STEERING COMMITTEE ON JUSTICE EFFICIENCIES AND ACCESS TO THE JUSTICE SYSTEM

REPORT ON DISCLOSURE IN CRIMINAL CASES

JUNE 2011

TABLE OF CONTENTS

EXECUTIVE SUMMARY

Disclosure problems continue to plague the criminal justice system. Twenty years after the landmark decision in *Stinchcombe*[1] constitutionally entrenched the obligation on the prosecution to make full disclosure to the accused, disclosure breakdowns still occur too frequently. They give rise to the possibility of miscarriages of justice, cause case delay and contribute to backlogged and congested court systems in many parts of the country.

This report focuses on the causes of disclosure problems as identified by the major professional participants in the justice system – the police, prosecutors, defence counsel and judges. It then recommends collaborative action to address the problems. The report does not conclude, as some argue, that the biggest cause of disclosure problems is the law of disclosure itself. We believe the system is still encountering disclosure problems primarily because all the professional participants in the criminal justice system, in one way or other, have not effectively responded to the information management challenges posed by constitutionally mandated disclosure.

The *Final Report of the Air India Inquiry* and the *LeSage/Code Report* comprehensively examined disclosure issues in the context of lengthy and complex cases. This report focuses on disclosure issues in "day to day" cases. It suggests that through better organization, greater cooperation, improved information technology and management, disclosure can be made earlier and the percentage of cases collapsing on the day set for trial because of disclosure problems can be significantly reduced. The report also asks whether all the disclosure currently provided is necessary, since 90% of cases are resolved without a trial.

Important issues addressed by the report include the lack of a procedural mechanism to facilitate the early resolution of disclosure disputes, the challenges posed to the system by unrepresented accused and whether codification of the prosecution's disclosure obligation would improve understanding of the scope of the obligation and increase the likelihood of judicial consistency.

The Sub-Committee on Disclosure (Sub-Committee) of the Steering Committee on Justice Efficiencies and Access to the Justice System (Steering Committee) received valuable information, advice and comments from numerous sources. The Steering Committee would like to thank the many people who assisted the Sub-Committee. The willingness of those involved in the criminal justice system to seriously consider the need for change is very encouraging.

The opinions expressed in this report are those of the members of the Steering Committee and not of the courts, ministries or organizations to which they belong. Not all members of the Steering Committee agree with all parts of the report. The overall direction of the report is, however, strongly supported by all members of the Steering Committee.

[1] *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, 68 C.C.C. (3d) 1.

INTRODUCTION

Information is the lifeblood of the criminal justice process. Without it police cannot investigate, prosecutors cannot resolve or litigate files, and judges and juries cannot fairly determine whether the guilt of the accused has been proven. Defence lawyers also require access to information to effectively discharge their responsibilities. But, prior to the decision of the Supreme Court of Canada in *R. v. Stinchcombe*,[2] defence access to information gathered by the police was not guaranteed. While the prosecution bar generally co-operated in making disclosure to the defence on a voluntary basis, the extent of disclosure varied from province to province, from court location to court location and even from prosecutor to prosecutor.

Working papers and reports from the Law Reform Commission of Canada, a commission of inquiry, and at least one bar committee recommended in the strongest terms that defence disclosure be placed on a more solid foundation.[3] These studies recognized that disclosure to the defence is an essential component of the right to a fair trial. Without disclosure, the accused cannot make full answer and defence. Disclosure is one of the pillars of criminal justice on which we depend to ensure the innocent are not convicted.[4]

Disclosure also leads to greater efficiency in the court process. It often results in waived and shortened preliminary inquiries and in shorter trials. It can also avoid the unnecessary attendance of witnesses and reduce the expense and inconvenience the system imposes on third parties.[5] Finally, effective disclosure may facilitate resolution discussions, the withdrawal of charges, and where appropriate, guilty pleas.[6]

Parliament could have assumed a leadership role in response to demands for expanded disclosure rights. However, as Justice Sopinka noted in *Stinchcombe*, Canada's legislators were content to leave the development of the law of disclosure to the courts.[7] As a result of purposive judicial interpretations of the fair trial right guaranteed by section 7 of the *Charter of Rights and*

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[2] *R v Stinchombe*, [1991] 3 S.C.R. 326.

[3] Royal Commission on the Donald Marshall, Jr. Prosecution, Volume 1, Findings and Recommendations (Halifax: The Commission, 1989); The Law Reform Commission of Canada, *Disclosure by the Prosecution* (1984), Report of the Special Committee on Preliminary Hearings (Toronto: Bench and Bar Council of Ontario, 1982); and the Law Reform Commission of Canada, Criminal Procedure: *Discovery Working Paper* (1974).

[4] *R v Stinchombe*, [1991] 3 S.C.R. 326, par. 336. A number of domestic and international commissions of inquiry have documented the role incomplete disclosure has played in wrongful convictions. See Bruce A. MacFarlane, Q.C., Convicting The Innocent: A Triple Failure Of The formulation of disclosure policies and practices across the country. Justice System (2006) *31Man. L.J*. 403 at 453 and the *Goudge Report*, September 30, 2008, http://www.attorneygeneral.jus.gov.on.ca.

[5] The justice system imposes obligations on many people. Expert witnesses, for example, are regularly affected by inefficiencies in the court system. They are frequently asked for their assistance but the system does not always consider other legitimate demands on their time. Efforts to increase systemic efficiency should not impose unrealistic deadlines on third parties or deprive the system of the flexibility required to respond to needs arising in individual cases.

[6] See also the *Report of the Attorney General's Committee on Charge Screening, Disclosure, and Resolution Discussions* (the *Martin Report*), (1993, Queen's Printer for Ontario) at 143.

[7] The judicial legacy of *Stinchcombe* is summarized in Appendix B. The prosecution's disclosure obligations are more onerous in content and timing in Canada than in the United States (see 18 U.S.C. § 3500), the United Kingdom, New Zealand and Australia. In addition the defence has reciprocal disclosure obligations that do not exist in Canada in all major common law jurisdictions.

Freedoms (*Charter*), Canada now has the most expansive disclosure regime of any common law country.[8]

Following recognition of the constitutional status of disclosure, the *Martin Report* provided Ontario with detailed recommendations on how best to incorporate disclosure into the criminal justice process. A subsequent Ontario report focused on the ways police and prosecution services could improve their delivery of disclosure.[9] These reports stressed the importance of improving the fairness and efficiency of defence disclosure in Ontario. They were influential in the formulation of disclosure policies and practices across the country.

As courts began to interpret and apply the principles in *Stinchcombe*, the resulting improvement in disclosure practices was heralded as an example of the *Charter* enhancing the fairness of Canadian justice. But as the full implications of constitutionally entrenching disclosure become apparent, some of the bloom started to come off the rose. Recent commentaries have focused on financial and efficiency costs entailed in meeting disclosure obligations. They have also identified excessive disclosure as a primary cause of the troubling increase in trial length experienced throughout Canada, especially in pre-trial litigation.[9]

This report first examines the operational challenges disclosure poses for the police, prosecution, defence and judiciary. Measures to address these challenges are then proposed. A major conclusion of the report is that "disclosure problems" are more properly understood as failures on the part of the criminal justice system to effectively utilize modern information management technology and procedures. They are not problems in the law of disclosure *per se*, but rather problems in how the law is being interpreted in some instances and, most significantly, in how it is being implemented. Too many of the professional participants in the justice system have, in one way or another, failed to effectively adapt to the increased challenges of constitutionally mandated disclosure.[10] Fairness and efficiency are not competing values. If the independent professional participants in the criminal justice system fully recognize that they are interdependent and must work cooperatively in the management and disclosure of information, a cultural change will take place that cannot help but enhance the quality of Canadian justice.

1. DISCLOSURE CHALLENGES

Adjusting to constitutionally mandated disclosure obligations has posed major logistical, interpretive and procedural difficulties for all the professional participants in the criminal justice process. Effectively and efficiently gathering, managing, digesting and disclosing large quantities of information is an onerous task for the police and prosecution. Receiving, managing and digesting large quantities of information is also an onerous task for defence counsel and judges. Resources committed to disclosure activities cannot be deployed elsewhere to address other pressing needs. Disclosure disagreements between the prosecution and defence frequently arise.

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[8] *Report of the Criminal Justice Review Committee*, Queen's Printer for Ontario, 1999.
[9] M. Moldaver, "Long Criminal Trials: Masters of a System They Are Meant to Serve" (2006) 32 C.R. (6th) 316 at 319 and "The Impact of the Charter on the Criminal Trial Process – A Trial Judge's Perspective" in J. Cameron, ed., *The Charter's Impact on the Criminal Justice System* (Scarborough: Carswell, 1996).
[10] Introduction to the Recommendations of the British Columbia Disclosure Management Working Group – December 21, 2009.

The absence of statutory procedure to obtain early judicial resolution of disclosure disputes is particularly problematic. Failure to meet the demands of full disclosure leads to delayed and stayed trials. Irrespective of who is to "blame", public confidence in the administration of justice suffers when serious cases, or a spate of less serious ones, are not determined on their merits.

1.1 Police Challenges

In *Stinchcombe* and more recently in *R. v. McNeil*,[11] the Supreme Court of Canada stressed the critical role played by the police in the disclosure process. Shouldering this role has had immense consequences for the police.[12] To avoid unacceptable outcomes, the police have been required to commit scarce human resources to disclosure. They have also been required to acquire and develop new and expensive information technology to cope with the sheer size and complexity of the information gathered by modern investigations. The other professional participants in the system have not always kept pace with the police when it comes to information technology. Another problem encountered by the police in some jurisdictions is an inability to obtain consistent advice from prosecutors. As a result, too little gets disclosed or over disclosure takes place. Police disclosure responsibilities are further complicated by the high degree of sensitivity attached to certain relevant information, including privacy concerns and the need to protect victims, witnesses and informants.

The challenges identified by the police community can be divided into three broad categories: the cost of disclosure, the disclosure process and disclosure misconduct.

1.1.1 The Cost of Disclosure[13]

The human resource, material and financial cost to the police of discharging their disclosure obligations are demonstrated by individual cases and by reviewing annual expenditures. The cost of disclosure in so-called "mega cases" can be staggering. We were told of a project where the first wave of disclosure alone amounted to 1.4 terabytes of information (3,172,311 different files in different formats). Making disclosure required the purchase of 200 external hard drives of 2 terabytes capacity and 1500 Blue-ray discs at a cost of more than $197,000.

The *R. v. Pickton* "mega" case in British Columbia started with a single file coordinator assigned to disclosure. Almost immediately the team commander recognized this would not suffice. Continuous review of the staffing situation became necessary. Within 5 months, 15 officers were

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[11] *R. v. Neil*, 2009 SCC 3.

[12] Commentaries on some of the major disclosure problems faced by police services across Canada are contained in Appendix C.

[13] In the wake of *Stinchcombe*, police and prosecution officials recognized the need for a process to determine who would bear the new costs entailed by the decision. Both Ontario and Quebec entered into memos of understanding intended to apply to all police services in their jurisdictions. The Quebec memo provides the *Surete du Quebec* will produce two disclosure packages (one for the prosecution and one for the defence, even if there are many accused). The Ontario memo is similar. Implementation of the Ontario memo has been inconsistent and contentious. We were told the Quebec memo was never comprehensively implemented and usually, if not always, the police produce and pay for the whole disclosure process. Discussions are continuing in both jurisdictions to address the cost of disclosure and to take advantage of the cost savings offered by electronic disclosure.

dedicated to disclosure. Approximately 20% of the police budget in the case was allocated to disclosing 1,300,000 pages to the defence on CD/DVD or portable hard drives.

Disclosure requirements associated with less serious cases also drain police resources. A police service we consulted estimated approximately 4 hours a week of investigator time is spent on disclosure preparation and following-up disclosure requests. Much of this time is spent copying discs, victim impact statements, witness statements, medical reports and other documents. This is necessary work but more efficient ways to do it must be found.

The 2010 Calgary Police Service disclosure budget exceeded $2,000,000. This did not include:

- transcripts for all internal affairs and related criminal investigations;
- producing Crown briefs, photographs, audio and video media, paper and printing, computer hard drives/jump drives, etc.;
- producing the second and all subsequent copies of disclosure materials required for the defence/court, including but not limited to photographs, audio and video media, paper and printing, computer hard drives/jump drives, etc.; and
- the CPIC Unit and Criminal History Unit, for the preparation of disclosure copies of criminal history material.

The police spend large amounts of time and money transcribing accused or witness statements. In some cases, a video record may only need to be duplicated and provided in the same form (e.g. a DVD recording). But in other cases, the video record will need to be transcribed. The need for a written transcript is virtually automatic for statements of an accused and transcription is often sought by counsel or the court for other types of records, notably lengthy interviews. A transcript can be reviewed far more quickly than an audio/visual recording. Once a trial date has been set, the prosecution (often in response to judicial requests) frequently asks the police to provide transcripts of 911 tapes and *KGB* interviews. Most domestic violence cases have a 911 or *KGB* tape requiring transcription.

Transcripts need to be carefully reviewed for accuracy and completeness. This is a labour-intensive and therefore costly exercise. Effective editing requires knowledge of the context of the recorded event. This means the interviewer or investigator must listen to the audio portion of the record while reading the draft transcript and making the necessary corrections or gap fill-ins.

Despite the burden transcription places on police resources, there is a lack of consistent practice in prosecution offices as to whether support staff, individual “line prosecutors” or supervisors are responsible for reviewing files and deciding what needs to be transcribed. This can result in requests an experienced prosecutor would not make. It can also result in inconsistent levels of service by the police (e.g. quality, timeliness, etc.) if the demands made by prosecutors are unrealistic. A prosecution request for transcription can be very expensive. Some police services and/or their funding bodies question why police should pay for transcribing material to be used during the judicial process. In some jurisdictions the police bill the prosecution for transcription costs and argue it would be more efficient to have the prosecution service directly coordinating transcription. On the other hand, prosecution services argue that they cannot be expected to take on open-ended costs generated from police activity.

If private sector transcription services are retained, transcripts generally cost about $5.50 per page and $9.50 per page if ordered on an expedited basis. Where translation is required, costs go up to approximately $10.00 an hour and 15 cents a word. There is also the possibility of significant delay (two to three months) when the private sector is used. In many cases the private sector cannot be used because of the need to preserve confidentiality.

Advances in information technology are constantly increasing police disclosure costs. The evolution of disclosure methods has gone from paper copies to cassette tapes, to VHS tapes, to CD/DVDs, and, recently, to Web disclosure. The current preferred method provides disclosure on a computer hard drive. Electronic disclosure requires large capacity servers, commercial scanning equipment, software with indexation, search engines, reports, data import and export, personnel for scanning, keyboard data and system management. The costs associated with cases involving multiple accused and voluminous disclosure briefs can be enormous. Disclosure briefs of 500 gigabytes to one terabyte in size are not unusual.[14] Photo books contribute to a professional presentation in court but they are costly.

The amount of data gathered during an Internet intercept can be massive and almost unmanageable from a human resources point of view. Millions of data packets must be individually viewed, processed and identified as relevant or non-relevant. Disclosure by Voice over Internet Protocol is another process which voraciously consumes human resources. Calls cannot be processed in real time and must be manually merged and processed by monitors.

1.1.2 The Disclosure Process

The challenges confronted by the police during the disclosure process can be categorized as technical, security related and legal. Most large police services have made a commitment to modern information technology. But we were told in some locations remote server data access lines between detachments need to be improved.

The vetting of large electronic files is extremely time-consuming. The personal information of credit card holders and credit card numbers has to be vetted. The privacy interests of innocent third parties relating to non-relevant material (e.g. intercepted by audio and video recording "bugs" and probes) need to be protected. Sensitive material can be in more than one document and unless careful vetting takes place, it is disclosed. It is not uncommon for sensitive information to be included in a police narrative report. This information will only be detected and held back if the individual reviewing the material prior to disclosure has knowledge of the entire incident.

Protocols and staff available to perform the important task of vetting disclosure are frequently not available. Moreover, there is a shortage of experienced file coordinators. The police community acknowledges the need for more police employees to learn how to organize material gathered during a large investigation in a way that facilitates disclosure.

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[14] In one case brought to our attention a self-represented accused sought disclosure of over 3 terabytes of data not tendered by the prosecution and 18 Transmission facilities for the delivery of voice communications over IP networks, such as the Internet.

Of concern to the police is the security of undercover operatives, informants, and agents. Undercover operatives often travel to work and the name of the police service employing them should always be edited from disclosure. Police, prosecutors, defence counsel and judges do not always agree over the need to distort facial images or to refrain from disclosing ongoing police projects. In the digital age, disclosure of undercover officers through surveillance video poses a serious safety concern. Police are not always convinced the identity of undercover officers is necessary for the accused to make full answer and defence.

The use of aerial surveillance by police has become common practice and common knowledge in criminal circles. Criminal organizations are interested in the types of equipment used as well as details regarding flights (e.g. elevations and directions of travel). So far, these details have been protected from disclosure as investigative techniques. The police are concerned that this may change in the future.

A systemic impediment to disclosure in some police computer branches is a lack of capacity to keep up with the volume of requests for forensic examinations of computer hard drives and cell phones. There are cases that take several years to make it through the court system and backlog is common. Furthermore, the software used for examinations in 2005 has changed over time and the prosecution is now requesting further work to meet today's standards. The volume of requests for further work makes it extremely difficult to complete disclosure in a timely manner. It is not uncommon for some cases to remain in the queue to be examined for over a year.

A number of police services report inadequate infrastructure to process large audio (e.g. all audio intercepts in a wiretap investigation) and video files (e.g. cameras that record “24/7”). Experienced officers indicate there is a significant increase in the number of audio and video files submitted. They sometimes ask if all the material must be disclosed. Another source of ongoing frustration for the police is the lack of standards on how and when e-disclosure will be utilized. They suggest that there should be PDF standards implemented for best file size/resolution and viewing.

The changing of technology platforms or formats for large media/data disclosure (e.g. telephone, internet, video) is expensive because electronic disclosure of large files is a greater challenge than a standard file. It is easy to scan a small file into PDF documents, whereas a large one requires an indexation structure, search engines and multimedia integration. The adoption of more sophisticated technology (e.g., Adobe 8) may address some of the problems, such as faint photocopying/scanning or illegible/missing officer’s notes. However, as the migration from Supertext to Adobe demonstrated, technology updates can give rise to additional costs and delay.

The police welcome disclosure advice from prosecutors, but prosecutor availability for advisory purposes varies across the country. In some jurisdictions prosecution advice is difficult to obtain in a consistent or timely fashion, even for large investigations. There can also be a lack of consistency in prosecution advice about disclosure responsibilities and formats. Some prosecutors insist on a disclosure format tailored to meet the historical preferences of their office, or even their individual tastes.

Vetting can be a bone of contention between police and prosecutors. The unavailability or unwillingness of prosecutors to participate in the vetting process can result in cases where the prosecution relies entirely on file vetting performed by the police. This can lead to unintended disclosure of sensitive information, delay and misunderstandings. Sometimes it is necessary for the police to postpone operations in order to allow the prosecution to study the file. Police are then obliged to make supplementary investigations to ensure the grounds to obtain warrants are contemporaneous.

The police note that the use of different prosecutors to vet and review disclosure and to prosecute a case can be problematic. This is often the case if the prosecution's theory changes between the two steps in the process. Depending on the Crown reviewing the file, requests for additional material can vary. For example, it was indicated that requests for additional material can vary significantly between provincial and federal prosecutors. This creates challenges for police services in developing standard policy and procedure for brief preparation.

Some police services report an inordinate amount of time is spent responding to prosecution requests for police notes where no notes exist. On the other hand, some prosecution services report that they spend substantial time following up with the police notes not provided to the prosecution. Even worse, cases have been stopped in their tracks where a police witness refreshed his memory from notes never provided to the prosecution, despite memos asking the lead investigator to ensure all officers involved in the file submitted their notes. It was suggested to us that it would help if Crown briefs explicitly stated a named officer did not take notes where it would ordinarily be expected that some notes would have been taken by the officer.

A common problem identified by the police arises when the prosecution does not know what has been disclosed. A related problem arises when defence counsel changes and difficulties are encountered in keeping track of disclosure. In some court locations there appears to be no standard practice of the old counsel returning the file to the prosecution so it can be passed on to the new counsel. On occasion the police are asked to prepare a whole new disclosure package. Similarly, the police receive last minute requests for disclosure briefs or for disclosure of documents/photos already submitted but somehow lost. The result is wasted cost and manpower. Multiple charges in different files for the same incident and same accused can cause an unnecessary multiplication of disclosure. We are advised by the police that this occurred 400 times in one jurisdiction alone in 2008.

Some police officers are skeptical about the purpose of unfocussed disclosure requests. Demands for: "all information and police records pertaining to…" can place an enormous strain on the police. They are a source of frustration when the reason for the request is not stated, understood or accepted.[15] This sense of frustration can be compounded when police conclude the prosecutor has forwarded the request for action without evaluating whether or not it has merit.

[15] Police representatives report they have noticed increased requests from some defence counsel for information not collected as part of the investigation. From a police perspective, some of this information is of no value and was not necessary to establish the charge and is not necessary to defend against the charge. Defence counsel reply that the police are not always in the best position to assess the usefulness of information from a defence perspective.

The police find particularly frustrating the attitude some counsel have towards disclosure. These counsel will not come to the police station or prosecution office to pick it up. The police are required to deliver the disclosure. It is also not unknown for disclosure receipts to go missing, followed by an assertion that disclosure was not made. On occasion, the police receive disclosure back following a guilty plea and it appears to the police that counsel did not bother to look at the disclosure. Police criticism of counsel carelessness is not directed solely at defence counsel. In 2008 a police service had to rebuild 50 files lost by a single prosecution office.

1.1.3 Misuse of Disclosure

The police community has major concerns about the misuse of disclosure by criminal organizations. Misuse of disclosure includes using it to facilitate criminal activity, such as harassment and intimidation of witnesses. It also includes revealing sensitive private information about individuals, including victims of crime and third parties, to parties not entitled to the information.

1.2 Prosecution Challenges[16]

Most Attorneys General across Canada issued disclosure directives to their prosecutorial agents following the release of *Stinchcombe* and the *Martin Report*.[17] Over time these directives have evolved to reflect new developments in the law. They have also given rise to a number of agreements between police and prosecution services concerning the content of the prosecution brief.[18] Despite the commonplace use of prosecution briefs, in many provinces there is not one consistent intra-provincial product.

All professional participants in the criminal justice system recognize the benefit of standardized Crown briefs. They include:

- an increase in the quality of the brief through police usage of standardized forms on a case specific basis;
- an increase in the speed of delivery to the prosecutor because of ease of creation;
- a decrease in the amount of "drip-feed" (i.e. incremental disclosure); and
- an increase in efficiency because of standardized procedures in redacting and delivery.

The federal government has reaped these benefits through the creation and implementation of its "Report to Crown Counsel"; a standard brief used in all major Royal Canadian Mounted Police

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[16] The preparation of this portion of the Report benefited from a survey conducted by the R.C.M.P. from October to December 2006 of provincial prosecutors from BC, Alberta, Manitoba, New Brunswick and Nova Scotia and federal prosecutors from BC, Alberta, Saskatchewan, Manitoba, NWT, Ontario, Quebec and the Atlantic region.

[17] For example, the Ontario Attorney General's Criminal Law Division Disclosure Policy Memorandum PM [2009] No. 1 (available upon request at ministry or Crown offices).

[18] In 2005 a disclosure protocol was entered into between police in Manitoba, Manitoba Justice and the Federal Prosecution Service. In 2005 the Attorney General of New Brunswick, the New Brunswick Association of Chiefs of Police and the R.C.M.P. entered into a disclosure protocol. In 2007 the British Columbia prosecution service and the police entered into a memorandum of understanding concerning disclosure. In February 2008, the Federal Public Prosecution Service and the British Columbia Attorney General's Ministry developed a Guide on Preparation of the Report to Crown Counsel.

(RCMP) cases. Common brief deficiencies cited by prosecutors who do not work with a standardized brief include:

- redundant information (e.g. witness statements repeated in the narrative of the brief, which should be a synopsis and not a compendium),[19]
- the lack of an index, and
- briefs provided in a variety of media (paper, email and video including, VHS, CD Rom and DVDs formats).

Prosecutors accept that they have the ultimate responsibility over what information is disclosed to the defence. This requires a final "vetting" of disclosure to ensure it does not contain information to which the defence is not entitled (e.g., the identity of confidential informants). Virtually everything gathered, received or created in the course of an investigation might be relevant, but much of it is not. This makes it desirable from the perspective of prosecutors to be in a position to provide full disclosure without investing an excessive amount of review time in vetting and sorting through every aspect of the police investigation with the same level of scrutiny and attention to detail initially invested by the police. Categorization by the police of all disclosure material as it is collected and entered in the database can serve to achieve more focused and efficient Crown vetting. A prosecution brief that is more "user-friendly" from the perspective of the prosecutor will also assist defence counsel's file preparation after the brief has been disclosed.

An integrated chronology is the backbone of every investigation. Prosecutors and defence counsel indicate that they like to receive a brief containing all necessary evidence, facts, statements establishing the offence(s) and the likelihood of conviction, along with the aggravating and mitigating circumstances for sentencing purposes. A detailed synopsis should be included telling the "story" of the case based on the integrated chronology. It should be presented in a narrative format and provide reference sources for all necessary evidence. This is where linking items within the database can be put to best use. In order to build the integrated chronology, each piece of evidence should be coded with the appropriate date, time and witness or other source. Standard coding fields are another useful feature.

To help ensure counsel get what they require to do their job effectively and efficiently, standards need to be developed to define:

- what information is required;
- what information is of marginal, conditional or no relevance;
- what type of reports and inventories of material should be included;
- how these reports and inventories should be organized;
- what constitutes sensitive data;
- how sensitive data should be protected; and
- who is responsible?

It is apparent some of the information technology used by police services was not designed with prosecutors in mind. For example, The Tasks and Task Actions E&RIII database[20] describes the

[19] Police acknowledge an officer's fear of "not wanting to miss anything" can lead to over-inclusion.

[20] An E&RIII database contains tasks assigned by supervisors and task actions taken in response to assigned tasks from the beginning of the investigation to the end. Evidence collected in the course of the task actions taken by each

course of an investigation but not the evidence required for prosecution. Consequently, a task report is generally not a suitable summary or detailed narrative for the prosecutor because it is not organized to provide a clear description or narrative of the case.[21] In other words, a task report does not have the proper focus for prosecution, or defence, purposes.

In the *Pickton* case there were approximately 13,000 task reports. Some of them consisted of hundreds of pages. The prosecution decided the safest course was to provide copies of all the task reports to the defence. As a result, they all had to be edited by the police and reviewed by the prosecution before they were disclosed.

Some police services do not provide transcripts as part of disclosure. Consequently, prosecutors are required to rely on annotations, particularly in bail court. Some annotations are thorough and provide sufficient information, but others do not. If the annotation is not adequate, the prosecutor may be required to watch hours of video. Alternatively, the prosecutor may not be in a position to provide the Court with all relevant evidence. This can lead to the accused being released on bail when he or she might not have been released had the prosecution been able to put the full picture before the Court.

Police note taking practices can add to disclosure problems for the prosecution. Increased reliance on video recording of statements can adversely affect the interviewing skills of investigators. Some experienced prosecutors feel investigators were better at focusing interviews when they personally recorded them. Meandering, unstructured and unnecessarily lengthy interviews are problematic for a number of reasons. They give rise to a need for second and subsequent interviews to clarify the statement. Poor statement taking can also adversely and unfairly affect the value of the evidence of a witness.

1.3 Defence Challenges

Defence counsel are situated downstream in the disclosure process. Errors made prior to the defence receiving disclosure can poison the water. If the police have not fully identified the fruits of the investigation, proper disclosure will not be made.

Failure on the part of the police to provide the prosecution, or the prosecution to disclose to the defence, information that ought to be disclosed will also lead to a defective disclosure process.

Disclosure to the defence that has not been organized or arranged (so called "dump truck" disclosure) forces the defence to spend time sorting and sifting through the material before the

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member is added to the database. This evidence, along with police notes, paperwork and other material, is linked to task actions in E&RIII.

[21] For example, each task and task action may comprise more than one activity, piece of evidence, or day of investigation. Therefore, tasks and task actions may contain overlapping activities, pieces of evidence or events, all of which must be sorted and organized in order to present an intelligible narrative of the evidence. Ideally, tasks should be kept simple in order to support sorting and organizing of the facts of the case to create an integrated chronology of all evidence and cover a single day. Ongoing tasks should be renewed each day. This approach serves to break down the task/task action report into manageable 'bytes' that may be easier to sort and reorganize to form an integrated chronology for the case.

onerous task of absorbing it can begin. Early, well-organized and focused disclosure facilitates the defence forming an early position on admissions of fact which shorten the trial process and permit the prosecution and defence to more accurately plan their cases.

Some defence counsel feel police and governments do not accord sufficient priority to disclosure. They suggest delays in receiving disclosure are a chronic problem in urban courts. They also point to "inadequate responses" by government to commissions of inquiry and academic literature describing prosecutorial "tunnel vision" and "noble cause corruption". These counsel argue senior police and prosecution officials have to advocate more strenuously for increased disclosure resources. They also feel senior officials should play a stronger leadership role in conveying the importance of disclosure throughout their organizations.

Another concern voiced by defence counsel is the lack of care and file organization they encounter in some prosecution offices. Essential items upon which a case may turn (e.g. a DVD interview) are sometimes produced too slowly. Improper cataloguing and vetting can lead to innocent non-disclosure. Too often the defence receives large electronic databases lacking structured search capability.[22] The lack of standardized checklists and disclosure briefs in cases of all sizes is inefficient and wastes counsel's time.

We were told in some prosecution offices that no one is responsible for supervising disclosure and important disclosure functions are left to administrative clerks instead of legally trained staff. Accurate records of what has been disclosed are not always kept. There is also a feeling amongst the defence bar that when police and prosecution budgets are reduced, disclosure capacity suffers.

Furthermore, defence counsel expressed frustration with judges who they feel fail to take nondisclosure or slow disclosure seriously. Too frequently the judicial response to a failure by the prosecution to meet its disclosure obligations is an adjournment. When the prosecution is forced to proceed, some judges shift the onus and require the defence to establish prejudice. There appears to be an overwhelming consensus on the part of the defence bar that judges in addition to the trial judge must be given authority to grant *Charter* remedies relating to disclosure.

1.4 Procedural Challenges

The need for increased judicial scrutiny of the prosecution's performance of its disclosure obligations has become a burden on the courts. This burden is amplified by the absence of a statutory structure in which to adjudicate disclosure issues. Writing in an extra judicial capacity, Justice Michael Moldaver of the Ontario Court of Appeal forcefully expressed the practical problems Canada's judiciary faces because of Parliament's failure to provide "a code of procedure designed to deal with such basic issues as how, when, why, by who and to whom

[22] The defence bar notes costs are driven up when information technology is used to make disclosure. Copyright and licensing issues can stand in the way of the police and prosecution sharing document management software with the defence. More and more defence counsel are accepting information technology costs as a "cost of doing business" and constitute a prudent investment in enhanced productivity.

Charter applications are to be brought".[23] This omission means there is no procedural mechanism available for the parties to obtain an early judicial resolution of disclosure disputes. This was identified as a major weakness in the criminal justice system at the January 2010 Second National Criminal Justice Symposium in Montreal.[24]

The principle of fundamental justice underlying the entitlement to disclosure is the constitutional right to make full answer and defence. Only a "court of competent jurisdiction" within the meaning of section 24 of the *Charter* can decide constitutional issues.[25] Consequently, a *Charter* right cannot be enforced at a preliminary inquiry.[26] From committal onwards, pre-trial motions seeking a *Charter* remedy cannot be brought before a judge, other than the trial judge or a superior court judge.[27]

Stinchcombe dealt with an indictable offence and specifically noted that different considerations might come into play in the context of summary conviction cases. It also held that the right to disclosure only arises at the time of the election of the accused. Notwithstanding these aspects of the decision, it has long been accepted, with virtually no discussion that the right to full disclosure applies in all cases.

1.5 Self-represented Accused

Self-represented accused are increasingly appearing before the courts. This is their right. However, facilitating their access to justice poses challenges to all participants in the process.[28] Self-represented accused have the same right to disclosure as represented accused. The precise means by which disclosure is provided to a self-represented accused must be left to the discretion of the prosecutor based on the facts of each case.[29] Instructions to prosecutors in various jurisdictions call for specialized access for self-represented accused. Alberta's *Prosecution Guideline on Disclosure* refers to "controlled and supervised, yet adequate and private" access to disclosure materials in circumstances where the safety, security or privacy of individuals may be

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[23] M. Moldaver, *"The Impact of the Charter on the Criminal Trial Process – A Trial Judge's Perspective"* in J. Cameron, ed., The *Charter's* Impact on the Criminal Justice System (Scarborough: Carswell, 1996).

[24] This two day conference invited 80 judges, defence counsel, prosecutors, police and government officials to discuss ways of addressing challenges in the criminal justice process. There was unanimous agreement that disclosure constitutes a serious systemic problem.

[25] See the *Final Report of the Air India Inquiry,* Vol. Three, Chap. IX, p. 298.

[26] See *Mills* [1986] 1 S.C.R. 863 and *Meltzer* [1989] 1 S.C.R. 1764. This does not preclude provincially appointed judges from presiding over judicial pretrial conferences to discuss disclosure or establish disclosure dates.

[27] There must always be a court of competent jurisdiction to provide and enforce a constitutional right when needed. The trial court will ordinarily be the appropriate court. Where a trial court has not been determined, or where a court is an inappropriate forum because it is implicated in the alleged breach of constitutional right, the competent court must be the superior court of the province in the exercise of its inherent jurisdiction. Bill C-53 was introduced and received first reading on November 2, 2010. This proposed legislation focuses on improving the efficiency of "mega-trials" and other complex cases. It contemplates providing the Chief Justice with authority to appoint a case management judge and the case management judge with jurisdiction to address issues such as disclosure.

[28] See the *Report On The Self-Represented Accused,* Steering Committee On Justice Efficiencies and Access To The Justice System, http://www.justice.gc.ca/eng/esc-cde/ecc-epd.

[29] The policies and guidelines of the Public Prosecutions Division of Newfoundland and Labrador state: "[Crown] Counsel should consider where disclosure is made to an unrepresented accused, the inclusion of a written explanation of the appropriate uses and limits upon the use of disclosure material."

at issue if the self-represented accused has unfettered access to documents and the ability to disseminate them freely. Prosecution guidelines in British Columbia that provide Crown counsel can arrange for disclosure to unrepresented accused to occur in a controlled setting, such as arranging for videotapes or other material to be viewed in the prosecution office or the local RCMP or city police detachment.[30]

Most jurisdictions provide for pre-trial judicial case conferences in criminal proceedings. Common practice when the accused is self-represented is to hold the conference in court and "on the record." At the case conference, issues relating to disclosure, including its content, the means of disclosure and the schedule and supervision of the access of the accused to the material can be discussed. If the parties do not agree, the judge can rule on the issues.

2. RECOMMENDATIONS

The disclosure challenges identified by the professional participants in the criminal justice process can be divided into the following categories:

- police and prosecution collaboration;
- disclosure management and responsibility;
- the content of disclosure;
- the timing of disclosure;
- the manner of making disclosure;
- self-represented accused and disclosure;
- early judicial resolution of disputes;
- improper conduct in relation to disclosure; and
- disclosure codification.

2.1 Police and Crown Collaboration

The Supreme Court of Canada noted in *McNeil* that the duty on police to provide full disclosure to Crown counsel "is as important as it is uncontroversial". The obligation on investigative agencies to provide the prosecution with all material relating to the investigation of the accused is a necessary corollary to the prosecution's duty under *Stinchcombe*. Failure to comply with this obligation is a police disciplinary offence in most Canadian jurisdictions.[31] Consequently, directions issued to prosecutors and police and other investigators by competent authorities should state:

- investigators and prosecutors are bound to exercise reasonable skill and diligence in their areas of responsibility to disclose all relevant information, even though such information may be favourable to the accused; and

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[30] *Practice Bulletin*, November 18, 2005, Criminal Division of the Department of Justice. British Columbia has several Practice Bulletins on disclosure and each makes a reference to access for self-represented accused.

[31] In Ontario it is a violation of the Code of Conduct under s. 42(1) of the *Police Services Act* for a police officer to fail to report: "anything that he or she knows concerning a criminal or other charge, or fail to disclose any evidence that he or she … can give for or against any prisoner or defendant". See T.M. Brucker, "Disclosure and the Role of the Police in the Criminal Justice System" (1992), 35 *Crim. L. Q.* 57 at p. 76.

- investigators are under a duty to report to the officer in charge or to Crown counsel all relevant information of which they are aware, including information favourable to an accused, in order that Crown counsel can discharge the duty to make full disclosure.

2.1.1 Working Together Effectively

Disclosure obligations in a particular case are determined by the scope of the police investigation and the charges prosecuted. Traditionally, the police alone determined the size of the case they would bring into the court system. The number of accused and charges alleged rested solely on what the police considered appropriate. As a result, the capacity of the court system to handle the prosecution was not always taken into consideration. Close consultation and a jointly developed strategic approach involving police and prosecutors can play an important role in ensuring that the case presented for prosecution can be digested by the court system.

The *Martin Report* recognized the value of early police and prosecution collaboration.[32] This collaboration can take place without the prosecution assuming responsibility for charge approval or taking over investigative functions from the police. Prosecutors can provide pre-charge legal advice as well as logistical and strategic advice on the manageable size and focus for a successful prosecution. The prosecution service can also provide helpful advice on the preparation and distribution of disclosure.

2.1.2 Division of Responsibility and Costs

Providing disclosure can be a time-consuming process, especially in large and complex criminal matters. At present there is no Canada-wide model or agreement providing guidance on Crown disclosure management. Consequently, there is no national consensus on important issues including: the respective roles and responsibilities of police and prosecutors, detailed format requirements, timelines, cost allocation and other procedural matters. Questions still arise between police services and prosecution services over "who does what"? For example, "vetting" disclosure to ensure only information subject to the prosecution's disclosure obligation is disclosed is time-consuming and detailed work. The police tell us prosecutors occasionally rely exclusively on the vetting done by the police and over inclusive disclosure can be the result. Most police and prosecutors agree vetting disclosure should be a shared responsibility. It must be worked out to suit the circumstances of the particular investigation and prosecution.

Generally speaking, investigators are best placed to identify sensitive information (e.g., informant information, investigative techniques, witness safety, etc.) and must take a primary role in identifying information they believe to be sensitive for prosecutorial review. Prosecutors

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[32] *Ibid*, at p. 28. Greater collaboration between police and Crown at the pre-trial stage was also endorsed in Barreau du Québec, *Rapport Final: Comité Ad Hoc du Comité en droit criminel sur les megaprocès*, février 2004, available online: Barreau du Québec. The Federal Prosecution Service Deskbook provides c. 54.3.1.3 http://www.justice.gc.ca/eng/dept-min/pub/fps/fpd.ch54.html: "The most effective way of satisfying Crown counsel's ethical obligation to make full disclosure of the Crown's case is to be involved at an early stage and continue to be involved throughout the investigation … the preparation of disclosure materials requires intensive cooperation between Crown counsel and the investigative agency, such that the responsibility should be viewed as a joint one".

may agree or disagree with the investigators' assessment and will need to know the reasons why information has been identified as sensitive.

The *LeSage/Code Report* contains specific recommendations concerning the respective responsibilities of the police and the prosecution in generating disclosure briefs:

- the police should do an initial edit of the brief, electronically highlighting or shading the proposed edits;
- the prosecution should then review the brief and make final decisions about the edits;
- the police should then provide a master brief to the prosecution, without edits, and a disclosure brief with edits. Each edit should be coded in the margins to explain the basis for the edit to the defence; and
- as much as possible, all of the above should take place pre-charge.[33]

With respect to specific types of information, the *LeSage/Code* Report recommends the following:

- transcribing important intercepted private communications and recorded witness interviews, likely to be used at trial, is a joint responsibility of the police and the Crown;
- the Crown should advise the police which intercepts and which recorded witness interviews should be transcribed and the police should use civilian employees to do the transcribing;
- the police should then include the transcripts in the disclosure brief; and
- as much as possible, all of the above should take place pre-charge.[34]

The *LeSage/Code Report* notes disagreements in Ontario around "who pays?" and are now being resolved in the context of most large complex cases. The police pay for initial external hard drives, both edited and unedited. The Crown then pays for copies of the hard drive made for disclosure to all accused. There is now universal acceptance of the principle that an accused should not have to pay for basic disclosure.

A cross-sector project in Ontario called "Justice on Target" is working on an electronic solution to disclosure in routine cases. Improved dialogue between police and prosecution officials is helping transcend an unproductive focus on fiscal positions. Shared interests can be achieved through collaborative use of modern information technology. We believe a jointly developed written agreement between police and prosecutors providing a mechanism for resolving disputes, including cost allocation, can assist when contentious issues arise.

2.1.3 Assigning Prosecutors to Police Stations

Assigning prosecutors to provide pre-charge advice to large, complex investigations is an accepted practice in most jurisdictions. A more recent development in British Columbia and Ontario is co-locating prosecutors at police divisions or with specific police units. These prosecutors are able to provide timely advice in a wide variety of cases. The police are

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[33] *Ibid*, recommendation 4, at p. 39.
[34] *Ibid*, recommendation 5, at pp. 40-41.

enthusiastic about having greater access to prosecutorial advice.[35] Quebec prosecutors provide a "24/7" consultation service to all police services. We are advised this service has been effective from both police and prosecution perspectives and has reduced the laying of unnecessary and weak information.

2.1.4 The Objective Prosecutor

To enhance prosecutorial objectivity, the *LeSage/Code Report* recommends that prosecutors who have worked closely with police at the investigative stage should not make the decision whether to prosecute, or retain carriage of the prosecution if it goes forward to trial. The *Report* suggests fresh, independent Crown counsel become involved when an investigation is complete. This does not prevent the pre-charge advice Crown from taking on some post-charge roles such as conducting the bail hearing, completing disclosure or providing ongoing advice and assistance to any prosecution.[36] The response to this recommendation appears largely to be dependent on the role of the respondent. Crown participants at the 2010 National Criminal Justice Symposium did not feel their objectivity was affected by working with investigators to develop a case, but most defence counsel supported the *LeSage/Code* recommendation.

Charge assessment is an ongoing public and ethical responsibility at all stages of a prosecution. Some prosecution managers have expressed concern about the inefficiency of having different prosecution teams learn a case twice. Other, less drastic ways, to maintain prosecutorial objectivity are available (e.g., supervisory oversight). There is also concern about the consequences of pre-charge advice to the police based on a prosecution theory subsequently rejected or substantially modified by trial prosecutors.

2.1.5 Increased Inter-Agency Communication

The *Criminal Justice Review Report*[37] recommends the establishment of a provincial coordinating committee to develop a directive comprehensively setting out the disclosure responsibilities of police and prosecutors and to address disclosure issues on an on-going basis.[38] Such a directive would increase the likelihood that disclosure responsibilities are understood and carried out. The participation of defence counsel and representatives of the judiciary on the committees would enhance the committee's effectiveness. In appropriate circumstances, it may be useful to have broader representation (e.g., intelligence services with respect to terrorism prosecutions).

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[35] Some prosecutors indicate these arrangements can give rise to the police seeking advice on every aspect of their work. There can also be a tendency on the part of some police supervisors to abdicate their screening role and send the officer directly to Crown counsel.
[36] *The LeSage/Code Report*, Ontario Ministry of the Attorney General, Queen's Printer for Ontario, 2008 at p. 27.
[37] *Report of the Criminal Justice Review Committee*, Queen's Printer for Ontario, 1999.
[38] *Ibid*, footnote 4, at p. 13.

As the *Criminal Justice Review Report* recognizes, new disclosure issues arise regularly. A good example is the decision of the Supreme Court of Canada in *McNeil*.[39] Police services across the country had to immediately respond to the decision. In some cases they sought advice from prosecution services. In other cases, they sought advice from in house or government legal advisors or retained lawyers. We understand some efforts were made to standardize the advice provided but the lack of a generally recognized advisory body resulted in a significant amount of duplication of effort. A national disclosure advisory body of experienced police, prosecutors, defence counsel and judges (where appropriate)[40] would be a useful addition to the present arrangements for disseminating and responding to judicial decisions. Such a body could operate as an umbrella organization for provincial coordinating committees. It could also serve as a clearing house for disclosure decisions and provide operational and policy advice to police and prosecution services.

The proliferation of information technology has opened up new possibilities for communication and co-operation between police and prosecution services. There appears to be a large appetite for the sharing of information, policies, and "best practices." Learning from each other and sharing expertise can play an important role in "leveraging" technology advances. A recent memorandum for U.S. Department of Justice prosecutors suggests some of the uses to which information technology can be put:

- to create an online directory of resources pertaining to discovery issues that will be available to all prosecutors on their desktop;
- to produce an electronic handbook on discovery and case management so prosecutors have a one-stop resource addressing various topics relating to discovery obligations;
- to implement a "distance learning" training curriculum and a mandatory training program for prosecutors, paralegals and law enforcement agents;
- to catalogue electronically stored information recovered as part of investigations, and
- to create a pilot case management project to fully explore the available case management software and possible new practices to better catalogue law enforcement investigative files and to ensure all information is transmitted in the most useful way to prosecutors.[41]

RECOMMENDATION 1: PRE-CHARGE ADVICE
Prosecution services should consider making prosecutors available to provide pre-charge advice to the police, including advice in relation to specific investigations. This recommendation is of particular importance in the context of major and complex prosecutions but also applies to routine investigations. We recognize the ability of prosecution services to fully implement this recommendation may be affected by resource limitations.

[39] Another example is the variety of practices across the country with respect to the disclosure of audio and video taped evidence and the transcription of witness statements.
[40] In appropriate circumstances it may be useful to have broader representation (e.g., intelligence services).
[41] Memorandum For Department Prosecutors, Monday, January 4, 2010, at p. 3.

RECOMMENDATION 2: COLLABORATIVE PROCESS
Every jurisdiction without a standardized agreement setting out the division and nature of the respective disclosure responsibilities of police and prosecution services should consider establishing a collaborative process to develop one. The agreement should contain a mechanism for resolving disagreements between police and prosecution services, including cost allocation. The mechanism should ensure that when disclosure disagreements arise police services are given an opportunity to provide input.

RECOMMENDATION 3: DIRECTIVES TO POLICE
Where they do not currently exist and after due consultation and consideration, all authorities responsible for policing should issue directives to police services within their jurisdiction, directing them to assist Crown counsel in complying with the applicable Attorney General's directive on disclosure. These directives should direct police, other investigators and prosecutors that:

- **investigators and prosecutors are bound in their respective spheres to exercise reasonable skill and diligence in examining or reviewing and disclosing all relevant information, even though such information may be favourable to the accused;**
- **they are under a duty to report to the officer in charge or to Crown counsel all relevant information to which they are aware, including information favourable to the accused; and**
- **the disclosure file should identify the officer who has overseen the disclosure.**

RECOMMENDATION 4: DIRECTIVES TO POLICE
We endorse the work being done across the country to develop improved ways for preparing and delivering disclosure through the use of modern information technology. We encourage the project teams doing this work to share the results of their work and the lessons learned from it with the provincial and territorial disclosure coordinating committees referred to in Recommendation 5 below.

RECOMMENDATION 5: DISCLOSURE COORDINATING COMMITTEES
We endorse the recommendation in the Criminal Justice Review Report that each province and territory consider establishing a disclosure coordinating committee. Representation on these committees should include: the police, the defence bar; legal aid, prosecution services, courts administration and the judiciary.[42] The disclosure coordinating committee should collect, circulate and promote disclosure lessons learned and best practices within their jurisdiction. The disclosure coordinating committees should also report disclosure lessons learned and best practices in their jurisdiction to the national advisory board referred to in Recommendation 6 below.

[42] Consideration should be given to representation from intelligence services with respect to terrorism prosecutions.

RECOMMENDATION 6: NATIONAL DISCLOSURE ADVISORY BOARD
The Committee of Deputy Ministers Responsible for Justice and the Canadian Association of Chiefs of Police should consider the feasibility and composition of a national disclosure advisory board. Representation on the board should include the police, defence bar, prosecution services, courts administration, corrections and the judiciary. The board should not consider specific cases but rather review and make recommendations concerning systemic issues of national importance. It is important the establishment of a national advisory board not delay the implementation of disclosure reforms required in specific jurisdictions.

2.2 Disclosure Management and Responsibility

Police must pursue all relevant avenues of investigation behind an allegation of criminal conduct. This can lead to the gathering of immense amounts of information. The information must be effectively catalogued, organized and fully disclosed in order for the disclosure obligations of the Crown to be discharged. As noted in the *LeSage/Code Report*, "when disclosure is disorganized and incomplete it leads to constant follow-up requests from the defence and this leads to delays".[43] The 2009 British Columbia Disclosure Management Working Group concluded the failure of police, prosecutors, defence counsel and judges to effectively and efficiently manage the huge amount of information now entering the criminal justice system is a major reason for the disclosure crisis facing the court process.

2.2.1 Disclosure Officers and Centres

The notion that police and prosecutors should work together and bring their respective skills to bear in developing investigative projects, deciding charging and prosecution strategy, and preparing prosecution briefs and disclosure is generally accepted. However, administrative structures to facilitate this cooperation are missing. An example of how one Canadian jurisdiction has facilitated the co-operative and timely preparation of disclosure materials is Alberta's experiment with disclosure centres in Edmonton and Calgary. Police and prosecutors work together to assemble prosecution briefs, disclosure packages and efficient responses to requests from defence for additional disclosure materials**.** Some of the disclosure materials, such as 911 calls or crime scene photographs, are routinely prepared in electronic format.[44]

Alberta began a review of disclosure practices in 2004 with an examination of the integrated disclosure models then in use in London, Ontario, Halifax, Nova Scotia, and Prince Albert, Saskatchewan. This integrated model was adopted in Edmonton and Calgary. Police and prosecutors work together in "disclosure centres" to ensure initial disclosure packages are assembled quickly and responses to requests for additional information are processed efficiently.[45] A great deal of the disclosure provided by the police in Edmonton and Calgary is now in electronic format. This has resulted in a significantly improved process, particularly with respect to digital forms of evidence such as 911 calls and crime scene photographs. Law

[43] The *LeSage/Code Report* at p. 31.
[44] The police and prosecutors of the Toronto "Guns and Gangs" unit also work in a shared facility and sing its praises.
[45] Information provided by Josh Hawkes, Director, Policy Unit, Appeals & Prosecution Policy Branch.

enforcement agencies have also indicated the process results in significant savings. Other areas in the province are taking steps to implement integrated electronic disclosure systems.

The cost of the Alberta initiatives is shared between law enforcement and the prosecution service. Operational details and responsibilities are formalized through Memoranda of Understanding between individual police agencies and Crown offices. These efforts are coordinated on a broader basis and best practices are circulated through a provincial disclosure committee with representation from police agencies and the prosecution service.

Although there has been no broad empirical analysis of the impact of these initiatives, anecdotal evidence suggests significant gains in the speed with which disclosure is provided. The integrated approach also reflects the fact that disclosure is a shared responsibility between police and the prosecution. Implementing collaborative operational structures and processes serves to reinforce the shared nature of the disclosure obligation.

In England and Wales a police "disclosure officer" is responsible for examining material gathered by the police during an investigation, providing material to the prosecution and disclosing material to the accused at the request of the prosecutor. Assigning this responsibility to a designated specialist increases the likelihood disclosure will meet quality control standards. Only briefs approved by the disclosure officer are forwarded to the Crown. All other briefs are remitted back to the investigating officer with an indication of what improvements or additional materials are required.[46]

Members of the police community we consulted suggested the introduction of the position of disclosure officer should be studied for possible adoption in Canada. They stressed that to be effective the officer must be of senior rank and have extensive investigative experience. Disclosure officers could be empowered to take appropriate action when officers fail to make full and timely disclosure to the prosecution or to respond to prosecution requests for additional materials or investigative work.

2.2.2 The Defence

Defence counsel also face significant information management challenges. In many ways, their information management problems are not dissimilar to those of the police and prosecution (e.g., cataloguing, organizing, recording, and storing information). But they also have unique problems (e.g., financial constraints, legally aided clients, etc.). Once again, information technology may provide some answers. In a recent Quebec prosecution, the defence was provided with online access to disclosure. This appears to be an effective means of providing disclosure if the parties are satisfied online access is secure.

An innovative suggestion that was made to us is that disclosure centres like those described above also provide service to defence counsel. After the information gathered by the

[46] Many Ontario Crown offices used to have and some still do have a police "court officer" assigned to perform this function. In many cases, these officers were removed from Crown offices when police services conducted cost cutting "core business" exercises.

investigation has been vetted and screened by the police and prosecution at the disclosure centre, it would be reviewed by an on-site defence representative. The defence disclosure package as well as the Crown brief would then be prepared at the disclosure centre. Both the prosecution and defence would receive their disclosure from the disclosure centre.

2.2.3 Police Investigative Files

The bulk of the information flowing into and through the criminal justice process originates in police investigative files. Police files should be organized from the outset with disclosure in mind. It is crucial when investigators gather information that they collect and note all relevant material, itemize all potentially relevant or marginal material and categorize what they take into custody to protect as sensitive material. This segregation of central, marginal and sensitive material allows for more efficient and effective file review by the prosecution and subsequent disclosure to the defence.

2.2.4 The Crown Brief

The Crown brief is the foundation document for disclosure. We were told that the quality of Crown briefs vary widely across the country, across provinces, and even within police services. The *Criminal Justice Review Report* recommended the implementation of uniform quality control standards.[47] At a minimum, the standards should stipulate that all police briefs must:

- be paginated;
- include an index; and,
- contain a meaningful synopsis of the case, including a list of police and civilian witnesses and a summary of each witness's anticipated evidence which clearly articulates the significance of that evidence.

The *Early Case Consideration Report* of this Steering Committee suggests more detailed content. It recommends that police and prosecution services in every jurisdiction jointly develop and implement a standard checklist for Crown brief and disclosure packages. The *Report* stresses the importance of police services developing training programs to ensure officers are fully aware of and comply with requirements to ensure the preparation of high quality Crown briefs and disclosure packages.

A committee of senior Ontario prosecutors have developed standardized and comprehensive Crown brief formats for all common *Criminal Code* charges. If approved, the work of the committee will be implemented in co-operation with the Ministry of Community Safety and Correctional Services (MCSCS) and with the Ontario Association of Chiefs of Police (OACP). This work will facilitate the adoption of standard Crown brief and disclosure practices for ordinary cases, and logically follows from Ontario's adoption of the Major Case Management brief in large complex cases.

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[47] *Report of the Criminal Justice Review Committee*, Queen's Printer for Ontario, 1999, recommendations 5.9, 5.10 and 5.11. 52 www.justice.gc.ca.

Brief standardization and quality control methods will only improve operations if front-line officers are aware of and follow them. Management commitment to the process is essential. We believe training of new recruits and continuing education of experienced officers on the importance of effective brief preparation should be considered a priority. We also believe that Crown brief preparation skills recognized as a performance measure and core competency for promotion to an investigative position.

RECOMMENDATION 7: QUALITY CONTROL OF THE BRIEFS
Police and prosecution services should work collaboratively to standardize and develop quality control for the briefs provided by police to prosecutors.

RECOMMENDATION 8: DISCLOSURE CHECKLISTS
Provincial/territorial disclosure coordinating committees should work collaboratively to develop standardized disclosure checklists and templates to establish shared disclosure expectations in the criminal justice system.

RECOMMENDATION 9: INFORMATION MANAGEMENT EXPERTISE
Provincial/territorial disclosure coordinating committees should examine ways to introduce more information management expertise to the disclosure process.

RECOMMENDATION 10: PROVINCIAL/TERRITORIAL DISCLOSURE COORDINATING COMMITTEES
Provincial/territorial disclosure coordinating committees should examine the feasibility and utility of establishing administrative structures permitting closer cooperation between police, prosecutors and defence counsel during the disclosure process.

RECOMMENDATION 11: POLICE DISCLOSURE OFFICERS
Provincial/territorial disclosure coordinating committees should give consideration to the feasibility and utility of establishing police disclosure officers in court locations where justified by case volumes.

RECOMMENDATION 12: EDUCATIONAL PROGRAMS
Police, prosecution services, defence bar organizations, legal aid services, law societies and judicial educational bodies should jointly develop and present educational programmes to educate justice professionals on their respective disclosure roles and responsibilities.[48]

2.3 The Content of Disclosure

2.3.1 Current Content

In *Stinchcombe* the Supreme Court of Canada endorsed the following disclosure content recommended in the *Marshall Commission Report*.[49]

[48] Interdisciplinary education was a recommendation of the 2010 National Criminal Justice Symposium.
[49] Vol. 1 at p. 243.

… the accused is entitled, before being called upon to elect the mode of trial or to plead to the charge of an indictable offence, whichever comes first, and thereafter:

- a copy of his criminal record;
- a copy of any statement made by him to a person in authority and recorded in writing or to inspect such a statement if it has not been recorded by electronic means; and to be informed of the nature and content of any verbal statement alleged to have been made by the accused to a person in authority and to be supplied with any memorandum in existence pertaining thereto;
- to inspect anything that the prosecutor proposes to introduce as an exhibit and, where practicable, to receive copies thereof;
- to receive a copy of any statement made by a person whom the prosecutor proposes to call as a witness or anyone who may be called as a witness, and recorded in writing, or in the absence of a statement, a written summary of the anticipated testimony of the proposed witness, or anyone who may be called as a witness;
- to receive any other material or information known to the Crown and which tends to mitigate or negate the defendant's guilt as to the offence charged, or which would tend to reduce his punishment therefore, notwithstanding that the Crown does not intend to introduce such material or information as evidence;
- to inspect the electronic recording of any statement made by a person whom the prosecutor proposes to call as a witness;
- a copy of the criminal record of any proposed witness; and
- the name and address, where not protected from disclosure by law, of any other person who may have information useful to the accused, or other details enabling that person to be identified.

The *Martin Report* subsequently recommended a model disclosure directive significantly expanding on this list. It was adopted by Ontario and is used as a template by most other Canadian jurisdictions. The items of primary disclosure identified in the directive can be summarized as follows.[50]

The prosecution is required to provide to the defence the following information in its possession unless clearly irrelevant:

- A copy of the charge or charges;
- An accurate synopsis of the circumstances of the offence;
- All statements obtained from persons who have provided relevant information to the authorities, even though Crown counsel does not propose to call them as witnesses;[51]

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[50] *Martin Report*, Recommendation 41(12).

[51] The *Martin Report* notes where the names and addresses of witnesses are supplied to the defence, the witnesses may be informed there is no property in a witness and the defence is entitled to interview them. But witnesses are not required to grant an interview. It is strictly their decision. Care must be taken to ensure the witnesses are not left with the impression they should not grant the defence an interview. The *Report* recommends there should be a standard form for providing this advice. To protect the privacy or safety interests of victims, witnesses, or confidential informants, the defence copy of disclosure should be "vetted" by removing any personal identifiers of victims, witnesses or confidential informants.

- Statements of any co-accused (whether made to a person in authority or not);
- Copies of any written statements;
- Copies of any will-say summaries of anticipated evidence, and copies of the investigator's notes or reports from which they are prepared, if such notes or reports exist;
- A reasonable opportunity, in private, to view and listen to the original or a copy of any audio or video recordings of any statements made by a potential witness other than the accused;
- Where statements or recordings do not exist, copies of the investigator's notes, in relation to the persons who have provided relevant information to the authorities;
- If there are no notes, then all relevant information in the possession of the Crown counsel that the person could give should be supplied, subject to Crown counsel's discretion to delay disclosure;
- Upon request by the defence, the name, address, and occupation of any person who has relevant information to give;
- The criminal record of the accused and any co-accused;
- A copy of any written statement made by the accused to a person in authority, and, in the case of verbal statements, an accurate account of the statement attributed to the accused and copies of any investigator's notes in relation thereto, and a copy of, and a reasonable opportunity to view and listen to, any original video or audio recorded statement of the accused to a person in authority. All such statements or access thereto must be provided whether or not they are intended to be introduced in evidence;
- A copy of any police occurrence reports and any supplementary reports;
- As soon as possible, copies of any forensic, medical and laboratory reports which relate to the offence, including all adverse reports;
- Where reasonably capable of reproduction, and where Crown counsel intends to introduce them into evidence, copies of documents, photographs, audio or video recordings of anything other than a statement by a person, and other materials should normally be supplied to the defence.[52]
- A copy of any search warrant relied upon by the Crown, the information in support, and a list of items seized pursuant to the warrant, if any;
- If intercepted private communications will be tendered, a copy of the judicial authorization under which the private communications were intercepted;
- An appropriate opportunity to inspect any relevant items seized or acquired during the investigation of the offence which remain in the possession of the investigators, whether or not Crown counsel intends to introduce them as exhibits in court;
- Upon request, information regarding criminal records of material Crown or defence witnesses that is relevant to credibility;

[52] The defence may be limited to a reasonable opportunity, in private, to view and listen to a copy of any audio or video recording where Crown counsel has reasonable cause to believe there exists a reasonable expectation of privacy or security interest of the victim(s) or witness(es), or any other reasonable public interest, which cannot be satisfied by an appropriate undertaking from defence counsel.

- Upon request, any information in the possession of Crown counsel, for example, information regarding outstanding criminal charges or criminal convictions demonstrated to be relevant to the defence;
- Where identity is in issue, and the Crown relies in whole or in part on the visual identification of the accused as the person seen in the circumstances of the crime, all information in the possession of Crown counsel that has a bearing on the reliability of the identification must be disclosed to the accused; and,
- Any information in the possession of the Crown relevant to the credibility of any proposed Crown witness, including:
    - any prior inconsistent statement or subsequent recantations of that person;
    - particulars of any promise of immunity or assistance given to that person with respect to a pending charge, bail or sentence, or any other benefit or advantage given; and,
    - any mental disorder from which that person is suffering that may be relevant to the reliability of his or her evidence.

The administration of justice has benefited from prosecution services adopting comprehensive disclosure regimes. However, it can be argued with the benefit of hindsight that the disclosure directives adopted in response to the *Martin Report* were the beginning of "disclosure creep." The great majority of cases in Canada are resolved by a guilty plea. When the accused is going to plead guilty, does the defence require all the disclosure provided for above?

2.3.2 Staged Disclosure

Stinchcombe provides that the accused shall not be compelled to elect or plead without "sufficient" disclosure to make an informed decision. "Sufficient" disclosure does not equate with "full disclosure". There are hints in *Stinchombe* that the possibility of providing disclosure in stages (Justice Sopinka refers to the information "packet" then provided in England under the *Criminal Justice Act 1967*) is acceptable. However, the current practice in Canada in all but the most routine case is to provide full disclosure at the "front end" of the process.

The *Martin Report* refers to "primary disclosure", but aspects of the disclosure identified by the report are not necessary if the accused is going to enter a plea of guilty. A significant number of the items enumerated in the *Martin Report* would not be the subject of prosecutorial disclosure in the United States. An accused in England, Australia and New Zealand does not receive disclosure of many of the items listed in the *Martin Report* until after entering a not guilty plea. There are no cogent reasons why an accused should automatically receive the following items currently part of "primary disclosure":

- All statements obtained from persons who have provided relevant information to the authorities, even though Crown counsel does not propose to call them as witnesses;
- Copies of any will-say summaries of anticipated evidence, and copies of the investigator's notes or reports from which they are prepared, if such notes or reports exist;
- A reasonable opportunity, in private, to view and listen to the original or a copy of any audio or video recordings of any statements made by a potential witness other than the accused;

- Where statements or recordings do not exist, copies of the investigator's notes, in relation to the persons who have provided relevant information to the authorities;
- If there are no notes, then all relevant information in the possession of the Crown counsel that the person could give should be supplied, subject to Crown counsel's discretion to delay disclosure;
- A copy of any police occurrence reports and any supplementary reports;
- A copy of any search warrant relied upon by the Crown, the information in support, and a list of items seized pursuant to the warrant, if any;
- If intercepted private communications will be tendered, a copy of the judicial authorization under which the private communications were intercepted;
- An appropriate opportunity to inspect any relevant items seized or acquired during the investigation of the offence which remain in the possession of the investigators, whether or not Crown counsel intends to introduce them as exhibits in court; and
- Any information in the possession of the Crown relevant to the credibility of any proposed Crown witness, including:
    - any prior inconsistent statement or subsequent recantations of that person;
    - particulars of any promise of immunity or assistance given to that person with respect to a pending charge, bail or sentence;
    - or any other benefit or advantage given; and,
    - any mental disorder from which that person is suffering that may be relevant to the reliability of his or her evidence.[53]

Defence counsel is in the best position to determine in any particular case what he or she requires. There may be reasons why the defence will want to obtain access to some or all of these items to ensure the client makes an informed plea decision. It does not follow, however, that in every case all of these items will be required by the defence before deciding how to proceed. Current disclosure practices can result in the defence receiving more information than is required to advise the accused on:

- whether the prosecution has a case;
- the strength of the prosecution's case; and,
- the best position available to the accused in the event of an early resolution.

Time and effort expended by police and prosecutors in preparing and disclosing information of no interest to the defence is a waste of valuable resources. Similarly, effort spent by defence counsel reviewing legally relevant but practically unimportant information is also a waste of time and money.

England, Australia and New Zealand use a "staged" approach to disclosure. This approach provides the defence with the disclosure it needs when it needs it. Initially, defence counsel requires sufficient information to provide comprehensive advice to the accused on the ability of the prosecution to prove its case and the consequences of entering a guilty plea. If the accused decides to proceed to trial, additional disclosure can then be provided.[54]

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[53] *Martin Report*, recommendation 41(13), at p.11 and pp. 247-248.

[54] England, New Zealand, and a number of Australian jurisdictions include defence disclosure as part of their staged approach. Legislation in these jurisdictions requires that the prosecution provide initial disclosure, the defence then

2.3.3 Material outside the Investigative File

The *LeSage/Code Report* recommends use of the following "practical procedural tools" for early and efficient resolution of disclosure disputes regarding materials outside the investigative file:

> Defence requests for disclosure of materials outside the investigative file should be subject to the following requirements:
>
> - They must be particularized in order to properly identify the files/materials in question and to explain how the files/materials could assist the defence, as required by the onus placed on the defence in *Chaplin*;[55]
> - There must be a real effort by the Crown and defence to discuss the request and try to resolve it pursuant to their duties as "officers of the court" and "ministers of justice";
> - If unresolved, the defence must bring on a motion in court in a timely way before the judge seized with pre-trial motions;
> - This judge must set strict timelines for either resolving all disclosure disputes or obtaining rulings at an early stage of the case and well in advance of the trial. Setting a date for trial or preliminary inquiry should only be delayed if the unresolved disclosure is significant in its impact on the accused's election;
> - The judge must rule on whether the defence has met its *Chaplin* onus in relation to the requested files / materials and must rule on any claims of privilege raised by the Crown and challenged by the defence;
> - It is generally not necessary or advisable to take up court time with a detailed examination of each requested file or document;
> - It is generally more appropriate, after identifying the potentially relevant and non-privileged files, for the court to order that counsel obtain disclosure by an opportunity to inspect and by requesting copies of only those documents that are determined, upon inspection, to be useful to the defence;
> - If there are confidentiality concerns about any of the documents to be inspected, the court should order counsel to conduct the inspection on an undertaking that counsel not disclose the contents of any document[56] Counsel will only be relieved of the undertaking in relation to any particular document upon obtaining the Crown's agreement to provide a copy of the document or upon obtaining a further order of the court. Breach of counsel's undertaking should be treated as very serious professional misconduct; and
> - Any residual disputes about release of particular documents or parts of documents, after conducting the inspection, can be brought back to the court for a ruling.[57]

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makes reciprocal disclosure and the prosecution responds with additional disclosure if the case is going to trial. Many American jurisdictions follow a similar approach.

[55] *R v Chaplin*, (1995), 96 C.C.C. (3rd) 225 (S.C.C.).

[56] We are confident the overwhelming majority of defence counsel would comply with such undertakings but understand law enforcement concerns about the consequences of noncompliance in the context of organized crime or terrorism cases.

[57] See *R. v. Chaplin and Chaplin* (1995), 96 C.C.C. (3rd) 225 (S.C.C.) wherein the court clarified the respective obligations of the prosecution and defence in two fact situations pertaining to information outside of the investigative

2.3.4 Consolidated List of Disclosure Exemptions and Inclusions

The police indicate it would assist them to have a comprehensive list of disclosure exemptions and inclusions so they can organize their files based on what should and should not be included in disclosure packages. Such a list also ensures prosecutors get what they require by identifying necessary information and information of marginal, conditional or no relevance. The precise details of exemptions and inclusions vary between jurisdictions.[58]

2.3.5 Tracking Disclosure

Recommendation 41(9) of the *Martin Report* suggests the prosecution office require a written acknowledgment from the defence when disclosure is provided to the defence. Obtaining acknowledgment of receipt of disclosure is an important task and must be taken seriously. Checklists can be used to monitor the timing and content of disclosure. All disclosure should be dated and the brief flagged, so the Crown is aware when additional disclosure has been added to the brief after the first court appearance of the accused. A number of police representatives expressed concern because some prosecution offices do not attach sufficient priority to disclosure tracking.

According to the "discovery" (i.e. disclosure) memorandum for United States federal prosecutors, "one of the most important steps in the discovery process is keeping good records regarding disclosure".[59] Disclosure matters are often the subject of court applications and keeping a record of the disclosures confines the application to substantive issues. Good records avoid time-consuming disputes about what was disclosed and when. These records can also be critical in post-conviction disputes, which are often filed long after the trial of the case. Keeping poor records can negate all the hard work put into a case. Fortunately, technology is rendering recordkeeping less onerous and Web based disclosure may provide a complete solution to disclosure tracking and archiving issues in the future.

RECOMMENDATION 13: STAGED APPROACH TO DISCLOSURE
Justice Canada, in consultation with other criminal justice stakeholders, should consider examining whether (1) a staged approach to disclosure is feasible in Canada; and, (2) it would improve the efficiency of Canada's criminal justice process without adversely affecting its fairness.

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file. Where the defence contends identified and existing material ought to have been produced, the prosecution must justify non-disclosure by demonstrating either that the information sought is beyond its control, or is clearly irrelevant or privileged. In contrast, where the prosecution disputes the existence of material alleged to be relevant and the prosecution asserts it has fulfilled its disclosure obligation, the onus falls on the defence to establish there is further potentially relevant material. Relevance means there is a reasonable possibility the material is useful to the accused in making full answer and defence. The existence of the material must be sufficiently identified to not only reveal its nature but also to enable the presiding judge to determine if it meets the test for prosecution disclosure. If the defence establishes a basis for concluding the evidence may exist, the prosecution must then justify a continuing refusal to disclose. This obligation is the same as in the first instance noted above.

[58] A chart summarizing the disclosure inclusions and exemptions common to most jurisdictions across Canada is contained in Appendix D.

[59] Memorandum for Department Prosecutors, January 4, 2010, The United States Department of Justice, p. 9.

RECOMMENDATION 14: PROCEDURAL TOOLS
We endorse the recommendations in the *LeSage/Code Report* concerning the use of the following procedural tools for early and efficient resolution of disclosure disputes regarding materials outside of the investigative file:

- **Defence requests should be particularized and explain how the materials could assist the defence, as required by the onus placed on the defence in Chaplin.**
- **There must be a real effort by the prosecution and defence to discuss the request and try to resolve it.**
- **If unresolved, the defence must bring a motion in court in a timely way before the judge seized with pre-trial motions.**
- **This judge must set strict timelines for either resolving all disclosure disputes or obtaining rulings at an early stage of the case and well in advance of the trial. Setting a date for trial or preliminary inquiry should only be delayed if the unresolved disclosure is significant in its impact on the accused's election.**
- **The judge must rule on whether the defence has met its Chaplin onus in relation to the requested files / materials and must rule on any claims of privilege raised by the prosecution and challenged by the defence.**
- **It is generally not necessary or advisable to take up court time with a detailed examination of each requested file or document unless national security or confidentiality concerns preclude inspection of the requested file or document by anyone other than the court.**
- **If there are confidentiality concerns that do not preclude inspection by counsel, the court should issue a direction that counsel inspect the document, subject to an undertaking that counsel not disclose the contents of the document. Counsel will only be relieved of the undertaking in relation to any particular document upon obtaining the prosecution's agreement to provide a copy of the document or upon obtaining a further order of the court.**
- **Breach of counsel's undertaking should be treated as serious professional misconduct.**

RECOMMENDATION 15: DISCLOSURE TRACKING RECORDS
Maintaining accurate disclosure tracking records is an important task. It should be assigned to a specific member of the prosecution team or the Crown office. Organizational skills and attention to detail are important job competencies of the person performing this role. Prosecution services should review the use of information technology to make this task less onerous and facilitate archiving.

2.4 The Timing of Disclosure

2.4.1 In Custody Accused

Stinchcombe states that the accused is not to be compelled to elect or plead without sufficient disclosure to make an informed decision. The accused in custody requires disclosure before they elect mode of trial and enter a plea. Basic disclosure is needed as soon as possible before the bail hearing, in order to assess the strength of the case. This information will assist the accused in

determining whether it is likely that they will be released on bail. It will also assist them in deciding whether to enter into plea resolution discussions with the prosecution.

It has been suggested to us that the prosecution should ensure disclosure for in custody cases is screened within two days of receiving it from the police. The two day screening deadline is accepted by most prosecutors as a "best practice". However, many question whether current resourcing levels permit it in their jurisdictions. Other prosecutors indicate that they already provide disclosure as fast as possible and an admonition to "expedite" disclosure is not going to make it any faster. The general view expressed by prosecutors is that only in the least complex of cases can Crown screening take place within two days of receiving the brief from the police.

2.4.2 Disclosure Timelines

Effective case flow management systems have meaningful goals from the inception of a file to its disposition. Of significant importance are time standards, which shape expectations with respect to the maximum length of time appropriate for particular types of cases. In the absence of clear goals, practitioners have no way of measuring their own (or their organization's) effectiveness in caseload management.[60] All major studies of trial delay have noted that establishing time limits for each step in the judicial process is one of the most effective ways of reducing delays and improving efficiency. This approach is reflected in the English, Australian and New Zealand disclosure legislation. The only disclosure deadline existing in Canada is the constitutional requirement that the accused be tried without unreasonable delay.

Judicial pretrial hearings are a regular feature in all levels of court in Canada. But, clear authority to issue binding directions is not conferred on the judges presiding over these hearings, as they have to rely on persuasion. Some counsel, both Crown and defence, are not easily persuaded. Delay should not be used as a bargaining chip by either party. Where counsel are unreasonable, pretrial judges should have authority to establish binding disclosure deadlines, subject to variation where required in the interests of justice.

A number of Canadian jurisdictions are facing an acute pre-trial custody crisis. In Ontario, for example, more than 65% of inmates in provincial institutions are awaiting trial. Delay in providing accused with disclosure is one of many problems contributing to systemic backlog in the courts.

The *LeSage/Code Report* recommends setting administrative goals for initial disclosure within time limitations running from the date of the charge and commensurate with the nature and complexity of the trial. The *Report* also recommends the Ontario *Police Services Act* and the *Crown Policy Manual* set out these administrative time lines. It has been suggested to us that administrative timelines should be addressed in the agreements contemplated in Recommendation 2 above rather than in legislation or inflexible directives.

[60] Other attributes of effective caseflow management are timely and accurate information, good communications and broad consultation, education and training, and mechanisms for accountability.

A number of reports have endorsed the view that in the absence of exceptional circumstances, primary disclosure should be provided at the first non-bail court appearance of the accused. The *Report of the Criminal Justice Review* and the *Early Case Consideration Report* suggest that prior to first appearance an experienced Crown counsel should screen the charges and confirm the material required to be disclosed.

RECOMMENDATION 16: ADMINISTRATIVE GOALS TO BE SET FOR BASIC DISCLOSURE

We endorse the recommendation in the *LeSage/Code* and Early Case Consideration reports that administrative goals be set for basic disclosure within time limits running from the date of the charge and commensurate with the nature and complexity of the evidence and the trial. These goals should indicate: (1) when the Crown brief is to be finalized to the extent possible by the police and provided to the Crown; and, (2) when basic disclosure and the Crown's position in the event of a guilty plea are to be provided to the accused. These administrative goals should be specified in the agreements referred to in Recommendation 2.

2.5 The Manner of Making Disclosure

Stinchcombe makes it clear that the manner (i.e. the means) used by the prosecution to provide disclosure to the defence is a matter of Crown discretion. For example, where safety, privacy, security and related interests are engaged the prosecution may provide the defence an opportunity to view the material rather than receive a copy of it. Accordingly, there are a number of acceptable ways disclosure can be provided to the defence. These include providing the defence with:

- hard copies of the disclosure material in one or more formats;
- an opportunity to inspect the disclosure under controlled circumstances (e.g. permitting the defence to review the materials in private, with or without the ability to make copies) at a secure location;
- a secure means of accessing a disclosure database on a website; and/or,
- disclosure material on terms governing how and with whom the defence may use and share the disclosure materials, regardless of the method of disclosure.

2.5.1 Disclosure by Access

The common practice in Canada is for the prosecution to provide paper copies of disclosure materials to the defence. In most cases of normal size this works well. But in unusually large or complex investigations, where the volume of material accumulated during the investigation makes the reproduction of all material normally reproduced impractical, the *Martin Report* recommends the prosecution provide the defence with a description or index of the material and a reasonable opportunity to inspect it.[61] If such procedure is used in a complex investigation, the prosecution must still inform the defence of any exculpatory information of which Crown counsel is aware.

[61] This right could be accompanied by an opportunity for the defence to obtain a reasonable number of copies it selects from materials accessed through this method.

As the *Martin Report* notes, in a child abduction case there may be tens of thousands of fruitless inquiries conducted and noted by investigators before the child is found. It cannot be said these inquiries are necessarily irrelevant. They may all be properly subject to disclosure, even though only one, or two, or even none, might ultimately be useful to the defence. In an extremely complex fraud investigation, the relevant documentation may fill many rooms. Although all the documentation is subject to disclosure on the basis that it is not clearly irrelevant, there may be very little of it of direct assistance to the defence. In circumstances such as these, it may be sufficient to provide the defence with a description or index of the materials in question and permit such access to the material as is reasonable in all of the circumstances.

A 2004 disclosure discussion paper prepared by Justice Canada noted disclosure by means of access to information in the possession of the prosecution is already possible under current law.[62] But, it does not appear to have become a regular practice.[63] Legislative amendments providing a firm statutory foundation for the practice, together with parameters for its use, might help encourage its development and use. One option would be for the amendments to specify that the prosecution must provide copies of defined core-disclosure materials, with the remainder of the disclosure to be provided by way of access.

The core disclosure package suggested under such an approach could include such categories of information as:

- the charge or charges;
- all statements from persons who have provided relevant information;
- all statements of the accused and co-accused;
- the criminal record of the accused and any co-accused;
- warrants and judicial authorizations; and,
- police occurrence reports.

The core-disclosure package could also include any exculpatory materials in the possession of the prosecution, including those mitigating or negating the guilt of the accused or reducing his or her punishment.

Another way of structuring such amendments would be to provide the prosecution with a more general authority to provide disclosure through access, subject to the ability of a court to order otherwise. Alternatively or additionally, amendments could define particular categories of material the prosecution could *only* provide through disclosure by access, unless a court ordered otherwise. This could include materials which are frequently of little value, but are not "clearly

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[62] See *R. v. Guess*, [2000] B.C.J. No. 2023 (C.A.), *R. v. Fisk*, [1996] B.C.J. No. 1232 (C.A.), *R. v. Black*, [1998] N.S.J. No. (S.C.), *R. v. Dohan* (1992), 116 N.S.R. (2d) 134, (T.D.), *R. v. Smith*, [1994] S.J. No. 38 (Q.B.), *R. v. K.(D.)*, [2003] O.J. No. 641 (Ont. C.J.), *R. v. Malik*, [2003] B.C.J. No. 2973.

[63] Disclosure by access to information was used in the Air India trial for the "third tier" of disclosure involving "peripheral material". This involved rooms and rooms of documents nobody had even looked at but which could not be discarded as "clearly irrelevant". Defence counsel were given access to the documents in a file room on an undertaking of confidentiality. It was the responsibility of defence counsel to review the material and if they found a document of interest, they could ask for a photocopy (see *Final Report of the Air India Inquiry*, Vol. Three, p. 272).

irrelevant." It could also include materials that are sensitive due to privacy or related concerns (e.g., pornographic materials).

A disclosure by access mechanism would likely be of use mainly in large and complex cases, which frequently generate enormous volumes of material subject to disclosure. In such cases, disclosure through access might be the fastest, most practical and most effective means of managing disclosure of extended categories of information. It might also serve to reduce disputes about disclosure, since disputes often arise when it is difficult to determine whether the information in a document meets the standard of relevance. If disclosing such materials would not require copying and furnishing vast quantities of additional documents, but would merely be a matter of granting access, the prosecution might be less likely to contest certain disclosure requests.

A number of practical considerations arise. How can the defence meaningfully assess the information to which it is given access? Some level of categorization or other organization, such as a general index of categories of documents, would likely be required for guidance. Granting access to additional disclosure material and providing the means to obtain copies could raise further issues; special file rooms might have to be set aside and special arrangements made to allow physical access. Another area of concern would be providing access to unrepresented accused, especially those who are incarcerated. Issues may also arise on the degree to which Crown or police representatives should monitor access, particularly in view of the privacy required by the defence while engaged in a review of the material.

How well would the disclosure by access approach address the major challenges inherent in disclosure? It would not remove the obligation of collecting the wide array of relevant information, assessing it for privilege, and ensuring all the information is, in one way or another, actually made available. Some argue that the actual benefits such legislative amendments are likely to realize could be relatively small. In large and complex cases, the challenges of disclosure might best be addressed by effective use of electronic disclosure.

It can further be argued that the disclosure by access approach would only provide a small benefit in a relatively restricted category of cases while at the same time complicating and slowing down the disclosure process. For example, under a core disclosure approach the practice of separating core and non-core materials could give rise to litigation over what materials must be included as core materials. It is also possible that the legislative establishment of a procedure to obtain disclosure through access could increase the range of material open to disclosure.

The risk of additional complications under a legislative disclosure by access regime should not be overemphasized. The use of the approach would not be mandatory. The prosecution could evaluate the risks and difficulties of proceeding by disclosure through access on a case-by-case basis and restrict its use to those cases where it is deemed worthwhile. Even if this amounts to a relatively small percentage of cases, these generally will be large and complex cases. It is in these cases that the greatest disclosure difficulties arise and where the benefits may be substantial. Risks or disadvantages may be minimal since the required materials will still be disclosed, whether by providing copies or providing access, and the entire process will remain subject to judicial scrutiny.

2.5.2 Child Pornography

The police community expressed concern about the various ways disclosure is provided in child pornography cases. Of paramount concern is the possibility that the material will fall back into the hands of an offender or another improper party. Concern is intensified where an accused is self-represented. The police are also worried about whether they may be facilitating the illegal possession of child pornography when they provide illegal images to the defence or create multiple copies (e.g., for counsel and the presiding judge).

It was suggested to us that child pornography should not be treated like other forms of information for disclosure purposes. It is not seized information subject to copying, editing and disclosing. It is more akin to seized cocaine. Possession of it is an offence. Disclosure by inspection may be the appropriate way to proceed in all situations, even in the case of defence experts.

2.5.3 Electronic Disclosure

Extensive use was made of electronic disclosure in the *Air India* trial. This included the Crown brief (also disclosed in hard copy) and a second tier of material potentially relevant to the defence, but not part of the prosecution case. A third tier of disclosure involved making a large volume of files available to the defence for inspection. To encourage early disclosure and make voluminous disclosure more manageable, the *Final Report of the Air India Inquiry* recommends the *Criminal Code* be amended to permit, in complex cases designated as such by the presiding judge, electronic disclosure and the inspection of material by defence counsel.[64]

Technology is playing a rapidly increasing role in circulating criminal justice information. It can achieve new levels of effectiveness and efficiency when wisely deployed. Wise deployment recognizes that the right of the accused to make full answer and defence cannot be adversely affected by technological changes. The 2010 *National Criminal Justice Symposium* discussed the following examples of how information technology can be better utilized in the criminal justice process without prejudicing the rights of the accused.

- Technology can be used to limit unnecessary court appearances and unnecessary costs (e.g. email/telephone appearances and internet scheduling).
- The use of web-based disclosure.
- The use of electronic knowledge bases.
- The potential of voice-activated transcripts.
- Inter-sectoral sharing of innovative IT initiatives.

As use of electronic technology becomes more wide-spread and cost effective, the defence bar will make greater use of it to convey information to the prosecution and the court. Defence counsel currently make extensive use of information technology for legal research purposes and it is only a matter of time until they will make use of the convenience and cost savings that a full range of information technology can provide.

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[64] *Report of the Air India Inquiry*, Vol. Three, p. 309.

While there is no denying the benefits available through information technology, these benefits usually come with a large initial price tag. Over time the costs associated with enhancing information technology balance out. However, to secure the initial funding required to develop and implement large scale information technology programs, the justice system has to compete with other government sectors, such as health and education. Unfortunately, some early and ambitious provincial efforts to introduce integrated justice systems did not meet with success. As a result, central agencies of government are now reluctant to approve large expenditures for justice information technology.

Some courts were initially resistant to the use of electronic disclosure.[65] This resistance was largely attributable to flaws in the initial technology and the stubborn refusal of some professional participants in the system to make the transition to an electronic environment. The courts are now generally open to electronic disclosure depending on the following factors:

- circumstances of the user;
- ability to search;
- indexing/organization;
- quality control (accuracy and completeness); and
- equipment/technology requirements.[66]

Defence counsel's preference for paper over electronic disclosure is no longer considered sufficient to impair the right to make full answer and defence.[67]

A number of studies have validated the benefits of electronic disclosure. The use of electronic disclosure, if the circumstances allow it and if a standardized, high performance and user-friendly search engine is available, permits evidence to be disclosed in a searchable form. It also allows evidence to be electronically linked to the trial brief.

The *LeSage/Code Report* advocates the use of electronic disclosure in lengthy, complex prosecutions. It recommends that a directive be issued under the Ontario *Police Services Act* stating the "Major Case Management" model of electronic disclosure, with Adobe 8 search software, should be utilized as the standard Crown brief in all complex cases.

A team of senior Ontario prosecutors have identified the basic minimum requirements and components of an electronic disclosure package. The team recognized that the package should be organized in a manner familiar and accessible to all users. A straightforward inventory or something akin to the folder organization of paper disclosure should be the minimum threshold. This will ensure accessibility and provide a simple back-up system to protect against the risk of missing something. A basic inventory would list all materials organized by type of evidence or document. Within each folder the materials would be organized by date and witness, etc.

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[65] See *Chan* 2003 ABQB 759; *Amzallag*, [1999] Q.J. No. 6252 (S.C.); *Hallstone Products Ltd.*, [1999] No. 4308 (S.C.J.); and *Jarvie*, [2003] O.J. No. 5570 (S.C.J.).
[66] *Nancy Irving*, Electronic Disclosure, October 2007, *Jonsson*, [2000] S.J. No. 571 (Sask. Q.B.), *Greer et al* 2006 BCSC 1894 and *Piaskowski*, [2007] M.J. No. 94 (M.Q.B.) 72.
[67] For example, *Mohammad*, [2007] O.J. No. 700 (S.C.J).

Elsewhere in Canada, electronic standards have been developed for regional memoranda of understanding, guides, standard crown brief templates and disclosure policies. Based on this material it appears national or provincial standards in the following areas are feasible:

- disclosure inventories & report types to organize material;
- document/evidence types to segregate and categorize material;
- vetting codes to identify sensitive information; and,
- disclosure inclusions and exemptions.[68]

Many e-disclosure applications now allow for complex linking of entries in the disclosure package. This means, for instance, that all evidence relating to the search of a particular address (e.g., witness notes, photographs, exhibit lists, warrant, ITO, etc.) or all observations of a particular address or motor vehicle (e.g., witness notes, photographs, surveillance reports, etc.) can be collected and linked together. Linking has undoubted benefits as long as users understand its limitations.[69]

The police in many jurisdictions have taken a leadership role in the development and use of criminal justice information technology. Some of this technology was developed primarily with police needs in mind. But much of it could serve the needs of the broader criminal justice system if there was a commitment to making the necessary changes. Police enthusiasm to modernize and improve the use of information technology makes them strong proponents of mandatory electronic disclosure.

The defence bar and government officials are understandably concerned about the price tag that comes with electronic disclosure. No one disputes the value and convenience of being able to store and search digital information. There is no gainsaying that once the initial investment in information technology is made, cost savings will result. Defence counsel point out, however, that it is particularly difficult for them to bear the start-up costs associated with a major move to computerization. Although, more and more members of the defence bar are accepting that up to date information technology is now a necessary cost of doing business.

Remote communities in Canada's northern jurisdictions do not currently use electronic disclosure. While information technology has the potential to bridge the vast distances between northern communities, it is unlikely to do so in the near future. Cultural differences will also have to be taken into consideration before greater use of electronic disclosure can be implemented in these jurisdictions.

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[68] Significant judicial work has been done on electronic standards. In 2008 the Canadian Judicial Council approved a *National Model Practice Direction and National Protocol for the Exchange of Evidence in Electronic Form*.

[69] For example, a report compiled of all evidence linked to an address or event is not necessarily exhaustive. A collection of all of the observation evidence linked to a particular address may not be all of the observation evidence of that address but may be only all evidence that has been linked to that address in the database. Linking should not be relied upon as the only way to organize the disclosure package. In order to be linked, material must be recognized as relevant and significant and a link must be added. These extra steps increase the risk of error or oversight, especially because relevance and significance can change during the course of an investigation and prosecution. Linking can increase the risk that relevant information will be missing. Linking should be used in addition to a straightforward paper inventory organization. Linking is very well suited to the creation of the integrated chronology or detailed narrative portion of the disclosure package.

RECOMMENDATION 17: CROWN DISCRETION
All national, provincial or regional disclosure standards should recognize the manner (i.e. means) by which the prosecution provides disclosure is appropriately a matter of Crown discretion. The Crown's exercise of discretion should only be reviewable by the trial judge. In the absence of a trial judge, a judge of the superior court can review the Crown's exercise of discretion on *Charter* grounds.

RECOMMENDATION 18: VOLUME OR SENSITIVITY OF MATERIAL ACCUMULATED
All national, provincial or regional disclosure standards should recognize in unusually large or complex investigations, where the volume or sensitivity of material accumulated during the investigation makes the normal methods of reproduction impractical, the prosecution's disclosure responsibility can be discharged by providing the defence with a description or index of the material and a reasonable opportunity to inspect it.[70]

RECOMMENDATION 19: ELECTRONIC DISCLOSURE
All national, provincial or regional disclosure standards should (1) recognize that where feasible and subject to judicially approved exceptions on a case by case basis, electronic disclosure is the preferred method of disclosure; and, (2) identify electronic disclosure requirements and best practices.

2.6 Self-Represented Accused and Disclosure

Self-represented accused are entitled to the same disclosure as represented accused, although not necessarily in the same form. Consequently, as soon as the accused indicates an intention to proceed unrepresented, the court should inform him or her of the right to disclosure and how to obtain it. The prosecution should inform all self-represented accused in writing of the appropriate and impermissible uses of disclosure materials.[71] Unless the self-represented accused clearly indicates he or she does not wish disclosure, it must be provided before plea or election to enable the accused sufficient time to consider the information when deciding how to proceed. Disclosure must be provided or waived prior to any resolution discussions.[72]

If there are reasonable grounds for concern that leaving disclosure material with a self-represented accused would jeopardize the safety, security, privacy interests, or result in the harassment of any person, the prosecution may provide disclosure by means of controlled and supervised, yet adequate and private, access to the material. The prosecution has to consider the ability of the self-represented accused to access the disclosure information when determining whether to provide disclosure to a self-represented accused through electronic means.

[70] The defence should also be afforded an opportunity to obtain a reasonable number of copies selected from the materials inspected.
[71] *Martin Report*, Recommendation 41(9)(b), at p. 8 and pp. 218-220.
[72] *Martin Report*, recommendation 41(7), at pp. 7-8 and pp. 209-213.

2.6.1 The Self-Represented Accused in Custody

Providing disclosure to the self-represented accused in custody can pose special challenges. The *Martin Report* recommends procedures and facilities be set up in custodial institutions for controlling disclosure materials for accused who are in custody while, at the same time, providing the accused supervised, yet full and private, access to these materials. Delivering voluminous disclosure directly to an accused in a remand centre may be a necessary evil. Some of the questions that have to be addressed include the following.

- Where do custodial officials store disclosure?
- When the disclosure is provided in electronic format, when and where does the accused access and review the material?
- Who pays for the computer, software, and word processing lessons?
- What obligations do the custodial authorities have with respect to the integrity and privacy of the disclosed material?
- Are there Crown witnesses in the same facility as the accused?

RECOMMENDATION 20: SELF-REPRESENTED ACCUSED
A self-represented accused is entitled to the same disclosure as a represented accused, although not necessarily in the same form. Consequently, a self-represented accused should be told as soon as possible by a judicial officer of the right to disclosure and how to obtain it. The self-represented accused should also receive from the court a standard form letter explaining the right to disclosure and how it is obtained.

RECOMMENDATION 21: ABUSING DISCLOSURE MATERIAL
The prosecution should inform the self-represented accused in writing of the appropriate uses of and limits upon the use of the disclosure materials and the consequences of abusing disclosure material.

RECOMMENDATION 22: WAIVING DISCLOSURE
Unless the self-represented accused expressly waives disclosure, fully informed of the consequences of the waiver, disclosure must be provided before plea or election and any resolution discussions.

RECOMMENDATION 23: LEAVING DISCLOSURE MATERIAL
If there are reasonable grounds for concern that leaving disclosure material with a self-represented accused will jeopardize the safety, security, privacy interests, or result in the harassment of any person, the prosecution may take reasonable preventative steps which do not deny the accused adequate and private access to the disclosure materials.

RECOMMENDATION 24: COPY OF ALL OR PART OF THE DISCLOSURE MATERIALS
In determining whether a copy of all or part of the disclosure materials should be given to a self-represented accused and/or whether terms and conditions should accompany the self-represented accused's possession of, or access to, the disclosure information, consideration should be given to whether such measures are necessary in the circumstances, including consideration of the need to protect the security and right to privacy of the witnesses and victims or the integrity of the evidence.

RECOMMENDATION 25: PRIVATE ACCESS TO DISCLOSURE MATERIALS
Incarcerated accused, whether or not they are self-represented, are entitled to adequate and private access to disclosure materials under the control and supervision of custodial authorities.

RECOMMENDATION 26: DISCLOSURE INFORMATION SHOULD BE PROVIDED THROUGH ELECTRONIC MEANS
In determining whether disclosure information should be provided through electronic means, the prosecutor should give consideration to the ability of the self-represented accused to access the disclosure information.

RECOMMENDATION 27: DEVELOPING A PROTOCOL
If a protocol does not exist concerning self-represented accused in custody and disclosure, the national Committee of Deputy Ministers responsible for justice, in consultation with the Canadian Association of Chiefs of Police and the national Heads of Corrections Committee, should develop one.

2.7 Early Resolution of Disclosure Disputes

Prosecuting counsel must advise the defence of any decision made not to disclose information in the possession of the Crown that would, but for the decision, be disclosed and the reason for nondisclosure.[73] Prosecution counsel should also advise the defence of the specific nature of the information, unless disclosure of the nature of the information withheld would reveal the identity of an informer, jeopardize anyone's safety or security or subject them to harassment, compromise an on-going investigation, or reveal police investigative techniques. Upon request Crown counsel should take any other steps reasonably necessary to facilitate a review by the trial judge of any decision not to disclose.

Recommendation 41(17) of the *Martin Report* recognizes the principles noted above do not prevent the defence from making further requests for disclosure of information in the possession of the prosecution. The recommendation encourages Crown and defence counsel to narrow and define the issues to assist the prosecution in determining whether the information requested is relevant.

[73] *Martin Report*, recommendation 41(16), at p. 12 and pp. 253-255.

It is not necessary here to reconsider generally the limitations imposed by the caselaw of the Supreme Court of Canada relating to constitutional remedies.[74] The impediment the jurisprudence creates concerning the ability of the defence to challenge on *Charter* grounds prosecution decisions to withhold disclosure is a specific matter that could be addressed by amending the *Criminal Code* to grant jurisdiction before trial. This could be done in several ways and such an expansion of jurisdiction could significantly expedite effective disclosure.

Despite the indication in *Stinchcombe*[75] that the right to disclosure under discussion in the case applied in indictable cases and arises at the point of the election of the accused, it has long been accepted that the right applies in all cases and arises at the time or charge. Yet, as the premise for the entitlement is a constitutional right to make full answer and defence, the Supreme Court has held that the right cannot be raised or enforced at a preliminary inquiry or some other phase before trial. This is a systemic impediment or inhibition to prompt and complete disclosure.

There are at least four reasons why it would be undesirable to extend pre-trial jurisdiction over disclosure only to preliminary inquiries. First, it would provide no forum in summary conviction or indictable matters within the absolute jurisdiction of the provincial court. Second, it would force the accused to request a preliminary inquiry just to raise a question of disclosure. Third, it would induce needless elections and reelections.

The fourth and most compelling reason why it would be undesirable to extend pre-trial jurisdiction over disclosure only to preliminary inquiries is that they take place too late in the process. The accused has an interest in disclosure at the moment he or she is put in jeopardy by a charge. That interest becomes increasingly urgent as the defence is required to make strategic decisions about the orientation of the case. The conduct of a trial is typically not a pressing concern at the early stages, unlike matters of interim release or plea.

If it would be unwise to restrict pre-trial jurisdiction over disclosure to preliminary inquiries, it would be more unwise to provide for it at "any time after charge". This would create another systemic problem, a proliferation of premature or pointless motions. In principle there is no reason why the accused should not be able to seize a court of a motion concerning disclosure at any time after charge but this would be unwieldy in practice. In most instances it would also be unnecessary because the prosecution fulfils its obligation to disclose in an efficient manner. Thus the challenge lies in providing the defence an effective avenue of redress when there is a serious and pressing question concerning timely and complete disclosure before trial.

In every jurisdiction a practice court deals with matters that require pre-trial consideration. There is no obvious reason or principle why disclosure should not be among them. No doubt this extension of jurisdiction would absorb valuable time in court but the net effect would likely be increased efficiency in the preparation and disposition of cases. In this context increased efficiency means that the parties and the court can ripen a case for trial or disposition earlier in a prosecution than is currently done. This would only occur, however, if a necessary condition of a

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[74] See Code, M. "American Cadillacs or Canadian Compacts: What is the Correct Criminal Procedure for s. 24 Applications under the *Charter of Rights*?" *Crim.L.Q*. 298.
[75] *R v Stinchcombe*, [1991] 3 S.C.R. 326.

pre-trial disclosure motion is a reasonable factual ground for belief that disclosure by the prosecution has been tardy or incomplete. Otherwise, such a motion would be a waste of time.

In some jurisdictions a judge is designated to manage a case before trial, or even before a preliminary inquiry. This practice takes different forms in different places but, wherever it is used, the practice could be adapted to allow the same judge pre-trial jurisdiction over disclosure matters. This is not inconsistent with extending jurisdiction to a practice court where there is no designated judge for a given case.

There are various issues that should be considered before a decision is taken to extend jurisdiction over disclosure to the pre-trial stages of a case. One imponderable question is whether such an extension in the hope of early efficiency would entail a multiplication of procedures in review and thus result in a net inefficiency. If the defence fails in a pre-trial motion would there be an avenue of review against this decision? If the foundation for seeking disclosure is the right to make full answer and defence, review of a decision against the defence cannot be excluded. It must also follow that the extension of jurisdiction over disclosure to pre-trial phases of a prosecution demands the best possible assessment of whether the risk of review will nevertheless yield a net benefit in the form of increased efficiency in disclosure.

Another question is whether an extension of this jurisdiction should be subject to exceptions. The procedure derived from *O'Connor*[76] and set out in Part VIII of the *Code* should be debated in this regard and there would be others. Perhaps the most important among these is whether the extension of jurisdiction should allow an application for a stay. It is submitted that this would not be appropriate as a pre-trial remedy for tardy or inadequate disclosure. In *Bjelland*[77] the Supreme Court made plain that a stay of proceedings for non-disclosure, as for other reasons, will be granted only in the clearest and rarest of cases. The reasons given there have added force before trial. Although the prejudice might be considerable, failures in disclosure before trial are remediable and the ultimate sanction for such failures should be reserved to the trial court as a remedy commensurate with the prejudice. Further, by denying the extension of pre-trial jurisdiction to this remedy there is a diminished risk that pre-trial proceedings will be exploited in an attempt to short-circuit proceedings at trial.

A further question concerns the distinction between ordinary cases and cases of unusual length or complexity. In mega-cases where a direct indictment is preferred, the risk of delay is better managed from the point when the indictment is preferred. When there is no direct indictment, pre-trial jurisdiction over disclosure would necessarily increase the logical possibility of protracted proceedings on this issue.[78] That is not in itself an argument against the extension of this jurisdiction to the pre-trial stages of a case. The argument for such an extension gains strength if there is a net gain in the promptness and completeness of disclosure. In cases that do

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[76] R v Oconnor, [1995] 4 SCR 411.
[77] R v Bjelland, 2009 SCC 38.
[78] Bill C-53 (*An Act to amend the Criminal Code (mega trials)*) was introduced and received first reading on November 2, 2010. This proposed legislation focuses on improving the efficiency of "mega-trials". It contemplates providing the Chief Justice with authority to appoint a case management judge and the case management judge has jurisdiction to address issues such as disclosure, even though he or she is not the trial judge.

not present questions of unusual length or complexity, the extension of jurisdiction would almost certainly yield such efficiencies.

Assuming that the extension of jurisdiction is a good idea, does Parliament have the authority to enact it? The argument against it is that the Supreme Court of Canada has ruled that nobody but a trial judge can grant a constitutional remedy and, accordingly, Parliament cannot contradict that by granting jurisdiction over disclosure at pre-trial phases of a prosecution. At its core the argument is that the Supreme Court has decided that only a trial court is a court of competent jurisdiction for the purposes of constitutional remedies[79] and that Parliament has no authority by ordinary legislation to extend that jurisdiction to other courts. It is not clear whether this argument has substance, or how much substance, but it should be noted if only to be dismissed. The thrust of the Supreme Court's decisions on jurisdiction over constitutional remedies was to assert that the superior court of the province would always have jurisdiction and that for reasons of economy so too would trial courts. Nothing in its cases would preclude the legislature's extension of jurisdiction to another court, provided that neither of these two principles is breached. Pre-trial jurisdiction over disclosure would not diminish either.

RECOMMENDATION 28: ALL TYPES OF INTERLOCUTORY CHARTER DISPUTES
We endorse the recommendation in the *LeSage/Code Report* that statutory tools be enacted to obtain early and binding resolution of disclosure disputes and recommend they be extended to all types of interlocutory Charter disputes. The Criminal Code should provide a judge, other than the judge who eventually hears the evidence at trial, with authority to make binding rulings on pre-trial motions, including Charter motions, and to manage the case at the pre-trial stage.

2.8 Misconduct in relation to Disclosure

2.8.1 Police

Police officers who engage in misconduct in relation to disclosure run the risk of criminal charges (e.g. obstruction of justice). Disciplinary schemes in five provincial jurisdictions also address failure to disclose evidence as a distinct category of misconduct.[80] A leading authority on the legal aspects of policing suggests in jurisdictions without provisions specifically governing disclosure of evidence, the issue would be captured by ordinary neglect of duty principles.[81] In one case considered by the Ontario Police Commission, the failure of an officer to include a witness statement in a Crown brief was found not to be deliberate. Consequently, misconduct

[79] See *Mills* [1986] 1 S.C.R. 863 and *Hynes* [2001] 3 S.C.R. 623.
[80] Alta. Reg. 356/90, s. 5(2)(h)(vi) ("failing to report anything that he knows concerning a criminal or other charge" and s. 5(2)(h)(vii) ("failing to disclose any evidence that he, or any other person to his knowledge, can give for or against any prisoner or defendant"). See also B.C. Reg. 205/98, s. 5(e), N.B. Reg. 86-49, s. 39(1)(cc), O. Reg. 123/98, Sch. s. 2(1)(c)(vi). The Code of Ethics of Quebec police officers, R.S.Q. 1977, c. 0-81, r. 1 provides that a police officer must not "prevent or contribute to preventing justice from taking its course" (s. 7(1) or "conceal or fail to pass on evidence or information in order to benefit or harm any person" (s. 7(2)).
[81] Paul Ceyssens, *Legal Aspects of Policing*, (Earlscourt, 2002) p. 7-82.

was not established.[82] However, in *Fortner and Goderich Police*,[83] a constable made false allegations against a second officer resulting in criminal charges. The constable then failed to disclose important evidence. The Commission held this and other misconduct required the constable's resignation.

2.8.2 Prosecutors

Canadian prosecutors run the risk of employment, professional and legal sanctions if they engage in misconduct with respect to their disclosure obligations. In a leading Canadian case on prosecutorial misconduct,[84] a prosecutor in a murder case delayed disclosing scientific testing to the defence implicating a person other than the accused. Defence counsel complained to the prosecutor's Deputy Minister. The prosecutor received a letter of reprimand and was removed from the case.

The Law Society commenced disciplinary proceedings against the prosecutor, citing a rule of the Alberta *Code of Professional Conduct* (found in most provincial rules of professional conduct), requiring prosecutors to "make timely disclosure to the accused or defence counsel". The issue before the Supreme Court of Canada was the authority of the Law Society to discipline prosecutors for the exercise of their professional duties, including as agents of the Attorney General. The Court held there is a clear distinction between prosecutorial discretion and professional conduct. The latter can be regulated by a law society and the law society has jurisdiction to investigate any alleged breach of its ethical standards, even those committed by Crown prosecutors in connection with their prosecutory discretion.[85]

Quoting from *Ethics and Canadian Criminal Law*,[86] Justices Iacobucci and Major noted not every breach of the legal and constitutional duty to disclose will constitute an ethical violation. Non-disclosure can arise from mere inadvertence, a misunderstanding of the evidence, or even a questionable strategy adopted in good faith. A finding of professional misconduct must be based upon an act or omission revealing an intentional departure from the fundamental duty to act in fairness.[87]

Prosecutors who misconduct themselves with respect to disclosure also risk employment discipline consequences. Disciplinary steps taken against government employees are seldom made public. This approach accords with standard human resource practices. As a result, however, interested members of the public usually do not learn what action, if any, has been taken against a prosecutor who has not complied with his employment obligations relating to disclosure. This can lead the public to erroneously believe there have been no employment consequences for the prosecutor.

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[82] *Ridge and Metropolitan Toronto Police* (1995) 1 OPR 219.
[83] *Fortner and Goderich Police*, (1975), 1 O.P.R. 219.
[84] *Krieger v. Law Society of Alberta* [2002] 3 S.C.R. 372.
[85] In *Stinchcombe* [1991] 2 S.C.R. 326 at p. 339, Sopinka J. warned that transgressions with respect to the prosecutor's disclosure duty constitute a "very serious breach of prosecutorial duty."
[86] Proulx, Michel and David Layton, *Ethics and Canadian Criminal Law*. Toronto: Irwin Law, 2001.
[87] An egregious case of deliberate non-disclosure by a prosecutor may attract criminal liability under ss. 137 and 139 of the *Criminal Code*.

2.8.3 Defence Counsel

Defence misconduct in relation to disclosure was considered in a 2004 Justice Canada consultation paper. It noted disclosure information has been found in the possession of persons unconnected with the proceedings, posted anonymously on penitentiary bulletin boards, in public places or posted on the Internet. Distribution of materials in this manner violates the security and privacy of victims, witnesses, and third parties.

It is inappropriate for any counsel to give disclosure information to the public and counsel would not be acting responsibly as an officer of the court if he or she did so.[88] Furthermore, while it is the constitutional right of the accused to receive disclosure materials in order to make full answer and defence, this does not mean that these materials may be dealt with in an irresponsible manner as between counsel and the accused. The *Martin Report* cautions defence counsel to maintain custody or control over disclosure materials, so copies of these materials are not improperly disseminated. Improper conduct by counsel (e.g. complicity in witness harassment) may amount to a criminal offence such as obstruction of justice. Rules of professional conduct include general statements concerning the responsibilities of counsel as advocate but they do not explicitly address defence misconduct relating to disclosure. Some defence counsel have expressed concern that inconsistent and varied prosecution requests for undertakings relating to disclosure cast aspersions on their ethics and professional reputations. There may be value in the formation of a joint prosecution/defence/police/judicial committee to draft standard disclosure undertakings for sensitive situations.

RECOMMENDATION 29: PROVINCIAL / TERRITORIAL DISCLOSURE COORDINATING COMMITTEES
Provincial/territorial disclosure coordinating committees should consider the need to develop guidelines relating to the proper and improper use of disclosure and to draft a standard disclosure undertaking.

2.9 Disclosure Codification

2.9.1 Current Complexity

The *Criminal Code* has always contained rudimentary disclosure provisions. Section 603 entitles the accused to inspect the indictment after committal for trial, his or her statement, the evidence and the exhibits from the preliminary inquiry and to receive, on payment of a reasonable fee, copies of the above. This provision can be traced to section 597 of the first *Criminal Code* in 1892. The *Code* also contains more recent provisions governing disclosure of records containing the personal information of complainants and witnesses in proceedings for sexual offences.[89]

[88] See Recommendation 34 of the *Martin Report* and *R. v. Lucas* (1996), 104 C.C.C. (3d) 550 (Sask. C.A.), affirmed by the Supreme Court of Canada without comment on this issue, [1998] 1 S.C.R. 439.
[89] Sections 278.1 to 278.91.

In *R. v. O'Connor*,[90] McLachlin J. (as she then was) wrote that discovery in criminal cases is always a compromise between the right of an accused to a fair trial and a variety of competing considerations, including the privacy rights of third parties. Where evidence is not in the hands of the police or prosecution (e.g. unseized third party records), the obligation to preserve and disclose does not arise. But where investigators learn of relevant information in the hands of a third party, the Crown is obliged to disclose the existence and location of the evidence to the defence. *McNeil*[91] requires the prosecution to:

- make reasonable inquiries of other Crown entities and other third parties in "appropriate cases";
- inquire, "when the Crown is informed of potentially relevant information pertaining to the credibility or reliability of the witnesses in a case;" and,
- request from the police any material relating to police misconduct by officers connected to the case.

The police have a concomitant duty to provide to the prosecution the information referred to above if it is in their possession.

O'Connor established a general common law mechanism for ordering production of any record beyond the possession or control of the prosecutor. This mechanism is not limited to cases where third party records attract a reasonable expectation of privacy. Parliament responded to *O'Connor* by enacting a statutory regime for the disclosure of records containing personal information of complainants and witnesses in proceedings for sexual offences. This statutory regime constitutes an exception to the common law *Stinchcombe* regime.[92] Consequently, disclosure of third party records is not governed by a single test.

2.9.2 National Standards

The *Martin Report* recommended that the Attorney General of Ontario issue a comprehensive directive setting out the purpose and general principles of disclosure, the specific requirements of full disclosure, and how disclosure was to be implemented. It also provided a draft disclosure directive. Ontario adopted these recommendations and issued an updated directive. Many other Canadian jurisdictions followed suit. But directives issued by Attorneys General only bind their agents. They do not have mandatory effect across the justice sector. This can give rise to confusion and disputes.

The constitutional right to disclosure is a common law child of the *Charter*. With the exception of a few specific *Criminal Code* provisions referred to above, disclosure law does not rest on a statutory foundation. Consequently, disclosure issues are resolved on a case by case basis and the law has been shaped by the views of individual judges. The police community, in particular, believes that standardizing the content of disclosure would reduce disclosure disputes, facilitate timely preparation of disclosure and create greater certainty in the law concerning the legal

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[90] *R v O'Connor*, [1995] 4 SCR 411.
[91] *R v McNeil*, [2009] 1 S.C.R.
[92] *R. v. Quesnelle* [2009] O.J. No. 5502 (C.A.). Access to all other third party records is governed by the procedure set out in *O'Connor*. This bifurcated approach is confusing.

requirements of disclosure. It was suggested to us that these benefits would best be achieved through placing disclosure on a statutory foundation.

Should Canada follow the lead of other jurisdictions and adopt a comprehensive statutory disclosure regime? Supporters of legislated disclosure obligations argue that legislation would provide clear guidance to all involved in the disclosure process. Fewer cases would collapse because of unexpected judicial rulings. Electronic disclosure, a necessity from the police perspective because of the efficiency savings it brings, could be made mandatory. Other participants in the justice system are not so certain. They point out because Parliament did not take a leadership role in creating the right to disclosure; judges have developed the contours of the right. There is a serious risk that new legislation would do little more than codify existing case law while opening up basic issues for re-argument. New legislation tends to spawn litigation over statutory interpretation. Moreover, the legislative process is not conducive to establishing detailed operational instructions and legislative amendment is unwieldy.

Justice Sopinka noted in *Stinchcombe* that there are ways short of legislation to establish a uniform disclosure regime. Section 482 of the *Criminal Code* provides courts with broad rule making authority. Rules made under this section are published in the *Canada Gazette*. Under subsection 482(5) of the *Code*, the Governor in Council can provide for uniformity of rules. And any such uniform rules have authority as if enacted under the *Criminal Code*. Justice Sopinka described this rule making authority as "under-utilized."

In 2004 Justice Canada circulated a consultation document noting that a "collaborative initiative could be undertaken to develop detailed model rules of court" to address disclosure management issues. Individual courts, at their discretion, could adopt these rules under section 482 of the *Code*. Certain of the model rules could then be established as uniform national rules under the specific authority of section 482(5) of the *Code*. Other rules could serve as general models for local rules of court. This would encourage individual courts to develop similar rules allowing for local variations.

The 2004 Justice Canada document does not take a final position on the value of detailed disclosure-management rules. It points out that disclosure management procedures in many jurisdictions are already subject to guidelines, protocols and best practices manuals and asks whether further clarification through formal, detailed rules would improve the situation. The document suggests such rules may not be sufficiently flexible to meet the varied circumstances and types of materials arising in different cases and "might even become the source of further disputes and delays as parties litigate the rules and exceptions to them."

While certain aspects of disclosure will vary by region or by case, the basic foundation is common to all Canadian jurisdictions. National standards with a flexible structure are feasible and they make sense for a variety of reasons. The RCMP is a national organization which works with most prosecution services in the country to varying degrees. The RCMP uses national electronic tools, (e.g., PROS, E&RIII, etc.), which could incorporate national standards. National standards would provide a foundation for training and information-sharing, particularly for investigators who move from jurisdiction to jurisdiction. Prosecutorial participation in the development of national standards could serve to lessen the inevitable growing pains involved in moving from paper based to electronic disclosure packages.

RECOMMENDATION 30: CODIFICATION OF THE LAW OF DISCLOSURE

Justice Canada should continue its collaborative initiative to examine codification of the law of disclosure. Consideration should be given to whether there are better ways to address Canada's disclosure problems. Specific issues the initiative should address include:

- **providing judges in addition to the trial judge with authority to make early disclosure decisions;**
- **summary conviction proceedings;**
- **disclosure timelines;**
- **electronic disclosure;**
- **disclosure by access and inspection, and disclosure issues relating to prosecutions involving sensitive information relating to national security, national defence or international affairs.**

CONCLUSION

Disclosure to the defence is a necessary component of the right to make full answer and defence. The *Stinchcombe* decision was a necessary response to a major shortcoming in Canadian law. There is no going back. This report has sought to explain why legislative reform or the establishment of national standards alone will not "solve" the current disclosure crisis. The Crown's disclosure obligation is a substantial one and codifying the obligation will not lessen the practical burden of fulfilling it.

Improving the way disclosure is managed to more effectively comply with the regime mandated by *Stinchcombe* will increase the fairness and efficiency of Canada's criminal justice system. If there is a more uniform system for organizing, keeping track of and providing disclosure, evidence is less likely to be lost. If disclosure is provided more rapidly, each step in the process will proceed more efficiently. A trustworthy, transparent disclosure system will increase the fairness of the system and reduce disclosure disputes. Judges with statutory authority and an inclination to actively manage pre-trial issues will drive cases forward and contribute to fair resolutions. We believe implementation of the recommendations contained in this report will assist the criminal justice system in responding to the information management challenges posed by the constitutionally guaranteed right to disclosure.

APPENDIX 1: REPORT PREPARATION

At its meeting on January 30, 2009, the Steering Committee on Justice Efficiencies and Access to the Justice System noted that disclosure problems in criminal cases have led to miscarriages of justice and contribute to cases collapsing, a major cause of delay in the justice system. The Steering Committee decided to strike a Sub-Committee to review the caselaw, academic literature and commission and inquiry reports to determine what is being done to address the problems posed by disclosure.

The Sub-Committee on Disclosure prepared a discussion paper and presented it at the September 30, 2009, meeting of the Steering Committee. The discussion paper canvassed recent or ongoing work in the area of disclosure reform. It also reviewed reports, initiatives, legislation and rules relating to disclosure in Canada and other Commonwealth. It concluded with eight lessons learned and eight outstanding issues. The Sub-Committee also submitted terms of reference that were endorsed by the Steering Committee. It was agreed that police input will be important in developing a practical report. Finally, the Steering Committee suggested the Sub-Committee use the January 2010 meeting of the National Symposium on Criminal Justice as a sounding board for some of the Sub-Committee's reform proposals.

The Sub-Committee prepared and presented a status report at the February 2, 2010, meeting of the Steering Committee. The literature review and consultation with a wide variety of stakeholders suggested an emphasis on the following themes: closer police/prosecution collaboration, greater standardization of content and deadlines for prosecution and disclosure briefs, waiver of full disclosure by accused wishing to plead guilty, cost responsibility, technology leverage and challenges, initial disclosure, and judicial dispute resolution earlier in the process.

Prior to the June 8, 2010, meeting of the Steering Committee, the Sub-Committee circulated a draft report and list of recommendations. The Steering Committee was asked to provide input at or after the June 8 meeting. The Steering Committee devoted a substantial portion of its meeting to discussing the draft report. The input received at the meeting and subsequently was incorporated into the draft report. Prior to the November 16, 2010, meeting of the Steering Committee, the Sub-Committee submitted a revised draft report for discussion at the meeting.

A discussion paper outlining the most controversial issues during the consultation process was circulated prior to the January 2011 National Criminal Justice Symposium in Toronto. A wide ranging discussion took place at the Symposium. Attendees were asked to provide written comments.

The Report was further discussed at the March 16, 2011, meeting of the Steering Committee and was approved by the Steering Committee at its June 7, 2011, meeting.

APPENDIX 2: *STINCHCOMBE* AND ITS LEGACY

> *The fruits of the investigation which are in the hands of the Crown are not the property of the Crown for use in securing a conviction, but, rather, are the property of the public to ensure that justice is done.* [93]

The *Stinchcombe* decision reveals the Supreme Court, relatively early in the life of the *Charter*, laying a foundation of principles and values to guide the future development of the law of disclosure. As Justice Sopinka recognized,[94] 1) there were many details remaining to be worked out in concrete situations, 2) it was neither possible nor appropriate to attempt to lay down precise rules, and 3) although the basic principles of disclosure would apply across the country, the details would likely vary from province to province and even within a province by reason of special local conditions and practices.

The basic principles governing the disclosure obligations on the prosecution as established in *Stinchcombe* and its progeny[95] can be summarized as follows.

- Failure by the prosecution to give full disclosure to the defence infringes on the right of the accused to make full answer and defence, a principle of fundamental justice enshrined in s. 7 of the *Charter*.[96]
- The fact it is the police and not the prosecutor that have relevant information does not relieve the prosecutor of his or her disclosure obligation.
- All relevant information must be disclosed, whether or not the prosecution intends to introduce it in evidence.
- All inculpatory or exculpatory evidence and all information that may assist the accused must be disclosed.
- The prosecution's duty to disclose relevant evidence includes the obligation to preserve relevant evidence.
- For disclosure purposes, relevance is determined by reference to the potential use of material by the defence. Material is relevant for disclosure purposes if there is a

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[93] *Stinchcombe* [1991] 3 S.C.R. 326 per Sopinka J. at para. 12.

[94] *Stinchcombe v. The Queen* [1991] 3 S.C.R. 326. Justice Sopinka also recognized the general principles articulated in Stinchcombe arose in the context of an indictable case and he noted many of the factors referred to "may not apply at all or may apply with less impact in summary conviction offences." Moreover, the content of the right to make full answer and defence entrenched in s. 7 of the Charter may be of "a more limited nature" in the context of summary conviction offences. Finally, Justice Sopinka noted the issue of reciprocal defence disclosure was not before the Court. His Lordship concluded these issues were best left to a case giving rise to them, where "consideration would have to be given as to where to draw the line."

[95] See *McNeil* [2009] 1 S.C.R. 66; *Taillefer and Duguay* [2003] 3 S.C.R. 307; *Shearing* [2002] 3 S.C.R. 33, 165 C.C.C. (3d) 225. *Mills* [1999] 3 S.C.R. 668, 139 C.C.C. (3d) 321, *Dixon* (1998), 122 C.C.C. (3d) 1 (S.C.C.); *Wicksted* (1997), 113 C.C.C. (3d) 289 (S.C.C.); *La*, [1997] 2 S.C.R. 680; *Carosella* (1997), 112 C.C.C. (3d) 289 (S.C.C.); *O'Connor* (1995), 103 C.C.C. (3d) 1 (S.C.C.); *Chaplin* (1995), 96 C.C.C. (3d) 225 (S.C.C.); and *Stinchcombe* (1991), 68 C.C.C. (3d) 1 (S.C.C.); O. (W.A.) (2001), 154 C.C.C. (3d) 537 (Sask. C.A.); *Gagne* (1998), 131 C.C.C. (3d) 444 (Que. C.A.) *Grimes* (1998), 122 C.C.C. (3d) 331 (Alta. C.A.); *Grimonte* (1997), 121 C.C.C. (3d) 33 (Ont. C.A.); *Bramwell* (1996) 106 C.C.C. (3d) 365 (B.C.C.A.); *T. (L.A.)* (1993), 84 C.C.C. (3d) 90 (Ont. C.A.); *Petten* (1993) 81 C.C.C. (3d) 347 (Nfld. C.A.); *Collier* (1992), 77 C.C.C. (3d) 570 (Ont. C.A.); and *Black*, [1998] N.S.J. No. 392 (S.C.).

[96] The accused's right to make full answer and defence does not oblige the prosecution to pursue defence investigative requests (*R. v. Darwish*, [2010] O.J. No. 604, Ont. C.A.).

reasonable possibility (the likely relevance threshold) that it may be useful to the accused in making full answer and defence.

- The right to disclosure is a right to know what relevant information is in the possession of the police and Crown. It is not necessarily a right to have copies of the material.
- The Crown's duty to disclose is engaged by a request from the accused for disclosure.[97]
- The Crown's obligation is a continuing one that begins before the accused elects mode of trial and continues thereafter.
- The accused will not be compelled to elect or plead without sufficient disclosure to make an informed decision.
- Where the accused is unrepresented by counsel, Crown counsel should advise the accused of his or her right to disclosure, and a plea should not be taken unless the trial judge is satisfied that this has been done.
- Crown counsel has discretion, reviewable by the trial judge, to delay disclosure to protect the identity of informers and the safety of witnesses or others who have assisted the authorities.
- The Crown has discretion to delay disclosure in order to complete an investigation but delayed disclosure for this reason should be rare.
- The Crown may refuse disclosure[98] on the ground that the material sought is:
    - beyond the control of the Crown;[99]
    - not relevant; or
    - privileged.[100]
- The court must apply the likely relevance threshold to screen applications to prevent the defence from engaging in speculative, and time consuming requests for production.[101]
- The manner of disclosure is a matter of Crown discretion.[102]
- Where the accused demonstrates on appeal a reasonable possibility that undisclosed information could have been used in: meeting the prosecution case; advancing a defence; or making a decision that could have affected the conduct of the defence, the accused has established that his *Charter* right to disclosure has been impaired.

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[97] Defence counsel or an unrepresented accused should be advised as soon as possible when the prosecution learns of additional relevant information in the course of interviewing witnesses. There is also a disclosure obligation on the Crown where information first comes to its attention on appeal or when the case is no longer in the court system.

[98] This exercise of Crown discretion is reviewable by the trial judge.

[99] In addition to disclosing material in its possession, the prosecution is required by *McNeil* [2009] 1 S.C.R. 66 to (1) make reasonable inquiries of other Crown entities and other third parties in "appropriate cases." *McNeil* recognizes that Parliament has enacted a statutory regime for the disclosure of records containing personal information of complainants and witnesses in proceedings for sexual offences. This statutory regime constitutes an exception to the common law *Stinchcombe* regime (*R. v.*
Quesnelle [2009] O.J. No. 5502).

[100] Privileges that can arise relate to confidential informants, solicitor/client communications and pubic interest immunity issues. The prosecution generally need not disclose any internal Crown counsel notes, memoranda, correspondence, or legal opinions (see *R. v. Shirose and Campbell* (1999), 133 C.C.C. (3d) 257 (S.C.C.).

[101] *O'Connor* [1995] 4 S.C.R. 411, 103 C.C.C. (3d) 1; and *Chaplin* [1995] 1 S.C.R. 668, 96 C.C.C. (3d) 225.

[102] Where privacy interests are engaged, the Crown may provide the accused with an opportunity to view the material, rather than a copy of it.

APPENDIX 3: DETAILED POLICE INPUT

The chart below is a selection of commentary from a more comprehensive survey conducted under the auspices of the Law Amendments Committee of the Canadian Association of Chiefs of Police. A copy of the whole survey may be requested from the Canadian Association of Chiefs of Police. The Steering Committee and the Sub-Committee extend their sincere appreciation to the Law Amendments Committee for its invaluable assistance. The police and intelligence services that participated in the survey were:

- RCMP "A", "E", "F', and "O" Divisions;
- Canadian Security Intelligence Service;
- Ontario Provincial Police;
- Surete du Quebec;
- Toronto Police Service;
- Service de police de la ville de Montreal
- Calgary Police Service;
- Ottawa Police Service;
- Halifax Regional Police Department;
- Winnipeg Police Service;
- North Saanich Police Department; Tsuu T'ina Nation Police Service; and
- Kingston Police Force.

Problem	Proposed Solution	Police Service
Responsibility and Organization		
1) Disclosure is too slow, disorganized and incomplete	Practical set of protocols with the Crown for effective case management adopting front end loaded approach, user friendly electronic format and the electronic Crown brief complemented by practical templates customized for its presentation.	RCMP O Division
	Early engagement of prosecution and paralegal team working with file coordinator from the police to ensure that evidence is gathered in a timely and continuous way and that it is organized and presented according to best practices.	RCMP O Division

	Audit files on ongoing basis to identify and collect missing reports, certificates and notes. Establish a Joint Committee and clearing house regarding disclosure issues. Calgary Police Service along with Alberta Justice has formed a Joint Disclosure Center within the Calgary Crown's office. The Office of Investigative Standards and Practices is a new concept in oversight of Major Cases. Its role is to assist units' set-up for Major Cases using the Major Case Management (MCM). A big part of that set-up is planning for Disclosure and the preparation of a final Court Brief. We have developed a Foundations of File Coordination course. Police education is fundamental to disclosure. Also, an Infoweb is in place via the RCMP to share best practices and lessons learned.	 Calgary RCMP « E » Division
2) Lack of appreciation for the importance of the role of the File Coordinator. The lack of experienced file coordinators was also identified as a major challenge in many regions.	Processing of files and having disclosure made from a centralized section (Court Section) provided a better product.	Halifax RCMP « E » Division

	A Memorandum of understanding on disclosure is in force in BC since 2006.	
There is a need for members/employees to learn how to organize the material obtained during the investigations in order to facilitate the disclosure.		
	To improve External or Systemic Disclosure issues will require further cooperation between Police and Crown. Both agencies continue to work toward this through communication and Police / Crown monthly meetings Regular Police / Crown Committee meetings.	Halifax
	There is a need to select the right people for the File Coordination job, train them properly and support them with personnel and equipment.	Winnipeg RCMP E Division
Responsibility for disclosure is important, given its impacts on financial, human and material resources. *McNeil* states that the police acts, for disclosure purposes, on the same first party footing as the Crown, but that its disclosure package is due to the Crown, who in turn has an obligation towards the defence. In Quebec, our 1994 MOU with the Quebec DOJ provides the SQ must produce 2 packages (1 for the Crown, 1 for the defence — even if there are	A joint police (SQ and major Quebec municipal police forces) – DPP Committee was formed in 2009 to review the existing protocol and practices. It has completed *McNeil* procedure and forms and will work on the larger issue in 2010.	SQ

many accused). It was never applied; we produce and pay for the whole disclosure process.		
3) For larger investigations, Crown resources and/or availability for advisory purposes are sometimes scarce. This situation may result in unintended disclosure of sensitive information, delay and misunderstandings. It is sometimes necessary to postpone police operations in order to allow the Crown to study the file. Police are then obliged to make where they can consult our investigation file directly form their office. Police are then required to conduct supplementary investigations to ensure that the grounds to obtain warrants are contemporaneous. There are situations where packages are not read by Crown before disclosure. Not the same Crown, other case theory.	Production of copies for the defence by the police should be clarified. We have developed a pilot project with organized crime prosecutors, where they can consult our investigation file directly from their office.	SQ SQ Montreal Halifax/Calgary

Crowns do not read the package; just give it. Everything gets disclosed. Cases are thrown out of court on the issue of failed disclosure.		
	Can we not legislate a requirement for a mandatory appearance in front of a judge SIX months prior to trial, should all disclosure issues not be resolved between Crown and defence? Or a parallel to the civil system or pre-trial management including a trial readiness certificate? If one party failed to sign the certificate you would bring a notice of motion. In reality this gets sorted out either at case management, or by making an application for trial (if the other party won't move it along).	Calgary
Lack of control by Judges in pre-trial court procedures	Standard cases: Meaningful Judicial Pre-trial • Standard = 3 court appearances • Defence/Crown mechanism in place legally for dispute resolution. Large cases : Judicial Case Management, especially at pre-trial stage. When an early assignment is not feasible, a "pre-trial case management judge" must be assigned and	OPP

	given the power to make new rulings on pre-trial issues including disclosure motions.	
5) Who is responsible for vetting?	There needs to be a firm and final decision on who is responsible for vetting of all disclosure, be it a regular case or a major case.	Ottawa
Sometimes, the file is so large, that the Crown will rely entirely on the police and won't review it.		SQ
	The police do the initial vetting and the Crown reviews it.	Montreal
	Police do the initial vetting.	
	The essential collaboration between Crown and police for that purpose should not lessen the necessity for each entity to provide the required resources.	
	Responsibility should be determined	
	Vetting or editing brief is a joint responsibility of the police and the crown	OPP
	There are two processes at the moment. For the day to day cases, the Crown Attorney vets the disclosure. For major cases, the Investigator is vetting the disclosure. Vetting should be done at investigator level prior to being submitted to File Coordinator	Ottawa

Resources to meet disclosure obligations are scarce, and their absence can delay the progress of an investigation,	Creation of a new full time employee (Disclosure Person) for each several investigative unit. Duties would include: • Reviewing and vetting major investigation files to ensure disclosure material is relevant, accurate and complete; • Preparing case reports for Crown counsel to conduct a final review of all material prepared for disclosure; • Assisting with requests from Crown counsel for disclosure material; • Assisting with prioritizing request from Crown counsel and assigning work; • Liaising with Crown counsel about content and format requirements for evidentiary material submitted for disclosure; and	RCMP O Division
6) Crown's office has staffing issues.	Preparing briefing regarding significant developments in trials. All of the Disclosure made by HRP goes through our Court Section. As a result HRP has put resources in place in the form of a commissionaire to look after all duplication of the files prior to being sent out to the Crown. While there is a cost involved in having this process in place, one advantage is that a more	Halifax

	consistent product is being produced.	
	Standard cases Dedicated Prosecution — A Crown will be assigned a case from start to trial and have ownership. This will provide continuity with issues including disclosure.	OPP
	Large cases : Closer collaboration by police and Crown through pre and post charge assistance and preparation of disclosure, often referred to as “embedded Crowns”	
The Disclosure related activities tie up regular member while they should be focusing on investigations	Adequate support staff trained in E&R in order to complete data entry, thus allowing the file investigator to supervise the disclosure entry, instead of dedicating his/her time entering the data.	RCMP « O » Division
	The cost of disclosure could be reduced by having civilian members and/or public servant replacing the regular members for the disclosure duties.	
	Salary on a regular member (Constable) is of $75,657.00 compare to civilian member (ADM -03) at $58,729.00 and Public Servant (CR-04) at $45,620.00.	RCMP « A » Division

	the Crown. While there is a cost involved in having this process in place, one advantage is that a more consistent product is being produced.	
	Standard cases Dedicated Prosecution — A Crown will be assigned a case from start to trial and have ownership. This will provide continuity with issues including disclosure.	OPP
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	The cost of disclosure could be reduced by having civilian members and/or public servant replacing the regular members for the disclosure duties.	
	Salary on a regular member (Constable) is of $75,657.00 compare to civilian member (ADM -03) at $58,729.00 and Public Servant (CR-04) at $45,620.00.	RCMP « A » Division

APPENDIX 4: CROWN BRIEF STANDARDS

Disclosable	**Non-Disclosable**
A. Police prepared content 1. Narrative prepared by investigators 2. Index of file content 3. Copy of information or indictment (or recommended charges) 4. Synopsis of facts 5. Bail brief 6. Charge review sheet (where applicable) 7. List of other potentially relevant info not included 8. List of exempt information and reasons	A. Police internal records 1. Compensation claim sheets 2. Financial records 3. Internal correspondence 4. A-5s 5. Source Debriefing reports
B. Police internal communications 1. Faxes In and faxes out (to be vetted) 2. Surveillance requests 3. Special O requests, Special I requests	B. Common law or statutory privilege 1. Informant, agent a) Informer identity b) Conversations with informant c) Conversations with UC agents 2. Solicitor-client a) Crown work product • Analytical charts • Phone toll analysis b) Legal opinions provided to police c) National interests • National security • Official secret • Public interest s.37 CEA
C. Accused 1. Personal information 2. Criminal record & history 3. Statement (written, oral, audio, video, police notes, etc.) 4. Assets information 5. Target profile package 6. Personal information	C. Witness, victim, privacy protection 1. Child exploitation image or statement (with conditions) 2. Sensitive information that could put person at risk-protect witness 3. 3rd party privacy right – common law, constitutional, or statutory 4. Information given in confidence (e.g., Crime-stoppers) 5. Third party records (*O`Connor* &

	s.278.1 CC) Database checks except relating to target or accused
<u>D. Witnesses</u> 1. Witness list including: a) name, b) address, c) occupation, and d) contact numbers (subject to prosecution discretion to delay, withhold or exclude) e) Witness Statements (written, oral, audio, video recorded) 2. Willsay summaries 3. Important information relating to witnesses: a) prior inconsistent or recanted statements; b) particulars of promises, benefits, advantage; c) info supporting mental disorder; info bearing on reliability of ID d) criminal record accused and co-accused e) criminal history of accused f) criminal records for other witnesses, (on request, if relevant to credibility) g) information bearing on reliability of I.D. evidence	<u>D. Evidentiary</u> 1. Information not in possession of police 2. Clearly irrelevant 3. Information from intelligence and security agencies 4. Information revealing intelligence gathering methods Location of places or of person allowing use for surveillance 5. Information that might facilitate other offences or hinder prevention 6. Ongoing or future investigations 7. Investigative techniques
<u>E. Witness notes, reports, drawings, etc.</u> 1. Drawings and accident reports 2. Expert statements, reports, notes, drawings 3. Medical records-notes; lab-forensic reports 4. DNA reports; 5. Computer forensics reports; 6. Certificates of analysis; Health Canada disposition report)	<u>E. Pejorative, prejudicial and extraneous</u> 1. Investigator's personal opinion as to strength of case, credibility of witness, sentencing 2. Slang 3. Conjecture or speculation 4. Sarcastic and negative comments.

7. Police agent notes, debrief notes or transcripts, letter of agreement & details of consideration	
<u>F. Photographs or videos</u> 1. Police notebooks; and 2. Police reports-occurrence, continuation, supplementary, update C237, surveillance	<u>F. Court ordered or statutory prohibition</u> 1. Information subject to sealing order
<u>G. Search warrants, special warrants</u> 1. Warrant and supporting material-(ITO unless sealed, report to judge, items seized, 2. Detention orders 3. Photos or videos of site 4. Special warrants and supporting documents, 5. Restraint orders	
<u>H. Wiretap</u> 1. Authorization; 2. Wire transcripts, 3. Recordings & summaries; 4. Phone tolls; 5. Phone toll subscriber info after vetted; 6. Technical evidence to address hookup 7. Transcriber, and 8. Translator notes and statements.	
<u>I. Exhibits</u> 1. Doc and non-doc, copies and reports; 2. Documentary (incl. financial, business records, ledgers, cheques, institution file notes) metadata & native file format for e-files; 3. Real evidence; 4. Seized property; 5. Property subject to forfeiture (offence related property-proceeds of crime)	
<u>J. Notices</u> 1. Evidentiary and other served notices, e.g., *CEA*, *CDSA*; and Notices of Intention	

K. Recordings 1. Video or audio statements, observations, crime scene; 2. Other recordings (answering machines, security videos)	
L. Post-offence 1. Photo line-up and related I.D.	
M. Media 1. Collected media reports; 2. Press releases; and 3. Collected news clippings	
N. Examples of Potentially Relevant Information 1. Investigative irregularities; 2. Internal investigation; 3. Excessive force; 4. Difficult to locate witness; 5. Tainted evidence; 6. Witness subject to mental disorder; 7. Offences committed by police during investigation; 8. Loss of continuity; and 9 Suspected *Charter* violation.	

APPENDIX 5: SUMMARY OF RECOMMENDATIONS

1. Prosecution services should consider making prosecutors available to provide pre-charge advice to the police, including advice in relation to specific investigations. This recommendation is of particular importance in the context of major and complex prosecutions but also applies to routine investigations. We recognize the ability of prosecution services to fully implement this recommendation may be affected by resource limitations.

2. Every jurisdiction without a standardized agreement setting out the division and nature of the respective disclosure responsibilities of police and prosecution services should consider establishing a collaborative process to develop one. The agreement should contain a mechanism for resolving disagreements between police and prosecution services, including cost allocation. The mechanism should ensure that when disclosure disagreements arise police services are given an opportunity to provide input.

3. Where they do not currently exist and after due consultation and consideration, all authorities responsible for policing should issue directives to police services within their jurisdiction, directing them to assist Crown counsel in complying with the applicable Attorney General's directive on disclosure. These directives should direct police, other investigators and prosecutors that:

- investigators and prosecutors are bound in their respective spheres to exercise reasonable skill and diligence in examining or reviewing and disclosing all relevant information, even though such information may be favourable to the accused;
- they are under a duty to report to the officer in charge or to Crown counsel all relevant information to which they are aware, including information favourable to the accused; and
- the disclosure file should identify the officer who has overseen the disclosure.

4. We endorse the work being done across the country to develop improved ways for preparing and delivering disclosure through the use of modern information technology. We encourage the project teams doing this work to share the results of their work and the lessons learned from it with the provincial and territorial disclosure coordinating committees referred to in Recommendation 5 below.

5. We endorse the recommendation in the Criminal Justice Review Report that each province and territory consider establishing a disclosure coordinating committee. Representation on these committees should include: the police, the defence bar; legal aid, prosecution services, courts administration and the judiciary.[103] The disclosure coordinating committee should collect, circulate and promote disclosure lessons learned and best practices within their jurisdiction. The disclosure coordinating committees should also report disclosure lessons learned and best practices in their jurisdiction to the national advisory board referred to in Recommendation 6 below.

[103] Consideration should be given to representation from intelligence services with respect to terrorism prosecutions.

6. The Committee of Deputy Ministers Responsible for Justice and the Canadian Association of Chiefs of Police should consider the feasibility and composition of a national disclosure advisory board. Representation on the board should include the police, defence bar, prosecution services, courts administration, corrections and the judiciary. The board should not consider specific cases but review and make recommendations concerning systemic issues of national importance. It is important the establishment of a national advisory board not delay the implementation of disclosure reforms required in specific jurisdictions.

7. Police and prosecution services should work collaboratively to standardize and develop quality control for the briefs provided by police to prosecutors.

8. Provincial/territorial disclosure coordinating committees should work collaboratively to develop standardized disclosure checklists and templates to establish shared disclosure expectations in the criminal justice system.

9. Provincial/territorial disclosure coordinating committees should examine ways to introduce more information management expertise to the disclosure process.

10. Provincial/territorial disclosure coordinating committees should examine the feasibility and utility of establishing administrative structures permitting closer cooperation between police, prosecutors and defence counsel during the disclosure process.

11. Provincial/territorial disclosure coordinating committees should give consideration to the feasibility and utility of establishing police disclosure officers in court locations where justified by case volumes.

12. Police, prosecution services, defence bar organizations, legal aid services, law societies and judicial educational bodies should jointly develop and present educational programs to educate justice professionals on their respective disclosure roles and responsibilities.[104]

13. Justice Canada, in consultation with other criminal justice stakeholders, should consider examining whether 1) a staged approach to disclosure is feasible in Canada and 2) it would improve the efficiency of Canada's criminal justice process without adversely affecting its fairness.

14. We endorse the recommendations in the *LeSage/Code Report* concerning the use of the following procedural tools for early and efficient resolution of disclosure disputes regarding materials outside of the investigative file;

- Defence requests should be particularized and explain how the materials could assist the defence, as required by the onus placed on the defence in Chaplin.
- There must be a real effort by the prosecution and defence to discuss the request and try to resolve it.
- If unresolved, the defence must bring a motion in court in a timely way before the judge seized with pre-trial motions.

[104] Interdisciplinary education was a recommendation of the 2010 National Criminal Justice Symposium.

- This judge must set strict timelines for either resolving all disclosure disputes or obtaining rulings at an early stage of the case and well in advance of the trial. Setting a date for trial or preliminary inquiry should only be delayed if the unresolved disclosure is significant in its impact on the accused's election.
- The judge must rule on whether the defence has met its Chaplin onus in relation to the requested files / materials and must rule on any claims of privilege raised by the prosecution and challenged by the defence.
- It is generally not necessary or advisable to take up court time with a detailed examination of each requested file or document unless national security or confidentiality concerns preclude inspection of the requested file or document by anyone other than the court.
- If there are confidentiality concerns that do not preclude inspection by counsel, the court should issue a direction that counsel inspect the document, subject to an undertaking that counsel not disclose the contents of the document. Counsel will only be relieved of the undertaking in relation to any particular document upon obtaining the prosecution's agreement to provide a copy of the document or upon obtaining a further order of the court.
- Breach of counsel's undertaking should be treated as serious professional misconduct.

15. Maintaining accurate disclosure tracking records is an important task. It should be assigned to a specific member of the prosecution team or the Crown office. Organizational skills and attention to detail are important job competencies of the person performing this role. Prosecution services should review the use of information technology to make this task less onerous and facilitate archiving.

16. We endorse the recommendation in the *LeSage/Code* and Early Case Consideration reports that administrative goals be set for basic disclosure within time limits running from the date of the charge and commensurate with the nature and complexity of the evidence and the trial. These goals should indicate 1) when the Crown brief is to be finalized to the extent possible by the police and provided to the Crown; and 2) when basic disclosure and the Crown's position in the event of a guilty plea are to be provided to the accused. These administrative goals should be specified in the agreements referred to in Recommendation 2.

17. All national, provincial or regional disclosure standards should recognize the manner (i.e. means) by which the prosecution provides disclosure is appropriately a matter of Crown discretion. The Crown's exercise of discretion should only be reviewable by the trial judge. In the absence of a trial judge, a judge of the superior court can review the Crown's exercise of discretion on Charter grounds.

18. All national, provincial or regional disclosure standards should recognize in unusually large or complex investigations, where the volume or sensitivity of material accumulated during the investigation makes the normal methods of reproduction impractical, the prosecution's disclosure responsibility can be discharged by providing the defence with a description or index of the material and a reasonable opportunity to inspect it.[105]

[105] The defence should also be afforded an opportunity to obtain a reasonable number of copies selected from the materials inspected.

19. All national, provincial or regional disclosure standards should 1) recognize that where feasible and subject to judicially approved exceptions on a case by case basis, electronic disclosure is the preferred method of disclosure, and 2) identify electronic disclosure requirements and best practices.

20. A self-represented accused is entitled to the same disclosure as a represented accused, although not necessarily in the same form. Consequently, a self-represented accused should be told as soon as possible by a judicial officer of the right to disclosure and how to obtain it. The self-represented accused should also receive from the court a standard form letter explaining the right to disclosure and how it is obtained.

21. The prosecution should inform the self-represented accused in writing of the appropriate uses of and limits upon the use of the disclosure materials and the consequences of abusing disclosure material.

22. Unless the self-represented accused expressly waives disclosure, fully informed of the consequences of the waiver, disclosure must be provided before plea or election and any resolution discussions.

23. If there are reasonable grounds for concern that leaving disclosure material with a self-represented accused will jeopardize the safety, security, privacy interests, or result in the harassment of any person, the prosecution may take reasonable preventative steps which do not deny the accused adequate and private access to the disclosure materials.

24. In determining whether a copy of all or part of the disclosure materials should be given to a self-represented accused and/or whether terms and conditions should accompany the self-represented accused's possession of, or access to, the disclosure information, consideration should be given to whether such measures are necessary in the circumstances, including consideration of the need to protect the security and right to privacy of the witnesses and victims or the integrity of the evidence.

25. Incarcerated accused, whether or not they are self-represented, are entitled to adequate and private access to disclosure materials under the control and supervision of custodial authorities.

26. In determining whether disclosure information should be provided through electronic means, the prosecutor should give consideration to the ability of the self-represented accused to access the disclosure information.

27. If a protocol does not exist concerning self-represented accused in custody and disclosure, the national Committee of Deputy Ministers responsible for justice, in consultation with the Canadian Association of Chiefs of Police and the national Heads of Corrections Committee, should develop one.

28. We endorse the recommendation in the *LeSage/Code Report* that statutory tools be enacted to obtain early and binding resolution of disclosure disputes and recommend they be extended to all types of interlocutory Charter disputes. The Criminal Code should provide a judge, other than the

judge who eventually hears the evidence at trial, with authority to make binding rulings on pre-trial motions, including Charter motions, and to manage the case at the pre-trial stage.

29. Provincial/territorial disclosure coordinating committees should consider the need to develop guidelines relating to the proper and improper use of disclosure and to draft a standard disclosure undertaking.

30. Justice Canada should continue its collaborative initiative to examine codification of the law of disclosure. Consideration should be given to whether there are better ways to address Canada's disclosure problems. Specific issues the initiative should address include:

- providing judges in addition to the trial judge with authority to make early disclosure decisions;
- summary conviction proceedings;
- disclosure timelines;
- electronic disclosure;
- disclosure by access and inspection, and
- disclosure issues relating to prosecutions involving sensitive information relating to national security, national defence or international affairs.