



Complex Case Review

Submission by the

Police Association of Ontario

June 2008

The Police Association of Ontario (PAO) is a professional organization representing over 31,000 police and civilian members from every municipal police association and the Ontario Provincial Police Association. The PAO is committed to promoting the interests of front-line police personnel, to upholding the honour of the police profession, and to elevating the standards of Ontario's police services.

Our unified voice has always been a key resource to government on all matters related to policing. Building on our shared goal of making communities safer, we have worked with successive governments on a number of important policy files sharing our experience and expertise. We have included further information on our organization at the end of this submission.

We are appreciative of being invited to make oral and written submissions to the Complex Case Review. The P.A.O. believes that it has a unique perspective to offer to the Review since its membership is comprised of police officers who are involved in law enforcement, who have ongoing dealings with both crown counsel and defence counsel and who routinely deal with issues of disclosure. In addition, unfortunately there do arise occasions when members of police associations are charged and go through the criminal justice system as accused persons. The P.A.O. can also offer to the Review the perspective of those who defend police officers.

The P.A.O.'s view is that for the most part there are very limited problems with respect to the pace, effectiveness and cost of large and complex criminal case procedures. Where there are problems, it is not the norm but rather peculiar to a particular case. The P.A.O. is very concerned about changes being made to criminal case procedures for the sake of change. The P.A.O. is especially concerned about any barriers being created to an accused person's right to full answer and defence and the right to a fair trial.

## 1. DISCLOSURE ISSUES

The P.A.O. fundamentally understands the importance of disclosure in the criminal justice system.

The P.A.O.'s response to the issues raised by the Review concerning disclosure will follow the order set out in the preliminary list of issues for consultation.

### A. Agreements as to Who Pays for Disclosure

It appears that across Ontario there is no real consistency as to who pays for disclosure: whether it is the police or the crown or whether the costs are shared. There also appears to be no real consistency as to who pays for the costs of transcripts, DVDs, photographs, audiotapes. This lack of consistency as to who pays the costs of disclosure is not just between police services but also within departments in individual police services. The P.A.O obtained information from different associations to give the Review some sense of the experiences of police services with respect to who pays for disclosure.

Aylmer Police Service	The Police Service provides all copies of the disclosure brief to the crown's office. The Police Service provides to the crown's office one copy of any DVD; the crown's office is charged \$10 per DVD for any additional copies.
Barrie Police Service	Generally the Police Service ends up paying the costs of disclosure. On major cases there may be cost sharing.

Durham Regional Police Service	The Police Service pays for the first copy of disclosure. The Police Service provides this copy of the disclosure brief to the crown's office. Additional copies of disclosure are the crown's responsibility.
Gananoque Police Association	The crown's office provides the Police Service with paper for photocopying of disclosure briefs. The Police Service then provides to the crown's office 2 copies of the disclosure brief. The Police Service bears the costs of providing DVD disclosure.
Halton Regional Police Service	The crown's office covers the expenses for crown briefs in major cases. The Police Service pays the costs of copying, and transcribing tapes.
Hamilton Police Service	The crown's office is responsible for all disclosure costs.
Hanover Police Service	The Police Service provides one copy of disclosure to the crown. The Police Service is in negotiations with the crown's office about compensation for additional copies of disclosure. The crown's office pays for the costs of transcribing video statements/ interviews.
Niagara Regional Police Service	The Police Service pays for the costs of disclosure to the crown including a copy for the defence.

<p>OPP</p>	<p>There are different understandings as to who pays for disclosure across the Province depending on the local court jurisdiction and depending on the local crown. Generally the OPP provides to the crown's office one copy of disclosure and the crown's office is responsible for subsequent copies. However, this is not consistently applied to all OPP detachments. If transcripts are required for investigative purposes, the OPP pays for the transcript; if the transcript is required for court purposes the crown pays for it.</p>
<p>Ottawa Police Service</p>	<p>The Ottawa Police Service and the crown's office are currently reviewing the issue of disclosure costs.</p>
<p>Peel Police Service</p>	<p>For the most part the Police Service bears the costs of one copy of the disclosure and the crown's office bears the costs of the second copy. However, some departments provide both copies of the disclosure brief to the crown's office.</p>
<p>Perth Police Service</p>	<p>The Police Service pays for all of the costs of disclosure including DVDs, and transcripts. Where there are significant costs involved, there is discussion between the police and the crown's office as to who pays the costs.</p>

Peterborough Police Service	The Police Service provides one free copy of all disclosure and there is a fee for service for the subsequent copies.
South Simcoe Police Service	The Police Service pays the costs of one copy of disclosure. The crown's office pays and makes the additional copies.
Strathroy- Caradoc Police Service	The Police Service pays the costs of paper disclosure. The crown's office is supposed to reimburse the Police Service for the cost of DVD/CD/VHS disclosure.
Timmins Police Service	The Police Service pays for all of the costs of disclosure.
Toronto Police Service	Two copies of disclosure are provided to the crown's office. The Attorney General provides a yearly sum to the Police Service to reimburse it for the costs of disclosure. The Police Service bills the crown's office for the costs of providing videotape and audiotape disclosure. The costs of transcripts are billed to the crown's office if the transcript was not done as part of the investigation.
York Regional Police Service	The crown's office covers the costs of defence disclosure. However, the police cover the costs of DVD or CD disclosure.

There are significant financial and manpower costs in the provision of disclosure especially in the provision of transcripts. These costs should not be dumped upon the defence. Otherwise, access to justice issues will result. These costs should not be imposed upon the police who already have significant budgetary issues. As the provision of disclosure is ultimately the crown's responsibility, the crown's office should be bearing the costs of disclosure.

Obviously the police should continue to provide at least one if not both copies of the disclosure brief to the crown's office. However, police services should be receiving fair and adequate compensation for the copying costs.

## **B. Standard Form of Disclosure**

It is the P.A.O.'s experience that there does not appear to be a standard form for disclosure from one jurisdiction to the next and even from one crown counsel to the next. Standardization would be helpful bearing in mind the requirement to disclose to the defence all of that which is not clearly irrelevant.

Some examples of the lack of standardization includes the treatment of police occurrences. Some jurisdictions will provide disclosure of these occurrences. Other jurisdictions take the position that the occurrences should be subpoenaed from the police service and that the crown's office will not object to the release of those occurrences. Others take the position that a third party records application is required to obtain the occurrences. Such occurrences should be disclosed upon request.

Another example of the lack of standard form for disclosure is how criminal records of witnesses are treated by the crown's office. In some jurisdictions crowns will automatically provide the criminal records of witnesses with the initial disclosure briefs. In other jurisdictions, such records are not produced unless a specific request is made by the defence.

Some jurisdictions will provide radio transmissions on request; others will not until a trial date is set.

Some jurisdictions will disclose photographs; others provide a black and white contact sheet charging significant costs to the defence for any color copies.

### **C. Organized Crown Brief**

The manner in which a crown brief is organized is very much dependent on the understandings and protocols between the local police service and the crown's office. There is an expectation that the crown's office will give direction to the police service as to the format and organization of a brief.

In any event, police officers already do receive instruction in major case management as to the format of a crown brief.

### **D. Assignment of Crown Counsel**

This is not an issue for most of the participants in complex cases. It is our experience that routinely crown counsel are being assigned early in the prosecution of complex cases. Such early assignment is always appreciated.

### **E. Vetting**

The vetting of crown briefs is the responsibility of the crown. Police officers should not be vetting disclosure for relevance. It is up to the crown to justify any non-disclosure so they should be doing the vetting. A police officer's only responsibility with respect to vetting should be to flag disclosure where there are concerns about Confidential Informant issues.

There are real concerns about delay and excessive editing when vetting is left up to the police.

## **F. Electronic Disclosure**

If electronic disclosure is being provided it should be provided in a format that is user friendly, easily searchable, indexed, free and where the defence, crown and police all have the same program.

Electronic disclosure should not be a means to pass off the costs of copying and disclosure to the defence.

The key parts of disclosure should be provided to the defence and crown in paper format e.g. witness statements.

The scanning process in electronic disclosure can cause significant delays in the provision of disclosure.

## **G. Time Limits or Administrative Guidelines for the Provision of Initial Disclosure by the Crown**

It is the P.A.O.'s experience that police policies around the province already have guidelines as to the timing of the provision of disclosure. Most if not all police services do have time limits for the provision of initial disclosure. Often the first appearance is set 6 weeks after the arrest to ensure that disclosure is provided at the first appearance. Often the police do provide the disclosure within their administrative guidelines and yet the disclosure remains in the crown's office for vetting or copying or other reasons and is not disclosed at the first appearance.

There is very little justification for why disclosure is not ready to be provided at the first appearance after a project has been completed.

All cases are different and have different variables. It is not possible to have standard time line guidelines for each case.

## **H. No Standard Time Limits for Defence Review**

There is no need for time limits as to defence review of disclosure. Every case is different and has different variables. One must bear in mind the significant resource differences between the defence and the crown. The reasonableness of the timing of defence review of disclosure can be judged if necessary in each individual case.

## **I. Further Disclosure Requests**

There was an expectation in Stinchcombe that before election there would be an informed decision. An informed decision would be based on receipt and review of significant disclosure.

Often the only way to ensure that disclosure is provided in a timely fashion is to have the clock running with the pressure of court appearances on the various participants in the criminal justice system.

Too often when trial dates are set without most of the disclosure having already been provided, disclosure is not provided in a timely fashion leaving the defence with little opportunity to review or investigate it. Trial dates then have to be adjourned or abandoned as a result of late or non-disclosure.

## **J. Opportunity to Inspect Police Investigative Files**

The P.A.O. has real concerns about the costs to the police and to defence if the opportunity to inspect police investigative files becomes routine. In addition there are privacy and continuity issues.

## **K. Crown Counsel Assisting Police at Pre-charge Stage**

In large measure crown counsel are already assisting the police at the pre-charge stage in large complex cases. This is encouraged and is appreciated. There are positive working relations between the police and the crown's office.

There are concerns however about the same pre-charge crown counsel subsequently prosecuting the case. Some times cases do need a fresh set of eyes with respect to issues of the reasonable prospect of conviction and public interest. Sometimes people can become too close to the case. Further there is a risk that the pre-charge crown counsel could become a witness especially in cases involving wire taps.

## **L. Early Preparation for Bail Hearings**

Early preparation for bail hearings benefits all participants in the criminal justice system. Too often a 3 day remand is being sought. Too often the crown wishes to speak to the police before conducting the bail hearing and yet the officer has finally gone off duty after working through the night.

There is a real concern that in some jurisdictions bail court does not start until 2 pm resulting in persons being regularly remanded into custody or bail hearings not being completed or even started.

Too often bail courts are too busy and yet one can walk around the court house and see that it is otherwise empty. Judges must be encouraged to assist justices of the peace and take on bail cases.

Early preparation for bail hearings works. A judge or justice of the peace is made available. The police have an opportunity to get the paperwork together; the crown is able to make a fully informed decision; security issues are taken care of; the defence can be confident that the bail hearing will not be adjourned and that potential sureties will not be inconvenienced any more than is necessary; and the bail hearing will occur quicker and more efficiently.

## **2. JUDICIAL CASE MANAGEMENT**

Judicial case management works in complex cases where the judiciary is experienced in criminal law, is experienced in long cases, is interested in case management and is civil.

There is a real concern that pre-trial motions are becoming lengthier than in the past not because of any Charter issues but rather because of either the implementation of the new rules in the Superior Court of Justice or because some of the parties seek to obtain rulings prior to the start of trial when in the past many of these rulings would be sought in the midst of trial in the context of a particular piece of evidence in issue. Often it will be much quicker to argue a motion in the midst of trial when the court has the context rather in a vacuum before the trial. This is especially the case with respect to Mohan issues and the admissibility of evidence. Concerns with duplication can arise when certain types of pre-trial rulings are sought.

Over-loaded indictments with too many accused and too many counts is a real concern. Not only can such indictments increase the length of trials but they can easily confuse a jury and risk the possibility of inconsistent verdicts. In addition, overloaded indictments increase the chance of antagonistic defendants which can increase the risk of mistrials and appeals.

Crown Counsel should be encouraged by the judiciary to negotiate formal admissions with the defence bar. There is a tendency by the crown to call unnecessary evidence when often the defence would concede the evidence in question.

The success or failure of pre-trials is really determined by the personality of the pre-trial judge. Persuasion and experience often succeed in impacting the conduct of a trial.

Pre-trial rulings on disclosure disputes can assist all parties. Much frustration can arise especially at the preliminary hearing stage when a judge indicates that it is not within his jurisdiction to address disclosure problems. It is preferential though that the trial judge make the determinations with respect to disclosure issues understanding the need for context. There are many jurisdictions now which do not have any difficulty with scheduling pre-trial motions including disclosure disputes with the trial judge at a different time than the scheduled start date of the trial.

It is beneficial for there to continue to be a separation between the pretrial case management judge and the trial judge. It may be necessary for there to be off the record discussions which counsel may not feel comfortable in engaging in before the proposed trial judge. Resolution discussions and frank discussions about the difficulties with evidence will either not take place or will be dampened if these discussions take place before a trial judge rather than before a pre-trial case management judge.

Another issue that needs to be addressed in this area in order to improve and strengthen judicial case management is to focus on technology. The unwillingness of many jurisdictions to use technology increases the costs and delay of criminal prosecutions. Many jurisdictions are averse to using conference calls for judicial pre-trials and yet other jurisdictions routinely use such technology successfully at times that are flexible for counsel and the court.

Many jurisdictions refuse to accept filing of notices by fax; while others permit it without any problems.

Some courthouses have internet access for counsel in courtrooms; others only have internet access for the crown and still others have no internet access whatsoever. Such internet access would assist in the pace, effectiveness and cost of large and complex criminal cases.

A significant issue with respect to the pace, effectiveness and cost of large and complex criminal cases is transcripts. Real time court reporting should be mandated for such cases at all stages: preliminary hearing, pre-trial motions and during the trials. Many court reporters have the technology to do real time court reporting and yet it is not being used. There is often a significant delay between the preliminary hearing and the trial (and between pre-trial motions and the trial) awaiting the receipt of transcripts when real time court reporting has not been utilized. In addition, it is of tremendous assistance to the court, crowns and defence to receive daily transcripts during lengthy proceedings in order to respond to legal issues that arise during a trial, in order to prepare effectively for the cross-examination of witnesses and ultimately to prepare closing arguments or the address and charge to the jury.

### **3. LEGAL AID**

The P.A.O. is concerned about access to justice. Too often one sees unrepresented defendants which is of real concern in complicated cases and particularly where there are victims of violence.

The P.A.O. is concerned with the inadequacy of legal aid tariff.

The P.A.O. is especially concerned about the ever increasing rules in the criminal justice system in both simple and complicated cases and the costs and delays that result from the greater demands for written argument. These ever increasing rules and requirements for the defence bar is making access to justice to those ineligible to legal aid (the middle class) more and more unaffordable and unattainable.

#### **4. CROWN/ DEFENCE COUNSEL**

The P.A.O. does not see misconduct, inexperience or inefficiency by the crown and/ or defence counsel as being a real or significant issue in the criminal justice system.

The P.A.O. recognizes that the defence bar must be fearless and courageous in their duties. The P.A.O. also recognizes that crown counsel must be independent and also understands that the role of crown counsel must exclude any notion of winning or losing.

Too often though the P.A.O. has seen that the approach of the crown becomes entrenched and becomes one about winning at all costs. Often the approach in justice prosecutions is not to review the case for reasonable prospect of conviction but rather to bring the case to trial and just let a judge or jury decide. Often the approach of the crown is to take positions in resolution discussions which discourage any possibility of resolution.

Too often there is a mistaken view in the criminal justice system that the defence of police officers is financially supported and yet many police officers in the province privately defend themselves and those who do receive funding do so in a very limited fashion. The funding of the defence of police officers is at a very limited and precarious state. The disparity in the resources between the defence and the crown is particularly evident in large and complicated cases.

There are already many sanctions available to address counsel misconduct. In addition, in this age of widespread media and ready access to the internet, counsel's reputations are quickly impacted by suggestions of misconduct. The P.A.O. is concerned that the failings of so very few may be the impetus for inappropriate change. The P.A.O. would encourage caution. Instead joint education with the different participants in the criminal justice system should be encouraged.

The preliminary list of issues for consultation sets out various judicial trial management tools for controlling counsel. Except for enjoining insolence and rudeness, the other tools will significantly and negatively impact on the accused's right to full answer and defence. The use of any of these tools will significantly increase the length and costs of proceedings. These types of tools make criminal cases more akin to civil cases and yet the life, liberty and security of accused persons is in issue in criminal cases and not in civil cases. Greater requirements for written argument and prior notice rather than oral advocacy can and does increase the length and cost of proceedings. Encouraging the requirements of summaries of proposed evidence is unacceptable as it is directly contrary to the defendant's Charter right to remain silent.

One side issue that is arising more often with respect to crown counsel is the refusal of some crown counsel to advise who they intend to call as witnesses at trial and the expected order. Some crown counsel take the position that this is not disclosure so they are not obliged to advise the defence of this. Whether or not it is a disclosure requirement, it is not only a matter of common courtesy for the crown to advise the defence of the witnesses but is their duty. It should be a matter of practice in every case for this information to be provided. Otherwise, delays and adjournments in the midst of trial become routine in criminal cases since no one can expect the defence to be ready to cross-examine every witness in large cases.

In addition, there are increasing concerns over some crowns routinely and arbitrarily refusing to consent to re-elections.

## **5. OTHER ISSUES**

The P.A.O. is respectful of and understands the importance of freedom of expression and the openness of the courts. However, the P.A.O. also recognizes the importance of such values in the criminal justice system as the right of an accused person to a fair trial, the presumption of innocence, the rule of law, the solemnity of court proceedings, the privacy and safety of the participants in the criminal justice system and the independence and impartiality of the judiciary.

The P.A.O. understands that the Review is to make recommendations that address the pace, effectiveness and the cost of large and complex criminal cases. It is the experience of many persons with an association with the P.A.O. that the increased participation of the media in the criminal justice system is significantly lengthening the pace of not only large and complex cases but many criminal cases. The increasingly interventionist approach of the media in criminal cases is diminishing the effectiveness of criminal cases and is fundamentally increasing the costs for all participants in the criminal justice system. Trials and preliminary hearings are routinely being interrupted by the media bringing "Dagenais" style applications.

In addition, the strong interventionist approach of the media is impacting negatively on the decisions that defence counsel make including decisions with respect to seeking access to informations to sealed search warrants and authorizations and seeking sealing orders.

The P.A.O. would like to be involved in any further consultation that may arise with respect to these issues or any others in the Complex Case Review. Thank you for the opportunity to make this submission and we would be pleased to answer any questions that you may have.



## **Mandate of the Association**

The Police Association of Ontario (PAO) was founded in 1933 and is the official voice and representative body for Ontario's front-line police personnel. Our membership consists of over 31,000 police and civilian members from every municipal police association and the Ontario Provincial Police Association (see attached for a complete listing of member associations).

The Police Association of Ontario promotes the mutual interests of Ontario's front-line police personnel in order to uphold the honour of the police profession and elevate the standards of police services.

The core objectives of our Association are to:

- Provide progressive and effective leadership and representation on policing issues;
- Deliver flexible and innovative services providing resource and support to our member associations;
- Deliver training and educational programs to foster enhanced association leadership; and,
- Encourage cooperation and unity within our membership.

## **Community Service**

The Police Association of Ontario and its affiliates across this province have a long history of community support and involvement. Whether through the work of our individual members or through the efforts of a local association, many charities, minor sports programs and assistance programs for people of all ages, have benefited from our efforts.

The PAO believes that our “Kids and Cops and Canadian Tire Fishing Days” is another example of this community spirit. We have partnered with Fishing Forever, a non-profit organization, whose principal focus is recreational fisheries conservation and securing the future of fishing in Ontario. The PAO has committed over two hundred thousand dollars to this program over the last several years and to date have taken thousands of young people fishing for the day with police personnel. The PAO was honoured two years ago with the Rick Amsbury Memorial Award for its contribution to fishing and youth in Ontario.



## Sharing Our Expertise

Our unified voice has always been a key resource to government on all matters related to policing. Building on our shared goal of making Ontario communities safer, we have worked with successive governments on a number of important policy files sharing our experience and expertise.

Notable amongst our past achievements is the revitalized Police Services Act. Our Association worked along side other police stakeholders including representatives of Ontario's Chiefs of Police, Police Services Boards and municipalities to forge a consensus on how best to transform Ontario's police services. Working with elected members on all sides of the Legislature on this important initiative was particularly rewarding.

In recent years, our Association has been advocating for a number of new initiatives that would improve community safety and protect police personnel including:

- Measures to address the escalating problem of violence in our communities posed by gangs, drugs and guns in particular;
- Implementation plans for the 1,000 new officers;
- Revitalizing the Ontario Municipal Employees Retirement System (OMERS) to better reflect the contribution of police and fire fighter personnel;
- Passage of the "pull to the left" law that requires vehicles to slow and pull to the left when approaching a stopped emergency vehicle.

## **Moving Forward: Developing The Work Plan**

- While proud of our past accomplishments, we understand that police services are constantly in transition. By responding to changing public expectations, we can ensure that Ontario's police services remain responsive, effective and accountable.



**PAO Member Associations**

Amherstburg	Kingston	Saugeen Shores
Aylmer	Kirkland Lake	Sault Ste. Marie
Barrie	LaSalle	Shelburne
Belleville	Leamington	Smiths Falls
Brantford	Lindsay	South Simcoe
Brockville	London	St. Thomas
Chatham-Kent	Midland	Stratford
Cobourg	Niagara Parks	Strathroy-Caradoc
Cornwall	Niagara Region	Stirling-Rawdon
Deep River	North Bay	Sudbury
Dryden	Ontario Provincial Police	Thunder Bay
Durham Regional	Orangeville	Timmins
Elliot Lake	Ottawa	Toronto
Espanola	Owen Sound	Waterloo Regional
Essex	Oxford Community	Wawa
Gananoque	Peel Regional	West Grey
Guelph	Pembroke	West Nipissing
Halton Regional	Perth	Windsor
Hamilton	Peterborough-Lakefield	Wingham
Hanover	Port Hope	York Regional
Kenora	Sarnia	

**Contact Person**

Robert Baltin, President  
 Ronald Middel, Chief Administrative Officer  
 Bus: (905) 670-9770  
 Fax: (905) 670-9755  
 Email [pao@pao.on.ca](mailto:pao@pao.on.ca)

## The Police Association of Ontario – a Resource for Government

The PAO has a history of working with government to ensure safe communities. Our unified voice has always been a key resource to government on all matters related to policing. The PAO web site is located at [www.pao.on.ca](http://www.pao.on.ca). It contains all of our media releases, position papers and other information on policing and community safety. We would also encourage you to contact our office should you need any further information. Some of the material includes:

- PAO federal and provincial submissions on pre-budget consultations.
- Public opinion polling information on community safety issues.
- Presentation to the Standing Committee on Justice Policy, Bill 159, An Act to revise the Private Investigators and Security Guards Act and to make a consequential amendment to the Licence Appeal Tribunal Act, 1999.
- Presentations to the Standing Committee on General Government on Bill 206, An Act to revise the Ontario Municipal Employees Retirement System Act.
- Presentation to the Standing Committee on General Government on Bill 53, An Act to revise the City of Toronto Acts, 1997 (nos. 1 and 2), to amend certain public Acts in relation to municipal powers and to repeal certain private Acts relating to the City of Toronto.
- Presentation to the Standing Committee on Justice Policy on Bill 56, An Act to amend the Emergency Management Act, the Employment Standards Act, 2000 and the Workplace Safety and Insurance Act, 1997.
- Presentation to the Standing Committee on Justice Policy on Bill 107, An Act to Amend the Human Rights Code.
- Presentation to the Standing Committee on Justice Policy on Bill 14, An Act to promote access to justice by amending or repealing various acts and by enacting the Legislation Act, 2005.
- Presentation to the Standing Committee on General Government on Bill 148, An Act to amend the Highway Traffic Act respecting seatbelts.
- Presentation to the Standing Committee on the Legislative Assembly on Bill 28, Mandatory Blood Testing Act.
- Presentation to the Standing Committee on Social Policy on Bill 152, An Act to modernize various Acts administered by or affecting the Ministry of Government Services.
- Presentation to the Standing Committee on Finance and Economic Affairs on Bill 187, Budget Measures and Interim Appropriation Act, 2007.
- Presentation to the Standing Committee on Finance and Economic Affairs on Bill 203, Safer Roads for a Safer Ontario Act, 2007.