

**Report of Meeting of Roundtable Participants, November 18, 2016
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INTRODUCTION AND BACKGROUND

[1] On November 18, 2016, a meeting was convened of various participants in the criminal justice system. The participants included judiciary from both the Supreme Court and Provincial Court of British Columbia, members of the defence bar to provide individual perspectives, the Criminal Justice Branch of the Ministry of Justice, the Public Prosecution Service of Canada, and the Legal Services Society. Unfortunately, although members of the Policing and Security Branch of the Ministry of Public Safety and Solicitor General were invited, they were not able to attend, and there were therefore no police representatives present.

[2] The meeting was convened as part of a larger initiative developed under the aegis of the Canadian Institute for the Administration of Justice (CIAJ) to identify and address the challenges presented through the criminal justice system by the increasing length and complexity of criminal prosecutions. That initiative began in November 2014 with a Vancouver "Roundtable" discussion focused on the topic of complex criminal cases dubbed "major cases".

[3] The purpose of the Roundtable process was to identify and consider cross-sector actions within British Columbia that might realistically be undertaken to manage the length and complexity of major cases, with particular emphasis on reducing unnecessary delay, increasing efficiency and lessening justice system costs.

[4] Following the initial Roundtable discussion in November 2014, a Steering Committee composed of representatives of the judiciary, defence bar, Provincial Prosecution Service, Legal Services Society and the R.C.M.P. developed an agenda for a second Roundtable meeting based on the themes which emerged from the first meeting. The second Roundtable was held in September 2015 and it led to a Report and Recommendations, which were issued in January 2016. That report is attached as Appendix A.

[5] The Report and Recommendations were posted on the CIAJ website and have since been considered by the standing Senate Committee on Legal and Constitutional affairs in the course of its study on court delays in hearing criminal cases in Canada. A final report from the Senate Committee has not yet been issued.

[6] One of the Recommendations of the Report attached as Appendix A is to convene a meeting each calendar year for particular invitees to "discuss general systematic issues that may be occurring specific to major cases, identify gaps and where necessary and appropriate brainstorm potential solutions for cooperative action."

[7] The meeting referred to by this Report is the first of those annual meetings.

THE NOVEMBER 18, 2016 MEETING

Objectives of the Meeting

[8] Although the Recommendations contemplated that at the annual meetings the "institutional invitees" would provide a synopsis "of projects, initiatives or other work contemplated under way or... completed... in alignment with the recommendations", that was not the primary subject of the November meeting.

[9] Rather, the Steering Committee for the Roundtable process decided that the focus of those attending the meeting on November 18 should be on two critical topics, each of which was the subject of a Recommendation in the Roundtable Report: the first topic is managing criminal case disclosure; the second topic is the development of a curriculum for professional development and training on major cases that could be made available to all participants in the criminal justice system.

Recent Developments

[10] The discussion took note of two recent developments, since the January 2016 Roundtable meeting, that bear on the topics to be discussed, namely the BCSC's new practice direction concerning large or complex criminal trials, and the BC Criminal Justice Branch's new comprehensive disclosure strategy, each described below.

(i) ***New Practice Direction from BCSC***

[11] At its core, the Practice Direction (draft attached as Appendix B) has three main pillars:

- an expectation that disclosure will be complete when the accused makes his/her first appearance at the Supreme Court or a short time thereafter;
- the appointment of a case management judge for every complex major case;
- the creation of an application screening conference - the purpose of which is to ensure that any application that is brought is conducted in a way that maximizes the efficiency of the process and minimizes the amount of court time required.

[12] Disclosure must be prompt in order for the trial to be promptly scheduled to take place within a reasonable time. Also, only with prompt disclosure can Crown and defence counsel identify and give notice of any pre-trial applications, and arrange for them to be determined. Prompt disclosure permits the Court to manage any such applications (using the application screening hearing, among other tools) to ensure that pre-trial applications are heard in the most appropriate and effective way.

[13] The practice direction proceeds from the basis also that for disclosure to be prompt and complete, as it must be, Crown and defence counsel be appointed or retained at an early stage.

[14] The Practice Direction is still a work in progress.

[15] Consultation with the Bar and others may require some changes. Also, the Court understands that the time-lines it sets out will pose challenges in some circumstances.

These may include, for example, cases where arrest and charge are emergent and investigations are ongoing, and some exceptional cases where significant redactions are needed before disclosure of the Crown's case can be made to the defence.

[16] The Court developed the Practice Direction before the Supreme Court of Canada's decision in *R. v. Jordan*. However, *Jordan* now amplifies the need to address delays in the criminal trial process. It also reinforces the Court's responsibility to take a leading role in that process.

[17] The challenge we face, as a system, is to avoid delays without sacrificing the integrity and purpose of the trial process which is to determine guilt or innocence in a context that respects and gives effect to the *Charter* protected rights of an accused person.

(ii) ***Criminal Justice Branch's Comprehensive Disclosure Strategy***

[18] Following the introduction of the Court's draft Practice Direction, the Acting Assistant Deputy Attorney General of the Criminal Justice Branch introduced the project which the CJB has formally undertaken with the Policing and Security Branch which is referred to as a comprehensive disclosure strategy for criminal cases (Disclosure Strategy). The A/ADAG's presentation included a PowerPoint which is attached as Appendix C to this Report.

[19] The disclosure strategy has several goals:

- to understand the current state of disclosure in B.C.;
- to improve best practices in disclosure management;
- to increase awareness and understanding of disclosure best practices and to encourage adoption of best practices;
- to recommend long-term improvements, including increasing "efficiencies" through technology or other solutions.

[20] A major challenge for prosecutions services, who receive disclosure from the police, is a significant increase in the volume of material created by investigators (police notes, witness recordings and statements, forensic reports, document compilation, etc.), or gathered during the course of the investigation (video surveillance, wiretap, search warrants, production orders, etc.). Because the police are the originating source of the material that must be reviewed, collated, vetted where necessary, and disclosed, their understanding of their mandate to organize disclosure materials into proper manageable categories (e.g., privilege claims, confidential informants, relevance, etc.) is critically important. There was discussion in the meeting about the importance of encouraging the continued development of a police culture and best practices that accept and understand the pivotal role investigators play in making timely and comprehensive disclosure, a reality.

[21] For instance, it is important that every "major" investigation start with the expectation that it will require an organized, understandable, accessible, easily

transmittable body of material, from the police to the Crown, and from the Crown to the defence. Managing the materials amassed in the course of an investigation for the benefit of Crown and defence is not an end in itself. Rather, it is necessary to allow the parties and the Court to secure timely dates, properly assess the quality and scope of pre-trial motions, avoid extraneous applications, and, to get to the merits of a case without undue or unnecessary delay. In other words, it serves the public interest, not simply the interests of the police, the prosecution, or accused.

[22] The police disclosure function on major cases is typically performed by a file coordinator. Appreciating the fact that policing representatives were not in attendance at the November meeting, and may have a unique perspective on this issue, participants at the meeting generally agreed that the file coordinator plays a pivotal role in effectively addressing concerns about disclosure and within the policing environment, this role should be recognized and adequately supported. From the perspective of Crown Counsel, the position of file coordinator in a police investigation is very important and if possible, the responsibilities attached to this role and the critical need for an organizational infrastructure that ensures adequate support should be given serious consideration as part of any major case standards that are developed and issued by the Director of Police Services to police agencies working throughout the Province.

Discussion - Disclosure Management

[23] Participants at the meeting agreed that prompt and comprehensive disclosure is essential for effective trial management, and the orderly progress of the trial within a reasonable time. Until full disclosure is made, a case simply cannot move forward in any meaningful way. Participants agreed also that disclosure poses one of the most significant challenges to all who are involved in the criminal process. It creates a resource intensive obligation for all, whether police, Crown, or defence.

[24] The participants at the meeting discussed the prospect that, given the extraordinary volume of disclosure that investigations of major cases can generate, a review of document organization and disclosure methods developed in commercial litigation would be helpful in learning some technical solutions to managing large amounts of material. It was pointed out that because police

expertise principally lies in investigation, not¹¹ in the organization of disclosure packages, other skill sets may be better suited to organizing and producing disclosure packages for Crown Counsel.

Ideally, the material generated or gathered through an investigation would be "information-managed" from the outset of an investigation using case management technology which has been designed to maximize the effectiveness and efficiency of the disclosure process. It was suggested that if the raw material could be put in a pre-existing structure to maximize efficiency and effectiveness, this approach would go a long way towards reducing the time-intensive tasks occurring later in the process and also it would ameliorate the effects of the need for ongoing disclosure.

[25] One of the difficulties faced in regularizing disclosure is that there are various police agencies throughout British Columbia with different systems and technology platforms. The problems associated with those differences are compounded when investigations are multi-jurisdictional. The Director of Police Services has statutory authority to establish standards on a province-wide basis, but it would be difficult to mandate particular technology solutions without challenging the independence of particular police agencies or the particular needs of each community and the exigencies of different priorities and different budgets.

[26] It was however agreed that there would be significant benefit if the Director of Police Services established minimum standards for the organization of disclosure and protocols governing its timing and accessibility.

[27] There was also discussion whether the police, in their disclosure package to Crown Counsel, could flag rather than remove information believed to be non-disclosable, to avoid possible under-disclosure or late disclosure of materials that turn out to be relevant and disclosable.

[28] Another significant problem identified by meeting participants arises when the Crown inadvertently discloses privileged material to the defence, which then needs to be retrieved and removed from the disclosure materials. When the defence work product is intermixed with the disclosure package, the exigencies of removing the privileged material can result in the defence losing its work product and having to start over again.

[29] A need for standardized indices for disclosure packages and/or naming conventions for use in compiling and organizing electronic disclosure was identified. It was suggested that defence counsel might be usefully involved in the creation of indices and search functionality of the database/dataset that will be used for transfer from the Crown to the defence to improve the disclosure process.

[30] There was also a suggestion that the police could do some prioritizing of disclosure by identifying the most important and relevant material separately from the less important material. There was also a suggestion that Crown Counsel could play a role at the front end of the litigation process by flagging materials for the defence that might be particularly salient, thereby allowing the defence to focus their efforts more quickly and be in a position to seek instructions on next steps at an earlier date.

[31] Confidential informants also pose issues and their use in the investigation can complicate disclosure issues significantly. The meeting participants agreed that police should turn their minds to the disclosure ramifications of using confidential informants when assessing whether this form of investigative technique is necessary and appropriate within the context of an individual case.

[32] Other specific concerns were raised including:

- duplication of documents within the same disclosure package;
- diversity in disclosure formats between policing agencies and the fact that more than one format might be used during the course of one investigation;
- a lack of case management software available to defence counsel that is compatible with more than one disclosure format.

[33] In his letter providing input to the Roundtable meeting, Mr. Pecknold noted that one of the recommendations from the Missing Women's' Commission of Inquiry was that the Director of Police Services developed standards for major case management for major crimes. Since then, the British Columbia Provincial policing standards for major case management have been finalized and approved by the Minister. In his letter, Mr. Pecknold explained:

In particular, the standards will require the appointment of a Command Triangle including a File Coordinator to each major case investigation. An officer assigned to the role of File Coordinator must have appropriate experience for the anticipated complexity of the investigation, and must have completed a provincially-approved file

11
coordination training course. The standards will also require the use of a provincially-approved electronic Major Case Management (eMCM) system throughout a major case investigation. In addition to its investigative utility, the use of a common eMCM system will enable consistent and efficient management of investigative materials to support disclosure. The standards will also require police forces to ensure that adequate resources are in place to support timely and accurate disclosure and reporting to Crown counsel during a major case investigation, and to ensure that procedures are consistent with mutually agreed upon protocols between police and Crown, such as the *Crown Police Liaison Committee Memorandum of Understanding on Disclosure*.

[34] Mr. Pecknold also reported that the standards developed will address the need for "cooperation and coordination between police agencies in complex investigation." The standards will also "mandate participation in information systems and processes designed to advance cooperation and coordination between police agencies". It is anticipated that the new standards will take effect in January 2019.

[35] Mr. Pecknold also referenced the comprehensive disclosure strategy and introduced at the Roundtable meeting by Mr. Juk noting that "further direction may be incorporated into the standards pending the outcomes of this project ... concerning the organization of disclosure." Mr. Pecknold also explained that the way the electronic

MCM system will be used to manage information and material will be developed and training for those involved (Team Commanders, File Coordinators and Primary Investigators) is also anticipated.

[36] It appears that police initiatives to develop provincial standards for major case management including disclosure practices presents an ideal opportunity for the Roundtable to engage with police agencies to address issues of the organization of disclosure and the creation of protocols to govern its timing and accessibility.

[37] From the perspective of the Legal Services Society, major cases are dealt with separately from less complex proceedings. Major cases are funded differently and separately, with involvement of the Justice Services Branch, Ministry of Justice. It is an expectation that counsel appointed to defend an accused on such cases will have some facility with large case management. LSS conducts regular reviews of budgets throughout the life of a case.

[38] The Legal Services Society sees a significant benefit in concentrating more resources at the front end of a case so that defence counsel have a better sense of the case, can analyze it more accurately, and can predict what the issues are with greater certainty. Timely and comprehensive disclosure is integral to that benefit. LSS views expenditures on a case as justified if they make a difference to the outcome.

[39] There was discussion about increased funding to support a discrete disclosure section of the Legal Services Society. The rationale for the discussion is that the more efficiently and effectively the disclosure is acquired, absorbed, distilled and analysed in a major case, the more effectively and efficiently the case will be prosecuted and defended.

[40] The meeting participants noted the importance of having police involvement in future meetings to address issues of whether and how to limit the scope of investigations in a way that is compatible with public safety.

Education and Training

[41] The second main topic related to educational programs and training, that might improve the efficiency and effectiveness of disclosure,

[42] Many issues were canvassed, including what skill sets are necessary for the more efficient conduct of mega trials.

[43] Also addressed were:

- investigative techniques (digital information, social media)
- cell phones records - delays in getting them, what information they can provide and what it is relevant to)
- pervasiveness of video evidence and what to do with it
- sophisticated gang investigations
- international investigations - how to identify main issues and keep the prosecution focused
- tech skills on data management
- using a project management approach to case management - building teams; using resources suitable to the task, delegating tasks, ability to adapt resource allocation to the evolving needs of the case, etc.
- pre-trial conference processes and how to use them effectively.

RECOMMENDATIONS

[44] Five recommendations were endorsed by the participants at the meeting:

1. That the Legal Services Society be funded by government to develop a disclosure office with designated staff having specific expertise who could be made available to defence counsel. Ideally, the LSS disclosure office could also provide access to and training upon case management software as part of the LSS retainer.
2. It was recommended that there be ongoing discussion to define system-wide training needs in major case management; to identify the issues that the training program should incorporate; and, to determine what skill sets are necessary to develop or prioritize to enable all participants to more effectively manage large, complex criminal cases. It was agreed that the identification of issues is best accomplished by ongoing discussions involving "people on the ground" rather than taking a top-down approach.
3. It was recommended that there be a certification process for those participants wishing to undertake large complex criminal trials.
4. It was recommended that a CLE program be developed in conjunction with the issuance of the British Columbia Supreme Court Practice Direction. The program would focus on the Crown Synopsis as a case management tool. The program would also address the principles of project management and whether and how such an approach would be useful in the context of the conduct of major trials (e.g. active ongoing monitoring, developing a litigation plan, etc.).
5. It was recommended that, where feasible, the Director of Police Services consider the creation of minimum standards for policing agencies in British Columbia on the organization of disclosure and protocols that govern its timing and accessibility.