

## ***Recommendations from BC Roundtable on Complex Criminal Trials September 2015***

### ***Canadian Institute for the Administration of Justice***

#### **A. INTRODUCTION**

In November 2014, the Canadian Institute for the Administration of Justice (CIAJ) brought together representatives of key organizations and institutional players in the British Columbia criminal justice system to participate in a roundtable discussion about identifiable problem areas associated with complex criminal trials (“Major Cases”).

The roundtable was attended by judges from all three levels of court in British Columbia, defence counsel, federal and provincial prosecutors, representatives from the Royal Canadian Mounted Police and municipal police agencies, the Legal Services Society and various representatives from the Ministry of Justice, including Court Services Branch (Sheriff Services), Justice Services Branch, Policing and Security Branch, Corrections and the Ministry’s Victims Services division.

A goal of the roundtable was to consider what cross-sector actions might realistically be undertaken to better manage the length and complexity of Major Cases, with a particular emphasis on reducing unnecessary delay, process inefficiencies and justice system costs.

Following discussion at the roundtable, a report was generated which identified key issues associated with Major Cases that require systemic improvement, some of which necessitate co-operative work between specific organizations and justice system participants who attended the roundtable. A sub-committee was formed to explore possible solutions to these issues, with a view to returning to the larger group of roundtable attendees with specific ideas for action.<sup>1</sup>

A follow-up roundtable discussion took place in September 2015, with a primary focus on a framework for co-operative action that was developed and put forward by the sub-committee. After consideration, a number of recommendations emerged from the September 2015 roundtable, specific to the British Columbia context (the “Recommendations”). These Recommendations, if implemented, are designed to facilitate co-operative effort across the system, while recognizing and respecting the independence and autonomy of diverse roles and responsibilities.

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<sup>1</sup> The Roundtable Report is attached to these Recommendations (dated November 21, 2014).

## **B. DEFINITION OF A MAJOR CASE**

For the purpose of the Recommendations, a Major Case is a case that has, or is expected to have, a large draw on the resources of the criminal justice system, typically flowing from the complexity of collecting and presenting the evidence. To that end, a Major Case may share some or a majority of the following characteristics:

- gang-related or organized crime elements;
- police investigation took a “project” approach;
- confidential informant and source issues;
- complex investigative techniques;
- wiretap, intercepted communications or other judicial authorizations under the *Criminal Code*;
- investigation spanned multiple jurisdictions, including international;
- voluminous disclosure;
- multiple, serious criminal offences;
- multiple accused persons;
- multiple victims or significant number of witnesses;
- large number of expert witnesses, forensic or otherwise;
- likelihood of significant media interest and involvement;
- complex legal issues;
- potential for complex and multiple pre-trial applications;
- voluminous exhibits;
- lengthy pre-trial and trial estimate;
- early requirement for case management;
- unique security issues, including secure facility requirements and/or translator needs;
- size of case likely requires a team approach for prosecution and the defence; or,
- case has been designated as “major” by an Attendee for organizational, budgeting and/or resourcing purposes.

Roundtable participants appreciated that no two criminal cases will ever be exactly alike and organizations and institutional players are diversely impacted by the size of a case depending on their resourcing capacity, as well as the substantive and procedural requirements that must be met to ensure a fair trial process. This is particularly true for members of the private defence bar, who typically do not have access to institutional resources.

**The Recommendations are intended to apply to large and resource-intensive criminal cases, from a system-wide perspective.** However, nothing in the Recommendations precludes similar actions or processes from also being developed for the more effective management of smaller, but nonetheless complex and time-consuming cases. The CIAJ encourages co-operative dialogue to this effect, whether

across the justice sector as a whole, between key organizations or institutional players, or within the context of individual cases.

## **C. RECOMMENDATIONS**

### **Crown Involvement at the Pre-Charge Stage**

1. The Criminal Justice Branch (Ministry of Justice) and Public Prosecution Service of Canada (Vancouver Regional Office) should work collaboratively with police across British Columbia to put case management models, protocols or processes in place that facilitate the availability and provision of legal advice early in the investigation of a Major Case to assist with issues such as (but not limited to):
  - *Charter* advice;
  - investigative procedures;
  - legal applications in support of evidence gathering;
  - informant, agent and complex witness issues;
  - organizing, compiling and formatting disclosure for transfer to the Crown and defence; and,
  - the size, focus and direction of the investigation for the purpose of litigation manageability.

### **Disclosure Standards, Practices and Electronic Tools at Investigative Stage**

2. The Criminal Justice Branch, Public Prosecution Service of Canada and Policing and Security Branch (Ministry of Justice) should work collaboratively with police across British Columbia to develop mutually-compatible disclosure standards, practices, processes, templates and electronic disclosure tools for Major Cases, with a view to enhancing the capacity to effectively manage disclosure and transfer it across the system from police to the defence (whether in, or out of custody).

Wherever feasible, the perspective, formatting and access needs, and resourcing capacity of the Justice Services Branch, Legal Services Society and members of the private defence bar should be sought through consultation, as a means by which to ensure that any standards, practices, processes, templates or electronic disclosure tools that are developed and put in place, are fully informed.

### **Adequate Resourcing and Information Sharing for Planning Purposes**

3. To encourage public accountability in the use of public funds to defend Major Cases, it is recognized that experienced and senior counsel will be more effective in efficiently managing the complex and myriad issues that arise within Major Cases. In order to encourage the participation of experienced and senior defence counsel, it is further recognized there should be adequate funding for their participation and ongoing support.

The Criminal Justice Branch and Public Prosecution Service of Canada will work co-operatively with the Justice Services Branch and the Legal Services Society to develop information sharing protocols and/or processes with respect to Major Cases, for the purpose of providing the Justice Services Branch and the Legal Services Society with information relevant to planning, case management and resourcing issues. The Legal Services Society remains exclusively responsible for the allocation of resources for Major Cases within its mandate and pursuant to its policies. In those rare cases where the Legal Services Society cannot manage the defence funding of a Major Case, the Justice Services Branch contracts with an appropriate independent person to act in this role and allocate resources in accordance with the policies and procedures developed by the Legal Services Society.

The Legal Services Society should work co-operatively with the defence bar, and, where appropriate, the Criminal Justice Branch and Public Prosecution Service of Canada, to assess, on an ongoing basis, whether there are processes, procedures, case management practices or resourcing requirements that the Society might consider and address to facilitate and support increased efficiencies and effectiveness at the pre-trial and trial phase of a Major Case.

This information should only be shared at a time, and in a manner, that does not in any way give rise to a real or perceived conflict of interest; jeopardize the independence of the system participants, or their proper role within the adversarial, criminal law framework; security and privacy interests associated with a Major Case; legal privilege; the constitutional right to counsel of choice; or the integrity and fairness of the investigative, prosecution or court process.

#### **Early Information Sharing for Logistical Purposes**

4. Where feasible, criminal justice system participants should give each other advance notice of a Major Case that is likely to enter the court system on a foreseeable date, facilitated by an appropriate communications process or protocol if desired, so that consideration by the impacted organization or institutional player may be given to administrative, specialized security, case management, media, victim or witness support processes, or other logistics as may be required, and sufficient time is made available for planning.

This information should only be shared at a time and, in a manner, that does not in any way give rise to a real or perceived conflict of interest; jeopardize the independence of the system participants, or their proper role within the adversarial, criminal law framework; security and privacy interests associated with a Major Case; legal privilege; the constitutional right to counsel of choice; or the integrity and fairness of the investigative, prosecution or court process.

### **Case Management in the Court System**

5. Recognizing that effective case management in the courts is appropriately led by the judiciary, the Court of Appeal for British Columbia, the Supreme Court of British Columbia, and the Provincial Court of British Columbia (the Courts) are encouraged to individually and, where appropriate, collectively, give serious consideration to establishing processes, procedures, guidelines, directions or rules of court for use by members of the judiciary, and counsel appearing before the Courts, specific to Major Cases.

If the Courts independently determine to move in this direction, the perspective, experience, practice realities and resourcing capacity of key litigation and administrative players within the criminal justice system, including the private defence bar, should be sought through advance consultation as a means by which to ensure that any processes, procedures, guidelines, directions or rules of court that are developed and put in place are fully informed.

Issues for consideration by the Courts might include (but are not limited to):

- where feasible, the adoption of non-traditional procedures or specialized processes, such as: case conferencing, case management, out-of-court examination, summary trials on specific issues, or document management processes that are informed by practices adopted in other jurisdictions, and/or the civil litigation process;
- procedures to encourage active engagement and application of the pre-hearing conference, focus hearing, joint hearing and case management provisions of the *Criminal Code*;
- assignment of case management judges with specialized criminal law experience; and,
- increased availability of judicial training for the trial Courts in the area of trial management, including training on the specific powers of a trial judge to pro-actively:
  - schedule an exit pre-trial from a preliminary inquiry;
  - use pre-trial conferences as an early management tool, informed by a case synopsis produced by Crown Counsel;
  - require counsel to prepare and submit a case plan;
  - develop a schedule or timeline for pre-trial motions;
  - manage the disclosure process, including setting timelines for production and requiring due diligence in defence requests;
  - require written notice of motions;
  - require supporting materials for motions;

- summarily dismiss motions that obviously lack merit;
- place time limits on oral argument;
- insist that motions be argued on a written record in cases where credibility is not an issue;
- canvass, encourage and, in appropriate circumstances, require admissions;
- control unduly prolix examinations and cross-examinations;
- direct the order of motions;
- defer rulings on motions;
- encourage use of video technology for appearances where appropriate; and, in exceptional cases,
- direct the order of evidence.<sup>2</sup>

### **Debriefing for Lessons Learned and Continuous Improvement**

6. Where feasible, criminal justice system participants should, within their own respective organizations, establish regularized processes for debriefing, both during and after a Major Case, selected at their own discretion, with a view to identifying strengths and weaknesses in their management of the Case, candidly reflecting on the practices employed, and exploring opportunities for improvement in recognition of the downstream, systemic impact that any one organization's actions may carry.

At an appropriate time, and without jeopardizing the fairness or integrity of any outstanding litigation process, the Criminal Justice Branch and Public Prosecution Service of Canada should meet with defence counsel on the selected Major Case and invite feedback on processes employed during the Major Case and their impact on the defence, as a means by which to fully inform the debriefing exercise.

At least once per calendar year, at a time and place chosen by the Associate Chief Justice of the Supreme Court of British Columbia, the Associate Chief Justice (or designate), Chief Judge of the Provincial Court (or designate), Criminal Justice Branch, Public Prosecution Service of Canada, Court Services Branch, Policing and Security Branch, Justice Services Branch, Legal Services Society and one or more representatives of the private defence bar should meet to discuss general, systemic issues that may be occurring specific to Major Cases and, where necessary and appropriate, brainstorm potential solutions for co-operative action.

### **Professional Development in Major Case Management**

7. Serious consideration should be given to the development of a practice manual, professional development training or a curriculum that is specific to Major Cases,

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<sup>2</sup> List of powers taken, in part, from the *Report of the Review of Large and Complex Criminal Case Procedures (The Honourable Patrick J. LeSage and Michael Code, November 2008)*.

and open to cross-sector access and participation, including access and participation by the judiciary.

Any such practice manual, training or curriculum should be developed through the work of a sub-committee formed pursuant to these Recommendations that includes representation from the roundtable participants, and any resulting material should include education that is specific to a greater awareness of project management skills as may be applicable to Major Cases.

Specific to counsel who have conduct of a Major Case, or contemplate taking conduct, the practice manual, training or curriculum should also include training relevant to:

- pre-trials following a preliminary inquiry;
- pre-trial conferences as an early management tool;
- case plans;
- managing schedules or timelines for pre-trial motions;
- managing the disclosure process;
- written notice requirements for motions;
- preparing notices and supporting materials for motions;
- time management of oral argument;
- admissions;
- examinations and cross-examinations;
- use of video technology for appearances where appropriate;
- scope of the trial management power; and,
- the ethical responsibilities of litigation counsel.<sup>3</sup>

If professional training or a curriculum is developed, best efforts should be made to have it accredited for the purpose of meeting the professional development requirements established for practising lawyers by the Law Society of British Columbia. Best efforts should also be made to keep any associated registration fees (or purchase costs associated with a practice manual) at a minimum, in recognition of the importance of its cross-sector impact and the need to keep this learning accessible.

Where feasible and constitutionally sound, criminal justice system participants should give serious consideration to making completion of any such training in Major Case management a professional requirement for engagement with and/or assignment to Major Cases within their respective areas of responsibility.

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<sup>3</sup> List of items taken, in part, from the *Report of the Review of Large and Complex Criminal Case Procedures (The Honourable Patrick J. LeSage and Michael Code, November 2008)*.

### **Recommendations as an Informing Document**

8. Criminal justice system participants should use their best efforts, on an ongoing basis, to educate the leaders, managers and staff within their respective organizations and affiliated stakeholder groups about these Recommendations as an informing document for organizational decision making and consultation processes specific to Major Cases.

As such, the Recommendations should inform any projects, initiatives, policies, procedures, practices, or cross-sector communication and consultations that are developed or employed, and specific to Major Case management.

Nothing in these Recommendations is intended to place a legally enforceable obligation on a criminal justice system participant, including the Roundtable attendees, or a vested right or entitlement in a party in a criminal case before the Courts. Similarly, these Recommendations are not intended to derogate from, or fail to respect the legal rights of accused persons as enshrined within the *Canadian Charter of Rights and Freedoms*.

### **D. NEXT STEPS**

In recognition of the importance to continue with the dialogue that occurred at the 2014 and 2015 roundtables, the roundtable attendees have agreed that at least once per calendar year, at a time and place chosen by the Associate Chief Justice of the Supreme Court of British Columbia, the Associate Chief Justice (or designate), Chief Judge of the Provincial Court (or designate), Criminal Justice Branch, Public Prosecution Service of Canada, Court Services Branch, Policing and Security Branch, Justice Services Branch, Legal Services Society and one or more representatives of the private defence bar will meet to discuss general, systemic issues that may be occurring specific to Major Cases, identify gaps and where necessary and appropriate, brainstorm potential solutions for co-operative action.

To inform this meeting, by no later than a date set by the Associate Chief Justice, the institutional representatives who attend the meeting will provide the Associate Chief Justice with a brief synopsis of projects, initiatives or other work that is contemplated, underway or completed by the institution in alignment with the Recommendations. These synopses will be treated as confidential and will not be open to publication in the absence of the consent of the provider.

In light of the information contained in the synopses, and at the discretion of the Associate Chief Justice (or designate), a full roundtable meeting may be called to collectively discuss systemic progress made in alignment with the Recommendations, gaps and/or potential solutions to new or ongoing issues. Any such meeting may result in further Recommendations, including Recommendations specific to facilitating:



- the effective training, retention and resourcing of experienced and senior defence counsel for Major Cases. This issue was identified as significant in the Roundtable Report dated November 2014, and the roundtable attendees appreciate the need for further work to be done in this area. .

## **E. ROUNDTABLE ATTENDEES**

The 2014 and 2015 CIAJ Vancouver roundtables on Complex Criminal Trials were attended by participants from the:

- Court of Appeal for British Columbia
- Supreme Court of British Columbia
- Provincial Court of British Columbia
- Royal Canadian Mounted Police
- Vancouver Police Department
- Delta Police Department
- Criminal Justice Branch (Ministry of Justice)
- Public Prosecution Service of Canada
- Members of the Private Defence Bar
- Legal Services Society
- Community Safety and Victim Services (Ministry of Justice)
- Corrections Branch (Ministry of Justice)
- Policing and Security Programs Branch (Ministry of Justice)
- Justice Services Branch (Ministry of Justice)
- Court Services Branch – Sheriff Services (Ministry of Justice)

The members of the judiciary who attended fully participated in the roundtable discussions, but expressed no formal view on the merits of the Recommendations, whether they should be implemented or in what form.

Members of the defence bar who attended fully participated in the roundtable discussions, but advised the other attendees that they were expressing their individual views on the Recommendations, and did not speak on behalf of other members of the defence bar.