DISCUSSION PAPER

ADDRESSING DISCLOSURE ISSUES IN MODERN TIMES: A COLLABORATIVE APPROACH

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The OACP is the Voice of Ontario's Police Leaders

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Executive Summary

This discussion paper aims to identify the policing challenges and opportunities posed by the *Protocol for Timely Disclosure in Criminal Cases* (the Protocol), which came into effect on February 1, 2024. The Protocol was subsumed by the Ontario Court of Justice's practice Direction on disclosure (see also this and this document).

The Ontario Association of Chiefs of Police (OACP) recognizes the fundamental importance of timely disclosure of the principles of the administration of justice. Timely disclosure is one of several Charter rights that ensure accused persons in the criminal justice system receive a fair trial in accordance with principles of fundamental justice. The OACP further recognizes that all participants in the criminal justice system are faced with increased pressures that must be addressed collaboratively to ensure these goals are met.

The following is a summary of some of the common challenges and opportunities identified by police services across Ontario, as arising from the Protocol.

Challenges

- *Availability of Administrative Resources:* Police services lack the available budgetary resources (human resources, capital resources, or technological infrastructure) to successfully meet the targets imposed by the Protocol. While some police services have already begun technology modernization projects, many other police agencies and other Ministry agencies have not yet begun this work. This creates digital infrastructure challenges on top of the human resource challenges as well. Police organizations struggle to hire and retain staff in these positions because they are generally lower-paying, entry-level positions, and staff move on quickly to other opportunities.

- *The Growing Pressures from Digital Evidence Management:* The legal framework for the current s. 11(b) time frames were made at a time that did not account for the increased pressures created by the exponential growth in digital evidence. The protocol does not practically account for the added pressures created by the extensive amounts of digital evidence that now routinely form part of a criminal investigation. The explosive increase in the amount of digital evidence that makes up nearly every criminal and provincial offence is attributed often to the police introduction of body-worn and in-car camera technology. However, the proliferation of other sources of digital evidence is as much a contributor to this increase as changes in police technology.

  Traffic investigations pertaining to fatal or serious Personal Injury Motor Vehicle Collision (PI MVC), whether criminal or Provincial Offences Act (POA), require extensive expertise of the officers utilizing digital evidence, including dash cams, event data recorders, etc. The disclosure requirements continue to add increased pressure to these complex investigations.

- *The Effects on the Quality of Investigations:* Police services are concerned that unreasonable time constraints and pressures to provide disclosure on the timeline mandated by the Practice Direction may lead to incomplete investigations, which may, in turn, result in increased errors, thereby undermining the substantive quality of prosecutions. This is particularly aggravated in complex criminal investigations, where evidence often requires external expert analysis and reports.

Opportunities

- *Locally Relevant:* Most police services have positive relationships with their local Crown Attorney office, which allows them to collaboratively determine locally relevant, reasonable, and practical timelines that can be met while maintaining high-quality investigations. Currently, there is little flexibility built into the Protocol to allow local discretion to ensure timely disclosure that meets the needs of that community.

- *Digital Evidence Management Solutions:* Collaborative working groups should focus on issues related to digital evidence management and the legal approach to search and seizure and disclosure of evidence on digital devices to streamline processes and address the management of the proliferation of digital evidence. It is critically important to find solutions not just to reasonable/realistic disclosure timelines, but to ensure that investigative and evidence handling processes keep pace with the rapid pace of change in technologies.

- *Reassessing Redaction, Transcription and Translation:* The responsibility for redaction, transcription and translation needs to be shared between police and Crowns. Considering the fundamental changes in the volume and types of evidence inherent in modern criminal investigations, police and Crowns should work collaboratively to re-assess the approach to redaction, transcription and translation of evidence. The government needs to decide who will bear the burden of this, and whoever does, should get a sufficient budget to perform the function swiftly.

- *Reducing the Administrative Burdens on Courts:* Practical solutions, such as after-hours bail court, should be considered to reduce the administrative pressures on the system, such as the availability of judicial resources, courtroom availability, and staffing pressures in local courthouses, which are equally contributing to delays in moving criminal proceedings forward in a timely manner. Such solutions need to be carefully researched and considered collaboratively by the Crown and justice partners.

Introduction

The Province of Ontario's *Protocol for Timely Disclosure in Criminal Cases* (the Protocol), which came into effect on February 1, 2024, seeks to ensure timely disclosure to enable successful prosecutions within the timelines established in *R. v. Jordan*. The Ontario Association of Chiefs of Police (OACP) noted in a letter dated February 26, 2024, to the Honourable Doug Downey, Ontario's Attorney General, our concerns with the concept of pre-charge screening, this Protocol has been universally adopted by police services across the province.

We note that the Ministry of the Attorney General (MAG) has retained the services of retired Justice Watt to address many challenges in the Court process, prosecutorial issues, and related police investigations (including evidence management and disclosure related challenges in the electronic world, R Vs. Jordan issues, etc.). Justice Watt has consulted with police services and will be making recommendations to MAG and, by extension, the Provincial Government, in this regard.

The Protocol seeks to address the concerns expressed by members of the judiciary and the Ministry of the Attorney General (MAG) over delays due to incomplete disclosure. By working with our justice partners to ensure police meet the objectives of the Protocol, our Ontario police community has signaled a clear willingness in delivering timely disclosure in criminal cases.

The Protocol aims to ensure a fair trial for the accused by giving them access to all relevant information in the prosecution's possession. The key components of the Protocol are:

- Obligation to Disclose
- Timeliness of Disclosure
- What Must Be Disclosed
- Continuous Disclosure
- Exceptions to Full Disclosure
- Digital Disclosure
- Judicial Oversight and Sanctions
- Role of the Police and Investigative Agencies
- Implications Derived from the Charter of Rights and Freedoms (Section 7 and 11(b))
- Consequences of Non-Compliance

In meetings coordinated earlier this year by the OACP and MAG, concerns have been raised, including by the Chief Justice of the Ontario Court of Justice, Her Honour Madame Justice Sharon M. Nicklas, regarding the timeliness of disclosure in criminal cases. The Chief Justice has shared statistical data with Ontario's police leaders on the average number of appearances to disposition of criminal cases and emphasized the legal obligations of police and the Crown.

We are cognizant of the need to collaborate with all justice partners to ensure timely disclosure goals are achieved.

While the police are the first point of contact when initiating the judicial system, the system is a complex network of various actors, all owning a part of the process. Delays need to be addressed, not just through a disclosure protocol. Bottlenecks in the offices of Crown Attorneys, the availability of Judicial Officials, translation services, defence counsel including Duty Counsel, victim/witness supports, and the technical capacity of all the components of the system must all be considered together, and all justice partners must focus on solutions.

The sheer volume of digital evidence that is available (Body-Worn Cameras, security camera footage, smart phone data, etc.) and the increase in digital volume exponentially is choking the system. Disclosure rules were proclaimed in a largely analogue era, and there needs to be some recognition of the challenge this flood of data presents. Without cooperation and collaboration of all justice partners, the disclosure challenges the justice system faces will only continue to grow as the volumes of digital evidence, the multijurisdictional nature of crime and the pressures on front-line resources increase.

Police Concerns

As the voice of police leadership in the Province of Ontario, the OACP plays an important role as a conduit for ensuring our justice partners are aware of the challenges and concerns resulting from the introduction of the *Protocol for Timely Disclosure in Criminal Cases*. We stress that raising these concerns in no way takes away from our sense of duty to work with our partners to ensure our common goals on timely disclosure are met.

In inviting Ontario police services to articulate their views on the Protocol, a number of common themes and concerns emerge:

- It does not include any ongoing financial support or consideration for the infrastructure required to comply with the Protocol.
- It exponentially increases the amount of work required of each police service.
- The infrastructure required includes not only additional human resources but also significant investments by police organizations in software upgrades, workspaces, computers, and training. Many police services have already had to apply to the Ministry of the Attorney General for emergency funding to provide some of the required infrastructure to comply with the Protocol. In most cases, this emergency funding will not replace the annual increase to police budgets that will be necessary to sustain the required infrastructure.
- The Protocol generally takes a “one size fits all” approach, which many police services in Ontario have noted does not adequately allow for locally focused agreements tailored to different jurisdictions. For example, one large police service reports that it has established effective practices that it is now being asked to abandon in favour of uniformity with the Protocol. Moreover, while some jurisdictions are set up to handle this model, many are not.
- The management of digital evidence, both CCTV and Body Worn Cameras (BWC), is a major challenge due to the emergence of this type of evidence resulting from new technological advancements and the need to comply with privacy legislation. For example, one service reported that it redacts and provides all BWC footage within 42 days and strives to supply footage related to impaired driving and domestic incidents within 21 days at the Crown’s request. Managing this volume of data is an immense task. A single incident can involve dozens of officers, each with recorded footage, all of which must be disclosed – even though only a few recordings may contain substantive evidence. The service reports that it currently takes approximately two hours to redact every one hour of video, adding to the strain on its resources.

This paper outlines common challenges and concerns of police services in the Province of Ontario.

Background

In the Province of Ontario, timely disclosure from police and Crown Attorneys to defence counsel is crucial for several important reasons:

Right to a Fair Trial

Timely disclosure is fundamental to an accused person's right to a fair trial, as guaranteed by the *Canadian Charter of Rights and Freedoms*. Section 7 of the Charter guarantees the right to life, liberty, and security of the person, and section 11(d) guarantees the right to be presumed innocent until proven guilty. Without full and timely disclosure, the accused cannot adequately prepare their defence, which undermines these rights.

Duty of the Crown to Disclose

Under Canadian law, the Crown has a legal duty to disclose all evidence not clearly irrelevant to the defence, whether it is inculpatory (evidence that supports the prosecution's case) or exculpatory (evidence that supports the defence). This duty was clarified in the Supreme Court of Canada case, *R. v. Stinchcombe (1991)*. The Court held that the Crown must provide full disclosure of all material evidence as soon as practicable.

Avoiding Wrongful Convictions

Full and timely disclosure is essential to preventing wrongful convictions. If the defence does not receive key evidence in time, they may be unable to challenge the prosecution's case or present their own evidence effectively. Delays or failure to disclose relevant information can lead to unfair trials and, potentially, the conviction of innocent individuals.

Efficiency of the Legal Process

Timely disclosure ensures the efficiency of the legal process by helping avoid unnecessary delays. Late disclosure can lead to adjournments, wasted court resources, and extended periods of uncertainty for the accused. It helps keep cases moving through the court system in a timely manner, preventing unnecessary backlogs.

Promoting Justice and Transparency

Timely disclosure promotes justice and transparency in the legal system. It ensures that both parties – the prosecution and defence – operate on an equal footing. Transparency builds public confidence in the criminal justice system, ensuring that decisions are based on all available evidence.

Ethical and Legal Obligations

In our justice system, the State has the disclosure obligation, and the State is represented by two separate yet inter-dependant entities: the police and the Crown. Delays or failures in disclosure can result in stays of proceedings or cases being dismissed, which can erode public trust in the justice system.

Consequences for Law Enforcement of Unrealistic Time Limits on Criminal Disclosure

Unreasonable time limits for police and Crown Attorney disclosure can undermine police investigations in several ways. These time constraints can affect the quality, integrity, and completeness of investigations, which in turn impacts the justice system as a whole:

Incomplete Investigations

When police are pressured to meet tight disclosure deadlines, they may not have enough time to fully investigate a case. This can lead to incomplete investigations, where critical evidence is overlooked or not properly collected. Rushing the investigative process compromises the thoroughness and accuracy of the findings, leading to weak or poorly constructed cases. It increases the risk that guilty individuals will be acquitted and that the innocent will be convicted.

Errors in Evidence Gathering

Police investigators may make mistakes in collecting, documenting, or analyzing evidence when they are forced to rush due to unreasonable deadlines. These errors can compromise the reliability of evidence, which might later be challenged in court or be deemed inadmissible. Incomplete or inaccurate evidence gathering weakens the prosecution's case and can even lead to acquittals of guilty parties.

Insufficient Time for Complex Cases

Some criminal cases, especially those involving serious crimes or complicated evidence (e.g., digital forensics, financial crimes), require extensive time to investigate properly. Imposing strict time limits for disclosure may prevent investigators from fully exploring all leads or gathering all necessary evidence.

Complex cases require detailed work and rushing them can result in significant gaps in the case presented to the Crown.

Hindrance in Cross-Agency Coordination

Many investigations require coordination between multiple agencies, such as police, forensic experts, or other law enforcement bodies. When unreasonable time limits are imposed, it can hinder the ability of these agencies to work together effectively. Delays in communication or collaboration due to time constraints can lead to incomplete evidence being shared with the Crown Attorney.

Pressure to Disclose Prematurely

Police may be pressured to disclose information prematurely before all evidence is collected, analyzed, or verified. It must be emphasized that premature disclosure can potentially jeopardize ongoing investigations or the ability to build a solid case.

Undermining the Prosecution's Case

If disclosure is rushed due to unreasonable time constraints, a Crown Attorney may receive incomplete or unverified evidence, which can severely undermine his or her ability to prosecute the case effectively.

A poorly constructed or incomplete case not only weakens the prosecution but also undermines the public's confidence in the criminal justice system. This can result in acquittals or mistrials, even when evidence exists that could have led to a conviction if properly handled.

Increased Risk of Charter Violations

If police and Crown Attorneys fail to provide disclosure within a reasonable time, it can result in Charter violations. Under Section 11(b) of the *Canadian Charter of Rights and Freedoms*, individuals have the right to be tried within a reasonable time. If disclosure is delayed because of investigative shortcomings, it can lead to arguments for stays of proceedings or cases being thrown out due to unreasonable delays.

Strain on Resources

Unreasonable disclosure deadlines place additional strain on already limited police resources. Investigators may have to divert attention from ongoing cases to meet disclosure obligations, leading to resource depletion and reduced effectiveness in other investigations. This strain can impact the overall quality of policing and reduce the thoroughness of investigations across multiple cases.

Impeding Investigative Best Practices

Effective investigations require the use of best practices, including thorough evidence gathering, witness interviews, forensic analysis, and case review. Unreasonable time limits may force police to cut corners, skip important steps, or make hasty decisions that undermine these best practices. The resulting investigations are likely to be flawed, increasing the risk of unjust outcomes.

Police Services' Observations on the Impact of Disclosure Protocol

Impact on Police Resources re: Administration

Timely and effective administration related to the disclosure process is critically important for ensuring the delivery of justice. Police services of all sizes are reporting major budgetary impacts because of the Protocol. Services now need to budget for and hire civilian support staff just to attempt to stay on top of disclosure, which, for both large and smaller police organizations, is prohibitive given the already significant fiscal challenges they face.

Police services must also advocate for increases in capital budgets for hardware, software, and critical infrastructure to address the technological nature of evidence and disclosure.

Police services must work closely with their local Crowns to ensure the delivery of justice. We are fully aware of the backlog of cases faced by the courts and understand the desire of the Ministry of the Attorney General to look for deferrals whenever possible. Police services have noted a number of issues that must be considered in any reform of the current processes:

- **Redaction – Impact on the volume of cases and requirements for additional staffing to meet expectations.** A specific concern repeatedly raised by police services is the requirement to complete Crown brief redactions, which has traditionally been handled by the Crown's office. Most police services lack the physical space and staffing capacity at the courthouse to manage this additional task. Standing up a unit for this purpose would involve hiring and training staff and duplicating an existing function within the local Crown's office. Furthermore, even if services were to create this unit, the unedited packages would still need to be submitted to the Crown for final review and redaction decisions. This redundancy could delay the disclosure process rather than expedite it.

- **Requirement of "dates and updated lists**" at each disclosure package date – notably the:

    - Dated List of any potentially relevant items in possession or control of police that have not been provided, reasons they have not been provided, and proposed dates of when they will be provided.
    - Dated List of any outstanding items potentially relevant items in possession or control of police that police will provide to the Crown.
    - Dated List of any potentially relevant items not yet in the possession or control of the police in which police intend to obtain and proposed dates they will be obtained and provided to the Crown.

- Police services have noted particular challenges when it comes to operating under a stricter timeline for delivering the **first disclosure package**. Justice Nicklas' proposal to reduce the first appearance timeline from five to three weeks to avoid encroaching on the *Jordan* framework would significantly impact police operations. This ruling leaves services with only 14 days to provide the initial disclosure, given

the requirement to submit the disclosure package to the Crown seven days before the first appearance.

- Regarding the **Disclosure Checklist and Tracking Form**, it has been noted that the form is several pages long and takes a considerable time to fill out. Currently, completing this form requires an extra 30-45 minutes for officers to complete. This form is to be completed at the 4-week, 6-week, and 12-week disclosure timelines. If the expectation is that this form be completed with each disclosure package, police would welcome an amendment to this form to make it a living document that can be updated with each disclosure package, rather than submitting a new checklist each time.

  This form appears to be more designed to assist the Crown workflow at the cost of the police. It uses old technology and there would certainly be the opportunity to create a document as suggested that is not created new each time, rather updated as disclosure is made. Automation and integration with RMS and DEM (spell out acronyms) could also be explored to reduce the burden on police.

In terms of **Major Cases**, for these complex investigations, disclosure is often extensive and a multi-step process. The sheer volume of evidence with the proliferation of video, body-worn and in-car cameras, and the redaction burden which these places on police services already strains resources. Imposing additional processes and timelines has the potential to render this an impossible task without a significant influx of resources and the associated financial burden.

Proper use of the DEM can greatly assist investigation teams, particularly file coordinators, track, file, and disclose large amounts of digital evidence. However, in many instances, police services report seeing slow uptake and a reticence to adapt to new ways of performing the functions or inefficient “hybrid” solutions which mix old workflows with the DEM. Feedback from those who have used the DEM is positive, but training on the platform’s use on major cases is lacking. As well, there could be significant efficiencies realized by developing integration with PowerCase. Because nearly all Ontario agencies are using the same DEM solution, and all are mandated to use PowerCase, the development work would benefit us all.

It should be noted that many Ontario police services report excellent relationships with their local Crown’s office in developing processes and workable timelines related to the increase in the volume of digital evidence and the transition to running all major cases on provincially mandated software. Services noted that it would be extremely disruptive should the Protocol be mandated to the extent that the ability of the Crown to find locally workable processes and timelines cooperatively with the police of jurisdiction is removed entirely.

Impact of Digital Evidence on Disclosure

The emergence of digital evidence as a critical factor in the ability of Ontario police services to ensure timely disclosure cannot be understated. The sheer volume of such evidence presents a clear resource challenge for police in this area of the justice process.

Volume and Growth: The volume of digital evidence is extraordinary and continues to grow as technology becomes more affordable and accessible to the public. For example, one small police service reported that the volume of disclosure takes a minimum of 40 hours per week to download, and the service now has to budget for a better system and utilize Sergeants in this area – personnel who are already overworked.

Another mid-sized service reports that the 84-day turn-around time for digital evidence, such as phone and computer analyses to be completed, is having a significant impact on its ability to deliver disclosure of digital evidence. Obstacles in this area include:

- Device encryption and the need for specialized techniques to unlock devices can sometimes take weeks, months, or longer to acquire the data.
- Concerns about the proliferation of solicitor-client privileged materials on devices have required further legal safeguards, which can significantly prolong the extraction process. The process for digital searches of devices that may contain solicitor-client protected communications urgently needs to be modernized.
- Crowns are not assigned cases in a timely manner, and although some police services report that they have met their disclosure obligation of 84 days, meaningful consultation with investigators comes much later.
- To this end, if the police are committing significant resources to ensure timely disclosure, the next link in the chain, the Crowns, needs to have earlier case assignments and review and scheduling of judicial pre-trail with the defence.

Role in Legal Proceedings: Digital evidence plays a significant role in the prosecution and defence of an accused individual.

Inclusion in Investigations: Even the most basic investigation will include some element of digital evidence, such as:

- officer body-worn camera video
- officer in car camera video
- private CCTV video
- police station video
- 9-1-1 audio recordings.

An example of the challenges facing all police services – no matter their size – is that of the Toronto Police Service. The service currently processes a petabyte (PB) (a measure of memory or data storage capacity that is equal to 2 to the 50th power of bytes. There are 1,024 terabytes in a petabyte, and approximately 1,024 PB make up one exabyte) of digital information every year. That's equivalent to one million, one-gigabyte laptops every year and it is growing exponentially.

The legal rulings on disclosure that led to the Protocol came at a time when there might be a handful of witnesses for each case. Now, with surveillance cameras in millions of businesses and homes and additional dashcams and mobile phone cameras saturating society, police have hundreds of potential witnesses, even in the smallest of cases. All of that digital evidence has to be viewed, cataloged, redacted, and disclosed.

While AI tools exist today that can help with vetting video, procuring these can be costly, can create integration and workflow challenges, and have not been tested in court.

The narrative around this situation should not be painted as a failure of police to meet disclosure timelines; the reality is that the Protocol timelines don't factor in the new and expanding volume of disclosure. It is unreasonable for police to disclose every piece of digital evidence with such tight timeliness.

The pending changes through NG-911 will only increase the volume of digital evidence received by police services. Communication centres will begin to receive thousands of videos from crime scenes, FaceTime-style calls will form part of the initial victim disclosure, and multiple videos will be received from multiple witnesses to motor vehicle collisions. The possibilities are endless.

Redaction Time: Redaction obligations on police services have a major impact on the ability of police services to deliver on timely disclosure. For example, one large service estimates it takes three minutes to effectively redact every one minute of video.

A single incident can involve dozens of officers, each with recorded footage, all of which must be disclosed—even though only a few recordings may contain substantive evidence. It currently takes approximately two hours to redact every one hour of video, adding to the strain on the service's resources.

There would be great value in amending the Directive to clarify what would be considered substantive or relevant, particularly in terms of the first disclosure requirements. Some police services are only providing redaction of arresting officer footage and witness statements for first appearances while others are providing all officer footage. This may not be realistic with more cameras deployed.

Privacy Concerns: Significant third-party privacy concerns/case law require careful review and redaction of any digital evidence including, but not limited to:

- Video recording members of the public who have no role in an investigation.
- Digital evidence recording audio of unrelated conversations
- Digital evidence recording police dispatch audio of unrelated police radio calls
- Digital evidence recording the public's personal identifiers

Translation Delays: Police services, especially in the Greater Toronto Area with its diverse population, experience digital evidence disclosure delays due to the need for translation of recordings to English.

Major Case Management Issues: The Public Prosecution Service of Canada (PPSC) is not accepting electronic disclosure through file transfer systems, which requires police services to physically deliver it to their office. A solution to this is to allow for disclosure through a file transfer system in the future.

The PPSC is currently in a procurement process to obtain its own Digital Evidence Management (DEM) solution. Federal procurement processes are just as challenging as

provincial procurement processes and so an implementation time is not known currently. However, the DEM already provides for the ability to deliver evidence digitally to the PPSC, regardless of the status of their own DEM. Of note is the fact that PPSC Crown agents are not compensated effectively to deal with digital evidence. Their payment schedule is outdated and is based on a paper-based system. The PPSC DEM procurement intends to ensure that DEM access is provided to agents as well as PPSC counsel offices. If police agencies simply declared that we were going to provide this evidence electronically, it would reduce the burden on the police and shift it to the Crown.

Some services also note that it takes time to upload/download large disclosure packages due to the size of files and slower network speeds (i.e., some video surveillance takes over a day to upload to a USB/file transfer system to disclose, plus the same time for the Crown's assistant to download on their end). It is anticipated that new technology in this area could help alleviate most of this time delay.

The management of digital evidence requires police services to allocate resources in several areas and manage potential consequences of the Protocol:

- **Efficiency and Effectiveness** (streamline processes, implement system and process changes)
- **System Development and Training** (develop and manage the system or workflow established from the protocol, including the creation of related training materials; ongoing training to ensure all members are proficient in the new procedures and technologies). These digital evidence management systems are designed to be easy to use and maintain by those without significant technological skills. This makes the training and implementation of these technologies easier than it may have been in the past with new tech.
- **Procedure and Policy Development** (continually develop and refine internal procedures in collaboration with external stakeholders)
- **Delays in the Judicial System** (Public safety concerns stemming from delays in charging or proceeding with a case, especially if it allows individuals to re-offend)
- **Courtroom Efficiency** – Over the past decade, police have observed that courtrooms are less efficient, with frequent delays that lead to wasted time for all parties involved – victims, witnesses, and the justice system. The lack of accountability for the accused and/or legal counsel being unprepared or unavailable is a significant issue that impacts the entire process.

Complex Cases Involving Firearm, Biology (DNA)/Chemistry/Toxicology Items, or Electronic Devices

In any case where a firearm, biology (DNA)/chemistry/toxicology items or cell phone(s) are involved, it takes a minimum of three months and upwards of a year to analyze and obtain results. The time in which police get these results back is directly related to the capacity of external agencies to process the evidence.

There is no feasible way to have these external agencies analyze these items under 21 days and complete disclosure within the timelines set out in the Protocol. Furthermore:

- Any complex/major crime investigation that involves a tracking warrant or wiretap is generally part of a project which usually exceeds six months given the many investigative strategies needed to conclude the case.
- Any drug case in which items are sent to Health Canada for analysis generally takes at least a month to come back, sometimes more – so any drug case cannot be completed in 21 days.
- It can be challenging to submit disclosure within the timeline set out in the Protocol when officers are out of the workplace for any length of time (injury, illness, annual leave, parental leave, bereavement leave, suspensions, etc.)
- Obtaining evidence from third parties can be challenging and time-consuming (Centre for Forensic Sciences reports, medical records, video evidence). Also, a concern has been raised that Scheduling Crown Operations Prepared Electronically (SCOPE) will not allow executable video player files to be imported, which can lead to delays in media disclosure. This concern is anticipated to increase as more and more police services implement BWC.

After-hours Bail Court for Serious Matters

There are opportunities for creative solutions to address the administrative burdens on criminal proceedings. For example, one police service has proposed that the Ontario Court of Justice consider creating an after-hours bail court for serious matters pursuant to section 469 of the *Criminal Code* whereby the police are lawfully in the throes of an investigation and respectful of Section 503 (1) of the Criminal Code of Canada.

The Supreme Court of Canada has made several rulings that help police better understand the guidelines they must follow to gather admissible evidence.
According to the Supreme Court of Canada in *R. v Storrey (1990*),

> *An arrest which is lawfully made does not become unlawful simply because the police intend to continue their investigation after the arrest. Here, the police had reasonable and probable grounds to arrest the appellant and there was nothing improper about their intention to continue the investigation. Neither that intention nor the continued investigation made the arrest unlawful.*
>
> *The appellant's detention for 18 hours before the charge was laid, primarily for the purpose of furthering the police investigation, did not constitute an arbitrary detention.*

The Criminal Code has codified the need to have an accused person taken before a Justice without unreasonable delay and as soon as possible within a 24-hour period. Non-compliance with meeting this time frame can result in the trier of fact resolving the matter in a variety of ways. The Attorney General of Ontario's submission to the Supreme Court of Canada in *R. vs. Reilly* (SCC File No. 38785) identified seven possible remedies, inclusive of stays of proceedings.

Where an accused is charged with an offence listed in section 469, no court, judge, or justice, other than a judge of or a judge presiding in a superior court of criminal jurisdiction for the province in which the accused is so charged, may release the accused before or

after the accused has been ordered to stand trial.

For greater clarity, section 469 of the *Criminal Code* states:

> Every court of criminal jurisdiction has jurisdiction to try an indictable offence other than
>
> a) An offence under any of the following sections:
>
> i) section 47 (treason)
> ii) repealed
> iii) section 51 (intimidating Parliament or a legislature)
> iv) section 53 (inciting mutiny)
> v) section 61 (seditious offences)
> vi) section 74 (piracy)
> vii) section 75 (piratical acts)
> viii) section 235 (murder)
>
> b) the offence of being an accessory after the fact to high treason or treason or murder
> c) an offence under section 119 (bribery) by the holder of a judicial office

Pursuant to section 522, only a Superior Court judge has jurisdiction to hear evidence in a bail hearing for a person charged with any offence listed in section 469.

As detailed above, there are, at times, competing interests in society's pursuit of justice. On one hand, the law and courts have determined that the police have a responsibility to investigate and solve crime. On the other hand, the law and courts have determined that a detained person must be taken before a justice within 24 hours. Creating an after-hours court to hold Special Bail Hearings modelled on a framework that already exists for the current after-hours Telewarrant Protocol is one solution that warrants consideration by MAG.

The purpose of sharing this service's submission on a possible remedy to the disclosure pressures faced by our justice system is to indicate that Ontario police services are ready to "think outside the box" on practical, workable solutions.

Substantial Disclosure

The term "substantial disclosure" is found in item 15 of the OCJ Directive. Police services would benefit from further clarity in a few areas:

- **Definition Clarity:** It would be of great assistance to police services to receive a clear definition of the term "substantial disclosure."
- **Prioritization**: A clear definition of the items required to meet substantial disclosure would assist police services in prioritizing efforts.
- **Efficiency Improvement**: Defining the term "relevant disclosure" would improve efficiencies. Police services have become weighed down by overly broad disclosure requests made by defence counsel without any necessary articulation.

We would also point out that other jurisdictions, such as those in England, have disclosure rules that Ontario could consider, including a definition of what constitutes “substantial” disclosure.

OACP Observations on Criminal Disclosure and 11 (b) Delays

Section 11(b) of the *Charter* guarantees the right to be tried within a reasonable time, and, for 24 years, *R.* v. *Morin*, [1992] 1 S.C.R. 771 was the leading case on trial delay. In 2016, a majority of the Supreme Court of Canada (SCC) found that *Morin* was too unpredictable, too confusing, and too complex. Moreover, its application did not encourage participants in the justice system to take preventative measures to address inefficient practices and resourcing problems. So, in *R.* v. *Jordan*, 2016 SCC 27, the SCC developed a new framework to combat the criminal justice system’s “culture of complacency”.

Jordan forced justice system participants to look for ways to maximize efficiency and minimize delay. On the disclosure front, a series of meetings between MAG and the police has led to the two relatively unsuccessful Formal Memorandum of Understanding (FMOUs) and the more recent Disclosure Protocol. In our respectful opinion, *Jordan* calls for fundamental changes to the way we do business. The Protocol simply prescribes rigid timelines for existing disclosure practices. Rather than looking for innovative ways to address the concerns about timely criminal disclosure, there seems to be a focus on funneling yet more administrative resources into our inefficient disclosure system.

One of the impediments to disclosure modernization is MAG’s persistent adherence to the *LeSage Report*’s recommendations on disclosure redaction. The 2008 report was commissioned by Ontario’s Attorney General to review large and complex criminal case procedures to identify issues and recommend solutions to move complex cases through the justice system faster and more effectively.

The *LeSage Report* recommended that the police should redact all disclosure and then provide the Crown with both a redacted and unredacted copy so that the Crown may review the brief and make final redaction decisions. The spirit of this was in relation to police having the best knowledge of what is required to protect investigative techniques, victim safety, source information etc. It was not meant to compel police to complete all vetting required in the initial copy to the Crown. This process of having both the police and the Crown separately review the disclosure for redaction is replicated in the current Protocol. Unfortunately, in many jurisdictions across Ontario, neither the police nor the Crown have the resources to redact disclosure in this fashion.

We do not believe that any jurisdiction has the ability to apply this process to the redaction of BWCs and other digital image disclosures. It would be more efficient for the police and the Crown to pool their resources and create joint disclosure offices. For this to work, we would need to have a standardized redaction protocol of what is and isn’t redacted. As mentioned earlier, there is currently no standard redaction protocol. We would all benefit from a standardization of a realistic and achievable standard across all agencies in Ontario.

Properly trained clerks would be able to redact disclosure without having two separate offices review the records for redaction. Of course, in appropriate circumstances, the clerk may have to consult with either the police or the Crown to address redactions related to privilege or relevance.

MAG has resisted this type of proposal, claiming it erodes police/Crown independence. However, the Windsor Joint Forces Court Services was set up in the late 1980s to handle disclosure and other functions relevant to the early stages of the criminal process. It was set up in response to the 1987 *Zuber Report* and was praised in the 1993 *Martin Committee Report*. It should be noted that trained clerks are already responsible for redacting and releasing police records through Freedom of Information requests and civil third-party records applications.

Creating a joint police/Crown disclosure may also pave the way for other innovations, such as the use of artificial intelligence in the preparation of summary reports, redaction, and transcription. It may also facilitate the interoperability between police and Crown records and digital evidence management systems.

Finally, we note that both of the FMOUs and many of the recent police/MAG discussions on disclosure have framed the *Jordan* decision as the SCC emphasizing the pressing obligation to provide disclosure. In fact, in both *Jordan* and its companion case *R. v. Williamson, 2016 SCC 28*, the delay issues were far more systemic than mere late disclosure. Much of the delay in *Jordan* was institutional delay brought on, in part, by the Crown's inaccurate assessment of the time required for the preliminary inquiry.

In *Williamson*, one month and four days were attributed to the late disclosure of two video interviews, whereas the trial judge attributed 26 months to institutional delay. We are not trying to minimize the impact disclosure has on trial delays. However, we do believe that the issue of trial delay is multifaceted and systemic across the entire justice system and that the entire justice process must be viewed through the lens of innovation.

Both the police and the Crown play pivotal roles in upholding the rights of the accused by ensuring all relevant evidence is disclosed to the defence in a timely fashion. We are pleased to work closely with MAG to look for innovative ways to ensure we adhere to both our *Stinchcombe* and *Jordan* obligations. In our view, the disclosure protocol should be more than arbitrary timelines and the allocation of resources.

As the majority notes in *Jordan* [at para. 117]:

> *By encouraging all justice system participants to be more proactive, some resource issues will naturally be resolved because parties will be encouraged to eliminate or avoid inefficient practices. At the same time, the new framework implicates the sufficiency of resources by reminding legislators and ministers that unreasonable delay in bringing accused persons to trial is not merely contrary to the public interest: It is constitutionally impermissible and will be treated as such.*

Conclusion

Ontario police services believe that collaboration by all justice partners regarding timely and efficient disclosure is vital to the effectiveness and efficiency of our justice system and the delivery of justice for victims of crime.

We are also sensitive to the need to protect Canadians' rights under our justice system. That's why it is incumbent upon police to work closely with our justice partners on practical solutions that do not negatively impact on any partner's ability to contribute to the effectiveness of our justice system.

Police services are ready to offer practical solutions to the challenges surrounding timely disclosure.

In today's evidence-based society, the judicial system must implement tracking metrics, such as case duration, frequency of delays, causes of adjournments, and the impact on victims and public safety. There are efforts in some jurisdictions to implement performance measures for courts, but these may not be universally applied or consistently enforced.

We also note that some countries or provinces have adopted more efficient court practices, such as setting stricter limits on adjournments or using technology to streamline case management. Canada has seen reforms, but more could be done to learn from jurisdictions with lower court backlogs and quicker case resolutions.

All justice system partners, including Justices, prosecutors, and policymakers, need to reevaluate current practices to ensure they are not sacrificing public safety or transparency to manage caseloads. While efficiency is important, it must be balanced with the need to protect victims and ensure that justice is served without unnecessary delays.

As Ontario's police leaders, OACP members are always ready to engage in discussions to address a systemic gap and create a model that maintains trust and confidence in the justice system.

Appendix – Disclosure Implications for Federal Policing (Royal Canadian Mounted Police ~ Gendarmerie Royale du Canada)

The RCMP plays a distinctive role within the provincial policing context. As the RCMP does not respond to regular public service calls, its resource allocation can prioritize criminal investigations, even amid non-criminal duties such as VIP protection, or out-of-province policing requests.

Initiatives for Timely Disclosure

The RCMP has implemented a number of important initiatives related to timely disclosure that should be acknowledged in this discussion:

- Electronic Major Case Management (eMCM) Unit: dedicated, experienced personnel focused on assembling material from investigators into comprehensive disclosure packages. This team actively troubleshoots issues that may arise during the process and provides timely reminders about disclosure obligations.

- Reporting Mechanisms: eMCM can generate status reports for both Team Commanders (Case Managers) and Senior Management to keep stakeholders informed about disclosure progress.

Support from the Office of Investigative Standards and Practices (OISP)

OISP plays a crucial role in addressing advanced disclosure queries:

- Training on Redactions: OISP provides valuable training to investigative units regarding redaction authorities, ensuring that all sensitive information is handled appropriately.
- Individual Investigator Redactions: eMCM and OISP have shifted redaction responsibility to the investigator submitting a document. This has removed an administrative constraint of one member reviewing and redacting all casefile documents, at times with imperfect information, and has reduced resources being directed to “re-redacting” materials.
- Case Volume Management: The OISP is actively collaborating with units to reduce overall case volume and emphasizes the importance of timely Report to Crown Counsel submissions. This approach serves as a roadmap to pinpoint unresolved areas that require further investigation.
- Disclosure Readiness Appraisals: To bolster preparation for disclosure, the OISP conducts disclosure readiness appraisals (Independent File Reviews – IFR’s) for various clients, ensuring that packages are complete and compliant.
- Delayed Charging: OISP has provided delayed charging as a strategic consideration for ongoing investigations with larger disclosure obligations, should circumstances permit.(This has been supported by both MAG and Public Prosecution Service of Canada (PPSC)).

Early Engagement with Crown Counsel

Investigators are encouraged to engage with Crown Counsel at the onset of investigations:

- Facilitating Understanding: Early contact allows Crown Counsel to grasp the nature of the disclosures and anticipate how they will be processed.
- Multiple Waves of Disclosure: This practice enables multiple rounds of disclosure to be provided ahead of charges, facilitating a smoother transition into prosecution.
- Proactive Case Planning: The typical size and complexity of cases allow investigators to proactively plan takedowns rather than reacting to disclosure demands post-investigation.

Digital Forensics and Evidence Handling

- The collaboration between Digital Forensic Services (DFS) and OISP focuses on setting “drop-dead” timelines for the examination of seized electronic devices. If these devices cannot be analyzed within a specified time frame, the RCMP may forgo the potential evidence to avoid Section 11(b) Charter challenges, thereby prioritizing the speed and integrity of the disclosure process.

Challenges to Effective Disclosure

- Absence of Standardized MAG Disclosure Package: The lack of a standardized disclosure package for MAG results in inconsistencies when local Crowns impose varying disclosure preferences. This leads to delays, as reorganizing extensive documentation, when requested ad hoc by individual MAG Crowns, can be cumbersome.
- Resource Limitations for MAG Crowns: Many Crowns do not have adequate resources to handle pre-charge disclosure waves efficiently. When additional organization is requested, it complicates the process significantly.