Submission on
Disclosure Reform Consultation Paper

NATIONAL CRIMINAL JUSTICE SECTION
CANADIAN BAR ASSOCIATION

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TABLE OF CONTENTS

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PREFACE

The Canadian Bar Association is a national association representing 38,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the National Criminal Justice Section of the Canadian Bar Association, with assistance from the Legislation and Law Reform Directorate at the National Office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the National Criminal Justice Section of the Canadian Bar Association.

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I. INTRODUCTION

The Canadian Bar Association's National Criminal Justice Section (the CBA Section) welcomes the opportunity to comment on the Department of Justice consultation paper, Disclosure Reform (November 2004). Members of the CBA Section include prosecutors, defence lawyers and academics from across the country. The CBA Section has been involved in earlier consultations on the subject of disclosure reform, and our comments in this submission are consistent with those earlier positions.

We have organized our response to generally correspond with the structure of the consultation paper, for ease of reference.

II. FACILITATING ELECTRONIC DISCLOSURE

The consultation paper suggests that electronic disclosure is not widely accepted within the criminal justice system. Possible explanations for resistance to electronic disclosure include:

1) inconsistent format between police forces in how they organize electronic disclosure;
2) inadequate technology to allow for easy trial preparation, for example, to search or organize disclosed materials;

3) difficulty of facilitating disclosure for incarcerated or unrepresented individuals;
4) an innate resistance to change from use of paper;
5) inadequate equipment available to handle electronic disclosure; and
6) unfamiliarity with computers, and insufficient time to learn.

A. Judicial Interpretation of Disclosure Requirements

A fundamental premise of our criminal justice system is that people accused of indictable offences have a right to full disclosure before electing a mode of trial. We believe that the proposal in the consultation paper would go against a body of case law suggesting that electronic disclosure does not meet the Crown's constitutional obligations and would contravene the *Charter* rights of accused.

Judges have consistently ruled that failure to provide a hard copy of the evidence will be seen as a violating the constitutional right to full answer and defence of those accused of crimes. As such, it results in an abuse of process and a breach of section 7 *Charter* rights.

In *R. v . Stinchcombe*, the Supreme Court of Canada concluded that the Crown's common law duty to disclose prior to election of the mode of trial is a *Charter*-protected right of the accused. Sopinka J. said:

> the fruits of the investigation which are in the possession of counsel for the Crown are not the property of the Crown for use in securing a conviction but the property of the public…to ensure that justice is… there is the overriding concern that failure to disclose impedes the ability of the accused to make full answer and defence. This common law right has acquired new vigour by virtue of its inclusion in s. 7 of the *Canadian Charter of Rights and Freedoms* as one of the principles of fundamental justice…Initial disclosure should occur before the accused is called upon to elect the mode of trial… .[1]

1 *R. v. Stinchcombe*, [1995] 1 SCR 754, 96 CCC (3d) 318 (SCC) at 333-336.

B. Provincial Case Law

i. Newfoundland

The Newfoundland Supreme Court (Trial Division) has held[2] that section 7 *Charter* rights of an accused were violated when new disclosure surfaced during a trial. Following review of the case law, Rowe J., as he then was, held that the delivery of hard copies of disclosure is the general rule:

> In R. v. V. (W.J.) (1992)…the Newfoundland Court of Appeal dealt with how disclosure should be made. Goodridge, C.J.N., for the Court wrote (at 108): "…It ought generally to be accomplished by the delivery of photostatic copies of the materials required to be disclosed…".[3]

The judge referred to similar judgments in other provinces, where courts ordered that providing CD-ROMs was inadequate and that hard copies must be supplied:

> In *R. v. Hallstone Products Ltd.* (1999), 140 CCC (3d) 145 (Ont SCJ), LaForme, J., held that providing copies of all documents was necessary to fulfill the obligation to disclose in the particular circumstances of that case. The judge wrote, "For the foregoing reasons, I find that basic disclosure will only be satisfied if the Crown provides one aggregate hard copy of all the pages seized from the defendants. Accordingly, it is hereby ordered that it does so". [4]

ii. Ontario

A headnote of *R. v. Hallstone Products Ltd* says:

> Court had requisite jurisdiction to decide specific and narrow aspects of …application given that there was not yet any trial judge. Court could decide specific question as to manner or method of disclosure and costs of disclosure…Efficiency and accessibility of documents was directly related to level of skill and expertise of operator and information retrieved was only as good as commands or instructions used to retrieve it….Production of documents in form of CD-ROM was not suitable substitute for production of hard copies…Crown's constitutional obligation to provide disclosure was not satisfied. Basic disclosure would only be satisfied if Crown provided one aggregate hard copy of all pages seized, free of charge.[5]

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2 *R. v. Mercer* (2002), Carswell Nfld 51, (2002) WL 35411 (Nfld TD), (2002) 210 Nfld & PEIR 46.

3 *Ibid*. at para. 41.

4 *Ibid*.

5 (1999) Carswell Ont 3609, 140 CCC (3d) 145, 46 OR (3d) 382, [1999] OJ #4308.

The court in that case held:

> In the end, I find that, while it is a helpful aid in this case, it is not a suitable substitute for being able to utilize the essence of all documents in hard copy. In this case, it seems to me, both the prosecution and defence will need to make assessments and conclusions through such things as, the necessary comparisons and references among documents, assessing the relationship and connection of one document to another, and the interpretations, if any, that will result from such investigation and analysis. That in my view is considerably difficult, given my observations of the performance of the technology, and may be impossible if some documents, as was shown to happen, are not found. In my opinion, there are demonstrated risks, in the specific circumstances of this case, to relying on the computer program as a tool to properly prepare and advance this particular criminal prosecution and defence. *And, of course, the prosecutor in this case need not be concerned with that since it has control, to the exclusion of the defendants, of the actual documents that it can rely upon if necessary*.[6] (emphasis added)

The court concluded:

> In the end, I find that the Crown's constitutional obligation to provide disclosure in this case has not been satisfied…basic disclosure will only be satisfied if the Crown provides one aggregate hard copy of all the pages…the defendants are to receive the one aggregate copy free of charge… .[7]

iii. Alberta

The same conclusion was reached by an Alberta court in *R. v. Cheung*.[8]

According to the case headnote:

> Accuseds were charged with various offences including conspiracy to commit indictable offences…Transactions underlying offences charged were evidenced by approximately 40,000 pages of interception transcript and 4,000 relevant audio recordings of intercepted conversation. Crown made continuing disclosure of evidence to accused in CD-ROM format… Accused were entitled to Crown disclosure of hard copies of transcripts. Full and fair disclosure is required to preserve rights to make full answer and defence and to fair trial.[9]

The court concluded:

> In the result I am of the view that it would be appropriate for me to order that the Crown provide to the applicants disclosure, in hard or paper copy the documentary data, and audio tapes of the audio-recorded intercepted communications stored on the CD ROMs… .[10]

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6 *Ibid*. at 37.

7 *Ibid*. at paras. 40-41.

8 (2000) Carswell Alta 605, (2000) AB PC 86, 267 AR 179, 35 CR (5th) 48, [2000] AJ #704.

9 *Ibid*.

10 *Ibid*. at para. 119.

iv. Quebec

In *R. v. Amzallag*,[11] the court ordered the Crown to provide a hard copy of all evidence it intended to introduce at trial. The Crown had supplied CD-ROMs. The court noted that it is not mandatory for lawyers to be computer-literate and said:

> The computer-literacy of the defense lawyers in this case varies from inexistence to complete fluency, though three petitioners are represented by two lawyers, who are partners, one of which "was able to access the material on the three CD-ROMs which are in her possession", while the other is "completely illiterate and cannot use a computer at all".[12]

The court added that:

> There is nothing in the Bar Act that makes it mandatory for lawyers to be computer-literate.[13]

The court ruled that the information used in the trial must be provided in hard copy. This ruling was made although a police officer and the national coordinator for the "super-gravity" program offered, at no cost, instruction and a single floppy disk to make the material easier to access. The court noted:

> The officer who prepared those CD-ROMs is not a computer expert…So over the weekend before his testimony, he prepared two more user-friendly ones and designed new indexes… .[14]

The national coordinator also made special efforts to ensure that tools to facilitate searching of the materials were available at no cost.

In spite of these efforts, the court concluded that hard copies of all the evidence in the trial must be provided, and said:

> The Crown is ordered to hand over, within fifteen days, to each Petitioner a hard copy of any evidence now available it will present at trial. A writ of prohibition is issued to prohibit the Respondent Judge in first instance from fixing a date for the preliminary inquiry until the Crown had complied with the previous order.[15]

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11 (1999) Carswell Que 4320, [1999] QJ #6252.

12 *Ibid*. at para. 7.

13 *Ibid*. at para. 9.

14 *Ibid*. at paras 5-6.

15 *Ibid*. at paras. 26-27.

C. General Comments

Canadian case law highlights the problems that can result from inappropriate electronic disclosure. In our view, legislation pertaining to electronic disclosure would be problematic. This is especially true if the legislation presumed that electronic disclosure would generally fulfill disclosure requirements, even without creating an obligation to use electronic disclosure. Certainly, there are situations where electronic disclosure is satisfactory, but these situations occur where Crown and defence counsel discuss its use and agree that it is appropriate.

A legislated presumption in favour of electronic disclosure would place an unnecessary burden on the accused, and could lead to abuse. For instance, if an accused represented by a modestly equipped law firm or a sole practitioner, perhaps under a limited legal aid certificate, serious complications could arise where electronic disclosure must be converted to paper to be truly useful. Printing large documents, especially when they include photographs or diagrams, can be an expensive and technologically challenging task. This problem could be even more acute for an accused who is either unrepresented or incarcerated.

The importance of full disclosure, coupled with its endless variations and the exemptions required to deal with those variations, suggests that legislative amendment is not the answer. While electronic disclosure can be a useful tool to add to others within our justice system, its use should be considered on a case-by-case basis.

III. DISCLOSURE THROUGH ACCESS

The consultation paper proposes legislative amendment to clarify that the Crown's obligation to provide disclosure could be fulfilled by providing the defence with reasonable access to, rather than actual copies of, the relevant

materials. As a rule, we believe that the police and the Crown should be required to produce all relevant materials, and not simply allow for access to those materials. We agree with the quote from the *Martin Report*, cited in the consultation paper, that "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".[16] Jurisprudence under section 7 of the *Charter* provides further guidance.

Disclosure through access may, in fact, generate more litigation. For example, for unrepresented accused, accused in custody or counsel not within close proximity to the place where materials are stored, the logistics of obtaining access may be problematic. Who would be responsible for compensating a lawyer who must drive some distance to access disclosure materials? Legal aid plans may well refuse to cover the additional time associated with such travel. A lawyer may need copies of certain materials, but wish to have those copies without revealing to a police officer or Crown counsel a particular area of interest to the defence. Whether the facilities provided in police stations or Crown counsel offices would adequately preserve solicitor-client privilege and confidentiality is another relevant issue. Also, where there are multiple accused and several counsel, problems around the time or space for review of disclosure might arise, as well as issues such as delegation of disclosure.

Any suggestion that the Crown or the police should define what is a core package of disclosure for the defence is fundamentally unsound. Full disclosure of all relevant materials is one of the benchmarks of a fair trial.

Page 11 of the consultation paper refers to the idea of dividing disclosure materials between "core disclosure" and "access disclosure". In our view, such a distinction would be fraught with interpretational difficulties. The consultation paper concedes that the issue of disclosure by access is only likely to arise in very

16 *Disclosure Reform Consultation Paper* (Ottawa: DOJ, 2004) at 10.

large or complex cases, which by their nature warrant individual attention, not legislation. Especially given the significant penalties that are often associated with such cases, administrative expediency must always remain the secondary consideration.

If, in particular cases, materials are best disclosed by giving access to counsel, this can be agreed between counsel as fair and appropriate in the particular case. In our experience, informal arrangements of this sort are frequently used. We also agree that issues surrounding a particular case might be such that disclosure is provided on the basis of undertakings by counsel or in rare instances where the materials are of a very sensitive nature, the Crown can seek the permission of the court to provide disclosure through access only. We are not opposed to the concept of "disclosure through access" in and of itself. Indeed, we believe that it may be an appropriate response to unique circumstances, especially those in large and complex cases. However, whether the circumstances of a case make disclosure through access an appropriate option is best left to the counsel involved to decide. In our view, legislating a general rule presuming disclosure through access as the acceptable norm would prove largely futile, and could potentially be quite dangerous.

IV. SPECIALIZED COURT PROCEEDINGS ON DISCLOSURE

Efficiency in the justice system is a laudable goal, but time or cost considerations must not compromise trial fairness or the rights of an accused. We believe that the complexities associated with developing a specialized court to deal with disclosure outweigh any potential advantages. For typical cases, such as impaired driving, possession of a narcotic, or common assault, the trial judge can best assess relevance and the requirements of disclosure for a particular case. Trial judges assigned at an early stage can manage the trial process, and pre-trial management conferences can best deal with any disputes.

In spite of legitimate reasons for considering specialized proceedings on disclosure, we believe that the number of exclusions and exceptions that would be required in any legislative amendment, as well as variations in regional practice, would only result in unnecessary complications. Disclosure problems that require attention arise in exceptional cases, generally those with inherent complexities beyond disclosure. For example, in large, complex cases, finding sufficient court time and resources, accommodations for numerous lay and expert witnesses and legal aid funding, are all matters best dealt with well in advance of trial under the rubric of case management. Pre-trial resolution of disclosure problems would be best achieved through an integrated approach with other case management issues under section 482, allowing individual courts to make appropriate rules.

V. DETAILED DISCLOSURE-MANAGEMENT PROCEDURES

In our view, national model rules will not add to well-established jurisprudence that defines disclosure requirements under the *Charter*. Our experience is that problems with disclosure do not arise from a lack of clarity about what is now required, but because of exceptional situations where individuals misunderstand but more often, refuse to abide by existing requirements. Local rules or practice designed to meet specific needs in a particular jurisdiction, have been, and will continue to guide disputes about disclosure, as they arise.

VI. ADDRESSING IMPROPER USE OF DISCLOSED MATERIALS

Control over the use of disclosure through criminal sanctions should be a last resort, and only if it is shown that no other method of control can be effective. For example, court orders imposing terms and conditions on the use of disclosed materials, undertakings by counsel, and standards of professional duty and responsibility are preferable options to achieve the desired result.

Without knowing the extent to which there have been abuses or misuses of disclosed information, and the nature of such abuses or misuses, it is impossible to assess whether legislation is necessary or what it should address. We are confident that members of the legal profession do not knowingly allow disclosed materials to be misused. However, unrepresented accused are not subject to the rules of professional responsibility that apply to lawyers. Certainly, it is a concern if disclosed materials end up being posted on the Internet, but we question how this can be prevented given the numbers of unrepresented accused at the current time. In those instances, and where it is demanded by the nature of the materials, court orders can address any concerns that might exist.

The possibility of a criminal offence for using disclosed materials for improper or collateral purposes would turn significantly on the definition of "improper" or "collateral". The way such terms are defined must not interfere with the integrity of the solicitor-client relationship, and the ability of defence counsel to advance the legal interests of their clients without fear of investigation or prosecution.

If it is ultimately decided that criminal sanction for the misuse of disclosed materials is appropriate, there should also be corresponding sanctions for the intentional withholding or destruction of materials that should have been disclosed. While we are unfamiliar with the documented harms from improper use

of disclosed materials, the serious harms associated with withholding or destroying materials that should have been disclosed are well documented.

VII. CONCLUSION

Complete and timely disclosure is the cornerstone of the right and ability to make full answer and defence. Both those involved in the criminal justice system and society as a whole benefit from orderly and efficient pre-trial resolution of disclosure issues. However, we should never sacrifice fundamental *Charter* rights for the sake of administrative expediency.

In our experience with the practical operation of Canada's justice system, problems with disclosure are the exception. We believe that it is both inappropriate and unnecessary to address exceptional situations by amending legislation. Legislative change should address verifiable problems or shortcomings in the existing law, and not respond to mere suggestions that there are problems. Issues around disclosure should be considered on a case-by-case basis, factoring in the unique and perhaps singular circumstances present. As those involved criminal justice system gain experience with such cases, procedures and practices will no doubt evolve to address issues unique to those cases.

While the case law to date has been quite consistent and clear, the CBA Section is aware that technology has improved, electronic disclosure is becoming more commonplace, and there is a general growing acceptance of electronic disclosure. As practicing lawyers, we believe that if properly organized and accessible, electronic disclosure can be an acceptable, if not preferred, substitute for paper. But, legislation is not required to mandate electronic disclosure. Without an agreed, universal standard for technology, there is little sense in attempting to prescribe a legislative standard. Finally, any proposals for change must keep in mind the realities, such as small and under-resourced police forces, lawyers

unable to keep pace with technological developments[17], unrepresented accused and accused in custody. In sum, there are too many variables and uncertainties for a uniform legislated approach.

Our evolution towards reliance on electronic disclosure depends on a number of variables. In our view, Parliament should not use legislation to accelerate the pace of that evolution.

17 The CBA is taking steps to urge the legal profession to keep pace with the relevant technology. See, for example, the latest change to the *CBA Code of Professional Conduct*, Chapter 11, commentary 4, "The lawyer should also develop and maintain a facility with advances in technology in areas in which the lawyer practices to maintain a level of competence that meets the standard reasonably expected of lawyers in similar practice circumstances."