen to be impaired driving, common assault and domestic violence (on the latter, one judge commented, "they're [the partners] working it out behind closed doors").

Judges identified a host of problems that make the unrepresented phenomenon especially problematic for all parties. For one thing, they contended that there is significant variation in how judges and crowns respond to an unrepresented defendant so perhaps questions of equity arise. One judge indicated that he felt comfortable giving advice to an unrepresented defendant only if he had a police officer or similar person as a witness; otherwise he might say, pointing to some defence counsel, "See Mr. Smith over there for his advice". Another judge went further, arguing that he did not think judges should ever directly talk about the intricacies of the case with the unrepresented person, even with a policeman as witness since "anything the judge says should be in the court and for the record". The judges noted, too, that crowns and NSLA lawyers are wary of such informal interaction with the unrepresented, crowns presumably out of fear of prejudicing the case by being seen as (or interpreted by the defendants as) offering deals directly, and NSLA staff presumably because they would only be offering "generalized advice" given that disclosure has not been reviewed etc and defendants "can read what they want or need into any quick advice you might offer". In addition to role-specific issues, judges highlighted presumed problematic implications for the process itself (e.g., slows up the process) and of course for the unrepresented (e.g., fewer "deals", fear and anxiety etc).

Judges also discussed the many diverse benefits that representation yields for the court process as well as for the defendant. Certainly the judges appreciated the benefits of representation for themselves; for example several judges reported that they especially have to depend upon probation officers' pre-sentence reports for background information when there is no defence counsel to provide such accounts. One judge commented that there is much inefficiency when defendants are unrepresented since "I will have to stop and discuss the process for them". The judges saw significant benefits accruing to the defendant from having his/her counsel talk with the crown about the case; not only might some charges be dropped but also "sometimes the unrepresented defendant will otherwise continue for trivial reasons such as I could not pay the fine all at once so I pleaded not-guilty and fought it". Certainly the judges

believed that having representation provides the defendants with both superior and salient knowledge and advice which would benefit his/her case and also much psychological benefit.

There was little enthusiasm expressed by the judges concerning elaborating the unbundling of defence counsel services as a solution to the serious problems they perceived in the unrepresented phenomenon, but also no quick dismissal of that option as a partial solution. Generally, what they favoured was "upping" the involvement of NSLA either by more generous eligibility rules or by some version of a duty counsel model. One judge suggested, in addition, that perhaps there could be a modest fee charged defendants for some basic service provided at the very "front-end" of the court process. Insofar as unbundling might play a role, the judges emphasized its most beneficial role as "at the front-end, getting disclosure, discussing the case with the crown and the client". It was also noted that unbundling could involve some technical issues (e.g., liability) and that any major initiative would have to be well-communicated within the CJS (especially to the judges) and to the general public. The judges were sceptical about a solution rooted in encouraging a roster of pro bono criminal lawyers, for many reasons but especially on the grounds that there are not enough criminal lawyers in the area to staff such a roster.

Outside metropolitan Halifax the interviewed judges presented a quite different viewpoint. None held that the unrepresented defendant in criminal court was a big problem in his area. Two of the three judges in fact defined it as a non-problem, one noting that he rarely saw an unrepresented person even in family court while the other reported that the unrepresented would constitute less than 10% of the his court cases at the plea stage where the offence was such that one could face jail; as for trials, he estimated that over the past year there might have been, at most, no more than four or five instances where the defendant was unrepresented. The other judge also considered the unrepresented defendants to be few in number in his area's court but he allowed that the implications of being unrepresented could be serious for the court process as well as for the defendant. Concerning the latter, he emphasized the very negative life-style implications of a person being convicted of impaired driving (e.g., loss of licence leading to loss of employment etc). The non-metro judges contended that the chief reason for the low profile of the unrepresented in their courts was that there was almost complete coverage by NSLA (and eligibility rules were generously interpreted). The judges, not surprisingly then, also gave short

shrift to the need for marketing an 'unbundling' system as a solution to the unrepresented phenomenon in routine criminal court cases. Unbundling, beyond instances of technical issues, was considered not only unnecessary but, for two of the judges, "almost unprofessional". Still, the judges allowed that "special lawyering" may sometimes be applicable for a charter challenge, something they saw happening at the front-end of the court process. To the extent that some solutions were needed, the recommendations were that either a kiosk staffed by a paralegal be set up at the courthouse or a duty counsel system under NSLA be established across the province.

Overall, then, the judges in metro, unlike their counterparts elsewhere in the province, held that the unrepresented defendant constitutes a serious and growing problem in provincial criminal court. The problems they cited were those typically noted in the literature and in previous local research. The growth of the phenomenon was considered by most metro judges, with one judge wanting more hard evidence, to be the result of restricted access to NSLA, itself the result of many factors such as higher standards, more complex cases and perhaps more demand for NSLA services. The judges generally advanced solutions based on upping the NSLA thresholds and/or mounting a duty counsel system under NSLA auspices. While not opposed in principle to a more elaborate system of unbundled defence services, there was little enthusiasm for it, except perhaps at the "front-end" if no duty counsel program was initiated.

CROWN PROSECUTORS

Fourteen prosecutors were interviewed and this grouping exhibited much more diversity on the issues examined than either the judges or the defence counsel lawyers. The metro Halifax prosecutors were especially divided in their views on whether the unrepresented in criminal court constituted a serious and growing problem. While all the prosecutors acknowledged that their preference, and in their view, that of the judges, would be for all defendants to have representation, several indicated that they were uncertain whether the unrepresented were "a big problem". One senior prosecutor, for example, asked rhetorically, "what is wrong with a person coming into court and pleading guilty?" At the same time he was quite interested in the special cases where a defendant applied to the court for legal assistance in cases where defence

challenges fell outside the routine (e.g., Rowbotham et al). Along the same lines, a young prosecutor, contending that the unrepresented constituted neither a major nor a growing problem, allowed that "bottom-line, it would be better for the crowns and the smooth court process if lawyers were present for the unrepresented". Still another crown prosecutor, sceptical about any priority being accorded the unrepresented phenomenon, observed that self-representation was very rare beyond the plea stage and when it occurs "it is often in neighbour-neighbour disputes and when a defendant wants to make a point or try to outfox prosecutors". The most common position among the metro area prosecutors was to hold that the unrepresented phenomenon was, as one crown put it, "a significant though not huge problem"; as one young prosecutor who held this view commented. "A duty counsel is not always necessary". Two senior prosecutors took the position that the problem was major and increasing or, at least, probably increasing. One of the latter added that "the unrepresented defendant is typically different and difficult and certainly bogs down the court process".

The prosecutors identified increasingly restrictive NSLA policies as the chief reason for defendants being unrepresented in routine criminal court cases. As one reported, "it's largely because of the tough eligibility rules for NSLA and the fact that income limits have not been altered for such a long time". He went on to observe that the Charter and the increased complexity of criminal laws may be responsible for the more sophisticated "Rowbotham-type" cases but these would be a special side bar dealing with complex issues, not relevant to the conventional cases. Another senior crown expressed the same view in these words, "NSLA has been putting its foot down on eligibility and also the costs of litigation have increased". One veteran crown gave a slightly different twist, noting that "it's partly because NSLA has nowhere near the number of staff required and so has a double veto on eligibility (i.e., either above threshold income/wealth considerations or no likelihood of custody) and partly because some unsympathetic judges rush cases along to trial".

The prosecutors generally perceived the unrepresented defendants as persons faced with minor summary and hybrid charges such as domestic assault and c.c.driving offenses, and being the working poor, those whose income/assets were greater than NSLA eligibility but insufficient to avoid financial hardship if they engaged expensive private counsel. One prosecutor commented that "they are not major players, [they're] the working poor" but he also believed, as

did several other crowns, that there were some persons (some "half-crazed", some reasonable and committed) who would act on their own even if there was a duty counsel available at arraignment and if there was awareness of unbundled defence counsel services and, further, there were some (who might be labelled 'recreational litigants') who would want "to go themselves but maybe hire counsel on the side to give them advice". Still, limited financial resources were deemed to be the principal cause of people being unrepresented. A young prosecutor characterized the unrepresented pool as "the grey area of affordability, the working poor" while another, veteran crown added "there is a huge field of the working poor, maybe even some middle class people, who cannot reasonably afford legal services".

There was a widespread belief, though not unanimity, that the unrepresented defendants often act unwisely, if not "irrationally", due to ignorance and fear, thereby causing many unnecessary problems for themselves by either a premature guilty plea or needlessly prolonging the court process. For example, one senior crown reported that "most unrepresented do not have any idea of what the crown is looking at, especially in domestic violence cases, where, when they find out, they are quick to plead guilty and get it over with". Another crown reported that "if at arraignment an unrepresented person is quick to plead guilty I might, in the presence of the judge, go over and talk about alternatives such as diversion".

There was also much agreement that the unrepresented slowed down the court process (e.g., causing more adjournments) and created issues for the multiple interactions among judges, crowns and defendants. Several crowns especially highlighted problems when the unrepresented change strategies in mid-stream or have enough information to raise issues but insufficient to properly advance them. One crown commented that "sometimes they come in with statements and arguments that certainly suggest they have talked with a lawyer" while another noted that "sometimes the unrepresented defendant kind of springs on the court a desire to get a lawyer at the trial stage". One senior crown reported that such defendants require the judge to explain rules and procedures as well as complicating the crown-defendant interaction. Virtually all crowns noted that prosecutors have to be careful when dealing with unrepresented defendants. One senior crown noted that "in the past the crowns would talk with the unrepresented about the case but a flood of complaints has caused this practice to decline and crowns are now very reluctant to confer without a witness present". One veteran crown cited bitter experience for his current

caution, reporting, "The unrepresented defendants make for some awkward situations for me. I've had people call me on the phone and ask a few questions, including 'what are you looking at if I plead guilty'; then, in court, they deliberately try to thrash me! So now I only talk to a defendant in the presence of the police, sheriff's deputy or a defence counsel". Still, even on this issue, there was some variation. One young female prosecutor, for example, noted she likes to have a police officer act as a witness (and these officials do not mind so acting) to any conversations with defendants at the courthouse, and commented that "there are limits on how far you can go in safely advising". On the other hand, another young female prosecutor reported that she was not inhibited or intimidated by risks to avoid talking with the unrepresented one-on-one, without witnesses but "it would depend on the circumstances and especially if the person was not a manipulator". Several crowns also noted that their own relationship with the judge can change when there is an unrepresented defendant. One observed that, "the unrepresented sometimes get the best lawyer, the judges who typically err on the side of doing more for the defendant if she or he is unrepresented". A more senior crown expressed a similar view, noting, "Nowadays, post-Charter, the judge sometimes intervenes, overstepping even the defence counsel when there is one".

As for solutions, and "placing" an extensive formalized system of unbundled defence counsel services, virtually all crown prosecutors preferred enlarging NSLA eligibility, and putting into place under NSLA auspices, a duty counsel system for non-custody cases along the lines of that currently available for custody cases. There were reservations and qualifications expressed about unbundling even on the part of those who allowed that it could have some value in facilitating access to justice and attenuating the "unrepresented" problem. One senior crown, interviewed on several occasions, and after exposure to the Toronto duty counsel program noted above, contended that that clearly was "the way to go" in contradistinction to his earlier views of wanting a more limited duty counsel system (i.e., general advice but no assessment of disclosure) in conjunction perhaps (carried out by) with a pro bono roster of criminal defence lawyers and a well-marketed system of unbundled defence services. A young prosecutor (recently engaged in private practice) indicated that while "unbundling may be better than nothing", her experience and that of colleagues elsewhere in Canada have led her to think that unbundling in routine criminal cases is not extensive anywhere in the country for some good reasons. Among the

prosecutors raising no objections to seeing more marketing of unbundled services as a partial solution, there was some scepticism that a market existed for more elaborate unbundling than currently takes place and the view that extensive consultation would have to take place especially with the judges and, of course, the salient public at large. Several crowns offered no position whatsoever regarding the value of unbundling, preferring to simply comment that an expanded NSLA and a duty counsel system "would be great" for resolving / minimizing the problems of the unrepresented. None expressed any positive views about putting in place a pro bono roster of lawyers offering generalized advice in conjunction with the marketing of unbundled defence services, but some did cite a host of negative considerations (e.g., too few lawyers for an effective roster, potential conflict of interest etc). While the issue of whether less restrictive NSLA eligibility and/or a full duty counsel system (i.e., including disclosure assessment and conversations with the crowns) could co-exist with and positively feedback on an unbundling initiative, unfortunately, was not pursued directly in the interviews, it did appear that the prosecutors saw these more as alternatives; in other words, they perceived a kind of zero-sum situation. between these possible solutions.

Six crown prosecutors employed outside metropolitan Halifax were also interviewed. With one exception, they contended that the unrepresented defendant in criminal court constituted neither a major nor a growing problem, in their areas. The one exception reported that there were many unrepresented in minor cases in her area ("perhaps 20% of the defendants") but that the relationship and communication between defendant and crown was such that the problematic aspects of self-representation were much mitigated. None of these crown prosecutors held that unbundling was commonplace in their area or perceived its elaboration to be especially valuable in relation to the unrepresented; in other words, their view of unbundling was that, as one put it, it was "neither here nor necessary". The offenses they identified as most likely to involve the unrepresented were spousal assault and impaired driving. It was generally contended that the unrepresented problem was minor because most defendants were accepted by NSLA (the implication was that NSLA accommodated the applicants) such that people who were unrepresented were so more by choice. These crown prosecutors indicated that they have to be careful when dealing with an unrepresented defendant; several followed the common metropolitan practice of having a police officer as witness to any conversation at the courthouse.

The crowns emphasized though that there is a different relationship between defendant and crown outside the metropolitan area and that more meaningful contact takes outside the courthouse, whether in person or by telephone. One female veteran crown noted that the accused persons often come in and talk with the crowns about their case so "there is good accessibility here and we give them a good feel for our sentencing intentions". Another prosecutor, a male veteran prosecutor, said, "we all know one another so the problem of being unrepresented is less ... in metro it is harder to reach people there but here we have lots of contact".

As mentioned, unbundled defence counsel services were largely seen as irrelevant in routine minor cases and NSLA eligibility was virtually always obtained when one faced more serious charges. The crowns, if anything, reported themselves "uncomfortable" with the idea of widely marketed unbundling in conventional criminal court cases and typically raised the usual concerns (e.g., "it would lead to confusion as to who is the attorney of record"). These interviewees did think that a duty counsel system would be valuable since "it gives you someone to meaningfully communicate with" and especially so in metropolitan Halifax where there is, in their view, more anonymity and relationships are more impersonal. Another of these respondents, citing this different ambience, commented concerning a possible duty counsel program, "it is not needed here but would be good for metro Halifax ... it would free up court time, be much easier on the crowns and get the judge off the hook".

Overall, the, the prosecutors' views varied significantly but most did not think that the unrepresented phenomenon was a major and growing problem. The common position was, however, that it did generate problems for the court system and crowns and judges, as well as for the defendants themselves. The unrepresented were seen to be largely the financially pressed, ineligible for NSLA and not reasonably able to afford private counsel, though the crowns did draw attention to the diversity of characteristics among the unrepresented. The chief types of charges these defendants faced were minor assaults and c.c.driving offenses. The metro crowns were not usually opposed to the idea of unbundling but they did have their reservations about it in principle and some scepticism concerning its feasibility. In their view the key to dealing with the "unrepresented" problems and issues was to have a more generous NSLA eligibility and especially a duty counsel program. Outside metropolitan Halifax, the small sample of crowns generally did not think that the unrepresented phenomenon was especially problematic and held

that extensive marketing of unbundling was "neither here nor necessary". In their view, given the different social realities and characteristic life styles, the relationships among CJS officials and defendants were quite different in metropolitan Halifax than in their area and, thus, a duty counsel system could be very valuable in the Halifax area for all parties and the court system as a whole.

DEFENSE COUNSEL

Twenty defence counsel lawyers were interviewed about the unrepresented defendant phenomenon and about the advisability of an extensive marketing of unbundled private defence services in conventional criminal court cases. Ten of these persons were employed through NSLA, eight in metropolitan Halifax and two elsewhere in Nova Scotia. The other ten persons were private criminal counsel all engaged primarily in the Halifax area. Both groupings were largely weighted in favour of senior, experienced lawyers, well-known and well-respected in the criminal justice system.

THE NSLA RESPONDENTS

With one exception, all of the Halifax area NSLA respondents held that the unrepresented defendant was a serious problem (i.e., major and growing) for the CJS. There was also a widespread scepticism that extensive unbundling of defence services provided any effective solution to this multi-dimensional problem. A senior NSLA official in reporting that the unrepresented constituted a big problem contended that "it is the number one complaint from judges" and added. "earlier in my career it was rare to see but now it's not unusual and even in the supreme court chamber 10% to 15% of the motions that the judge has to deal with come from unrepresented [litigants]". Another senior NSLA lawyer noted the problem has increased despite the fact that he and others have stretched NSLA eligibility criteria all the time and "do not like to turn away the needy". One of his younger colleagues shared his general views on the unrepresented but disagreed with the practice of stretching of NSLA criteria, arguing that "in the long run it is counterproductive and unfair to the NSLA staff since it creates heavy workloads". Certainly the issues of equity in access to justice frequently came up as these defence counsel

advanced the "problem" premise. One noted that while custody accuseds were all able to access duty counsel, non-custody defendants could not and many people were otherwise unable to get counsel. Another NSLA staffer referred to the unrepresented as "an increasing problem" that indicates justice is becoming less accessible; he added, "at arraignment we see three legal aid lawyers and five private ones, with the former representing say sixteen people and the latter only four or five. In the USA the right to counsel seems more enshrined". The lone NSLA lawyer, who did not report the unrepresented as a major and increasing problem, referred to the duty counsel system in place for custody cases and contended, for the non-custody, that while there were a large number unrepresented at first appearance, the percentage dropped off dramatically after that as "people appreciate that they need counsel".

The NSLA staffers generally contended that the chief reasons for the large - and growing - number of unrepresented defendants were that the eligibility criteria have become increasingly restrictive (i.e., the income/wealth thresholds, pegged at 'social assistance' levels, have not been adjusted since the early 1990s and the possibility of a custody sentence must be looming for the defendant), and the demand for NSLA more and more pressing such that even widespread "stretching" by NSLA lawyers has not solved the problem. Several respondents also cited 'macro-level' factors such as the impact of the Charter, higher standards adopted by the Bar and generally more complex cases to deal with. A senior NSLA official observed that "the costs of legal services, even adjusting for inflation ... have become more expensive. In the past a lawyer might have been able to tailor the services to the client's resources but with so much oversight nowadays, rules from the Bar and so forth, you have to provide the works ... so much is required of the defence counsel that more resources - certainly for NSLA - go to fewer cases". The respondents did not highlight any changes in the size of NSLA staff complement or any especial change in lawyers' fees per se (i.e., hourly rate). The lone exception to the view that the unrepresented constituted a major and growing problem acknowledged the above macro factors but believed they were countered by movements such as restorative justice and adult diversion which, in his view, have reduced demand pressures for defence counsel.

The unrepresented defendants were deemed, most characteristically, to be the working poor. One senior NSLA lawyer observed, "there is a real hole regarding eligibility and the working poor are falling through it ... people making \$25,000. per year find private counsel too

costly but are ineligible on an income basis for legal aid". A few respondents included a significant slice of the middle class (i.e., "the lower middle class") in the population thwarted by stringent NSLA rules on the one hand and expensive private counsel on the other. One respondent noted that when he was in private practice he found it hard to say no (i.e., not provide defence services) even though "it was often hard to collect payment. People asked, 'can you give me some help?' and I tried"; he did allow that sometimes he may have been conned - "well, it's a point. People did not usually have any difficulty coming up with the money if they took your advice seriously but there are some who were and are willing to risk their liberty; but, yes, some unrepresented defendants are motivated more by ego than by economics". Only one respondent referred to the unrepresented pool as significantly constituted by "recreational litigants", persons strongly motivated to argue their own cases or, as one informant put it, "the do-it-yourself person whom you can't make accept a lawyer unless it is to be used to counter judge or crown arguments against their continuing to make arguments". The charges most frequently associated with the unrepresented were minor property crime, common assault, "minor" domestic violence, and impaired driving. There was much reference to the nature of the charges since a majority of the respondents held that the charges faced by the unrepresented can have serious negative implications for them. One respondent suggested that a minor offence could lead to short custody sentences, noting that "a second-time shoplifter would not be eligible for NSLA". Another experienced NSLA respondent commented that "some charges are minor in nature but serious formally, such as certain assault charges (e.g., assault with a weapon as a result of throwing something). With defence counsel these charges can be bargained down but without it a person could get a serious conviction. It's true that judges are pretty good at catching these but there is a real danger".

The NSLA staffers readily identified problems for the CJS and the various role players that result from the unrepresented defendant phenomenon. As noted above, they especially advanced the claim that the unrepresented, depicted as basically socio-economically disadvantaged, were being frustrated as regards access to justice, and experiencing negative outcomes as a result (e.g., charges not being reduced or dropped). One respondent noted that "a lawyer has to be involved and size things up before the case gets too far in the court process". Most interviewees held, too, that the unrepresented slowed down the court process, especially

causing more adjournments in this era of "Charter sensitivity". The problems extended to all three pivotal roles - the judge, the crown prosecutor and the NSLA lawyer. Virtually all NSLA staffers contended that judges and crowns dislike dealing with the unrepresented because it complicates their roles in the CJS. Presumably, dealing with the unrepresented draws out ambiguities in these roles. One senior NSLA lawyer commented: "crowns are most comfortable in their adversarial role and do not like to talk with a defendant without a witness". Another senior official commented, "judges have new rules too and cannot give short shrift to or intimidate the unrepresented so they have to hear them out, show patience, be helpful and so on; judges clearly prefer comprehensive legal services with appropriate procedure and discourse".

The respondents certainly believed that the unrepresented generate some frustration and job dissatisfaction for them as well; they have to refuse clients and be very careful, when approached at the court house, in responding to pleas for advice because there has been no review of disclosure and "people can read what they want or need into quick advice you might offer". Several respondents indicated that they occasionally discuss a case in very general terms with unrepresented defendants (i.e., what charges are being faced, the plea menu, the type of sentence if convicted) but are fearful of misleading the person. One veteran defence counsel noted "yes, people pester you for advice at the court house, often asking, 'are you legal aid?' presumably having the view that, if yes, they can ask for free legal advice. I often make some time available to them but in dealing with a case my comfort zone is having three bits of information, namely the 'confidential instructions to the crown' sheet, the information sheet and the victim statement report - [all of which are unavailable in these contacts]".

In discussing solutions to the problems of the unrepresented defendants, the NSLA respondents basically emphasized changing the thresholds for NSLA eligibility and instituting a duty counsel program in the metropolitan area. A duty counsel system providing full pre-plea services to non-custody cases was seen as something which, in the words of one respondent, "cuts them off at the pass, helping to streamline things and facilitate meaningful allocation of NSLA resources to where they are most needed". One NSLA lawyer stressed that such a system would require significant consultation time. Some respondents held that even a duty counsel system that stopped short of assessing disclosure could be useful and cost-effective for many

problems (e.g., defendant satisfaction and sense of justice, efficiency in the court process through dispensing information and direction).

The NSLA respondents were almost all sceptical, if not negative, about the value and feasibility of an extensively marketed system of unbundled defence counsel services. A few respondents identified value with unbundling in routine criminal cases if it took place at the 'front-end' and involved assessment of disclosure and discussions with the crown; they held, too, that there might be a market for such unbundled services and that it could be accepted by judges if properly communicated. Still, even these respondents were uncertain of the market prospects (one person commented that "even prestigious firms such as Pink's and Arnold's have to have other lines, either civil or special contracts as there is not a lot of money in criminal law") and readily identified hurdles to elaborate unbundling (e.g., the retainer?, the lawyer of record?) and, generally, they believed a duty counsel system would be preferable. A few informants considered that, as one succinctly put it, "the private Bar in haste to get a market through unbundling might weaken NSLA and drive it to a more certificate-type system". Another, a senior staff member, argued that "unbundling is a myth and would basically mean less service for the same money"; he considered that a duty counsel program for non-custody cases, along the lines of the one in Toronto, would conflict with unbundling in that its likely consequence would be a reduction in business for the criminal Bar. Another NSLA lawyer cautioned that extensive unbundling would mean that the unrepresented "would have more marbles to throw around in the courtroom and the judge might get impatient and wonder where all these ideas are coming from ... the melange of discourse might be incomprehensible and worrisome". There was no enthusiasm at all for solutions involving a roster of criminal defence lawyers offering limited pro bono services at the 'front-end' of the court process; among other things, the respondents held that there would not be enough return (i.e., future business) from the pro bono work to justify the required commitment. Other respondents contended that the combination of some pro bono activity and unbundling would never work as "well, I'd be surprised if there was much will to do that". Instituting a program of mandatory fees in order to fund 'front-end' duty counsel or other services was rejected by almost all respondents for value reasons (i.e., it would be wrong and perhaps a violation of one's constitutional rights) and for practical reasons (e.g., studies have shown that the recovery costs do not warrant such a policy). A few respondents mentioned that

improving the lawyer referral service and having more court workers available would be beneficial but none saw these as pivotal to dealing with the central problems of the unrepresented.

Two NSLA staffers, engaged outside metropolitan Halifax were also interviewed. One considered that the unrepresented persons did not constitute a major problem in her court - "they are few and are almost always by choice" - presumably because virtually everyone is accommodated by NSLA if they cannot afford private counsel. The other respondent claimed that in his area as many as 25% of the accused persons in criminal court who are denied NSLA eligibility proceed without representation; still, he hastened to add that "I cannot recall a single case where a person, refused legal aid, was subsequently jailed on the charge". Both these respondents identified domestic violence, minor property crimes and common assault ("weekend fights", said one) as offenses associated with the unrepresented defendants; they also highlighted impaired driving charges, noting that convictions here may have profound negative implications in rural and small town areas; as one said, "that's why they are litigated; it's not the fine!". The respondents also reported that crowns and judges do not like dealing with the unrepresented defendants. As for solutions to the problem of the unrepresented, neither respondent was positive about an extensive marketing of unbundled defence counsel services. They listed the usual issues (e.g., it might be confusing, who would be the attorney of record etc) and reported that the local Bar has not raised the issue and, besides, who would want to do it. They also opined that a duty counsel system for non-custody defendants would be good for the Halifax area, "even if it makes the disparity with us more pronounced".

Overall, then, the NSLA respondents in metro Halifax, held that the unrepresented constituted a major and growing problem, largely because of the combination of restrictive NSLA eligibility policies and macro-level factors which presumably have led NSLA to expend more resources on fewer cases and private counsel to become very expensive. The unrepresented defendants were seen to be the working poor, perhaps including the lower middle class, who were squeezed between NSLA ineligibility and expensive private counsel. The offenses involved were acknowledged as usually minor but sometimes the implications could be serious, quite apart from whether a person was convicted or not. For these NSLA respondents, the unrepresented phenomenon raised problems concerning equity in access to justice and caused

significant problems for judges and crowns as well as for themselves. In their suggested solutions, priority was given to changing NSLA eligibility criteria so that more defendants could access the service, and instituting a duty counsel system along lines similar to the one that exists for custody cases. There was little enthusiasm for encouraging "unbundling" as most respondents questioned its value and its feasibility.

PRIVATE CRIMINAL LAWYERS

The ten private criminal lawyers were similar to the NSLA staffers in considering that the unrepresented defendant constituted a major and increasing problem for the criminal justice system. A veteran defence counsel noted that "a crisis is brewing and the players in the criminal justice system need to acknowledge that and adjust to it". One attorney, who described himself as exclusively engaged in criminal cases, claimed that perhaps as many as 50% of the criminal court cases involve unrepresented defendants. Another lawyer, who described the problem as "serious and getting worse", held that "a lot of [unrepresented defendants] plead guilty when they shouldn't" and judges and crowns vary considerably in how they respond to the unrepresented, "even though they are pretty fair in such cases". A Bar administrator expressed similar views and added that recently an appeal court judge had commented that the unrepresented phenomenon now constituted a crisis for the Nova Scotian justice system.

A senior Bar official's comment, that "my reigning principle is that no person should appear in court without counsel", certainly seemed to have captured a strongly-held position among the private defence counsel, a position that sharpened their sense of a crisis. Most lawyers saw the unrepresented as typically vulnerable and "clueless" (with respect to the legal issues and court processes of the case) and neither motivated to nor competent in handling their own cases; as one said, "they don't have a clue about how to proceed, what questions to raise, what words to use and so on". The respondents expressed concern about defendants' prematurely pleading guilty or "getting into trouble trying to make his way". Several respondents expressed ruefulness about unrepresented defendants needlessly ending up with a criminal record and its long-term negative correlates. One defence counsel claimed that "even for something like impaired driving as many as 25% of the accused persons could probably get acquittal if they have good

representation" and he advanced a number of strategies that often might effect acquittals in other minor cases (e.g., getting court delays helps in shoplifting where there is much turnover among the security guards who are key witnesses). In his view, there is a lot of pressure on duty counsel, and perhaps even NSLA staffers, to encourage guilty pleas "in order to keep things flowing" and the accused persons are not well-informed about the negative correlates of conviction. Another senior defence counsel was critical, too, of the position that "the unrepresented defendants are usually first time offenders of minor crime and guilty anyways so what is the big deal?" In her view, lawyers could make a difference at all stages (e.g., going for a discharge at sentencing) and even in simple cases, "the presence of a lawyer shows that the system cares while lack of representation undermines the quality of justice"; as for strategies to get people acquitted, she noted that, "well, we have a code of ethics and don't try to subvert justice but there are acceptable strategies too, especially when one realizes that people may not fully appreciate the implications of conviction; we are advocates in a broad way, not just cut and dried legalism, and sometimes too the guilt is almost accidental". Other attorneys observed that some people just want to plead guilty and get it over with "since courts can be a scary milieu so let's make sure it's not because they do not have representation".

In accounting for the "unrepresented" problem, these defence counsel reiterated the contributing factors advanced by the other CJS players summarized earlier, namely the increasingly restrictive eligibility criteria for NSLA and the increased complexity of court cases because of the more complex laws, the Charter, Bar standards and so forth which impact on NSLA resources and also make private counsel expensive. Concerning the former, the respondents pointed to the income/wealth NSLA guidelines which have not been adjusted for some thirteen years and the requirement of a highly possible custody sentence, usually acknowledging some NSLA flexibility especially where the accused is facing incarceration. Elaborating on the latter [i.e., modern complexity of law], one lawyer summed up a general view, contending that "more and more people solve problems through the court; there's more litigation. more domestic violence, more volume and cases and rules and standards have increased costs [for an adequate defence] considerably". Another respondent observed that "legal counsel is increasingly costly, out of reach for the average person but lawyers are typically not rich and lawyering is a complicated job so the fees are not out of line - they are not the problem".

The private defence lawyers identified the unrepresented defendants as mostly the working poor caught between NSLA ineligibility and costly private defence services. Most reported some experiences (though not the usual pattern) where potential clients visited their offices and then walked away because they found the retainer and projected total costs too expensive. Indeed, several lawyers indicated that they have themselves occasionally advised potential clients that, given the charge and the details of the case, it would not be a good investment or make much sense for the defendant to engage his/her services. One senior lawyer, for example, reported that in his introductory interviews he covers three issues, namely "(a) guilt and likelihood of conviction; (b) consequences of conviction; (c) cost of further lawyering", and then, commented, "in many instances there is little point of having an expensive lawyer; it makes no rational sense for say shoplifting, and on some other charges like simple breathalyzer violations, it would not matter". Few respondents held that there were many "deadbeats" (i.e., people who could afford legal services but just do not want to); instead, they argued that there was genuine hardship common among the unrepresented. Nor did the respondents believe that "recreational litigants" were common among the unrepresented; indeed, one attorney offered the view that it would be more common to find persons with mental health problems among such litigants.

The types of offenses where the unrepresented defendant was common were seen to be domestic assault and impaired driving; in the former instance, according to several respondents, "the accused may know that the victim is not going to testify" (a lot of these cases, it was argued, can be traced back to the policy of zero tolerance for domestic violence), while the latter instances, impaired driving / breathalyzer violations, can be costly to defend and do not usually elicit a jail sentence. Other types of charges, common among the unrepresented would be minor property crimes and simple drug possession cases.

As noted, the private counsel defined the unrepresented phenomenon as a crisis and problematic for all CJS role players as well as for the unrepresented. Several respondents noted how it "slows down the jammed court process and creates all kinds of problems". Compared to the other role players, however, their comments focused much more - and with more emotion - on the problems for the unrepresented defendants. In the case of the latter, as mentioned above, many contended there was a major issue of inequity in access to justice with predictable negative

implications (e.g., quick guilty pleas, needless convictions, a record). One senior lawyer noted that it was ironic that, given NSLA criteria, the people receiving legal aid may be increasingly restricted to those who are repeat offenders and steeped in the criminal subculture. Another senior lawyer, very sympathetic to the limited access provided the working poor, was also quick to point out that those who do receive legal aid are worthy of it. An argument was also made, concerning problems for the defendant, from the premise that not having counsel leads often to irrational not-guilty pleas whose implications may be as discomfiting for defendants as they are irksome for the court process; for example, one private defence lawyer commented, "A lot of people don't plead guilty because they don't know what to expect, don't know about adult diversion, don't know that they may just be facing a fine where payments can be spread out over time, don't know about conditional discharge and so on, so a lot of time is spent on court appearances and postponing to see NSLA, to see a private lawyer etc; they plead not guilty - and endure all this - out of ignorance or irrational fear".

Most respondents noted that the unrepresented defendants pose problems for judges and crowns who, in their view, vary much in how they respond to the unrepresented, and the associated ambivalences and ambiguities in their CJS roles, even while, on the whole, being quite fair in their response. Several defence counsels reported the common observation that "some crowns refuse to talk with an unrepresented accused without a witness". For crowns, they reported, the problems included "who do I talk to regarding undertakings, evidence, videotapes etc". For judges, it was held that there are obligations (here several cited a recent appeals court ruling that the judge has an obligation to raise constitutional issues, where warranted, on behalf of the defendants) to explain matters of law to the unrepresented litigant.

There was much complexity and nuance in the criminal lawyers' viewpoints on marketing unbundling as a significant, partial solution to the problems of the unrepresented. Other issues, not unrelated but marginal to the thrust of this research, frequently cropped up. One such theme dealt with the inadequacy of compensation for certificate (contract) work carried out for NSLA / Department of Justice, which at least stalled representation in some cases; negotiations over the tariffs apparently are on-going. Another such theme concerned defence counsel providing specific, not complete, defence services in complex cases where there are issues of Charter challenges, other voir dire issues, proceeds of crime side bars and the like. Half the small sample

reported that they indeed had provided such specific defence counsel services in the past and they indicated that the danger of "being locked in by the judge" (and thereby, sometimes, having to provide their own system of legal aid for non-paying clients) was worrisome. At the same time they also reported that they had been successful in establishing in these instances that they were "just working for that particular day for the client"; one lawyer noted that he used to have problems with the judges and federal prosecutors when providing specific legal services in complex drug cases but no longer, while another lawyer reported that her only negative experience occurred when she did not clearly communicate to the judge that she was only representing the client "on this matter, this day".

As for routine unbundling in more conventional criminal cases, while there was widespread acknowledgement that unbundling could be beneficial for financially pressed defendants and for the smooth operation of the justice system, many issues were raised. First, there was much uncertainty as to the business possibilities of a system of extensive unbundling in routine conventional cases where the unrepresented are mostly found. Is there a market for unbundled services which is not being tapped? A few lawyers thought yes and a few thought not while others were unsure. Clearly, most believed that there would have to be much "education" done, inside the CJS and among the public, if unbundling was to be successfully marketed. The sceptics generally took the position advanced by one seasoned criminal lawyer, namely "I have a hard time seeing the client as seeing that this is some savings. Those who understand have the resources to get legal counsel". Secondly, there was some concern about the implications for the participating lawyers (e.g., liability, professional responsibility) and their relationship with judges and crowns. Regarding the latter, one strong advocate of unbundling commented that "educating the judges and crowns about unbundling would be the number one priority, even more than worrying what the defendants and the public might say". Thirdly, there were "technical issues" raised; for example, one Bar official asked rhetorically, "can one do a credible legitimate cross-examination for \$350 without having a deep awareness of the other facets of the case". Interestingly, almost all the defence lawyers explicitly stated that they would never do cross-examinations under such circumstances (i.e., as an unbundled task). All the lawyers indicated that their preference and the most appropriate defence in conventional cases would be "to do the whole case". At the same time most reported that they had on occasion provided some

unbundled services for such conventional cases in the past, basically at the front end, dispensing legal advice, often for free, and, more rarely, appearing at sentencing on behalf of a client.

Several lawyers expressed strong reservations about offering unbundled services save in special circumstances where there are diverse, specialized complex side issues. One respondent, for example, reported that he had ethical and other issues ("it's hard to just do one part of the process not being fully involved") with unbundling and did not know of any jurisdiction where it was commonly utilized. In his view, the basic starting point for defence counsel is to get disclosure from the crown, review it and give the client an assessment of the crown's case. He could envisage participating in an unbundled services market up to this point but his preference would be for a duty counsel system, either staff or contract lawyers, as in Ontario. Another veteran defence counsel, while acknowledging some unbundling in civil/family cases ("I've often said, well, I can do this, maybe you can do that"), stated simply, "I don't unbundle in criminal cases"; subsequent discussion elicited the response that some provision of front-end legal services (review of disclosure) could be acceptable.

One of the two defence counsel who strongly championed extensive unbundling, and who reported that he had provided significant unbundled services in the past, considered that unbundling is becoming "increasingly reasonable"; in his view most obstacles could be overcome (e.g., a fixed price menu could even be developed) if there was support from the judiciary and the Bar. To work, he argued, unbundling has to become the standard practice, the norm - not a special circumstance in complex cases - and the Bar Society has to assume more leadership on the matter. Another defence counsel suggested an alternative format for "unbundling" which would see all persons charged with a criminal offence entitled to one or two hours of legal advice via a certificate enabling them to engage a lawyer of their choice; he envisaged "front-end" services largely being provided, such as review of disclosure, discussions with the crown about options etc but usually not going into court and entering a plea, and not being the lawyer of record.

Expanding NSLA eligibility and instituting a duty counsel system for non-custody cases were popular solutions to the problems of self-representation for the private defence counsel, as they were for the other CJS role players discussed above. And, like the others, the private defence stressed that this should not be done at the expense of current NSLA resources. It was

usually considered that a kiosk model (equivalent to the triage model in hospitals' emergency departments) could also have value, though the respondents had some serious reservations about such an approach, especially if it was staffed solely by a paralegal, a role seen as carrying insufficient status to have the appropriate standing with other CJS officials, and likely to confound the distinction between dispensing legal knowledge and offering legal advice. A paralegal operating in conjunction with a duty counsel was much more acceptable. Some respondents still were critical of a limited duty counsel approach which, perhaps triage style, saw a lawyer providing generalized advice without an adequate assessment of disclosure. Other defence lawyers appeared to support such a limited approach if coupled with appropriate referral activity, to either NSLA or private counsel. The respondents did not express concern about a duty counsel under NSLA auspices taking away potential business from themselves. One senior lawyer commented, "This won't affect private practitioners; people who want to retain lawyers and can, will continue to do so. They might talk to the duty counsel in the first instance but may want to have more thorough-going advice".

There was little mention made of the lawyer referral service or of court worker programs and these appeared to be conceived as valuable and 'improvable' but essentially "back-up" to the central issues of representation. A few respondents expressed reservations and some frustration about their involvement in the lawyer referral service on the grounds that, as one articulated it, "basically all you can do is interview the person in that time and barely read the disclosure; the case would have to be a very simple one to make any headway on it in the short period of time".

There was little enthusiasm for more pro bono activity. Only one respondent advanced the idea of a solution based on more pro bono activity by a roster of criminal lawyers. He argued such a strategy made economic sense too since it would likely lead to future business, even in the case at hand, and could be linked to a more extensive marketing of unbundled defence services. Most respondents were not enthused about solutions based on pro bono work by the small number of criminal lawyers practicing in Halifax. Some observed that such a system would have to be well-organized and routinized or else it would wreak havoc and sour relations between defence counsel and the judiciary. Other respondents considered that a pro bono rotation of private counsel doing limited duty counsel work could result in a conflict of interest situation or at least the appearance of one (i.e., an attorney trying to line up a client). Most respondents

indicated that they regularly do much pro bono work already and it is time for greater commitment from government. Several criminal lawyers reported that they often give an accused a half hour or so of free consultation quite independent of the lawyer referral service program. Others, in underlining this view, pointed to the challenges and stresses of being a criminal lawyer (e.g., "hard to make a living", "few lawyers opt for it as a specialty"). Indeed, one respondent, who indicated that he has largely vacated the field of criminal law, downplayed the suggestion that it might be hard to make a living because NSLA handles most cases, but commented, "It's not just the business or the money. It's the toll it takes on you to deal with these kinds of cases, the people involved, the actions and so on; it's very depressing". The private lawyers also strongly rejected the idea of a mandatory fee for all criminal court cases in order to fund new initiatives.

Overall, the private defence counsel considered that the unrepresented defendants constituted a serious problem that could be described as a crisis for the criminal justice system. They especially conceptualized the problem as one of inequity in access to justice and focused on the problems entailed for the defendants who they generally characterized as vulnerable, deserving, ordinary citizens. The latter were seen as squeezed between restrictive NSLA eligibility and the high costs of legal services. The latter factor was seen to be primarily a function of more complex laws and higher standards and not fees per se. Their views regarding the possibilities of unbundling as a solution to the unrepresented problem were varied and quite nuanced. There was a broad consensus that unbundling could be beneficial for all parties, especially at the "front-end", but many concerns and reservations were also expressed. There was much support for adopting more generous NSLA eligibility criteria and for a full duty counsel model.

OTHER CJS ROLE PLAYERS

A handful of other local persons knowledgeable about the unrepresented phenomenon and sometimes providing services to them were also interviewed. Some were staff in the Court Services Division of the Nova Scotia Department of Justice while others were engaged in

providing court worker services or managing the legal information phone line which connected callers to the lawyer referral service. In addition to their views on the unrepresented defendant issue, these informants usually provided relevant data and other source materials referred to above. They generally agreed that the unrepresented constituted a significant and increasing number in both family and criminal court. Their portrait of the unrepresented and their theory of why their numbers may be increasing were similar to the other groupings discussed above. The common position, among these respondents, was that effective solutions were challenging to advance. One respondent commented that a pro bono legal service developed in collaboration with her organization still did not convince many targeted defendants to avoid rushing into a premature guilty plea. There was scepticism too about the value of a kiosk model of providing information and direction to accused persons, and uncertainty concerning the effectiveness of unbundling (e.g., the defendants were seen as financially pressed and often having other problems). These respondents, like others, suggested more generous eligibility standards for NSLA, and were quite positive about adopting, for metropolitan Halifax, some form of a duty counsel system for non-custody cases.

THE SELF-REPRESENTED DEFENDANT

SAMPLE DESCRIPTION

To reach the targeted sample size of 100, almost 200 defendants, unrepresented or, better perhaps, self-represented, in court were contacted upon exiting the courtroom and asked to participate in the research. The project was explained to them, confidentiality and anonymity were guaranteed, and all were informed that the interviewers were not lawyers, could not provide any legal advice and indeed the questions would not focus on the specifics of their court case. The potential participants were asked for their phone numbers and a convenient time when they might be contacted. As the study progressed, access to a room at the provincial court house was obtained and a number of interviews were carried out on site with defendants for whom that was convenient. Most respondents in the sample however were reached by telephone. All defendants were also given a card identifying the project's principal investigator and how to reach his office. Roughly one in ten persons approached indicated that they were not interested in participating for one reason or another; there was no apparent pattern in the refusals. At least fifty persons who provided telephone numbers could not subsequently be reached or, if reached, kept deferring the telephone interview until the researchers dropped the matter. Most initial interviews took place at the arraignment phase but a number were conducted when the case had progressed to different phases of the court process (see table 7).

The interviews generally went quite well as almost all defendants were willing to discuss issues of representation. The questionnaire format was more of an open-ended type (i.e., an interview guide) which explored themes (see the instrument in appendix one) such as previous court experience and representation, knowledge and awareness of the court process, thoughts on how their case was proceeding, contacts with NSLA, private counsel or others, expectations concerning representation in subsequent phases of their case, and their views on what was most crucial to an adequate defence. In addition, for those defendants whose case was on-going and who provided contact information (i.e., name and phone number), an attempt was made to carry out follow-up interviews. A similar instrument, with some different themes such as their

assessment of a possible duty counsel system, was utilized here (see appendix two). Thus far, only fifteen follow-ups have been conducted, largely because of difficulties in reaching the sample participants.

Tables 7 and 8 provide information on the sample of unrepresented litigants who were interviewed. It can be seen (table 7) that multiple repeat offenders (defendants with at least two previous convictions) made up some 44% of the sample and half of these persons were young adult caucasian males between the ages of eighteen and thirty. Males accounted for three-quarters of the sample. Ethnically/racially, non-caucasians, all of whom were Afro-Canadians, constituted 15% of the defendants interviewed. Most defendants faced more than one charge but typically one offence "centred" the charges. In table 7, data are presented for three specific offenses generally associated with self-representation, namely criminal code driving offenses, domestic violence (spousal/partner/intimate assault) and simple possession of marihuana. All other criminal code offenses are included under the category, "other offenses". Table 7 also shows that three-quarters of all initial interviews occurred prior to the defendant entering a plea.

PATTERNS IN BACKGROUND CHARACTERISTICS

Since the literature and informed local opinion (i.e, the CJS officials interviews cited above) highlighted the greater frequency of self-representation / unrepresentation in certain offenses, these latter initially were differentiated then combined to contrast with conventional criminal offenses when descriptive data were analyzed. Table 8 provides an overview of this analysis. Category A, the highlighted offenses, featured more caucasian males than category B, other conventional offenses such as assault and minor property crimes. The differences by category were more pronounced however by age, post-secondary education, employment status and multiple repeat offender status. Those in category A were significantly more likely to be over thirty years of age (44% to 30%), to have had post-secondary education of some sort (48% to 25%), to be employed full-time (56% to 42%) and to be non-multiple repeat offenders (34% to 52%). Overall, then, it is readily apparent that this grouping would be less likely to access NSLA given its requirements of both possible jail time (more likely for multiple repeat offenders) and low income (more likely for those who are not employed full-time). What is less obvious is why

more of these types of defendants, who often are well-educated and employed full-time, do not seek private counsel and whether unbundled defence counsel services would be utilized by them if that option were marketed.

In addition to the overall analysis by category type, the sample data were examined for socio-economic characteristics by specific offence. Those seventeen respondents facing criminal code charges on driving matters (e.g., impaired driving, refusing breathalyzer etc) were, with one exception, all caucasian males, 55% of whom were working full-time and 50% of whom had had post-secondary (usually university) education. Their ages ranged from nineteen to forty-seven years. A third were multiple repeat offenders. Among those charged with simple possession (i.e., CDSA 4-1), 60% were working full-time and 70% were caucasian males while 50% had at least some university education; 70% were first-time defendants. The domestic violence subsample was more diverse in background characteristics. Roughly 50% had at least some post-secondary education and 60% were working full-time at that time of their interview. As in the other subsamples, those working full-time generally had low income employment (e.g., working in fast food operations) but several reported trades or managerial positions. A third of this subsample were multiple repeat offenders. The domestic violence subgroup differed primarily in that only approximately 50% were caucasian males with the others being either females or Afro-Canadians.

Among the remaining defendants interviewed, charged with different criminal code offenses (i.e., category B), usually minor and unlikely to lead to prison terms (though short-term jailing was clearly a possibility in some instances), there was much diversity. Diversity diminished as one traversed the continuum from first-time defendants to single repeat offenders to multiple repeat offenders. First-time defendants were evenly split in terms of post-secondary education or not, full-time employment or not, whether or not they were over thirty years of age, and whether they were caucasian males or not. Single repeat offenders were more likely to be under thirty of age, and without post-secondary education or full-time employment. Multiple repeat offenders made up the largest subgrouping of this category B, contributing roughly 50% of the category's sample. These multiple repeat offenders were especially likely to be young adult males under thirty years of age, poorly educated (i.e., just some 10% had any post-secondary education or training) and employed, if at all, in low wage jobs. Clearly, the multiple

repeat offenders would be the most likely to meet NSLA eligibility since they rarely had significant, legitimate financial resources and their criminal record could result in jailing even for minor offenses.

Overall, category B defendants, and especially the multiple offender subgrouping, accounted for roughly 60% of all the interviewees and fitted better the model of the NSLA client as held by most criminal justice system officials. Category A defendants, on the other hand, those charged with c.c.driving, "domestics" and simple possession offenses, fitted better the model held of the self-represented litigant, though perhaps the large proportion of such persons, who were well-educated and employed full-time, might be considered somewhat surprising. It needs to be noted however that typically their employment usually featured low-wage jobs, jobs identified in the sociology literature as secondary or marginal work world jobs.

PARTICIPANTS' THEMES

Examining the particular themes that emerged from the defendants' interviews was problematic because of the significant individual variation and even idiosyncratic responses yielded by the interviews. The strategy followed here is to present some emergent themes first by category of offence and then overall; subsequently, detailed write-ups are included, for the offenses highlighted in this study, which convey the significant variation found and which capture the viewpoints through quotations and contextual information, hopefully enabling the reader to draw their own inferences as well.

CATEGORY A

Turning first to category A offenses, the central themes that emerged were that respondents considered that they knew little about the court process, that they did not meet NSLA eligibility nor could afford private counsel, and, frequently, that they questioned the legitimacy of the charge. Among the small group of defendants charged with simple possession, most defendants reported little knowledge of the court process or justice system. There was, overall, much ambiguity concerning the criminal labelling of the act and what to expect in the way of a sentence. There was the general sense that "a lawyer was not necessary". Only one

defendant reportedly contacted NSLA; this same person reportedly also contacted a private lawyer. No one claimed innocence but virtually all saw the offence as very minor and one that was suited for diversion thereby avoiding a criminal record. This small grouping typically had some contact with the crown prosecutor, some reportedly via the mail. As noted in the detailed write-up below, diversion was the common resolution. This subgrouping did generally consider that having the option of engaging unbundled legal defence services was a good idea, that private counsel, while preferable to NSLA was too expensive, and that the key to an adequate defence was having a good lawyer; but, generally these issues were not deemed salient to their immediate case.

Among the seventeen defendants charged with c.c. driving offenses, there was more variation in responses. The majority of the persons also considered that they had little knowledge or awareness of criminal court processes. There was reportedly much more contact with NSLA and with private counsel, and dissatisfaction that they were not eligible for NSLA and found the private counsel too expensive. There were some respondents who conveyed a simple resignation - "was caught and will be fined" - and were principally interested in a quick resolution of the case. A significant minority considered that they were wrongfully charged and appeared quite frustrated that their arguments - that police acted inappropriately or that there was a technical excuse for their test results - could not be advanced by lawyers. Apart from financial and eligibility considerations, they reported that they were not encouraged by their legal contacts to fight the charges. The implications of losing one's licence and having (or adding to) a record were seen as too severe by a number of defendants but there was also an ambivalence towards engaging private counsel, partly because there was a perception (reportedly gained in several by contact with lawyers that they did undertake) that having a lawyer would make no difference, and partly because they did not want to or could not afford the expense. There was a diversity of views concerning the value of an option to secure unbundled defence counsel services but most defendants considered it a useful alternative though not salient in their own case, either because of affordability factors or because no one was offering the option. These defendants were split on whether having a lawyer was the central component of an adequate defence; not surprisingly, given that they were self-represented, a number emphasized the importance of "facts and evidence" among other factors.

Turning to the domestic violence subsample, there was, as noted above, much diversity in defendant characteristics by age, gender and socio-economic factors. Not surprisingly, then, there was considerable variation in the responses of persons charged with assault or threats vis-à-vis a spouse, partner or intimate friend. A significant minority of the defendants considered that the charge against them was not warranted and apparently expected it (better perhaps 'them' since there were usually multiple charges) to be withdrawn, either because the victim would collaborate in securing withdrawal or because of "evidence" that would be brought to light. Still, the most common pattern was for defendants to claim that they needed counsel, hoped to be eligible for NSLA and believed that they could not afford private counsel.

Among the female, domestic violence defendants, knowledge/awareness of the court process varied by whether one was a multiple repeat offender (i.e., claimed much awareness) or a first-time defendant (i.e., claimed little knowledge/awareness). All but one of the females believed that they needed counsel, even those few who hoped to have the charges dropped. One had secured NSLA and the others were hoping for NSLA eligibility. All believed that private counsel was too expensive but a couple of females did not rule out engaging a private lawyer if the need arose. Several women did report that they were on the verge of simply "pleading guilty to get it over with". Most of the women saw advantage in having the option of obtaining unbundled defence services, especially at the "front-end" with respect to disclosure analysis and discussions with the crown prosecutor. A majority held that the key to an adequate defence was having a good lawyer while others highlighted considerations such as "the truth of the situation". Several defendants, in follow-up interviews, indicated that access to a duty counsel might have been beneficial in reducing stress and enabling them to better sort out their options.

The male, domestic violence defendants were much more diverse in their views. The multiple repeat offenders were quite confident, a few even cocky, with respect to their knowledge and awareness of the court process and the criminal justice system. Other defendants in this subgrouping, especially of course those without any prior court experience, reported limited knowledge. There was, as among other groups of defendants, a common pattern whereby respondents emphasized their need for counsel, hoped for NSLA eligibility and contended that they could not afford private counsel. Several defendants, though, had already been either rejected by or accepted for NSLA. Several defendants did indicate that they were considering

private counsel despite its costs while two others appeared to be what might be called "recreational litigants", determined to represent themselves and striking a confident pose in that regard. A handful of male defendants claimed that the charges against them were not merited and could possibly be dropped for one reason or another; in one instance, thus far, that did happen. A number of the male defendants reported themselves under stress and experiencing considerable anxiety, in large measure it would appear because of the combination of not having representation, some uncertainty about how the case would evolve (e.g., whether the charge would be withdrawn) and having to abide by existing undertakings (e.g., no access to children). A few respondents reported that the stress and delay were such that they were inclined to plead guilty despite their claims of relative innocence'. Another defendant, who considered his actions wrong but dissociated himself from criminality, was eager to plead guilty and put the incident ("a heat of the moment thing" in his view) behind him. The male defendants, for the most part, appeared interested in the option of unbundled defence services whether for trial or pre-plea (disclosure analyses and discussions with the crown prosecutors) phases. Generally, they indicated the importance for an adequate defence of having a lawyer but a significant minority emphasized other considerations such as "telling the truth" or "having a good alibi". Among those completing a follow-up interview, where there was an explicit question relating to the possible value of a duty counsel system, most thought such a system would be valuable to speed things up, and see where they stood through defence-crown discussions, thereby reducing stress and anxiety; one such defendant expressed concern lest such a duty counsel system render "hasty advice".

CATEGORY B

Turning to category B defendants, those charged with any other criminal offence but c.c.driving, domestic violence and simple possession, the views were less divergent, especially beyond the first-time defendants. These latter defendants - the first time defendants - virtually all contended that their knowledge/awareness of the court process and the justice system was very limited. The majority indicated that they needed defence counsel, were applying for NSLA eligibility and could not afford private counsel. Several when interviewed had already been

rejected by NSLA and claimed to be searching for defence counsel. A handful of the first-time defendants indicated that they were inclined to plead guilty and were not actively seeking defence counsel of any kind; they appeared to be at a stage where they could be readily influenced one way or the other regarding a possible guilty plea. The first-time defendants generally appreciated the option of obtaining of unbundled defence services as it was explained to them but a few wondered if the quality of the defence would still be as good as "full-service lawyering"; it was not clear whether they connected the 'unbundling' concept to their own case at hand. Finally, most of these defendants reported that in their view the most important component of an adequate defence was having a lawyer.

There were fifteen respondents who were single repeat defendants, all charged with minor assault or low level property crimes. Most of these defendants reported having little knowledge or awareness of the court process or the justice system. At the same time, they typically indicated that their previous court case had "gone okay" and that their current case was proceeding well. More than half the sample - all those charged with common assault and several charged with theft under - contended that they should not have been charged in the first place. The majority believed that they needed defence counsel and were seeking NSLA eligibility, claiming private counsel was not affordable. A few of these defendants indicated that they were seeking counsel primarily to improve their chances of receiving a non-custodial sentence. Another few defendants had already pleaded guilty without seeking any defence counsel, presumably because they believed they were guilty and did not want to prolong the court experience. The defendants, overall, thought that the option of securing unbundled legal services made sense and was valuable but a few quickly indicated that they could not afford even specific private defence service while several others considered it necessary to engage defence counsel for the whole court process. The two defendants who were interviewed in follow-up both liked the idea of a duty counsel system, believing that it could provide the defendant an earlier, better sense of his situation.

The largest subgroup of category B was that of the multiple repeat offender. Despite the larger number, this grouping was more homogeneous than the others in social characteristics and in views and experiences. These thirty-one persons, with a few exceptions, were charged with similar offenses as the first-time and single repeat defendants (i.e., common assault and minor

property crimes). Most of these defendants considered that they had a quite good knowledge/awareness of the entire court process. Most, too, reported that they needed defence counsel, were hoping to get NSLA services and could not afford private counsel. They typically considered that having a lawyer was the most important component of an adequate defence in court. The eight female defendants here typically shared these views. They also mostly reported themselves content with the representation (usually NSLA) they had in previous court experiences and were confident of obtaining NSLA eligibility in their current case. They were positive about the option of unbundled defence services, especially the value of services at the pre-plea stage, though several indicated that they could not afford even limited private counsel services.

Male multiple repeat offenders gave quite similar responses. Among those whose case had concluded at the time of initial interview, five had pleaded guilty and one had taken responsibility and been diverted. None of these persons had obtained defence counsel of any kind. Given that they reported themselves very knowledgeable and informed about the court process, and given that they typically insisted that having a lawyer was the crucial component to an adequate defence in court, why did they not have any representation? All indicated that they could not afford private counsel and most said they did not seek NSLA eligibility basically because the charge was quite minor and not worth bothering about NSLA; only one person reported that he had been rejected for NSLA eligibility.

Among the males in the multiple repeat offender category whose cases were on-going, differences in views and attitudes were modest. The younger adults were more likely to emphasize, and sometimes brag about, their knowledge of the court process and the justice system. Still, across the board, there was the common position articulated that the defendant needed counsel, was hoping for NSLA eligibility, and could not afford private counsel. It was rare for a defendant here to indicate any contact whatsoever about his case with private lawyers. Need for counsel was acknowledged even while the defendant expressed and exuded confidence about his own knowledge and awareness of the court process; presumably based on based experience with usually NSLA representation, these defendants appreciated the adage that only a fool has himself for a lawyer. A few defendants reported, however, that they had been rejected for NSLA eligibility and would likely remain unrepresented and several others in complaining

about the delay and general slowness in accessing NSLA suggested that they might just decide to plead guilty to get things over with! These defendants appreciated the concept of unbundled defence services but only one indicated that he could afford and might utilize specific defence counsel services were they available as such. Finally, the few persons who completed a follow-up interview were positive about a possible duty counsel system, suggesting that it could speed up the court processing.

SOME OBSERVATIONS ON THE PARTICIPANT'S VIEWS

1) There were significant differences between the two categories of defendant charges, as those in category A, the highlighted offenses, were clearly less likely to engage defence counsel because of ineligibility for NSLA. While they were better educated and more often employed, they were either unable or unwilling to afford private counsel and more likely to consider that having defence counsel would make no difference.

2) Knowledge and awareness of the court process varied within and across categories A and B. Defendants in the latter category, B, reported more familiarity and knowledge of how the "system" works. Generally, reported knowledge/awareness depended more on experience with the court process than on age or educational background - young, ill-educated multiple repeat offenders in category B were most likely to claim much knowledge and awareness. Having much knowledge/awareness appeared in turn to be correlated with stressing the importance of having legal counsel for an adequate defence in court, but there were a few instances where persons identifying themselves as very knowledgeable believed also that they could best mount their own defence.

3) Across all categories and subgroupings of defendants, with the exception of those charged with simple possession of marihuana, there was a common pattern of reporting that, for the case at hand, counsel was needed, that private counsel was too expensive and that NSLA eligibility was sought. In the category A groupings of c.c. driving charges and domestic violence charges, this view of the costs of obtaining private counsel seemed to have more of a foundation in the defendants' experience, that is, it was more often based apparently on actual contact with private lawyers.

4) Generally, many of the defendants contacting NSLA had had previous, and usually positive, experiences with NSLA. This was especially true for simple and multiple repeat offenders in category B. There was little contact reported with private lawyers across the entire sample. At the same time, the view was widespread that not only was private counsel not affordable but also that it was better than NSLA representation typically, reportedly, in one or both of two ways, namely providing quicker access for the defendants and more focus on their case. A number of defendants who held these views considered that NSLA lawyers were "over-worked and under-paid".

5) There was a large proportion of defendants who challenged the legitimacy of the charges they faced. This was most true of those in category A but not uncommon among those category B persons charged with assault. These persons, again apart from those charged with simple possession, appeared to exhibit the most stress and anxiety about the progression of the case in court. A number of these persons - as well as a few who seemed just fed up with "slowness" of the process - indicated that they were inclined to "throw in the towel" and plead guilty. There was another grouping of defendants who emphasized their guilt and typically their inclination to quickly and without defence counsel resolve the matter by pleading guilty. A few defendants seemed destined to be without legal counsel primarily because of inertia, apparently just not getting around to consult with anyone. On the whole, the researchers were surprised at the significant number of defendants who projected a vulnerability to a quick plea of guilty for one reason or another.

6) The vast majority of the respondents interviewed at arraignment indicated that they had not bothered about representation, whether NSLA or private counsel, at this stage in their court involvement. This was true of both categories A and B, and held also for first-time and veteran defendants (a few of the latter indicated that they purposely delayed taking any action for personal reasons). It was rare for anyone to report that he or she had consulted with any lawyer or accessed any legal services. It was quite uncommon for anyone to report contacting the lawyer referral service (or even knowing anything about it) but a few did so, in several cases to much benefit (e.g., reportedly securing information on diversion, on lawyers' fees etc). Most defendants reported no contact with the crown prosecutors and few had accessed disclosure at the time of their interview (indeed the majority seemed unaware of what disclosure was and that

it was accessible, though courtroom observation was that sometimes disclosure was made available at court). The vast majority of the defendants indicated that they had no contact with other officials or other role players at the court house but a few females mentioned the Coverdale court worker and a few had obtained basic information from court administration staff.

7) Most defendants exhibited a very limited sense of the defence counsel's role, focusing exclusively on conviction matters and paying scant, explicit attention to issues of due process and sentencing. Thus, it was not unusual to hear a defendant report that "I am in the wrong so why should I get a lawyer" or "they got me dead to right so why should I get a lawyer". A few more experienced defendants did highlight that their concern was more on sentencing than on whether or not they would be convicted.

8) Once it was explained to them, there was a strong interest expressed among defendants in the option of engaging unbundled defence counsel services. Among specific unbundled services, most defendants identified the trial phase as especially requiring legal counsel and the plea phase as the least ("I can do that myself"); aside from these polar views, defendants emphasizing the priority of having counsel services at the pre-plea phase (i.e., disclosure analyses and discussions with the crown prosecutor) were matched in number by those emphasizing the priority of defence counsel for post-plea phases. However, the single most frequent response by defendants to the question about unbundled services was to emphasize the need to have counsel for all phases/stages save plea; among the multiple repeat offenders it was most common to contend that one needed legal counsel to be there for the entire process.

The drawback in these data concerning unbundled defence services is that many defendants did not grasp the idea of unbundling as an alternative to conventional representation (clearly too that failure relates to the inadequacy of our communication) and/or did not reflect on whether they could and would meet the expense of such representation. A number of respondents indicated that they did not believe that could afford any private services whatsoever. Several others indicated that in consultation with private lawyers they had not been offered such an option and still others questioned the interviewers about where they might find lawyers who would offer such unbundled services. In other words, then, it was not clear that respondents grasped the concept or that they perceived it as an available option or that they would use it if it was an available option.

9) Among the dozen or so defendants (thus far in this study) who were asked whether a duty counsel system (again explained by the researchers to include disclosure and discussions with the crown prosecutor) would be a valuable initiative, there was much enthusiasm for such a project. Generally, defendants considered that it would reduce stress and expedite the court process by giving the defendant a better sense of where she/he stood and what the options were. The few reservations articulated dealt with whether there would be "hasty decisions" made, and how much value it would yield for those committed to their innocence. Somewhat surprisingly, from the researchers' perspective, defendants facing domestic violence charges were also quite positive about being able to access duty counsel, for reasons similar to the ones just cited. Taking these views in conjunction with other views expressed throughout the sample, especially the not uncommon reporting that discussions with the crown provided relief to some defendants, it would seem that a duty counsel system could have a significant impact. It is unclear whether it would lead to many more and earlier guilty pleas (most probable) or whether it would encourage a higher amount of representation whether by NSLA or private counsel. As noted above, many defendants appeared quite vulnerable to pleading guilty just to get things over with, so the stance and views of the duty counsel would undoubtedly be very important.

Table 7

**Sample Description: Self Represented, Non-Custody, Provincial Criminal Court Halifax,
Multiple Repeat Offenders (MRO)* and Others**

1. Personal Characteristics	Number and Percentage
<i>(A) 18-30 Years of Age</i>	
Male Caucasian MRO	22
Other	24
Female Caucasian MRO	4
Other	6
Male Black MRO	3
Other	3
Female Black MRO	1
Other	3
Subtotal	66
<i>(B) 31+ Years of Age</i>	
Male Caucasian MRO	7
Other	13
Female Caucasian MRO	4
Other	6
Male Black MRO	3
Other	1
Female Black MRO	0
Other	1
Total	101
2. Main Charges Faced**	
CC Driving	17
Domestic Violence	17
CDSA Possession	7
Other Offences	60
3. Stages at First Interview	
Pre-Plea	76
Pre-Sentence	12
Concluded	13

* A multiple repeat offender (MRO) is someone who reported himself/herself to have appeared in court and been convicted on two or more occasions.

** Main charge faced is derived from the charges reported by the interviewee. In most cases this reporting was verified by consulting the court docket.

Table 8

**Sample Description: Self Represented, Non-Custody, Provincial Criminal Court Halifax:
Background Characteristics of Defendants by Offence Category**

Background Characteristics

Category A¹: Domestic Violence, Criminal Code Driving, Simple Possession

Caucasian ²		Males		Age > 30		Post-Secondary Education ³		Employed Full-Time ⁴		% MRO ⁵	
#	%	#	%	#	%	#	%	#	%	#	%
35	85	34	83	18	44	19	48	23	56	14	34

Category B⁶: All Other Offences

Caucasian		Males		Age > 30		Post-Secondary Education		Employed Full-Time		% MRO	
#	%	#	%	#	%	#	%	#	%	#	%
49	82	42	70	18	30	14	25	25	42	31	52

¹ The total number of defendants in this category was 41.

² All non-caucasians were Afro-Canadian.

³ Post-secondary education included university and community college.

⁴ Those not working full-time included students, the disabled and persons working part-time.

⁵ MRO refers to defendants with at least two previous convictions.

⁶ The total number of defendants in this category was 60.

DETAILED PARTICIPANTS' VIEWS: CATEGORY A

1. SIMPLE POSSESSION OF MARIHUANA

The subgrouping of the sample charged with possession of "pot" was diverse in social characteristics - five were caucasian males ranging in age from 23 to 53 years old while there was also a young female adult and a black male in his mid-thirties. In half of the six cases where educational achievement was known, the defendant had post-secondary education and four of the seven persons were employed full-time. Five persons were first time defendants and two were multiple repeat offenders. Four of the interviews occurred at final appearance where there was a variety of dispositions - two persons were diverted, one fined and, in the remaining case, the charge was dropped. None in this subgrouping was represented by NSLA or private counsel.

CONCLUDED CASES

Among those whose case was concluded, there had been virtually no contact with any CJS role player save the crown (and that, in two cases, only by letter apparently). Those with no prior court experience indicated that they knew very little about the court process (one noted, "I don't even watch Law and Order") but had been confident that they would not need counsel for such a charge. One (a thirty-six year old, disabled person with a grade eleven education) received diversion and the other (a twenty year old unemployed person with a grade twelve education) saw the charge against her dropped. In the former case, the defendant reported that he would probably have been eligible for NSLA and could even afford private counsel if needed, but added that "it's straight-forward being unrepresented; I am not going to stop smoking marijuana regardless. I'm allergic to alcohol and don't drink. This is the only thing that makes me feel good". Neither defendant had previously thought about securing unbundled legal services for specific phases of the court process but considered that in general the most important component of an adequate defence was "having a good lawyer". The two multiple repeat offenders in this subgrouping - a thirty year old black man unemployed but with a post-secondary education and an employed twenty-three year old with a high school education - both claimed to have much awareness of the court process and expected a favorable disposition. Neither considered that a

lawyer was needed for the matter at hand. One received diversion and the other apparently a small fine (this latter person emphasized that he was "caught with it"). Both these "veterans" of the court scene thought that unbundled defence services would be especially valuable in the sense that all defendants should have counsel in the trial phase at the minimum.

ON-GOING CASES

The other three defendants were interviewed at arraignment. None had legal counsel and none had previously been charged with a criminal offence. One, a twenty-three year old, employed, with a post-secondary degree and, reportedly, a father who was a lawyer, had talked with the crown prosecutor and apparently diversion was under consideration. His lawyer-father reportedly had advised him to do so and also suggested that there was no need to engage the services of private counsel for arraignment. The defendant expressed no concerns about the current case and was confidently exploring options. For him, "unbundling" was not salient in his own case but, as a generalized approach, something he found interesting and of value. In his view the key to an adequate defence was having a good lawyer. The second defendant, a 53 year old high school graduate employed as a low wage, and perhaps part-time, commissionaire, was very confident in his knowledge of the court process but uncertain "whether I need a lot of counsel here" in dealing with the charge at hand. He stated that it was likely he could get diversion (and no record) if he pleaded guilty. He was uncertain about his eligibility for NSLA but declared that he "couldn't afford a \$1000 retainer for a private lawyer". He claimed to like the idea of accessing unbundled defence counsel services though did not connect this option to his particular case. In his view, the most important component of an adequate defence was "get your facts straight". The third defendant interviewed at arraignment, a thirty-five year old labourer with "some high school education" professed to have little knowledge of the court process. He did not think he would be eligible for NSLA and was ambivalent about engaging private counsel given that if convicted, "I'm just going to get a fine ... I received a letter saying that"; on the other hand, he said he wanted to avoid a criminal record.

Follow-up: One of the above defendants whose case was unresolved - the fifty-three year old - was in fact diverted as he had hoped, with the assistance of an NSLA lawyer, and at the time of the follow-up interview, claimed to have successfully completed the diversion

conditions. He thought that the court process "was both efficient and fair". Between first appearance and the diversion, he had contacted both NSLA and private lawyers, noting "the problem of getting a lawyer was initially based on money. I couldn't afford a paid (private) lawyer but I was also making money so I wasn't sure if I would qualify for legal aid. I kind of fell in a grey area of the system". Looking back he allowed that what is important is "you have to have representation ... everybody needs representation unless I suppose you're a law student or something". As to hiring counsel in any future court involvement, he emphasized the importance of financial resources - "If I had the money, I would be more likely to hire private counsel for all parts. You really need the money. Legal aid lawyers are over-worked and under-paid". He also agreed, after the features of a Toronto-type duty counsel system were described to him, that "that probably would have been adequate for his case".

2. C.C.DRIVING CHARGES

Apart from one young black adult male, all the seventeen persons in the sample who were charged with criminal code driving offenses were caucasian males. In comparison to other groupings, they were older (i.e., 60% were more than thirty years of age) and more likely to be employed full-time (55%). Also with one exception, all faced breathalyzer or impaired driving charges.

MULTIPLE REPEAT OFFENDERS

Two forty-seven year old caucasian males, one with grade 9 education and the other grade 12, and both unemployed and multiple repeat offenders, faced similar breathalyzer-related charges. One defendant professed little knowledge about the criminal court process and felt "stonewalled" about what was happening in his case. The other claimed to have much knowledge about the court process, to have been well-represented by counsel in past cases, and thought everything was going well now ("today was good; the crown was very understanding and I want to explore the possibility of legal aid; even the police were nice - I am satisfied"). Both defendants were concerned about representation. One commented that he was not eligible for NSLA and could not afford private counsel's fees of roughly \$1500., a figure he claimed to have received from the private lawyers he had talked with. The other was apparently in a similar situation but still hoping to secure NSLA services; this grade nine educated person observed, "representation is very important. With my level of education it's absolutely necessary". Both men were interested in the unbundling concept, deeming legal services crucial for disclosure if not the complete court process. At the same time, neither saw unbundling as practical, one claiming not being able to afford any service while the other claimed no lawyer was offering unbundled services. The men differed in terms of their responses regarding what the criterion for an adequate defence was, one offering "the truth from everyone", while the other, the defendant most concerned about representation, highlighted "a lawyer who will speak for you" ("A lawyer who will speak for you. Someone who will represent you well. Some are good and some are cracker jacks. People like Joel Pink are worth it, even if they do cost \$500 an hour").

Another forty year old caucasian male, a university graduate who had "served time" on related offenses in the past, reported that he had a fairly high awareness of the court process. His

current case was concluded and he did not secure legal counsel. While claiming that the conviction could have serious implications for his career he stated, "I had to spend \$600 to find out what was going on and to go through disclosure. There was nothing that I could do to get off in this case. Given my job the key was for it to be expedient and get it over with. It would have cost \$4000 and the result would not have been different"; somewhat incongruently, this respondent then suggested "If I would have had counsel I would have been cleared. Even the prosecutor said I was barely over the limit", indicating perhaps some ambivalence on his part concerning the benefits of a costly defence in this type of case. Ineligible for NSLA, he did not think, based on initial consultation, that "expensive private lawyers" would have helped. In response to a query about "unbundling", he said that, while he appreciated the benefits of being able to purchase specific legal services (i.e., unbundling), this strategy would not have been useful in his case. Not surprisingly perhaps, in response to what he would consider most important to a good defence, he answered "facts and evidence", rather than emphasizing, as most other defendants did, having a good lawyer.

Two young (22 and 26 years of age) caucasian adults, both multiple repeat offenders with post-secondary education (one of whom was still in school while the other was employed), faced different driving charges, namely a breathalyzer offence on the one hand and 'having no insurance' on the other. Both defendants indicated that they were well aware of the court process and that, in the current case, they were concerned about their lack of representation. Neither believed that he would be eligible for NSLA and neither had secured private counsel. One man had consulted with a private lawyer and reportedly been told that he would be wasting his money if he engaged legal services since he would likely be found guilty in any event. Both defendants suggested that the most important factor in having an adequate defence in court would be having a lawyer and the quality of that representation. A third young man, an under-employed, high-school educated defendant who was also a multiple repeat offender was interviewed after he had pleaded guilty and received a fine of \$1250. He considered himself quite knowledgeable about the court process, aware of "pretty much everything". Rebuffed by NSLA ("they won't do MVA cases"), he did not want to expend his scarce resources on private counsel ("it would ruin my savings"). Still, he was apparently satisfied with the outcome of his case, commenting that "it was okay; I could have faced more serious charges"). He was uncertain of the value of

unbundled services but thought he might consider the options in the future. In his view, the most important thing in an adequate defence was a combination of appropriate self-presentation and legal strategizing - "be polite, know your case, don't show ignorance, be respectful and do good planning with the lawyer. Lots of lawyers wait until the last day or even just talk to him (i.e., the client) at the court".

REPEAT OFFENDERS

A plurality of the sample involved in driving offenses had had one previous experience in criminal court, several just as a youth. Most were young adults (i.e., under thirty years of age) but two were in their mid-forties. Both of the latter had been in court to plead guilty but in one case the tentative plea was "not accepted" and the defendant advised by the judge to consult legal counsel, which he agreed to. Neither man was particularly confident in their knowledge of the court process. One, an employed high school graduate, reported that he had spent some money on lawyer services but could not afford to spend more so he pleaded guilty ("I simply cannot afford it, don't want to tie up any more of the court's time and have put my family through enough"). The other forty year old, unemployed, had withdrawn his plea and was "checking out" NSLA. He stated, "I got caught red-handed. I was going to plead guilty but the judge would not accept my plea. He told me to get a lawyer. The problem is that they cost too much. If I had the money I would get a lawyer.. I got my tongue twisted today since I had no lawyer. I knew what I wanted to say but I couldn't seem to find the right words". He was not confident that he would be eligible for NSLA but certain that he could not afford private counsel. He liked the concept of unbundled legal services but claimed not to have the wherewithal to purchase any legal services whatsoever and added that, if he had resources, he would prefer to engage legal counsel "all the way". In his view the most important aspect of a successful defence strategy was "telling the truth".

Five young adult defendants, one a university graduate and four with high school education, faced breathalyzer/impaired driving charges and were at the plea phase. All reported having little or just vague knowledge about the court process and all expressed a wish to have some legal representation. They expected to receive a fine and possible driving suspension if convicted but there was some uncertainty; for example, the university graduate commented: "I

imagine it will be a fine. I hope it's not jail. Is it true that for a second offence you get fourteen days in jail? I don't know what I'd do with myself in jail. I'm really not a criminal". The youngest, a nineteen year old labourer, reported that he could not get NSLA and could not afford private counsel - he claimed that he had been advised via "a legal service" that private counsel would cost at least \$2000 in his case. Three other young men maintained some hope that they would be eligible for NSLA while all contended that they could not afford private counsel. Two considered that they had special arguments that could be advanced in their defence; one, for example, wanted to advance his addiction to alcohol as an attenuating factor; the other advanced a highly technical argument based on the inappropriateness of a breath test given his recent lung operation.

The nineteen year old was interested in the possibilities of securing unbundled representation, at least for disclosure, but had no idea how to proceed on it. He suggested that he would be self-represented and depend on "telling the truth" as the key to his defence. All the other defendants in this grouping expressed similar views re unbundling (i.e., good idea, would use it if affordable, at least for disclosure if not trial). And all three - perhaps with necessity driving their judgment - also focused on criteria other than having a good lawyer as the key to an adequate defence (e.g., justice, no bias, evidence, knowing the crown's position). The lone black young male in this subgrouping was interviewed post-sentence (he had received a fine). He shared the position of the others with respect to limited awareness of the court process, not being able to afford private counsel (he was unemployed at the time) and valuing the concept of unbundled defence services, especially at the front-end (i.e., a lawyer to explain what is going on and to help the defendant explore options). This was his second conviction for impaired driving and in both instances he was unrepresented, had contacted no one for defence (neither NSLA nor private counsel) and did not talk with the crown prosecutor or receive disclosure. Why not? He stated that in both cases "It was my mistake. I got caught red-handed and felt I should just go and get what I deserved". While claiming that "the case went well", he allowed that he thought he received a higher fine than some other similar defendants did.

FIRST TIME DEFENDANTS

Three well-educated caucasian men, ranging in age from twenty-four to forty-six, appeared in criminal court for the first time in their lives facing breathalyzer/impaired driving charges. One, a thirty-one year old, middle class person claimed to have a "roughly 70%" knowledge of the court process and expected a fine if found guilty. He considered having a lawyer to be essential to an adequate defence and intended to have one. At the time of interview he professed to have been taken aback when he contacted a private lawyer and was reportedly told that he would have to deposit \$2500 in a trustee account to cover possible costs. He indicated that he was "looking around", also inquiring about NSLA eligibility and would be interested in purchasing unbundled defence services if a trial were to occur. The forty-six year old, a holder of two university degrees but temporarily unemployed, considered that he had a reasonable level of awareness of the court process, that things were going "okay" so far, and that he expected a fine and licence suspension. He had been rejected for NSLA eligibility but thought he had at least obtained some good advice from that office. He was interested in the concept of unbundling and allowed it could be beneficial if affordable. He did not expect to have any representation and perhaps that fact contributed to his position that the most important factor in a good defence is "clear and concise arguments". The third defendant in this set was a twenty-four year old graduate student who professed to have little awareness of the court process and no sense of the crown's position. He was "looking around" for a lawyer but sceptical that he would meet NSLA eligibility (because of assets and a part-time job) and ambivalent about whether he could manage to afford private counsel. He felt that, in the end, he would probably just plead guilty.

Finally, a twenty-year old, seaman (Navy) with no prior court experience and self-professed little knowledge of the court process pleaded guilty to impaired driving and was awaiting sentence at the time of the interview. He did not apply for NSLA eligibility and felt that he could not afford private counsel. He claimed to have a good sense of the case and the crown's intentions with respect to sentencing. The defendant was not keen on the idea of unbundled defence services and considered "having a lawyer" central to an adequate defence. As for his current case though, he stated, "I went into court knowing I was guilty and was going to plead guilty so I felt I didn't need a lawyer".

FOLLOW-UP

The forty-seven year old multiple repeat offender referred to above, who had described his situation as "stonewalled", did secure private counsel and his case was on-going at the time of the second interview. He noted that his income and ownership of property made him ineligible for NSLA but he could not afford "a top notch private lawyer". He reported that "the charge has rendered me unemployed because I can't drive. I do construction, plumbing, electrical. I do it all. [But now} I'm still on a ninety day suspension. I am making no money now". Presumably directed to the lawyer referral service by the judge at arraignment when it was apparent he was ineligible for NSLA, he obtained a lawyer "who charges \$100 per hour and requested a \$1500. retainer ... most lawyers demand a \$3000. retainer". He reported that he was very dissatisfied with his lawyer, essentially, it appears, because the lawyer has advised him to plead guilty whereas he wanted to have the lawyer challenge/discredit the RCMP officer who charged him. He added, "the entire case is about credibility, the RCMP officer versus me. My lawyer has ruined all of my evidence. He is causing me to be found guilty". Asked about how he might deal with similar charges in the future, he raged on about his current situation - "If I had the ability to defend myself I would fire my lawyer tomorrow. If I had the money I would hire a real lawyer. If I was guilty I would plead guilty but I am innocent and I am being railroaded by the system"; still, he liked the idea of unbundled defence counsel services, at least obtaining counsel for trial, and allowed that an elaborate duty counsel system would have been extremely useful "because then I would have a chance to talk to the Crown outside of the courtroom".

3. DOMESTIC VIOLENCE

There were seventeen defendants in the sample whose charges centred around domestic violence involving a spouse/partner or friend. In over half these cases there were charges laid additional to assault. This subgrouping exhibited significant diversity in socio-demographic characteristics. Ages ranged from twenty-two to fifty-two, half the sample (for which ages were provided) being in their twenties and half over thirty years of age. Two-thirds were males. Eight had post-secondary education achievement, mostly some university, while nine had some high school (a few had graduated). Four of the seventeen were black (two men, two women). The majority (ten) of the subgrouping were employed full-time while another four (possibly five) were attending university. The grouping was diverse too in court experience; eight had no prior court involvement as defendants while three had one such experience and six were multiple repeat offenders.

FEMALE DEFENDANTS

Two of the six females were over forty years of age and both had some experience in the defendant role. One was a forty-two year old black female working full-time in the field of community services charged with uttering threats against her husband (or ex-husband, it was not clear to the interviewer). She had had one previous experience in court as a defendant and considered that "it went well". She believed that she was familiar with the court process and had no complaint against the process in this case, save that early indications were that the crown prosecutor was, according to her, emphasizing "too much" the alleged victim's disability. She felt she needed a lawyer and that while she could not afford private counsel, her low income would make her eligible for NSLA. She claimed that, despite her innocence on the charge, she would plead guilty if guaranteed that she would only get probation. She professed to be aware of the idea of securing unbundled legal services and thought it would be especially relevant for obtaining counsel at the "front-end", reviewing disclosure and consulting with the crown regarding the possible disposition. She held that the key to an adequate defence was to secure a good lawyer, who especially "does what the client asks".

Interviewed four months later, the defendant was awaiting trial after entering a plea of not guilty. She had been successful in securing NSLA and was delighted with her representation

("he is an incredible lawyer ... even came to visit me in the hospital"). Whether influenced by this current counsel relationship or alleged previous experiences, she was critical of private counsel but did allow that "it's much faster if you have a private lawyer". In response to the hypothetical question about being able to access duty counsel, she considered that it would have made a big difference - "I wouldn't have ended up in the hospital because of worrying and stress". Indeed, she added that if she ever had a similar charge in the future, she would "try to sort things out outside of court".

The other fortyish defendant was a caucasian woman, a high school drop-out on permanent disability, facing charges of violating an undertaking with respect to a domestic assault. She was a multiple repeat offender who considered herself "very very knowledgeable" about the court process. She reported that she was guilty and came to court prepared to enter such a plea and somewhat indifferent about the consequences - "Worried? Nah, Go to jail for a month. Take a break". However, the crown (court?) advised that she get a lawyer so she proceeded to make an appointment with NSLA. She had no doubt that she would meet the NSLA eligibility criteria but thought the whole thing a needless detour - "I'm guilty. There's no getting away so why not just accept the guilty plea instead of forcing me to get a lawyer for sentencing? Now I'll have to return at the end of summer and plead guilty again. Meanwhile I will get caught with my boyfriend again. What can ya do?". She did not consider unbundled services especially relevant. Still, she did allow that having a defence counsel "who believes in you" and "dressing well" were valuable components of an adequate defence.

The remaining four female defendants were all between twenty-five and thirty-two years of age and all first-time defendants. Three young caucasian females in their mid-twenties faced domestic violence charges (i.e., assault) in relation to broken relationships. One was a university student while the other two were high school graduates working full-time, one self-employed. None had any prior convictions or criminal court experience but one had had a "good outcome" in a family court case where she was represented by a lawyer. All three reported that they knew little about the court process. In two instances, the woman expressed no complaints about the experience thus far in the court process but both had high hopes that the charges would be dropped - one was involved in a private prosecution while, in the other case, the woman reported that both she and her ex-fiancé - each of whom was facing charges vis-à-vis one another - were

trying to have the charges dropped. Both these female defendants were exploring the possibility of securing NSLA, while hoping that they may not need it and also confident that they could secure defence counsel somehow if necessary. The third woman, self-employed, expressed concern about her case especially about whether she could afford private counsel in the event that she was ineligible for NSLA. All these women indicated the need for a lawyer. One woman related the need to the claim that "without a lawyer nobody talks to you; the other lawyers and judges are dismissive of your case"; she added, "I don't need a lawyer if I can explain". Two defendants saw merit in unbundling defence counsel services, especially with reference to examination of disclosure and discussions with the crown. The third defendant, the more worried one, was not enthused about unbundled services, believing that "you need a lawyer throughout". Overall, their criteria for an adequate defence emphasized appreciation of the circumstances or, as one put it, "that everyone knows the truth of the situation"; another simply stated "honesty".

A thirty-two year old black female, a graduate student working part-time, was interviewed at arraignment on domestic assault. She had no prior involvement in criminal court but reported "much" awareness about the court process and claimed to have a good sense of her probable sentence in the matter at hand. She was not happy with the way her case was proceeding ("it's been hard to obtain disclosure") and expressed frustration that she was not eligible for NSLA but could not afford private counsel (reportedly, she had obtained estimates of the costs); she commented that, "the problem with legal aid is that I have a house and assets. I have more assets than say the average person. Because of that I am denied. It doesn't seem to matter that I am doing my masters, studying, and have no income. I can't afford a lawyer and yet I am still not eligible for legal aid". In her view, her position was generalizable to the middle-class person in the defendant role. The woman expected that she would be pleading guilty - "basically I am considering taking a guilty plea for something I didn't do. I am going to have ruined a clean record just because it is too expensive to fight". She was interested in the idea of unbundled legal defence services and considered that the key to an adequate defence was "having the right lawyer".

MALE DEFENDANTS

Five of the eleven male defendants were multiple repeat offenders. The five were caucasians ranging in age from twenty-two to forty-four years of age. Their educational achievement ranged from grade three to university, and, with the exception of a university student, all were employed full-time at the time of their initial interview. These defendants were usually quite confident concerning their knowledge and awareness of the court process. For example, one young male, a twenty-two year old high school graduate working regularly in a fast food establishment, claimed to have been acquitted a few times in the past with the effective help of his NSLA lawyers. He considered that he had a good knowledge of the court process. He suggested that "the case would be thrown out" as he is innocent and a key witness for the prosecution "is not showing up in court". Nevertheless, he said that he was actively looking for a lawyer but faced a dilemma because he earned too much for NSLA eligibility ("for NSLA it's \$21,000 and under per year but I make \$23,500") but still could not afford private counsel ("I got a free consultation from a private lawyer who said it's in my best interests not to hire him as he costs too much money. I am asking around, trying to get a cheap lawyer"). He emphasized that he would want a lawyer for the trial phase "if the case goes that far".

This perspective, a combination of knowledge claims and valuing legal representation, was typical among the multiple repeat offenders. A forty-four year old male, a tradesman with a grade ten education, asked about his knowledge and awareness, confidently said, "I can get around". He too expected his case to be thrown out but stressed that he wanted a lawyer, a private lawyer if he could not get NSLA. In his view the key to an adequate defence was "witnesses if any". A thirty-nine year old self-employed, grade ten educated bricklayer reported that he had a good knowledge of the court process and that having representation was very important - "I have come before without a lawyer for pleas. It is different without a lawyer. A lawyer speaks for you. I found that I would get up there and get tongue-twisted". He was unsure of being able to get either NSLA or an affordable private lawyer with the result that apparently he was finding the current situation "very stressful". He liked the concept of securing unbundled defence services, deeming representation at trial to be particularly crucial.

Both these defendants were interviewed in a follow-up a few months later. The forty-four year old who expected the charges to be dropped was still facing charges but, having gone on medical leave ("I only receive \$400 a month"), he was confident he would be able to acquire

NSLA eligibility. He was empathic that he could not afford private counsel. The respondent was also disappointed at the slowness of the court process, noting, "I want to move on with my life. I want to be able to see my kids again. I can't do that until this is all over with". He allowed that a duty counsel system, as described to him, might have resolved some of his concerns. The other defendant - the thirty-nine year old - never obtained any representation but did have his charges withdrawn by the crown. Nevertheless, he remained outraged at the way he was treated by both police and prosecutors. According to him, he had contacted both NSLA and private counsel but in the end used neither; "I used two Readers' Digest law books and they saved me \$25,000. The Crown threw out all the charges and then apologized". He reported that the case had exacted a toll - "caused me extreme mental anguish. My nerves are shot and I can't sleep any more". Still, he saw little value in a duty counsel system and also held that in any similar future situation, "I'd still represent myself. I don't believe in paying money into the system. It's extortion".

The remaining two defendants in the multiple repeat offender category deviated slightly from the norm in one way or another. A twenty-eight year old who ran his own repair shop reported that he was not very knowledgeable about any aspect of the criminal court processing but valued representation highly - "In one of the previous cases I would have won if I had a lawyer. It makes a big difference; a lawyer knows how to present and speak for you". He was concerned about his current case but determined that he would seek private counsel (since he believed himself ineligible for NSLA) - "whatever is required [to get counsel] I'll do ... I'll sell my house and my car if I have to". The other young adult multiple repeat offender, with only elementary school education, stated, "I have been through court forty times plus; this is my home ... I know the system inside out. There is nothing you can tell me that I don't know. I could teach the lawyers a thing or two". While represented by defence counsel in most previous court cases, he was sceptical about the benefits they produced for him; "I was better off without lawyers. They just throw you in jail. Every time I had a lawyer I ended up in jail". He assessed his current case as proceeding as expected ("they always take the woman's side"). Apparently he had already determined that he would not be eligible for NSLA (claiming to have contacted and been rejected by NSLA because he was employed) and knew he could not afford private counsel ("Damn no. What do you think I am a millionaire") but he was sanguine about his prospects ("I don't think I need it ... I am facing jail time"). If he could afford unbundled legal services, he

would secure them for the post-plea phases; as it is, his defence will depend on "telling the truth", following the strategy "Smile, look straight at the judges, tell them the truth, be straight-forward and don't fuck around with them".

LIMITED EXPERIENCE MALE DEFENDANTS

Two males had one previous court experience and four were "first-timers". With respect to the former, both defendants claimed very limited knowledge of the court process, did not think the charges were merited and were very worried about the case. A twenty-six year old, unemployed caucasian male with a grade eleven education was facing charges for assault and violation of a peace bond. He had appeared in court as a defendant once as a youth and considered that he had little awareness of the court process. In his mind the current charges were "bizarre" and without merit, involving himself, his ex-girl friend and her new friend. In his first interview, after a second appearance in this case, he thought matters were proceeding fairly but very slowly, allowing too that the delay has been partly his fault for putting off seeking legal representation. He was waiting word on NSLA eligibility but did not consider private counsel because it was "too expensive". He had met several times, he said, with the crown prosecutor but had not received disclosure materials. He was uncertain about the possibilities of unbundled defence services but would definitely like to get advice pre-plea so he could "see where I stand and what my chances are". He noted several times during the interview that he would just rather go and plead guilty so he would not have to worry about the case any more, contending that "there is too much to the process and without a lawyer the whole process seems messed up"; he made these statements even while claiming that if he pleaded guilty he would get an automatic thirty day jail term. In his view, an adequate defence depends on "knowledge of the process and of your rights so having a lawyer is the only way to go". In a follow-up interview several months later, the defendant reported that he had obtained a legal aid lawyer and the case was going to trial. He expressed some concern that he has not been able to talk with the lawyer more and that he himself was not as involved with his case as he would like to be. Asked whether he would have been satisfied if he had had defence counsel (i.e., a duty counsel) assessing the disclosure and discussing options with the crown prosecutor, he replied quickly "for sure, for sure".

The other single repeat offender was a forty-four year old African immigrant, a taxi-driver with a graduate degree, facing his second incident of domestic assault. A few years earlier, when unrepresented, he received a term of probation; he commented, "I didn't know how to do it [represent myself] ... it was sad ... I didn't know what to do. I received probation for a year". He held that he had very little real knowledge about the court process or the justice system and very much needed a lawyer. He was quite worried about how the case was proceeding - "I am very, very worried. For personal reasons mainly, I am worried about choosing a lawyer. They don't understand my culture. I am very scared. I need a top gun lawyer. I don't understand why I have been charged". Uncertain about NSLA eligibility, he allowed that he would try to get a private lawyer since "I need a lawyer big time". He was interested in the idea of seeking unbundled defence counsel services and envisaged obtaining a lawyer for any post-plea phase. Noting that "knowledge" is the key to an adequate defence, he felt his defence would be adequate "if I got a good lawyer".

There were four defendants who were appearing in criminal court for the first time, two young men and two middle-age ones. The former, two young men, in their mid-twenties, currently in university and both without any prior convictions, faced charges of domestic violence. An African immigrant, in his mid-twenties and enrolled in graduate studies, strongly disputed his charge of assault. He had no prior court experience but nevertheless believed he had a "pretty good knowledge" of how the court system worked. He definitely felt that he should not need a lawyer because the charge was inappropriate and did not think he could afford private counsel; still, he indicated that he was considering that latter possibility. He did not want to discuss unbundled defence services, reiterating that "no charge is warranted here" and also claimed that the key to an adequate defence is "knowledge of the system more than having a lawyer". The other person, a young, possibly aboriginal man, faced a slew of charges centred around the assault but including break and enter and theft. He held that he knew nothing about the court process and hoped to get NSLA since he said he could not afford private counsel. At the time of the first interview he considered the chief criterion for a good defence to be "being a clear speaker and not folding under pressure". Interviewed again several months later, he had secured NSLA, had had several charges dropped by the crown but had pleaded guilty to two assault charges for which he was awaiting sentencing. He was most unhappy with his NSLA

lawyer claiming "all he did was delay ... I was left out of the process. I was like a match in the wind. I had no knowledge about the process or system and did not know what was going on". In his mind, private counsel (which he "could not afford") would have been preferable because NSLA, "they're too busy. They want to get through your file as quickly as they can, then, like, next". He changed his views about what is central to an adequate defence, now arguing, "it is all about what goes on outside the courtroom and the lawyer's ability to look after you and bargain with the crown". He thought that a duty counsel system might have been helpful in his case but wondered about whether the system would lead to hasty advice. Faced with a similar charge in the future he would "hire private counsel for the whole thing. Money is the problem though".

Two caucasian males, one forty-two and the other "early fifties", both of whom had high school education, worked full-time in low wage, labour/maintenance jobs and were without any prior criminal court experience, faced domestic assault charges with significant anxiety. Both considered their knowledge of the court process as "very poor"; one commented, "I don't know anything. I'm scared". He added somewhat, incongruently, "I am not worried about it. I didn't assault my wife. She is supporting me ... we were both drinking at the time ... the only thing that bothers me is that the police didn't explain things and they made me sign things when I was drunk". The other defendant was at the sentencing phase. He complained about the delay in the case's processing noting that "I am very unsatisfied. They mess around. They keep adjourning. I pled guilty right away and now it's just becoming antagonizing and worrisome. I'm worried about what is going to happen to me; it's taking too long now". He did not seek any defence counsel whatsoever, arguing "I did it so why bother ... I didn't hire a lawyer. I knew that I was guilty and I am prepared to pay the consequences", Still, he was worried somewhat about getting a record - "I don't want a criminal record. A criminal record would not allow me to travel overseas, with border security and what not". He saw benefits in the unbundling concept and considered the idea very salient in "more serious cases". As for an adequate defence, he simply stated "having a good alibi", something, he added, he did not have in this case. He exuded a sense of detachment about defendant strategy partly perhaps because of his view that "I won't re-offend. I made it through forty one years with no record and I'm sure I can make it through another forty one without a record".

Interviewed two months later, the forty-two year old defendant, unrepresented through all phases of the case processing, reported that he had received a sentence of one year probation, a fine and mandatory domestic violence counselling. He had patched up things with his girlfriend and looked back at the violent incident as " a serious mistake that I will never make again ...[the result of] a heated argument and we were both stressed out". He reiterated that he did not get a lawyer because "I wanted to take responsibility for my actions and the court was willing to work with me". He deemed the court process to have been fair though inefficient - "I was sent home three times because they kept on delaying it". He did allow that a duty counsel system (as described to him) would be an excellent initiative - "Yes, that would have made a big difference. I might have even gotten off! I think a duty counsel system is a fantastic idea, especially for people like me who don't know the system. It really was a scary experience".

The other, older man, the more worried of the two, indicated that he had contacted a few private lawyers but concluded that he could not afford them; he reported "yes, one guy wanted \$1000 for plea alone. I can't afford that and that was the cheapest I could find". He also indicated that it now appears that he will be able to secure NSLA representation. In any event he was adamant that he needed help, even to the point of contending that he would not use unbundled defence services since he needed the full services. He concluded his interview with the comment, "I have no idea what would be best defence".

DETAILED PARTICIPANTS' VIEWS: CATEGORY B

1. OTHER OFFENSES: FIRST TIME DEFENDANTS

Fourteen defendants were interviewed who faced charges in criminal court for the first time in their lives. There was surprising diversity in the age/gender/race composition as only three of the fourteen were young caucasian male adults. Educational accomplishment also varied and half the subgrouping claimed to have some post-secondary training if not university. Almost half these defendants also reported full-time employment. The offenses in question were low-end property crimes and common assaults or threats thereof; the one exception was a large theft committed by a caucasian woman in her fifties.

Not surprisingly virtually all these "first timers" reported that they were unaware of court processes and did not know what to expect; one person summed up the common apperception aptly, "it's all foreign to me"; there were a few exceptions where defendants claimed a fair amount of knowledge, along the lines of 5 in a 10 point scale. Several expressed a strong desire to get the matter over with quickly; for example, a nineteen year old caucasian male, in the army reserve, stated, "I just want the thing to be done. I guess you gonna do what you gotta do" but he later allowed that "I am going to call legal aid. If they don't help me then I will do it myself. If it were a serious charge, like murder, I would have a lawyer do it". In two instances, the interview was conducted after the case had been concluded. In one of these, the unrepresented person, a female student, was diverted on the charge of assaulting a police officer. She was one of the few persons in the entire sample of one hundred who contacted the lawyer referral service; apparently, there she found out about the diversion option and successfully secured it via conversations with the crown prosecutor. The other unrepresented litigant whose case was completed received a conditional sentence and restitution order upon pleading guilty to a large theft. She had not been eligible for NSLA (according to her because she "made \$1000 a year too much") and said that private counsel "costs too much ... their service is not worth their price". She elaborated on the issue of representation suggesting three levels of access (i.e., "the Martha Stewart lawyers, the normal lawyers and, for the very poor and unemployed, Legal Aid"). In her view, the value of legal representation depends on the case - "if it's simple theft and you're caught red-handed then there is really no point in obtaining a lawyer". Somewhat surprisingly, she was quite pleased with the court process, considering it very fair in her case; she stated that she was "totally impressed" with the crown prosecutor who took the initiative, discussing the case with her and indicating "what they were looking for" in terms of a sentence.

Among the other defendants whose cases were still being processed, there was a general sense that it was necessary to obtain the service of a lawyer and most were either trying to determine whether they would be eligible for NSLA or had obtained indication that they would be eligible. Several respondents, however, were not actively seeking any defence counsel. One nineteen year old male, unemployed with a grade nine education, said he was not going to bother to contest his "threats" charge but would plead guilty and probably get probation. Another young male adopted the same position, made no contacts whatsoever and expected a fine; he also

claimed to have just missed being diverted on his "theft under" charge ("I almost had diversion. I played phone tag and she gave up on me. I was interested. I did leave messages for her"). Still another young man (a plumber working full-time) had made no contacts, believing, on the basis he said of a conversation with the crown prosecutor, that adult diversion was very possible in his case.

There was widespread contention among this subgrouping that private defence counsel was too expensive and they could not afford it. Only a few of these respondents reported that they had actually contacted a private lawyer but, whether unemployed or working full-time, there was the common claim that private counsel were beyond their financial resources. A forty year old white male, an employed manager, recognized that he was ineligible for NSLA and was ambivalent about private counsel. He seemed surprised by the process despite claims of having superior knowledge of the courtroom, commenting "I didn't think that I needed a lawyer. I really didn't think it was going to work this way. I thought that all would be fine (the charges dropped) ... See, I'm up for a promotion at work and I can't afford a [criminal] record"; he was clearly still hesitant about hiring private counsel - "I can't spend hundred of dollars on it ... I am still thinking about it". A 35 year old woman, unemployed and disabled, charged with a prostitution offence apparently knew that she was eligible for NSLA but she added that "no, I don't think private counsel costs too much. I can afford it with payment options, like if I pay a certain amount per month". An employed thirty-five year old black male, ineligible for NSLA ("they told me they don't deal with these matters") and fearing conviction ("a criminal record will affect my volunteer work ... would affect me a lot"), complained "I can't afford the retainer {asked by lawyers he contacted} The cheapest I could find was \$1500.. I am trying to divide it up (i.e., unbundle) and do what I can to reduce the costs. I just can't afford it. I have two little girls". An employed cleaner, also rejected by NSLA, stated that he will now search around for private counsel but his situation seemed to be the common one of not being eligible for NSLA (i.e., working full-time and unlikely to face custody if convicted) and not being able to afford private counsel.

Almost all respondents were interested in the concept of securing specific defence counsel services (i.e., unbundling) and considered it a valuable strategy whether at the front-end (assessing disclosure, advising the client and perhaps discussing options with the crown) or post-

plea. One defendant, for example, expressed the not uncommon viewpoint that with significant front-end help "I can represent myself if I know what to do and what my options are". It was less clear whether any would want or be able to spend money on specific legal services, whether because of their financial situation or because of the possibility of inferior service - "If I get unbundled services the lawyer may not do his homework. The lawyer is getting less money this way". Still, only one defendant took an "all or nothing" approach to engaging defence counsel. The most common answer to the question, what is most important to an adequate defence in criminal court?, was "a good lawyer"; one more middle class defendant reported, "having a lawyer who can speak to me and to the court, a lawyer who will stick up for me". Other suggestions included "make sure your story is straight" while another emphasized "the evidence", adding "in this case I think it'll work against me. They have the evidence. I don't".

2. OTHER OFFENSES: SINGLE REPEAT DEFENDANTS

Level two defendants were those who had had but one prior conviction or, in a few cases, reported some court appearances but no convictions. Not surprisingly, two-thirds of the fifteen respondents in this subgrouping were between eighteen and twenty-six years of age but three were over forty years of age and one-third of the grouping was female. Thirteen of the defendants had high school education or less, and nine were either unemployed or on disability; the few working full-time were in low wage jobs. Three of these defendants were young black females under twenty-five years old and all were initially charged with "theft under". With one exception (i.e., aggravated assault), the charges these fifteen defendants faced were quite minor, more than half being fraud or theft under and the others being mischief or common assault; in a few instances "breaches" were also laid.

CONCLUDED CASES

While most of these defendants were interviewed at arraignment, two were contacted when their case had concluded. Both had pleaded guilty to mischief/public damage and had received a fine. Both defendants were high school educated and working in a low wage job. One claimed to have "not much knowledge" about criminal court processes while the other reported himself "well versed in legal rights". Neither defendant actively pursued counsel of any sort. One claimed he had no time to meet NSLA and knew he could not afford private counsel. The other believed he might have been eligible for NSLA and, if not, his parents would provide for private counsel if needed, but he simply opted not to pursue these possibilities; he commented, "I did not want a lawyer. I knew that I was guilty. My parents always taught me to own up to my mistakes... I am satisfied with the outcome. I got what I deserved". The defendant also believed that a lawyer would not have made any difference - "I was guilty; I wouldn't have won". Perhaps the defendant did not appreciate that a lawyer might have impacted favourably on the type of sentence but, interestingly, he, not the other defendant, also received a discharge.

ON-GOING CASES

The remaining defendants generally expressed the view that they were unaware of the court processes they now were part of, giving themselves a score of two or three out of ten; one woman in her forties commented, "I have no idea. I am totally lost here. I haven't been involved in this system for a long time. It's much different now". A few claimed to be very knowledgeable (one thirty year old male stated, "I know the whole criminal code. I know all about the criminal act, my rights and the procedures") but they also acknowledged that they still needed a lawyer. Generally, the defendants reported that their case was proceeding well enough for the moment and, with one exception, they were positive in their assessments of previous court appearances, usually including their representation by NSLA. For example, one woman noted that while she had received jail time earlier for a bank robbery, "it could have been worse". Nevertheless, more than half these persons claimed that they were innocent, that their charges should be thrown out, and, to use the words of one young male, "I feel I shouldn't be here". All the defendants charged with common assault (usually with an additional charge) either thought or hoped that the charge would be dropped. The three black females were all disgruntled about their "theft under" charge; two contended that racism was involved in their being charged while the other was angry that a co-accused had received a referral to restorative justice while she herself was being charged in court; she commented, "I got pinned with all the responsibility. My co-accused is doing restorative justice. She won't get a criminal record. I will. I would have preferred adult diversion or restorative justice. This was the fourth offence for her and it was my first time".

The defendants whose cases were in progress generally expressed a desire to have legal counsel. One respondent reported that she was a grade six illiterate and could not read so needed counsel badly. Another female defendant, without counsel at second appearance (still pre-plea), commented, "going through without counsel is not fair". Two male defendants, each of whom considered himself very knowledgeable about the court process, emphasized the need for legal counsel not to avoid conviction but to receive a non-custodial sentence; as one commented "I could get custody ... the crown is looking for me to do time". A few defendants apparently adopted the strategy of not bothering to contact a lawyer until after arraignment. The defendants, when interviewed, were typically in the process of determining whether they would be eligible for NSLA and claimed that they could not afford private counsel, an option that those who

explicitly compared types of counsel, said would be their preference if they could afford it. Only one defendant, a male facing an assault charge, indicated that he had not sought any counsel and did not plan to, somewhat surprisingly since he emphasized that he did not want a record and that the key to a good defence was having a lawyer, albeit in his mind "a high priced lawyer".

Three defendants, interviewed in a follow-up some months later, had obtained NSLA representation though their cases remained at the pre-plea stage. None had explored the option of private counsel; as a young black woman noted "I don't know how that works. The first and only thing I thought of was legal aid. They are known to help people right away if you're eligible". All considered that they could not afford private counsel. One, a forty year old white disabled person, was very angry with her counsel, accusing the latter of "an absolute lack of commitment", largely, it appears, because the lawyer had spent little time with her and then left on vacation ("A horrible bedside manner. She doesn't care about my case. She treated me like a number and was more concerned about her vacation ... she had me in and out in ten minutes"). She vowed that were she ever to reappear in court on a similar charge she "would raise the money for a private lawyer even if I have to pick up cans and scrub houses"; in her view, "private lawyers actually sit down and listen to you. Legal aid lawyers get paid regardless". Nevertheless, she reported that the NSLA staffer was exploring the option of adult diversion.

The other two defendants interviewed a second time, were young black women. One of these respondents, in a follow-up interview a few months after her arraignment interview, reported that she had had an assault charge added to her "theft under" but also that her NSLA lawyer was attempting to explore the possibility of diversion; despite the additional charge, she was now much more confident about her case and felt that her NSLA attorney was representing her well. She added that were she ever to re-appear in court on a similar charge, "I would consult with legal counsel earlier on in the process. I'd have representation right from the beginning". The other defendant, interviewed more than four months after her arraignment interview, had obtained an NSLA lawyer, pleaded not guilty and was scheduled for trial six months down the road. While pleased with her representation, she continued to claim befuddlement at her being charged at all, contending "I don't know what is going on. A friend [that she was with] switched tags on an item. I didn't do it. I didn't do anything". She did not see a duty counsel system as

something that would have helped her - "no. it wouldn't have made a difference. I have been charged for something I didn't do".

The subgrouping was rather divided on the merit of being able to secure unbundled defence services (after it was explained to them of course since, with very few exceptions, most expressed surprise that one might be able to do so). A common response was that the concept makes sense but even phase-specific services would likely be unaffordable. For example, one man working full-time in a low wage job, who feared a custodial sentence, nevertheless stated "I know that it is possible to unbundle legal services but it's still too expensive for me. I have a family and cannot afford \$200 an hour to sit down with a lawyer. That's my grocery money. My family has to eat". Certainly, most defendants acknowledged the value of having defence counsel for trial. A smaller proportion emphasized the value of having counsel at the front-end of the process (i.e., disclosure, discussions with the crown) and an even smaller proportion emphasized the sentencing phase - "the sentence is always something that is worrisome" said one such informant. A significant minority took the view that one needed a lawyer all the way; for example, the forty year old female defendant who was re-interviewed stated, "I would want a lawyer for the whole thing, someone to follow it and represent me. This is important business. I am putting my life in someone else's hands". Another person commented, "you have to be represented throughout, not just during individual parts; it's important that they be aware of the whole thing".

The defendants usually identified having a lawyer as most important for an adequate defence in court. Usually, too, they elaborated a little - "a good lawyer", "a lawyer who believes in you", "the gift of gab ... I need a lawyer who will stand up and speak what is on my mind", and "a lawyer is trained to know the law and the language and would be able to explain everything to the client". A few respondents suggested either or both "evidence" and "witnesses", while another highlighted "what gets taken into consideration"; she elaborated, "judges and lawyers should listen ... judges should pull people aside and talk to them alone. It's hard for some people to talk in court. It's intimidating and embarrassing ... if judges would talk to "criminals" they might better understand the circumstances. Sometimes people act in a certain way for a reason, sometimes because of things that happened in their past. If they did that I think that

people would be less likely to re-offend. It would show the "criminals" that someone actually cares".

Both defendants with whom there was a follow-up interview and with whom the concept of a duty counsel system was discussed (i.e., disclosure analyses plus discussions with the Crown concerning sentencing possibilities) thought it would be a welcomed initiative for defendants. One defendant commented, "Yes, it would have made a big difference. I would have known what was going on. I went to a lawyer and I still don't know what's going on. It's an unsettled feeling". The other emphasized that a lawyer's services would still be required for the post-plea process.

3. OTHER OFFENSES: MULTIPLE REPEAT DEFENDANTS

Multiple repeat offenders (i.e., those with at least two previous convictions) constituted the largest category of defendants charged with offenses other than domestic cases, criminal code driving cases and marihuana possession cases. There were thirty-one such persons in the sample. In comparison with the other subgroupings, this category was more overwhelmingly young adult, poorly educated and without full-time employment. Fully seventeen of the thirty-one persons were between eighteen and twenty-five years of age. Only four of the thirty-one had any kind of post-secondary education and only thirteen were employed full-time. Eight were females and six were Afro-Canadians. The chief charges faced - and most defendants faced more than one charge - centred on minor property crime (theft under and fraud under accounted for fourteen cases) and common assault (nine cases). There was a smattering of cases involving break and enter, mischief, prostitution-related crimes and one quite serious aggravated assault case. Overall, defendants (i.e., twenty of the thirty-one) in this subgrouping reported themselves very knowledgeable and aware of court proceedings. Most of these defendants (i.e., eighteen at the time of initial interview, described their situation with respect to legal counsel as, "hoping for NSLA eligibility and not able to afford private lawyer services". Most of the defendants indicated that they needed defence counsel for their cases and a significant minority reported themselves quite worried about how their case was proceeding. Approximately sixty percent of these defendants identified having a lawyer (or some variant of that phrase such as "a good lawyer who can defend me properly") as the most important feature of an adequate defence, while the remainder pointed to features such as "a good story", "truth will speak for itself" or evidence/witnesses.

FEMALE DEFENDANTS

Of the eight females in this subgrouping, three were in their forties, three were twenty-nine years of age and two were in their early twenties. The three women in their forties had different socio-economic backgrounds with respect to levels of education (from grade nine to university) and employment (one worked full-time, one was unemployed and the third on disability). They faced different charges - fraud, prostitution offenses and theft under

respectively. Interviewed at the pre-plea stage, they reported much knowledge and awareness of the court process and all indicated that in their previous court cases they had been well-represented by NSLA. For example, one defendant observed, "It went excellent in the past. The outcomes are always different if you have a lawyer". She added that she was unrepresented at this court appearance because it was her first appearance and she wanted to "put the case off as long as possible". Another woman, explicitly drawing on her past experiences, commented, "Having a lawyer makes a difference. They can explain your circumstances to the court. Circumstances make a difference. A lawyer gives you a chance to talk. When you have a lawyer your side is better articulated. You have a better rapport with the court. You receive a certain level of support". The women all indicated that they felt they needed to obtain counsel and were confident that they would obtain NSLA once again. All indicated that they could not afford private counsel and none had initiated any contact with private counsel, though the defendant charged with prostitution-related offenses (including a breach) contended that private counsel would be more effective. While not commenting on the affordability factor, all three defendants appreciated the concept of unbundling defence services, especially emphasizing the importance of having counsel for pre-plea disclosure analyses and discussions with the crown prosecutors.

The defendants aged twenty-nine were charged basically with fraud, assault and theft under respectively. Only one of the three had graduated from high school and only one was employed. Just one of the three reported having much knowledge or awareness of the court process. As was the case with the older women, these defendants, interviewed pre-plea, considered that they needed representation and were hopeful that they would be able to secure NSLA eligibility. One woman facing assault and threat charges noted that she had had representation in many previous cases and "They all went well. It was great"; she added, "I won't come to court without a lawyer. I never plea alone. I am not a good talker. I don't have the gift of gab. I think it's important to have a lawyer there, even for fines ... this is a serious charge. This makes legal advice even more important". None of the women had contacted private lawyers nor believed that they could afford such counsel. They did not express any interest or enthusiasm about the "unbundling counsel services" concept but, rather, indicated they could not afford any private counsel. In a follow-up interview two months after arraignment, the defendant charged with fraud reported that she had been able to obtain NSLA eligibility and was now satisfied with

the progress of her case and the services of her lawyer, though she had yet to enter a plea. Asked whether she would do anything different were she to face a similar charge in the future, she replied "get a lawyer at the beginning". Asked whether she would be inclined to obtain a private lawyer, she reiterated her lack of financial resources and added, "[getting a private lawyer] probably wouldn't have made a difference. I'm just trying not to get a harsh punishment. I don't want to go to jail or get probation".

The two youngest female defendants (about twenty-one years old) were both high school dropouts and unemployed. One was caucasian and the other black. The former was a self-professed drug addict charged with prostitution-related offenses while the latter's chief charge was breach of probation. Only the caucasian defendant reported herself very well informed about the court process ("I know the system pretty well. I know the criminal code. I know it well enough to get around") but both emphasized their need for counsel. The caucasian woman emphasized that "I am not nonchalant about it ... [attending court today without representation] was my choice. I wanted to delay the matter. I wanted to be home for my daughter's birthday. Yes though you should have representation. Everyone from all walks of life should have representation. It does make a difference". Both defendants stated that they were seeking NSLA eligibility and could not afford private counsel. The black woman while commenting that "I did it and now I am going to pay for it", emphasized that she needed legal counsel because she could not herself make any sense of the crown's case. Like the other female defendants these two persons highlighted the importance of having a good lawyer ("one who puts up a fight") but expressed no interest in discussing unbundled legal services.

MALE DEFENDANTS: COURT PROCESS CONCLUDED

Six of the male defendants in this general multiple repeat offender category were initially interviewed at the conclusion of their court case and another's case was concluded by the time he was interviewed in a follow-up two months later. These were mostly young caucasian males under twenty-five years of age but one was a thirty-six year old caucasian and the other a thirty-year old black man. Only one had any post-secondary educational achievement but four of the seven were employed full-time. The charges faced were mostly theft under but there was one assault, one mischief and one significant, large fraud. Five men pleaded guilty and received

either a term of probation and/or a fine or had yet to be sentenced. In one instance - the assault case - the charges were withdrawn, and in another instance the defendant was given adult diversion. None of these defendants was represented by counsel, whether NSLA or private.

With two exceptions, these men reported themselves very knowledgeable about the court process and several could be described as "cocky" about their sophistication in that regard. For example, the thirty year old black man, a high school graduate and qualified tradesman, gave himself a "10 out of 10" score and, noting that he represented himself in fifteen of twenty cases over the years, commented "I have more trust in my own ability. I get to choose my own questions that way. I have control over my own destiny". Another defendant, who had his assault charge dropped by the crown contended that his experience proved that one can address criminal charges successfully without engaging a lawyer but he qualified the remark by noting that his case did not proceed to the trial stage. Still another contended that he had a good general understanding of the court process. Four of these defendants acknowledged that the primary feature of an adequate defence in court would be to have a good lawyer but they cited either the minor nature of the charges faced and/or the costs of private counsel for their not having representation in the case at hand. For example, two defendants who received probation contended that they did not consult with any one because their case was too minor and that private counsel was too expensive. Another defendant, happy and surprised that he was offered adult diversion, made essentially the same argument, adding that he was not even interested in securing unbundled counsel service (something he professed to know about) because "I wanted to keep my money". An unemployed, twenty-two year old went without representation, while claiming he was eligible for NSLA though could not afford private counsel, apparently because "I was caught red-handed and didn't want to contest it. I committed it and now will suffer the consequences". An employed thirty-six year old facing a serious fraud charge did contact NSLA but claimed that he was refused eligibility and could not afford private counsel.

The two defendants who most strongly emphasized their own knowledge of the court process might well be likened to "recreational litigants" in that they suggested that representing themselves was both appropriate in light of their "commitment and savvy" and more effective than if they had obtained legal counsel. One of these defendants, a high school graduate working intermittently, held that his assault charge was serious ("I could be jailed right now") but he

could not afford private counsel and was unimpressed with NSLA ("the wait for legal aid is insane ... that's why the court process drags on"). He opined that he represented himself well ("it went awesome ... the crown withdrew the charges") and would do so in the future too - "I'd be less likely to hire private counsel now unless it is a very serious crime. It can be done by yourself. I have proven that. You just have to get everything together - the evidence and the witnesses". The black defendant, fined for his theft under, reported that, while a lawyer might have helped, he would, in the future, "be less likely to get a lawyer. I'd do it on my own and then, if I got a bad shot in court, I'd get a lawyer for appeal". Indeed, he claimed that in the case at hand he has approached NSLA to handle an appeal, adding "I could have even done the appeal by myself, but I wanted to speed it up". Still, both these defendants allowed that for a serious crime and especially at trial, they would probably in the future try to obtain private counsel; one reasoned, "they {private lawyer} could talk the mangle jingle and show me in the best light. They could show a better picture of me than I do". Both noted too, as did the other defendants in this category, that a duty counsel system would have alleviated many of their initial concerns. There was no clear pattern in the responses concerning accessing unbundled defence counsel but the concept would appear to be congruent with the perspective of most of these defendants; sometimes, though, the responses were puzzling as in the case of the defendant who was fined and who contended that he would rather do pre-plea and trial work himself but would want to engage counsel for the sentencing phase.

MALE DEFENDANTS: ON-GOING CASES

A handful of these cases involved defendants outside the eighteen to twenty-five age category, namely four men in their forties and one in his mid-thirties. These defendants were poorly-educated (only one having completed high school) and only two (the two black persons in this subgrouping) reported having regular employment, one just part-time. They were all interviewed at either arraignment or plea where the charges included common assault, fraud under and break and enter. The men varied much in their assessment of their knowledge and awareness of the court process. One claimed "zero" knowledge while two others rated their knowledge and awareness as roughly "5 out of 10". The two oldest made stronger knowledge claims; for example, a forty-six year old black working man with a grade seven education and a

lengthy record commented that he has much knowledge about all aspects of the court process, adding "The court makes it so you have to have a lawyer. The court likes you better if you are represented. I disagree. Sometimes you don't have to have a lawyer".

These men emphasized their need for some legal counsel and typically indicated that they were waiting on their NSLA application and had not and would not be considering private lawyers because of their lack of financial resources. One defendant, who complained about "throwing his money away" on private counsel in a previous case, noted that "I'm not working that much now so I can't afford it" but he wanted NSLA because "I need a lawyer. If you walk in without one, you're looked down upon off the bat". A defendant who expressed great confidence in his knowledge/awareness and reported the case going well ("I think it's going good so far. This is the second time that I was charged in this case. It was thrown out before because the plaintiff did not show up". contended that legal counsel may not be needed in his case but "I will run it by legal aid anyway". Another defendant, disabled, despite being critical of his representation in some previous cases, also cited the need for a lawyer ("it's still better to have a lawyer") and expected to obtain NSLA defence counsel. A man charged with fraud considered the matter to be "a stupid case" but he cited good previous experience with NSLA and indicated he was hoping to use their services again. There was clearly some ambivalence in the defendants' assessments of NSLA counsel as several shifted easily between praise and criticism, indicated that they themselves missed meetings with counsel and reported, as one stated, "they only do so much and it does not seem to be enough"

These older men had mixed views about the possibilities of being able to access unbundled defence counsel services but four of the five held that the concept was interesting as counsel was especially necessary for certain phases of the process. Most pointed here to trial and sentencing phases (one defendant commented regarding the sentencing phase, "Oh God yes. I would definitely do it here {get unbundled services}. They like you to have a lawyer here. They don't like people to be unrepresented") though one man - the one arguing his charge was "a stupid case" - thought obtaining front-end defence services could be a wise investment. Asked what was in their view the most important feature of an adequate defence, three of the men emphasized "a good lawyer" while the others pointed to evidence and "being innocent".

The remaining dozen multiple repeat offenders were all between eighteen and twenty-six years of age. All but one were caucasian and only one had graduated from high school. About a third of this subgrouping was regularly employed, all in low wage jobs (e.g., drywall work, fast food establishments). The charges faced were typically multiple but centred around petty theft and common assault plus breach of probation; there was also one case of break and enter and one case of aggravated assault. Two-thirds of these men estimated their knowledge/awareness of the court process to be quite high (one commented, "I know a lot about it - from past experience and from watching TV"). These latter men exuded, superficially at least, a confident demeanour concerning their case. For example, an unemployed grade seven defendant, who said "I'm not worried", readily compared the approaches of NSLA and private counsel, and also discussed the technical aspects of his case - claiming he should not have been charged with theft of a truck since "I was caught in the truck. I didn't steal it. The co-accused stole it. I was only in possession". Also, an unemployed defendant with grade ten education reported himself "very aware" and added about his court processing, "it's going pretty well as I want". Another of these young men allowed that while he was quite knowledgeable, what he was less confident about was what went on "behind the scenes" of the court processing. Only three of the young defendants indicated that they had little knowledge or understanding of the court process.

At the time of their interview, one person had pleaded not guilty and all the rest were getting their legal counsel in place prior to making a plea. The common pattern in the grouping was for the defendant to report that they were seeking NSLA eligibility and not considering private counsel at all because they could not afford it. One young man, employed as a gas station attendant, expressed frustration at his reported six week wait for an NSLA assessment but said a private lawyer was beyond him as he was still in debt over a previous case where he had engaged private counsel. A twenty-five year old black man reiterated that theme, stressing the need for counsel ("the judge does not take me as seriously without a lawyer") and his inability to afford private counsel. Most defendants were confident that they could secure NSLA counsel. One noted that his charges were serious charges and he could not afford private lawyer so NSLA was warranted. A few defendants decried the delay they claimed in accessing NSLA and the slowness in moving their case along. One noted, "Things get too prolonged. I just want to get it over with" while another stated, "it's taking too long ... they should give a lawyer right off the bat

... a lot of bullshit to go through". Both defendants believed that this slowness would not have happened if they could have afforded private counsel and both hinted that the slowness might cause them to plead guilty.

Aside from the general pattern, there were minor variants. For example, two defendants, facing charges of theft under and assault respectively, each argued that despite his need (certainly at least convenience - "would be easier if I had a lawyer") he would likely be without representation since NSLA had rejected his application and he could not afford private counsel. One individual suggested that if rejected by NSLA he might have other options while another defendant, complaining about the "slowness" of NSLA processing, mused that perhaps a lawyer was not necessary given the "minor" nature of the case against him. Overall, though, virtually all these young multiple repeat offenders indicated clearly that they wanted legal representation even though the charges on the surface at least were typically minor.

In a follow-up interview three months later, the defendant facing the most serious charges (i.e., aggravated assault plus) indicated that he had secured NSLA eligibility and had entered a plea of not guilty. He was adamant that legal representation was crucial at all stages of court processing - "It's important to have a lawyer there the entire time. They can't come in part way through. It's like walking into a baseball game or a boxing match when it's half-over". He frequently expressed a preference for private counsel and indicated that he had discussed his case with a private lawyer but "couldn't afford him"; asked whether there had been any negotiation for specific services, he commented "No, I didn't bother. It would not have made much of a difference. I still couldn't afford it". He remained frustrated about his case referring to it as "stupid ... I shouldn't have been charged in the first place ...I don't understand what is going on" and suggested it was too early to tell whether he was being adequately represented ("we'll see at trial"). He believed too that an elaborate duty counsel system would have benefited him by speeding up the process.

The young male defendants as a group were interested in the concept of unbundling defence services and one unemployed twenty year old claimed to have practised that strategy ("I have done it for a past hearing. It's good to have a lawyer for the closing statements"). Some emphasized the especial value of securing, via unbundling, legal counsel at the front-end (disclosure and discussions with the crown prosecutor) while others saw its value in post-plea

phases. Only one person - an employed defendant - indicated that he could afford obtaining some unbundled defence services. Not surprisingly, the majority of these young defendants considered that the key factor in an adequate defence was having a good lawyer. A few advanced other features such as "a solid story" ("yes I have it. I have witnesses" said one defendant) and "the truth will speak for itself".

APPENDICES

Atlantic Institute of Criminology
The Unrepresented Person in Court Project
Interview Summary

Initial Interview Summary

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

The following details the areas to be explored and types of questions to be asked but the wording will have to be adjusted to the particular circumstances of the interview situation. In the preamble, mention that this we are a university-based group doing research on how people without legal representation or counsel fare in the court process so we would like to talk with the person about these issues. It should be made clear to all possible participants that we are not lawyers, that we are not interested in the details of their specific case, and that confidentiality and anonymity is guaranteed.

General Observations/ Comments

BASIC INFORMATION AND THEMES: UNREPRESENTED LITIGANT INTERVIEWS

1. BASIC DESCRIPTIVE INFORMATION

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

CHARGE(S) FACED (MORE DETAIL IF POSSIBLE)

2. STAGE AT WHICH PERSON IS WHEN INTERVIEWED (ARRAIGNMENT, PLEA, TRIAL ETC)

3. PREVIOUS APPEARANCES IN COURT?
DEFENDANT/VICTIM/WITNESS?

IF DEFENDANT, REPRESENTED BY COUNSEL?

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

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

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

ANY SPECIAL AREAS WHERE HAVE MUCH AWARENESS?

ANY SPECIAL AREAS WHERE HAVE LITTLE AWARENESS?

5. WHAT'S YOUR SENSE OF HOW THIS CASE IS PROCEEDING? (AS EXPECTED? SATISFIED? FAIR FROM YOUR POINT OF VIEW?)

6. ANY PARTICULAR REASON WHY YOU HAVE NO LEGAL COUNSEL?

THEN ASK SPECIFICALLY ABOUT: ASK EACH

CAN'T GET NSLA?

CAN'T AFFORD PRIVATE LEGAL COUNSEL?

DON'T THINK YOU NEED IT?

LEGAL COUNSEL COSTS TOO MUCH SO WON'T USE IT?

STILL CONSIDERING ENGAGING A LAWYER?

OTHER COMMENTS?

7. DID YOU CONSULT WITH THE LAWYER REFERRAL SERVICE?
ELABORATE

8. DID YOU CONTACT NS LEGAL AID RE ELIGIBILITY? (ELABORATE)

IF ELIGIBILITY DENIED, DID YOU STILL GET ANY ADVICE FROM
NSLA? ELABORATE

9. DID YOU CONSULT WITH A PRIVATE LAWYER? ELABORATE

DID YOU DISCUSS SPECIFIC SERVICES AND FEES? ELABORATE

10. HAVE YOU CONSULTED WITH CROWN PROSECUTOR? (HAVE YOU ACCESSED THE CROWN FILE - DISCLOSURE?)

11. HAVE YOU CONSULTED WITH OTHERS AT THE COURT (eg, COURTWORKERS)

12. DO YOU THINK YOU HAVE A GOOD SENSE OF THE CROWN'S CASE?

OF HOW THE CROWN WILL PROCEED?

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

13. IF THERE WAS A LIKELIHOOD OF DIVERSION OR CONDITIONAL DISCHARGE (NO RECORD) WOULD YOU HAVE PLED GUILTY?

14. DID YOU - AND IF NOT, WOULD YOU IF YOU KNEW IT TO BE POSSIBLE - CONSIDER ENGAGING DEFENCE COUNSEL FOR SPECIFIC ASPECTS OR PHASES OF YOUR CASE SUCH AS

REVIEW OF CROWN'S FILE (DISCLOSURE)?

DETERMINING WHAT THE CROWN MIGHT PROPOSE FOR SENTENCE?

MAKING YOUR PLEA?

HANDLING THE TRIAL?

AT THE SENTENCING PHASE?

15. FROM YOUR PERSPECTIVE WHAT'S MOST IMPORTANT TO AN ADEQUATE DEFENCE IN COURT?

HOW DO YOU ASSESS YOUR CASE AGAINST THAT STANDARD? WILL YOUR DEFENCE BE ADEQUATE?

INTERVIEWER'S COMMENTS

Atlantic Institute of Criminology

The Unrepresented Person in Court Project

Follow-Up Interview Summary

Current Status of Matter (i.e. plea, trial, sentenced, etc.)	
Name of the Offender (Last, First)	
Charge(s)	
Phone Number	
AIC Interviewer (Last Name, First Name)	
Date of the Interview	
Format of Interview (Phone, In-Person)	
Time of the Interview	
Notes	

The following details the areas to be explored and types of questions to be asked but, as in the initial interview, the wording will have to be adjusted to the particular circumstances of the interview situation. In the preamble, mention again that this we are a university-based group doing research on how people without legal representation or counsel fare in the court process so we would like to talk with the person about these issues. It should be made clear to all possible participants that we are not lawyers, that we are not interested in the details of their specific case, and that confidentiality and anonymity is guaranteed. Here we are simply following up on the interview a month or two earlier.

BASIC INFORMATION AND THEMES: UNREPRESENTED LITIGANT INTERVIEWS

1. BASIC DESCRIPTIVE INFORMATION

GENDER / AGE / RACE-ETHNICITY / SES (EDUCATION, EMPLOYMENT OF SELF AND/OR CHIEF FAMILY EARNER) It might be best to ask these questions at the end because they may emerge naturally from the interview. **JUST CHECK EARLIER INFORMATION FOR ACCURACY!**

2. CHARGE(S) FACED (MORE DETAIL IF POSSIBLE)? HAVE ANY BEEN DROPPED? IF SO, WHICH? WHY?

3. STAGE AT WHICH PERSON IS NOW INTERVIEWED (ARRAIGNMENT, PLEA, TRIAL, ACQUITTAL, SENTENCING)

4. IF ALREADY SENTENCED - OR ACQUITTED: DID YOU GET A LAWYER IN THIS CASE?

(A) IF YES, LEGAL AID OR PRIVATE?

FOR WHAT STAGES OF THE COURT PROCESS (e.g. arraignment, plea, trial, sentencing)?

(B) IF NO, WHY NOT?

ASK ABOUT EACH OF THE FOLLOWING POSSIBLE REASONS:

CONTACTED BUT INELIGIBLE FOR NSLA?

CONTACTED BUT COULDN'T AFFORD PRIVATE COUNSEL?

CONTACTED BUT OBJECTED TO COSTS FOR PRIVATE COUNSEL?

DIDN'T CONTACT NSLA (WHY?)?

DIDN'T CONTACT PRIVATE COUNSEL (WHY?)

5. IF CASE STILL BEING PROCESSED: HAVE YOU OBTAINED A LAWYER?

(A) IF NO, WHY NOT?

ASK EACH OF THE FOLLOWING?

HAVE YOU CONTACTED NSLA? RESULTS TO DATE?

HAVE YOU CONTACTED PRIVATE COUNSEL? RESULTS TO DATE?

DO YOU HAVE PLANS TO CONTACT EITHER NSLA OR PRIVATE COUNSEL? WHY OR WHY NOT?

(B) IF YES, NSLA OR PRIVATE? FOR WHAT STAGE(S) OF THE COURT PROCESS?

6. THE EXPERIENCE TO DATE FOR ALL RESPONDENTS:

HOW DID (HAS) THE CASE PROCEED(ED) IN YOUR VIEW?

WAS/ HAS IT BEEN FAIR AND EFFICIENT FROM YOUR POINT OF VIEW?

DID (DO) YOU NEED MORE LEGAL COUNSEL? WANT MORE?

HAS YOUR POSITION BEEN ADEQUATELY CONVEYED IN COURT?

7. FROM YOUR PERSPECTIVE, WHAT'S MOST IMPORTANT TO AN ADEQUATE DEFENCE IN COURT

HOW DO YOU ASSESS YOUR CASE AGAINST THAT STANDARD?
IS/WAS YOUR DEFENCE ADEQUATE?

8. THE FUTURE (ALL RESPONDENTS):

(A) IF YOU HAD RECEIVED DEFENCE COUNSEL JUST FOR THE EARLY STAGES - ARRAIGNMENT, LOOKING AT THE CROWN/POLICE FILE AND TALKING WITH THE CROWN ABOUT WHAT THE CROWN WAS LOOKING FOR IN TERMS OF SENTENCING BUT THEN YOU ARE ON YOUR OWN, OR WITH LEGAL AID OR WITH PRIVATE COUNSEL- WOULD THAT HAVE BEEN ADEQUATE FOR YOUR CASE?

(B) IN LIGHT OF YOUR EXPERIENCES, WOULD YOU BE MORE OR LESS INCLINED TO HIRE PRIVATE COUNSEL IF YOU FACED SIMILAR CHARGES IN THE FUTURE?

(C) ARE THERE SPECIFIC PARTS OF THE COURT PROCESS FOR WHICH YOU WOULD BE MORE LIKELY TO HIRE PRIVATE COUNSEL IN ANY FUTURE COURT CASE?

WOULD YOU BE MORE LIKELY TO DO SO:

IN THE EARLY PHASES (e.g., pre-plea)?

AT TRIAL?

AT SENTENCING?

(D) IN LIGHT OF YOUR EXPERIENCE IN DEALING WITH THIS COURT CASE, HOW DIFFERENTLY WOULD YOU RESPOND IN THE FUTURE IF YOU EVER FACED A SIMILAR CHARGE IN COURT?

(E) WHAT ADVICE ABOUT HANDLING A CASE IN COURT WOULD YOU GIVE TO CLOSE FRIENDS OR RELATIVES FACING COURT ON SIMILAR CHARGES?

INTERVIEWER'S COMMENTS: