

# Criminal Prosecutions

## Background

The Criminal Law Division (Division) of the Ministry of the Attorney General (Ministry) prosecutes criminal charges on behalf of the Crown before provincial courts in Ontario. It consists of Crown Attorneys, Deputy Crown Attorneys and Assistant Crown Attorneys, who are appointed under the *Crown Attorneys Act* (Act) and Crown Counsel, who are appointed under the *Ministry of the Attorney General Act* (collectively referred to as Crown attorneys or prosecutors). The Act outlines the duties of Crown attorneys in prosecuting charges laid by police forces, such as summoning witnesses to attend court, providing disclosure to defence attorneys, presenting evidence in court and dealing with bail applications of accused offenders.

It is the role of the Ontario Provincial Police and municipal police forces to lay criminal charges, under the federal *Criminal Code of Canada* and the *Youth Criminal Justice Act* and other provincial statutes, for such crimes as assault, uttering threats, impaired driving, robbery and homicide. Certain charges fall under the jurisdiction of federal prosecutors, and Ontario Crown attorneys generally do not deal with crimes involving drugs, terrorism, tax law and money laundering.

The Division's Crown attorneys also represent the Crown in criminal appeals; provide legal advice to the police, the Attorney General and other law enforcement officials; provide special services such as applications to a court for electronic-surveillance authorizations, extraditions and search warrants; and develop criminal law policy recommendations for both provincial and federal applications. In addition, the Division participates with other stakeholders in major initiatives targeting criminal activity related to guns and gangs, as well as the Ministry's Justice on Target initiative to reduce the average number of court appearances and days needed to dispose of a criminal charge.

The Division receives about 600,000 new criminal charges each year from more than 60 police forces in Ontario. A Crown attorney is to prosecute a criminal charge only if there is a reasonable prospect of conviction and if it is in the public interest to prosecute. If at any stage of the case changed circumstances make the prospect of conviction no longer reasonable, the Crown attorney is duty bound to discontinue the prosecution.

Criminal charges are prosecuted in either the Ontario Court of Justice or the Superior Court of Justice. The vast majority of charges are dealt with by the Ontario Court of Justice, which typically tries less serious offences presided over by a judge alone; trials for more serious *Criminal Code*

offences take place in the Superior Court of Justice and are heard either by a judge alone or by a judge and jury.

The Division operates from its head office in Toronto, six regional offices and 54 Crown attorney offices across the province. Operating expenses totalled \$256 million in the 2011/2012 fiscal year, 84% of which was spent on staffing. The Division employs approximately 1,500 staff, including about 950 Crown attorneys and 550 support and administrative staff. In addition, the Division spends approximately \$3.2 million annually on contract lawyers who work on a part-time per diem basis.

## Audit Objective and Scope

Our audit objective was to assess whether the Division had established adequate policies, systems and procedures for the timely and efficient prosecution of criminal matters on behalf of the Crown, and for measuring and reporting on program effectiveness.

Senior management reviewed and agreed to our audit objective and associated audit criteria.

We conducted our fieldwork at the Division's head office in Toronto and visited five of the six regional offices and 11 of the 54 Crown attorney offices. Our work included interviewing staff, including prosecutors assigned to the Guns and Gangs initiative; reviewing recent reports and studies; and examining policies, records, case files and systems. We also met with staff from the Ministry's Justice on Target initiative.

We also held interviews with representatives of five police forces in the province, Legal Aid Ontario, the Criminal Lawyers' Association, and the Ontario Victim Services Secretariat to discuss their perspectives on prosecutions and the criminal justice system in Ontario.

We researched criminal prosecution programs in other Canadian and foreign jurisdictions and met with senior management of the federal and

three other provinces' prosecutorial services. We also engaged an independent expert who has senior management experience in delivering criminal prosecution programs.

We considered recommendations we made in our previous audits of the Ministry, including Legal Aid Ontario (2011), the Court Services Division (2008), and our last audit of the Division (1993). We also considered several major public reviews of the criminal justice system over the last decade.

The Division's internal auditor conducted several reviews that were helpful in our audit, including those about travel card use and employee expenses; controls over the administration of proceeds of crime; and the Division's project to implement a new electronic Crown Management Information System (CMIS).

## Summary

The number of Crown attorneys and the overall staffing costs for the Criminal Law Division (Division) have more than doubled since our last audit in 1993. Yet the number of criminal charges that Crown attorneys dispose of per year has not substantially changed—572,000 in 1992, compared to 576,000 in 2011. Partly as a result of the Charter of Rights and Freedoms, many cases are more complex than they used to be, so that more time and more court appearances are needed to prosecute them. Also, additional Crown attorneys have been assigned to deal with certain crimes, such as those involving gangs and other dangerous and high-risk offenders.

However, it is difficult to gauge the actual impact of this on prosecutor workload, especially because the Division makes little use of numerical and statistical information to analyze the relative workload, efficiency and effectiveness of its Crown attorneys, and relies more on informal oversight by senior staff at each of the 54 Crown attorney offices. When we last audited the Division in 1993,

we noted “a systemic emphasis on prosecutorial discretion,” and that monitoring was done by “more subjective means, such as informal feedback and personal knowledge about the individuals involved.” This observation remains valid today.

We continue to believe the Division would benefit from having information systems that would provide it with reliable summary data on prosecutor workloads, the outcome of prosecutions, the average time taken to resolve charges and other key performance indicators, both at a local office and an individual Crown attorney level. The Division can also make better use of the information on court activities currently available from within the Ministry until it completes the development of its own information systems.

Our other major observations were as follows:

- The Division does not formally assess its prosecutorial performance—for example, it does not gather information on how efficiently charges are screened; how long it takes to prepare cases; whether court diversion programs for resolving minor criminal charges are used appropriately; the number of bail release applications, and what their conditions and results are; and what the outcomes of cases are. Furthermore, the rates at which certain Crown attorney offices went to trial were up to 20 times higher than the rates of other offices, significantly increasing justice system costs. We noted that Statistics Canada reported that Ontario had Canada’s highest rate of adult criminal charges withdrawn or stayed (suspended by a court) in 2010/11 (43% for Ontario versus 26% for the rest of Canada) and the lowest rate of guilty verdicts (56% for Ontario versus 69% for the rest of Canada)—but the Division does not have the information needed to determine the reasons for this or whether this relates more to certain regions or Crown attorney offices.
- No staffing model has been established to determine how many Crown attorneys should be at each local office, and there is no benchmark for what a reasonable workload for each Crown attorney should be. Workloads per Crown attorney varied significantly among local offices and between regions. For example, at two similarly sized Crown attorney offices, the average workload during the 12-month period ending March 31, 2012, was 572 charges per attorney at one and 1,726 charges per attorney at the other. The Division does no periodic analysis to assess:
  - the reasons for the significant decrease over the last two decades in the average number of charges a Crown attorney disposes of per year; or
  - whether Crown attorneys need to be reassigned among Crown attorney offices to balance workloads and ensure similar charges can be handled consistently regardless of where in Ontario they are laid.
- Of the Division’s six regions, the Toronto Region disposed of the most charges in total, but it did so at the highest cost per charge—\$437, compared to the average of the other regions of \$268. The Toronto Region also disposed of an average of about 40% fewer charges per Crown attorney than the average of other regions. We also noted that the use of court diversion programs for persons accused of minor criminal charges varied widely between Crown attorney offices—for example, one office reported that it resolved 11% of its eligible charges using diversion programs while a similarly sized office resolved 75%. Reasons for these significant differences had not been analyzed.
- The Division does not have a systematic process in place to ensure that services at its 54 Crown attorney offices are consistently meeting minimum professional and Division standards. In our review of case files at 11 Crown attorney offices we noted no standards for recording decisions and events, forms were either missing or not used, and case files were missing.

- A much-needed electronic case management system originally projected to cost \$7.9 million and to be completed by March 2010 has been significantly delayed because of weak management, oversight and financial reporting, and insufficient resources being dedicated to the project. Other provinces, such as Manitoba, already have such systems in place and we noted that, rather than develop a new system, Alberta recently paid \$1 for the rights to use and further develop Manitoba's system.
- Because the Division does not measure its performance, the Ministry makes no mention of the Division in its annual reporting. In this respect, the Ministry differs from some other jurisdictions, which do measure and report on their criminal prosecution operations.

We did note that the Division has contributed to some recent progress in improving court efficiency, as reported by the Justice on Target initiative, including the reversal of a decades-long trend of an increasing number of appearances and days needed to complete a criminal case in court.

### OVERALL MINISTRY RESPONSE

The Criminal Law Division is committed to continuing to provide the citizens of Ontario with the highest-quality, efficient and effective prosecution services in support of public safety. The Division finds great value in and is actively incorporating the observations and recommendations of the Auditor General's review as it continues to improve how it delivers prosecution services in these changing times.

The audit correctly reports that cases are more complex than 20 years ago. In addition to the Charter of Rights and Freedoms, other factors add to the complexity of cases, resulting in an increased demand on Crown attorneys' time and hence an increase in the number of Crown attorneys. For instance, the introduction of mandatory minimum sentences has

resulted in significant reductions in guilty pleas and significant changes in their timing, which translate to more time being spent on a file. A typical impaired-driving case illustrates the point. Today one case takes two days in court, whereas in 1992, two to four cases were prosecuted in one day. In part because penalties have increased, such charges are vigorously defended and defence applications to exclude key evidence that the defence alleges the police obtained in violation of the accused's rights under the Canadian Charter of Rights and Freedoms are common. Nevertheless, the Division agrees with the Auditor General that it needs to find a way of measuring the impact that increased complexity has on workload.

We agree that information collection and analysis are essential decision-making tools. We recognize that a multi-faceted electronic case management system is key, not only to information collection and analysis, but also to moving some of the paper-based manual processes into an electronic approach. We are disappointed with the progress made to date on our project to implement such a system. Nevertheless, our commitment to implement such a system, or group of systems, remains steadfast, and we are taking steps to get back on track.

In the meantime, the Division is taking action to ensure the appropriate and necessary measurement of our workforce and workload through information already available to us. The Division will identify the gaps in meaningful data collection and will research similar metrics and systems that are being used to measure resourcing in the other jurisdictions referred to in the report.

Through the actions that we are taking to increase our effectiveness and to continuously improve, we will deliver on the commitment to public safety for the people of Ontario.

## Detailed Audit Observations

### MANAGING OPERATIONS

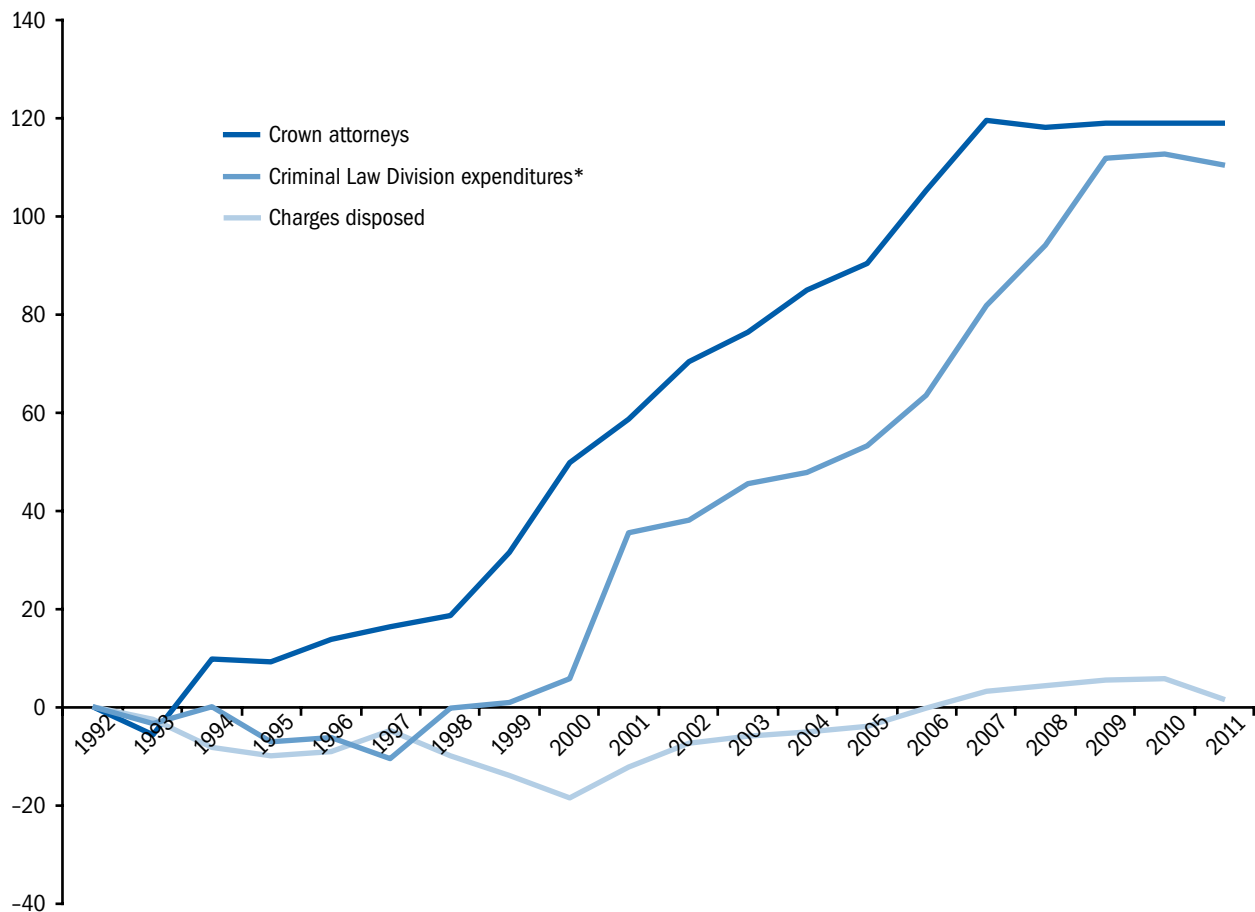
Since our last audit in 1993, the number of criminal charges disposed of is virtually unchanged—572,000 in 1992 compared to 576,000 in 2011. Yet the number of Crown attorneys and support staff, as well as staffing costs—even after taking inflation into account—have doubled over the same period, as shown in Figure 1. In contrast to some other provinces we visited, management oversight tends to be more informal in nature, so as not to be perceived to affect the independence of each Crown attorney. As well, less use is made

of information as a means to gauge the relative workload and effectiveness of the Division's Crown attorneys. Specifically, the Division lacks information systems at many levels to provide information to allow it to assess workloads and effectiveness.

We understand that there are reasons why disposing of criminal charges consumes more resources now than it did in the past. For example, additional Crown attorneys have been assigned to focus on domestic and sexual violence, guns and gangs, dangerous and long-term offenders, and Internet child exploitation. Changes in legislation and case law that have occurred since 1982 as a result of the Charter of Rights and Freedoms have increased the complexity of many cases. The average time and number of appearances required to dispose of

**Figure 1: Annual Percentage Change in Number of Crown Attorneys, Charges Disposed and Criminal Law Division Expenditures, 1992–2011**

Source of data: Ministry of the Attorney General, Public Accounts



\* Annual percentage change for expenditures were based on amounts adjusted for inflation to 2011 levels using Statistics Canada's Consumer Price Index.

a criminal charge have both doubled since our last audit, and these increases have been steadily climbing over the last 20 years except for the most recent year. Mandatory minimum sentences, disclosure requirements, and more complex evidence, such as DNA evidence, cell phone activities and computer forensics, have also contributed to an increase in the demand on Crown attorneys' time.

Nevertheless, given a doubling of staff relative to essentially no caseload increase, it is all the more critical to objectively assess the efficiency and effectiveness of the Division's resource management. This requires timely, relevant and accurate information and analysis. Specifically, the Division needs information on how efficiently charges are screened; how long it takes to prepare cases; whether court diversion programs are used appropriately for minor charges; the number of bail release applications, and what their conditions and results are; and what the outcomes of cases are. This information can help management assign prosecutors to local Crown attorney offices to balance workloads across the province and monitor trends in charge resolution to identify situations that cause inefficiencies and delays. However, the Division has neither a manual nor a computerized system for collecting the needed information. It also has not established benchmarks against which it can assess aspects of its performance.

Information that is available to the Division has come primarily from outside sources, most notably the Ministry's Integrated Court Offences Network (ICON), which reports on charges processed by the Ontario Court of Justice for each courthouse. Most Crown attorney offices serve only one courthouse, making the ICON reports useful for assessing certain aspects of each office's performance. However, even though this information is distributed monthly to regional and local Crown attorney management, we found no indication that the Division routinely used the information to analyze the performance of its regional and Crown attorney offices and individual Crown attorneys. As well, the usefulness

of this information to the Division is limited for the following reasons:

- ICON reports information on a criminal charge basis rather than by case or person. Since most cases involve multiple charges and not all the charges proceed, management has not been able to determine whether whole cases have been lost, or whether minor charges were simply withdrawn but the case proceeded on more serious charges.
- Although ICON reporting does separate the number of charges that are stayed by the court (proceedings against an accused are stopped before an acquittal or conviction) from the number of charges withdrawn by prosecutors, it does not identify the reasons for either occurrence; knowing this could help the Division reduce their frequency. Stays and withdrawals can occur for many reasons. For example, the accused may have been denied complete disclosure, a right to counsel or a timely trial; evidence may have been deemed inadmissible; and witnesses may have refused to testify. In some of these cases, preventing the stay and withdrawal is in the control of the prosecutor.

Each Crown attorney office's management responsibilities are assigned to a senior Crown attorney, who we noted also continues to carry his or her own caseload. Senior Crown attorneys told us that they rely extensively on feedback from prosecutorial staff about their own workloads. They also rely on anecdotal information, such as comments from the judiciary, defence attorneys and court staff, to make them aware of concerns with prosecutors' performance. The management framework tries to strike a balance between prosecutors having independence in the day-to-day decision-making on cases assigned to them and the need for Division management to hold prosecutors accountable for efficient and effective prosecutions that meet expectations and standards.

We noted that local Crown attorney offices have developed their own management and operational



practices. In some cases, this is because local police forces or courts are administered slightly differently from one area to another or because the 54 local Crown attorney offices vary greatly in size—the smallest have only one or two Crown attorneys, while the downtown Toronto office has more than 125. In smaller Crown attorney offices, one person might handle all incoming cases from beginning to end, whereas in larger offices it is common for several prosecutors to work on a case at different stages and make court appearances. However, there is no overriding provincial management model, and head office had not done a formal analysis on the variation in practices among offices that could be used to identify best practices in the various Crown attorney offices where it might be beneficial to standardize practices to reduce costs. For example, we found no consistency in how case files were handled by Crown attorneys, including ownership and custody assigned to files between police forces and Crown attorney offices, standards for documentation on case files, and notation standards for key decisions, such as screening charges or bail and sentencing recommendations.

### RECOMMENDATION 1

To ensure that decisions on the use of legal and support staff resources and results of prosecutions are supported by timely, relevant and accurate information, the Criminal Law Division of the Ministry of the Attorney General should identify what information is needed and develop systems as soon as possible to deliver this information to its regional and local Crown-attorney-office management. The Ministry should also use this information to hold the Division accountable for demonstrating the cost-effective use of its resources. Until such time as the Division can gather its own information on its activities, it should make better use of the available ministry information on courthouse activities to more effectively oversee operations and report on its use of resources.

### MINISTRY RESPONSE

The Criminal Law Division recognizes the importance of having reliable management information system(s) to make informed decisions in support of the effective leadership of its operations.

The Division is reviewing existing systems and the information available within the Ministry that relates to its work with a view to identifying the gaps in current information analysis, reporting and report usage. The Division's longer-term objective is to ensure that future information systems accurately capture and support the analysis required to enable measurement of the cost-effectiveness and optimal use of its resources, including measurement and assessment of workload.

### OVERSIGHT OF PROSECUTORS

Management of cases and their timely progression through the justice system has been a particularly crucial issue since October of 1990, when the Supreme Court of Canada released its ruling in the case of *R. v. Askov*. In general, at the time, the Askov ruling and related rulings established that the acceptable time to trial was generally eight to 10 months. As a result, thousands of backlogged charges across the country were dismissed on grounds of unreasonable delay in the prosecutions. Since then, there have been further court rulings that have narrowed the circumstances under which a judge can dismiss a charge on the basis of unreasonable delay caused by prosecutors. The Ministry has been examining its processes to resolve charges at the earliest opportunity to reduce both costs and the risk of delays. Its Justice on Target initiative is one of these strategies.

Justice on Target aimed to achieve, over a four-year period ending in June 2012, a 30% reduction in the number of court appearances and days to dispose of a charge. Justice on Target reported that

as of March 31, 2012, it had achieved success in reversing a decades-long trend of increases, but it was not close to meeting these reduction targets. Court appearances and the number of days to dispose of a charge had decreased by 7% and 2%, respectively. The Division is a key stakeholder in the initiative, contributing to the reductions achieved by helping to implement opportunities for charges to be resolved earlier.

The management staff at Crown attorney offices told us that they informally monitor charges that reach the eight-month, 10-month and 12-month marks out of concern that charges will be stayed due to the delay. As Figure 2 indicates, the backlog of charges in the courts taking longer than eight, 10 or 12 months still exists and has not changed significantly, although there has been some improvement in the most recent fiscal year.

The Division does not track whether specific actions taken by Crown attorneys have any effect on the progress of a case. For instance, Crown attorneys we interviewed told us that prosecutors initiate only a small percentage of court adjournments—one of the leading causes of delays—but there is little data to support this given that the Division does not track the delays caused by adjournments and the reasons for them. As well, information in ICON on the causes of adjourn-

ments was either incomplete or not used by the Division.

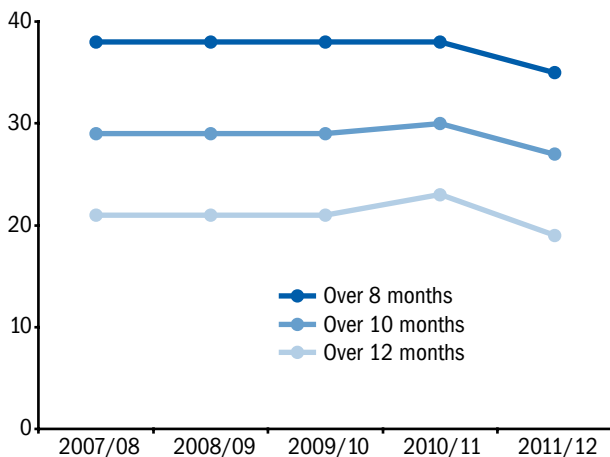
We were surprised that the Division does not formally track the number of motions made by defence attorneys to the court requesting that charges be stayed due to delay, or the reasons for the successful motions. Although the ICON system identifies pending charges and the extent of the delays, there is not enough data in ICON to analyze what types of charges make up the backlog and the reasons for the delays. As a result, it is up to the Division to gather information on the reasons for stays. Another example of an area where inconsistencies should be probed by the Division to understand and reduce delays is the setting of trial dates. While courts control the progression of cases, we noted at several Crown attorney offices we visited that some courts had rules for setting trial dates within, say, 90 days, while other courts had no such rules. Prosecutors also have a significant role to play in ensuring that cases progress through the court in a timely manner by bringing any unnecessary delays to the attention of the court for action. A senior Crown attorney also has the opportunity to bring up more systematic causes for delays at a particular courthouse at regular meetings that are held with the judiciary on the administration of the courthouse.

Statistics Canada reports that in 2010/11, Ontario had the lowest proportion of guilty verdicts in adult criminal cases among all Canadian jurisdictions, at 56%. The national figure, excluding Ontario, was 69%. The Division has not analyzed its prosecution results to determine why this might be the case.

The Division has said it is aiming to reduce the number of trials that collapse—usually through last-minute guilty pleas or the withdrawal of charges—on the day the trial is set to begin. Trials that collapse on the first scheduled court date incur costs that could have been avoided because they unnecessarily tie up courtrooms, court staff, the judiciary, witnesses and police, all arranged months in advance. Trial collapse rates vary widely among

**Figure 2: Ontario Court of Justice Percentage of Criminal Charges Pending, 2007/08–2011/12**

Source of data: Ministry of the Attorney General





Crown attorney offices, from 4% to 22%. The Division obtains trial collapse rates from ICON, but ICON does not provide enough detail to allow the causes of the collapses to be analyzed or compared. For instance, ICON captures only collapsed charges, not collapsed cases. Minor charges are regularly withdrawn at trial, particularly when multiple charges have been laid, so statistics on collapsed charges do not isolate the real problem, which is the collapse of entire cases.

In addition, the Division did not analyze why certain regions and Crown attorney offices had higher trial rates—local offices ranged from about 1% to 20% of total annual charges, and the region with the highest rate was Toronto. The cost implications of a Crown attorney office proceeding to trial at a rate of 20 times more than another office warrants more formal attention, particularly since the Toronto Region has the largest total caseload in the province.

### Disclosure and Screening of Charges

After police lay charges, they provide a report on those charges to the Crown attorney's office in what is known as a Crown brief. Police forces want to move to an electronic disclosure system to improve efficiency, but the Division has been slow to implement its system for accepting Crown briefs electronically. At the time of our audit, only five of 54 Crown attorney offices were accepting electronic disclosure from police forces.

After receiving a Crown brief from police, Crown attorneys assess, or screen, the charge(s) to determine whether to prosecute—essentially, whether there is a reasonable prospect of conviction and, if so, whether the prosecution is in the public interest. During this screening, Crown attorneys can decide not to prosecute charges by withdrawing some or all of the charges or otherwise resolving charges without going to trial by recommending to the court the use of diversion programs or alternative sentencing options. Alternatively, additional charges could be laid by the police on recommendation of the Crown attorney.

A stay of proceedings occurs when charges are temporarily or permanently suspended by the court, such as when the rights of an accused person have been violated or the Crown attorney requests that the accused person participate in a diversion program; in contrast, withdrawn charges are initiated by the Crown attorney when there are no reasonable prospects of conviction or it is not in the public interest to prosecute. Statistics Canada, which receives data from the Ministry's Court Services Division, reports that 43% of adult criminal cases in Ontario in 2010/11 were resolved by staying or withdrawing charges laid, the highest proportion of such cases in Canada. The average of other provincial and territorial jurisdictions in Canada was 26%. There could be many reasons for withdrawing charges, including the quality of the Crown briefs that police send to Crown attorneys for charge screening, plea negotiations, witnesses not co-operating and the success of diversion programs. Such a significant difference could also indicate that Ontario as a whole or certain Crown attorney offices are incurring unnecessary costs because weaker charges are not being sufficiently screened out before court proceedings begin. However, the Division does not collect data so that charge withdrawal rates can be analyzed to determine if there are any systemic issues that warrant attention.

### Diversion Programs

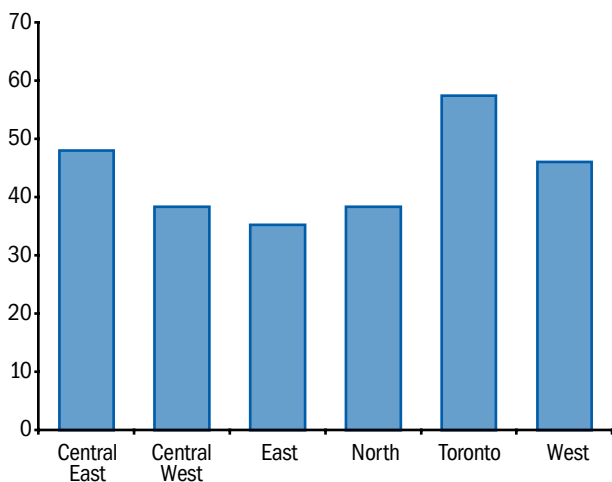
The Ministry's voluntary diversion program, called the Direct Accountability Program, is an alternative to formal prosecution for people who have been charged with minor criminal offences. The program benefits the accused, the courts and the community. The program involves accused people being held accountable through community-based sanctions such as restitution, community service work, charitable donations or participation in programming such as anger management or alcohol and drug awareness. The charge(s) against the accused can be withdrawn or stayed if the person

successfully completes the sanctions imposed. Diversion strategies—used for charges that Crown attorneys deem eligible, such as theft-of-property offences—are less costly than formal court proceedings and they allow for quicker resolution of charges, which frees up court resources.

Diversion programs were in place in almost all Crown attorney offices. However, as Figure 3 illustrates, referral rates by Crown attorneys as reported by the Justice on Target initiative differed widely among the six regions. For example, the Toronto Region had a referral rate of 57% and the Eastern Region 35%. The referral rates varied even more significantly among Crown attorney offices. For example, in the 2011/12 fiscal year, two Crown attorney offices in the same region that are roughly the same size had referral rates of 11% versus 75%. The Division's process for tracking and analyzing its use of the programs and the results of the referrals did not sufficiently address the varying referral rates or improve their consistency. As a result, the Ministry cannot determine whether the diversion programs are being appropriately used to the extent possible. In fact, the varying use of diversion programs by Crown attorney offices and Crown attorneys may result in an inconsistent approach

**Figure 3: Referral Rates to the Direct Accountability Program (Diversion) by Region, May 1, 2011–April 30, 2012 (%)**

Source of data: Ministry of the Attorney General



across the province for dealing with minor offences and the resulting criminal records of those who are not diverted.

## RECOMMENDATION 2

In order for the Criminal Law Division to adequately oversee its prosecutions, monitor its costs and assess its performance, it should regularly analyze the trends, rates and reasons for stays and withdrawals, adjournments, trial rates, bail release violations, guilty pleas and guilty verdicts, and use of diversion programs. In addition, the Division should compare its performance to other provinces and, where Ontario's overall trends differ from those of other large provinces, determine the reasons for such differences.

## MINISTRY RESPONSE

The Criminal Law Division recognizes the importance of using information to evaluate the quality and results of its prosecution service.

Analyzing and seeking to understand the trends, rates and reasons for outcomes in criminal proceedings will be helpful in overseeing our prosecutions. Further analysis and research into how this will assist with the monitoring of costs and performance of the Crown in conducting prosecutions is required. The Division recognizes the need for consistent practices and approaches within its regions and local offices, taking into consideration the variables that exist, such as size of office, geographical/demographic information, size of police force and charge volume. There are lessons to be learned from each office, with perhaps the most valuable coming from the comparison of like offices.

The Division will also benefit from the experience of other large prosecution services across Canada and will seek opportunities to make meaningful multi-jurisdictional comparisons.

## MANAGING WORKLOADS

As we noted earlier, the number of Crown attorneys has doubled since 1992 despite the fact that the number of criminal charges has remained essentially constant. The Division is unable to assess whether the increases in the number of Crown attorneys is reasonable because it does not gather the necessary information to analyze whether the complexity of the cases or the time needed to dispose of the charges has increased to such an extent as to require twice as many staff. The Division does not use a staffing model to determine the appropriate number of Crown attorneys, and there is no benchmark for what a reasonable workload for each Crown attorney should be.

Using data from the Ministry's ICON system, we calculated the average number of charges disposed of per Crown attorney and found a wide variance among Crown attorney offices. For example, at half of the 54 Crown attorney offices, the rate of charges disposed varied by more than 25% of the overall average of 700 charges. Furthermore, the average workload per Crown attorney at two similarly sized Crown attorney offices differed significantly for the 12-month period ending March 31, 2012—572 charges per attorney at one office versus 1,726 charges per attorney at the other. There were also two regions that disposed of significantly fewer charges per Crown attorney, compared to the other four regions, as shown in Figure 4.

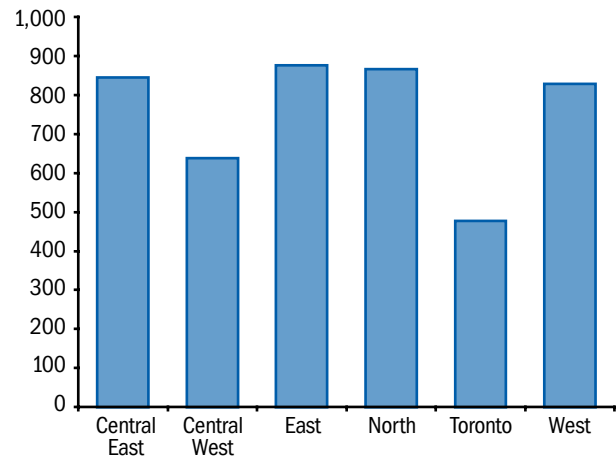
One of the key reasons for ensuring that Crown attorney workloads are reasonably comparable is that they should be able to devote a similar amount of time to charges of a similar nature and complexity, regardless of where in Ontario the charge is laid.

Crown attorney offices also had different ways of organizing staff and assigning cases to Crown attorneys. For example, one office we visited had case management co-ordinators to carry out administrative tasks for incoming charges, while in another office Crown attorneys performed these functions.

Over the past few years, the Division has drawn up business plans requesting that additional Crown

**Figure 4: Average Number of Charges Disposed of per Crown Attorney by Region, 2011/12**

Source of data: Ministry of the Attorney General



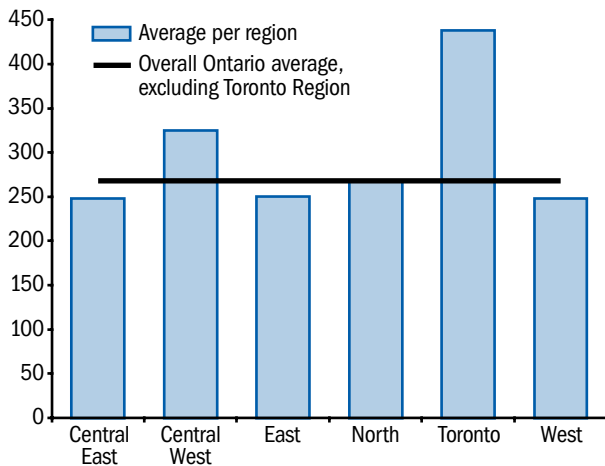
attorneys be hired for initiatives such as efforts to address guns and gangs, high-risk offenders and domestic violence, but these plans have not included any expected outcomes or workload measures. As a result, it is difficult for the Division to demonstrate what payback has resulted from the incremental costs that were incurred or why the additional staff resources were necessary, especially since it has no measures in place to assess the workload of its existing prosecutors.

We noted that both Manitoba and the Public Prosecution Service of Canada (federal prosecutors) track each prosecutor's workload. In addition, British Columbia and Manitoba assign each case to a specific prosecutor, which allows their management to monitor and assess workloads; this is not the usual practice in Ontario. These other provinces and federal prosecutors also use electronic case-management systems to track workloads.

In addition, we calculated the average cost the Division incurred to prosecute charges and noted significant differences between regions, as indicated in Figure 5. For instance, the Toronto Region had the highest average cost at \$437 per charge, versus the average of other regions of \$268 per charge. As Figure 4 already illustrated, the Toronto Region also disposed of an average of about 40% fewer charges per Crown attorney than the average of other

**Figure 5: Average Cost per Charge Disposed of by Region, 2011/12 (\$)**

Source of data: Ministry of the Attorney General



regions—478 compared to 811. The Division had not done a formal analysis to determine the cause of these variances.

Our discussions with the Division's senior management also revealed that the Division's collective agreement with its prosecutors might be interpreted in such a way as to restrict the Division's ability to address workload pressures, particularly in its ability to relocate prosecutors between Crown attorney offices. In addition, the collective agreement limits the Division's use of contract lawyers to address workload pressures to a maximum of 30 days in any quarter of a year. This could also account for management's reluctance to deal with some of the differences in costs and workloads per office. We did note during our fieldwork that the Division had completed an assessment of its head office support services to Crown attorney offices and as a result had been able to reduce its head office staff by 11 positions.

### RECOMMENDATION 3

To ensure that Crown attorneys have the workload flexibility to devote a similar amount of time to charges of a similar nature, the Criminal Law Division should:

- establish benchmarks for what a reasonable workload for each Crown attorney should be;

- collect and analyze information on workloads and cost variances between regions and Crown attorney offices to identify opportunities to use resources as efficiently as possible and address inconsistencies; and
- ensure that management has the ability and flexibility to address temporary and permanent workload pressures by, for example, relocating prosecutors and support staff between Crown attorney offices, and using contract lawyers where and when appropriate.

### MINISTRY RESPONSE

The Criminal Law Division recognizes the need and the increasing operational requirement to develop measures of workload.

Defining workload is challenging and must go beyond the number of cases per Crown attorney. There are a number of factors that impact workload. For instance, a significant murder trial could take two Crown attorneys three years, equating to a fraction of a case per year. Also, in a small office, two prosecutors might carry a workload of 1,500 charges per year and have to fulfill all obligations on these charges from screening and vetting right through to disposition. They also might need to travel three hours to deal with some of the charges. It is challenging to determine the relative workload weight of these two examples.

The Division will research other jurisdictions' attempts to measure workload and will develop an approach that meets its needs. Using available data, the Division will then review workload and develop processes for making comparisons. The Division will also use the information to analyze the differences between regions and local offices to determine how resources can be used as effectively as possible. This will also promote staff wellness in the Division by providing additional information on which workload distribution decisions can be made.

## QUALITY ASSURANCE

The Division's management style provides regular feedback and support from senior Crown attorneys to prosecutors through ongoing collaboration. However, the Division does not periodically review a sample of the work done by each of its Crown attorneys, particularly its more than 750 assistant Crown attorneys, to assess whether they generally meet expectations and professional and divisional standards. We were advised that the criminal justice system itself acts as an external quality control measure, in that the work of prosecutors is reviewed by police, judges and defence counsel during each case they prosecute. However, senior Crown attorneys who oversee other prosecutors generally get information on the quality of the work done in court by their staff prosecutors only when they are told by court staff, or, periodically, when prosecutors observe colleagues' court proceedings when they happen to be in the same courtroom.

Without such periodic spot checks, divisional management faces a challenge in its bid to ensure that high-quality prosecutorial services are consistently delivered across the province. Periodic reviews would help to identify whether case files are acted on in a timely manner, whether professional standards are met, whether policies for bail and charge screening are complied with, and whether efficiency-increasing initiatives such as diversion programs are used appropriately and consistently.

Crown attorneys have prosecutorial independence in their decision-making, but they are accountable for carrying out the policy direction set out in the Divisional Crown Policy Manual. The manual is a compilation of prosecution policies, detailed legal advice, and practice memoranda and guidelines intended to provide a consistent approach to prosecutions across the province. For instance, the manual addresses procedural policies on charge screening, providing disclosure, dealing with victims and sentencing, as well as accepted practice for specific types of prosecutions, including Aboriginal

justice, child abuse, impaired driving and matters under the *Youth Criminal Justice Act*.

Our review of case files at the 11 Crown attorney offices we visited showed a number of inconsistent practices. For instance, ownership and custody of closed case files was handled inconsistently, a number of files we requested could not be located, and standardized forms, such as for charge screening, were either missing or not used by the Crown attorney office. There were also no standards for recording decisions and events, which were therefore inconsistently recorded, both in different offices and within the same office.

In addition, Crown attorney offices have their own management-oversight processes, supplemented by employee performance evaluations done semi-annually by the local senior Crown attorney. However, these evaluations did not include a review of any recent files the prosecutor had completed. Including a spot check of a sample of files as part of the employee evaluation process would also communicate the importance of documenting compliance with Division standards.

We did note certain circumstances where case files were reviewed by senior Crown attorneys, but these processes were ad hoc and were not based on any comprehensive or formal checklist to assess compliance to professional and divisional standards. For instance, quality of case work will be assessed if an appeal is granted by a court, which occurs in less than one-quarter of 1% of all closed cases. In addition, we noted that the Division had initiated a good practice of periodically reviewing some high-profile cases processed by the Major Case Management and Guns and Gangs units of the Division to assess processes or practices that worked well and what could be improved.

From our research, we learned that one other province does reviews of prosecutors' case files and that the federal prosecutors recently initiated a pilot project to do so. In addition, we noted that the Crown Prosecution Service of England and Wales (CPS) had a robust, publicly reported quality assurance program for assessing its work. The CPS's



program included assessing case work on closed files against the CPS's core quality standards and the code setting out what their prosecutors do, how they make decisions, and the level of service they commit to in key aspects of their work. In its most recent assessment of more than 10,000 closed case files, the CPS found that 78% of commitments in the case files were fully met, 11.5% partially met and 10.5% not met.

#### RECOMMENDATION 4

To ensure that regional and division management have adequate assurance that cases are prosecuted in a consistent, timely and effective manner that meets expected standards, the Criminal Law Division should perform a periodic, objective review of a sample of files from each Crown attorney relating to the prosecutions each one handled during the year.

#### MINISTRY RESPONSE

The Criminal Law Division will compile a list of practices to advance the leadership's commitment to reinvigorate the performance planning and feedback process, including more meaningful feedback that differentiates performance, attendance by the supervising Crown attorney during proceedings and spot-checking files. This information will supplement existing quality control practices with respect to periodic review of files. Consultations with the supervising Crown attorneys will occur prior to implementation of items on the list. In doing so, the Division anticipates that it will be able to ensure the continued development of its workforce and to allow decision-makers to enhance consistency in how files are prosecuted on a local, regional and provincial level. Although these practices have existed in local offices for some time, the Division will benefit from a more consistent approach across all offices.

## CROWN MANAGEMENT INFORMATION SYSTEM

Many Crown prosecution services—for example, Manitoba in 1999, British Columbia in 2002 and the Public Prosecution Service of Canada in 2002—have moved to electronic systems that essentially manage and track cases and how resources are used to prosecute those cases.

Ontario Crown attorney offices still rely largely on paper-based manual processes to manage their workload. As of the end of our fieldwork in July 2012, the Division's project to implement an electronic case management system, known as the Crown Management Information System (CMIS), was significantly delayed and projected to be over budget.

The original business case for CMIS was submitted to Treasury Board for approval in December 2006 and estimated that the project would cost \$7.9 million and be completed by March 2010. CMIS would allow the Division's 54 Crown attorney offices to receive, track, store, modify and share electronic documents; and to automate several processes, including scheduling, criminal case management and business intelligence. In addition, the new system would allow the Division to receive electronic documents from police forces, including Crown briefs and pre-trial disclosure documents. The Ministry's Justice Technology Service unit was to work with the Division to provide the information technology expertise and manage the project.

In 2010, the Division engaged a consultant to assess why the CMIS project had been delayed. The consultant recommended that the Division put together a dedicated project team, including specialists in change management, communications and implementation management. It also recommended that the software application that was originally chosen for the project be replaced with more robust, vendor-supported, user-friendly software. The project completion date was extended to March 2012, and the Ministry established a new project team.



By September 2011, the new project team leader reported that the project was delayed again. In November 2011, the Ministry developed a new tentative strategy under which an additional three years would be required to complete the project, making the projected completion date March 2015, at a revised projected cost of \$11.5 million. As a result, it was decided in May 2012 that the project would be reviewed by the Ministry's internal auditors.

In its June 2012 report, the Ministry's internal auditors raised a number of concerns with respect to the management of this project. The internal auditors also noted that IT consultants hired to develop CMIS, at a cost so far of \$1.3 million, were not managed effectively and that billings were based on time spent rather than meeting project deliverables and outcomes.

In addition to the internal auditor's findings on project delays, we questioned why a totally new project was initiated and developed without more carefully considering the systems already in use in other provinces and the cost and time savings that could be achieved by using an already proven system. We noted that, although the Ministry did research existing systems in 2005, it did not pursue, for example, working with Manitoba's system, which we observed has useful features for tracking cases and workloads, something that would address many of the concerns we have raised in this report regarding the Division's lacking information on its operations (although Manitoba's system does not electronically store case documents, which is a feature the Division has specified for its new system). We were advised that Alberta's new case management system will be modelled on Manitoba's system, which was provided to Alberta at a cost of \$1. Alberta plans to enhance the system to electronically store case documents. Manitoba's agreement with Alberta requires that Alberta provide Manitoba with any modifications and enhancements to the case management system, which we consider to be a beneficial collaborative arrangement for both parties.

As of July 2012, CMIS was still underway, and a total of approximately \$5.2 million had been spent. The Ministry will need to seek Treasury Board's approval should it revise its budget and timeline to complete the project.

## RECOMMENDATION 5

To ensure that the paper-intensive processes currently used by the Criminal Law Division are replaced with an electronic case-management system to better manage and track prosecutions and staff resources, the Ministry of the Attorney General should significantly strengthen project management to mitigate the challenges posed by its Crown Management Information System (CMIS). In addition, the Ministry should formally evaluate existing case-management systems in other jurisdictions to identify any potential for achieving savings and shortening the time to get the required system in place.

## MINISTRY RESPONSE

The Criminal Law Division agrees with the Auditor's recommendation that having a robust information management system in place will enhance the Division's capacity to more effectively and efficiently prosecute cases and use resources. The Division has already taken steps to enhance its project management and oversight of the CMIS project. Rather than implement the tentative \$11.5 million strategy, the Division is now evaluating existing case management systems from other jurisdictions, as well as systems used by police forces, and will continue to do so. Specifically, systems will be re-examined with a view to establishing specific components of a system rather than continue to seek one ideal system for Ontario's prosecution service. For example, the Division is currently re-examining Manitoba's case management system to determine if it could meet some of Ontario's needs.

## PERFORMANCE MEASUREMENT AND PUBLIC REPORTING

We found the Ministry does not, in any substantive way, measure or report on the performance of the Criminal Law Division. In fact, the Ministry makes no mention of the Division in its annual reporting.

As we have noted throughout this report, the Division collects little data of its own. For example, the Division does not currently have performance indicators for Crown attorneys' workloads, charges disposed of per Crown attorney, cost per case, average cost of trial resolution, and prosecution outcomes such as conviction rates and use of court diversion programs. It also does not track certain key prosecutorial outcomes, such as trial collapse rates, rates of withdrawal of charges, the number of stays and adjournments, crimes committed by accused persons on bail release, and witness attendance rates.

A number of other jurisdictions we researched, including British Columbia, Manitoba, the Public Prosecution Service of Canada, and the Crown Prosecution Service of England and Wales (CPS) did measure and report on their results. For instance, British Columbia's Prosecution Service publicly reports a strategic plan, which includes its priorities and major projects, and timelines for their implementation. CPS also reports extensively on its business planning and performance management, and analyzes its efforts to meet strategic goals. It reports on criminal case outcomes for each of its districts, witness attendance rates and average costs per case.

In its annual report, the Alberta justice ministry reports on the public perception of fairness in its prosecution service—that is, the percentage of Albertans who agree that the Alberta justice ministry provides fair and impartial service in prosecuting people charged with crimes.

Jurisdictions such as the United Kingdom and the United States report on prosecutors' success rates in obtaining convictions, but we acknowledge that this is not common practice in Canada. Division staff and prosecutors in other Canadian juris-

dictions told us that the idea of measuring “success” by computing and emphasizing conviction rates was not consistent with what has been established as the Crown attorney's role: to simply lay out the facts and let a judge and/or jury decide innocence or guilt. However, this view does not take into account the fact that Crown attorneys make decisions on whether or not to prosecute based on what they consider the likelihood of conviction. For instance, dramatically high conviction rates might indicate undue conservatism in proceeding to trial with charges, while low rates might indicate the need for increased senior level oversight and guidance.

As noted earlier, Statistics Canada data shows that Ontario achieved the lowest proportion of guilty verdicts in adult criminal cases among Canadian jurisdictions in 2010/11, as well as the highest proportion of cases in which charges were stayed or withdrawn. Without further analysis, these statistics could mean that, overall, Ontario Crown attorneys are not as successful as prosecutors in other provinces. On the other hand, they could indicate that Ontario successfully re-directs a higher proportion of cases away from courts and to its diversion programs and achieves lower-cost solutions for cases involving relatively minor charges. Without analyzing the reasons for these variances, the Division and the Ministry cannot make an informed judgment on issues such as these. We were advised that the Ministry also does not compare key performance measures with other provinces because there have not been successful collaborative efforts among the various prosecution services to identify appropriate, consistent and meaningful performance measures.

### RECOMMENDATION 6

Particularly given the importance of the Criminal Law Division to the mandate of the Ministry of the Attorney General, the Ministry should develop performance indicators specifically for the Division, and should publicly report on the

Division's progress toward those indicators. It should also consider liaising with other provinces' prosecution services to develop common performance measures that would allow for comparison, benchmarking and the identification of best practices.

### **MINISTRY RESPONSE**

Given that what gets measured gets done, the Criminal Law Division acknowledges the importance of continuing to evolve its key per-

formance indicators and of measuring results in support of its core mandate of contributing to public safety for the citizens of Ontario. The Division will continue to explore additional qualitative and quantitative performance indicators, both within the Ministry and with other prosecution services. The audit accurately outlines our concerns about defining success through the measurement of conviction rates. Once these indicators are identified, the Division will move forward to publicly report on the results relating to these performance indicators.