REPORT ON THE CIAJ'S COMPLEX CRIMINAL TRIALS ROUNDTABLE HELD FRIDAY, MAY 2, 2014

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In May 2014, the Canadian Institute for the Administration of Justice (CIAJ) initiated roundtable discussions between representatives of key stakeholders in the criminal justice system, on the recurring theme of complex criminal trials and how to better manage them. While conferences and working groups have been held, and reports have been written, on the subject, it is one of those themes that always benefits from additional brainstorming and ideas. It also warrants being periodically brought back into the limelight so as to ensure ongoing efforts to curb delays and expenditures associated with long complex trials, and to question and obtain feedback on practices and ideas that have been tried and tested since the last go around.

And so judges from the provincial and superior court in Ontario, defence attorneys, federal and provincial Crowns, police representatives – from the RCMP, the OPP, and the TPS –, Legal Aid representatives, as well as court administration representatives including Directors of Court Operations, met this spring to bring their thoughts, concerns, and ideas to the table. They came from across Ontario and British Columbia and canvassed ideas – both old and new – that could apply nationally, although the focus was on the practices and systems that exist in Ontario.

What follows is an account of those suggested measures in relation to which there was largely consensus. My purpose is to create a record of these valuable suggestions for circulation and discussion. Accordingly, I have included some of the concerns or caveats expressed in relation to a few of the measures. For those ideas that are not novel, I have also referred to other studies or reports in order to put them into context.

While the discussion often focused on major projects and what is more commonly described as the classic "mega trial", all "complex criminal trials" – including those that might at first blush appear simple, but for any number of reasons evolve into lengthy or complex proceedings – were fair game. It was agreed that too much time would not be spent dwelling on how to define the complex trial, the participants being in general agreement that "you know it when you see it".

It was further agreed that, as observed by former Chief Justice Patrick J. LeSage and then-Professor (now Justice) Michael Code in their 2008 report on complex criminal trials, short trials are not coming back.[1] Time will not be spent here going over the policy choices made that they say have been the main contributors in making the twenty first century criminal trial what it is. The fact of the matter is that it is here to stay. No set of rules will change that. The focus ought therefore to be on keeping them within the confines of a manageable trial, and managing them more efficiently.

[1] Michael Code and Patrick J. LeSage, *Report of the Review of Large and Complex Criminal Case Procedures*, November 2008, at p. 14 ("Code-LeSage Report")

Participants in the roundtable discussions were also cautioned to adopt a "self-critical frame of mind" and to not suggest that more money would solve the problem.[2] With these cautionary words in mind, they canvassed improvements in relation to four main areas of the criminal process: arrest and bail, disclosure, proceedings in the Ontario Court of Justice, and proceedings in the Superior Court of Justice.

ARREST AND BAIL

Large-scale arrests are becoming increasingly common. Nevertheless, participants acknowledged that significant efforts have been made by police to reduce the number of arrests made in relation to any given investigation or project, and to facilitate and smoothen the ensuing bail process. By the same token, it was agreed that more could be done in that regard. This is especially so with respect to large "projects" where police are generally not reacting to events, but rather have planned the bulk of the arrests and therefore have significant control over timing.

1) Provide earlier notification to the legal aid service provider on takedown day, so as to make arrangements for additional duty counsel or a better allocation/deployment of duty counsel where they are needed.

The Code-LeSage report underscored the importance of giving prior notice of large-scale arrests to the local administrative judge, so as to provide for the necessary court space, staff, and time required for timely bail adjudications.[3] Participants at the recent roundtable confirmed that this was being done: justices, Crowns, and court staff are generally lined up and ready to go when the first bail candidates arrive at court. Indeed, in Ontario, the regional senior judge is currently notified and he or she advises the justices of the peace and court services to ready the courts.

However, bail hearings or initial appearances have remained temporarily stalled because duty counsel are kept out of the loop and have to scramble to be reassigned in sufficient numbers where needed. Most accused, in particular in the context of large projects, are represented by duty counsel on their first appearance before the courts. As such, it is important for duty counsel to get some lead-time in order to get properly organized.

That is not to say that concerns weren't raised regarding this suggestion. Police, mainly, expressed concern about expanding the circle of those who have advance knowledge of planned arrests, given the greater potential for leaks and jeopardizing of the arrests. Two responses were given to this line of concern: first, duty counsel only require very generic information in terms of notification; and second, they do not require much notice in order to respond effectively. Notification in the early morning hours or just a few short hours before the arrests, or at the very least while they are taking place, that extra resources will be required at any given courthouse,

[2] Nevertheless, there is no doubt that each of the steps described below needs to be properly resourced if they are going to have any impact. In particular, police and Crown need to ensure that major cases are sufficiently and properly staffed.

[3] Code-LeSage Report, *supra*, at p. 82

would already greatly improve the ability of duty counsel to respond. This is especially so given that the first wave of accused generally don't begin to arrive at the courts until the afternoon of an early-morning takedown. Ideally, however, approximately twelve hours notice should be given to allow them to line up additional resources.

A formal line of notification should therefore be established to legal aid management so that it can set about to find defence lawyers at the earliest opportunity. The suggestion was also made that in larger centers such as Toronto and Ottawa, it would be simple, for instance, to create a protocol between Legal Aid, the Regional Senior Justice and the Crown for a strike force of duty counsel from the surrounding area, who would be called in on 4 to 8 hours notice. Of course, duty counsel would have to agree to be available. But very little administrative commitment would be required to organize this, and no financial commitment would be necessary. The fact that this has yet to be done is emblematic of the system not having adjusted to the realities of complex cases being a fact of life.

Finally, the point was also made that some notification should also be given to interpreters, to have them available in due time.

2) **At the time of arrest, a police synopsis should already be available in paper or electronic form (ideally both). These should be prepared with a focus on the three grounds for detention in relation to each accused.**

This recommendation is meant to apply particularly to long-term investigations, where it should be feasible in light of early Crown involvement. Indeed, given the fact that disclosure will tend to be collected and organized as the investigation proceeds, and the fact that there is control over the timing of arrests as well as a significant level of planning and organization that goes into large investigations, synopses relating to each known target should be available to defence counsel on the day of arrest, ideally in both hard copy and electronic copy.

Paper copies of the synopses are generally already made available on the day of arrest. However, participants noted that these tend to be very lengthy and contain information relating to all accused. It was suggested that they be individualized with a focus on the three grounds for detention. Knowing the general architecture of each bail to take place would be of great assistance to both Crown and defence, and lead to speedier bail resolutions.

Electronic copies of the synopses allow for rapid searches and therefore quick navigation through what can be a lengthy and substantial document, in the face of limited time. Some commented that synopses are currently not provided in electronic form because duty counsel do not have laptops. But it was further commented that that would soon change. As a result, it was agreed that the synopsis should be given electronically, either on a memory stick or to be downloaded from a secure website.

The Public Prosecution Service of Canada (PPSC) already provides "substantive event summaries" at a very early stage, which are generally a step up from the usual synopsis. They

consist of a detailed narrative of the case with links to supporting documents. These summaries also tend to give defence counsel an informed view of the Crown's perspective on the case.

Some participants went further and suggested that if initial disclosure is already available in electronic format – which one might expect as it is compiled as the investigation proceeds, it should be provided to counsel as of the first day. Not only would this be key to facilitating the bail process, but it may lead to speedy resolutions for some accused. Defence counsel are indeed loathe to allow any resolution decision to be made on the basis of a synopsis, but may be in a position to properly advise their client if initial disclosure has been made. Of course, this means early involvement of the Crown, something that was further recommended by all.

3) **While not amenable to a default protocol, as between the provincial and federal Crowns, a single prosecution service should ordinarily take responsibility for a case.**

This recommendation was made with a view to ensuring that a case is tightly run and doesn't "balloon" into a more complex prosecution than it needs to be. For a number of reasons, two prosecutions certainly mean added complexity.

In certain types of cases, it appears that the division of labour is already provided for. For instance, in "guns and gangs" investigations, federal crowns generally delegate the prosecution of federal matters to provincial crowns, often before arrests take place. This works well. However in many instances, in particular in large investigations that are not big projects, there remains a significant lack of coordination between federal and provincial crowns.

The general view at the conference was that one prosecution service should take control of the case, at the earliest possible opportunity. Crown attendees however took the view that a cookie-cutter type of approach may not be viable. That is because many factors enter into the equation, and these are not always easily discernible at the front end: for instance, what the most important charge is, who the witnesses are, whether one service has been involved in giving advice to the police and is well-versed in the case, and in more remote areas, available personnel, to name a few. Nevertheless, a protocol should be in place to provide for a discussion in this regard at the earliest possible stage. Negotiations should generally be done upfront, with a view to arriving at an agreement wherein only one service will take on the case.

4) **The police should consider obtaining criminal lawyers' email addresses from their provincial criminal lawyers' association, and emailing lawyers instead of engaging in a series of calls to the lawyer upon an arrest.**

Defence counsel pointed out that many amongst their ranks will not answer a 5 a.m. call from an unknown number. If an email is sent informing the lawyer of their client or potential client's arrest, the lawyer will know ahead of time that the client will be making an appearance in bail court that same day.

The defence bar urged police to download and incorporate the email addresses from the criminal lawyers list normally posted on their association's website (such as the CLA website). A point person officer can then be responsible for this task, as opposed to making a series of unsuccessful calls.

5) The police should have a designated point person to vet sureties and run security checks for those accused in a position to be quickly released.

Accused persons who are quickly identified as persons who can be released with a proper release plan in place should appear in a designated court. There, the police should have a designated officer or civilian whose essential task would be to run police checks on the proposed sureties. The defence would quickly be advised of who the designated surety officer or person is, and would thus immediately know who to go to with their proposed plan. Once the surety officer clears the surety or sureties, the plan is ready for final approval by a designated Crown, who should also be fully briefed and prepared in advance to address bail. For those accused who were targets of the investigation (as opposed to people who were perhaps unexpectedly found in some of the targeted arrest locations, and who are themselves charged with an offence), the Crown should immediately have a position on bail, and the terms on which it proposes release. This would greatly assist in streamlining the process.

Of course, as a first step, the police should give careful thought to whether they are able to deal with some of the accused with the police release powers, as opposed to bringing them to court.

DISCLOSURE

The Code-LeSage Report dealt extensively with disclosure issues. This is not surprising given that when it comes to managing long and complex cases, its functionality is generally the central issue. This Report will therefore be our point of departure for many of the propositions set out below. Eight years later, can it be said that progress has been made?

1) Crowns need to be involved from the get-go.

Sooner is better. Crowns need to be involved in the police investigation as the theory develops and disclosure is being compiled. The Code-LeSage report insisted on early pre-charge cooperation between Crown and police.[4] It described the purpose of the required cooperation as follows, and forcefully made the case for its necessity in large complex matters:

[4] As did the Steering Committee on Justice Efficiencies and Access to the Justice System in two of its reports: Department of Justice Canada, *Final Report on Mega trials of the Steering Committee on Justice Efficiencies and Access to the Criminal Justice System to the F/P/T Deputy Ministers Responsible for Justice*, 2005, at p. 8; and Department of Justice Canada, *Final Report on Early Case Consideration of the Steering Committee on Justice Efficiencies and Access to the Criminal Justice System*, 2006, at p. 9

> This allows the Crown and the police to consult as to the size and focus of the case, before any charges are laid, such that a manageable prosecution is more likely to emerge. It also allows the police and the Crown to begin building the disclosure brief at the pre-charge stage so that it is substantially ready once charges are laid.
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> In the context of the large complex case, the justification for close police and Crown collaboration at the pre-charge stage goes well beyond merely providing legal advice on investigative techniques such as search warrants, wiretaps, undercover agents and tape recorded "KGB statements". Rather, the Crown needs to engage with the police early on as to the scope of the investigation, the targets of the investigation and the theory of the case. In other words, the police need pre-charge advice in these very large cases as to what a manageable or feasible prosecution would look like, if it is to emerge at the end of the investigation. There is no point in the police pursuing a sprawling unfocused investigation, with hundreds of targets, if it will lead to a case that cannot be prosecuted because there are too many accused and overwhelming disclosure problems.[5]

Code and LeSage observed that closer collaboration was already taking place between Crown and police at the pre-charge stage. They pressed for still closer collaboration. The participants at this conference did the same.

One of the key reasons for advocating for such collaboration was because of the disclosure point already made above. The Code-LeSage Report already observed that a great benefit of close collaboration early on in the investigation was that "the disclosure brief will be built each day, as the investigation proceeds, and will be substantially ready when charges are laid."[6] Accordingly, the case was made at the recent conference that the bulk of disclosure should be available practically as of the day of arrest. Not only should it be available very early on, but if Crowns are indeed involved from an early stage, it should also be well organized and searchable.

One suggestion was that paralegals be retained to assist the police investigation. Many are already hired by some prosecution services to assist with vetting and preparing the disclosure. Crowns observed that these paralegals tend to become highly specialized in key disclosure issues that are often present in large-scale investigations, such as issues relating to informants. The immense (direct and indirect) benefits of complete, timely and organized disclosure are discussed below.

2) The standards for disclosure should be universal. It should be as organized and searchable as possible.

The Code-LeSage report highlighted the importance of applying consistent standards as to form, content and timeliness of disclosure. It noted that since *Stinchcombe*, the recommendation had been made again and again that directives or guidelines be put in place in this respect.[7] While none existed at the time of their report, Code and LeSage reported that a consensus

[5] Code-LeSage Report, *supra*, at pp. 24 and 26-27
[6] Code-LeSage Report, *supra*, at p. 27
[7] Code-LeSage Report, *supra*, at pp. 22-23

appeared to have been reached amongst all levels of prosecution and police working on large complex cases in Ontario. The uniform standard for disclosure in these cases was the electronic "Major Case Management Brief" consisting of 52 file folders and Adobe 8 search software. Code and LeSage recommended that this be made the subject of a directive under the *Police Services Act* to ensure its implementation across the province.[8]

Yet six years later, that remains to be done. Perhaps as a result, it appears as though the Major Case Management Brief is still not used by all major police forces. Participants complained that there is still no consistency in the organization of the briefs across cases, across police forces, and in the software to be used.

Many options indeed appear to be available and used in different jurisdictions or by different police forces. While Super Text appears to have been abandoned, reference was made to major case management systems such as SCOPE (used by the TPS), ENR3 ("Evidence and Reporting" – which is server based) (RCMP), and the above-mentioned 52 file Major Case Management Brief (OPP) being used by different forces. In other jurisdictions, such as Quebec, disclosure has started being put in a "cloud", whereby the defence is given a password that is valid for 48 hours. Using that password, the defence can download the newest disclosure. Many have been asked to convert to Adobe, which appears to be the most standardized software for the time being.

It would certainly be useful for Crowns, defence lawyers and police to once again discuss a common approach. Most agreed that at least for the time being, Adobe and the Major Case Management Brief were good options that could be the subject of standardization, and that many were already moving towards their use.

Still, many viewed it as unacceptable that we were not yet there. To ensure its implementation across the board, the adoption of a directive by the Ministry of the Attorney General or pursuant to the *Police Services Act*, or arriving at a Memorandum of Understanding between the Ministry and police, which sets out the characteristics with which a brief must comply, would be best. A standard protocol also has the advantage of diminishing the burden on Crowns to organize the disclosure. This had also been the subject of a recommendation by Code and LeSage,[9] but the cost of various organizations transitioning from one format to another has apparently been its main obstacle. As was said in the same report, however, "Many of our current practices and procedures are slow, complex and inefficient and carry with them numerous hidden costs for the police, the Crown, the accused, the courts and LAO. Reform will reduce those costs."[10] This is one of those instances.

The participants nevertheless canvassed ways of getting around the cost factor. Given that the financial burden of the change might only fall on some, even though all benefit, they advocated for a sector wide approach, whereby no single entity is responsible for the charge. It was also obvious to all that no consensus – and therefore no standardization – will be reached unless the move comes from the top down. Discussions must be had at a high level. And given the time required to budget for and transition to new equipment, they must start now.

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[8] Code-LeSage Report, *supra*, at pp. 23-24 and 33 and 37
[9] Code-LeSage Report, *supra*, at pp. 32-37
[10] Code-LeSage Report, *supra*, at p. 166

And what are the sought-after characteristics of the ideal electronic disclosure brief? The ideal brief is organized, searchable, accessible, and usable in court. None of this should surprise the reader. These are much of the same characteristics and features enumerated in the Code-LeSage Report.[11] In particular:

- There should be a unique document number for each document within a file, not just a pagination reference.
- It should be easy to print out only selected documents.
- It should also be possible to save a particular document independently, as its own document or file.
- The software should have a character recognition feature allowing for conversion of a document into Word format.
- There should be a standard index with a searchable database, and it should be organized in such a way as to allow for easy retrieval and search in court or by the jury, for electronic prosecutions.

A key feature of the ideal brief that has started being used is the use of hyperlinks, whereby the evidence relating to each accused and each charge is set out with a hyperlink allowing one to jump to the particular piece of disclosure being referred to. Such a chart can also be used as evidence in a preliminary inquiry, by way of section 540(7) of the *Criminal Code* (discussed below). This method is also very useful in wiretap or surveillance cases – where for each intercept or surveillance summary, a hyperlink will take the user to the relevant audio, video, notes, reports or transcript. Many observed that when disclosure can be structured in this way, and that the case is thereby clearly laid out against each accused, many don't take very long to resolve.

Yes, organizing voluminous and complex disclosure upfront is a time-consuming and expensive task. But organized and timely disclosure has significant positive trickle-down effects, not the least of which is cost-saving: bail is facilitated and can take place earlier, pleas happen at the outset and thereby render the case more manageable, preliminary inquiries may be waived (if they are not required to "discover" the case), etc. In the end, if the cost is not reduced, it is simply redistributed elsewhere. But overall, it shouldn't be costing more to the system and the cost is better allocated when it is invested at the outset.

3) The parties should be able to ascertain that disclosure is complete.

This recommendation came about after reflecting on the causes of a recent mistrial declared by Justice Antonio Skarica in a Brampton kidnapping case,[12] which resulted in part

[11] Code-LeSage Report, *supra*, at pp. 33-34 and 36

[12] In the unreported case of Gunalingam, Singh and Jassal. See, e.g.: http://www.thestar.com/news/gta/2014/02/12/police_and_crown_negligence_triggers_kidnapping_mistrial.html

because of the very late disclosure of key cell phone records which had apparently been inadvertently overlooked by the various Crowns juggling the case. The risk for such mistrials, but also for potential miscarriages of justice, led many to raise the need to have a disclosure system that allows for quality control. Crown counsel need to be able to ensure that everything in the Crown brief has been provided to the defence, and defence counsel need the ability to satisfy themselves that they have received full disclosure. Certainly, in the case of electronic disclosure, the size (number of bytes) of any given computer file is a good comparator. But because of redactions and cutouts, it is not foolproof. Indeed, the metadata in a redacted version is different from the unredacted version.

The easiest method to ensure completeness is for the disclosure to be sequential. But what of updates to initial disclosure? It was agreed that while the second or subsequent waves of disclosure need to be provided independently, it must at the same time be integrated with the initial set of disclosure so as to permit searches within a single location, as well as to ensure that everyone is on the same page once before the court. In other words, the defence should be provided with supplementary disks, as well as one comprehensive disk or hard drive. The current common method of having several disks, without knowing which disk contains a particular piece of information, is not optimal. Internet-based disclosure models or "clouds", which allow for a central electronic record that everyone can access, might solve the problem. In those cases, updates to disclosure are also instantaneous.

It is true that the ability to make electronic notes on the disclosure or to flag sections of it leads to wasted work when additional disclosure comes about. Obviously, the ideal approach is to make efforts to avoid serial disclosure, which creates a moving target not conducive to the rapid progress of a case. Defence theories may change as disclosure rolls out, which was a point forcefully made by Justice Skarica as he lamented the 18-month delay in providing important evidence to the defence.

Aside from the quality control measures internal to the disclosure itself, there should be a file manager in charge of collecting the disclosure and ensuring that it is complete and timely. Aside from favouring an organized file, this serves to impress upon other officers that they have to turn over their notes if asked by that person.

4) There is a need to ensure that the defence is electronically capable.

A) The police and Crown office should provide a support person or trainer for defence counsel to know how to search and organize electronic disclosure.

In cases where disclosure is complex or there is a risk that it be misunderstood, the police should offer presentations to understand the disclosure brief. These should take place prior to setting dates. Such tutorials have been used with success, such as for navigating through the various hard drives in the case of the "Toronto 18".

B) Legal Aid should fund technological training to ensure that defence counsel are capable of making efficient use of electronic disclosure.

Lawyers can no longer afford to be computer-illiterate. Still, many are unable or unwilling to "skill up". While every defence lawyer may not need to be fully trained, Legal Aid should have a hand in ensuring that they are able to read electronic disclosure. Tutorials ought to be held for criminal lawyers to become competent in accessing electronic disclosure. Making it a professional standard for the Law Society could also incentivize lawyers to learn how to access and work with electronic disclosure.

5) In-custody accused must get better access to disclosure.

Defence counsel at the conference raised a burgeoning problem: that of having increasing difficulty in accessing the detention facilities to review disclosure and prepare the case. This is mainly a function of jails being in continuous lockdown, thereby preventing counsel from meeting with their clients.

One solution that was piloted in Quinte with Kingston lawyers is a new secure "Skype" system, allowing counsel and their client to communicate privately with a live video image that allows for some viewing of the disclosure. Some raised the issue that Skype will not work unless there is available staff in the correctional setting, and that it may also not be available during lockdown periods. This is one of those instances where the correctional authorities will need to be consulted and brought into the discussion.

6) Disclosure and the self-represented accused is a unique problem.

Another issue that the roundtable participants didn't purport to resolve was the case of the self-represented accused. Out-of-custody accused that do not have counsel are generally granted access to computers at the courthouse in order to review their electronic disclosure. In-custody accused are granted access to a computer at the jail. However, space may not be available in every courthouse, the jail might only grant access to a computer for a very limited time period each week, or the accused might be computer illiterate.

In some instances, the right accommodations were made for computer literate accused. For instance, in the "Toronto 18" case, the Crown removed the non-association condition amongst the accused so that they could all be housed on the same range and have access to the electronic disclosure. Each had unlimited access to a computer in his cell and unlimited paper.

When such accommodations can be made, they should be made. Nevertheless, significant issues remain. The one true consensus that was reached amongst participants in this regard is that self-represented accused are worthy of a whole day conference.

7) **It is unnecessary for the police to compile an information report and review all of the contents of seized devices such as phones and computers, prior to disclosure being made.**

A major time-consuming and resource-intensive task stems from the huge number of devices seized at the end of an investigation. The sheer volume of material collected from these smart phones, flash drives and other devices can take an astounding amount of time to analyze. These devices will often include applications that the police might themselves need to download in order to access a particular document or recording.

Participants suggested that the devices be scanned for contraband, and if none is found, a mirror image of the device should be turned over to the defence on the understanding that it has not been reviewed in detail by police or Crown. While this may have to be done by the Crown at some stage prior to trial, this does not need to be accomplished right at the outset.

PROCEEDINGS IN THE ONTARIO COURT OF JUSTICE

Making wise decisions about guilt is no longer sufficient for cases to be considered a success: they must also be properly run. Newly appointed judges are now taught to case-manage as part of their duties. This focus on case-management is applicable as much to set dates as it is to focus hearings, case management conferences, preliminary inquiries and trials. This judicial education ought certainly to continue. The suggestions below might also be considered to case-manage more effectively, and to keep trials and preliminary inquiries at a manageable level.

1) **More involved case-management should take place.**

"More involved case-management" can mean many things, as simple as day-to-day scheduling and as complex as negotiating appropriate resolutions. All ideas were canvassed.

It was certainly the consensus that judicial pre-trials are crucial to the success of a preliminary inquiry. In the case of long and complex trials, the trial coordinator should be notified and a case management judge assigned to shepherd it through. The same judge should follow the case through all of the set dates, the pleas, and the preliminary inquiry, so as to not have to reinvent the wheel. This judge should establish boundaries, encourage pleas and reasonable positions on sentence, and assist the parties in narrowing the issues. The case should already be somewhat simplified before arriving before the preliminary inquiry judge.

The participants also agreed on the terrible delays and inconvenience caused by continuations, and the importance of finishing within the allotted time. Of course, this has much to do with arriving at the most accurate time estimate possible (a rule of thumb being to add on 25% to the estimated time), but can also be managed as the hearing progresses and time is

getting short. First, the hearing can be scheduled to start and finish without breaks. Counsel should also be told to arrive at court by 9:30, despite the hearing only starting at 10.

More accommodating, however, is the practice of scheduling hearings for only four days of the week – for instance Tuesday to Friday or Monday to Thursday – while holding the remaining day above everyone's heads if the matter is not completed. (Or alternatively, planning for days off with the threat of sitting on those days if necessary to stay on schedule.) This has been observed to be an impressive incentive to get things done and can be a key tool for judges. Counsel apparently cherish their off days and will come to remarkable agreements and consensus with it hanging over heads. Adapting hours in order to stay late when necessary to remain on track for completion within the allotted time is another option.

2) The parties should make greater use of "discovery" or out-of-court examinations.

In certain jurisdictions, increasing use has been made of the discovery examination method, whereby witnesses are examined out-of-court before a special examiner in lieu of having them testify in a preliminary inquiry. This can either be done in open courtrooms in the judge's absence, in a special examiner's office, or in jail if the accused is in custody. Participants agreed that many witnesses do not require the presence of a judge to give their testimony, in particular when committal is not in issue. Even in cases where committal is in issue, certain witnesses that don't require the attendance of a judge could be heard out-of-court.

Caveats were nevertheless expressed: for instance, some opined that the method would not be appropriate in sexual assault matters, and even in *very* complex matters such as large guns and gang projects. In addition, there was no consensus that these discoveries should entirely replace preliminary inquiries. Rather, the many benefits of preliminary inquiries from a case-management point of view were highlighted throughout the discussion: for one, preliminary inquiries allow the parties to obtain the perspective and guidance of the judge at an exit pretrial (which is advocated for below), which favours resolution; it may also be the right opportunity to cut loose some of the more minor accused, and narrow down the players for trial (instead of preferring an indictment and arriving at trial with a plethora of accused); it allows the defence to test the evidence in a way that might lead to abandoning certain motions, or to lay out for the client the reality of the strength of the case against them. But more than that, they allow the parties to focus their case for trial and narrow the issues before the proceedings in Superior Court. Loss of the preliminary hearing would likely just back-end issues into motions in Superior Court. The benefit is not entirely for the defence: the inquiry allows Crowns to assess the strength of their case by seeing their witnesses testify, which might also favour resolution or abandonment of some of the charges.

This was recognized by Code and LeSage in their report: "Those who advocate greater use of direct indictments in long complex cases ought to think carefully about the advantages gained from a period of time in the Ontario Court where the case is essentially whittled down and organized so that a much more focused trial ensues."[13]

[13] Code-LeSage Report, *supra*, at p. 77

3) Exit pre-trials should be the norm. This could be achieved either through an amendment to the OCJ rules, or simply by being strongly encouraged by judges of the court.

Pre-trials with the justice who has presided over the preliminary inquiry at the end of the inquiry offer invaluable insight to the parties and in particular the accused about the case. These pre-trials are more conducive to resolutions than are the ordinary judicial pre-trials given that the judge has actually heard some and perhaps all of the key witnesses testify. Counsel thus get the views of a judge who has heard some of the evidence to take back to their client. The Crown also benefits from obtaining the judge's view on resolution or on its case generally, including on the approach to take with respect to the more minor players. Crowns also expressed that they welcomed the judge's feedback as providing them with backup ammunition in the face of complainants – in particular sexual assault complainants – to withdraw the charges. An exit pretrial also assists the Superior Court judge who takes over the case once it reaches that court. Judges also commented that they might use the opportunity, in the event of a mismatch between counsel for the defence and for the Crown, to flag to a less experienced counsel that they should consider becoming a junior counsel at the trial. Using the preliminary inquiry as a way of screening for ineffective counsel indeed avoids a heap of trouble before the Superior Court.

Importantly, this practice does not require an amendment to the *Criminal Code*. An amendment to the court's rules would suffice if they were to be made mandatory in most cases. In the alternative, they could simply be strongly encouraged by the preliminary inquiry judge. Either way, there is no downside to this practice.

4) The preliminary inquiry judge should make more effective use of focus hearings.

The "focus hearing" and other related provisions, enacted in 2002 and found at sections 536.4, 540(7) and 540(9) of the *Criminal Code*, remain underutilized by the courts. By virtue of those provisions, the tools do exist to cut down preliminary inquiries, but they are not used as effectively as they could be. This might be for some of the reasons stated above, that in fact both Crown and defence counsel often do find benefit to the preliminary inquiry.

Another reason might be the failure to see anything in the focus hearing – conducted by the preliminary inquiry judge – that distinguishes it from the traditional case conference (s. 625.1 of the *Code*). Even the participants had difficulty discerning the difference.

Code and LeSage observed the same thing, but noted that if the focus hearing is "interpreted as advisory and not directive", it "would be entirely duplicative of the traditional s. 625.1 'conference'". They observed:

> What potentially distinguishes the "focus hearing" from the "conference" is that the preliminary inquiry judge also possesses the powers found in s. 540(7) to dispense with certain *viva voce* witnesses and admit their evidence in hearsay form at the preliminary inquiry. Presumably, Parliament intended some relationship between the two provisions such that the judge would identify "the witnesses to be heard," when conducting the s. 536.4

> "focus hearing", and would then be able to rule at the preliminary inquiry that the evidence of any other witnesses could potentially be admitted in hearsay form pursuant to s. 540(7), provided their evidence was "credible and trustworthy."[14]

Code and LeSage recommended that these provisions be used in combination in order to give the focus hearing more teeth. They reported that the focus hearing powers – which admittedly were fairly new at the time of that report – were not being used effectively.[15] Unfortunately, that remains the case today.

Many participants continued to advocate for greater resort to s. 540(7), which allows "credible and trustworthy" information that may otherwise not be admissible, including hearsay, to be adduced as evidence at the preliminary inquiry. They observed that this could also be done in writing. It is already done in this manner for instance in the case of drug-related experts, as these experts are generally not controversial at least at the preliminary inquiry stage of the proceedings. But much broader use of the provision is occasionally made, and was advocated for, such as proceeding by way of a single witness, for instance the lead investigator, who might adduce the Crown's case by means of a chart (relating to each accused and each count), transmitted to the judge and defence several weeks ahead of time. The defence would nevertheless have the option of adding on a limited selection of additional witnesses. Crowns indicated that when they heavily rely on s. 540(7), they are usually quite accommodating with respect to witnesses the defence proposes to hear from.

5) In the appropriate case, direct indictments should be used. When they are used, they should be preferred earlier rather than later.

With the above caveat in mind, there are nevertheless cases where it would be appropriate and not counter-productive to resort to direct indictments. Direct indictments could be increasingly used in Ontario, as they are in British Columbia and increasingly in Alberta. However in light of the benefits of a preliminary inquiry, they should only be resorted to when there has been a lot of planning, strategizing, and structuring of the case. They may be appropriate where there is sufficient confidence that there will only be two or three central issues at trial, and perhaps in instances where delay may be a big issue at the front end. Prosecutors should be instructed to utilize them in an effective way.

The main take away from the discussion, however, was simply that *if* resort to direct indictments is to be had, that election should not be done at a late hour.

[14] Code-LeSage Report, *supra*, at p. 78

[15] Code-LeSage Report, *supra*, at pp. 78-81. The alternative recommendation was for the Ontario Court of Justice to issue rules so that "any direction made in accordance with a rule as to the witnesses to be heard at the inquiry will have the same force as a court order".

6) The number of accused per preliminary inquiry should be restricted.

While the maximum number of accused in any given case to keep it manageable will depend on the type of case, the live issues in the case, whether they are unwieldy or narrow and focused, and whether these issues are common to all accused or not, and a number of other potential factors, there was general agreement that 6 or 7 ought generally to be the limit, with 10 being the upside limit.

While judges might prefer having one preliminary inquiry for all of the accused, so as to avoid the inconvenience to civilian witnesses who would be called multiple times to give the same evidence, others, such as Legal Aid Ontario, are resistant to the idea because of the ensuing cost for lots of lawyers just to be present. There is certainly a trade-off to running two or more manageable preliminary inquiries, and running a single larger one that might end up collapsing or stretching out over an even longer period of time. No matter who's got it right, preliminary inquiries with 30 accused are not properly manageable, not to mention that most courthouses are not logistically adapted for the endeavour. Further, it is important that cases not be built that invite conflicts of interest. There is without a doubt a need to divide the preliminary inquiries into reasonable numbers of accused. After all, as observed by a participant, "if there are too many people on the boat, it sinks".

7) A follow up judicial pre-trial should be held 6 to 8 weeks before the preliminary inquiry, as the parties start focusing in on the hearing.

A second judicial pre-trial a few short weeks prior to the preliminary inquiry can be very useful. With the hearing date fast approaching, the parties are generally more motivated to resolve. In order to address funding concerns by Legal Aid, participants agreed that there was no reason the pre-trial could not simply be held by way of a conference call.

PROCEEDINGS IN THE SUPERIOR COURT OF JUSTICE

The *Fair and Efficient Criminal Trials Act*,[16] passed in the wake of the Code-Lesage Report and other working groups or steering committees such as the Working Group on Criminal Procedure of the Coordinating Committee of Senior Officials, significantly improved the state of affairs by the introduction of the "case management judge". It allows for pre-trial motions to be heard and decided by a different judge from the trial judge, and for joint hearings to take place on these motions in relation to separate but related trials, provided they are being held in the same province before a court of the same jurisdiction.[17] These amendments were key to addressing the main causes of trial length, all generally related to the expansion of pre-trial motions:

[16] S.C. 2001, c. 16
[17] *Criminal Code*, Part XVIII.1 (ss. 551.1 to 551.7)

> [M]odern law reformers have consistently argued for pre-trial case management in a much more robust form, with real judicial powers to make rulings. … [M]odern criminal proceedings have been transformed by three major events – the *Charter of Rights*, the evidence law "revolution" and the enactment of numerous complex statutory offences and procedures. The common feature of all three of these initiatives has been an explosion of pre-trial proceedings, most of which involve subtle nuanced legal tests and highly flexible remedies. It is the expansion of the pre-trial proceedings, more than anything else, that has lengthened and delayed the modern criminal trial. These preliminary motions require early resolution because they will often determine the whole complexion of the case…[18]

These important amendments were considered, and lingering issues discussed.

1) Effective use should be made of the 2011 amendments to the *Criminal Code* regarding case management, with a view to the differences between a case management judge and a joint hearing judge.

Sections 551.1 and 551.3, which allow for a case management judge who is not the trial judge to hear pre-trial motions and issue binding decisions, have certainly started being used. It was observed that the case management judge will often aim to be the trial judge.

Section 551.7 serves a similar function but applies when the same or a similar issue is to be adjudicated in related trials. In such cases, a "joint hearing" judge can be appointed to adjudicate the issue in a manner that is binding in relation to the distinct trials. The participants observed that the statutory scheme differs from the "case management" scheme, but it is unclear whether the legislator intended anything by this difference. Certainly, the case management judge has broader powers than does the joint hearing judge. However, the same result can apparently be achieved by the case management judge, given that he may be appointed before any severance occurs, and can rule on pre-trial motions. Moreover, whereas the provisions explicitly allow the trial judge to refer a matter back to the case management judge to be adjudicated upon during the course of the trial on its merits, no such power is provided for in relation to the joint hearing judge. It remains to be seen whether the distinction will be of concern in practice, or if there is some hidden wisdom to the legislator's intent. Practitioners ought to be aware of the distinctions in order to utilize them more and utilize them appropriately.

The participants advocated for effective use of these 2011 amendments to the *Criminal Code*. In the end, however, it was determined that more time is needed to assess whether the amendments have been or will be effective.

2) Counsel must be kept to a strict schedule with respect to pre-trial motions.

The scheduling of pre-trial motions has a big role to play in effective case management. Judges at the roundtable insisted that in instances where the case management judge kept a tight

[18] Code-LeSage Report, *supra*, at p. 60

leash on the motions, set boundaries, and established a momentum, the proceedings ran smoothly and efficiently. In this regard, an inventory of motions should first be compiled, with a deadline for counsel to announce and file. The case management judge should then determine the best order for the motions, and maintain an ambitious schedule and filing dates so as to ensure that there is no dead time, and to keep the ball rolling. It should be determined who is lead counsel on each motion.

Code and LeSage similarly made reference to the number of common law case management powers that judges should not be shy to exercise, such as:

> [R]equiring proper written notice of a motion to allow the court and opposing counsel time to prepare; requiring supporting materials for a motion including written legal argument and an offer of proof, so that its potential merits can be properly considered; summarily dismissing those motions that obviously lack merit so as not to waste court time; placing time limits on oral argument in order to encourage disciplined and focused advocacy; insisting that motions be argued on a written record, such as a preliminary inquiry transcript or witness statements, and without vive voce evidence, in those cases where credibility is not a proper issue on the motion; and directing the order of motions, deferring rulings on motions and even directing the order of evidence, in exceptional cases, all for the purpose of ensuring the efficient conduct of the trial.[19]

There was a general consensus that despite occasional resistance in the Superior Court to schedule the pre-trial motions first and ahead of the trial dates, this is the most favourable approach as many matters might resolve following these motions, without the need to ever set trial dates for many accused and the need to approach Legal Aid with a budget or other issues. Indeed, this was a key component of Code and LeSage's case management recommendation:

> [E]arly rulings on many of the pre-trial motions are essential to what we mean by "judicial case management", in its full sense. These early rulings will facilitate resolution discussions, will determine whether the case proceeds at all and will determine how long it is likely to take at trial. In short, the modern criminal case is not really being managed at its early stages unless there is a judge available with power to rule on the pre-trial motions.[20]

The statement and consensus on the point could not be clearer. Ongoing resistance is unjustified.

3) Judges should consider hiring lawyers to assist them in running the case.

In British Columbia, judges involved in long complex cases have increasingly had recourse to outside resources to assist them with research, drafting, and general case managing. The lawyers essentially act as law clerks. Of course, the judge might also consider asking for a full time law clerk to be dedicated to the case. This was said to have functioned very well, for instance, in the Air India trial. These resources are available to judges and they should seek to make greater use of them.

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[19] Code-LeSage Report, *supra*, at pp. 70-71
[20] Code-LeSage Report, *supra*, at p. 61

4) Legal Aid should adopt a more flexible approach to changes in counsel.

First, much concern was expressed with respect to the timeliness of Legal Aid approval for major case funding, and its effect on the progress of cases. This was said to not only fall on the shoulders of Legal Aid, but also on counsel who often delay filing their requests. Legal Aid Ontario indicated that it is trying to address these issues by setting deadlines for their decisions, and by having model budgets for funding large cases. It is a work in progress.

More challenging and the source of more disagreement, however, was Legal Aid's position with respect to changing counsel. Most counsel expressed concern that LAO's stringent criteria for counsel changes has had a deleterious effect on some trials. Indeed because of LAO's resistance to changes in counsel, many refusals have resulted in *Rowbotham* applications and accordingly in much court time being spent on adjudicating the issue, with the end result being that the money still comes from the state (albeit from a different pocket), but with less supervision. However, there may be very good reason for LAO's policy – including discouraging accused from repeatedly changing counsel, and avoiding the inconveniences that come with such a change.

Limited solutions to this problem were suggested. Some urged Legal Aid to give more allowance to changes and at the very least to increasingly consider stepping back in and permitting the change once a *Rowbotham* application is in fact brought. The key is to address the issue without taking up any court time. The defence bar and Legal Aid should meet with the aim of having a faster turn around time when a case is in transition from one counsel to another.

5) Limit the number of accused and the number of charges on a single indictment.

Everyone was unanimous that the number of accused in any given trial, as well as the number of charges, should be limited. It was agreed that while trials with a dozen or so accused have certainly been seen, the tipping point was generally 4 to 6 defendants, with a leaning towards 4 for jury trials. A greater number than that creates a real risk of derailment. A maximum of 6 should be the presumption and the prosecution should be able to justify circumventing it.

In addition, Crowns should be more surgical when drafting indictments and deciding what charges to pursue. The focus should be on those counts that are necessary or on those that are considered to be the primary counts. A diversity of charges increases the chances that the trial judge will make a mistake, just as much as it unnecessarily complicates the case for the jury. Even though the jury now has the charge in writing, it is very difficult for them to sort through multiple charges.

In making these choices, the Crown should assume that the case will be decided by a jury, not a judge alone: it should know its audience.

6) Jury trials should be held anywhere within the same region that is most convenient.

Many posited that the Regional Senior Justice should have the authority to move a jury trial to a courthouse within the same region where there might be more courtrooms available or the resources and facilities to accommodate the trial. For instance, a jury trial that is to take place in Barrie could be moved to Oshawa. Because it was not entirely clear whether there is authority to do this, an amendment to the *Criminal Code* might need to be considered in order to clarify the point.

7) Assigning the right people to the case.

Head Crowns have the ability to assign experienced Crowns to large and complex cases. When a Crown is nevertheless causing problems, the channels to complain about them are fairly straightforward. An effort should also be made to assign the right judges – those with the right temperament, judgment, stamina and experience to handle large cases, and who have the ability to navigate complex issues.

The more complicated issue, given the right to counsel of choice, is to filter out inefficient lawyers who tend to waste court time instead of focusing on the trial's real issues. These lawyers contribute to the complexity of the case. They are a problem for everyone: other counsel, the judge, the Crown, the jurors, and Legal Aid. For judges, there is the further challenge of knowing how to deal with the *under*-represented accused.

In the wake of the Code-LeSage Report, Legal Aid attempted to remediate this problem by creating an "Extremely Serious Criminal Matters" panel, whereby counsel on the panel receive a monetary supplement for handling these types of cases. Unfortunately, being all carrot and no stick, this has not been enough to keep time-wasting lawyers from accepting those cases. Indeed the program gives a better rate to the more qualified counsel on the panel, but does not prevent unqualified counsel from taking on complex cases at the lower rate of pay.

Moreover, the number of years in practice does not accurately reflect quality of counsel. Like other lawyers, not all defence counsel have developed their legal skills even though they have been in practice for many years. They might still be taking on cases that are beyond their competence. To get onto the complex cases list, references should be mandatory and LAO should have the right to make discreet inquiries of Crowns and judges.

All were agreed that Legal Aid is the one that has a significant role to play here, and it is already very much aware of the problem. It was further agreed that Legal Aid may need to work this through without the assistance of the criminal defence bar, who might be unlikely to sign on to measures that limit the ability of its members to sign on to cases.

8) More must be done to prevent late breaking pre-trial motions.

A careful balance must be reached when it comes to the foreseeability of pre-trial motions, and the level of preparedness that can be expected of counsel. Some motions are genuinely not anticipated but arise necessarily in the course of the long trial. Some defence lawyers are marginalized financially and cannot be expected to file materials on every point in advance.

Nevertheless, there is a gate-keeping function for the judge presiding over the trial. Late breaking pre-trial motions are sometimes brought with no regard for the rules.

First, time limits should be put on oral argument. Ideally, there should also be a requirement that written materials – full factum and affidavits – be filed by a certain date, as this not only might make counsel think twice about the merits of the motion, but it also gives the judge a better idea of its viability. However, as noted above, caution should be exercised so as to not unduly penalize counsel with limited resources.

But beyond that, the trial judge should play a more active role in requiring that counsel put forward their best case even before affidavits, evidence and facta are filed. In many instances, no proper pleadings are apparent on the motion, or vague relief is sought. The motions judge should determine at the start of the motion what if any remedy there might be "even if" all of the elements the defence seeks to establish are established. Judges indeed have the power to require proof of the likely success of a motion,[21] and should be more active in exercising this power. This is regularly done in the courts of British Columbia and ought to pass appellate scrutiny in Ontario. This exercise might reveal that some motions with little focus are not going to lead to an effective remedy. Legal Aid can also assist in this regard by developing criteria for funding motions, which would include the probability of success and the relevance to the issues in the trial.

Overall, judges should be more aggressive about weeding things out, but not overly aggressive so as to not weed out those motions that may be meritorious.

Conclusion

Many of the ideas and suggestions canvassed during these one-day roundtables are not novel, but they warrant reaffirmation. Some are the result of informal *post-mortems* of major cases that went awry. Others are simply drawn from the participants' own observations and practices. Several are minor points that could make a big difference. Just like the majority of the recommendations stemming from the Code-Lesage Report, they are mainly "best practices" that do not require legislative or regulatory amendments. Where possible, therefore, all participants in the criminal justice system should be encouraged to apply and make use of them without further delay.

[21] See, for e.g., *R. v. Garofoli*, [1990] 2 S.C.R. 1421, *R. v. Pires; R. v. Lising*, 2005 SCC 66, [2005] 3 S.C.R. 343, and *R. v. Nixon*, 2011 SCC 34, [2011] 2 S.C.R. 566 in support of this position.

In particular, there is little excuse for not adopting the numerous measures that clearly enjoy consensus and that have been recommended by experts or advocated for for a number of years now. Several participants indeed expressed frustration that several years after the Code-Lesage report, we have not implemented many of the sensible and cost-saving measures that were recommended. We have all accepted that the short trial is not coming back. We must now not only accept that everyone has to adapt to this reality, but take concrete and immediate steps to make the necessary changes.