Department of Justice Canada
Ministère de la Justice Canada

Disclosure Reform

Consultation Paper

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INTRODUCTION

Under the *Canadian Charter of Rights and Freedoms*, an accused person is guaranteed the right to the disclosure of all relevant information in the possession or control of the Crown, with the exception of privileged information.

While the principle of disclosure is key to the proper functioning of our criminal justice system, the obligation can present significant challenges. The burden of managing large quantities of information can be considerable, especially in complex criminal matters, for both the Crown and the defence. Furthermore, disputes can arise over which information is relevant and over what fits within the categories of privileged information. Disputes over what information has to be disclosed, along with delays in transmitting it, can impede trials themselves, and sometimes result in proceedings being stayed due to unreasonable delay. A further area of concern is that information contained in the disclosed materials is sometimes misused.

On February 27, 2004, the Minister of Justice and Attorney General of Canada, Irwin Cotler, announced that he had asked Justice officials to develop proposals for amendments to more efficiently and effectively implement the Charter-mandated disclosure obligation. The announcement noted that amendments would be examined in the five following areas:

- facilitating the electronic disclosure of materials to the defence;
- reducing administrative burdens in disclosure by clarifying the core materials to be given to the defence, while ensuring the defence's right of access to all relevant information;
- setting up specialized court proceedings to provide a way for parties to deal expeditiously with all matters pertaining to disclosure, including relevance;
- establishing disclosure-management procedures that would clearly set out obligations relating to disclosure, including timelines;
- addressing any improper use of disclosed materials.

The Minister also announced that specific proposals would be put forward for consultations with the legal community and the general public.

This paper is intended to facilitate consultations on the proposed areas for disclosure reform that were set out in the February 27 announcement. For each area of potential reform, a basic statement of issues is provided, together with a description of the proposals to address these issues. This is followed, in each case, by a fuller discussion of how the proposals could work to improve disclosure. Potential challenges raised by the proposals are also discussed, along with possible alternative ways of framing them to address the underlying issues. At the end of each section, specific questions are posed about the legislative proposals.

You are invited to forward your comments by February 8, 2005, to the following address:

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BACKGROUND

It is a fundamental element of the fair and proper operation of the Canadian criminal justice system that an accused person has the right to the disclosure of all relevant information in the possession or control of the Crown, with the exception of privileged information. Relevance, in this context, has been found by the courts to mean that there is a reasonable possibility of the information being useful to the accused person in making full answer and defence. This right to disclosure flows from section 7 of the *Canadian Charter of Rights and Freedoms*, which provides that "everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." The right to proper disclosure is recognized in particular under principles of fundamental justice as necessary to the accused person's ability to defend himself or herself against the charges that have been laid.

The main legal principles applying to the disclosure of information in criminal matters were set down by the Supreme Court of Canada in the landmark case of *R.* v. *Stinchcombe*, [1991] 3 S.C.R. 326. These rules have been elaborated and applied in numerous subsequent cases. Recently, in *R.* v. *Taillefer*; *R.* v. *Duguay*, [2003] 3 S.C.R. 307, Mr. Justice LeBel reiterated the key principles as follows:

> The rules may be summarized in a few statements. The Crown must disclose all relevant information to the accused, whether inculpatory or exculpatory, subject to the exercise of the Crown's discretion to refuse to disclose information that is privileged or plainly irrelevant. Relevance must be assessed in relation both to the charge itself and to the reasonably possible defences. The relevant information must be disclosed whether or not the Crown intends to introduce it in evidence, before election or plea…. Moreover, all statements obtained from persons who have provided relevant information to the authorities should be produced notwithstanding that they are not proposed as Crown witnesses….. [p. 334]

The obligation to disclose "relevant" information has been construed broadly by Canadian courts. This was recognized by Mr. Justice LeBel in *R.* v. *Taillefer*; *R.* v. *Duguay*, and he went on to comment:

> As the courts have defined it, the concept of relevance favours the disclosure of evidence. Little information will be exempt from the duty that is imposed on the prosecution to disclose evidence. As this Court said in *Dixon*, *supra*, "the threshold requirement for disclosure is set quite low…. The Crown's duty to disclose is therefore triggered whenever there is a reasonable possibility of the information being useful to the accused in making full answer and defence" (para. 21; see also *R. v. Chaplin*, [1995] 1 S.C.R. 727, at paras. 26-27). "While the Crown must err on the side of inclusion, it need not produce what is clearly irrelevant" (*Stinchcombe*, *supra*, at p. 339). [pp. 334-5]

The Crown's disclosure obligation can create significant challenges. Proper disclosure requires managing vast quantities of information within the justice system. The task is further complicated by the high degree of sensitivity that is attached to certain relevant information, including privacy concerns, the need to protect victims, witnesses and informants, and the need to protect national and international government confidences.

The challenges involved in managing the sheer volume of information are highlighted most clearly in large and complex cases. Such situations frequently arise, for example, in cases related to organized crime, due to the sophistication of the criminal activities involved, as well as the sophistication of the investigation techniques. These and other types of large and complex cases can result in an obligation to deal with vast quantities of documents and other pieces of information, such as sound and video recordings. Disclosure even in small and moderately sized cases can also be a challenge for the justice system, especially in view of the number of such proceedings, and some of the proposals for disclosure reform may be of assistance in such cases as well. Issues related to the sensitivity of information and the need to prevent misuse, for example, can be of concern regardless of the size of the case.

It is important to keep in mind that information relevant to a criminal matter begins to be generated from the moment an investigation is initiated. In large and complex investigations, such as those into suspected organized crime activity, the collection of information can begin years before any trial. Preparation for disclosure therefore needs to be considered early within the course of an investigation and prosecution. Disclosure itself should be made as soon as possible after charges are laid in order to allow the accused person to make informed decisions.

Disclosure, of course, is not just a matter for the Crown in preparing for trial, but also a key concern for police during an investigation: it is a matter of joint management by police and the Crown. Investigators and prosecutors are obliged to ensure that they are organized to meet their legal obligations for proper and timely disclosure. This has sometimes been a challenge, but it is one that the Canadian justice system has addressed and will continue to address. Steps being taken to improve disclosure management in various Canadian jurisdictions include: information management training, including working sessions and seminars for investigators and prosecutors; the development and sharing of best practices; the development of protocols for disclosure management; and closer direct cooperation between investigators and prosecutors, including assigning Crown counsel to provide advice on disclosure issues during investigations.

These improvements in the practical management of disclosure information do not mean that problems are not still encountered. Meeting the disclosure obligation, especially in large and complex cases, can impose considerable burdens in human resources and costs. Difficulties in ensuring proper disclosure have led to delayed trials, and even to proceedings being stayed. Disputes over what information should be disclosed, and about the timeliness and manner of disclosure, are not uncommon, and the need for

judicial resolution imposes additional costs on parties and the justice system as a whole; the result can be additional delays in having the merits of matters properly heard.

While continued improvements in the practical management of disclosure information are essential, legislative reforms may also be of assistance. Proposals for legislative reform in the area of disclosure are the focus of this consultation paper. However, it should be kept in mind that legislative reform alone cannot 'solve' the overall issue of disclosure. The disclosure obligation is a substantial one, and legislative amendments cannot eliminate the practical burden of fulfilling the obligation. The proposals discussed here seek ways to implement the Charter-mandated disclosure obligation more efficiently and effectively.

FACILITATING ELECTRONIC DISCLOSURE

Electronic disclosure, in appropriate circumstances, can be of considerable assistance with the sheer physical challenge of disclosure. Although parties to complex proceedings are increasingly relying on electronic case management, there has not been clear acceptance within the criminal justice system of the electronic provision of disclosure materials as a sufficient form of disclosure in and of itself.

Proposed Legislative Response

- **Legislative amendments could be made to provide that where the Crown transmits disclosure materials in electronic format, complying with specified standards, this is presumed to be a proper form of disclosure with respect to those materials unless a court, in the interests of justice, decides otherwise.**

Discussion

Although electronic disclosure has not been firmly accepted within the criminal justice system, neither has it been rejected. Numerous cases have proceeded on the basis of electronic disclosure. Even where courts have indicated that this form of disclosure is not appropriate in a particular case, they have generally been careful not to categorically reject its possible use in other situations.

Clearly, electronic disclosure can play a role in the justice system. As advances continue to be made in technology, and as those involved in the justice system become increasingly comfortable with and reliant upon electronic document management, electronic disclosure may well become the principal means of disclosure. It may be time to address the practice of electronic disclosure in specific legislative provisions.[1]

The proposed legislative response could create a presumption in favour of electronic disclosure as an adequate form of disclosure. Such a presumption would not set out an *obligation* to provide electronic disclosure, but would make it clear that the option is generally available to the Crown. It is important to note that this presumption concerns the form of disclosure, not the contents. It would, of course, still be the responsibility of those preparing the disclosure package to ensure that the materials in the package – whether provided electronically or by hard copy – include all relevant information required under court rulings.

Electronic disclosure can offer substantial advantages. Electronic materials can be more portable and easier to store, as well as more accessible, especially through the extremely powerful tool of text search capability. However, it might also have disadvantages and pitfalls. Some fear in particular that electronic disclosure can take the form of a simple massive transfer of electronic files, without any inherent organization and without any easy capability to access and search the material. To be sure, lack of organization can

[1] Analogous legislative provisions already exist in related areas of law. For example, sections 31.1 to 31.8 of the *Canada Evidence Act* set out certain evidentiary provisions in respect of electronic documents.

also be a problem for hardcopy disclosure. Nevertheless, electronic disclosure may be especially susceptible to problems of usability when it is done poorly. For these reasons, the potential legislative amendment could specify factors for courts to consider in deciding whether electronic disclosure is adequate, such as the legibility of electronic documents, the ability to perform searches, and the question of the reasonable availability of technology to the defence – possibly including the costs of any specialized computer system requirements.

Of course, electronic disclosure is not a panacea for ensuring more effective and efficient disclosure. Not all documents are originally created and stored in electronic format, and a substantial amount of document scanning is necessary in many cases. Scanning can require considerable time and money, and can also lead to difficulties when the source material is not easily scanned or the scanning is improperly performed. Further, electronic document storage and retrieval technology provides its own complications, including problems of compatibility among different software. Special difficulties in accessing electronic technology may arise with respect to unrepresented and incarcerated accused persons.

While the proposed legislative change is suggested as a presumption, it could be argued that the circumstances that make electronic disclosure appropriate may vary from case to case. Electronic disclosure is not *always* the preferred or appropriate option. Further, it may be that the organizational and technological standards for electronic disclosure, although advancing, are not yet mature enough to make it advisable to create a presumption. An alternative might be legislative amendments to put electronic disclosure on a legislative foundation, but without specifying a presumption.

It could also be argued that there is actually no need for legislative amendments addressing electronic disclosure. Although electronic disclosure is not accepted in all cases within the criminal justice system, it appears to be gaining increased acceptance: the justice system is *already* evolving in its approach. Some may suggest that it is more appropriate to allow this evolution to continue, hand-in-hand with the evolution of technology and the level of comfort of those who work in the justice system. On the other hand, legislative amendments might accelerate the process by sending a message within the system that electronic disclosure is appropriate.

Questions

1. Is it appropriate to address electronic disclosure through legislative amendments, or should it be left to evolve through prosecution and defence practice and court decisions in individual cases?

2. If it is appropriate to address electronic disclosure by legislation, should the legislative amendments create a presumption in favour of this form of disclosure?

3. What legislative standards could be prescribed with respect to electronic disclosure?

4. What would be the cost implications of greater electronic disclosure? Who should bear the cost of any special computer system required by the defence to receive and use electronic disclosure?

DISCLOSURE THROUGH ACCESS

The constitutional right of an accused person to disclosure has normally been fulfilled by the Crown furnishing copies of the material. Given the wide scope of the concept of "relevant information" and the sheer volume of material, especially in large and complex cases, this practice has often created a serious administrative burden for the police and the Crown in respect of copying and transmitting documents and other materials.

Proposed Legislative Response

- **Without reducing the obligation to provide disclosure, legislative amendments could permit this obligation to be fulfilled, in appropriate circumstances, by providing the defence with reasonable access to disclosure materials and the opportunity to obtain copies.**

Discussion

The common practice in criminal cases is for the Crown to provide copies of disclosure materials to the defence. However, the Ontario Attorney General's Advisory Committee on Charge Screening, Disclosure and Resolution Discussion, chaired by the Honourable G. Arthur Martin, recognized in its 1993 report (the "Martin Report") that this practice might not be appropriate in every case:

> [I]n an unusually large or complex investigation, where the volume of material accumulated during the investigation makes the reproduction of all material that would normally be reproduced impractical, the Crown may, instead, provide the defence with a description or index of the material, and a reasonable opportunity to inspect it. If such a procedure for providing disclosure is used in a complex investigation, Crown counsel none the less must inform the defence of any information which Crown counsel is aware of and which is exculpatory or favourable to the accused in any other way.
>
> For example, in a child abduction case, there may be tens of thousands of fruitless inquires conducted and noted by investigators before the child is found. It cannot be said that these inquires are necessarily irrelevant, and, thus, they may all be properly subject to disclosure, even though only one, or two, or even none, of them might ultimately be useful to the defence. Likewise, in an extremely complex fraud investigation, the relevant documentation may fill many rooms: and, although all of the documentation is subject to disclosure on the basis that it is not clearly irrelevant, none the less there may be very little of it that is of direct assistance to the defence. In circumstances such as these, the Committee thinks it 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….

> Without in any way attempting to be exhaustive, access to disclosure materials that is reasonable in the circumstances of complex investigations will depend on such matters as the volume of the material, its sensitivity, the need to protect the integrity of the material, and the nature of the prosecution. Ultimately, access to the material must be guided by the purpose of disclosure, that is, to facilitate the right to make full answer and defence. [Martin Report, pp. 237-8]

As these comments indicate, it may not always be appropriate to fulfil the disclosure obligation by making and providing copies of materials. In appropriate circumstances, disclosure could take the form of offering a reasonable right of access to materials for which copies have not been provided. This right could be accompanied by a reasonable opportunity for the defence to obtain copies it selects from the materials accessed through this method.

Providing disclosure by means of access to information in the possession of the Crown, rather than providing copies, is already possible under current law. However, despite the comments in the Martin Report, it does not appear to have become a regular practice. Legislative amendments providing a firm statutory foundation for the practice, together with parameters for its use, might help encourage the development and use of this practice.

It is important to note that this disclosure-access proposal, like the proposal about electronic disclosure, deals only with the form of providing disclosure, not the extent and content of the materials that must be disclosed.

One possible structure for the amendments suggested under this proposal would be for the amendments to specify that the Crown may provide copies of defined core-disclosure materials[2], with the remainder of the disclosure to be provided by way of access to the other relevant materials. The core disclosure package suggested under such an approach likely would be extensive, comprising the main "Crown brief" materials. It 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. It would also include any materials in the possession of the Crown that are exculpatory of the accused person, including those that could mitigate or negate the guilt of the accused or reduce his or her punishment.

Another manner of structuring such amendments might be to provide the Crown with a more general authority to provide disclosure through access, subject to the ability of a court to order otherwise. Alternatively, or in addition, amendments could define particular categories of materials that the Crown could *only* provide through disclosure access unless a court ordered otherwise. This could include materials which frequently are of little value, but are not "clearly irrelevant." It could also include materials that are

[2] This core-disclosure proposal was set out in the February 27, 2004, announcement. In this consultation paper, the proposal is put forward in more open terms as disclosure through access. A core-disclosure process may be one way of providing for such an approach, but it might not be the only way.

sensitive due to privacy or related concerns – for example, pornographic materials seized in the course of child pornography prosecutions.

It is likely that a disclosure-access mechanism would be of use mainly in large and complex cases, which frequently generate enormous volumes of materials that are subject to the disclosure obligation. In such cases, disclosure through access might be the fastest and most practical and 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 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 Crown might be less likely to contest certain disclosure requests, thus leading to fewer disputes.

A number of practical considerations arise, however, with respect to access to disclosure materials, notably the question of how the defence can 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 as guidance. Granting access to the additional disclosure materials 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 special concern would be providing access to unrepresented accused, especially those who are incarcerated. And issues may 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 review of documents.

It is also fair to question how well the disclosure-access approach would actually address the challenges inherent in disclosure. After all, the concept would not remove the obligation of collecting the wide array of relevant information, assessing it for privilege, and ensuring that all of the information is actually made available, in one way or another. Some might 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: more effective use of such disclosure might make the disclosure-access approach less worthwhile or even unnecessary.

Others might argue that, while providing only a small benefit in a relatively restricted category of cases, the disclosure-access concept actually risks complicating and slowing disclosure. For example, under a core disclosure approach, the practice of separating core and non-core materials could open up another ground for litigation over what materials must be included in the core materials. Disputes could also arise over the extent of defence requests to copies of additional materials. It is also possible that explicit legislative establishment of a procedure to obtain disclosure through access could extend the range of materials to which expectations of disclosure would arise.

However, the risks of additional complications should not be overemphasized. As with electronic disclosure, the use of this process would not be mandatory. The Crown could

therefore 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 that amounts to a relatively small percentage of cases, these generally would be large and complex cases, which is where the greatest disclosure difficulties arise and where the benefits may be substantial. For the defence, it may be argued that any risks or disadvantages may be minimal, since the required materials would still be disclosed – whether by providing copies or providing access – and the entire process would remain the subject of judicial scrutiny.

Questions

1. Would it be beneficial to proceed with legislative amendments that address disclosure through access?

2. If so, would it be best to use a core disclosure model, or would another model be preferable? If a core disclosure model is used, how should the extent of the core materials be defined?

3. What provisions could accompany the disclosure access proposal to minimize practical difficulties in implementation, such as issues of physical access to the materials and providing a means to obtain copies?

4. What implications could a disclosure access proposal have for costs?

SPECIALIZED COURT PROCEEDINGS ON DISCLOSURE

Disputes over disclosure issues arise frequently in the criminal process. While informal resolution of such disputes is to be encouraged, it must be recognized that judicial rulings will often be required. Delays in obtaining a judicial determination on a disclosure matter are not uncommon. These delays may arise from inability to obtain early access to a court or from the nature of motions proceedings themselves.

Proposed Legislative Response

- **Amendments providing for specialized court proceedings could allow disclosure motions to be heard in an expedited manner through quick access to a court and flexible proceedings before the court:**

  - **expedited access could allow either the Crown or the defence to apply by notice of motion to an appropriate court, before a trial judge is appointed, for rulings on matters related to disclosure;**

  - **flexible procedures could allow the court, on application from either party, to employ any manner of proceeding appropriate to the nature of the individual motion, the need to resolve the matter quickly, and any other interests of justice: specifically mentioned manners of proceeding could include proceedings by written submissions only, proceedings by oral submissions without supporting material or motion record, proceedings relying on affidavit or *viva voce* evidence, proceedings by telephone or video conference, proceedings in chambers, and *in camera* and *ex parte* proceedings.**

Discussion

In some criminal proceedings, especially large and complex matters, considerable time can be spent dealing with motions to resolve disclosure issues. These motions typically are heard only by the trial judge, and it can take some time before this judge is appointed.[3] Further delays can result from the preparation for and hearing of disclosure motions using formal court procedures.

To address such challenges, special provisions could provide clear jurisdiction and parameters for proceedings, before a trial judge is appointed, that would allow parties to deal with all disclosure matters, including relevance, privilege, and the adequacy of the form of disclosure. Specific allowance for flexibility in proceeding could permit disclosure motions to be resolved quickly, providing the manner was appropriate to the particular motion and consistent with the interests of justice.

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[3] A judge of a superior court other than a trial judge, exercising authority under subsection 24(1) of the *Canadian Charter of Rights and Freedoms*, can resolve such issues where constitutional rights are at stake. See, for example, *R.* v. *Girimonte*, (1997), 12 C.R. (5th) 332 (Ont. C.A.); *R.* v. *Laporte* (1993), 84 C.C.C. (3d) 343 (Sask. C.A.); *R.* v. *Blencowe* (1997) 118 C.C.C. (3d) 529 (Ont. Ct. (Gen. Div.)). However, this manner of proceeding is the exception, and there is some uncertainty about when it is appropriate.

For this concept to provide a benefit, the decision on disclosure likely would need to have essentially the same authority as one made by the trial judge. If not, the special procedure might serve only to complicate and extend disputes, since the motions could be re-litigated at trial. Therefore, disclosure orders made in this fashion likely should be vested with full authority, with only a limited right of review by the trial judge.

It might also be advisable to provide some legislative encouragement for the parties to use the early dispute resolution mechanism for disclosure issues, rather than simply waiting for appointment of the trial judge. For example, the amendments could require a trial judge, in considering any remedy sought with respect to disclosure, to consider whether the remedy could have been sought earlier through specialized court proceedings.

While early resolution of disputes in this manner may have advantages, it could be argued that the trial judge is in the best position to rule on disclosure motions by considering them in the full context of the case. The advantages of early resolution would have to be weighed against possible disadvantages of involving a judge other than the trial judge. It should be kept in mind, however, that the proposal could allow the trial judge a residual right of review. Further, the advantage of review by the trial judge may perhaps be overstated in respect of disclosure motions, which by their nature should be resolved some time before trial and tend to involve issues that do not necessarily require knowledge of the larger context of the case. It could even be argued that there would be positive advantages, in addition to early resolution, in having a judge other than the trial judge to hear them, since it might, for example, permit parties arguing a disclosure motion to provide a full factual context without fear of compromising positions at trial. (Similar considerations apply in the context of pre-trial conferences, where a judge other than the one assigned to the trial is able to engage in frank dialogue with counsel.)

This is not to suggest that it would necessarily be appropriate to resolve all disclosure disputes by specialized early court proceedings. The judge at the specialized disclosure proceedings arguably should retain discretion to rule that a matter should be reserved for resolution by the trial judge. (This would be in addition to the trial judge's limited right to review rulings from the specialized proceedings.) Also, these proposed specialized court proceedings would not affect or provide an alternative to special proceedings that are already provided at law, such as those dealing with personal information records governed by sections 278.1-278.91 of the *Criminal Code* or with information in respect of which notices are given or objections are made under sections 37-39 of the *Canada Evidence Act*.

Implementing specialized court proceedings on disclosure might present technical challenges. It may be difficult and unproductive to isolate procedural changes for resolving disclosure disputes from other pre-trial issues. Many questions may arise in this regard. Should the proposed procedural changes be expanded to apply to pre-trial issues in addition to disclosure? How should this procedure relate to case management and pre-trial conferences? What level of court should hear such proceedings? Should the same judge presumptively hear the multiple motions that can arise in a given criminal matter? Could disclosure motions be brought by third parties in certain instances, given

that disclosure rulings may sometimes involve the interests of such parties? Should disclosure motions be subject to interlocutory appeals?

Another challenge in implementing these procedural changes could be to accommodate regional differences in court practices. The proposed disclosure proceedings may present difficulties in smaller, rural, or northern communities, where there may not be flexibility of judicial resources to allow easily for the assignment of judges to be specially seized of disclosure matters. Some aspects of this proposal may therefore be better implemented through local rules of court, rather than *Criminal Code* amendments, in order to allow for regional variations in practice. The general matter of potential new rules of courts addressing disclosure is the subject of the next proposal in this consultation paper.

Questions

1. Would it be beneficial to proceed with amendments providing for specialized court proceedings to encourage early resolution of disclosure issues?

2. What level of court should hear such proceedings?

3. Should multiple disclosure motions in a given criminal matter presumptively be brought before the same judge?

4. Should such amendments be limited to large and complex cases?

5. Under what circumstances should a trial judge be able to reconsider the decisions rendered in specialized pre-trial proceedings?

6. Should such proceedings also be considered for pre-trial issues other than disclosure?

7. Should aspects of this proposal be reserved for local rules of court to allow for regional differences in court practice?

DETAILED DISCLOSURE-MANAGEMENT PROCEDURES

Providing disclosure can be a time-consuming, multi-stage procedure, especially in large and complex criminal matters. Certain problems may arise from the lack of clear rules providing guidance on disclosure management, including roles and responsibilities, detailed format requirements, timelines, and other procedural matters.

Proposed Legislative Response

- **A collaborative initiative could be undertaken to develop detailed model rules of court that would address disclosure-management issues. At their discretion, individual courts could adopt these rules under section 482 of the *Criminal Code*. Certain of these model rules could perhaps be established as uniform national rules under the specific authority of subsection 482(5) of the *Criminal Code*.**

Discussion

The constitutional obligation of Crown disclosure has led to a need to manage a vast amount of information within the justice system. Various practices have been developed over the years to assist in fulfilling this obligation, but it might be of some benefit to attempt to clarify disclosure practices through a structure of rules. Such an approach was suggested, in part, by Sopinka J, in *Stinchcombe*:

> There are many details with respect to [the application of the general principles of disclosure] that remain to be worked out in the context of concrete situations. It would be neither possible nor appropriate to attempt to lay down precise rules here. Although the basic principles of disclosure will apply across the country, the details may vary from province to province and even within a province by reason of special local conditions and practices. It would, therefore, be useful if the under-utilized power conferred by s. 482 of the *Criminal Code* which empowers superior courts and courts of criminal jurisdiction to enact rules were employed to provide further details with respect to the procedural aspects of disclosure. [pp. 341-342]

Section 482 of the *Criminal Code* provides individual courts with a broad authority to make rules with respect to any prosecution, proceeding, action, or appeal within their jurisdictions. Rules made under this section are published in the *Canada Gazette*. Under subsection 482(5), the Governor in Council can provide for uniformity of rules, and any such uniform rules have authority as if enacted under the *Criminal Code*.

The initiative proposed here would be a collaborative effort of justice system experts to develop detailed *model* rules of court on disclosure. Certain of these model rules could perhaps be established as uniform national rules under subsection 482(5). Others could serve as general models for local rules of court, encouraging individual courts to develop similar rules, but allowing for variations depending on the court.

It is not clear, however, whether the development of such detailed disclosure-management rules would be a worthwhile or advantageous policy direction. Currently, disclosure-management procedures in many jurisdictions are already subject to guidelines, protocols and best practices manuals. It is not clear that further clarification through formal, detailed rules is what is required. Indeed, such rules may not be sufficiently flexible to meet the varied circumstances and types of materials that arise in different cases and might even become the source of further disputes and delays as parties litigate the rules and exceptions to them.

These are valid considerations, but there may nevertheless be areas of disclosure management where rules could provide advantages. A collaborative effort might be able to identify these areas and to develop model rules to respond to them.

Questions

1. Would it be beneficial to proceed with an initiative to develop detailed model disclosure-management rules to encourage the adoption of such rules under section 482 of the *Criminal Code*?

2. If so, on what areas of disclosure management should the rules focus?

3. Should any such initiative consider the development of uniform rules under subsection 482(5) of the *Criminal Code*?

ADDRESSING IMPROPER USE OF DISCLOSED MATERIALS

In recent years, there have been some troubling instances of disclosed materials being misused. Misuse of disclosure information includes use of these materials to facilitate criminal activity, such as harassment and intimidation of witnesses. It also includes situations where sensitive private information about individuals, including victims of crime and third parties, is revealed.

Proposed Legislative Response

- **Amendments could be made to the *Criminal Code* to:**
  - **set out that all persons who receive disclosure information – including third parties – have a legal responsibility not to use it for improper or collateral purposes;**
  - **set out an explicit power on the part of a court to make any order with respect to disclosure materials that it deems fit whether the materials are in the hands of counsel, the accused, or third parties: the order could be made in the interests of justice or to protect the privacy of those affected by the proceedings, but subject to the right of an accused person to make full answer and defence;**
  - **create a targeted offence for misuse of disclosure material: the offence could address the use of such materials to help facilitate the commission of a criminal offence, as well as the use of disclosure material with the intention of violating any person's privacy.**

Discussion

Disclosure materials can include information of considerable sensitivity, affecting both the interests of the public in fighting crime and the privacy interests of individuals, including victims and third parties. While criminal justice in Canada is a public process, this does not mean that all the underlying documentation is to be freely distributed in public. In particular, disclosure materials are not appropriately distributed in the public domain. As the Martin Report stated, "it is inappropriate for any counsel to give disclosure information to the public. Counsel would not be acting responsibly as an officer of the court if he or she did so."[4] Further, while it is the accused person's constitutional right 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 unrestricted manner as between counsel and the accused. The Martin Report makes recommendations on restrictions that should apply to the handling of the materials in this regard, stating, in

[4] Martin Report, recommendation 34, p. 179, cited with approval in, for example, *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.

part, that "defence counsel should maintain custody or control over disclosure materials, so that copies of these materials are not improperly disseminated" (p. 179).

Nevertheless, disclosure materials have been used inappropriately in some cases. Third parties have been found in possession of such materials, possibly with the intention of garnering information that could lead to activities contrary to the interests of justice, such as harassing or threatening witnesses. Disclosure information has also found its way more generally into the public domain, whether in the possession of persons unconnected with the proceedings, posted anonymously in public places, or posted on the Internet. Distribution of materials in this manner may violate the privacy of victims, witnesses, and third parties.

Legislative amendments addressing the use of disclosure materials may help in establishing firmer rules and discouraging misuse. The focus of the amendments suggested here would be on clarifying duties in respect of disclosure materials and the powers of courts to enforce these obligations. It should be noted that undertakings and conditions, sometimes supported by court order, are already sought and received with respect to disclosure materials in some cases. However, this is not done consistently, and difficulties can arise if undertakings are refused by the defence, since some may argue that the refusal cannot interfere with the basic right of an accused person to disclosure. It might be better to address these issues through statutory rules that, without interfering with the obligation to provide disclosure, apply automatic legal obligations of proper use of disclosure materials. The approach could be akin to the implied undertaking rule that applies with respect to discovery information in civil proceedings, under which the obligations are deemed to go along with the transmittal of the information. The statutory provisions proposed here could also be accompanied by provisions addressing the power of courts to enforce these obligations.

While some might see such codification as doing no more than reciting obligations and powers that could be or should be already recognized in law, it may nonetheless help to clarify and extend duties and powers. Analogous codification in the civil context has taken place in some jurisdictions. For instance, Ontario's *Rules of Civil Procedure* provide: "All parties and their counsel are deemed to undertake not to use evidence or information to which this Rule applies for any purposes other than those of the proceeding in which the evidence was obtained" (Rule 30.1.01(3)).

Legislative amendments also could potentially encompass other, more detailed duties with respect to disclosure documents, such as duties with respect to counsel supervision of access by an accused and of proper storage and disposal of disclosure materials. Moreover, amendments could also include a power to seek a court order to vary the usual rules where the interests of justice or a broader public interest are at stake.

As well, the proposal could be accompanied by an offence targeting misuse of disclosure materials.[5] The offence could be defined in terms of the use of such materials to facilitate the commission of a criminal offence. While this definition might appear to duplicate underlying offences that could be charged, it could recognize that use of the disclosure material constitutes a separate wrong – one that would appropriately be subject to a separate, additional offence.

The disclosure offence might also be defined to apply to the use of disclosure material with the intention of violating a person's privacy. This aspect of the offence could recognize that disclosure material can contain sensitive private information, including information about victims and third parties. Even where such information is not misused to commit other offences under the *Criminal Code*, the violation of privacy itself constitutes a significant wrong, which could be addressed by this provision.

If such provisions on misuse of disclosure were to be enacted, it would be necessary to consider whether they should be subject to specific exemptions and defences. In particular, the offences, and any exemptions and specified defences, would have to be appropriately and carefully drafted to ensure that an accused person's ability to make full answer and defence is protected. Consideration could also be given to protecting good-faith use of the materials in the public interest beyond use by an accused to make full answer and defence.

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[5] The federal government previously sought to address abuse of disclosure in Bill C-42 (1994), which proposed a new section 604 of the *Criminal Code* to create the offence of publication of disclosure material. The proposed new section read as follows:

> **604.** (1) Subject to subsections (2) and (3), the accused, counsel for the accused and every person acting on behalf of or under the direction of the accused or counsel for the accused shall not publish any material provided by the prosecutor for the purpose of permitting the accused to make full answer and defence.
>
> (2) A judge of the court before which the accused is to be tried may, where the accused shows reasonable cause, order that material referred to in subsection (1) may be published on the terms and conditions ordered by that judge.
>
> (3) Nothing in this section affects the right to publish information that is otherwise publicly available.
>
> (4) Every person who contravenes this section is guilty of an offence punishable on summary conviction.

This amendment was, however, rejected by the Senate Committee studying the Bill. Among the grounds on which the amendment was questioned in Committee proceedings was that it created an offence that was targeted, in part, at the criminal defence bar. Further, the concept of "publish" was not seen as being clear. It may be suggested, however, that an offence provision, such as that proposed in this consultation paper, could be narrowly and clearly targeted so as to avoid such objections.

Questions

1. Would it be beneficial to enact legislative provisions to address the obligations of those who receive disclosure documents and to address the power of courts to make an order in respect of these materials? If so, how should these obligations be framed?

2. Should any such amendments include a misuse of disclosure offence and, if so, what would the appropriate scope of such an offence be?

3. Should any provision be made for the use of disclosure materials beyond what is necessary to make full answer and defence in an individual case, such as use in a broader public interest?

FURTHER IDEAS FOR LEGISLATIVE REFORM

The discussion in this document focuses on the five proposals announced on February 27, 2004. However, additional ideas for potential disclosure reform may also be worthy of consideration, whether in the context of the current reform initiative or of future possible legislative policy development. Therefore, in addition to your comments on the proposals discussed in this consultation paper, the Department of Justice Canada welcomes other proposals for reforming disclosure in criminal matters.