

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.¹

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.

¹ 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.²

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.

² 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).

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, 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.³

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

³ 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).

Case management a professional requirement for engagement with and/or assignment to Major Cases within their respective areas of responsibility.

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.

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COMPLEX CRIMINAL TRIALS ROUNDTABLE REPORT

Vancouver, B.C.

Friday, November 21, 2014

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INTRODUCTION

In November 2014, the Canadian Institute for the Administration of Justice (CIAJ) brought together representatives of key organizations and institutional players in the criminal justice system to participate in a roundtable discussion about complex criminal trials and their management. The roundtable was modelled after a similar one hosted and organized by the CIAJ in Toronto in the spring of 2014.

The Vancouver roundtable was attended by judges from all three levels of court in British Columbia, defence counsel, federal and provincial prosecutors and representatives from police agencies (RCMP, Vancouver Police, and Delta Police), Legal Services Society and various Ministry of Justice branches (court administration, sheriffs, corrections, and victim services).

The goal of the Vancouver roundtable was to examine complex criminal cases from the perspective of a number of different actors in the criminal justice sector and to consider what actions could be undertaken in respect of the processes and procedures that come into play at various stages in the overall process. A secondary goal was to discover whether there was any consensus concerning process or procedure changes that have been suggested as ways to reduce delay and expenditures associated with long complex trials.

The context for the discussion was that all participants in the criminal justice sector are grappling with the management of complex criminal cases in the context of finite resources and continuing pressures to reduce costs and delay. All participants accept that complex criminal trials are not a transient phenomenon and have become a permanent part of the legal landscape in British Columbia. The issue then, is how to manage them effectively and efficiently within that context in a manner that respects the independence and autonomy of the various participants, but also with the recognition that there is an expectation that all participants will be appropriately cooperative.

ISSUES

In order to bring some structure to the discussion, the format for the Vancouver Roundtable involved the consideration and discussion of four major issues:

1. What is a major case? How is it defined? When can it be identified? Is it important to have a definition?
2. Is there room for enhanced or formalized information sharing at the front end of a major case? How can that be accomplished? What are the impediments to increased information sharing? What is the benefit of increased information sharing?
3. Is there room for more effective case management, including judicial involvement, once the litigation process has begun?
4. What major case training and professional development may be needed for increased efficiency across the system?

MAJOR CASE IDENTIFICATION

The first discussion was to define “major criminal case”. Do all participants have to have a common understanding of what is included or not? Does it mean the same thing for all participants? Does it matter if a particular case is considered major for one participant, but not for others?

Common Definition

From the discussion a consensus emerged that there is no single unifying definition for a major criminal case. Most acknowledged that each participant within the sector can identify a major case when they see one. A case that is more resource and time intensive for one organization may not be similarly taxing for another organization; however, there was a general sense that however defined, major cases consume a disproportionate amount of resources and take a significant amount of time to conclude.

As such, attempting to identify a major case is worthwhile in theory and as a starting point for managing these types of cases. Early identification may initiate special procedures within various organizations allowing each organization to marshal the appropriate resources for the case. A more organized and systems based approach to these types of cases may encourage more streamlined investigations, which can lead to more targeted and focussed prosecutions and, ultimately, more efficient trial processes.

Common Features

Despite the lack of a single definition for a major case, there was consensus that most major cases will have some if not many of the following characteristics:

- gangs or organized crime
- project approaches (especially named projects) at the police level
- confidential informant issues and source issues
- complex investigative techniques (e.g., Mr. Big, “moving witnesses”)
- wiretaps and intercepted communications
- international and/or multiple jurisdiction elements

- multiple accused
- multiple victims
- multiple, serious charges
- high public interest and expectation
- complex legal issues
- voluminous and complex disclosure (quality, format, volume, etc.)
- lengthy trial estimate
- early requirement of case management
- security issues
- potential for complex and multiple pre-trial applications
- accused in custody

Complexity Indicators

A number of organizations identified some of the factors that result in a case being designated as major for their organizations.

Police

Serious criminal activity, need for resources, multi-jurisdictional, multi-team, multi-offender, complex investigative techniques, handling human sources (e.g., confidential informants, informants), direct indictments, public interest/concern cases. Certain benchmark offences may indicate a major case (e.g., murder, kidnapping).

Sheriffs

Public interest, political factors, profile of case important.

Judiciary

Nature of the case and nature of the investigation, volume and nature of exhibits, hearing length estimates, nature and volume of pre-trial applications.

Legal Services Society

Estimated legal fees exceed \$150,000.

Prosecution Services

Volume of documents and disclosure, need for translators, number of accused, number and nature of pre-trial motions, seriousness of the charges.

Corrections

Pre-trial detention and scope of e-disclosure.

Defence Counsel

The perspective brought to bear by defence counsel was unique. A major case can overwhelm a defence practice and can have a negative financial impact on a defence practice. Unlike many of the other organizations in the sector, defence counsel rarely have access to the same resources and administrative support services. As a result, the threshold for a major case is reached more often and in a wider range of cases than for other participants. Defence counsel can be more constrained by funding issues than other participants may be, which leaves them with less flexibility for putting together an appropriately skilled and experienced team to work on a large case. Without an adequate team, the progress of the case slows as defence counsel carry more and more of the burden. In addition, the current legal aid funding model can be problematic in respect of behaviours and actions that are rewarded financially and those which are not.

INFORMATION SHARING

Is there room for enhanced/formalized information sharing at the front end of a major case?

Usefulness

Increased sharing of information earlier in the life of a case is important for the ease with which a case works its way through the system. Sharing information can assist participants identify cases which are or have the potential to be major cases, proactively, rather than dealing with them reactively.

It was suggested that in addition to information sharing on a case level, increased information sharing on a broader sector level would also be beneficial to all of the participants and to the system as a whole. It would be helpful for all participants to know the impacts of a major case on other participants in the system. Greater knowledge and understanding of the experience of other participants in the sector provides the opportunity to develop a perspective and understanding that is more complete than the one available when each participant only focusses on its particular piece of the process. A more complete understanding of another participant's experience can improve the functioning of the overall system.

Appropriate Boundaries

There was a broad consensus that whatever methods or practices are established to share information, such methods or procedures must respect core system values and conflicts. Increased sharing on a more formal basis must be approached with extreme care and caution in order to ensure that sufficient safeguards are in place to protect the independence of various participants within the system. These would include the Crown's authority with respect of charge approval, an accused's right to choose his/her own counsel, and an accused's right to be tried by an impartial adjudicator. Safeguards must also address pressure to share information that ought not be shared.

On a practical level, it was challenging to determine what type of information beyond the logistical information could be appropriately shared without compromising the independent and separate roles that each organization plays or without compromising the function of

different organizations. For example, for police agencies, the scope and complexity of certain investigations make it very difficult to share information prior to the point where decisions have been made about laying charges. On the other hand, it was agreed that early discussions between the investigating police agencies and the prosecution service were crucial to ultimately having a case adjudicated on its merits rather than getting bogged down in procedural skirmishes (e.g., pre-trial motions over disclosure)

Despite concerns about appropriate safeguards for information sharing, there was consensus that in circumstances when it would be appropriate to share information, it could and should be more easily, efficiently, and effectively shared.

It was suggested that the least problematic information sharing was logistical in nature. For example, letting the courthouse know that charges are being laid and how many first appearances to expect. The other type of information sharing that is less problematic is advising court administration of logistical issues and the anticipated size or security needs of a particular case to ensure that sufficient judges and courtrooms are available. For some institutional participants (e.g., judiciary, court administration, sheriffs, etc.), although advance notice is appreciated, these groups can usually get ready fairly quickly.

Learning Opportunities

There was discussion about implementing measures to support opportunities to learn from the experience of complex criminal cases (e.g., debriefing after completion of a case). Currently, the system does not provide any formal opportunities to do this. Although there are some serious impediments to implementing a formal structure, there was agreement that working to develop such a structure would be beneficial to all of the participants. It was suggested that this type of external process was particularly important for defence counsel who do not have an internal team to debrief.

Format Options

There was some discussion about possible formats for a post-trial debrief:

- identify a concluded complex case and conduct an intellectual dissection of it;

- external review by someone unconnected to the case, but experienced in the management of complex criminal cases. The review could involve interviews of the participants and would lead to the production of an analysis including recommendations for improvement;
- judicial case management conference involving judge, crown, and defence after the conclusion of the trial.

Concerns

The involvement of the trial judge in a review of the trial while an appeal is pending is not appropriate; delaying the review until the conclusion of the proceeding including any appeals is problematic. The unpredictable delay between the conclusion of the trial and the review reduces the efficacy of the review: it is not timely in respect of the events that it is reviewing and the participants may not be able to recall events with the level of detail required for a complete and accurate review. It was noted that none of these concerns prevented any organization within the system from reviewing its own actions and decisions in respect of a particular case and that such reviews should be encouraged.

CASE MANAGEMENT

Is there room for more effective case management, including judicial involvement, once the litigation process has begun?

Judicial Case Management

There was agreement that an important feature of managing complex criminal cases is increased judicial management. Once charges are laid, a large criminal case has three phases:

- **Phase 1 – Disclosure.** The process of disclosure is incomplete and defence is asking for more than it has been provided. In addition, in many cases, the issue of funding the defence has not been finalized.
- **Phase 2 – Applications.** This is the process of determining certain issues (e.g., challenging wiretap authorizations, admissibility of statements, etc.) that must be sorted out as part of focussing the issues for the trial.
- **Phase 3 – Trial**

The fundamental purpose of case management is to ensure that each case proceeds through each phase effectively and efficiently. All of the participants have a role in case management; however, it is most often led by the judiciary. Depending on the case management judge, the nature of the case, and the specific phase a case is in, case management can look quite different from one case to the next.

Expectations of Case Management

Effective judicial case management is expected to deal with disclosure issues and develop a schedule for various pre-trial applications. Case management conferences are also an opportunity for the judge to exhort Crown Counsel and defence to discuss issues between themselves before asking the court to issue directions. Counsel should not be shy in seeking judicial direction about where structure might be needed to keep a case on track. Even with the most effective case management, there will always be issues that are not anticipated during the pre-trial process; however, if most issues are dealt with at the pre-trial stage, the trial that

follows will have a much better chance of proceeding more smoothly and with a more intense focus on the issues that are really in dispute.

Specialization in Case Management

There was discussion about judicial specialization in case management. The *Criminal Code* provides for case management to be assigned to a judge other than the trial judge. The suggestion was made that judges who are assigned in the early stages of a proceeding be experienced criminal judges who can deal with disclosure issues, set a schedule for pre-trial applications, etc. In addition to experience, it was suggested that judges need more peer support in respect of case management and trial management authority. It was suggested that internal training programs need to be developed.

Culture Change

The discussion of case management also included the issue of a culture change. It was noted that while all parties have a role to play in this process, for case management to succeed not just in a particular case, but in respect of the system as a whole, adoption of intensive case management must be led by the judiciary. In addition, it is necessary for counsel (both Crown and defence) to buy in and accept and support more active case management.

Crown Synopsis

The experience with the Crown synopsis in the Supreme Court demonstrates how a culture change can be effected by judicial leadership. The requirement for a Crown synopsis and pre-trial conferences was first introduced in 2010 as part of a pilot project. Initially there was some reluctance to produce the Crown synopsis when required and to actively prepare for and participate in the pre-trial process. However, over time, the Crown synopsis has become an integral tool of the pre-trial process and sufficient preparation for pre-trial conferences has become an accepted part of the pre-trial process in the Supreme Court. Although no rule changes were required, a clear judicial expectation that a Crown synopsis would be produced and support from the Criminal Justice Branch and the Legal Services Society resulted in a practice and culture change taking root.

CASE MANAGEMENT RULES

Flowing from the discussion of the different approaches to case management and the discussion of effecting a culture change, there was considerable discussion and debate about whether rules were necessary or desirable.

Necessity/Desirability

It was suggested by some that the *Criminal Code* and, in particular, recent amendments in respect of mega trials, provide judges with sufficient authority and tools to effectively manage cases already. What is needed instead is for the existing case management powers in the *Criminal Code* to be used more aggressively and consistently. It was observed that there appears to be judicial caution about being seen to interfere in the management of a case. Concern about case management decisions being second guessed or criticized by appellate courts needs to be tempered with the more immediate concerns of managing a complex criminal case in an effective and efficient manner. It was suggested by more than one participant that trial judges need to use their case management powers more often, more consistently, and more aggressively.

Lack of Professionalism

Others noted that an underlying issue that may occur in some complex criminal trials is a lack of appropriate communication and cooperation among counsel. The addition of new procedural rules will not address this problem and may, in fact, make the situation worse by providing more opportunities for parties to argue.

Flexible Framework

There was a general consensus that if rules were to be prepared, what should be drafted was a framework or outline which provided a high degree of flexibility. All agreed that the detailed approach adopted in Ontario after the 2008 Lesage Code Report was unnecessary. For the culture of professional civility and collegiality including the practice of criminal counsel both prosecuting and defending in criminal cases, such detailed rules were unwarranted. The experience of the Provincial Court with the Criminal Caseflow Management Rules demonstrates the importance of a flexible approach and broad based consultation as part of the development

of any rules. Procedural rules may offer greater certainty and predictability, but it would suffice to provide a light, flexible framework rather than very detailed rules which attempt to identify and codify a response to every possible issue.

Suggested Rules

There were a number of suggestions for the types of rules that could be enacted including application filing deadlines, page limits, and oral submission limits. There should be a requirement for counsel to produce a case plan which will explain why certain applications are being made and which will set out an agenda of when they will be brought and how long each is expected to take. It was also suggested that in order for the rules to be effective in effecting change, there needed to be real consequences for failing to follow rules. Despite the desire for consequences for failure to adhere to a rule, judges should not dismiss an otherwise meritorious application.

Process for Developing Rules

If rules were introduced, proper consultation with stakeholders was considered important in order to create buy in.

Other Case Management Suggestions

There was some discussion of other approaches to case management including

- considering the civil litigation example (settlement conferences, case management, summary trials of specific issues);
- use of Ontario style cross examinations done outside the court room, like examinations for discovery;
- settlement-like conferences where parties can express themselves freely, try to find common ground and narrow the issues. The conferences would be recorded, but the recordings would be sealed (even for the parties) and the presiding judge would not be the trial judge; and
- considering whether the criminal sphere can learn any lessons from the civil litigation bar in terms of dealing with voluminous disclosure.

PROFESSIONAL TRAINING

What major case training and professional development may be needed for increased efficiency across the system?

There was consensus that in addition to the legal knowledge and experience to conduct a complex criminal case, training in project management was required for all organizations. The effective management of complex criminal cases involves a skill set that is different than pure legal skills. These cases require: developing a framework and creating a road map, marshalling the case against that road map, anticipating and managing risks, building teams and leadership structure, and sustaining a team approach over an extended period.

Areas for Training

The management of disclosure was identified as the area in which training would be most beneficial for all participants. None of the organizations in the system are immune from the impacts of the dramatic growth in the volume and complexity of disclosure material and there are numerous examples of delay in getting to trial resulting from problems with disclosure.

There was widespread consensus that addressing disclosure problems would have an important impact on complex criminal cases and that training would be a good place to start. A number of suggestions for training were made including:

- Development of a disclosure practice manual as a universal starting point for all participants
- Continuing legal education course in the principles of complex case management
- Development of a certification program which would include principles of complex case management (e.g., disclosure).

Disclosure

Disclosure plagues all participants in the system. It consumes an incredible amount of resources of a number of participants (police agencies, Crown Counsel, defence counsel, corrections, and judiciary). Disclosure was one topic identified where all participants would benefit from additional training. There is a sense that a more organized approach to the

collection and management of disclosure is needed so that the disclosure wheel is not reinvented with each case. It was agreed that although progress has been made in this area, many groups need better tools for managing disclosure so that regardless of the case, there is a framework for collecting, cataloguing, and indexing evidence in a systematic and consistent manner. There were suggestions for improving the way that disclosure is managed. For example, once charges are laid, it should be common practice for the Crown and defence to establish the policies and procedures that will be used to manage disclosure.

Exploring Other Systems

Suggestions were also made that participants could consider looking for assistance from other fields where vast quantities of information are managed. For example, some police agencies are working on systems for the investigations stage that could streamline disclosure after charges are laid, and are considering using librarians and archivists rather than police officers to manage the information systems and the documents. There would be benefit to developing best practices for document management in large case investigations. With limited resources, it makes sense to take advantage of the learning and experience of others whether they are in the criminal justice system or not.

The Team Approach

Large complex cases simply cannot be handled by a single person. There was a suggestion that adopting a team approach to a particular case would also require the manager of the team to assemble a team with the skills necessary for the particular case, to manage the large and small problems that come with working in a team, and to manage the stress of each team member. Some suggestions were made about applying the team approach to the prosecution or defence of a particular case. For example, with respect to disclosure, perhaps a properly trained and experienced paralegal could manage disclosure for all of the accused regardless of whether they were separately represented. Adopting a team approach requires a culture change as well as the development of resources and support for those participants, particularly defence counsel, who lack the institutional resources that other participants have been developing (e.g., Crown Counsel, Legal Services Society).

Certification Programs

It was suggested that over time, training programs on complex case management including disclosure be developed. It was further suggested that when such training programs are available, there could be a move towards requiring the training as a prerequisite for being involved in a complex criminal case. For instance, the Legal Services Society could require completion of the training before providing a retainer.

Defence Counsel

There was some discussion of the particular needs of defence counsel. Defence counsel do not presently have, or have access to, the same institutional resources available to other participants for the management of complex cases. There was a suggestion that project management resources could be made available to defence counsel in the form of a case management coach or experienced counsel who can assist defence counsel in building their teams and acquiring sufficient resources (e.g., funding, computer systems) to run the case. There was also the suggestion for the development of a resource who could assist defence counsel manage disclosure (both from a technical perspective as well as legal) and manage arguments (have you considered this argument, this approach).

NEXT STEPS

The participants have agreed to the following next steps:

1. Roundtable attendees will meet again in six (6) months.
2. The Supreme Court Criminal Law Committee will be asked to consider the issue of major case criminal rules for possible endorsement and the development of a consultation process and/or rules project led by the Criminal Law Committee. An update on the status of this item will be presented when the Roundtable reconvenes.
3. Judge James Sutherland, from the Provincial Court, has agreed to act as the Provincial Court liaison in the event it is considered appropriate to also engage the Provincial Court on this issue for the development of a consistent approach.
4. A Roundtable Sub-Committee was formed, with the specific objectives of:
 - a. reviewing the Roundtable report;
 - b. identifying the remaining issues that may be amenable to the development of a collective action plan (or simply assigned to a particular organization for development and implementation);
 - c. establishing the said action plans; and then bringing them back for consideration and possible endorsement at the six month re-grouping.

The members of the Roundtable Sub-Committee are:

- Judge Adrian Brooks
- Joyce DeWitt-Van Oosten, Q.C.
- Richard Fowler, Q.C.
- David Griffiths
- Michael Klein
- Gil McKinnon, Q.C.
- Robert Prior
- Inspector Gary Shinkaruk (or Superintendent Lee Bergerman) - RCMP

5. Clayton Pecknold, ADM Policing and Security Programs (Ministry of Justice), has agreed to assist the Roundtable Sub-Committee with the possible development of a cross-system training/professional development program for major case management in light of his ongoing contact with the Justice Institute of BC.

LIST OF ATTENDEES

Court of Appeal

Madam Justice Elizabeth Bennett
Mr. Justice David Frankel
Madam Justice Sunni Stromberg-Stein

Supreme Court

Associate Chief Justice Austin Cullen
Madam Justice Catherine Wedge
Mr. Justice James Williams
Heidi McBride, Legal Counsel

Provincial Court

Judge Adrian Brooks
Judge Joseph Galati
Judge James Sutherland

Police Agencies

Superintendent Lee Bergerman (RCMP)
Inspector Gary Shinkaruk (RCMP)
Superintendent Mike Porteous (Vancouver Police)
Inspector Lorne Pike (Delta Police)

Ministry of Justice - Criminal Justice Branch

Assistant Deputy Attorney General Joyce DeWitt-Van Oosten, Q.C.
Peter Juk, Q.C.
Robert Bob Wright, Q.C.

Public Prosecution Service of Canada

Martha Devlin, Q.C.
Robert Prior
Ernie Froess

Private Defence Counsel

Greg DelBigio, Q.C.
Richard Fowler, Q.C.
Michael Klein
Gil McKinnon, Q.C.
Janet Winteringham, Q.C.

Legal Services Society

Mark Benton, Q.C.

David Griffiths

Heidi Mason

Ministry of Justice

Assistant Deputy Minister Lynda Cavanaugh (Community Safety and Victim Services)

Assistant Deputy Minister Brent Merchant (Corrections Branch)

Assistant Deputy Minister Clayton Pecknold (Policing and Security Programs Branch)

James Deitch (Criminal Justice and Legal Access Policy Division)

Bill Small (Community Corrections)

Sheriff Service

Chief Sheriff Paul Corrado

Superintendent Roger Phillips

Rapporteurs

Natasha Edgar

Cassandra Patterson

Rebecca Stanley

CIAJ

Beth Symes

Michèle Moreau

ORGANIZING COMMITTEE

Associate Chief Justice Cullen

Assistant Deputy Attorney General Joyce DeWitt-Van Oosten, Q.C.

Superintendent Lee Bergerman (RCMP)

Greg Delbigio, Q.C.

Mark Benton, Q.C., (Legal Services Society)

Beth Symes (CIAJ)

Michèle Moreau (CIAJ)