

The Duty to Disclose

The Challenges, Costs and Possible Solutions: Final Report



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Collaborative Centre for
Justice and Safety

University
of **Regina**

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I. EXECUTIVE SUMMARY

Background and Study Objectives

In recent years, there has been a growing interest in holding public safety services such as the police more accountable for their performance as publically funded agencies (Ruddell & Jones, 2014). As a result, there has been a determined and focused search for cost efficiencies within the criminal justice system. One area where there has been an increase in workload and costs is due to legal requirements associated with pre-trial disclosure. While Cowper (2012) noted that the disclosure ruling in the Supreme Court's *R. v. Stinchcombe* (1991) decision was predicted to result in an increased number of pre-court resolutions, which has not always been the case. Malm, Pollard, Brantingham, Tinsley, Plecas, Brantingham, Cohen and Kinney (2005, p. 13) reported that disclosure requirements have, in some cases, had a "debilitating, effect on police resources." Given the inter-related nature of the justice system, it is not difficult to see how this costly requirement also impacts upon the operations and budgets of Public Prosecutor Units as well. The *Stinchcombe* decision has resulted in justice agencies having to balance the requirements of the court ruling to ensure just and fair outcomes for the accused, while seeking strategies to ameliorate the increased workload they have experienced.

The purpose of this report was to shed light on the practice of disclosure in Saskatchewan using information collected from justice-system practitioners and stakeholders, as well as practitioners from other provinces. Based on an analysis of their observations, four broad recommendations were generated that incorporated suggestions from the Saskatchewan participants, while also giving consideration to best practices reported by officials from other provinces who are grappling with similar issues. These recommendations fall under the broad themes of: 1) legal issues and requirements, 2) standardization of disclosure packages, 3) electronic forms of disclosure, and 4) transcription.

Method

This study employed a variety of research methods in order to increase our understanding of disclosure issues within and outside Saskatchewan. After a comprehensive literature review was carried out, a series of thirty-seven semi-structured interviews was conducted. Twenty-nine face-to-face interviews with police personnel, Crown prosecutors, defence counsel and one judge were conducted in Saskatchewan. An additional eight participants from British Columbia,

Alberta, Manitoba, Ontario, and Nova Scotia, representing their respective Ministries of Justice, Prosecution branches, and police services were also interviewed. Attride-Stirling's (2001) thematic network analysis was used to analyze the transcribed interviews.

In addition to the interviews, a "transcription form," that was intended to identify the processes and costs associated with transcription was provided to a number of Saskatchewan police services and this yielded responses from five agencies. Finally, a review of web-based documents found on provincial government websites from across the country was conducted. This component of the research used qualitative content analysis to identify the different disclosure practices.

Limitations

There are some limitations associated with the research. The interview component of the research was limited in several ways: 1) although Crown and police personnel were sampled from each prosecutorial region in the province, only one region had defence counsel representation; 2) travel budgets and schedules did not permit the researcher to obtain interviews with all of the potential participants; 3) participation from outside of the province was limited in its scope (i.e. no defence counsel outside of Saskatchewan were interviewed); 4) some police services/prosecutor offices were over-sampled due to participant availability and their desire to participate; and 5) while judicial participation was sought, only one retired judge responded as it was suggested that it was inappropriate for the judiciary to comment given their roles as adjudicators of disclosure issues. In addition, the "transcript cost" component of the research was limited by the lack of consistent methods of recording by the police services as to the actual costs of transcription (e.g., these costs are not reported consistently). In addition, no data were collected from either the Crown or defence as to the costs they incurred when transcribing police statements. As such, the cost estimates that are reported for transcriptions are incomplete and only approximate the true costs.

Conclusions

The literature review, content analyses, examination of agency cost estimates and the analyses of the 38 interviews resulted in the identification of four broad themes associated with disclosure: 1) legal issues and requirements, 2) standardization of disclosure packages, 3) electronic disclosure, and 4) transcription. A brief summary of each category is presented below and an expanded list of these recommendations, presented in Table 1, follows those conclusions

(a rationale for these recommendations is provided at the end of the report). The researcher did not take into account the potential financial costs associated with the implementation of these recommendations. Rather, these recommendations were based upon the “best practices” identified by the Saskatchewan participants while also considering practices in other provinces that align with, and/or address, similar disclosure-related issues.

Legal Issues and Requirements

The results of the research were consistent with the literature review surrounding the issues and challenges faced by criminal justice personnel as a result of the landmark cases of *R v. Stinchcombe*, *R. v. McNeil*, and *R v. O’Connor*. While it was consistently reported that the rationale and intentions behind those legal decisions were sound, there were unanticipated outcomes. While some legal scholars observed that there were potential efficiencies that might have arisen from these decisions, the majority of practitioners suggested that the end result was a problematic increase in the workload associated with meeting these legal requirements. The analyses revealed that there was very little variation between any of the provincial jurisdictions with regard to: 1) determinations of relevance, 2) producing complete disclosure packages amidst oftentimes very short timelines, 3) addressing requests for third-party evidentiary records, 4) the potential misuse of disclosure (particularly in the context of increased ease and accessibility of the internet), as well as, 5) the perception that, at least to some degree, disclosure requirements have become a tool for defence that contravenes the intentions behind the duty to disclose. These issues were reported as increasing police and prosecutor workloads. Consistent with the findings from the literature review, it was reported that abiding with the *Stinchcombe* requirements had reduced the capacity of justice personnel to undertake their core functions given the increased administrative requirements.

Of particular relevance to the province of Saskatchewan, it was reported that the practice of Royal Canadian Mounted Police (RCMP) members acting as Crown counsel in a number of rural or remote locations was problematic in terms of disclosure. This practice was not seen as consistent with the notion that the Crown, who bear the ultimate responsibility for disclosure of materials, should be in control of the flow of disclosed materials. Instead, this was seen as undermining full disclosure and potentially costly in terms of processing disclosure requests as well as creating the possibility of negative court decisions by having the police acting in prosecutorial roles. In addition, the time spent by police personnel in the performance of these

additional duties placed a burden on the detachment by reducing the time devoted to core policing functions.

Standardization of Disclosure Packages

The recommendation by participants that disclosure packages should be standardized emerged from a lack of consistency across the province of what materials were provided to the Crown as well as concerns regarding the completeness, quality, and organization of disclosure packages. Participants recognized that moving toward a standardized disclosure package would be costly in terms of changing current operational practices and increasing police workloads in the preparation of these packages. However, it was also suggested that this workload would eventually be reduced once the standardized format became the norm. Standardization would also create efficiencies for police by reducing requests resulting from incomplete disclosure packages. In addition, consistent and better quality packages are predicted to reduce court time allocated to disclosure issues. Lastly, standardized disclosure packages have the potential to increase the number of pre-trial resolutions as well as reducing replication and duplication of efforts.

Standardization has been achieved in other provinces, and according to respondents interviewed in this study, some of the positive results reported above have been achieved. In consideration of standardizing disclosure packages, the findings in the literature review also suggest that standardizing police reporting mechanisms, by incorporating the National Information Exchange Model (NIEM) recommended by the Canadian Association of Chiefs of Police, is a logical outcome of this approach.

Electronic Disclosure

The increased use of technology in society presents justice personnel with a number of challenges with respect to disclosure. Video evidence is frequently collected from a number of public and private sources—including security cameras, smart phones, wiretapping, police recording of statements—and this has the potential to generate unwieldy volumes of electronic evidence. Storing, cataloguing and retrieving this evidence has generated the need to fulfill disclosure requirements using only electronic formats. Electronic disclosure is already a reality to some degree across the country; however, the progress toward fully electronic disclosure has been hampered by a resistance to change from paper copies, outdated or incompatible

information technology structures and capacity, misaligned operational practices within the justice system and financial barriers to adopting new technology.

This research suggests that fully electronic disclosure is inevitable in the future and Canadian case law has typically supported this progression. It was also found that electronic disclosure is positioned to provide some solutions to the previously noted challenges faced in the disclosure process, and in particular, meeting strict time requirements as well as facilitating more effective information sharing. Despite the initial cost burden incurred in introducing electronic disclosure programs and processes, it was suggested that long-term cost-savings, when compared to providing printed disclosure packages, would be realized. In order to fully implement electronic disclosure protocols a systems approach is needed, wherein technological structures and business processes are aligned across all components of the criminal justice system (police, Crown, courts and corrections). As a final note, respondents expressed concern that consideration must be given to the so-called “weakest link,” such that disclosure processes must be workable for all parties, even those with the fewest resources.

Transcription

The findings regarding the transcription of recorded statements taken by the police largely focussed on financial and procedural considerations. Case law as well as the outcomes from the analyses completed for this report makes it evident that the police have met their legal disclosure obligations by providing recorded statements in a useable format (e.g., a tape recording). It would be incredibly rare that the format of the recording (i.e. the software used) would be unusable given the greater consistency and compatibility in formats, especially after the police have distributed software to all end users accessing these recordings. Nevertheless, the use of transcripts was recognized as an important tool for use in court given the pitfalls and cumbersome nature of the electronic mediums.

The processes for producing transcripts as well as the determination regarding who bears the financial burden for their production vary across the country. Some jurisdictions require the police to produce and pay for transcription, others place the burden with the Crown, and in another, it is a shared responsibility. The production of transcripts also varies depending on the responsibility mandated by different provinces; transcripts are completed: 1) “in-house” by police and/or civilian personnel within police services, 2) within a centralized transcription unit as well as 3) contracted out to third-party vendors. As a possible mediating solution, voice-to-

text software was being used by police personnel, but due to software capabilities was only used to transcribe officer notes. Altogether, the burden of transcription costs differs throughout the country and there is no common approach.

II. LIST OF RECOMMENDATIONS

Table 1: List of Recommendations

Recommendation 1: Legal Issues and Requirements

Recommendation 1.1: Crown Counsel Assume Responsibility for Court

It is recommended that the Crown assume the responsibility of providing prosecutors in locations currently using police officers.

Recommendation 1.1a: Explore Expanding the use of Video Court

It is recommended that the Government of Saskatchewan explore expanding the use of video courts across the province.

Recommendation 1.1b: Disclosure Training for Police Officers in Saskatchewan

It is recommended that the Saskatchewan Association of Chiefs of Police ensure that their personnel receive training on disclosure requirements and the effects of incomplete disclosure on the administration of justice.

Recommendation 2: Standardization of Disclosure Packages

Recommendation 2.1: Form a Disclosure Standardization Committee

It is recommended that the Government of Saskatchewan form a committee to develop a standardized format for disclosure packages.

Recommendation 2.2: Explore Ontario's 52-File Format

It is recommended that the Saskatchewan Ministry of Justice examine and give consideration to the feasibility of using the 52-file format employed in Ontario as a framework for the discussion of standardizing disclosure packages.

Recommendation 2.3: Create a Centralized Disclosure Unit

It is recommended that the Government of Saskatchewan give consideration to the creation of a centralized disclosure unit housed within the Ministry of Justice.

Recommendation 2.4: Develop a Disclosure Tracking Mechanism

It is recommended that the Government of Saskatchewan create a province-wide tracking system with standardized timeliness and other quality control mechanisms for early disclosure preparations, compliance with disclosure standards, and trial readiness.

Recommendation 2.5: Provide Cross-training on the Standardized Package

It is recommended that the Government of Saskatchewan create and undertake the necessary steps to ensure training on the standardized format.

Recommendation 2.6: Standardize Police Data Reporting

It is recommended that the Government of Saskatchewan, in their progression toward a standardized disclosure package, also consider adopting the National Information Exchange Model (NIEM) as advocated by the Canadian Association of Chiefs of Police.

Recommendation 2.7: Shared Vetting Responsibilities

It is recommended that, as part of the standardized disclosure package, police vet and mark in the first instance all disclosed materials to the Crown that fall within the legally permissible exclusions for disclosure. The Crown engages in the final vetting of the materials prior to transmission to the defence or self-represented accused.

Recommendation 3: Electronic Disclosure

Recommendation 3.1: Form an Electronic Disclosure Committee

It is recommended that the Government of Saskatchewan form a committee to further examine, develop and implement the expanded use of electronic disclosure within the province, and that the committee establish guidelines for evaluating the success of these endeavours.

Recommendation 3.2: Employ a Systems Approach

It is recommended that the Government of Saskatchewan employ a system-wide approach in the

development of electronic disclosure that aligns the business practices and protocols for police services, prosecution units, the court operations and corrections.

Recommendation 3.3: Explore the use of PRISM

It is recommended that the Government of Saskatchewan explore the PRISM disclosure system and processes currently used in Manitoba and Alberta, as a possible mechanism for use in Saskatchewan.

Recommendation 3.4: Explore the possibility of an Internet-Based Format

It is recommended that the Government of Saskatchewan explore the viability of an internet-based electronic disclosure protocol.

Recommendation 4: Transcription

Recommendation 4.1: Form a Transcription Committee

It is recommended that the Government of Saskatchewan facilitate the formation of a committee to develop a province-wide memorandum of understanding that clearly outlines the various partner's roles in the provision and production of transcripts.

Recommendation 4.2: Ministry of Justice assume responsibility for Transcription

Determination and Costs

It is recommended that the Public Prosecutions branch of the Saskatchewan Ministry of Justice make a determination as to which recorded statements, or parts thereof, will be transcribed as well as bear the financial burdens associated with the production of those transcripts.

Recommendation 4.2.a: Police Transcript Responsibilities

It is recommended that the police provide, at no charge, any transcript produced as part of a police investigation.

Recommendation 4.2.b: Police Statement Marking Responsibilities

It is recommended that the Saskatchewan Association of Chiefs of Police instruct their personnel to provide marked (time-stamped) annotations with each recorded

statement as to the information contained within recorded statements.

Recommendation 4.3: Transcription Unit or Public Tender

It is recommended that either the Government of Saskatchewan explore the creation of a Centralized Transcription Unit housed within the Ministry of Justice OR tender transcription services to a private vendor.

Recommendation 4.4: Track Transcription Costs

It is recommended that the Government of Saskatchewan create a mechanism for tracking expenditures for transcription.

Recommendation 5: Province-Wide Memorandum of Understanding

It is recommended that the government of Saskatchewan request and review the memorandum of understanding created in the province of British Columbia as a reference for the creation of a province-wide memorandum understanding that addresses the multiple disclosure-related issues raised in this report.

III. LEGAL CASE REVIEW SUMMARY

The origin of the duty to disclose is found in case law, and was affirmed under section 7 of the *Charter of Rights and Freedoms*. The basis of recent elaboration of the duty is found in the judgment of the Supreme Court of Canada in *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, where a very broad duty to disclose was outlined (hereafter *Stinchcombe*).

Ideally, disclosure should take place before an accused enters a plea or elects a mode of trial, but after charges have been laid. However, there is some discretion allowed in the timing of disclosure. The exercise of this discretion is reviewable by the trial judge. In principle, the Crown has a duty to disclose to the accused all material in its possession that has a bearing on the case, whether that evidence is inculpatory or exculpatory. The duty is ongoing, with the result that additional disclosure must be made as the Crown comes into possession of new evidence.

The Crown is under no obligation to disclose evidence that is clearly irrelevant to the case at hand, though the Supreme Court has cautioned that the Crown should “err on the side of

inclusion.” Disclosure may be delayed if it would have the effect of impeding the completion of an investigation; this, the Court has observed, must be a very rare occurrence. Questions of privilege (relating to a number of areas) may also arise, and will affect whether particular pieces of evidence will be disclosed or not. Questions of privacy may also affect disclosure. In some cases, specific legislation with respect to privacy will determine whether or not disclosure is proper. In other cases, the courts will be required to decide the issue.

The onus is on the Crown to justify any decision not to disclose material in its possession to the accused. The Crown has a duty to make reasonable efforts to discover evidence that is relevant to a case, whether that evidence is held by other Crown entities or by third parties. In all cases where the Crown has chosen not to disclose evidence to the accused, the discretion of the Crown is reviewable by the trial judge.

The Supreme Court has made it clear that the “police (or other investigating state authority)” have a duty to disclose the “fruits of the investigation” to the Crown. There is also a duty on police to disclose evidence to the Crown of findings of serious misconduct by officers involved in the investigation. This must be disclosed to the Crown “*without prompting*” on the part of the Crown or of the accused. In both these instances, the materials provided by police are a part of the requirement for first party disclosure.

Material disclosed to the accused must be in a useable form. The trial judge will hear argument about whether this requirement has been met. In Saskatchewan, the Court of Appeal has required the Crown to supply the accused with a “Laporte inventory,” making the accused aware of what evidence is in the possession of the Crown even if it is not being disclosed. The accused may also apply for third party disclosure. Police may be subject to a request for third party disclosure, especially with respect to records of police misconduct.

Breaches of the duty to disclose may lead to a variety of consequences, depending on the severity of the breach and the impact of the breach on the accused. These outcomes could include allowing an accused to withdraw a “guilty” plea, a delay in moving to trial, the ordering of a new trial, or the staying of charges (for a complete version of the legal case review see Appendix 1).

IV. DISCLOSURE FOUNDATIONS AND PRINCIPLES

Disclosure in Canadian criminal law has a long and contentious history given its relationship to perceived and real miscarriages of justice resulting in wrongful convictions. According to Maude (1999, p. 716), Crown disclosure of all relevant materials to the defence has been argued by some as necessary given the disparities in resources between the state and the accused. The obligatory foundation of full disclosure by Crown to the defence arose from common law decisions, eventually establishing the obligation within the context of the *Charter of Rights and Freedoms* (Williams, 1996). This review of the literature is not intended to be exhaustive; but rather, to present a synopsis of the foundation upon which the duty to disclose arose as well as address a few of the resulting principles and some of the issues associated with this obligation.

Prior to *Stinchcombe*, and other cases that followed (specifically *O'Connor* and *McNeil*), the parties engaged in criminal investigations and prosecutions had not been provided with any “clear-cut principles” to which they could refer in reference to disclosure practices (Brucker, 1992, p. 57). This is not to say, however, that some of the issues associated with disclosure had not previously surfaced. A number of Commissions, and reports “recommended in the strongest terms that defence disclosure be placed on a more solid foundation (Canadian Association of Chiefs of Police, 2011, p. 6). Recognizing the absence of legislation surrounding pre-trial disclosure, other than specific circumstances in the *Criminal Code*, the Department of Justice Canada began investigating the idea of pre-trial disclosure in the context of preliminary inquiries (Law Reform Commission of Canada, 1984).

Common Law Position

Despite the inclusion of pre-trial disclosure and discovery in the civil procedures under Canadian law, as well as the advantages they provided in terms of fairness and expediting dispute resolution, this was not the case in criminal law. As noted by Williams (1996, p. 3), “until the mid-1980’s, looking to the common law to justify a right of pre-trial disclosure was a bleak prospect indeed ... the accused had no free-standing right to disclosure.” According to the Law Reform Commission of Canada (1984), the defence was almost solely reliant on the preliminary inquiry to ascertain the case against their client. The practices occurring at this time were observed as regionally disparate and informal processes largely based on “personal relations among members of the criminal bar” (Law Reform Commission of Canada, 1984, p. 3).

When pre-trial disclosure did take place, it was at the Crown's discretion, with the Judge having discretionary powers at trial (Law Reform Commission of Canada, 1984; Williams, 1996).

According to Martin (1993) in the *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions*, the preliminary hearing and limited disclosure were not satisfactory in meeting the objectives of ensuring a fair trial as well as judicial efficiency.

In the absence of criminal law enforcing pre-trial disclosure, Canadian courts began addressing the practice through a series of judicial decisions (Law Reform Commission of Canada, 1984). Until the mid-1970's, criminal prosecution was in some regards amenable to the Crown and defence utilizing the element of surprise as an adversarial tool in presenting their cases. However, the element of surprise began to lose favour from the perspective of the judiciary. This orientation toward disclosure began finding its way into judicial decisions. In referencing *R v. Demeter* (1975), the Law Reform Commission of Canada (1984, p. 3) stated that,

Canadian courts appear to have accepted the English position that in order to eliminate the prejudice inherent in surprise the Crown is obliged before trial to furnish the Defence with statements of those witnesses to be called at trial who were not called at the preliminary inquiry.

Williams (1996, p. 3) reported that Saskatchewan began progressing toward a common recognition of pre-trial disclosure in the mid-1980's. Williams (1996) pointed out that the failure to disclose witness names in a case in British Columbia, resulting in disciplinary action, may have prompted the progress observed in Saskatchewan common law decisions. He argued that Saskatchewan courts moved toward pre-trial disclosure as, "not so much a recognition of a new right of the accused, but rather, as part of further elucidation of the duties imposed on Crown Prosecutors" (Williams, 1996, p. 3). Williams (1996) discusses the contributions of a number of cases to this pre-*Stinchcombe* progression toward the realization of pre-trial disclosure in Saskatchewan courts. In *R v. Trotchie* (1984) Justice Wimmer "recognized a general duty on the Crown to make full disclosure of its case before trial and to make the defence aware of any other evidence in its possession which may be relevant to the issues and worthy of consideration by the Court" (Williams, 1996, p. 4). One year later, in *R v. Burr and Burr* (1985), the Saskatchewan Court of Appeal decided that, "the duties on a Crown Prosecutor included a duty to make

‘timely’ disclosure to the defence of all evidence supporting innocence or mitigating the offence” (Williams, 1996, p. 4).

Constitutional Position

Although the duty to disclose was becoming much more clearly articulated in case law, “the 1991 decision of the Supreme Court of Canada in *R. v. Stinchcombe* marked the beginning of a new era in pre-trial disclosure for an accused” (Williams, 1996, p. 5)². In rendering this decision, the Supreme Court of Canada ruled that the accused had a *right* to disclosure based on section 7 of the *Canadian Charter of Rights and Freedoms*, which states that, “everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.” Disclosure, aligned with this right, constitutionally provides the accused with the information required to “defend himself or herself against the charges that have been laid” (Department of Justice, 2004b, p. 3); that is, their ability to *make full answer and defence*. According to Colton (1995, p. 532), this is the “underlying concern [emanating from *Stinchcombe*] in defining the right to disclosure.” Furthermore, as noted by Justice Patrick LeSage and Michael Code in their *Report of the Review of Large and Complex Criminal Case Procedures* (2008, p. 21), “failure to comply with this right is closely related to the risk of miscarriages of justice.” The *Stinchcombe* decision provided some principles upon which disclosure in criminal cases is to proceed.

General Rule

According to Hubbard, Brault and Welsch (1999, p. 362), “*Stinchcombe* delineated what was commonsensical—the accused is entitled to know what information the Crown has in order to know the case against him and to enable full answer and defence to be made.” This is conceived wherein, unless protected by concerns for privacy, privilege or ongoing issues related to the investigation, all materials in the possession of the Crown are to be disclosed to the defence prior to the accused entering a plea or selecting a mode of trial (Colton, 1995; Williams, 1996). Justice Sopinka clearly articulated this duty by stating, “Subject to the Crown's discretion, all relevant information must be disclosed, both that which the Crown intends to introduce into evidence and that which it does not, and whether the evidence is inculpatory or exculpatory” (*R. v. Stinchcombe*, 1991, p. 3). However, within the realm of their discretion, questions arise with

² Interestingly Williams (1996, p. 5) noted that the Saskatchewan Court of Appeal in *R. v. Bourget* recognized that constitutional right existed in 1987, four years prior to the *Stinchcombe* decision.

respect to defining and determining relevance. Nevertheless, the general rule directing the Crown in this regard clearly is to “err on the side of inclusion” (*R. v. Stinchcombe*, 1991, p. 16).

Relevance

In accordance with *R v. Stinchcombe* (1991), the Crown has a legal obligation to disclose to the defence all “relevant” information pertaining to the defence, be it inculpatory or exculpatory, regardless of whether or not the Crown intends to use this evidence at trial. All relevant information is to be provided as “the fruits of the investigation which are in its possession [Crown] are not the property of the Crown for use in securing a conviction but the property of the public to be used to ensure that justice is done” (*R v. Stinchcombe*, 1991, p. 2). The use of the word “relevant” is, however, subject to definition and interpretation (Martin, 1993; Colton, 1995). Martin (1993, p. 199) commented that, “the word ‘relevant’ is not to be construed narrowly, but is to be given a liberal construction.” *Stinchcombe* created a better state of affairs than previously existed, as according to Williams (1996), the term “relevance” was previously a somewhat problematic “modifier” of disclosure. Policies prior to *Stinchcombe* contained the same language and had been interpreted and implemented narrowly by Crown prosecutors. The *Stinchcombe* decision made it clear that such a narrow interpretation would no longer be acceptable.

As Colton (1995, p. 534) observed, “aside from the only moderately helpful assertion that Crown counsel must err on the side of inclusion, no principles or boundaries are set out to guide the exercise of that discretion as it applies to relevance.” The problem arises in that at the outset the defence argues very generally with regard to relevance as they “simply want to know *if* the information *could* be relevant to the accused’s case” (Colton, 1995, p. 534). Crown counsel is not, however, in the same position as the defence and is not necessarily equipped to assess relevance from that perspective. In addition, *Stinchcombe* did not create an obligation for the Crown to share with the defence that which it is not disclosing. The defence is therefore left with a situation wherein, “they do not know what the information is, what it contains or even whether the Crown has any information at all” (Colton, 1995, p. 534). Gover (1991) argued that an excessively broad application of *Stinchcombe* could lead to the defence requesting volumes of information from the Crown purely on a speculative basis. This results in what might be referred to as “fishing expeditions” that create an onerous obligation on the Crown. The flip-side to that problem is that it might also then result in “extensive withholding of information which could

prove useful to the defence and, arguably, should be disclosed” (Colton, 1995, p. 535). It is, therefore, the scope of disclosure that needs to be determined. The courts have weighed in on this.

In the first instance, it is important to recall that the determination of relevance is reviewable by the Court. According to *Stinchcombe* (1991, p. 17), “Counsel for the defence can initiate a review when an issue arises with respect to the exercise of the Crown's discretion. On a review the Crown must justify its refusal to disclose.” Williams (1996, p. 11) argued that the implication is that the Crown is obliged at minimum to inform the defence of the evidence in its possession, thereby permitting the defence to make an application to the court in order to review and determine its relevance. In such a case, Justice Sopinka provided direction to the trial judge.

The trial judge on a review should be guided by the general principle that information ought not to be withheld if there is a reasonable possibility that the withholding of information will impair the right of the accused to make full answer and defence, unless the non-disclosure is justified by the law of privilege. (*R. v. Stinchcombe*, 1991, p. 17)

Refining, or perhaps expanding the notion of “impairment,” the decision in *R. v. Egger*, suggests that the determination of relevance includes evidence “reasonably capable of affecting the accused’s ability to make full answer and defence;” and the decisions in *R. v. O’Connor* and *R. v. Chaplin* referred to information that “may be useful to the defence” (as cited in Williams, 1996, p. 10). It appears clear that there is what might be referred to as “a low threshold” with respect to making an argument for inclusion under the guise of relevance. “The *Stinchcombe* test—“not...clearly irrelevant”—has been “set quite low” and, therefore, “includes material which may have only marginal value to the ultimate issues at trial” (Code, 2008, p. 22). With few exceptions, it has become evident that the “obligation to disclose is far-reaching, and is only limited by the twin parameters of relevance and privilege” (Hubbard et al., 1999, p. 362).

Privilege

Privilege only exists as a justifiable reason for non-disclosure when it is based on a pre-existing legal basis. It is “an exclusionary rule of evidence based on social interests external to the particular trial ... it makes inadmissible otherwise relevant, probative and trustworthy evidence” (Colton, 1995, p. 556). Williams (1996, pp. 11–15) provided an overview of the four criteria³ upon which privilege is established, including 1) police informer privilege, 2) police

³ Williams (1996, p. 11) notes that the Supreme Court approved the criteria in 1991.

reports and privilege, 3) private therapeutic records and privilege, and 4) privilege v. full answer and defence. As is noted by the fourth criteria, despite the potential for privilege to be an exception to the general rule of disclosure, it is by no means absolute (Colton, 1995; Williams, 1996).

Withholding disclosure based on privilege remains open to defence requests for judicial review. The trial judge must weigh the social interests associated with the privileged information against the accused's right to make full answer and defence. According to Justice Sopinka, "The trial judge might also, in certain circumstances, conclude that the recognition of an existing privilege does not constitute a reasonable limit on the constitutional right to make full answer and defence and thus require disclosure in spite of the law of privilege" (*R v. Stinchcombe*, 1991, p. 17). Therefore, while clearly the accused's *Charter* right might result in an override of privilege established in law, "it [remains] unclear in which instances privileged information would *not* constitute a reasonable limit on [that right]" (Colton, 1995, p. 525).

Timing

The timing of disclosure to the defence is an issue of record. Generally speaking, disclosure should be provided to the defence at the earliest time possible⁴; however, there are circumstances wherein the Crown may be permitted discretion with respect to the timing of disclosure to the defence (Colton, 1995, p. 530). This discretion is reviewable by the court and in accordance with the *Stinchcombe* decision, the Crown can be required to justify the decision to delay disclosure. The Department of Justice (1984, p. 20) stated in making recommendations that preceded *Stinchcombe*, that,

With respect to the moment at which disclosure is actually made, The Commission expects the Crown prosecutors will provide the material to the defence within a reasonable time to allow the defence to digest it in preparation of its case. If such time should not be available, a motion for adjournment would be fully justified.

In order to meet disclosure obligations in a timely manner there must be consideration of disclosure requirements and standards at the earliest stages of the investigation (Department of Justice, Canada, 2004b).

⁴ The earliest time possible is often taken as meaning "that initial disclosure should occur before the accused is called upon to elect the mode of trial or to plead" (*R. v. Stinchcombe*, 1991, p. 20).

The accused is not entitled to receive disclosure until after a charge is laid. In addition, disclosure obligations do not arise “until the accused chooses to exercise that right” (Williams, 1996, p. 6). Until such a time as the Crown receives a disclosure request from the accused, no formal duty exists. Although disclosure requests are most often observed as relayed to the Crown through the accused’s legal counsel who are fully aware of this duty, the issue of unrepresented accused raises an additional consideration. In the case of the unrepresented accused, “the Prosecutor bears an additional duty to advise the unrepresented accused of the right to disclosure before a plea is taken” (Williams, 1996, p. 6) or prior to making a decision regarding the mode of the trial. As noted in *R. v. Stinchcombe* (1991, p. 20), this results from the effect that each of these crucial decisions result in raising critical issues with respect to their rights and, “[i]t will be of great assistance to the accused to know what are the strengths and weaknesses of the Crown’s case before committing on these issues.” Indeed, in Report 22 *Disclosure by the Prosecution* (1984), the “notice of the right to disclosure” was argued as potentially “as important as the right to disclosure itself” (Department of Justice, Canada, 1984, p. 19).

While it is clear that disclosure should be provided at the earliest time possible, in many cases, particularly those involving accused held in custody, the first court appearance might arrive very quickly and at this time the materials in the Crown’s possession “are rarely complete” (Williams, 1996, p. 7). The disclosure obligation incurred by the Crown is ongoing. As noted in *R. v. Stinchcombe* (1991, p. 20), “the obligation to disclose is a continuing one and disclosure must be completed when additional information is received.” This obligation never ceases to exist once the accused has submitted a request; whenever additional information becomes available, even following the completion of a trial, the Crown “must remain diligent” in meeting this obligation (Williams, 1996, p. 7). Permissible delays by the Crown in their provision of disclosure to the defence generally fall under two categories: witness protection and jeopardizing the completion of an ongoing investigation (Colton, 1995; Williams, 1996). In the end, however, “it will, therefore, [only] be a matter of the timing of the disclosure rather than whether disclosure should be made at all” (*R. v. Stinchcombe*, 1991, p. 12).

Locke, Evans and Segal (1999, p. 42) called for the creation of provincial standards pertaining to the timing of disclosure preparation and delivery given the “significant variations within the province.” LeSage and Code (2008) recommended that “administrative targets” (i.e. established time limits) be created to provide incentives for timely disclosure. “All of the leading

studies of trial delay have noted that establishing time limits for each step in the judicial process is one of the most effective ways of reducing delays and improving efficiency” (LeSage & Code, 2008, p. 43).

Crown and Police: Roles and Discretion

The roles of the police and the Crown in processing criminal cases are separate yet intertwined. When compared with other governmental agencies, the relationship between the police and the Crown is considered unique in the context of disclosure in criminal cases (Brucker, 1992; Melanson, 2010). In addition, while still maintaining their constitutional independence, the increased complexity of many criminal cases has resulted in “a natural evolution towards much closer police and Crown pre-charge collaboration over the past 20 to 30 years” (LeSage & Code, 2008, p. 25). Martin (2009, pp. 37, 168) provided substantial reasoning for this independence stating that,

Separating the investigative and prosecutorial powers of the state is an important safeguard against the misuse of both. Such a separation of power, by inserting a level of independent review between the investigation and any prosecution that may ensue, also helps to ensure that both investigations and prosecutions are conducted more thoroughly and thus more fairly.

The police, as the investigative arm of the state, have the primary responsibility for acquiring such evidence. However, it is Crown counsel who must conduct the prosecution. Crown counsel cannot do so effectively without being apprised of all that is relevant.

The Royal Commission on the Donald Marshall, Jr. Prosecution (Hickman, 1989, p. 231) stated that, “if the criminal justice system is to function fairly, the police must carry out their responsibilities without being influenced by extraneous consideration.” While arguing for closer collaboration between the police and the Crown⁵, LeSage and Code (2008, p. 26) do not necessarily advocate for pre-charge screening, although they recognize this is the practice in some provinces. However, they do suggest that the Crown can engage in an “advice-giving” role and collaborate with the police in determining, “the scope of the investigation, the targets of the investigation and the theory of the case” (p. 26). With respect to the benefit for post-charge disclosure, they argue that this collaborative process enables the building of the disclosure

⁵ It should be noted that the LeSage and Code (2008) *Report* refers to large and complex cases. However, the same basic underlying principles of cooperation would appear to make sense in any investigation.

package as an ongoing enterprise such that it will be “substantially ready when charges are laid” (p. 27).

In terms of the police, Crown independence and the provision of disclosure to the defence, Brucker (1992) observed various court rulings that suggest the duty to disclose blurs the line of independence once a charge has been laid by the police. Citing *R. v. MacPherson* [1991], Brucker (1992, p. 58) records that, “once an information has been sworn and a charge laid against an accused, I can see no justification whatsoever in the prosecution continuing to be split between the investigative body and Crown counsel pursuing the prosecution.” Brucker (1992, p. 59) reported the following excerpt from *R. v. Caccamo* [1995],

Suffice it to say that police investigators do not have an exclusive proprietary right to their investigative files once a charge has been laid but must be subject to the same rule of disclosure of all the evidence they have uncovered ... as the prosecuting Crown.

The rulings of the Court suggest that the divisibility of the police and Crown prosecution essentially ends once the charges have been laid and that the police are equally accountable when providing disclosure to the Crown, and henceforth to the defence. Regardless of the questions surrounding the relationship between the police and Crown, Martin (1993) noted that disclosure obligations on the part of the police already existed by virtue of the *Police Services Act*⁶. In “[accord] with the mutual independence of the Crown and the police, [the *Police Services Act*] ... makes the obligation to disclose a matter of internal police necessity, rather than a matter of direction from the Crown (Martin, 1993, p. 168-169).

In order for the Crown to meet its disclosure responsibilities as set out in *Stinchcombe*, they require the police to provide them with all relevant evidence pertaining to the case. As cited in Williams (1996, p. 15, italics in original), in the case *R. v. T. (L.A.)* the corresponding duties were clearly articulated in that,

There is a duty on the crown to make full disclosure and, accordingly, *the crown has an obligation to obtain from the police—and the police have a corresponding duty to provide the crown—all relevant information and material concerning the case.*

It is clear that the Crown has an obligation to provide all relevant materials in its possession to the defence to meet disclosure obligations. The determination of what evidence is relevant, or

⁶ According to Martin (1993, p. 168), “Regulation 791 of the *Police Services Act*, R.S.O. 1990, c. P-15 ... provides that an officer is guilty of neglect of duty if he or she, ‘fails to disclose any evidence that he, or persons with his knowledge can give for or against a prisoner or defendant.’” Within the Saskatchewan *Police Act*, 1990, c. P-15, section 80.51 requires the police service to disclose all relevant material; therefore, to not do so would be in violation of the *Act*.

arguably rather, what evidence is “clearly irrelevant,” remains initially within the purview of the Crown (Colton, 1995). As Justice Sopinka articulated, it is the Crown’s responsibility to separate “the wheat from the chaff” (*R. v. Stinchcombe*, 1991, p. 16). This discretionary decision-making process remains at arm’s-length, or independent from the police (Code, 2008).

However, the waters become a little muddied when potentially relevant materials are not within the Crown’s possession. The question then emerges regarding the Crown’s duties in seeking out and obtaining additional materials deemed potentially relevant as a result of either the police investigation, their review of the case, or defence disclosure requests. Melanson (2010, p. 233) noted that, “the Crown is not a passive recipient of relevant information without any obligation of its own to seek out and obtain relevant materials.” This is largely understood as coinciding with their role as “gatekeepers” of relevance as well as their fundamental loyalty “to the proper administration of justice” (Melanson, 2010, p. 233).

According to Hubbard et al. (1999), Canadian courts have recognized broad, but not absolute, prosecutorial discretion with regard to initiating and conducting criminal prosecutions as permissible within the *Charter* standards and constraints of the principles of fundamental justice. As a result, judicial *interference* in these decisions is noted as an extremely rare occurrence (Hubbard et al., 1999, p. 338)⁷. Furthermore, as noted above, there are certain circumstances wherein prosecutors retain discretion with respect to material they may decide against providing to the defence. In these cases, simply requesting disclosure may not suffice in acquiring the requested materials. While the defence is permitted to request of the court access to the materials, it remains incumbent upon the defence in some situations to “set out an evidentiary foundation for its demands” (Hubbard, et. al, 1999, p. 363).

Defence Disclosure and Responsibilities

According to Williams (1996), a criminal lawyer has a duty to his or her client such that they are obliged to “raise every issue, advance every argument, and ask every question, however distasteful, which he [or she] thinks will help the client’s case” (p. 1). Furthermore, he or she is required by professional codes of conduct to explore and put forward all possible legal remedies available in the defence of their client. In recognition that the accused is entitled to undertake an adversarial stance in approaching the case against them, reciprocal disclosure requirements,

⁷ These same authors note that this practice of *judicial non-interference* is also observed in American courts.

observed in other common law nations, has been examined, as some have argued it may provide benefits to the process of administering justice in Canada (Maude 1999; McKinnon, 1995). Crucial in this consideration is balancing “the competing interests of an accused and those of the state, so that the administration of justice will not be brought into disrepute” (McKinnon, 1995, p. 25).

While the *Stinchcombe* decision may have provided an opening for considering the idea of a reciprocal duty to disclose on the part of the defence, it simultaneously denied that obligation based on the assumption that the defence is entitled to “assume a purely adversarial role toward the prosecution” (*R v. Stinchcombe*, as cited in Tochor & Kilback, 2000, p. 397). The debate over the issue of defence disclosure focuses on a variety of issues. According to McKinnon (1995), those in favour of reciprocal disclosure propose that it should “encourage realistic pre-trial discussion of the merits of the charge, increase early dispositions by stay of proceedings or guilty plea, permit better representation of counsel, narrow the issues for trial, diminish inconvenience to witnesses and juries, and minimize expensive court hearings” (p. 60).

In addition to the issue of disclosure by the defence to the Crown, a second issue is noted by Martin (1993) regarding the possible misuse of disclosed materials.

It cannot be overlooked that, while the right to make full answer and defence is paramount in the realm of disclosure, there are other important, and competing, values at stake ... [including] public safety, the privacy interests of victims or witnesses, and the need to maintain the integrity of the administration of criminal justice. (Martin, 1993, p. 175)

As noted by Tyler, Neill and Clark (1998), this is of particular interest in the case of electronic disclosure in the discovery process. Providing opportunities for inspection rather than supplying copies has been suggested as a possible remedy to this issue in certain circumstances (Tyler et al. 1998, Locke, Evans & Segal, 1999). However, Tyler et al. (1998) observed that where privilege does not apply in the case of an original document, or piece of evidence, then it would not apply to the electronic copy of that same piece of evidence.

One potential misuse of disclosed materials noted by Martin (1993) is that they cannot be used to fabricate evidence that would counter the case set out against the accused. Materials contained in disclosure packages, while relevant to the case, “can include information of considerable sensitivity, affecting both the interests of the public in fighting crime and the privacy interests of individuals, including victims and third parties” (Department of Justice,

Canada, 2004b, p. 18). In addition, the dissemination of disclosed materials presents a second aspect of misuse that could potentially harm victims and other third parties (Martin, 1993). The Department of Justice, Canada (2004b) suggested that legislative amendments could provide one avenue for reducing the likelihood of abuses of disclosure. While cognizant of professional codes of conduct referring to ethical breaches, the suggested amendments would clarify “the duties in respect of disclosure materials and the powers of the court to enforce these obligations (Department of Justice, Canada, 2004b, p. 19).

Williams (1996, p. 24) reported that within Saskatchewan it was common practice that disclosed materials were “subject to several trust conditions.” The imposition of trust conditions placed on the recipient(s) of disclosed materials was done to address the potential issues of misuse noted above. However, outstanding questions remain with respect to “whether a policy imposing the same trust conditions in every case is an exercise of discretion” (Williams, 1996, p. 25). There will certainly be some instances wherein the defence, in meeting their obligation to the client, may need to share disclosed materials with other parties (i.e., an expert witness employed by the defence to examine certain elements of the Crown’s case). Although professional and ethical considerations are required of defence counsel with respect to sharing disclosed information, it has been suggested based on case law, that a “blanket requirement of undertakings by defence counsel in every case not to release information to other parties was inappropriate ... [and that] the Crown was to deal with each matter on its own merits” (Williams, 1996, p. 26).

Third Party Records

A disclosure question arises with regard to the statement in *Stinchcombe* (1991, p. 3, emphasis added) that requires the Crown to disclose, “All information *in the prosecution's possession* relating to any relevant evidence the person could give,” as not all materials considered relevant by the defence may be in the Crown’s possession: that is, there may be evidentiary materials held by third parties. According to Paciocco (2005, p. 158), “‘third-party records’ are documents, other than those created as part of the investigation of an offence, that contain information about the ‘third-parties’ to a criminal proceeding, namely complainants and witnesses.” Obtaining these materials causes delays in court proceedings. “The work of prosecutors, defence and the courts is often delayed by inefficient transfer of case information between parties, particularly to defendants who may need to review the material with counsel in

a corrections facility” (Government of British Columbia, 2012b). Many of the questions regarding third-party disclosure were addressed in the landmark case, *R. v. O’Connor* [1996]. Of interest in disclosure discussions,

The Court distinguishes between ‘disclosure’ and ‘production.’ ‘Disclosure’ rules and principles apply when we are dealing with the records in the possession or control of the Crown. ‘Production’ rules apply when we are dealing with records and materials in the hands of third parties. (Williams, 1996, p. 34)⁸

A so-called “O’Connor application” must be initiated by the accused in order to seek production of third-party records. LeSage and Code (2008) noted that case law, particularly referencing *R. v. Chaplin and Chaplin* [1995], places this “burden” on the defence. According to Williams (1996), assuming that the “relevancy” question is made in favour of the defence, the Court receives and reviews the requested materials. The Court then engages in balancing privacy interests with the accused’s ability to make full answer and defence. If this is affirmed by the court in favour of defence, the materials are then disclosed. LeSage and Code (2008) stressed the importance of defence counsel making “a considered request” for production of third-party records. As noted in *R v. Girimonte* [1997], “Disclosure demands which are no more than ‘fishing expeditions’, seeking everything short of the proverbial sink undermine the good faith and candour which should govern the conduct of counsel” (as cited in LeSage & Code, 2008, p. 47)⁹.

Given the previous discussion of issues arising from the mutual independence of the police and Crown, records of police misconduct became the focus of additional “third-party” records issues. The Supreme Court decision in *R v. McNeil* provided greater clarity regarding the oft-noted independence of the police and the Crown with respect to their various roles in processing criminal cases. It additionally was argued to have “‘bridge[d] the gap’ between first party disclosure and third party disclosure” with respect to files pertaining to various types of police misconduct and their relevance to the case being prosecuted (Melanson, 2010, p. 231). According to Melanson (2010, p. 232), “The underlying rationale of the Court was that the Crown and police are in a different position than other third parties and can assist in bridging the gap between state disclosure and third party production as it relates to evidence that is potentially relevant and ‘pertaining to the credibility of the [police] witness in a case.’” The *McNeil* case,

⁸ See Martin (2009) for additional commentary on how the coroner fits into the discussion of production and disclosure as a third-party.

⁹ For a more complete discussion of third party records, see the Legal Case Review in Appendix 1.

incorporating the so-called “Ferguson Five,¹⁰” essentially identified the police as gatekeepers of potentially relevant police misconduct information and established that these records were to be considered first party disclosure requirements. The findings of the Court in *McNeil* established the following two categories as forming first party obligations:

1. When the police misconduct in question concerns the same incident that forms the subject-matter of the charge against the accused: directly related or ‘self-evident’ misconduct (e.g., if a police officer is charged under the *PSA* for excessive force in relation to the accused’s arrest).
2. Where the misconduct of a police witness is not directly related to the investigation against the accused but is nonetheless relevant to the accused’s case where findings of police misconduct by a police officer may have a bearing on the case against the accused—serious but historical or ‘indirect’ misconduct—(e.g., a criminal record of perjury or deceit). (Melanson, 2010, p. 234)

It has become clear that records of police misconduct no longer fall within the “third-party records” debate. It is established that these records are relevant and are therefore aligned with first-party disclosure requirements.

Effects of Disclosure Violations

In the event that disclosure obligations are not met to the satisfaction of the court, the accused is provided with remedies. These remedies generally fall within either *section 7* or *24* of the *Charter of Rights and Freedoms*. Williams (1996, p. 28) noted that, timing of disclosure is relevant to the application for remedies and “it is only when a violation of the right to make full answer and defence is made out that the issue of an appropriate and just remedy for non-disclosure will arise.” Otherwise the trial judge may simply require that additional disclosure is made and grant an adjournment to facilitate it being completed. Williams (1996) stated that there is a wide range of possible remedies available to the court when it becomes evident that there were violations of the disclosure requirements. These include, “mistrial, exclusion of the non-disclosed evidence, damages for wasted legal fees, or costs” (Williams, 1996, pp. 28 – 29).

¹⁰ The “Ferguson Five” represent categories of police misconduct, identified in the Ferguson Report which reviewed police misconduct in the context of *O’Connor* applications for third party disclosure. These were further delineated with regard to those then recommended as falling within first party disclosure obligations. According to Melanson (2010, p. 234), the “Ferguson Five” included: 1. Any conviction or finding of guilt under the *Criminal Code* or under the *Controlled Drugs and Substances Act* (the “*CDSA*”) for which a pardon has not been granted, 2. Any outstanding charges under the *Criminal Code* or *CDSA*, 3. Any conviction or findings of guilt under any federal or provincial statute, any finding of guilt for misconduct after a hearing under the *Police Services Act* or its predecessor *Act*, and 5. Any current charge of misconduct under the *Police Services Act* for which a Notice of Hearing has been issued.

In addition to the effect on the case itself, the failure to disclose relevant information by the police to the Crown could also result in professional and criminal actions taken against the party responsible for the violation, be they Crown prosecutors or police. Professional discipline is in recognition of the integrity required of these public servants and the increased scrutiny that accompanies such positions (Martin, 1993). As previously noted, the *Police Services Act* implores officers to provide the Crown with all relevant material and failure to do so might result in charges of “neglect of duty.” Finally, *Disclosure by the Prosecution: Report 22* (Law Reform Commission of Canada, 1984, p. 27) suggested that an officer who “deliberately suppressed such information ... might well be liable to prosecution for obstructing justice.”

Logistical Effects of Disclosure Requirements

The effect of precedent-setting cases in Canadian criminal law is multifaceted. The various cases surrounding disclosure, particularly *R. v. Stinchcombe*, *R v. McNeil*, and *R. v. O'Connor* are no exception. These cases have arguably had a significant effect on the future of all criminal cases that follow; in particular, what is required of the police and Crown in preparing disclosure for the defence following the laying of a criminal charge. A number of studies, reports, commentaries, and later cases have discussed the effects of the disclosure practices.

Intended and Unintended Consequences of Disclosure Reform in the Courts

The primary reason for the application to the Supreme Court of Canada in *Stinchcombe* was to clarify the rights afforded the accused with respect to pre-trial disclosure. As noted above, this was premised on case law as well as section 7 of the *Charter of Rights and Freedoms* as affecting the accused’s ability to make full answer and defence to charges brought against them. Although numerous issues remained unresolved regarding disclosure, the case clearly stated that the accused has a constitutional right to full disclosure. With regard to the question surrounding the Crown’s obligation to make full disclosure, the issue is “settled.”

According to the Department of Justice (1984, p. 1), the criminal justice system’s fairness and efficiency is predicated upon “the quality of information available to litigating parties.” Pre-trial disclosure was argued to provide efficiencies by expediting resolutions by reducing issues needing to be addressed in court. Justice Sopinka also alluded to additional perceived benefits resulting from the implementation of full pre-trial disclosure. In what appears to be consideration of a systems approach to operations of the criminal justice system, Justice Sopinka suggested that some efficiencies were likely to result.

The adoption of uniform, comprehensive rules for disclosure by the Crown would add to the work-load of some Crown counsel but this would be offset by the time saved which is now spent resolving disputes such as this one surrounding the extent of the Crown's obligation and dealing with matters that take the defence by surprise ...

There is also compelling evidence that much time would be saved and therefore delays reduced by reason of the increase in guilty pleas, withdrawal of charges and shortening or waiver of preliminary hearings. (*R. v. Stinchcombe*, 1991, p. 11)

Cowper (2012, p. 7), reported that there is a requisite need for “adequate but not perfect disclosure,” in order to seek a greater number and more efficient pre-court resolutions. This may additionally assist in reducing the inefficiency noted with respect to trial scheduling and processing (Cowper, 2012, p. 7). In addition, Martin (1993, p. 143) argued that complete pre-trial disclosure may “lead to shorter trials and waived or eliminated preliminary inquiries, it may prevent unnecessary attendance of witnesses, and may facilitate resolution discussion, the withdrawal of charges, and where appropriate, pleas of guilty.” Despite the suggested efficiencies created as a result of disclosure, other commentaries suggest that Justice Sopinka’s recognition of an increased workload might have been somewhat understated.

Malm, et al. (2005) explored police service and delivery costs and capacity over a 30-year period. Their conclusions suggest that the demand placed on police service capacity has been significantly greater than the resourcing they have received in the same time period. Based on a variety of factors, the time required to see a case from an initial call for service to provision of evidence to the Crown for their review has increased from between 60% to 1,000% (Malm et al., 2005, p. 19). These increases are largely observed to result from administrative work associated with technological changes, as well as legal rulings and legislative changes.

According to Malm et. al (2005), technological advancements, while providing for improvements in a variety of policing-related duties (i.e., communication, dispatch, case management, etc.), incur costs associated with respect to time spent on training, re-training and issues associated with addressing circumstances where technology fails to operate as expected. Additionally, “improved technology often carries with it demands from others in the criminal justice system for new and increasingly time consuming activities on the part of police officers ... an associated increase in administrative work” (Malm et al., 2005, p. 9) The Steering Committee on Justice Efficiencies and Access to the Justice System (Government of Saskatchewan, 2011, p. 9) reported that other criminal justice participants have “not always kept

pace with the police when it comes to information technology.” Disclosure requirements have had a net effect of decreasing the time spent on what might be referred to as “core police duties” while demanding police “commit scarce resources” to the processing and production of disclosure packages for the Crown (Canadian Association of Chiefs of Police, 2011, p. 9). For example, one study reported that, “daily logs” indicate that more time is spent on administrative tasks associated with paperwork than “responding to calls and conducting investigations combined” (Malm et. al, 2005, p. 9).

Legislative and policy changes as well as judicial decisions affect the requirements of day-to-day police work. Based on their research, Malm et al (2005) identified a number of significant legislative changes and judicial decisions impacting officer workload. Their findings indicate that, in terms of legislation, the *Charter* has singularly had the greatest effect of all legislative changes since 1970. They further identified “eleven cases of major importance” noted as having a direct effect on police “workload and costs” (Malm et. al, 2005, p. 12). Given the focus of the current study, it is noteworthy that these scholars stated that, “even without an economic analysis, there is unanimous agreement that **R. v. Stinchcombe, [1991] 3 S.C.R. 326** has had the most profound, and in some instances debilitating, effect on police resources” (Malm et al., 2005, p. 13, bold in original). The officer time needed to meet the requirements resulting from this judicial decision has severely affected police budgets, such that it has reduced the capacity of police to engage in investigations, thereby decreasing the number of crimes the police can effectively manage. Issues arising for police services with respect to disclosure have been organized around “three broad categories: the costs of disclosure, the disclosure process, and disclosure misconduct” (Government of Saskatchewan, 2011, p. 10). First, the financial burden on police services associated with disclosure includes human resources, training, equipment and transcription. With respect to disclosure processes, the Government of Saskatchewan (2011, pp. 13 - 17) identified a number of issues including the vetting of disclosure files, keeping up with the requests for forensic examinations and additional disclosure requests, technological issues with regard to remote servers and infrastructure to process audio and video files, tracking of disclosure, and unfocussed disclosure requests. Consistent with the previous discussion around the misuse of disclosure, the Government of Saskatchewan (2011, p. 17) reaffirmed police concerns for misuse of disclosure to “facilitate criminal activity such as harassment and

intimidation of witnesses ... [and] revealing sensitive private information ... to parties not entitled to it.”

The Crown and defence also reported ongoing issues resulting from disclosure. The lack of standardization, organization, and contents of Crown briefs and the design of police information systems is not readily conducive to the needs of counsel preparing their cases. Vetting disclosure packages, a lack of transcripts, and an overreliance on video and/or audio statements by police that is argued to have had negative effects on police note-taking were observed as primary issues of concern by the Crown (Government of Saskatchewan, 2011). Recognized as “downstream in the disclosure process,” the defence issues typically arise from errors or issues occurring prior to the receipt of disclosure from the Crown (Government of Saskatchewan, 2011, p. 23). Defence counsel reported concerns with missing information in disclosure packages, inaccurate records surrounding the tracking of disclosed materials, and a reduction in disclosure capacity as the upstream issues that affect their role in the process (Government of Saskatchewan, 2011). Defence counsel also noted “frustration with judges who they feel fail to take slow nondisclosure or slow disclosure seriously.” Last, they expressed concern regarding the narrow authority structure that only permits the trial judge the ability to grant remedies arising from disclosure (Government of Saskatchewan, 2011, p. 23).

Electronic Evidence and E-Disclosure

The rapid development in technology in the past 30 plus years has had a significant effect on the practices of criminal justice professionals, particularly those of police, and, by extension, on disclosure. In addition, case law has also embraced and at times “suggested” that these technological advances (i.e. videotaping interviews) are moving in the direction of becoming required whenever possible (see *R. v. B (K.G.)*[1993] and *R. v. Khan*). Furthermore, as noted in a UK study *Swift and Secure Justice: The Government’s Plan for Reform of the Criminal Justice System* (2012, p. 43), technology is observed as having “a critical role to play in delivering efficient criminal justice.” Although electronic disclosure is not necessarily required, it can be a “very practical tool” especially in large and complex cases (LeSage & Code, 2008, p. 32). The Department of Justice, Canada (2004b, p. 6) went so far as to propose a legislated response supporting the use of electronic disclosure wherein,

Legislative amendments could be made to provide that where the Crown transmits disclosure materials in electronic format, complying with specified standards, this is

presumed to be a proper form of disclosure with respect to those materials unless a court, in the interests of justice, decides otherwise.

The improvements in technology, the overcoming of many technical problems (arguably overstated by LeSage and Code as seen, for example, in continued issues of compatibility and IT infrastructure limitations), the increased familiarity with technology, as well as the consideration and adoption of electronic practices across many Canadian jurisdictions are all indicative of the seemingly inevitable evolution of disclosure practices towards digital formats.

It appears from various reports that a *systems approach* in the implementation of technology is crucial (Government of British Columbia, 2012a; UK Ministry of Justice, 2012). Through the adoption of a systems approach regarding technology, the UK Ministry of Justice (2012, p. 43) suggested that their endeavours will “transform criminal justice from a fragmented, paper-based system to a seamless, digital service.” These processes, while promising, require a high degree of collaboration between all components and actors in the criminal justice system as well as a considerable investment in complimentary and compatible IT infrastructure. In addition, the application of a systems approach is suggestive of compatibility and/or the standardization of not just practices and technology, but also of data inputs. As reported by UK Ministry of Justice (2012, p. 44),

Our ambition is for all the information and evidence collected and relevant to an investigation be captured once, digitally. And for this to be in a format which can be shared immediately and electronically with all criminal justice partners with minimal manual interventions. This will provide for a truly seamless and efficient criminal justice service.

The interoperability of data exchange between various components of the criminal justice system avoids duplication of data entry efforts. Multiple manual entries of information at different points along the criminal justice system process can be avoided. It further permits the sharing of data across provincial jurisdictions as well as between different ministries. According to Public Safety Canada (2014, n.p.), the National Information Exchange Model (NIEM) “is designed to bridge the information gap between systems, facilitating the flow of knowledge and enabling faster, more effective cooperation between two or more organizations.” Within the realm of emergency response and recovery, Public Safety Canada, in a coordinated effort with other federal partners, “has been working [since 2010] ... to implement a Government of Canada governance model, which represents Canadian interests and will guide the evolution of NIEM

within Canada, in order to support its usage, expansion, data standards and architecture principles” (Public Safety Canada, 2013, p. 33). Interoperability and data sharing are becoming a reality within and beyond the criminal justice system.

The use of videotaped interviews by police has become commonplace across Canadian jurisdictions. Martin (1993, p. 154) reported that the practice of videotaping was “increasing over time ... [and] well accepted by criminal investigators.” The Martin Report (1993, p. 156) also reports that studies of the use of video recordings of statements made by the accused or witnesses, “have overwhelmingly supported the viability and desirability of such recordings.” In his evaluation of videotaping interviews, Baldwin (1992) reported numerous benefits associated with the use of video recordings. One finding of significance was that, “under the video taping regime, challenges to interview evidence remain a rarity” (Baldwin, 1992, p. 21). Canadian courts have found that video recordings of statements and/or interviews are useful tools for the court. For example, although not stated as necessary, Lamer C.J. and Sopinka, Gonthier, McLachlin and Iacobucci JJ. in *R. v. B. (K.G.), [1993] 1 S.C.R. 740* (p. 9), stated that, “A videotaped statement with its complete and comprehensive record of the questions posed, the answers given and the demeanour of the witness, will often serve as a complete answer to the issues of reliability and voluntariness of the statement.” Finally, Baldwin (1992) reported that the practice of videotaping statements protected police personnel from allegations of improper interview techniques (i.e., coercion).

While the technological advances have their benefits (i.e. better and faster communications systems, crime analysis capabilities, case management, portability and storage etc.), they are not without their limitations. Referring specifically to videotaping interviews, Martin (1993) noted that the use of video equipment is not always feasible and may detract from following up on other avenues of investigation. In addition, more generally speaking, technological advances are also observed to have “an associated increase in administrative work” (Malm et. al, 2005, p. 9) and should not be considered a “panacea for ensuring more effective and efficient disclosure” (Department of Justice, Canada, 2004b, p. 7). This administrative work brings with it a cost in terms of actual dollars (i.e., equipment, training, and support costs) as well as time demands from those engaged in processing increasingly higher amounts of evidentiary materials. Malm et al. (2005, p. 14), reported that processing disclosure on a single “large-scale fraud can easily reach into the tens of thousands of dollars and sap the entire

operational budget of an investigative unit or department, limiting its capacity to conduct other investigations.” In addition, Locke et al. (1999) noted additional concerns with the use of video recordings, including 1) a deterioration of police interviewing skills, 2) the cost of reproducing electronic recordings, 3) the production of transcripts, and 4) inefficiencies in court when trying to utilize playback equipment. With respect to electronic disclosure, the Canadian Bar Association (CBA) (2005, pp. 1 - 2) outlined a number of issues related to the reluctance or resistance to electronic disclosure including:

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 using paper
5. inadequate equipment available to handle electronic disclosure
6. unfamiliarity with computers, and insufficient time to learn

Although the police and Crown do not have any control regarding the requirement for disclosure, the format in which disclosure is provided is not rigid. LeSage and Code (2008, p. 33, emphasis in original) recall that in *R v. Blencowe* (1997, underlined material in original), “Watt, J. ... made the point succinctly by stating, ‘what the constitution requires is prosecutorial disclosure. It does not insist upon a particular form of disclosure as a constitutional principle” (see also Martin, 2009). Nevertheless, it has been proposed that electronic disclosure should be “consistent and comprehensive ... readily searchable ... well-organized” (LeSage & Code, 2008, pp. 32-33). The suggestions are replete with rhetoric regarding the standardization of practices regarding electronic disclosure packages. As an example of standardizing electronic disclosure packages, LeSage and Code (2008, p. 33) reported that their consultations with justice professionals revealed that “the ‘Major Case Management’ electronic format, with its 52 file folders and Adobe 8 search software was uniformly praised by the participants in our Review as the solution to past difficulties with electronic disclosure.” Standardization of practice and information collected and shared is arguably a step toward greater efficiency and the reduction of errors.

The Department of Justice, Canada (2004b, p. 7) recognized that the evolution of electronic disclosure practices were likely to progress “hand-in-hand with the evolution of technology and the level of comfort of those who work in the justice system.” Personal

preferences regarding familiarity and comfort with electronic practices are likely to vary across justice professionals. In addition, the CBA (2005, p. 6) argued that Canadian case law identified many shortcomings associated with electronic disclosure and that “a legislated presumption in favour of electronic disclosure would place an unnecessary burden on the accused, and could lead to abuse.” However, this does not necessarily create an obligation to provide paper/printed copies in order to meet the constitutional requirements of disclosure (CBA, 2005; LeSage & Code, 2008). With respect to cost and efficiency, there has been recognition that “the disclosure brief encompasses a wide array of materials, much of which counsel will never use at trial” (LeSage & Code, 2008, p. 35). To require printed copies of all disclosed material, in addition to a well-organized and searchable electronic disclosure package, is inefficient, costly, and therefore unwarranted. This position is supported in case law¹¹ such as *R. v. Therrien* [2005], *R. v. Greer et al.*, [2006], and *R. v. Piaskowski et al.*, [2007]. In *R. v. Therrien* [2005]. Barrow J. stated that,

There is a cost, and a substantial cost, in converting to paper form electronically disclosed documents. What that cost might be in any particular case will vary. Among other things, it will depend on how much of the material in question reasonably needs to be printed in hard copy. There is no evidence before me as to what the cost will be in this case. In any event, the cost issue is not determinative of the matter. The issue is whether electronic disclosure, in the context of this case, and the skills and resources of this accused and this defence counsel, is sufficient to permit the accused to make full answer and defence. I am satisfied it is. (p. 13)

Although the courts do not necessarily consider “costs” when assessing the viability of electronic disclosure meeting the constitutional requirements of disclosure, they apparently do remain cognizant of them.

The importance of containing policing (and criminal justice system) costs while ensuring that core policing services (e.g., those related to emergency response, criminal investigations and enforcing laws) are of key importance to policymakers and members of the Canadian policing industry (Ruddell & Jones, 2014) is evidenced by an increased focus on the “economics of policing,” (see Ruddell & Jones, 2013), and several conferences and summits held throughout 2013-2014 (Charlottetown, January and September, 2013 and Vancouver, March 2014). Moreover, topics related to the economics of policing have been addressed at the Canadian Association of Chiefs of Police 2013 annual meeting (Ruddell & Jones, 2014). However, as Cowper (2012, p. 73) cautions, one must be diligent against seeking efficiencies, which may

¹¹ The CBA (2005) also reported the existence of case law that espouses a contrary position.

“undermine core justice values” of which disclosure is one specifically identified. It is only within the framework of these values that efficiencies should be sought.

Research Questions

While the aforementioned rulings and discussion clearly establish that the Crown and police have a duty to disclose, they remain silent with regard to a number of issues related to that duty. Preliminary investigations surrounding some of these issues in Saskatchewan identified the following unresolved issues: 1) the scope of the requirement for disclosure, 2) the evolution of disclosure practices, 3) current state of the practice of disclosure, 4) the costs of disclosure, and 5) the practice of disclosure in other Canadian jurisdictions. Through the examination of these issues, the intent of this research is to provide evidence-based solutions to address these issues. It should be noted that *R. v. Stinchcombe* recognized the existence of wide variations in the extent and practice of disclosure across jurisdictions as well as hesitancy to adopt “uniform, comprehensive rules for the Crown.” As such, it is likely that any proposed solution will not be able to account for all possible exigencies. Nonetheless, it may present a foundation upon which the issues surrounding disclosure may be framed. In order to understand these five issues better, the following research questions were developed.

Primary Research Question:

What possible solution (model) can address the disclosure issues in Saskatchewan?

Secondary Research Questions:

What is the duty to disclose?

What do the courts actually require to be disclosed to defence?

What is the current state of disclosure practice in Saskatchewan?

What are the costs associated with disclosure?

What practices do other Canadian jurisdictions engage with regard to disclosure?

Answering these questions will shed light on the duty to disclose as it pertains to Saskatchewan. In the sections that follow, a description of the methods used to answer these questions is provided. That description is followed by the results of this study and a list of recommendations based on these findings.

V. METHODOLOGY

The development of the research process began with a meeting between the lead researcher and a “steering committee” including representatives from the Ministry of Justice (Corrections and Policing), the Crown, and the Saskatchewan Association of Chiefs of Police. In this meeting, the foundational research question was flushed out. The researcher then developed a proposal for the committee’s consideration that included detailing the suggested methodological approach that would be undertaken.

Answering the research questions required a multi-method approach. This approach included qualitative interviews with a sample of individuals (Crown prosecutors, police personnel, defence counsel, and a judge) within as well as outside of the province of Saskatchewan. It also sought to develop an estimate of the costs associated with transcription by requesting police services to fill out a transcription cost form as well as tabulating and reviewing the results. Finally, a web-based search of other provincial jurisdictions was undertaken in order to review current disclosure and transcription policies¹². Where the interviews and/or web searches identified additional potentially relevant documentation, the researcher requested copies of these materials from the relevant sources.

The transcription cost component of the research yielded responses from five police services. With regard to the interviews, 29 face-to-face interviews were completed within Saskatchewan and another five telephone and three face-to-face interviews with participants from other provincial jurisdictions including British Columbia, Alberta, Manitoba, Ontario, and Nova Scotia. The methodology underpinning this study is described below.

Interviews

The research sought to inform our understanding of disclosure and its related issues and possible solutions from the perspectives of those actually engaged in the day-to-day operations of the criminal justice system. Given this research purpose, this approach aligns closely with what Stebbins (2001, p. 3) refers to as “limited exploration” as it represents research aimed at “searching systematically for something in particular,” rather than notions of broad discovery. Despite the observation that exploratory research may be conducted either through quantitative

¹² Quebec was not included in this process given the very different nature of the criminal justice processes and legislation within that jurisdiction.

or qualitative methodological approaches, exploratory research of the issue of disclosure tends toward the use of qualitative approaches (Stebbins, 2001).

Malinowski, a revolutionary anthropologist, argued that in order to garner an extensive and complete understanding of a given social phenomenon, the researcher was required to “go and live and work with the people they studied” (Holdsworth, n.d., para. 1). Malinowski (1922) argued that the insider perspective was critical if one wanted to understand a social phenomenon. As such, this research sought to identify key informants who were in a position to provide a functional perspective of disclosure. It is the perspective and understanding of the experiences of those engaged in disclosure practices and processes that provide the most complete and compelling understanding of the issue. Pelto and Pelto (1978) refer to this approach as emic positioning. In accordance with the emic position, the researcher is essentially external to the process, seeking to understand the phenomenon of interest from the perspective of the research participants. Neuman (2006) explained the emic approach as the analysis and presentation of the results from the perspective of the “insider.” The analysis and findings of this research reflect the understanding of the research participants.

Sampling and Participants

Non-probability sampling procedures were used in order to obtain interview participants. Three of the four primary types of non-probability sampling techniques were utilized in this study: 1) purposive sampling (also known as judgemental sampling), 2) availability sampling (also known as convenience sampling), and 3) quota sampling. Non-probability sampling is a useful and valid technique when engaging in exploratory research (Bachman & Schutt, 2014), and is often the primary sampling method of choice for qualitative research as it does not require the researcher to have a complete list of all possible participants (Berg, 2004). Furthermore, these approaches are particularly useful when the topic of investigation is relatively specific, requiring the researcher to access key informants: those who are subject matter experts.

Purposive sampling involves the selection of participants based on their ability and expertise in a given area (Neuman, 2006). According to Lohr (1996), it also provides the researcher the opportunity to select a representative sample. This is undertaken to ensure that “certain types of individuals or persons displaying certain attributes are included in the study” (Berg, 2004, p. 36). Three guidelines, proposed by Rubin and Rubin (1995) are given consideration when using this sampling method: participants should be “knowledgeable about the cultural arena or situation ...,

willing to talk, and representative of the range of points of view” (as cited in Bachman & Schutt, 2014, p. 119). In this research, purposive sampling was undertaken in order to ensure that those individuals with a working knowledge of the disclosure policies, processes and practices participated in the study. Furthermore, given the nature of the topic, a wide array of potential perspectives was sought across the range of participants. These individuals were thought to provide an understanding of the challenges, issues and potential solutions arising from the judicial decisions affecting disclosure.

Availability sampling was also incorporated into the process of selecting participants for this research. As the name suggests, these individuals were selected on the basis of their availability and willingness to participate in an interview (Bachman & Schutt, 2014). Additionally, the sampling design utilized quota sampling. This approach “begins with a kind of matrix or table that creates cells or stratum” (Berg, 2004, p. 36) wherein the researcher identifies various groups thought to provide a certain perspective on the topic under investigation. According to Bachman and Schutt (2014, p. 117), “quota sampling is intended to overcome the availability sampling’s biggest downfall: the likelihood that the sample will just consist of who or what is available, without any concern for its similarity to the population of interest.” The researcher identified a number of groups relevant to this project. They included members of police services (sworn and civilian), Crown and defence counsel and members of the judiciary (provincial court judges). Furthermore, given the provincial focus of the research it was determined that there should also be representation from across the province where possible. The researcher began by creating a sampling frame in accordance with the Crown district offices in order to provide for geographical representation. Attempts were made to locate participants from each of the four groups within each of these regions.

The identification of potential subjects began with the researcher engaging members of the steering committee involved in the original discussions regarding the project. These individuals acted as gatekeepers by assisting the researcher in gaining access to potential interviewees (Berg, 2004). These gatekeepers were able to identify individuals as potential participants. The researcher also used his personal contacts to seek out additional participants through a variety of channels. Once the contact information was received, the researcher contacted potential participants (either by email or phone), providing each of them with an overview of the research project as well as discussing and obtaining a signed informed consent form.

Ethics

Prior to any interviews or other data collection taking place, a research ethics application was submitted to the Research Ethics Board (REB) at the University of Regina and was approved (see Appendix II). There were no ethical concerns related to this project as it sought professional opinions from those engaged in the disclosure processes. Nevertheless, if the individual expressed a willingness to participate, an informed consent form (see Appendix III) was sent to them electronically. This form provided a written overview of the study as well as how the information they provided would be used. Given that many of the individuals approached to take part in this research were identified by gatekeepers and that most interviews took place in the participant's place of work, it was not possible to guarantee anonymity. This research, however, did provide for confidentiality of the participant's responses. Efforts, including referring to individual participants with randomly assigned numbers rather than by name, as well as vetting responses for information that could potentially identify an individual participant, were undertaken to provide for confidentiality. Finally, the interview data and the link between the participant and their transcript were only accessible by the lead investigator.

Interview Analysis: Thematic Networks

Consistent with the advice put forward by qualitative researchers (see Attride-Stirling, 2001; Carlie, 2002; Taylor-Powell & Renner, 2003), the analysis should identify and explore emergent patterns or themes in the responses of the participants. Analysis of the interview data proceeded following Attride-Stirling's (2001) thematic network analysis model for analyzing qualitative interviews. Attride-Stirling noted that while qualitative research has grown in popularity and acceptance, there remains an issue with regard to researchers clearly articulating and describing the analytical process in order to demonstrate aptly the methodological rigour with which the analysis was undertaken. Thematic network analysis provides such a process as it "makes explicit the procedures that may be employed in going from text to interpretation" (Attride-Stirling, 2001, p. 388). Table 1 (below) provides a summary of the analytic stages and steps the researcher engaged in to arrive at the final thematic network (for full details on each component of the process see Attride-Stirling, 2001).

Table 2. Thematic Networks – Steps in the Analytic Process

Analysis Stage A: Reduction or Breakdown of Text

Step 1. Code Material

- a. Devise a coding framework
- b. Dissect text into text segments using the coding framework

Step 2. Identify Themes

- a. Abstract themes from coded text segments
- b. Refine themes

Step 3. Construct Thematic Networks

- a. Arrange themes
- b. Select Basic Themes
- c. Rearrange into Organizing Themes
- d. Deduce Global Theme(s)
- e. Illustrate as thematic network(s)
- f. Verify and refine the network(s)

Analysis Stage B: Exploration of Text

Step. 4 Describe and Explore the Thematic Networks

- a. Describe the network
- b. Explore the network

Analysis Stage C: Integration of Exploration

Step 5. Summarize Thematic Networks

Step. 6 Interpret Patterns

(Attride-Stirling, 2001, p. 391)

In the initial step of the analysis, the researcher created a coding framework that was based on a combination of ideas extracted from previous research in the area of disclosure. In addition, emergent codes, those not previously noted in the literature, but rather arising within the interview data itself were identified. According to Attride-Stirling (2001, p. 388) the thematic network represents the systematic extractions of the “(i) lowest-order premises evident in the text (Basic Themes); (ii) categories of basic themes grouped together to summarize more abstract principles (Organizing Themes); and (iii) super-ordinate themes encapsulating the principal metaphors in the text as a whole (Global Themes).” The thematic network is then depicted in a “map” which provides a visual representation of all levels of themes as well as the relationship existing between them.

Transcription Costs

The financial burden related to the costs of transcribing audio and video recorded evidence (i.e., interviews, wire-taps) were a focal point of this research. In order to get a clearer picture of what the actual costs for transcription are, the need for past as well as a current estimation of costs was deemed necessary. The researcher provided Saskatchewan police services with a “transcription form” (see Appendix IV). Agencies were asked to complete and return the forms. The form solicited information about the types of materials transcribed, formats used, and expenditures incurred as a result of transcription (i.e., personnel [salary], equipment, and paper). This information was recorded and analyzed and the results are presented below.

Process and Practices in other Canadian Jurisdictions

The implications of the *Stinchcombe* decision on the practices and the processes regarding disclosure and transcription has been of interest across the country. This research explored what was taking place in other Canadian jurisdictions to see if there were lessons to be learned from other provinces that had the same issues and concerns. The research followed two avenues of exploration. The first was a review and content analysis of web-based materials reported on provincial Ministry of Justice (or their equivalent) web sites relating to Crown policies around disclosure. The second method involved interviews with individuals in other provinces about the challenges faced resulting from changes to judicial disclosure requirements as well as what they have done, or were doing, with regard to addressing these challenges.

Review of Web-Based Documents

Many of the provinces, in addition to the Federal Prosecution Services, have similar guidelines with respect to the ways in which the duty to disclose is conducted. However, there is also divergence in practice that will be highlighted in the pages that follow. In order to examine both the variability and consistency of disclosure practices throughout Canada, this component of the research utilized qualitative content analysis in reviewing these web-based documents. The researcher selected this approach to content analysis based on both theoretical and substantive considerations (Hsieh & Shannon, 2005, p. 1277).

Scherl and Smithson (1987, p. 199), describe content analysis as, “a family of procedures for studying the contents and themes of written or transcribed qualitative data, usually by reducing it to more structured or concise units of information.” This approach identifies explicit words or phrases that capture the meaning associated with the data through the generation of

categories or themes. According to Mayring (2000), the process may involve inductive category development and/or deductive category application¹³. In order to establish these categories, akin to what Hsieh and Shannon (2005) refer to as “directed content analysis,” this researcher employed a deductive (*a priori*) approach to analysis by initiating exploration of the data from previously identified categories derived from established literature and legal cases.

Interviews

The researcher employed similar processes in seeking out participants from other provinces as was undertaken in Saskatchewan. The majority of the interviews with these participants occurred over the phone rather than in person. These interviews tended to be more focused on current practices and experiences rather than the issues leading up to their current practice. The lead researcher used the same analytic approach to the data collected from the participants outside Saskatchewan.

¹³ According to Mayring (2000, n.p.), “the main idea of [inductive category development] is, to formulate a criterion of definition, derived from [the] theoretical background and research question, which determines the aspects of the textual material taken into account. Deductive category application works with prior formulated, theoretical derived aspects of analysis, bringing them in connection with the text.”

VI. THE SASKATCHEWAN EXPERIENCE

The Interviews

Within the province of Saskatchewan, 29 face-to-face interviews were completed. These interviews took place in locations representing the four regional offices of the Crown: North Battleford, Prince Albert, Regina and Saskatoon. Each interview lasted between approximately 40 and 90 minutes, the majority of which were approximately one hour in length. The interviews were digitally recorded and then transcribed. The transcribed interview data resulted in approximately 680 pages of text, averaging about 24 pages per interview.¹⁴

Of the research participants actively working in the courts, nine were Crown counsel, three were defence counsel, and one retired judge agreed to participate. With respect to the police, the interviews with sworn (13) and civilian members (3) included nine from the Royal Canadian Mounted Police and seven from municipal services.

Results

Following Attride-Stirling's (2001) thematic network analytical process, the interviews were coded using the coding framework previously discussed, basic themes were identified and organized into organizing themes, and a global theme emerged that represented the coming together of the organizing themes into a coherent concluding thematic map. The discussion of the results proceeds with the description of each of the organizing themes and the basic themes from which they were derived¹⁵. Following that is the presentation and explanation of the global themes.

Organizing Theme 1: Legal Requirements and Issues

Table 3 provides a summary of the codes arising in the analytic process by listing the issues discussed, the basic themes that emerged from the analysis, and the more overarching organizing theme. Evidence, in the form of direct quotes from participants is provided with the discussion of each issue identified as a basic theme.

¹⁴ The average takes into account that a few of the interviews had two participants interviewed simultaneously.

¹⁵ In many cases, there were numerous quotes made by participants on the same issue, hence the creation of the theme. Therefore, it is important to note that the quotes provided as supporting evidence of each of the issues discussed only represent a selection amongst many.

Table 3: Organizing Theme 1: Legal Requirements and Issues		
Issues Discussed	Basic Theme	Organizing Theme
<i>Wrongful Convictions</i>	Reasons for Disclosure	LEGAL REQUIREMENTS & ISSUES
<i>Prior to Stinchcombe</i>		
<i>Charter Right</i>		
<i>Crown and Police Roles</i>		
<i>Defence Disclosure</i>		
<i>State Resources / Financial Disparities</i>		
<i>Efficiencies</i>		
<i>Relevance</i>	General Requirements & Issues	
<i>“In Crown’s Possession”</i>		
<i>Exceptions</i>		
<i>Timing</i>		
<i>Ongoing Duty</i>		
<i>Tool for the Defence</i>		
<i>Misuse of Disclosed Materials</i>	Trust Conditions	
<i>Unrepresented Accused</i>		
<i>Transfer of Materials</i>		
<i>How and When Requests are Made</i>	Disclosure Processes	
<i>To Whom From Whom</i>		
<i>Follow-up Requests</i>		
<i>Police Acting as Crown</i>		
<i>Labour Intensive</i>	Cost	
<i>Court Time</i>		
<i>Reasons for Delay</i>		
<i>Effect on Cases</i>		
<i>Effect on People</i>		
<i>RCMP Stop Acting as Crown</i>	Possible Solutions	
<i>Increased Use of Video Court</i>		
<i>Better Quality Disclosure Packages</i>		
<i>Disclosure-Specific Training</i>		

Basic Theme 1: Reasons for Disclosure

The first basic theme, “Reasons for Disclosure,” reflects the participants’ perspectives regarding why the duty to disclose exists. It came together as a theme based on a number of issues that emerged after analyzing the results of the interview transcripts. These issues include: wrongful convictions, the state of disclosure practices prior to *Stinchcombe*, the establishing of disclosure as a constitutional right following *Stinchcombe* and other cases heard before Canadian courts, an examination and clarification of the roles of the Crown and the police, disclosure obligations of defence counsel, and efficiencies thought to result from the implementation of pre-trial full disclosure.

Wrongful Convictions

The recognition that previous cases wherein individuals (e.g., David Milgaard, James Driskell and Donald Marshall) were wrongly convicted as a result of inappropriate practices (i.e., the withholding of information) was clearly deemed unacceptable to participants, and a driving force behind the reason for disclosure challenges and changes in Canadian case law.

I think it all emanates from the fact that there’s a lot of wrongful convictions that were determined that occurred because of a lack of due disclosure, that there could be some non-culpatory things or stuff that would help the accused that weren’t disclosed and therefore, that tainted the trial. (P5)

The whole reason for this disclosure issue came about as a result of several wrongful convictions, and starting with perhaps Milgaard. And in Milgaard there was evidence which the police appeared to have, which might have led to him being found not guilty had it been disclosed. (P7)

We went from Donald Marshall and those things and got to *Stinchcombe* and we’d never go back to that way. (P14)

So I mean, *Stinchcombe* and the whole thing was —I mean, was brought about as a result of some poor practices on the part of the police. (P12)

The practices that led to the wrongful convictions were uniformly recognized as unfair and undermining the fairness believed to be the foundation upon which the administration of justice is premised. (P5)

One of the crucial things that the Supreme Court did with a series of cases, starting with O’Connor and *Stinchcombe*, is to set out the rules which require disclosure, so that there is, in the end, a fair trial and so that with the hope at least that it will prevent or at least avoid most of the wrongful convictions. (P7)

The intent is to ensure that this is a fair process, and they now had, you know, a constitutional foundation to pin it to. But, you know, there's a reason why—well, Section 7 didn't talk in any kind of explicit terms about right to disclosure, it talked about the right to life, liberty, and security of the person. The right not to be deprived of that, except in accordance with fundamental justice. And they said, what does fundamental justice require? Well, it requires that the accused get disclosure. (P10)

Prior to Stinchcombe

Although prior to *Stinchcombe* disclosure was required within many provincial jurisdictions, and there was some degree of disclosure, it was certainly not at the standards required following that decision.

Before *Stinchcombe*, it was essentially prosecution by ambush, is how I've heard it described. (P1)

Well, the fact of the matter is in those days it was trial by ambush, and trial by ambush simply means that everybody guards their own little bit of information and doesn't disclose it until trial, and then there's no opportunity to refute the evidence which they have even though some of it may not have any factual basis. (P7)

Before *Stinchcombe*, it was completely dependent on who you had on the other side of the file, as to what kind of disclosure you got. But, you never got a copy of the police report. All you would get is, at best, the prosecutor telling you what it said over the phone, maybe a couple of days prior to the trial. And then, you'd better be a good note-taker. But, that's how it worked ... So, you were having to deal with everything on the fly, you know, so you may not have seen an important thing in the officer's notes until you're actually in court (P10)

Because in the olden days, basically, if you want to call it the olden days, you know, you would have the accused's statement and that sort of thing and you know if you felt like giving it you would, and if you didn't, you didn't have to. There was no requirement. (P16)

Following the *Stinchcombe* decision and other cases, as well as with the passing of time, disclosure obligations began to become better clarified compared with past practice.

Before [*Stinchcombe*], we would sometimes—way back when, we would—it was—we would read the files to the Defence. And we'd give them copies of some statements, but we wouldn't give the police reports. This is, like, in the early '80s sort of thing, and then it sort of evolved and sort of grudgingly we got, you know, more and more into case law—and it's still evolving, what our duties are. (P18)

I think the prosecution picked and chose a little bit more then on what was disclosed than it is now. I mean, now it's pretty much a blanket. You get—as a defence lawyer, you will get everything that's gathered. (P25)

Charter Right

Consistent with the accused's *Charter* rights was the recognition that the right to full answer and defence was established long before this as an element of natural justice.

If you read Justice Sopinka's decision in *Stinchcombe*, really what he was saying, he says, is that it's really a rule in natural justice. That nobody should be facing an allegation, especially of criminal conduct, unless they're entitled to know fully what's out there that's relevant to their charge. But the basis for the disclosure didn't arise out of the *Charter*; it really arose out of rules of natural justice. (P8)

The *Stinchcombe* decision located the duty to disclose within the range of constitutionally protected *Charter* rights. The participants recognized the relationship established in *Stinchcombe* between the guaranteed *Charter* rights and the duty to disclose.

I assume you know this all evolved from Charter issues, and perhaps the, you know, the prime concern might have been, you know, you go back to the Milgaard case and things like that because I assume that the whole reasoning behind it is to prevent unlawful convictions and that sort of thing. And you know, ensure that the accused knows the case against him. (P17)

You know, it pertains to the accused's right to be able to provide a full answer and defence to the charges against him (P2)

Under the *Charter of Rights*, as you well know, the obligation is that the accused get a fair and open trial and that means a complete and fair disclosure. (P7)

Stinchcombe is an important decision, but we need to, you know, people need the right to fair answer, you know, full answer and defence is, that's an important principle, so I wouldn't disagree with that. (P15)

Crown and Police Roles

The roles played by the police and the Crown are designed to be mutually independent yet they are undeniably related to each other. The police investigate a crime and make the decision as to whether or not they will arrest a suspect and lay a charge.

[Crown] may make suggestions on things that we'd say are of assistance to us and ask that they be looked into. But, we don't do any of that, right. It's not the American system where we're out there, part of the investigation (P4)

Every jurisdiction that I've been policing in, we as a police force or jurisdiction, decide what charges are going to be laid or not going to be laid. The Crown does not make that decision, and we've been very cognisant in those various divisions that we do not give up that ability to lay charges and make the decision on charges ourselves. We'll consult with

Crown for their decision because they're ultimately going to prosecute the case. But we make the decision as to whether or not we're going to lay charges. (P13)

The Crown retains the final decision as to whether or not they will proceed with the charges laid. They have a number of considerations to examine in making this decision.

[The Crown has] this difficult situation where they are still operating in an adversarial system, they still are trying to, they still have to put a case forward, you know, that they expect to win. They have to make the decision, first of all, "Am I going to go ahead with this? Is there a reasonable likelihood of a prosecution that's in the public interest?" So, if it meets that criteria then they are going to go ahead and try and win because the law understands that, the system understands that if you've got two parties working at it you'll come up with a solution. But at the same time, you've still got this overriding thing of fairness and so on, that you've got to be alive to, and you can't get caught up in the battle. You've got to continue to meet your obligations as the Crown. (P8)

We're [the Crown] not hiding, you know, we're not trying to hide that stuff. I never worked in that milieu. We've always been that way, to the point that if the evidence as it comes in, if it, you know, flips to the other side, we have a standard of prosecution—it's a reasonable likelihood of conviction, and if it's not there or it's no longer there, well then we're obligated to stay or withdraw the charges, and that's the end of the matter. That's been our obligation, right. (P15)

'This is the information that we have,' and the investigators are always in contact with the Crown prosecutor that's assigned to their case. For instance in a murder investigation the detectives will talk to the Crown back and forth about, you know, what's going on and how it's progressing and things like that. (P14)

They'll decide either that a charge is warranted or a charge isn't warranted. Obviously, I don't get anything if they decide a charge isn't warranted, unless there's some other reason for us to look at it. If they aren't sure, they may send it to us for a referral and that would be the only situation where I'd get the information [being the investigation, not the physical charge information] before a charge is laid. (P4)

The role of the Crown prosecutor is multifaceted with respect to deciding the merits of proceeding with a case. While the participant above suggests concern on the part of the Crown with respect to the likelihood of prosecution and conviction, as stated by another participant, however, the role of the Crown is not to "win" the case. Rather it is to present the evidence to the "triers of fact" and let them render their decision.

I've had Crown prosecutors—there's a wonderful gentleman—and what he would do is, we would be arguing a case and he would say, well, there's something else that arises here, that the accused might want to argue this. And like, that was the epitome of fairness,

sort of saying, I'm not interested in a conviction. I'm interested in laying everything out for the judge. And so he would sort of say, well there might be something else that the accused could argue here, if he thinks that this happened. And judge, if you find that this is the true situation, these are what the facts are, there's another thing here, that the accused could argue, that to be blunt, I hadn't thought of or hadn't considered. (P5)

I'm laying it all out for you and you, judge, are there to make the decision. As opposed to saying, I'm a Crown prosecutor, I want to convict this bastard, and so I'm going to try and channel all my energies to that. (P5)

The duty to disclose, while ultimately resting with the office of the Crown prosecutor, is extended to the police by reason of their unique relationship in processing criminal cases.

The Crown has a duty to disclose all materials in its possession, but it actually goes—and it actually extends to the police officers. So, it's not just a situation where you go to the Crown prosecutor and say, "Okay, have you given me complete disclosure?" They need to know that the police officers and the other investigator officers, whoever they might be, have also given disclosure. (P7)

For the purposes of disclosure, the Crown and the police are considered to be one entity. So, when I say the duty is on the Crown, those duties extend to the police. (P10)

Well, it gets extended to the police because anything that we have in our possession we have to disclose, and for the most part that applies to anything. Anything in the possession of the police is in our possession as well. (P17)

The cooperation between the Crown and the police in jointly ensuring that each is apprised of the fruits of the investigation and have a commonly agreed-upon package for disclosure is important and based on a good working relationship.

Having a good relationship with your Crown is very important and they understand the nature of the work we're doing. Some Crowns will come over, sit with the teams, and review disclosure with them, to make sure everything is good. (P6)

My experience has been with Crown [when I was] in [another province] and I mean, maybe for Crowns and again in [other provinces], when we dealt with stuff, there was generally a decent relationship, working relationship between Crown and defence. They would discuss stuff. (P13)

So, when I say back and forth, they'll talk to the prosecutor about, you know, points of law and stuff like that so that we make sure that we do things so that we're not going to lose on a technicality or something like that. (P14)

Defence Disclosure

There were questions and issues raised by participants with regard to requirements—or lack thereof—with respect to the defence providing disclosure, as well as how this might have an effect with regard to what the Crown provides to defence in the disclosure package. Consistent with case law, there is no reciprocal duty of disclosure on the defence except in specific circumstances.

There's been very limited disclosure coming the other way. There's some cases, obviously, and trying the *Criminal Code* now under Section 650, but you know for expert reports and things like that they have to, you know, they have to at least give us notice and a resume and their anticipated evidence, but it's only at a fairly late stage in the trial proceedings, in the first place. So, you know, there's quite a difference between, I suppose, what happens in Canada versus what happens, for example, in the UK. (P17)

You can ask for an adjournment if it's an expert and that kind of stuff. But—and you're not given these reports. But I think it would be nice to have a little bit of reciprocal disclosure because I mean, initially the whole criminal justice system sort of evolved from medieval times when there was, like, 160 hanging offences or capital offences. So it's sort of a law of evidence evolved to protect innocent people, and they got these exceptions and rules and—okay, so we have to prove the case beyond a reasonable doubt. You got to do all this stuff. (P18)

There's another reason why as defence counsel, tactically, rely on that right that [they] have not to disclose anything. [They] have a duty to [their] client. And [they] also have an obligation not to disclose, all the time. (P5)

In some circumstances this can be a source of frustration and make full disclosure that much more difficult for the Crown.

I mean, it's still trial by ambush, but it only applies to us as prosecutors because we never know what the defence is going to do. (P17)

They don't have to tell us. We can say it's relevant, but again, how can I judge what's relevant to the defence, and a defence sort of case when they're not telling me what their defence is? The defence know who our witnesses are. They have copies of their statements. They—there's no surprises, and if there is, they can get an adjournment. ... We don't—the defence doesn't have to tell us if they're calling evidence or not, and all of a sudden, I'm not telling you my defence. I'm not going to—and five minutes later they're standing up and calling for witnesses that you have no knowledge of and you're sort of—got to stand up and try to cross examine them as best you can. (P18)

The determination of what is relevant (part of prosecutorial discretion, discussed below) is made more difficult as the Crown is not privy to the defence to be presented. As noted above, there is

some concern that, although recognizing the importance of disclosure in providing a fair and just process, that perhaps the pendulum has swung a little too far.

Efficiencies

Although remaining mindful that the decision in *Stinchcombe* was not concerned with efficiencies, it was posited that there were possible benefits to the justice system arising from the disclosure requirement. The participants expressed mixed responses regarding the potential efficiencies that disclosure was originally thought to provide. Some participants stated that efficiencies were likely the result of providing earlier resolution to cases (possibly more guilty pleas), others noted that even if it goes to trial, everyone is (or at least should be) better prepared and providing disclosure presents a thorough review of the case, wherein in some cases will not proceed at all.

I think, certainly it was believed and I think, experience has borne out the fact that when there's full disclosure, there's a resolution of more cases before trial. And I think that the courts believed that would happen and I think that's what has happened. (P10)

My view is that if you did it right away things would move ahead much more quickly to a resolution. Whether that resolution is a negotiated resolution or a trial, it'll still be better. So, yeah, full disclosure on a timely basis definitely is cost effective. (P8)

They're not having a recess so they can go back, 'Well we didn't know that.' So, then the Crown gives them some more information and then they set another date for down the road and I think that's made it more efficient. When we actually show up in court if there is not a guilty plea—which there usually is in most cases—but if there's not a guilty plea and we're going to go to trial then everybody, when we set the date for September the 23rd, 2013, everybody's prepared that day. Nobody is going to show up and say, 'Hey we need a little more time here because we haven't quite got this or that done.' So, everybody gets there and that makes it more efficient I think. (P14)

We save court time too because of the disclosure too. But I mean, we have our standards whether to bring a case. There's got to be reasonable likelihood of conviction. So, you know, you sometimes get one side of the story, you don't get the other side and when you start sort of—in your quasi judicial function as prosecutor is when you weigh the case, whether you're taking—you may decide not to proceed. (P18)

Part of that is us being as prepared as we can be for trial and then, when it comes to the disclosure, making sure that it is disclosed in a manner that defence can raise their defences, or, admit to responsibility. You know, that's the process. *Stinchcombe* isn't just limited to giving you information to give you a defence, right. *Stinchcombe* says all relevant information. All relevant information, more often than not, I'd say, would lead to

guilty pleas. Which then saves resources, may save further police expense, Crown expense, court expense, move forward on a trial or just other court dates. (P4)

Despite the potential efficiencies reported by many participants, others responded with comments that were contrary.

The intended efficiency on the back end would be lost on the front end. That could be seen as reasonable, but if it becomes so burdensome on the front end, which could actually delay people going to trial, which also incurs costs, both financial, personal, whatever. (P5)

I suppose, one of the arguments some defence lawyers make is, well, now that I know the Crown's case, I can better instruct my client. And then, of course, our usual response to that is, well, your client knows what happens one way or the other. So, you know, why should—if he told you something different than what was in the disclosure, you know. So, I don't think it's changed anything whatsoever. I don't think we have any more guilty pleas or less guilty pleas or anything. (P17)

It might encourage a guilty plea. I don't know if it increases efficiencies, I don't know. I didn't see that I guess, because I mean, *Stinchcombe*, it has been around a long time. And I mean, the backlog at this courthouse is phenomenal. (P25)

In most cases, the defence lawyers are Legal Aid. They get paid for number of times they show up in court, and the chances of them pleading somebody out, even when it's totally obvious, it's money out of their pocket if they don't go to trial. So they go to trial. And they'll call things—they call our police witnesses to show up for court, knowing full well that they're not going to go to trial, to see if they show up. They know what the case is, but it's all about the bucks at the end of the day. The justice system and things being done properly for the right reasons, missed the boat years ago. (P13)

You'd have to look at that per capita [creating efficiency in the court] I guess. I don't think, we're just, we get busier every year. So I don't, the way it's made it more efficient I think is to make sure that everybody is as prepared as possible when they get to court. (P14)

Although efficiencies may be realized on the back end of the criminal justice process (although many doubted this), the issues it created at the front end of the process would appear to have reduced the anticipated efficiencies when looking at it from a broader perspective (particularly for the police). In addition, the continued backlog in the courts and the potential for financial incentives to reduce the likelihood of pleas was reported as evidence that there had not been a positive effect.

Summary

As outlined by the participants, many of the reasons for disclosure reflected the issues raised in the *Stinchcombe* case. The avoidance of wrongful convictions, the right for the accused to make full answer and defence as well as a clarification regarding the roles of the police and Crown were clearly evident in the participants' responses. While continuing to assert the independence of the police and Crown, the participants acknowledged that while the duty to disclose ultimately rests with the Crown, the police are equally responsible for the provision of complete disclosure packages to the Crown. The participants also provided the perspectives on the issue of defence disclosure. As is the current state of affairs in Canadian law, while there are certain circumstances wherein defence must provide the Crown with a modicum of disclosure, there is no standing duty to disclose imposed upon the defence. The participants were mixed in their responses regarding the anticipated efficiencies thought to result from the *Stinchcombe* decision (e.g., a greater number of earlier resolution of cases through plea bargaining) with some suggesting this was possible while others arguing that even if there were early resolutions of the cases there were no efficiencies gained in "the system" as the work required pre-court to provide disclosure offset any perceived efficiencies in court.

Basic Theme 2: General Requirements & Issues

Stinchcombe provided increased clarity as to the requirements surrounding constitutionally guaranteed disclosure obligations. Participants in this research identified a number of aspects of these requirements as well as commented on some of the issues that arose as a result. The areas that they provided commentary on include relevance, "in the Crown's possession," exceptions (to relevance), timing of disclosure, that it is an ongoing duty, and that disclosure has become a tool for the defence. Each of these is discussed below.

Relevance

The determination of what is relevant to the defence, in providing them with their right to make full answer and defence, was in its most basic application agreed upon by the participants as encompassing all of the "fruits of the investigation." This includes all inculpatory and exculpatory evidence regardless of which party the materials might be deemed to benefit.

The duty is on the crown, the duty on the Crown is to disclose all relevant material to the charged before the court, whether or not it's beneficial to the Crown's case. (P11)

So relevance would be anything that is logically connected to either a defence or a Crown case, right. So anything that has to do with any element of the offence basically, any evidence, any relevant evidence to the elements of the case and credibility of witnesses, that sort of thing. That's relevance. (P3)

Obviously, our duty as prosecutors is to disclose—typically called the fruits of the investigation, right. Anything that's, any investigation that's generated by the police we are duty obligated to disclose. I don't know if the police back in those days [pre-*Stinchcombe*] were providing the exculpatory stuff, right, whereas we are obligated to provide inculpatory and exculpatory, right. So if it vindicates the accused, we provide [it]. If it can assist their defence, well then so be it. (P15)

Everything that's going to make your case, plus those—plus stuff that's going to be—could be used, I guess, for the accused to benefit him or her from not being found guilty, I guess, of the offence. I mean, in essence—I mean, pretty well the entirety of the file, everything that we've done. I mean, there are a few instances where, I mean; informant privilege and other things that are clearly irrelevant or are going to hamper ongoing investigations or investigative techniques that would be removed. But I mean, all—the bulk of the file is what needs to be disclosed so the Crown can prove their case. And so, defence can have all material available to them to defend their client. (P26)

Within the array of materials that the Crown receive from the police they are permitted to use discretion with regard to the final determination of what is, or is not, deemed relevant to the case. This determination may result in some materials not being forwarded to the defence as part of the disclosure package.

[The Crown] will look into whether [they] think it's something they should have as relevant. And that's kind of one of our functions, is that kind of—that final screen before things get to defence or before the Court gets involved of, do we think it's relevant. And that's kind of our discretionary role in there. (P4)

From my perspective, the duty for us is, of course, to disclose to Crown the full investigation. You know, it's not up to the police to determine what is disclosable to defence and what could be held back. That would be the Crown's to argue and the Crown's to determine. (P24)

The Crown has vetting authority on disclosure. It's also the—they really are the agent for the justice system. We're just gathering the information. They're the agent to take it to the next step of the wheel, if you want to call it that. And they should control that information at that point, how it's vetted, how it's given out. I mean, we disclose everything to the prosecution, but they can still pull them back from there. (P25)

The disclosure package for the defence could be ten times the volume that the package for the Crown is, that's going for the evidence in court. That's probably the best way to

describe it, only a fraction [of the entire disclosure package sent to the Crown] will end up being used as evidence. (P16)

There are some “grey areas” with respect to relevance wherein a difference of opinion might be observed between the Crown and defence. One of the issues, already alluded to above is that without defence disclosure it can be very difficult for the prosecution to determine what the defence might consider relevant.

The Crown must disclose everything to the defence, but the defence, philosophically, doesn't have to disclose anything to the Crown. And so, in some ways, how is the Crown supposed to know what's relevant to the defence, and what's not? (P5)

In addition, the Crown and the defence approach their roles from a very different perspective from the outset. This can lead to philosophically different perspectives with regard to relevance.

There's no question that the Crown and the defence always tend to start from different starting points, in terms of relevance. My experience in the case law would bear this out, is that the Crown has generally fought expansion of what should be disclosed. (P10)

Some defence just asks for things that we don't feel are relevant to—it's not something, those will come up where defence will, it will be, that will be a defence-generated request. (P15)

There's some defence counsel ... that would be very quick to start saying, hold on, there's a conspiracy to obstruct justice in the—and I thought, well, no lawyer or accused is that important in little old Regina, that we're going to have ten people risk their careers to obstruct justice on a two-bit dangerous driving charge. (P5)

Some prosecutors just say, 'Hey fine I'll give you the records, if you think you can do something with them, go ahead.' But there are other prosecutors who take a very hard line and say, 'That's not relevant and you're not going to get it,' and so we're working our way through the courts to decide whether it is or isn't. (P8)

If something is irrelevant in our respectful opinion then we would advise defence that we don't think it's relevant to the case. So, then the defence would make an application for disclosure to the court. (P15)

However, prosecutorial discretion is not without its limitations and/or checks and balances. Participants reported a combination of professional integrity as well as the ability for defence to request judicial review of disclosure requests as generally keeping prosecutorial discretion in check.

We [the Crown] don't want to—we certainly don't want to hide information. We want to give as much information as we can. And I think the test is so broad that we have, that it does become the default position. (P2)

And if you end up with an issue and the accused decides it's important, he can apply to the trial judge for a ruling as to whether the documents, or the information it's based on is relevant. So, the bottom line is, there's an arbiter, and that's the trial judge, in most cases. (P10)

Unless the Crown says, 'Okay, enough. We've given you full disclosure. We're satisfied and we're not adjourning this anymore. Let's get a hearing and then you can argue it out in front of a judge.' (P18)

But what I do in those—if it's a grey area and we can't decide, then they go get a—you can make an application, and that's what I suggest defence do, go make an application. (P19)

The final disclosure package transmitted to the defence, once relevance and all its considerations have been undertaken, was noted as potentially being significantly different from that provided to the crown by the police in the first instance.

So in a sense, the disclosure package for the defence could be ten times the volume that the package for the Crown is, that's going for the evidence in court. That's probably the best way to describe it, only a fraction [of the entire disclosure package sent to the Crown] will end up being used as evidence. (P16)

Despite this potential difference, it was generally noted by the participants that there was reasonable consideration by most Crown counsel when tasked with disclosure requests.

I can categorically state—there's never any reticence on the part of the Crown to give you disclosure, like, it's not – you know, we might harp over I think you're taking too long and stuff like that, but the Crown—yeah, I've had one Crown just sort of say, we give you everything that we get. There's not any reticence, or I can't point to any, it would be foolish of anyone to start saying there's a conspiracy among Crown to delay disclosure and stuff like that. Like the rest of us, they're just trying to do their job, fulfil their role (P5)

And so, although I say the Crown is the one who makes the first decision, the defence in their request, is often, you know, telling the Crown, this is what we think is also relevant. And, you know, often many times the Crown may not dispute that, just obtain the material. (P10)

It's not just an esoteric thing. Where you don't know necessarily—there's evidence on the fringes of relevance. But because you don't have a warrant statement perhaps from the accused, or you don't have the insight from the accused that a Defence attorney

would have, you don't have a perfect view of what might be relevant to that Defence attorney. And that's where I suppose we want to err on the side of caution. ... Sometimes you view some evidence and it just strikes you as quite obviously wholly irrelevant to the charge. And if it's—oftentimes that gets disclosed as well. (P29)

Furthermore, participants acknowledged that the “test for relevance” within the courts was generally “low.” Given this recognition of the test, the Crown is required to be diligent, erring on the side of caution, being inclusive.

But since Stinchcombe, we have the duty to disclose any relevant evidence, so it's a test of broadly relevance. So anything that's broadly relevant to the criminal charge of the accused, we have to disclose. It's such a broad test for relevance. Usually there's not that issue. I mean, it's whatever is broadly relevant. (P2)

The law will still find a delay on us if we don't provide it because if the court finds it to be a relevant question to ask. And you know, relevance is a fairly low standard. (P17)

But you know the threshold under Stinchcombe was quite low (P7)

The Crown has to exercise utmost good faith in deciding what's relevant. So, you're right, what that meant was, the Crown has to err on the side of inclusion, not exclusion. (P10)

“In Crown's Possession”

The issue arising with regard to the Crown's disclosure responsibilities is complicated by the fact that some material, considered relevant by the defence may not be held in the possession of the Crown (or police). These “third-party” records become a contentious element of the disclosure process and the legal requirements placed on those representing the state.

Sometimes defence requests third party records. You've read the decisions on that. And I mean, sometimes they're not in our possession, so there's an issue about whether we actually disclose or not. (P2)

So, then you get, it gets into really a big grey area in many respects because how far can you go with respect to third party documents. (P7)

Well, third party requests, those, there's no automatic right to any third party records. There are some Crowns who will take the view that, 'I'm only obligated to disclose to you what's been provided to me by the police. I have don't have to check with the police and see if there's five other statements that they got that they didn't give me.' There's other Crowns, would recognize that really I have to make sure that I've got all of the information the police have and then disclose it to you, which I believe is what their

obligation is. You can't avoid disclosure by saying, 'Well gee, the police got it so why should I have to disclose it?' (P8)

Absolutely it's possible [that the Crown might not have them]. But they have a duty to get them. (P7)

And the most obvious would be us saying, yes, we've got, you know, the bare bones case here, but we actually want a DNA warrant done. We want to confirm. We want a test on blood, you know, make sure we've got the right guy. So, that would take some months of delay. (P15)

There have been court rulings with respect to third-party disclosure (as discussed in the literature review). The two main ones that participants referred to were *R. v. O'Connor* and *R. v. McNeil*.

That went to the Supreme Court and then, the Supreme Court set out these guidelines for an O'Connor application, saying, if I want some information that's important to my case, and you the prosecutor don't have it, someone else has it—well, I make an application. And the Crown doesn't really have to be involved in that. And then what happens is, if I—so, I could go to a psychiatrist's office and say, I want the psychiatric records of this particular complainant, because she has made several false allegations of sexual assault before. She's a drug addict, she's suicidal – there might be something in there that's pertinent, or that a judge ought to know, with respect to her credibility. (P5)

Like O'Connor applications and that. [When you are] trying to get information from Child/Family Services, social services, medical reports from doctors, or whatever, yeah. There's not much you can do, because you try and explain to defence that third party is out of my control. I can send letters. I can ask them for their disclosure. We can get a court order for disclosure, but the court order usually is only binding on the parties. (P11)

They have to disclose to the Crown. Crown is the gatekeeper with McNeil. We don't give directly to Defence. But, for example, if the officer has a finding of misconduct in relation to an integrity issue, well that is—may be relevant for the Defence to raise. (P9)

So, if you're involved in that case, and there's a complaint against you, then it's an automatic disclosure. And if it's a case where, you know, where you've got discipline on your record and you're on a two-year probation order or some—not probation, criminal probation, but an internal probation or something under that. You've been issued discipline according to the police municipal regulations, then that would be, you know, up to the Crown to determine if that meets the disclosure and then they can—they argue about between defence [and Crown]. (P12)

And what McNeil had said, yeah, they're third parties, but there's a duty on the Crown to bridge this gap, to be a link between the accused and these other police forces. And they used the expression, use their good offices. (P10)

Even with consideration of the court rulings, there still needs to be consideration of other issues raised with respect to relevance (see the exceptions discussed immediately below) which means there must be an attempt to balance the right for the defence to have full disclosure in order to make full answer and defence (which tends to be given priority), with the protection of privacy and privilege within the scope of relevance.

The next one [stage in the disclosure process following the defence request] is the balancing act. And on the balancing act, of course—so if the court determines that the material is likely relevant, the court then goes to the second phase of the balancing act. And then the court is to, again, to do this in camera or in a voir dire, etc., and then to deal with the true relevancy of the targeted records, etc., individually. And then this, of course, assuming the relevance is established, then the court has to weigh the multiple competing interests, etc., be they third party, privacy interest, etc., or privilege to determine whether or not any disclosure should be made. Well, let's say that the victim, for example, has a series of mental health issues, which immediately raises the privacy issue. And then one has to determine, and again, it's on an individual case-by-case basis, why does the other side need these records? And do they need it because they want to put before a jury perhaps, or the judge, that because this person has a mental illness, etc., that it's not likely the person can be believable or it's not likely that the person actually incurred the harm that she alleges she incurred [indiscernible]. So, again, it's always a balancing act. I guess there are some things which are clearly inadmissible and in that case, you know; you just say the Crown doesn't have a duty to do that. (P7)

Exceptions to Relevance

The exceptions to relevance exist such that they should balance the defence's right to make full answer and defence with the rights of other parties involved in the case, as well as protecting police investigative practices and informants where possible.

[Exceptions can include] privileged information, information between the Crown and police, information that may reveal a police investigational technique, confidential source information—human source—confidential informants, those type of information that is protected under case law or by privilege. (P9)

One area that provided an impetus for giving consideration for an exception to the general rule of disclosing all materials to the defence was the concern for witness safety.

If there's personal information of a witness or a complainant that might put them in danger, that kind of thing (P2)

Yeah, just for privacy, so that the—you know, in most cases, the accused would have some prior knowledge who the witnesses are anyways. It's just that for the protection of the witnesses involved in our cases, in a sense. (P16)

And, what they were worried about is if they let me know, who the witnesses were that were going to testify, that my guy, even though he was in jail, would sort of get to them and try to influence their evidence. Unfortunately, in a related case, that same accused had been charged with obstruction of justice, because a guy was going to testify against him and he went and beat him up. So, they had some well-grounded fears that my guy would sort of do that. (P5)

Another area given consideration with respect to the determination of relevance was balancing the right of the accused to make full answer and defence with the concern for the individual privacy of others participating in the proceedings such as witnesses or victims.

[Witnesses or victims become reluctant] Who needs this? Who needs this? Why do I—I don't want this, I don't want—you know, and it doesn't even have to be anything illegal, like I say, related to counselling records, if someone says, I went to my therapist because I had an abortion when I was thirteen and then when I'm twenty-four, someone sexually assaults me and I'm still dealing with my therapist. And someone says, I want all your therapist's records, I'm not testifying. Like, who signed up for that? And that's where the privacy interests are engaging, you have to show that it's relevant. (P5)

We're also not going to be disclosing things that would not be relevant to the case, such as the hospitalization number of the victim or something like that, private information, that doesn't need to be disclosed. (P3)

So, names of witnesses, not necessarily—I don't think that it's required that they have their addresses or their birth dates or whatever, but again, that can be up for discussion, depending on the nature of the charge. We may either be responsible for having the police assist in arranging for an interview, as it were, with defence counsel, rather than actually giving them the contact information. Because of course, that's that person's privacy issue. (P4)

It appeared to be somewhat of an accepted position that the protection of the identity of a confidential informant was an exception to relevance.

You know, unless it's going to identify an informant, or unless it's some technique that they don't really need to know, I mean, you know, there's really nothing—you know, if I look through all this, I'm sure I could[n't] find one thing that it wouldn't matter whether or not they had or not. And you know, it's not relating to the file itself. (P17)

So, for example, this might be a report that I generated as a result of a conversation with a confidential informant and if I were to disclose this in its true form, the identity of the informant can be compromised. If I—however, if I—what's happened is a lot of times, we're afforded the opportunity to vet the information, so I can stroke out certain things and [lock it] and we'll disclose the copy of a search warrant or intelligence report or something like that. (P12)

It gets a little more complicated perhaps, if some of that stuff involves confidential informants. You know, there's certain areas where we would have to step back and decide, you know, weighing the interests of say a confidential informant, that is the one that jumps out to me, where we may not be able to disclose for other reasons, for competing interests, right. (P15)

Withheld, or the safety of confidential informants. And the courts have recognized confidential informants as being kind of sacred grounds, same with Crime Stoppers. (P20)

Information regarding a spectrum of police investigative techniques, or information that could jeopardize the current or other ongoing police investigations was also reported by participants as receiving judicial consideration as an exception to relevance.

The court will be cautious about ordering an undercover operation, etc., destroying an undercover operation, and the court is going to be very cautious before they require that person to come in and testify and blow the whole undercover operation. It's probably not going to happen. (P7)

When I was in auto theft, for example, manufacturers of vehicles put hidden markings on vehicles so they could be identified once the number plate's been removed. The locations of those, case law said, we don't have to disclose that to defence. We don't tell them where the numbers are hidden, because it would thwart the whole process. (P24)

Or certain investigative techniques we don't have to disclose either right, because it'll jeopardize future investigations. The bad guys get to learn all our tricks of our trade, right. (P20)

Finally, a few participants identified a few Special Cases (particularly in the case of child pornography) wherein an exception to relevance could be argued.

Prime example of this would be the category of child pornography. Obviously, that's not something that we keep in our offices, generally speaking. Although, in certain circumstances, we'd be permitted to. Generally, that's something that stays with the specialized ICE unit – doesn't leave their possession ever, and we would have them come into our office, or another location. Counsel would both meet with the ICE officer to view the material for the purposes of being thorough ... I'm not necessarily agreeing that the accused should get to see it. But, that their counsel should. (P4)

We were talking about secure websites and that, again from personal experience as an investigator, one area where we do have issues with disclosure a lot of times is with child pornography, with our ICE units. And you know, we can't—by law we can't disclose images. (P12)

Regardless of the exceptions to relevance that can exist, it was noted that defence should be made aware of the existence of documentation not deemed relevant such that they can make their own assessment and make a request if deemed appropriate.

But sometimes there would be a set of reports indicating other exhibits that they view to be not relevant that weren't disclosed. And that's something that's very important, at least it was in my practice, to also let defence know about additional items that were seized that we haven't provided them. And at least give them a descriptor of what that was and it gives them an opportunity to request it if they want it. (P29)

Timing

The timing of disclosure was an issue raised by virtually all participants. The requirement of providing disclosure in a timely manner was observed by participants as an onerous task that depended on a number of different factors including when the charge was laid, the time to first appearance, and whether or not the accused was in custody.

Once the person is actually charged then you're entitled to get the disclosure. Stinchcombe clarified that you're entitled to disclosure but only once you're charged. And the reason why you're entitled to the disclosure then is you're entitled to know what case you have to make against you. (P8)

Stinchcombe actually requires disclosure, and I think there's a phrase in Stinchcombe, before plea. And so, you really have to know what the evidence is before you decide whether or not you're going to plead guilty or not guilty, or you're going to try and work out some sort of negotiated resolution. (P5)

Rule of thumb is, as much information as you know at the time of first appearance, is typically, what we would disclose. It's—you've got your general occurrence report, video, audio, stuff like that, and notes and call, and that would be your first appearance. Here [are] the two copies for the prosecution, and that, it's still under investigation. (P25)

Well we do it as quickly as is humanly possible. But usually it'll take—depending on what the disclosure is, because certain operations have to be done within 24 hours—but usually disclosure has to be done prior to trial. And a certain portion of the disclosure has to be done prior to preliminary hearing, so it all depends on what the case is. The most important thing is going to make sure they come before a JP initially, and that they get the show cause hearing initially. (P14)

Timing is very important for courtroom number two for the custody courts. We need to get as most information as possible to make our decisions on bail, and they're important decisions. A person's liberty is at stake here. So we're—you know, okay, are we going to release this guy or not? Has he failed to appear in other times? Is he a danger to the public? Is he going to continue committing further crimes? And you sort of—you know, do we [have] a good case? If it's a crappy case that's likely going to get withdrawn, we're

likely to release the guy. Whereas you got a really good case and he's going to get convicted and he's going to be in jail for five or six years, you want him inside until he's—it gets resolved. (P18)

It's as soon as—whatever they have, at the time they come to court. There are times that I will use, what is commonly referred to as kind of the three days that we get to prepare for a Show Cause, to assist in that investigation. I know the investigation's very rarely something's just happened at three a.m. this morning, we have people in custody, [and] they're going to appear this morning. But, realistically, the officers aren't going to even have most of their work done. (P4)

Our calls for service on the weekend are very high. And they'll be times when our cellblock will be full, come Monday morning. And there [are] twenty-six people to go to court that day. So, if you're the Crown prosecutor on docket, it's almost advantageous of you to come in and be aware of the files that you're going to be facing Monday morning, otherwise there's no way you can cope. So, for a long time, the prosecutors were coming in even on the weekends. And that takes a big commitment on their part, too. Because you know, that's their weekend, that's their only days off, and they're coming to the office for three or four hours and reviewing files. But, that also benefitted them for Monday, so they weren't walking into a hurricane, you know. (P12)

On-going Duty

As a result of the challenges associated with providing as much disclosure as is possible in time for the accused's first appearance in court, many participants reported that partial disclosure is a real possibility. These concerns, while not necessarily removing the demand for disclosure may result in partial disclosure or delays in material that will be disclosed eventually.

If it involves an ongoing investigation, for example—you're in the middle of an investigation, an opportunity comes up, and the arrest is made, and you're still not far enough down the road to say, well, I was looking at this and I didn't think I would reach this point until, maybe, another month or two months. What we're doing here, is in some cases, we'll take that opportunity, complete a partial disclosure. (P6)

As you can appreciate, and it's becoming less and less because the more times we go before cross and we start—have to start to disclose some of the techniques, there is some times those—that portion of the file, of the investigation, it gets disclosed anyways. You can understand what I'm getting at. Whether it's an undercover operation technique; whether it's a—just a procedure, in a sense. But there isn't really too much now that I understand, that isn't disclosed on the investigative technique side. (P16)

It says [referring to *Stinchcombe*], 'If the record holder of some of the other interested parties advances a well founded claim of privilege,' and then quote, 'in all but the rarest cases where the accused [instances at stake] the existence of privilege will effectively bar the accused's application for the production of the targeted documents, regardless of the

relevance.' So, again, while, the duty to disclose is broad, it is focused on the, as I say, the claim of privilege. So, the claim of privilege has a strong, it's a strong barrier to cross. So, it's not that it can't be, but, and again, you have to look at the individual case and the individual application. (P7)

And there's, you know, there's privacy concerns in relation to the complainant which will sometimes, by legislation, trump a disclosure obligation. (P8)

Well, at that stage, the Crown may not have all the evidence and, of course, they may not know about the evidence until—they would take the position, well, this is the evidence that we have, and we've disclosed this evidence, etc. But if new evidence comes along after they've made that statement to the court, they're duty bound to make the disclosure to the defence. And to fail to do so, again, is highly prejudicial to the defence. (P7)

Right, it's [disclosure obligation] ongoing. So, that if they come up with new information, they also have to share that. Even if a conviction has occurred, if new information arises, they are still obligated by the duty to disclose – the process actually doesn't end. (P5)

Disclosure is referred to as ongoing. Even past the completion of the case. (P4)

As well, anything that—and that's ongoing, so as the case progresses, additional information comes in, we disclose it. (P15)

And then as the stuff rolls in over the next X number of weeks, months, further disclosure is made. I mean, it's not the full package every time, but it's just, you know, another statement taken. (P25)

Disclosure goes essentially forever. (P23)

Tool for the Defence

While recognizing that there is a fundamental need for fairness facilitated by disclosure, there was also the recognition that, as with many other decisions rendered by the courts, that the expectations and practices that follow could be taken too far. No participant disputed the need for the accused to be protected against the potential for wrongful convictions arising from the number of reasons noted above.

Well, you know, it's very lawyer dependent because, you know, some people use this as a sword; some people use it as a shield, and of course everyone thinks of it. You know, I don't think anyone would disagree with the fact that it's fine to use as a shield because you're protecting yourself against—you know, if you're asking for it on the basis that, you know, your client might not be guilty, or your client needs information so can you prepare a proper defence, that's great. But many defence counsel use it quite often as a

sword in the sense that they'll ask for stuff, knowing it's difficult for us to get. Not that they need it, but just to slow the case down because of course delay also always benefits them; and some lawyers play that game because that's the worst thing for their client is to have a trial on the merits. (P17)

I think that *Stinchcombe* had extremely noble, good intentions and Justice John Sopinka, when he wrote it, had the best of intentions. And it does sound cynical for a defence lawyer to say, because it has ... but the use of the disclosure has been more beneficial to the defence, because now you get more of everything and that does give you more opportunities. (P5)

Because the ultimate [effect on a case], which is a stay of proceedings, if they get past that magic number, which the Supreme Court says is, I think for indictable matters is about 14 months, you know. So, if they can legitimately delay, drag out the procedure, the proceedings, and we're not on top of it and, you know, forcing things along to trial, then we will lose cases on delay, certainly. (P15)

And the reason is, because it's much easier to argue a matter before the court on disclosure than it is about the facts. Lawyers don't want disclosure. They want to argue about disclosure, right. I always think of that. (P9)

However, the obligation of a defence lawyer is to do the best job they can in providing their client with a defence within the confines of the law. It is the role of the judiciary to determine, on a case-by-case basis, the merits of disclosure requests and then determine if they have been met as well as what the possible consequences of failing to do so might mean.

The defence may now not be arguing on fact, but arguing disclosure issues. And that's a defence in terms of set-up, disclosure, or set up a delay argument by playing the disclosure game. (P18)

This is an adversarial system and there's lots of times where defence counsel don't really have any other avenue but to nitpick and, you know, I'm not ashamed of it, I make no apology for it. (P5)

I say to my guys, you know, the prosecutors I deal with, 'I'm glad I don't have to wear your hat.' I mean, I have to operate within the rules and the rules that apply to me, and I have to operate within the law, but I'm an adversary for my client's position and, you know, providing I'm operating with the rules that's fine. (P8)

I suppose that's the most frustrating aspect of it, is that it's not—basically, the way disclosure is being interpreted, you know, and I guess the phrase might be pulling our pants down type of thing, you know, that's all fine, but if it gets to the point where they [are] you know, they're asking for everything under the sun despite the fact that they never use it. You know, they ask for stuff. We give it to them, and you know that, you

know, they were just asking you just to test you rather than for some true disclosure purpose. (P17)

And to be blunt, many, many defence lawyers probably, too many, go on fishing expeditions. And try and draw a line, and that's sort of what makes it—that's what makes it harder, when you've got a legitimate case, where you need information. We've got all this case law built up where judges are probably resistant, because lawyers have probably overdone it, in terms of trying to go after this kind of stuff. I think that's where defence lawyers are going to hurt themselves, because there's going to be a backlash then, or there's going to be a reaction to that, where if we keep asking for a silly amount of disclosure, our rights to disclosure are going to start to get confined and limited. (5) (P5)

And as I say, this is oftentimes when defence counsel get into what we call a fishing expedition because they say, 'We're not sure that there's anything out there, but we're going to throw this net out, and we're going to see what we catch.' And so that's something the court has to be careful about. Again, they have to make a sufficient case for the production of it or else the court's not going to allow it. (P7)

Nevertheless, there was consensus among participants that there was no going back, and that, even if it were possible, it was not desirable.

I think, like I said, I never worked pre-*Stinchcombe*, it's a long time ago, but I can't imagine a justice system where you didn't have access to what the police, what the evidence was against you. It's kind of shocking actually to imagine that that's how it was. (P15)

At the end of the day, the intent for it was to have it so that the police and the disclosure and so on and so forth, were fair to the accused, fair to the prosecution, so that everything was done above board, which is exactly the reason that it should have been. However, at least in my opinion, it's gone—had gone left of centre. It's come back to something that we have adapted to and are able to work with. (P13)

Summary

The *Stinchcombe* decision defined a number of components concerning disclosure obligations while leaving others to be determined on a case-by-case basis in the court. The participants discussed the concept of relevance as well as the “grey areas” that might accompany it. It was clear that given the perceived low threshold of the “test for relevance” in the courts, it was suggested that the Crown should be very diligent in assessing relevance and err on the side of inclusion. Nevertheless, privacy, privilege, as well as things that could potentially undermine ongoing police investigations, must be given consideration. There is an inherent balancing act that must be undertaken by the Crown in the first instance and then the court if an application

proceeds. The timing for the provision of disclosure was described by participants as onerous; particularly in cases when the accused was in custody and their first appearance before the court was quickly pending. This issue was addressed by providing partial (in the sense that it reflected what the police had been able to provide the Crown in this short time frame), and ongoing disclosure (as the investigation continued and the matter proceeded). Finally, many participants reported frustration with the interpretation and use of the *Stinchcombe* decision as a technical tool by the defence; a legal loophole of sorts. Rather than a case being judged on the merits of the evidence, it was noted that many times it is a disclosure issue that is raised as the “defence.” However, despite this recognition, participants representing the defence perspective replied that it was their legal duty to provide their client with the best possible defence within the limits of the law. While recognizing that the disclosure obligation is in fact onerous, it is required and if justice is to be served, the courts must adhere to these *Charter* rights.

Basic Theme 3: Trust Conditions

The third basic theme emerging from the interview data collected from the participants revolved around an additional issue regarding the materials that become part of a disclosure package. Given the sensitive nature of the materials, particularly as it relates to privacy as well as the aforementioned issues with respect to relevance, there were noted concerns with what might happen to these materials once they are disclosed in accordance with the legal requirement. This was of particular interest in the case of unrepresented accused, as well as when an accused changes their defence counsel. These concerns are typically addressed by the use of trust conditions imposed prior to the release of the disclosure package.

Misuse of Disclosed Materials

Protecting an individual’s private information is a concern when providing disclosure packages. Once the information has been released, it is, at least to some degree, out of the control of the Crown.

I mean, this goes to the question of trust conditions, which is, you know, a fairly—well, it’s not a new thing because we’ve been fighting about them again, since the ‘90s, but you know, obviously, when we give disclosure we don’t want it spread out all over hell’s half acre. (P17)

We don’t give out any electronic data to self-represented accused, because we’re worried about it getting on YouTube or distributed. We’ve had—especially in sensitive cases,

child abuse cases, sexual assault cases in the past, we've—victims have had their statements sort of being spread around the school yard sort of thing. (P18)

I mean, we're protecting witnesses in that case, because I mean, it's a defence lawyer and, again, from experience, I have seen where a defence lawyer has given the whole package to his client. (P25)

Well, usually what they do is they ask for [trust condition] [order] that's become kind of a standard procedure here, where they have to promise not to share it with anyone. And so we have special letters for people in the jail or in the pen, correctional. (P17)

Unrepresented Accused

In addition to issues regarding the potential misuse of disclosed materials, another challenged faced by Crown is in with regard to the situation where there is an unrepresented accused. In these cases, it might be the case that the accused is completely unaware of their right to disclosure and this right must be shared with them.

Yeah, it's possible that some of them don't [know their right to disclosure]. I'm not certain on that one. I would think that in some cases they wouldn't know that. A lot of them—a lot of the younger people now, the 18 to 28-year-olds, and that's probably a big—the 60 percent, 70 percent bracket, they watch a lot of cop shows on TV or law shows on TV. So they've heard this—you're obligated to provide me with information. So they would know it, but—you know, I'm not going to say that there isn't cases where the accused, it's apparent that he didn't know that he should be asking for disclosure. (P16)

So, they've got a charge, they've got a court date, they go—they may talk to a lawyer, they may not. They can—they don't need to have a lawyer to make your request for disclosure. And usually, when people are unrepresented, the Crown just says, here's the disclosure we're going to prepare to provide you. (P10)

Transfer of Materials

In the first instance of the release of disclosure packages, there is often an accompanying trust condition placed on that release. However, when an accused changes counsel, there might be additional issues regarding control over the disclosure package, particularly having it returned in a timely manner for use by the subsequent counsel.

We've got letters, we've got an acknowledgement between us and we believe that they're not going to be providing copies to their clients. And then there [are] private lawyers where, you know, we have to give a trust condition letter saying that you're receiving these on these trust conditions, and this is all you can do with them. (P17)

The other thing is, is—and this is an interesting kind of sidebar point, is trust conditions. If a lawyer—lawyers can—from my understanding, lawyers can put other lawyers on trust conditions, which says, here's your disclosure. If you stop representing the accused, you have to return the material. (P9)

And then obviously they're [previous defence counsel] supposed to return the disclosure to us, and then we'll give it to the new lawyer, just so we kind of keep control over it. And that's again, partly due to privacy concerns, but also since we're kind of supposed to be in charge of the disclosure, you know, it's good to, you know, you need to keep control of it. (P17)

Well, it slows down because what happens is our support staff sends a letter to the other lawyer and says, "Return to disclosure." And depending on how quickly they do it, it can be weeks. (P18)

There's various ways they do it, if the person says they've switched lawyers and the one person withdraws in court, I authorize right then and there in court. I'll say, 'I'm authorizing disclosure to be released from so and so.' Well, they sometimes keep it and then we have to get another copy. They don't want to—I don't know, there's some law firms I've heard, I don't know any—if it's ever been established, but I know people have gone, they've quit that firm and the firm won't give the disclosure. Sometimes they—maybe they hold it back until they have been paid or something or whatever. But it sometimes is difficult to—but then we have to do it again, which we prefer not to do, because it's time consuming. (P19)

Summary

Some participants noted issues arising as a result of the potential for misuse of disclosed materials as well as circumstances wherein an individual elects to represent himself or herself. Given the sensitive nature of a lot of the materials included in a disclosure package (even after vetting has occurred to address privacy and privilege issues) there was a noted concern that these materials be used only for the purpose for which they were created and should not enter into the public domain particularly given the easy access to the internet. In addition, self-represented accused persons may need to be apprised of their right to disclosure in the first instance as well as the appropriate use of the disclosed materials in the second. Finally, in the instance wherein an accused elects to change their legal counsel, noted difficulties (e.g., delays which impede trial processes, having to prepare disclosure packages more than once at an additional cost) were raised by participants. In responding to this, participants suggested that the provision of trust conditions accompanying disclosure packages should alleviate some, but not all of the concerns.

Basic Theme 4: Disclosure Processes

The fourth basic theme emerging from the participants' responses detailed the processes related to requesting and receiving disclosure requests.

How and When Requests are Made

Requests for disclosure typically emanate from defence counsel once a charge is laid. While a constitutional right, it is incumbent upon the accused to make a formal request for disclosure.

Although this duty is on the Crown, it's technically only triggered if the accused makes a request. What triggers the request is, you know, usually a charge. If somebody's not charged, [he or she is] rarely—well, you won't see [him or her] making a request for disclosure. (P10)

The duty, first of all, the Crown have to disclose, but it's up to the defence to launch an application for some items which they think the Crown has failed to disclose. And so, and this duty, as I said before, is automatically triggered upon defence request. (P7)

The preparation of disclosure requests vary from one defence counsel to another; ranging from a general "form-letter" to exhaustive documents containing very specific requests.

So, some people will make a general disclosure demand. And say I'm asking you to produce anything that you have in your possession whether by notes, reports, video tapes or whatever, relevant to these proceedings and please provide them. Others prepare three page or four page letters with an unbelievably long list of everything they're asking for, and those are standard form letters and they're generally not tailored to the particular case and nobody reads them. (P8)

But, if someone's represented by counsel, their counsel will usually send a request for disclosure, and he'll send—he or she—will send a strong signal to the Crown as to what they think is relevant, by what they've included in their list. You know, they won't—I mean, sometimes a request for disclosure may simply be, we request disclosure, disclosure in accordance with Stinchcombe, or whatever. But often, there are detailed requests, because they know something of what's taken place. (P10)

I've evolved in how I ask for disclosure. There [are] some lawyers that will give twelve page letters saying I want this, this, this, and this. And there's others, and I've sort of come to this position myself over time, is I simply send a letter saying, please provide disclosure. Because, it should be all there. (P5)

Before the requested materials are provided to the Crown by the police, they were noted as going through a quality control process in an attempt to ensure that all relevant and requested material is transmitted.

Then it's returned to the member so they can review to make sure that yeah, it's complete and done correctly. Then the supervisor reviews it for the same purpose, and then it's forwarded to our court officer. And then typically every morning, any new disclosure she brings forward to Crown in the morning and goes from there. (P1)

The package goes through a few sets of filters—it goes through a filtering process before it will ever get to court. First of all, there's the submitting officer. Then it goes to their NCO, which is a sergeant or a staff sergeant. And then from there, a lot of our court staff are very good at catching errors as well ... Well, quality control. Because if you send, I'm trying to be politically correct here, just you've got to make sure that you're sending the proper thing to court. You can't—if a file is a piece of garbage when it gets there, for example, it's full of spelling mistakes or there's a clear *Charter* issue in the file, you know, to save embarrassment and also a breach of somebody's rights, it's certainly an advantage to have several sets of eyes look at it. But, you just don't want to be that person that made the mistake that's, you know, like has a significant impact on your charge file. (P12)

To Whom and From Whom

Participants suggested that the ideal process should be that the defence makes the disclosure request of the Crown, the follow up with the police, the police provide the materials to the Crown, and the Crown provides the defence with the disclosure package.

In this location, the practice is for defence to go for those requests through Crown, so that Crown is aware of what defence is asking for and can make the steps to ensure that they get what they need to get and there's no—so they are the middle man in this situation. (P1)

Mostly from the Crown but not always, we will get some requests from the defence directly. Now we have a policy here where we give all our disclosure through the Crown, so we let the Crown do all the things, all disclosure. (P20)

We do [receive requests directly for the defence], but we don't act on them. They will go back to prosecution. We have had a couple since I've been there, but we wouldn't act on them. (P25)

Defence may make direct requests of the police, which I find a little bit odd, because there is that risk that things are going to get disclosed to defence that prosecution has missed, which is going to make it very hard for them to do what they need to do. Whereas, if the disclosure onus is on prosecutions, and they disclose to defence, defence makes their request, they make sure that everybody's kept aware. (P24)

And the message that we deliver would be, my preferred message would be for all requests for disclosure to come through the Crown. (P23)

However, this was noted as the ideal and that, given logistical circumstances wherein the RCMP are acting as Crown in some remote circuit courts, this was not always achieved and could lead to potential issues regarding the Crown's ability to facilitate, control, and monitor the flow of disclosed materials.

Fort Qu'Appelle, that was predominantly the case, although we did have a court officer. He was often tasked with the court docket duties on first appearance. So he was tasked with the distribution of disclosure to defence and then to Crown, either at that date or even at a later date if Crown wasn't available on first appearance. [Defence] made direct requests all the time. And what we would do is, you know, look at the copy of the letter, disclose everything we possibly could and forward a copy to Crown to advise them. (P1)

But there are some rural RCMP detachments where I'll send out a request for disclosure, copy the Crown, and they'll send it directly to me. Others will insist it go through the Crown first. (P8)

I'm going to say at the detachment level, at the frontline level, most times they'll come to—right through to the detachment. I'm not going to say defence don't follow the process, but most times they skirt the Crown and they'll come right through to us. So—and in some cases, I got to say, we disclose directly to defence at the same time we disclose to Crown. Rather than letting Crown go through the door first. But the procedure that we drive at, from the management perspective is, you disclose to Crown and let Crown disclose to defence. (P16)

On circuit court points, that's more likely to happen, a request going straight to the police station. So there might be a scenario where a defence attorney would actually send a follow-up—request for follow-up or further disclosure to a police agency. And they may respond directly. Ideally, we want to be getting a copy of that. Sometimes there's some disconnect there. (P29)

The Crown knows exactly what's disclosed so they can look at it and say, 'Yeah you get this and this and this, but you're not going to get this,' right, because at the end of the day they kind of have the final say, the Crown. (P20)

On more than one occasion, stood up in court and said, "Just a minute Your Honour, I need a five minute break. I need disclosure from defence." Because I don't have what they have, because the RCMP have given it directly to them and I didn't know about it. Not so much in North Battleford, but in [circuit point] that's happened lots, lots of times. The reason for that is that in North Battleford we handle all files in court. In [circuit point], the RCMP handle a lot of files. Do I think that's a huge problem? It's just part of the job. (P3)

Follow-up Requests

Follow-up requests for additional disclosure are often received by the police. The most-often cited reason for these requests was incomplete investigations.

See and that's the other problem. I'm doing investigation on this file which is already set for trial eight months later. Why am I doing the investigation? I'm not trained to do investigation. I have no [deleted] idea how to do any investigation. But I know that I don't have enough evidence based on what they've done, right. And they need to do something more. (P3)

Yeah, because a lot of times you get the bones of the investigation, they're still saying they are still waiting to talk to A, B, and C, and then once those, or they're being transcribed, or whatever, those statements, you know. So, once those statements are received they'll be sent in. (P15)

And they'll request additional investigation. So, if X is the investigator on a file on a theft under of a bicycle and I didn't get a statement from a witness, or get a statement from a witness who saw the person steal the bike, or take a picture of the bike or, you know, just every investigative steps, they'll send out a prosecutor request asking the officer to go and do that. (P12)

Additional requests might also arise due to requests for the production of third-party records which the police may, or more likely, may not have in their possession at the time.

[Additional requests from Crown] They may request, specifically for something like an impaired investigation, they may request records that indicate that the breath equipment's been tested, maintained on a yearly basis, for example. (P1)

We're routinely saying, you know, 'I see this is referenced in your police report, but I don't have a copy of it.' So, you know, medical records are the most common, or you know, often we'll have to do follow up investigation, which will lead to further disclosure that we send out. (P15)

There may also be instances which arise as a result of defence-generated requests. These may result from information defence counsel receive from their client that require further investigation or sometimes from defence trying to use police resources to further their own investigation.

Sometimes what an accused tells a defence lawyer provides a new avenue for investigation, like alibis witnesses, etc. (P2)

Defence Counsel says, you know, 'Gees, you know, my client said that this person's a witness.' Well they'll send us a request saying, 'Hey can we speak to this person?' You know I'll send it off, I'll do up a request and fire it back to the investigating officer saying, 'Hey take a statement from this guy, and here's this file,' and assign them a diary date. They'll then forward it to me, make copies of it, I give it to the Crown as disclosure and then they fire it off. (P20)

And they're asking for other stuff. They're asking you to create disclosure. You know, 'send the police out and do this.' No, that's not part of the investigation. We're not going to be your private investigators, that sort of thing. But then you have to look at the request and see whether it's reasonable or not, and sometimes it's just easier to fire it off than fight it out in court. (P18)

A source of frustration noted by one police officer occurs when there has been an issue with respect to keeping track of what has already been disclosed to Crown and then to defence.

Where I see it misused is when these continual requests will come through, when we're either almost—we've already made the disclosure and then the Crown has no record or we don't have a record of that we've made that disclosure already. Or we're—or they're presenting something that we never had in the beginning, to begin with, in our collection of evidence. And then they're alluding to the fact that the police or the investigation did have this piece of evidence and they've withheld giving it to the defence. (P16)

I mean, if you're just dumping stuff onto discs there's no way of tracking things as well, that's an issue. I mean, and as things are going on there, continually vetting things, going through things and essentially constructing a disclosure package as the investigation proceeds. (P26)

And that's often the case, is that if there isn't a good record of what's been disclosed, then it gets subject to disclosure again and again and again. Accused will go through Legal Aid, and then the Legal Aid will find out he's got to drop him for conflict reasons. So he'll move to another lawyer. Then the disclosure package will be referred to again and again. So then if there's follow-up between defence and Crown on further disclosure requests, then those are often disclosed a couple of times to a defence request, if you can understand where I'm coming from. The gatekeeper should be the Crown Counsel. (P16)

Police Acting as Crown

In some areas of the province, RCMP officers are engaged directly in court, essentially operating in lieu of Crown at first appearances, running the docket.

So in the small communities, we're the investigator, the court liaison person, and playing the role of the prosecutor in that first appearance. So in most of the—in the urban centres, this is not the case. So this is in the bigger, the Humboldts, the Davidsons of the world. So we're the police officers on the street that have made this arrest, prepared the court package, sworn the information and now there's that first appearance. We're also the prosecutor, if you can figure that one out. So in a sense, the Crown don't—the normal procedure you see of a cloak and—a black cloaked person in the courtroom on that first appearance, it's not. It's usually an RCMP officer. (P16)

But in most—in many detachments, I'd say, you know, outside of here, maybe Yorkton, Swift Current, the larger detachments, we're acting as agents of Crown, certainly on first appearances. (P1)

So the Crown is sitting there because they're there for trials. But they don't represent the Crown on those first appearances. So in a sense, he's got a summons to appear or a 'recog' to appear in court for that first appearance, and the accused is there and he may be represented by Counsel. So the first thing that that counsel does, defence counsel says, 'I'd ask the Crown for disclosure.' Well, in the position we're in as acting as Crown, we turn the package—one for the Crown, who sit right there and do ... and one for the defence. (P16)

So we are doing first appearance ... all matters that are before the courts that—up to the point where a not guilty plea is entered. We are doing docket court in our locations. Very few locations actually have a prosecutor engaging as Crown. So it's not ideal. I know Sask Justice realizes there's an issue too. I mean, ideally the only time you should see a police officer in the courtroom is to give evidence. But unfortunately, that's not our reality. It is a resource issue on behalf of Sask Justice. For example, in Manitoba, they have their prosecutors do everything, from my understanding. In Alberta, prosecutors do everything, including courtroom security. (P9)

From the perspective of most of the RCMP participants (as well as some counsel), this situation can raise concerns and challenges associated with disclosure and the administration of justice in general. The primary concern is that the officers are not legally trained to perform these duties, relying on experience which they may, or may not, have had the opportunities to garner.

In certain locations I've been at, Crown doesn't really get involved until there's a—either it's a very serious incident, or it's a separate trial. So adjournments, you know, plea bargains, are often left to the discretion of the court officer. And no, I would not say we're qualified for that, and it can be pretty daunting when that's the case. (P1)

It's challenging. So, you have a first appearance and prosecutions isn't the master of that file already at that point, then what happens is, defence lawyer gets up and makes a constitutional challenge. Well, police aren't really trained to answer to those kind[s] of challenges. And you know, so it becomes very difficult for the State to be properly represented. (P24)

How do you be the—you know, the accuser one day and the prosecutor the next, right? Ideally, we don't have the same members prosecute that are involved in the case, obviously for transparency. But the other issue has become is—you know, we are not legally trained as far as speaking to legal matters. So if we're all of a sudden, for example, in a provincial case, for example, if you have a person who is—engages a lawyer or is legally trained, now you're putting them up against an RCMP member who

may have anywhere from six months service to more experience. You know really—is that really serving the interest of the administration of justice? (P9)

No [they are not trained on disclosure], not out of depot. It's something that you evolve into with experience. And I think that position that has come about has sort of become one where over time it's a bit of a learning opportunity. (P16)

No [officers are not trained on disclosure], not out of depot. It's something that you evolve into with experience. And I think that position that has come about, has sort of become one where over time, and it's a bit of a learning opportunity, but once you get it I guess it's working well, according to the Crown. We just did a review in Onion Lake. I spoke to the Crown attorney there, and the Crown told me that the job that the corporal was doing—this is actually an NCO, a supervisor is running the docket up there and is the court liaison person—and he is providing a service that's second to none as far as she's concerned. But he's got 20, 25 years service now, so that's evolved over a period of time. (P23)

Generally speaking, our members have been able to do it just by experience. However, you know, it's not ideal. It's not a practice that should be encouraged. (P9)

In addition, this undertaking represents a costly endeavour for the police as it removes the officers performing these tasks from what is considered more policing-related operations.

I still can't get my head around the practice that goes on in this province with the police running the docket. It's a huge consumer of our time. It dedicates a full-time policeman to sit in court, which I just can't get my head around that. And whether there's going to be a change or not, I don't know. But to me, it certainly seems to be, when we're talking about problems with keeping police on the street and doing policing duties and policing functions, I really see the court system is not the role of the police, running the docket. (P23)

But again, it's—again, every time we're doing these functions such as prosecution and courtroom security, it's taking us away from our core police function, which should be preserving the peace and investigating criminal matters, not being tied up with secondary duties. (P9)

And then the agreement was—because there was a municipal contract at that time between the RCMP and the town of Fort Qu'Appelle—that that municipal contract was used to—the agreement was that if the town hired somebody to fill the court docket role then the police would release the responsibility from, that duty from a member and put that member into the school and do bylaws downtown and that kind of stuff. So that alleviated that member from the court and put them out on the street essentially. (P23)

The participants raised issues regarding the police acting as crown specifically related to disclosure matters. There are issues regarding relevance, privacy concerns that they stated the officer was not in a qualified position to assess.

The RCMP are basically doing disclosure. Ideally, I know one thing I used to do is I used to send disclosure through Crown. But a lot of times the RCMP are acting as Crown and providing disclosure directly to defence. So if they're not seeing that information prior to it being disclosed to legal counsel, how can they then be responsible for it? Or vet it and determine, well no, we shouldn't be disclosing this. (P9)

Where we're doing docket court and things like that, still. The evolution of the court process and the evolution of case law [haven't] really kept pace with the fact that we – our prosecution system, maybe hasn't evolved as fast as the rest of the country. The fact that police are still so deeply involved in prosecutions in this province means there's a bit of conflict [within] the disclosure world and roles and responsibilities of police in prosecutions. (P24)

In addition, concerns were raised with regard to providing full disclosure as required by law, as well as conflating the disclosure process wherein it might prove problematic for Crown counsel as disclosure is made, in the first instance, directly to defence and problems of tracking what has been provided and ensuring crown was aware of everything provided were also raised.

We as the RCMP have taken on that role. Wrong. It shouldn't be. That's not our role, and you can see the conflict right away, in a sense. So then, in that situation, defence come to us directly with follow-up requests, rather than going through the Crown because they know that they've got so many other cases, they'll just go directly to the police officer or the detachment. While there [are] some efficiencies [with regard to] just moving the system along quicker in that kind of a process. But there's some weaknesses in the whole system in the fact that, well, did the accused get full disclosure before making an informed decision to enter a plea? I'm hoping that he did. (P16)

It can and I've had cases where—we've got an Alberta defence attorney, local fellow in the Estevan area, defence received disclosure directly from RCMP. She's now sent a letter to me. I've got conduct of the file. She sent a letter to me saying, 'This is what I've got, and this is what I need.' And the list of what she's got is something different from what I've got on my file. So it becomes a bit of a—we all got to get together and get on the same page. And that's not necessarily the easiest thing to do sometimes. (P29)

[With respect to the] RCMP handing the disclosure to defence counsel, that's fine as long as we know that that has been done, you know, and your average, you know, robbery, stabbing up there, that's average up there as opposed to a murder. But on those kinds of files, well, you know, as long as we've made a notation that's fine. Again, usually what happens, where the difficulties arise is around zero eights because, for example, they might send disclosure upon request to defence counsel, and we don't know that they've

done that. So, we don't know what defence counsel has and doesn't. And then the defence counsel has the ruse of sending letters to the detachment that don't make it to our office, requesting disclosure. And then we go to court, and they ask for an adjournment because we don't know that they wanted this other stuff. (P17)

Now with that said and done, one thing that—and I've been very vocal about when we've had our meetings with Sask Justice, is that even in their own report, they're very clear that prosecutors are ultimately responsible for disclosure, period. (P9)

While aware of the potential issues that might arise, a few participants expressed that a good working relationship between the Crown and the police in collaborating when the issues arose might suffice to address the issues.

That's where there's an open invitation to—if the issues arise, there's usually a prosecutor nearby. They do run the TSA, the traffic courts, and sometimes criminal matters might get set down for those days. Maybe it's a regular docket day and there's no files requiring a Crown prosecutor to be there, but there [are] a couple of criminal charges on the docket. So there's a—typically there's a prosecutor within reach. It's not unusual for the police officer running the police docket to hand a file to the prosecutor in the moment and say, 'Can you run the show cause hearing?' Or, 'Can you answer this question for defence or for the judge?' And maybe the file was never reviewed before; we do our best to assist in that situation. Once we've touched it, it's probably ours and we're hanging onto it. (P29)

I've been in the situation many, many times and he's sitting right beside me, because I just passed him a copy of the disclosure package and I've given it to defence. And yet I'm doing the show cause to [remand] this guy in custody so that he's not released. I'm thinking, 'Hey buddy, come on, help me out.' (P16)

But situations might play out where Prosecution has no files on the docket for the day. And so we're not sending the prosecutor out to that court point, but there is a docket being run. There's a JP or a judge there and a situation could arise where they're not legally trained to answer a question they might come across. Many of them are quite good. But they know to exercise their judgement and ask for an adjournment or even a stand down for a moment, to call and ask a question if it comes up. (P29)

One thing that we've been very proactive in telling our members is if you're not sure, contact Crown. You get engage—and especially engage them early. Don't wait till the last minute because nobody likes having a bombshell dropped on [him or her] in the last minutes of—ten minutes before you walk into the court type of thing. (P9)

Summary

Ideally, disclosure requests should be made to the Crown and the dissemination of the packages retained under their control. As the Crown was identified as having the ultimate

responsibility for disclosure, they need to be in control of what, when and to whom the package is disclosed. Disclosure requirements begin with the request submitted by defence counsel typically following a charge. Additional and ongoing requests may result from incomplete investigations and the development of new avenues requiring investigation. Keeping track of disclosed materials was presented as a source of potential frustration sometimes requiring additional disclosure packages to be generated by police at their expense. The issue of what can or cannot be disclosed as well as the tracking of disclosed materials was discussed as especially problematic in the circumstance wherein police officers (RCMP) are acting as Crown. The police do not receive the proper legal training required to make determinations as to relevance or other disclosure-related queries. In addition, having disclosure transmitted from police directly to defence was noted as problematic as the Crown, who eventually retained control over the case once it proceeded to court did not necessarily know what had been disclosed in these first instances. When giving consideration to the independence of police and Crown within the criminal justice system it was reported as inappropriate that police could end up playing these dual roles in an individual case. The fear that disclosure issues could be made in court resulting from incomplete disclosure solely because there were issues with tracking what had been disclosed and to whom thereby undermining the case as whole was the primary reason for police personnel (including municipal police) suggesting that Crown should retain sole and ultimate control over the disclosure process.

Basic Theme 5: Costs

The fifth basic theme emerging from the analysis of the interviews focused on the costs associated with disclosure. There was wide recognition that the *Stinchcombe* decision, while sound in its judgement and intent, had significantly increased the burden on the police and Crown by requiring changes in practice that were noted as being very labour intensive and costly. The courts also see costs in terms of delays and adjournments. There are costs to individual participants as well. Finally, there are costs with respect to the effect that disclosure has on cases.

Labour Intensive

The participants noted that the disclosure obligations arising from *Stinchcombe* came with additional, arguably enormous costs in terms of the additional time required to investigate

the case with disclosure requirements in mind, the labour intensive processes of collecting and putting together the disclosure packages as well as managing the information.

I sound a little bit cynical, but I think the cost of disclosure and providing all the disclosure is truly enormous. It's been getting more and more all the time. (P5)

The demands of our systems have changed, the way we do things, collect evidence, the courts' requirements. Evidence collecting has changed. And it's far more labour-intensive and it's far more detailed than it ever was. There's more to collect. We understand more. We look for more. And that flows from statement taking to DNA. So, if you look at the time that's involved, it all keeps amassing. (P24)

And that's just overall part of the—what's been placed on member's plates in terms of overall expectations on any investigation. It just create[s]—the creation of more work, and the more work that has to be done on a file, just creates more disclosure. (P1)

It imposes additional burdens on the participants. There's no question that, you know, the police were not—the police departments, were not ready to comply with what *Stinchcombe* meant. (P10)

Everybody's time. Policing resources have been expended to either cover for that officer to be at court. Or, he's being paid double-time to be at court. The prosecutors are all being paid to be there. Everybody else is being paid to be there. The lawyer that there is there for them, or any witnesses they have as well, or specialists, if they—worst case scenario, we've brought somebody from the Winnipeg lab. And then, we're really in trouble. Sometimes that's recouped, sometimes we try to get part of the way through some evidence, or something, but we can't always do that. (P4)

So the process and the amount of data is the same. It's just that it's a huge impact on a small agency because you do not have that records management resources behind it. I mean, it—in a small organization like ours, the disclosure process really starts almost at the point of the initial charge. (P25)

I think the time that it takes, the demand on resources for preparing disclosure packages right from transcription to photocopying to tracking people down to make sure you're getting the disclosure. (P20)

Well, people are spending more time on files. So, we're just not able to respond as nimbly and as efficiently as we want to. And we just need more resources. (P22)

The police, in particular, presented a position that the administrative tasks associated with processing disclosure have been onerous with respect to allocating officers' time to addressing disclosure processes that take them away from providing police core functions.

The process of providing disclosure, from a police perspective, and it's not something we can easily get away from, it's time consuming, right. Because that means the member is making copies, usually two to three copies of the file, whether it is done electronically or the traditional method of stand by the photocopier. That's time off the road for the member. (P9)

It's taken police resources that you're paying a lot of money to do policing, off the street to do disclosure. So as a result, we've taken police resources away from doing what they're intended to do, which was to prevent crime and to provide a service to the public, we've put them into administrative roles, filling out things for lawyers and judges, which at the end of the day, has done nothing to make the system any better. And it's not that they don't want to be out there. It's that they're tied up doing these administrative functions that have been legislated as a result of getting stuff done. It hasn't done anything with respect to providing better policing services to the citizens of any part of Canada. (P13)

There [are] additional disclosure requirements—there [are] all these additional requirements that are just keeping them [Officers] in front of a computer. (P1)

So, man-hours are being taken up, and I think, you know, this is one of the things the police departments continue to complain about, is the fact that, some would argue, we spend more time producing disclosure than we do fighting crime, you know. I would beg to differ, but certainly, they make that argument. And there's no doubt that it has imposed, you know, time obligations on the police departments. It's done the same with the Crown. (P10)

And then I don't think that the police—of course, their complaint about the whole thing is, well, instead of being on the beat and being on the street, they're writing stuff up. They're clerks, you know, glorified clerks, right. For most of them, you know, at least half their job is being a glorified clerk. (P17)

I mean, disclosure is a beast, it's a burden, it's a— but it's a necessity. It has to be done. But, I mean, I just—I mean, I don't have any numbers or anything, but I can only imagine the amount of time—well, I know the amount of time, but the amount of money that is put forth into, you know, people assigned essentially to disclosure. I mean, it's—and I mean, those are hours that—hours of money that they're taking off of the investigative streams. (P26)

If we really want to be fair with disclosure, we ought to provide our advocates in court, our prosecution and defence, the additional time it takes. We ask for more police officers, because it takes longer to do investigation. Have we really provided the same access to counsel, for both prosecutions and defence to have additional hours per case to prepare themselves properly? I think disclosure just made it more difficult for them to prepare cases. (P24)

Court Time

The costs associated with increased court time spent as a result of processing disclosure and the adjournments and delays resulting from disclosure issues were also reported by participants as significant.

Then part of the court worker's job is—there's a little bit of time spent there every morning, going back and forth and ensuring—so it's difficult to put a total on it. It's significant. (P1)

It costs some money; it costs the court money. Like I dare say, if you went down to court number one, which is our docket court, and sat in there for a half hour and listened to how many cases were adjourned because there wasn't disclosure received yet, you'd probably—I'm guessing—75%. (P8)

If a trial date is set and it's lost, there's a cost to the system that we've lost that trial time. (P15)

And then it's just a further backlog on the entire system when we don't provide adequate or complete disclosure on a timely basis. (P1)

Time wise, it's—sometimes an adjournment is required to get further disclosure. (P2)

I don't think we're taking up a lot of court time fighting disclosure motions. Cases may stay in the court system at the intake level, so, you know, the provincial court is the intake court for all charges, even the ones that end up being tried in Queen's Bench. And they won't leave the docket courts, which is the intake court, until the accused has received sufficient disclosure to be able to either make his election as to where he wants to be tried, and/or enter a plea. So, what we've probably seen is cases staying in the intake court longer, while disclosure gets completed. (P10)

So, those kinds of administrative delay, we have to wear. And so then, it becomes a cost to you and I as taxpayers, because of the court time. (P11)

Reasons for Delay

A number of participants addressed what they perceived to be the causes for the delays in court. The first issue raised was police training and awareness of what disclosure truly required of them within the context of the court. While it was recognized that some officers are very competent in this regard, it was nevertheless noted as an ongoing issue. The resulting delay usually occurred in response to incomplete disclosure packages requiring additional follow-up requests and adjournments to then review the materials.

I think a lot of Crown don't get that their [the police] job is twofold. That probably the majority of their job is keeping the peace and not getting shot, right. So they're out there on a daily basis, not thinking about six months or a year down the road when they're on

the stand. There are really good officers out there who totally get, like, the whole court process and everything like that. And I'm not saying the other ones aren't good. They're just not trained. They usually don't understand the elements of an offence. (P3)

I think there's, I think, a lack of understanding at whoever's providing it at the police end that, 'I've got to provide everything.' You know that, 'I should look and if I see here there's photos taken. It's no use sending this over until I track down the photos or at least figure out what happened, and then I'll, you know, get the package and send it over.' One is probably educating the, you know, to make sure there's good communication and understanding between the police and the Crown in terms of what the disclosure obligation is. (P8)

I mean, you do have to frequently request additional disclosure from the police in the forms of notes, reports from other officers, further witness statements, follow-up with medical evidence, that kind of thing. (P2)

And so it would be nice to have the city police more—have more supervision of their constables in terms of directing them to get evidence and making sure that the file is complete right away. (P18)

Another source of delay noted by the participants was waiting for third-party materials to be received, catalogued and provided.

This is where you'll see delays. Sometimes, we will delay on setting a trial date because we want to know how long before the lab can be ready. So, to try and assist in that. Or, how long before a vehicle reconstruction report, in the case of, generally, a fatal MVA. Or Coroner's report. And of course, all those are coming from either specialized persons or outside bodies that have to get us this information, then we're going to have to go through it. (P4)

But by the same token, if the lab tests are critical to the accused's defence, he can't be expected to enter his plea, or make his election. And I'm just saying, even though the Crown can't be faulted and that's how long it takes, the reality is the Crown can't turn the time around against and say well, the accused shouldn't have asked for that disclosure, you know. (P10)

Oh, again, then they come back to us. That's often the case. They will ask us for; let's try to give you an example. So the toxicology reports aren't—don't come back in a timely—or we're waiting for toxicology reports. So we make that initial disclosure. They know that there's a blood demand made and we're waiting for the results of the toxicology report. So that'll come in probably in the second or the third appearance for court. The defence will make an application to Crown, or maybe even come to us direct and then we make that subsequent disclosure on receipt of that. (P16)

Sometimes as a result of how quickly files come into the system, all the evidence isn't prepared yet on the police side. Photographic evidence, DNA analysis, toxicology

reports, autopsy reports. All sorts of—forensic handwriting analysis. Sometimes those detailed processes aren't—the police have an investigation conducted and an offence, a crime scene. They come on and they have sufficient evidence within the context of a short-term investigation to develop reasonable probable cause. So they charge and they do that. But in the midst of that investigation, they've also obtained forensic samples, 'ident' investigative samples, fingerprints, that need to be analyzed and subject to further analytical process, evidentiary processes that have a follow-up process to them. (P29)

Finally, two participants discussed the potential effect that having private counsel as opposed to legal aid managing the case on behalf of the accused can have.

Just different—again, different—higher priced legal counsel has all their research team working on one impaired driving case, it affects the way Crown handles that case, as opposed to if they were dealing with Legal Aid. So—and you can see it in the courts with even the way judges handle cases sometimes too. Certain private defence counsel can walk into a room and basically say, 'My calendar is booked for the next 18 months to 2 years because I'm an important lawyer.' And it'll postpone or adjourn a case for that whole time period. Whereas if it was a Legal Aid case, it would be dealt with probably within two or three months. (P36)

Private, you know, if you've got the money, you'll—what's the difference between a team of lawyers and a single lawyer? What's the difference between a big firm that has a bunch of articling students that they can put on something and review these things in great detail? You look at a murder trial of somebody that's the rich and famous; there [are] a lot of people going to review those statements. It's going to be seen by a lot of eyes, and they're going to be looking for the nuances and they're going to search for it. They're looking in a lot more detail. (P24)

Effect on Cases

Disclosure issues arising in court were also noted as potentially having a huge effect on individual cases. As a *Charter* right, the violation of such can lead to a range of consequences from the withdrawal of charges, to delays, to cases being dismissed. It might impact whether or not the case will even proceed to court.

You can look at it that disclosure is paramount. And so it's paramount, in terms of advising the clients, in terms of the initial threshold question, do I plead guilty or not guilty. It also then, has a huge impact on how the trial is going to be conducted. (P5)

Well, it could end up with them withdrawing the charge, staying of the charge, a *Charter* issue, you know. (P12)

So, what happens then is then I keep adjourning while I'm waiting for the disclosure. And then, let's say we're about to go to trial and gee, it comes out that there was actually two other witnesses there that they forgot to mention and the Crown just found out about.

I get that. Now we've got to adjourn again while I consider this new information that's been received. And, you know, that's not unexpected on a first appearance, but it is troubling when it gets to, you know, this is the fourth, fifth or sixth time. (P8)

At the very least, you're dealing with a delay of prosecution, which can cause further problems down the road in terms of the ability to successfully prosecute the matter. (P1)

Well, it can delay the case. If it delays it too long, the accused may find themselves in a position where they're bringing an application to have the whole case thrown out for delay. So, they've got a remedy, at the end of the day, because the courts have clearly stated that delay that arises from a failure to provide disclosure is the responsibility of the Crown. (P10)

And then there is an application to stay the case on the basis that there's been failure to disclose. So, the Crown is faced with a serious risk of having a judge say, 'You didn't disclose this. The process is not—can't be fair without this disclosure. Therefore, the case is stayed.' (P7)

Judicial stays, either right away (because we should have had it to them, there's no reasonable excuse other than negligence) or we forgot, or we missed it, or something human. Or, an adjournment and the delay argument that comes into play, you know, there is the Constitutional right to trial within a reasonable amount of time. If it's because the disclosure, that's something that falls on the Crown and if it becomes too long, they may stay the charge, they may give the person a lesser sentence. (P4)

However, it was noted by one participant that each of these matters is seriously reviewed by the court. In the case where the defence has made disclosure requests (possibly "playing the delay game" as alluded to by some participants elsewhere in this research), the court can ensure that the delay will not be used as a source for defence later in the trial.

Although again, and let me just caution you on that one, because if the defence makes the request for this information and a judge is likely to say to the defence, okay, this is going to take six months, or whatever, and you need to waive delay. And if you fail to waive delay, the judge may say, fine, we're proceeding. But you know, when the defence themselves make the application they're responsible for the delay. They can't turn around and use the very thing they did to argue now it should be dismissed because of delay that we caused. So, you can't do that. (P7)

The final effect that failing to meet disclosure obligations was reported as potentially having was that of the pursuit of civil remedies.

Well, for example, let's say we have an issue where there's been a non-disclosure or—and now the person's coming back for civil remedy. I hired my lawyer, paid five thousand dollars for my lawyer. I've gone out and hired an expert witness now at

fourteen thousand dollars, and now I've won on a non-disclosure issue, right. That kind of—I would say the Crown wears it. We all wear it. (P9)

If this judge at the trial level says, yeah, Crown you should have disclosed and I'm ordering you to disclose it and furthermore, I think it was wrong for you to put this in dispute, and I'm going to order you to pay costs of this application. That's what we call applications to deal with disclosure issues; we call them Stinchcombe applications. And, you know, those are costly. That's why you can ask for costs as an adjunct remedy. But, the courts have said that in order to get a cost remedy that the Crown's conduct has to be really bad; the Supreme Court has said, the Crown's conduct has to be egregious. (P10)

Well, the punitive, you know, the damages, I would tend to challenge those. But I mean, the reality is that can be out there, right, to fail to disclose notes of an officer, and you were supposed to do it at the last trial. And now the second trial date has come along, and the Crown still hasn't gotten their act together, which is shocking, but can happen. Then we've had defence counsel make an application. (P15)

Effect on People

The costs to the system were not the only costs incurred according to the participants. Individuals (witnesses and the accused) associated with a given case that are not employed within the system also incur a variety of costs, financial, time, and emotional. In addition, the participants recognized that there might also be costs to the community and to the reputation of the criminal justice system within the community.

Yeah, witness frustration, victim frustration. (P3)

The witnesses that may have been required to be at that trial, to then have the matter stayed or adjourned, or whatever. You know, we've got our witnesses there; ... waiting to testify and an officer shows up ... I forgot to give you my notes. (P7)

And that does generate cost to the accused, because every time I've got to go, appear, and adjourn it for another month to get that, you know, I'm not free. (P8)

The accused may have taken time off work to be there. Wasted court time, wasted money for the accused, and wasted effort there. He's paying his lawyer. (P4)

And the longer the delay goes on, you can presume more prejudice. Because, you know, depending on the nature of the charges, somebody's charged with sexual assault, you know, you live in a small town, you know, that's a terrible charge to be having that hang over your head for a long time without some kind of resolution. (P10)

Yeah, the emotional cost, I mean most people don't appreciate the emotional cost of any court case. You know, there's a financial cost. There's a time cost, it's going to take some of your time because you're going to have to invest some time. But there's an emotional

cost, because things are going to be floating around in your head until this thing gets dealt with. (P8)

So, the impact on the community was, while they were providing disclosure, six months, that crew of people was selling a [kilogram] of coke a week in [the city]. That's the impact on this community, you know. And so, I won't say a [kilogram] of coke, but half a [kilogram] of coke every week was moving through [the city], and they were continuing to move to sell it. So, we charged them six months after we've completed our investigation, because they'd finally got the disclosure done. That is, I'm not so sure that that's acceptable, you know. So, that's an impact to the community, when we have people who – potentially dangerous people and individuals, out on the street, because they don't have the disclosure package enough—we don't have disclosure prepared to lay a charge. (P22)

The cost can be loss of charges, loss of confidence, loss—by the courts or by the public in terms of any victims. (P1)

Summary

There was wide recognition that the *Stinchcombe* decision, while sound in its judgement and intent, had significantly increased the burden on the police and Crown by requiring changes in practice that were noted as being very labour intensive and costly. The costs to the court included delays and the effect that non-disclosure could potentially have on cases. The responses of those interviewed also shed some light on a few possible reasons why the delays in court came to be, including a lack of complete disclosure packages resulting from training and awareness issues among the police, waiting for third-party records, and whether or not the accused had retained the services of counsel compared to legal aid. With respect to a broader notion of costs that are borne outside of the system, the participants noted the time, financial, and emotional costs incurred by witnesses and the accused as trials become lengthier as a result of disclosure processes and issues. The frustration experienced by these individuals was also noted as potentially impacting the view of the criminal justice system in the wider public eye.

Basic Theme 6: Possible Solutions

The previous basic themes provided a lot of context within which the legal requirements for disclosure arose. In addition, they provided participant's perspectives regarding a number of issues experienced as a result of disclosure requirements. This basic theme presents some of the possible solutions participants identified as potentially addressing the issues, making disclosure a more seamless process that avoids some of the current pitfalls. These included getting the *RCMP*

to stop acting as Crown in court, assessing the potential to increase the use of video court, needing to find ways to ensure better quality disclosure packages, and engaging in disclosure-specific training.

RCMP Stop Acting as Crown

Given the aforementioned disclosure (and other issues) perceived to arise from the RCMP acting as Crown in more rural and remote areas, it was suggested that a number of disclosure issues would be alleviated if the RCMP were to cease the performance of this role.

We ought not have police officers interpreting case law and interpreting law as to what is appropriate and not appropriate. That's not our role and it's a dangerous role for us to be in, because we are now trying to advocate, you know, on behalf of the State as—in making legal decisions. We should not be in that role, where we're trying to interpret case law. We need to be aware of it, absolutely. And we need to be respectful of it and taper our business practices to make sure we're meeting the courts' expectations. But, we ought not be the ones trying to determine whether or not, you know—to make representation to the court on the interpretation of that. That, to me, is the dangerous grey area that still exists here in a lot wider expanse than other areas. (P24)

I believe all disclosure, all disclosure, has to go through the Crown. They are the main prosecutors. They are the ones who are ultimately responsible for this, and that's right in their own steering committee on justice efficiencies and access. (P9)

I think if there is any possibility or any movement towards getting out of that whole docket, acting as the Crown, to me that's going to alleviate a lot of that pressure that comes from disclosure. Because not only are we doing disclosure we're also being the Crown on top of it all, so that's one thing that I see as being fairly significant. (P23)

It was suggested that there was agreement, on the part of prosecutions that, in the ideal situation, they should be performing this function and not the police. In addition, this was considered in line with the practices in neighbouring provincial jurisdictions. However, for this to occur there was recognition that prosecutions would need additional resources.

I know the prosecutors agree that yeah, ideally in the perfect world, they want to take this over. They don't have the bodies, but Sask Justice has to start becoming more engaged with this. A lot of—and the legal system isn't getting any easier. It's not getting less complicated. [Alberta and Manitoba] have a working model of how prosecutors are becoming engaged—police officers aren't acting as prosecutors. (P9)

Increased Use of Video Court

One suggestion that might possibly alleviate the extra burden placed on prosecutions in the event that they were to relieve the RCMP of their current duty to act as Crown was to increase the use of video courts across the province.

I've done a case—I don't know if the courts have advanced that way. I think provincial—rural courts should be looking a lot more at video court. (P9)

We have the video court. We have the video capability. (P11)

And they had set up video court—and you're talking technology—where they had set up systems for a central location for the clients to all come in and sit in front of the video court and have an appearance before a judge here in Regina. (P23)

In addition to possibly addressing disclosure concerns, an increased use of video courts would also alleviate some of the issues surrounding the costs of prisoner transport as well as the accused having their day in court in a timelier manner.

Well the movement of prisoners is a huge issue for us too, to make sure that's done in a timely manner so we're getting these guys before the courts. So, that information is not delayed and they're getting their right to appear in a timely manner adhered to. (P23)

Why are we bringing the person out of remand, out of Saskatoon to make a five-minute court appearance in La Ronge, Saskatchewan? (P9)

Why would I transport him up there, just for Legal Aid to stand up and say, we had to farm it out to lawyer X. Lawyer X isn't here today. (P11)

So I said to them—it took me about eight phone calls to figure out that there's only one interprovincial video link in the whole province that we can use at any time. Only one witness can appear out of province at any given time. There should be lots of video links to have witnesses appear. Even though it's a video link issue; you would think it would be a court issue. (P3)

Better Quality Disclosure Packages

Cognizant of the concerns surrounding incomplete disclosure while also related to the tight timing requirements associated with disclosure, the production of more timely and better quality disclosure packages was discussed as a possible solution.

Though, that's something that, although disclosure is an ongoing beast, as it were, the sooner you can say that we're pretty close to complete, or we're at complete as far as we know, the better. So, if that happens very early on in the court continuum. If your first or

second appearance and you feel you have all of the evidence, or as much of the evidence as you think you're going to have, it may lead to early resolutions. (P4)

Just having complete investigations prior to us receiving a file would be so ideal. (P2)

I would hope that I'm at least a week before court, getting my package. And if they manage it poorly, they're under more of a time constraint. (P4)

A firmly established review process for assessing the completeness of the disclosure package was suggested by a few participants as one way to assist in alleviating the issue.

It's reviewed by a supervisor, with their onus. And the reason that's done is too, because nothing should ever be leaving the detachment without the quality—the check for quality. (P9)

I mean, obviously it would have to be reviewed at the end by an investigator—the main investigator to ensure accuracy and that everything was done properly. (P26)

Disclosure-Specific Training

Related to the previous suggestion of obtaining complete and timely disclosure packages was the next suggestion: that of disclosure-specific training. This suggestion appears to be directed toward the newer officers as they have not had sufficient time in the field to gain the experience of senior officers who were noted above as having developed the knowledge and skills on the job.

They talked about training officers and the RCMP detachment has a nice checklist, 'these are the things that have to be in there. Make sure these are there before they go.' But with a brand new officer, there's a learning curve (P2)

They need some help in terms of training their officers, because it's a devastating effect on disclosure, incidentally, because the investigation is not done. Even when they're on the stand and you're asking them questions that have to do with the elements of the offence and the [indiscernible]. They have no idea why you're asking them that question lots of times. Lots of times they don't. They just don't. (P3)

Six months at depot is not a lot of time and you've got a lot to learn there. A first-year lawyer has a lot of knowledge of the law, [and] we still expect those police officers to know the law. When there's no ability, you know, they get a week or, two weeks or whatever it is as part of their training in depot or the police college. You're trying to train them in provincial legislation and federal legislation, in how to police a particular type of community, maintaining images, maintaining discipline, maintaining all those things. (P4)

But, that training at the front end for the people who are doing the input, then save how much time at back end? Oh, tons, tons. (P11)

I don't think it would hurt to have police become more knowledgeable that 99% of your work will be disclosed. Whether it's a conversation, or you have that text message to your wife. You know, things like that. I think that it would be a good wake up call for a lot of members to realize that, you know, that pretty much everything now, with the exception of those things we talked about, is disclosable. And I think now, the mentality has shifted, you know. So, any time you can do education on things, it's a good thing. So, yes, my answer is yes, to that. (P12)

Earlier training on how to put a file together as well as what the Crown is going to ask from you and you know, we're going to ask you, who, what, where, when, and why. But, we're also going to ask you, did you talk to A, B, C, and D, not just A. (P4)

One training suggestion included engaging in cross-training involving the police and Crown coming together to understand each other's roles and expectations.

Ideally, in the perfect world, cross training would be ideal. Just at this time, with the resourcing issues faced by both the police and Sask Justice, I don't see it realistic. (P9)

[Cross-training] I think—and again, Crowns learn, just like the police have to, right. You know, we had the benefit of having some very senior and very good Crowns here, that knew the way things worked but also, sometimes they had a little bit of difficulty with change. So, it's always good to be, you know, learning and mixing, and seeing what's out there that's new. So, any time you can get together it is a good thing. (P12)

On the job, or experiential learning with a mentor was also noted as a way to get less experienced officers more familiar and competent when addressing disclosure requests.

I think it just comes with time preparing court packages. Because as you're going through your training, as you're coming in, receiving guidance and direction from somebody like this that would be acting in a court liaison position. You know going in and sitting in on the docket, seeing how it's run, putting together disclosure packages, just basically getting some experience with the whole process. (P23)

One of the best things that is—like, say ideally—it's not ideal because it takes away from core policing [functions], is to have a new member sit and watch—observe the court process. (P9)

Finally, it was reported that the policing world is already very conducive to providing their officers with ongoing training.

The people are good at what they do and we train them, you know, to the best that we can train them and they do a good job, and in consultation with the Crown, they usually present a very good case in court. We train our people constantly. (P14)

Yeah, we do in-service training there and we do it at the Canadian Police College, we do it through various agencies in the United States, in Western Canada. So, and we're constantly, our people are constantly being trained, so that they're, you know, so they're as well prepared to do their job as is possible. (P14)

Summary

The participants identified four areas where improvements could be made in an attempt to address some of the issues and challenges experienced with disclosure. The first was to have prosecutors take over in areas where the RCMP is currently acting as Crown in the province. This would alleviate a number of the concerns associated with disclosure primarily arising from a lack of legal training among police. It was recognized that this might then become a resourcing issue for prosecutions and that funding would need to be provided. One avenue that was suggested could address both of these issues simultaneously was to assess the possibility for increasing the capacity to use technology to allow for an expansion of the operations of video courts. Front-end work to provide better quality disclosure packages was also suggested. Within that suggestion was the need to ensure that quality control mechanisms were in place in the review of disclosure packages prior to their delivery to the Crown. In addition, disclosure-specific training was one way it was suggested to address the concerns surrounding the quality of disclosure packages. Various potential methods for training, particularly focused toward less experienced officers were suggested. It was not clear, however, at what point this training would be undertaken.

Organizing Theme 2: Standardization of Disclosure Packages

Table 4 provides a summary of the codes arising in the analytic process by listing the issues discussed, the basic themes that emerged from the analysis, and the more overarching organizing theme. Evidence, in the form of direct quotes from participants, is provided with the discussion of each issue identified as a basic theme.

Table 4: Organizing Theme 2: Standardization of Disclosure Packages		
Issues Discussed	Basic Theme	Organizing Theme
<i>Provincial Disparities</i>	Impetus Behind Standardization	STANDARDIZATION OF DISCLOSURE PACKAGES
<i>Quality of Disclosure Packages</i>		
<i>Collaborative Development</i>	Guiding Principles	
<i>Problem-solving approach</i>		
<i>Pragmatism</i>		
<i>Leadership</i>		
<i>Consistency</i>	Outcomes	
<i>Better Quality Packages</i>		
<i>Avoid Disclosure Issues in Court</i>		
<i>Avoid Replication and Duplication</i>		
<i>Build on Previous Localized Practice</i>	Possible Solutions to Implementation	
<i>Properly Resourced</i>		
<i>Assigning a Dedicated Disclosure Lead</i>		
<i>Legislation</i>		

Basic Theme 1: Impetus Behind Standardization

The first Basic Theme, referring to the impetus behind seeking standardization, reflects the participants’ perspectives regarding why disclosure packages should or should not become standardized across the province. It came together as a theme based on a number of issues that emerged after analyzing the results of the interview transcripts. These issues included *provincial disparities*, the *quality of disclosure packages*, and *financial* reasons.

Provincial Disparities

The existence of a great deal of disparity in what constitutes a disclosure package was reported by many participants. It was clear that there is no standardized format for the provision of disclosure from the police to the Crown.

I would say, not very consistent at all. I think we all have different business practices. We all have different systems. At the end of the day, we get the same product out, but how we get there, I don’t – I’m not so sure it’s very consistent. (P22)

So that's where—even within Saskatchewan, even within different areas of the province, the format can be different. (P9)

The RCMP is different from city police and I'm sure Saskatoon city police, Regina city police, and PA city police are not the same. There's sort of no across Canada or disclosure check sheet. Form 58 of the Criminal Code, you know. So, there isn't anything. For instance, does every prosecution office do the same? No, because they're all different. You get a file waived in from North Battleford; it looks completely different from files we get from La Ronge or Argyle. (P11)

But you put the—but the basis for everything is the same. So that when I get a constable that goes from here to there and someplace else, he's not going to a different place. Because it used to be, and it still is, going from one division to another is, like, you might as well have gone to another country. And within the divisions, it still is. They don't do things the same in Meadow Lake as they do in Prince Albert ... We're doing the same job. It should be virtually identical. (P13)

Standardizing across the province makes sense on all sorts of different levels, because I think we do do things—well, I know, I don't think, I know we do because I worked in Meadow Lake prior, so I know that every office does it a little bit differently. (P15)

One source of the noted disparities was the court itself. Judicial personnel were reported by a few participants as having their own ideas as to what disclosure should look like (i.e., what an acceptable disclosure package would include). While this is certainly understandable in the context of judicial reviews completed on case-by-case assessment of disclosure issues, it was nevertheless considered a reason for provincial disparities.

And then some of the courts, specifically the judges – and I'm not speaking ill of them – but some of them are pretty strong-minded and have their own individual opinions on things. And often the judge, well the judge runs the court so if the judge wants it one way the judge tends to get what he or she wants. (P23)

And from my experience, some of the judges want it [their own] way. So they can dictate at some point in the process, 'No, we want it a little bit different.' (P25)

The primary source for the disparity between disclosure packages provided to the Crown was Crown preference. This was evident within as well as between the prosecutorial regions of the province. Additionally, there was a sense of frustration from police given that there had been some kind of agreement in place at a prior time which was not maintained as Crown personnel changed.

It depends on the Crown often, so there's no standard practice, I would say, that's consistent across the board. That tends to be a bit of a local practice as well as to what the

Crown expects in the initial disclosure package. So, there's a lot of time spent trying to figure that out. I think it's kind of ad hoc. Like as the, you know, if the Crown needs a particular piece of information then they make the request and then it comes in piece by piece, kind of thing. (P23)

The people within the Crown, they can't figure out, within their own office, how they want disclosure. But yet the Crown will say, 'You can provide whatever kind of package,' or 'this is what I want and this is what I want and this is what I want.' So at the end of the day, we're all trying to prosecute an impaired driver. That's nuts. (P13)

We get a certain direction from the regional Crown's office and then individual Crown wants it different. I want this and that guy wants that. And then, they complain, we don't like your system, because we don't like the way you produce it. But, that's what the consensus was, that's what they wanted. So, really, one office would have twenty Crown, or I don't know how many Crown, but several Crown and they all like it different. (P22)

So, even though we had an agreement initially when we set this up, as prosecutors change, they didn't like that format, so they want a new format. So, they send over a prosecutor and they say, okay, this is what we're doing. How do you want this changed? Oh, I think this format is good. And then we still hear rumours about, no, this format isn't good. So, what is it? What is that you want? There has to be a standard format for it to go over, but that standard format can't be one that is dictated to every police service because we all have different resources and systems. (P21)

Regardless of the reasons for different disclosure packages, it was reported that standardization would be welcomed and something that makes sense.

Disclosure in the province should be cut and dry, here it is. Here's a court package. This is what it's made up of. Here's what the disclosure is ... And the Crown in Fond du Lac, which shows up on a circuit court, or the guy in Regina working for Regina Police Service, or the guy in Estevan, or Weyburn or anywhere else, it's exactly the same. It's no different. We'd put together a package. We'd do a template. I mean, only common sense would say, why did you do it differently every place? Only an idiot would do it differently within the same jurisdictions all over the place. (P13)

Quality of Disclosure Packages

The importance of complete and professional disclosure packages was recognized by many participants as crucial.

Yeah, we actually are making some forward movement I think, to try and get a better package put together right at the front end, and I think everyone recognizes the importance of that. (P15)

It's just a way for Crown to understand or ensure the quality and consistency of disclosure practices, and ensuring that everything that's being disclosed, they're aware of. [It's] just an effort to provide efficiency and to provide consistency. (P1)

And other than the fact that it [unstandardized packages] then provides a poor product because there's no consistency of how you do it. (P13)

The only time it [standardization] probably comes up is if I, you know, said I've got disclosure and there [are] 12,000 pages there and they're not really sorted or indexed or anything like that. And I'm going to need a couple months to get through these things, the judges; the court will give me the time to do that. (P8)

The police, yeah, can you please provide me with the, you know, for example, the notes of constable so-and-so. And usually what I'll find is that, well, he didn't make any notes. And of course, they didn't write that he had no notes, but I still have to figure that out just in case. (P17)

Summary

The participants noted that the reasons for moving toward standardized disclosure packages included addressing provincial inconsistencies which undermined the quality of disclosure submitted to the Crown. As noted in the first organizing theme, the costs associated with disclosure issues raised in court can be dire in nature. The sources for the lack of standardization were observed to emanate primarily from two sources: the court (judicial personnel), and the Crown, where it was implied that this was mainly a matter of personal preference. It was also noted that the lack of standardization was desirable and doable, the lack thereof not making sense.

Basic Theme 2: Guiding Principles

On the assumption that proceeding towards a standard format for disclosure packages was desirable, the participants outlined a number of principles that they believed should guide the process toward standardization. These included *collaborative development* of the final template, the importance of *engaging the front lines*, utilizing a *problem-solving approach*, being *pragmatic*, and the need for *leadership*.

Collaborative Development

Beginning with collaborative development, participants were clear that as many parties involved in the disclosure process as possible should be at the table to work through the process together.

Oh, I think the collaboration is important. I mean, because we all understand the problem. Justice sees the problem and we see the problem. (P22)

I think it boils down to relationships with your Crown. If you're, you know, you have a, if you're in a small detachment somewhere and you have a Crown coming in once a month for a monthly sitting, you meet regularly with that Crown and you have those discussions with them and say, 'Here's what we're finding challenging for us. I can't do this, I can do that. At what point is it necessary?'" (P23)

Probably representation from the SACP, which could then be pushed down to some records management from the RCMP and from us, to the officers. And I don't know how you would—I know—I think it's the defence lawyers or Legal Aid Society, I think there's probably some voice that would be at the table. And from my experience, judges do not like to get involved in that process. They do not want to be seen as dictating what's coming forward. So—which I think is a gap. I understand why it's done. You know, the independence of the courts ... But you need the three players. You need at least the police presence and prosecution, defence. (P25)

Engage Front-lines

The importance of engaging the front lines in the production of a standardized format was deemed important by one participant as it was argued that the ones actually processing disclosure requests should have a voice in the discussion and would be able to provide first-hand knowledge of their experiences.

But, the problem is and I mean, even university world, you have the people making the decisions that have never done the work, or have been out of the work – the trenches, for twenty years, and don't know what's going on in the trenches anymore, but they make these wonderful decisions up top. And that would be my scare, is if all of a sudden they said, Sask Justice says, all disclosure has to be this way. (P11)

Problem-solving Approach

Rather than taking a 'we can't' approach to addressing standardization, the participants suggested that a problem-solving approach was better suited to achieve an agreeable format. Looking to identify the problems with disclosure packages, as well as what the ideal package would include should drive the result.

So what is the typical—what’s the typical reaction of that? Resistance to the change. ‘We can’t do that.’ Rather than saying, how do we make it work? These are all the reasons that we can’t. Well, then when you realize it’s not going away, they say, no, okay, we’ll make it work. And you figure things out and you make it work, and I think that’s the stage we’re at for the most part with that stuff now. (P13)

[We need to determine] what are the key pieces of the information? (P21)

Things that are pretty generic to virtually any file. (P9)

But that’s what has to happen; a discussion to say, how can we be efficient? (P36)

Pragmatism

In addition to being collaborative and taking a problem-solving approach, participants noted that given that there was a great deal of variation with respect to the types of cases that disclosure has to deal with, there needed to be a pragmatic approach that permitted flexibility when necessary.

Because when you put absolutes on people, you handcuff them. It’s always got to be flexible enough for one-offs. (P9)

Yes, I think [standardization] does [make sense]. I mean, obviously, there has to be some flexibility depending on the nature of the case. (P23)

I mean, there’ll be idiosyncrasies and differences for every community that they have even within the divisions. But as far as the basics—all the basics is the same, then we’re good to go. (P13)

Right, you’re in the same province. Just because you have a different court circuit or a different judge, you have a different set of rules kind of thing. Sometimes you come in [and] you look like a rock star because you’ve got this new form that you were using when you worked somewhere else. But it’s all the same. (P36)

Additionally, pragmatism needed to take into account variation within the province with respect to differential resources and capabilities. The solution, when reached, would have to be one that everyone would be in a position to follow.

We can’t set a standard that’s so high that it can’t be maintained by everyone. And unfortunately, when you look at policing services across the province, you can’t compare Morris, Saskatchewan to RPS and expect them to have the same standard. They don’t have the same bodies there, the same resources. So that’s the big thing. It has to work for everyone or it’s not workable. It’s not maintainable. Well, what they fail to consider is the ripple effect. And just because it works for you, doesn’t mean it’s going to work for them. And if it doesn’t work for them, if something happens, it’s no different than the

risk matrix. Then we start getting into our questionable, unacceptable risk. [It's] no different with disclosure; if we're going to have a process, it has to work for everyone. (P9)

It should be consistent, you know; and it – and we shouldn't put together a process that makes it impossible for small agencies to operate. (P22)

Leadership

Finally, leadership was discussed as critical to the process. It was leadership that needed to drive the process as well as the eventual implementation.

Crown and the police need to sit down and decide a standardized format, so it's done across the board the same way. That's going to be—you know, and that is not difficult. That's a requirement of senior Crown and our senior management to sit down and make a decision and move things forward. (P13)

And the bottom line is—and maybe if there's a reluctance on the part of one party or the other to come to the table, that's where the provincial government and Justice needs to be engaged to say—but again, most of this stuff, it's pretty simple to do. Like, make a decision. Come up with a solution. Make it work. Pretty simple stuff. It's just you got to—somebody's got to make a decision, settle in and do it. (P36)

Then it's the need from prosecutions and the willingness to accept from defence, what that looks like. But it—to push back the clock is going to be very difficult. I mean, the genie's out of the bottle. So how do you put it back in? (P25)

So, you have to make it known to your prosecutors that this is the format that you guys have agreed to, you know, and that's that. (P21)

I mean, what has to happen is the Crown has to get on board through them and say, 'This is what we want and this is what we're' — because we as the police provide the information to the Crown. And I don't think for us, it makes any bit of difference one way or the other. You tell us what it is you want us to give you and we'll provide it for you. No different than when *Stinchcombe* started. They said, okay, you got to disclose. All right, no problem. We'll disclose. (P13)

The need for strong leadership in regard to implementing standardization was considered all the more pressing due to the fact that this road had been previously travelled with no lasting effects.

I know probably three or four years ago, they went through the exercise of a uniform report to Crown Counsel and I know that they did come up with something at the end of the day. But I know that, you know, you try to adhere to that and then, no, Crown wants it this way, Crown wants it that way. You know, can you change this and put this here instead of that or—so, I mean, although we've come up with a, you know, a format that

was agreed upon by committee, you know, consisting of police officers and managers and prosecutors themselves. And you know, and still, I mean, it's still not an agreed upon format. I guess it's a best practice, it's a place to start, I guess. But, yeah. I mean, yeah, if we could have consistency across the board and we know what we needed to do. (P26)

Summary

In order for a process to begin to find a standard format for disclosure packages that would address the issues associated with disclosure arising from non-standardization, the participants identified crucial principles that needed to be present for the process to be successful. Working together from a problem-solving and pragmatic approach under strong leadership was deemed the way to get there.

Basic Theme 3: Outcomes

The beneficial outcomes associated with standardizing disclosure packages addressed the issues previously noted.

Consistency

It was reported that standardization has the effect of getting everyone on the same page which leads to less confusion in performing one's role.

So, [get] everybody on the same page and we do what we're supposed to be doing, it'll be all good. The other thing I guess, they're talking about, is this consistent practice, so we all know what's expected and when it's expected. (P23)

Better Quality Packages

Furthermore, it was expressed that standardization (consistency) of the packages would provide for better quality assurance checks prior to disclosure getting disseminated to the Crown.

Everybody doing the same thing in every jurisdiction, taking the best of how everyone does it, which, you know, is quite a big project I think, to undertake. But it strikes me that at the end of the day you'd have the best product that you could put together, so that makes sense to me. (P15)

One thing that I've learned over the years is be very cautious—or very particular on outlining what you've disclosed. And that's where those check sheets are nice. (P9)

We're to the point that we—it's—you know, you're just going through the process of setting up your file in that sense to ensure those tasks are completed. So that when you ultimately build your disclosure package, everything that you indexed is all prepared for [Crown]. (P16)

It kind of acts also as a table of contents for the Crown and defence, because they can say, okay, this is all the stuff they've disclosed. It shows here four DVDs and they can confirm that yeah, that's what they have. (P1)

And the reason that's done is too, because nothing should ever be leaving the detachment without the quality—the check for quality. (P9)

Avoid Disclosure Issues in Court

Better quality packages submitted by the police to the Crown can lead to less errors which, in turn, leads to less disclosure issues in court and reduces the potential advantage gained by the accused.

So, I mean, our job as prosecutors at the end of the day, is kind of that gatekeeper function, right. It's making sure you review the investigation. We're not, we work in tandem with the police, but we're not in concert. You know what I mean? We're two separate entities, and we're checking their work to make sure that they're submitting what needs to be submitted, asking questions, you know, do you have notes on this, is there a statement from so-and-so, go get this [indiscernible]. And then a lot of times the criticism lands on us because we, and quite rightly so, if something was obviously missed, easy enough for us to request, we didn't request, now you're there, it's the day of trial, and you don't have officer so-and-so's notes, you know, and so it's a miss by the police, but it's a miss by the Crown, and it falls to the advantage of the accused. And so it should, because it's [missed]. (P15)

Avoid Replication and Duplication

Finally, standardization was argued as providing for efficiencies by reducing duplication and making better use of existing resources.

Well there's one here that talks about varying requests from varying prosecutors for different types of disclosure packages. And then after all that then they may want a full court brief for trial. So, this seems to be a replication of, duplication of what they've already got. (P23)

They're going to be very, very similar. So you know what, cookie cut it and make it simple. I mean, what we look at, and what I looked at the last number of years, after being commissioned, is looking at stuff and how can we put systems in place to streamline what we do, so that we're not reinventing the wheel every time we turn around. It's simple, but we make it difficult; and in making it difficult, we waste time and we waste money and we waste resources. And who suffers at the end of the day? Joe Q Public out there on the streets. (P13)

Summary

The outcomes identified by participants suggest that standardization of disclosure packages can lead to a more consistent outcome that improves the overall quality of the packages forwarded to the Crown. Managing potential issues that can arise from incomplete or poor quality packages on the front end of the case can have a positive impact later in the case processing. In addition, standardization might lead to better use of existing resources thereby garnering additional efficiencies within the entire system.

Basic Theme 4: Possible Solutions

Moving toward implementing a standardized format for disclosure packages was noted as a potentially difficult task given that people have become accustomed to the current practices despite recognizing the issues that it might cause. *Building on previous local practices, proper resourcing, and assigning a dedicated disclosure lead* were considered important in moving forward. Consideration was also given by participants to the idea of *legislating* a standardized approach.

Build on Previous Localized Practice

Numerous examples were provided from across the province that suggests there are many groups who have identified this issue and have been working toward a resolution.

But I can say for the economic crime program, we have one standard of practice and then, the business rules are built around the case. And the business rules are pretty standard, with, you know, we'll change it a little bit, depending on the type of case you're in. But, it's standard practice, yeah, the SOPs [Standard Operating Practices] are laid out. The north and south office both have over the years, worked with the Crowns, the AG's office, and our disclosure format was designed in conjunction with the Crown. This is how we would like to see it. And that's how it's been built. So, it's a standard package given to the Crown, both north and south. So, if you leave here and go to Saskatoon, they know the package they're going to get. (P6)

I think it—when we went to our new Information System in 2005, for a couple of years prior to that we were meeting quite regularly with the Crown trying to establish what it was that they wanted to see as a regular part of their disclosure package, so that we could build a sort of a template (P21)

But we've come a long way in the last eight, ten years as far as standardization. Our policy is all the same. Structures are all the same. I mean, we've gone a long way towards standardization. And if we're [not thinking about] being a national police force and doing things—I mean, the only way we're going to be efficient is to be as standardized as we can. [But] you have to sit with the various police departments or the chiefs or

representatives, just say what works for you guys, then sit there as a group. Not to say what needs to be in it, because they're the experts. They know what they need to prosecute a case and what kind of stuff that they need. But put it into something and make it standardized and do it. (P13)

We have a type of template for disclosure in terms of—it lists all the—it's like a check sheet. It lists all the common things that would be involved in any disclosure, in terms of reports, the charging information, the prosecutor information sheets, criminal record if applicable, [and] member notes. You know, just what's typical. And then also we use a space so that you can add add-ons. (P1)

It was a bunch of sergeants that sat down around the table and—at my behest, about a year ago, and said, 'Listen, can you put something together so that it can help out our junior officers.' It's a guide for our sergeants when they're reviewing the files and then also for our clerks. And they talked to some of the prosecutions and they came up with this hand drawn with little boxes and it—photocopied now a million times and it seems to be working. (P25)

I forget what it's called. They started it. So we've now got a standardized reporting structure on the federal side. Now we've taken that standardized reporting structure on the federal side, over to the contract side or the uniform side. (P16)

When I was the federal Crown here, I had a checklist that I made up that sort of was a generic one and then, I'd have specific ones if it was an undercover op., of the things that I needed. And if I wasn't getting it, I had sort of a received column and a sent column, so I know when I got it and if I sent it out to defence. (P11)

I mean, there's one fellow here actually that wrote a little bit about what he thinks should happen. He says, 'What we need is a national RCMP standard which the RCMP will be using in its disclosure that meets or exceeds our jurisprudential requirements. The issue will be getting consensus throughout all jurisdictions across the country [as well as] what they should look like entailing our disclosure to our local Crown. By examining case law and being future minded good stewards many of the questions may not need to be asked.' So, we do, everybody's on the same page and we do what we're supposed to be doing, it'll be all good. (P23)

And that's as an organization with the RCMP across Canada. We're way better at the standardization from one province to another, than what we were. I mean, we've still got a ways to go, but I think when I moved to Alberta from Newfoundland in 1985, God, I thought I went to another planet. Like, other than the fact that these guys wore the same uniform and drove the same colour cars that I had been driving back east, they didn't do anything the same. Nothing [is] at all the same. (P13)

Properly Resourced

Some participants noted, in conjunction with recognizing differential capacities in different areas of the province, that it was important for the process to recognize that proper funding needed to be in place once the format was in place in order to ensure its sustainability.

But when you're—when you don't have the resources in place to maintain it and sustain it, then it becomes a—the golden bar that no one can reach. (P9)

There needs [to be] some resources. (P22)

And then you get into the municipal police forces, like the RMs (Rural Municipalities). That's a whole, you know, that's a whole kettle of fish too, because they don't have the resources that SPS or RPS has and, you know, they're struggling to do the best job that they can with the resources they have. (P15)

When identifying proper resourcing, it was suggested that a shift in how the resourcing of the police is thought about should be adjusted; there needs to be greater recognition of the demands for administrative services, information technology as well as the importance of civilian positions.

So time and salary dollars; and getting the province to understand that—because, and understandably so, when the province gives money to the [police], they want boots on the ground for their money. They don't think of information management, because they also don't necessarily—it's not their world, right. (P27)

They don't see the work being done underneath. They just, they can't even relate to all of that, and there, there's a lot that has to go on, a lot. And I think after a while, like we've been really good here in that we don't waste our expensive police resources on some of the administrative work. They tried to reduce the cost in the administrative portion by assigning civilians, and we're very well integrated with the police officers. (P21)

The back end—if I could sit with them, face to face and do what I'm doing with you, I know I would sell them. Because there [are] big repercussions. Like, no matter how many boots on the ground you have, if you can pick them up, charge them and take them to court but you can't win the court case, you're wasting your boots on the ground, right. (P27)

They sort of lose touch with that and think, oh, why, suddenly it's, 'Oh, well why have we got all these civilians?' But wait, because these civilians are doing this work and your officers actually are on the street. They are investigating crime. They are doing this, and so they tend to lose touch with that. So, unless the message stays consistent to the Board and they understand that there's this huge piece of work here that, you know, has to be done, you won't, it won't get accepted. And when the crunch comes with the budget, you go with the high profile stuff, right. (P21)

Assigning a Dedicated Disclosure Person

Upon completing the standardized format, participants suggested the need for an individual dedicated to ensuring that the file progresses in accordance with the format. Given that the ongoing duty to disclose, the timing issues that might result in partial disclosure at the outset, the evolving investigation, and follow-up requests for disclosure require getting on top of the disclosure package at the earliest stage and tracking the process is vital.

I think as we're seeing, especially in the large scale investigation, which I'm mostly involved in now, I mean, we have to have—I mean, we're looking at—people need to be assigned [to disclosure] right off the get go of the investigation. It's not a glamour job at all. But, I mean, it's—at the end of the day, it's one of the most important jobs there is out there. (P26)

So we've standardized that format of how we make our disclosure. As soon as that file comes in, we've got a homicide; we assign a disclosure person, or a major case management person I should say, to that file. So they're the ones that start that disclosure process already. (P16)

You need to have that person who can look back or who could be that funnel for disclosure and essentially that disclosure is a living document where it's constantly changing and things are being added to it and deleted [from] it. I mean, in the confines of our disclosure laws. But I don't really know, I mean, what other answers there really could be. I mean, we can't, like you said, we can't go back. (P26)

Consistent with the principle of a collaborative effort it was additionally suggested that a Crown counsel be assigned to a specific case as soon as possible to assist the individual in navigating any disclosure issues.

What would be ideal is having Crown assigned to your investigation right off the hop. And I mean, and working—I mean, they need to be fully engaged and working with disclosure individual as well to put it in ... a little more dedication or infusion from them would be ideal. I mean, it would be ideal for us to essentially feed the Crown and the Crown make their disclosure package based on how they want things. I mean, that would be perfect. (P26)

Legislation

The question as to whether or not to produce legislation requiring and defining a standardized disclosure package was put to the participants. For a variety of reasons, the response was a resounding and unanimous 'no.' In the first place, it was argued that as new cases appear before court, the case law itself evolves with, therefore, the potential for disclosure requirements to also evolve. In addition, to legislate something that removes judicial discretion

to rule on defence requests was viewed as inappropriate and contrary to the adversarial system, undermining the accused's rights.

I think it would be a mistake to legislate it. First of all, it is a bit of an evolving animal. Secondly, it is a situation—if you were going to legislate it, then you start setting out rules or lists or whatever. And whenever you do that you're going to miss things, you're going to include things that maybe shouldn't be in there and you're removing the ability of the court to look at it and say, 'Hey, on this particular facts, on this particular case, this is what's relevant and should be disclosed, if there's an issue.' So, I think the case laws, the common law – and I'm a big fan of the common law and not a big fan of codification – I think the common law in this area works pretty well. (P8)

I think it would be hard to legislate. For every rule you have, lawyers will try to think their way through things. It's just what we're paid to do. So, it's going to continue to evolve. (P4)

You could legislate a duty to disclose, then, the question is what do you disclose? So, the problem, with legislation you need to have the judicial discretion to decide what has to be produced and what does not have to be produced. Well, because it's left to the courts, first of all, because there are certain documents which do not have to be produced, and the difficulty here is oftentimes the defence counsel—they launched this application, and it's launched by way of a subpoena *duces tecum* [production of evidence] requiring the person that it's directed to to produce all of the records which they have. You know, legislation, to kind of pigeonhole every application to fit in a legislative program does not work. (P7)

And I think defence lawyers will not be happy with that. Because that will specify what you can and cannot get. And right now, if you've got the right defence lawyer and the right prosecutor, and a reasonable request is made, things work smoothly. But, this is an adversarial system and there's lots of times where defence counsel don't really have any other avenue but to nitpick and, you know, I'm not ashamed of it, I make no apology for it. (P5)

Well, you know, you could set out sort of a category or a litany of rules to be followed, etc. That's not going to stop the applications for disclosure on the grey area or the area where counsel are really doing fishing expeditions. They expect that there's something out there. So, it's not going to stop that, and so you'll never get this codified to such an extent that you can say to the police officers or the Crown, etc., these are what you need to; these are the rules you need to follow. (P7)

Summary

A number of examples were provided by participants wherein individuals and/or independent police services have recognized the need for a standardized approach to disclosure and taken steps to address it. The only apparent difference between what they are doing and what

is being suggested is that they have been working, at least to some degree, in isolation from each other, addressing particular local needs. There is a potential to build upon the past experiences already existing in the province to avoid “recreating the wheel.” In order to achieve standardization on a broader scale (i.e., across the province), taking into account the relative capacity of different police services (and even smaller detachments within the RCMP), there needs to be resources provided such that the standard is achievable for all police services. These resources need to be considered in the broader context of policing and the administrative aspects that assist in ensuring that disclosure is done properly. Despite the agreement amongst participants that standardizing disclosure is a worthwhile project, it was made very clear that legislation was not the route by which this could or should happen.

Organizing Theme 3: Electronic Disclosure

Table 5 provides a summary of the codes arising in the analytic process by listing the issues discussed, the basic themes that emerged from the analysis, and the more overarching organizing theme. Evidence, in the form of direct quotes from participants is provided with the discussion of each issue identified as a basic theme.

Table 5: Organizing Theme 3: Electronic Disclosure			
Issues Discussed	Basic Theme	Organizing Theme	
<i>Software Compatibility Issues & Corrupted Files</i>	Technological Challenges	ELECTRONIC DISCLOSURE	
<i>IT Infrastructure Limitations</i>			
<i>Security</i>			
<i>Storage and Retrieval</i>			
<i>Generational Gap</i>	Paper vs. Electronic		
<i>Resistance to Change</i>			
<i>Going to Court</i>			
<i>Environmental</i>			
<i>Argument for Paper is Outdated</i>			
<i>Software Costs</i>	Associated Costs		
<i>Creation Costs</i>			
<i>Storage Costs</i>			
<i>Training Costs</i>			
<i>Not Currently Using</i>	Current use of Electronic Disclosure		
<i>See it as the Future</i>			
<i>Electronic Disclosure Already Practiced</i>			
<i>Less Resource Intensive</i>	Efficiencies Gained		
<i>Timeliness</i>			
<i>Improved Access Capacity</i>			
<i>Impair Efficiency</i>			
<i>Evolve with Technology</i>	Possible Solutions		
<i>Properly Funded</i>			
<i>Utilize a “Systems Approach”</i>			
<i>Amalgamation</i>			

Basic Theme 1: Technological Challenges

The first basic theme, issues with technology, reflects the participants’ perspectives regarding why electronic disclosure is potentially problematic. It came together as a theme based on a number of issues that emerged after analyzing the results of the interview transcripts. These issues included *software compatibility issues and corrupted files, IT infrastructure limitations,*

security issues with various forms of electronic disclosure, and *storage and retrieval* issues arising in no small part from the massive volumes of data that have accompanied the technological explosion over the past two decades.

Software compatibility issues and Corrupted Files

Participants identified existing issues within the criminal justice system itself with respect to the compatibility between different electronic formats. It was reported that a lack of standardized electronic systems created barriers in the incorporation and use of electronic disclosure.

The courts use specific programs, prosecution uses specific programs, RCMP uses specific programs, Regina PA, Saskatoon police, all use different programs, as well. (P4)

But, you'd have to have a different program for the court recording system. Then, you get stuff from the police. You have to have a separate thing. Or even, the jails, the penitentiaries. (P11)

And so it's that bad there. It's not quite as bad here, but it's not great. Like, the systems aren't compatible, and I think that they're—I thought that they were going to do something where they kind of—the courts and the Crown kind of got together and got a system that was somewhat compatible and useful, a new computer system. And I thought the RCMP were somewhat—or Police Service were somewhat on board with that, so that it was more compatible. It should be. (P3)

Yeah, so we will get discs sometimes in a format that we can't download it. (P8)

It was further reported that one of the reasons behind these incompatible systems was that the RCMP, as a federal police service, despite performing contract policing to the province, was obligated to use the federally recognized systems as dictated by their superiors in Ottawa.

Where we fall down, even though we're contracted as a provincial police service, is we are still slaves to Ottawa. Our masters are in Ottawa, so we have to use their programs. So even if we want to adopt a format approved by SACP municipal partners, we may not necessarily be able to because of our reporting criteria to Ottawa; which is unfortunate. Ideally, I'm much more interested, even with records management, I'm much more interested in someone who's been picked up in Regina for break and enter, than I am someone who's picked up for impaired driving in Digby, Nova Scotia. So it does create issues. (P9)

It was also reported that the broad array of technological advances throughout society meant encountering software systems in the wider population that were incompatible with their own internal systems.

I have an aggravated assault that was taped surreptitiously on a cell phone and that was interesting. I don't know—I mean, I could play it on my lovely format, but I don't know what the police had to do to it to make it a format that we could deal with. (P11)

Their player is not compatible with ours, so we actually physically have to send – in a lot of cases, the merchants aren't familiar with their own equipment, so it's very taxing, but we do have to send our IT people down there to remove the images or whatever from their – it happens on a weekly basis, for sure. And then, we have to put it into a format where we can disclose that as part of the file. It can be a shoplifting from Superstore where they caught it on video. So, we have to—they're not familiar with how to burn it onto a DVD for us so we can disclose it as part of the disclosure package. So, video ... technology presents challenges. (P12)

Then, various convenience stores, especially the surveillance things that have more than the one screen. You know what I mean. (P11)

Furthermore, licensing and proprietary software has made the matter even more difficult to navigate and find solutions.

At times, I mean, I have had files where they can't recover some files from cell phones, etc., and they've sent it to the tech [crimes] and that's been the limiting point there, where they just can't obtain any images off the cell phone. So there is an issue of, you know, the phone company—or phone maker itself might have some copyright that the police can't get through their software or get access to their phone systems [proprietary rights]. (P2)

Licensing, well yeah, or you know, when we run into it, again, collision reconstruction. Well, on some vehicles we have the software to unlock the little black box. Some vehicles, we don't. That's nonsensical, that the policing services don't have access to that, but that's the way it is. Proprietary software. Absolutely, they don't want everybody out there – now, I disagree with that. I think that if it's part of an investigation, the copyright kind of vanishes. (P4)

Despite the noted issues, the participants did suggest that in most cases they have been able to overcome these obstacles. In the case where Crown or defence counsel was unable to access electronic files, this was typically reported as getting addressed by providing them with the software, providing them access to a location where the counsel could view the materials using police equipment, or providing disclosed materials in hard copy formats where possible.

You have to—or some need special programs to open, so you have to ensure that defence has that. So what they do is when they do a disclosure, they provide that software with the video. (P2)

Our IT staff will include the player right on the DVD, so they can go plug it in and play because they don't have the software. (P12)

I mean, things that I have heard, I mean, it's essentially, well, here, we buy you the program or for that particular thing, you know, we've got a desk at the office or you know, come as you will. You can use that, we'll show you how to use it and take you through it. So, I don't think it becomes a large issue because I think with most computers that you have to have nowadays, can pretty well do anything that we're going to disclose to—but I mean, yeah, there are some instances where, you know, people just don't have that software. I mean, we have to make it available to them either buying them the licence or the program or making a terminal available to them so they can utilize to see it on. (P26)

If they had trouble accessing it, if need be, we will even provide the equipment for them. We've done that. (P6)

If everything is just put onto CDs, the police have—they use a software system and they'll give that software system, you know, access the material. (P10)

If they [defence] need assistance in opening it, yeah, maybe then we get into—and we've had these discussions, you know, I can't get this to work, I don't have the proprietary software. Well, maybe I make arrangements for them to view it. (P7)

And what happens is, I mean, if you're going to use electronic disclosure then the Crown and the defence have to have the capabilities of utilizing that. And in some instances perhaps they can't, so then we have to provide a hard copy. (P14)

And so, there's an obligation, really, on both sides. Like, A, on the defence counsel to get with the times and B, if there's something there in terms of software, the obligation is on the Crown to send you the software and so that you can read the RCMP format and stuff. (P5)

When there are issues with corrupted discs or files, there are often back-up copies made to ensure the integrity of the original file that can be disclosed a second time.

I mean, some of the disclosure that we get now is given electronically, so you have issues sometimes with files being corrupted when you get them or that kind of thing. (P2)

Yeah, I know that [name deleted] had a major issue, but this was from [another] division on an arson murder she had. And her external hard drive was all [messed] up, and she couldn't get the links to work. So I mean, I just didn't believe [indiscernible] that time. Finally, I went in there and it was just a disaster. Like, it didn't work at all. (P3)

There's no guarantee that you're going to be able to open a file, right. Discs go wonky. But we've built in things so that we have a backup on the first [disc], on the C-drive. For a little while, it'll stay there. And then there are two copies made, so hopefully, if there's something wrong with the disc, you know, one will be bad and one will be good. No guarantees. It's technology. (P21)

Whether the technological issue was due to software incompatibility or a lack of technical savvy on the part of the end user, these issues were noted as slowly beginning to disappear as time and technology progresses.

You know, that is something that when it first started in different jurisdictions, six, eight, ten years ago, I think may have been a concern and it may have been valid. From what I've seen in the last four or five years, nah, that's a lost the argument. Because there's nobody now that can't—I mean, and computer software is so much more user friendly now. We're able to convert from one to the other with—I mean, stuff before, because of the way the stuff was formatted, there might have been issues. But no, I'd say the last four or five years, that's getting to be a thing of the past. I can see 15 years ago, 10, 15 years ago when it first started, yeah. I could see it being an issue, but I can't now. (P13)

Some, you know, defence counsel didn't have the capabilities or how to use the software or whatever. So, it takes time for them to get up to speed, but eventually they get up to speed and it makes their job a lot easier too. (P14)

Another technological issue raised by participants was with regard to poor quality programs and equipment. The video equipment used in many police holding cells was one particular piece of equipment that garnered frustration from a number of participants.

The cellblock video is a major problem. (P3)

The ones in the RCMP cells are time frames, they're terrible, they can't tell you anything, because a [indiscernible] show the person's there in terms of determining how they're walking or state of sobriety isn't there. But the ones in the city police, they do, they're actual time and most of them have audio with them as well. (P8)

But you know, more subtle signs of impairment don't show up well on these, you know, kind of low-definition cameras. You know, you're not going to catch every stagger or every step. You're not going to; it's not like actually being there. (P17)

You know, I commonly got, especially with the DVD, I got, I can't get this to work. So, things like that. (P12)

IT infrastructure limitations

The second issue confounding the use of electronic disclosure was widespread recognition of outdated, antiquated IT infrastructure. While the police were generally noted as “leading the technological way,” so to speak, the other components of the justice system, the Crown and the courts were reported as seriously lagging behind and in dire need of an update.

I just—I do know that the whole justice system is [messed up], [deleted], in that the computer systems are so screwed. Like, [names deleted] the clerks, for example, are working on DOS still. They're working on DOS. And they have—they cannot cut and paste things into their information. And they have to enter it into the computer twice, typing up every information. (P3)

Their [Prosecution] system is so antiquated it's not even funny. (P21)

There was no way that those smaller courts had those capabilities. (P10)

One disadvantage I see is courtrooms being set up for electronic disclosure. (P6)

And I'm finding that some law offices, including government offices, aren't up-to-date with scanning capabilities and sending things PDF. (P11)

I know from what I've heard, the police would certainly like to see electronic disclosure, and that's something that for our ministry we're not in a position to take on, just because of our, I think it's because of our IT systems. You know, we don't have that capability, and I think the problem is that there's no uniformity across the province, right, between policing agencies and then the Crown has to—the IT issues, so that's a problem. (P15)

I think the general consensus is that it's electronic is the preferred method, but not everybody has the same equipment or the same software programs that open it. And not everybody at small detachments has the proper equipment to burn CDs. And when they're doing that type of thing, the receiving end may not have the appropriate software to have it, yeah. (P23)

In one location, the result has been the police service returning to the provision of hard copies of their disclosure packages.

[Our Police Service] has got into a habit now, but it's a bad habit, is they—the data on the system is made into a hard copy because the prosecutions in [X location] do not have technology. (P25)

Another IT limitation, noted particularly for the northern parts of the province was the lack of internet infrastructure requiring the use of dial-up technology. Given the possible content contained in a disclosure package, the size of the file and the lack of a consistent and fast internet connection made even receiving the files problematic.

Then you come in to issues of size of the attachment. If you want to email it, do you have to email eight attachments versus one? (P9)

I know we talk about internal communications outside of this, where we're sending documents out and things and the line speed is such that these guys in a lot of these places can't open them. (P23)

So if you're dealing with a person in custody for 12 hours and you're dealing with about 12 hours of cellblock footage that is needed, that can take 4 to 5 hours to download. (P1)

Maintenance and efficient access to ongoing technical support was also noted by participants as an issue negatively affecting the potential use of electronic disclosure.

I think you have the issue with the systems going down. The problem we have is it's maintained by Regina. So, whenever we have issues, which we're having right now, we have to go through the provincial IT staff. Right now, our PIES [ph], we call it PIES, it's provincial [indiscernible]—but, it's our electronic disclosure, and right now it's been down, it's going for weeks. (P12)

That maybe the municipal partners or the Crowns don't understand is, you know, you're down to the nuts and bolts here of a—you don't have tech support. You don't have the computer people at your disposal. (P9)

When you look at the north, of course always look at the north. I'm thinking the remote—Deschambault Lake and, you know, those crazy outposts out there. I mean, would there be times where maybe you have to actually produce a court—because this system is down, the internet is down, there's a storm. (P27)

Once again, as noted with the previous issue of software incompatibility, a number of participants suggested that a lot of these had been, or were in the process of being, addressed.

I know the courts in Regina, they're all wired and well, I shouldn't say wired. They bring the stuff in. They've got the ability; you just let them know. You know, we need to have a DVD player, we need to have a CD player, we need to have a TV in that courtroom. So, that part's coming along (P10)

I think, for the most part, [the courts] have adequately kept up, in terms of the technology, because if I want to hear the tape, there [are] always counters on it. (P5)

I think it's gotten better, because a lot of the provincial courts, these services have now gone to a system called For the Record, so it's very common throughout the province. I attended as an investigator to Court of Queen's Bench, which is a very old building, you know, we need a TV to play this video and back then it was VCRs, but now I think everybody's gone to the For the Record, which is compatible with a lot – not with ours, yet, but it's something we're investigating switching to, where it's a lot easier now to play those videos and to do recordings and things like that. (P12)

Yeah, they're [the courts] getting that way, yeah, because the courts also have to have video equipment and audio equipment to play this stuff which is creating a lot of better use of our time. (P11)

In one particular case, the use of a portable system was presented as one way that many of these obstacles have been tackled, especially in the more remote areas of the province.

There's a number of courtrooms in the province that are capable and that have been modified for that, but the program we use here is portable, put it in two suitcases and walk away. Laptop, desktop, screens, cables, and extension cords. And walk away. Under thirty-four-hundred bucks. So, you can take that and travel all of Northern Saskatchewan. (P6)

Security

The final obstacle that participants expressed concern about with regard to the use of electronic disclosure was that of security.

I'm sure electronic files can just as easily go missing, right. (P15)

I believe it's past its infancy stage, but still being worked on. There [are] a lot of parameters around working in it. Security is number one. And then access for the Crowns into that. It's an internet-based disclosure process. And our outfit's been looking at it for a couple of years. (P6)

If you email it to a prosecutor and he's out, who's getting it? You know, no different than sometimes a last minute thing, people will fax a disclosure to the prosecutor's office, especially if there's a show cause. Well, who's at the other end receiving it? (P9)

Ensuring that the file integrity, such that it could be demonstrated in court, that the file had not been altered was raised as a security concern.

Well, but you see, the only problem I would have is nowadays, the authenticity of it, you know, and has it been corrupt, or everybody can Photoshop. Like, as long as you can tell the integrity of it. There's no time stamp on it, how do I tell this was a continuous video? Or did she sort of videotape, then the party went on and maybe something else went on and provocation or something and then, she decides to tape a little more. (P11)

What are the fears around digital copies? Is it, I mean, is it—Was it altered? Let's say they both have the same answers, but this is highlighted in yellow and this one's not, is that the same? And you're going to say, well, why—and that becomes an issue in court, as well, if your disclosure doesn't match. If this page is 123 and this page is 122, just as a matter of printing, because of font, that can generate a time consuming discussion of whether or not you have the same disclosure as defence, or—and so that can be frustrating, as well. (P12)

We've—there's—the bottom line is, there is no hiding the fact that technology is a great thing, but it comes with some serious issues that are very hard to manage. And even the cloud, when we have a space issue, even with the electronic, we have a space issue. Well, we can't go to the cloud. There's no way that the security would ever be sufficient to go to the cloud. There [are] a couple of companies and actually, I was quite impressed to read that the National Defence in the States were using the cloud. But then there [were] lawsuits because if you go to the cloud, you have to make sure that you have—you sign an MOU or a contract with the company who will manage your cloud, that information. (P27)

We can't protect the record's integrity, because our records management system is our official system, but it may not have everything that's on the Adobe packages, because people are putting them together, off to the side. (P22)

However, as one participant noted, electronic files are becoming more and more sophisticated such that the concern for a file's integrity was likely better and easier to demonstrate than paper files.

So that metadata is actually safer than the actual paper one. So I think it's through education and so on. We have to educate the court, because the fact that it's paper and has an original signature, doesn't mean anything anymore. There [are] signatures on paper that you would swear are original signatures, because they've got the colour ink and they're not. They're machines, or they're stamps, or they're digital that you have fixed on a piece of paper ... So this is a big thing for the future and for disclosure. Disclosure will have to go electronic. It'll have to—the paper will just have to go. (P27)

Storage and Retrieval

The storage, maintenance, cataloguing, and retrieval of electronic data have become an enormous undertaking given the huge volumes of data that exist and are captured and then required for disclosure.

We created this crazy amount of information in the world with the technology. And then we realized that oh, we never thought of how we're going to manage this, what we're going to do. (P27)

It's just the massive amount of—and the massive amount of resources to keep the massive amount of information that we're capturing. (P22)

With our provincial ICE units, I know that that can be—that can be a major deal with court, quite literally, because the amount of images, because of technology, it could be in a person's collections or in the terabytes. So, there are millions and millions of images. (P12)

And that ballooned like you wouldn't believe, every store, every place in the world, now has video tapes coming in. (P21)

And now, the big thing that is going to be particularly hard on us is police are videotaping everything now. We've got our whole building almost recorded now. It's going into all of our cars. We have audits behind our information systems of who's been in what and done what and when, and they're all becoming aware of that out there. So, now we're being asked all the time to provide videos of our cells area and our [indiscernible] area and probably our front desk area, and now it's going to be out in the car and every traffic stop—those things, that's going to just kill us. We're going to have to build staff every year because every year we're adding more video, and the increases, the requests are going to increase to have that included as part of disclosure. (P21)

We've now had to hire a full-time—I don't even know—I'm not even sure what her title is. But, full-time person to manage videotape, whether it's crime scene videotape, whether it's cells, whether it's interview stuff, to capture all of that stuff and put it together for the courts. We've had to create a full-time job to do that, just because of all of the video we get. (P22)

All data that is either collected by routine (i.e., ongoing video recording by police) or as a result of an investigation must be stored, catalogued, and retrieved upon receipt of a request for disclosure. In addition, this data must be stored for a long time.

There is a decision on that from a few years ago with the RCMP from Lumsden where they're recording themselves that they were getting rid of the video in—I forget what it was, you know, a few months, it was less than a year. And they said, no, you were destroying evidence, so you have to keep it minimum one year. And then if the prosecutor puts a hold on it, say it's an [intox] because half of our cases don't go on here. So, if he tells us that, we copy that video now and hold it somewhere else just in case, in you know, if it's going to be more than a year. (P21)

And once—those ones, those interviews have to be stored for years and years and years, you know. Depending on the type of crime it can be anywhere from three to, for 50. (P21)

And we're having to keep things like, some things we have to keep indefinitely. Cell videos, for instance, all that detention video, we have to keep for at least a year, because you can make a public complaint for up to a year after the offence, or excuse me, the alleged incident. (P22)

Because disclosure is technically a continuously ongoing process, even after the case has reached a verdict in court, storage continues beyond the conclusion of a trial. Furthermore, given the sensitive nature of much of the disclosed materials, it is often the case that disclosure provided to

the defence is returned once the case has run its course in the courts. This further exacerbates the storage requirement issue.

Like, most—some prosecution letters ask for it back, like, I know when I was doing drug stuff, there [were] a lot of the higher, sensitive cases, we would demand the disclosure back at the close of the case. But, now I've got people costs of trying to deal with your disclosure you just sent me back, thank you very much. But, like even the federal government, or the provincial government, look at all the storage [issues] we have. (P11)

There's an impact in how we were going to keep them, where we were going to keep them, how we keep track of them. I mean, even space, space was a huge issue. Space is an issue for the force now because when we archive. (P27)

Yeah, and it takes up—and that's a challenge for us, like, it's—we get, you know, just a couple of statements, we have to create a file for that. And it's electronically on the system, so it's—you know, it would be nice if you wouldn't have to keep the original copies. But, at this point, we have to keep anything original, especially statements. (P12)

You know, video requests here can be a major challenge, especially when they're talking about video requests from the cellblock, because those are very time consuming to—for us to retract. (P1)

One participant further noted that another legal requirement, not necessarily directly related to disclosure, has also placed a storage and retrieval burden on police.

According to the Criminal Records Act, we have to track who we give information to because two things. A, if the person gets pardoned later on, or a record suspension, which is a new term, a legal term now, we are supposed to contact everybody who we've ever given any information about this person on ... We're supposed to do the same thing when the retention disposition—the retention is met. We are supposed to let everybody know and say, the records we gave you have met the retention, and you are—we strongly encourage to you to purge it if the disposition is purged, or to archive it if the—or give it back and we'll archive it within and so on. (P27)

Another participant noted that the difficulty associated with storage and retrieval has had the effect of altering police practice such that they are no longer videotaping all instances of taking a breathalyser.

And so, the videotapes, I think, in the breathalyser cut both ways for people and you actually saw the RCMP or, it was the Regina city police, that sort of said—and some people didn't believe it—they said, look, we have trouble archiving all these videotapes. And storage is becoming a problem for [them], so therefore, [they are] not videotaping all these breath tests anymore. (P5)

Associated with the volumes of data collected and the issues surrounding aspects of relevance (i.e., privacy, privilege) is that of having to vet electronic documents.

Especially if you're taking fixed reports off our police records management system. That has to be vetted. For example, a witness's, a victim's date of birth and personal information. How does that all transpire? Who is responsible for vetting it? Those types of issues have come up. Well, paper you take a black liner and cross it out. If you're just doing a—everything to a disc and give it to Crown. Like, a lot of times with fixed reports, you can't— go in and vet it, right. It's a fixed report. (P9)

And they can ultimately decide what goes for defence—we're sort of sending it. (P12)

The police, for example, changed some of their computer systems in terms of, you know, because there they print their addresses and phone numbers, and it's an automatic thing because it's all based on computers. And you just say, well, you can just change that. Well, no they can't because it's some complicated program and, you know, they don't have the tech to do it, and they have to wait till the next roll out in four years to update their technology. So, it's a bit frustrating. And so we have girls here wasting their time with black, whatever you call it, Chinese markers, or whatever, you know, blacking out all this stuff. You know, it seems like we have all this money that we're spending on technology, and we can't do anything about that. (P17)

Yeah, the secretaries [in Crown office] do that automatically, and for the most part, you know, unless it's a sensitive file (17)

The cataloguing and retrieval of electronic documents is also challenging in the context of tracking disclosure as it moves out the door. This is especially the case when timing requirements result in the provision of partial disclosure at the outset, followed by ongoing disclosure as the investigation continues.

Because [no, right] in any exhibit that we're providing, I mean, we have to keep continuity of the master material, and we have to be account—we have to be able to account through the course of the investigation for what we're providing to the Crown. (P13)

So, they'll get pieces all the time so that they're not trying to review a lump at the very end of a huge file. So, we send what we get, sort of as we get it, and then we confirm before the court date, if it's one that's established in the future, that everything has gone. (P21)

And if they—if the Crown—I mean, if the Crown and the defence can't keep track of something that's put together in a proper electronic format, if they can't keep track of it electronically, just imagine what kind of a disaster it is if it's in a paper format. Because electronic stuff is pretty easy to keep track of and file. Paper is a nightmare. (P36)

And a lot of it too is I mean, with volume is just a tracking system of tracking what has been done and where it is and has it been disclosed. I mean, I guess that can come down to it too, when you're disclosing things in waves. You know, first wave, second wave, third wave is, okay, you know, it can potentially become an issue as to what has been disclosed, what hasn't been disclosed. (P26)

Yes, it [ongoing disclosure] presents issues. They don't like it either because then things get kind of mixed up over there and they don't have a very good process for tracking and repackaging new things, so it really confuses the prosecutors. We would send it all at once, you know, except for the odd thing, if that's what they wanted, but they don't want that either. So, it's like, you can't have your cake and eat it too. If you don't want to wait until, you know, before the court case to see the file all nicely bundled, then it's not going to be all nicely bundled if you're not going to handle it as you're receiving it. (P21)

I mean, before, like I even prefer even CDs and DVDs, but it was hard because the RCMP major crimes does it different than the smaller units. So, you would get these nicely displayed things, but then, two months down the road, they'd send you another disc. Okay, so is this disc a complete replacement? Or, did they just add something and if they've just added something, you know, how do we document so that we make sure that defence knows what we're giving them this time? So, it gets a little difficult, [that's why] I prefer the electronic disclosure. (P11)

Disclosure is provided to date, put your most—kind of draw the line in there, as of this date from now, yeah. And keep an ongoing electronic file. Then after this date, this was sent, this was sent. (P36)

But you'd have a date that you'd know he was going to court. So prior to that date, then we'd update whatever we had and let them know. And then same thing, provide them a disc, give it to defence. I don't see that as being any issue. (P13)

[Our tracking system] tells us when everything's gone, on the interface, which also helps us because we used to lose things when it was paper, or even when we send over discs they'd lose them, and now we've got it all tracked. We know when it was sent. It timestamps it all. And then what we do is if we know, if—we know the court date, the first court date, so we keep that in order, so we confirm that all of those files have been sent over three weeks prior. If anything comes later it would still get sent, but we make sure that we've sent over the majority. And then it's up to that prosecutor to see if there's anything else that is missing. (P21)

Summary

The exponential growth of technology has presented a number of challenges with respect to disclosure, and the use of electronic disclosure in particular. Compatibility, infrastructure, security, and data storage are all issues that affect the disclosure process. Nevertheless, in many

cases, these challenges are viewed as manageable and progress has been made to address them as they arise.

Basic Theme 2: Paper vs. Electronic

The second basic theme addresses the question regarding the use of paper disclosure packages versus electronic formats for disclosure. The issues reported by the participants included a *generational gap (technological savvy)*, *resistance to change*, preferences for *use in court*, concerns regarding the *environment*, and that the *argument for using paper is outdated*.

Generational Gap (Technological Savvy)

Many of the participants reported that a lot of the paper versus electronic format debate was a function of personal preference and one's degree of comfort with technology.

And here it depends on the Crown. It depends, if you're dealing with your Crown in Prince Albert, or if you're dealing with Crown in Swift Current, wherever. Like, it's different. Every office is different. Even within each office, it could be different. (P13)

But I mean, there [are] people in our office [prosecutions] and every office, that aren't comfortable with computers and can't deal with an electronic format. I think it becomes at some point a willingness to embrace the new technology. And I've certainly seen in this office that some people just aren't willing to do that. (P2)

I think we're also caught in that time when you've got generational gaps, right. You've got people out there that need paper. It's the format they're comfortable with. It's the format they use. It's the way they organize themselves. It's the way they've evolved. You've also got a new generation that's electronic. And part of this is just that gap. (P24)

And then there's obviously a [younger] population that's more comfortable with computers, more comfortable with electronic disclosure. I, myself, am probably a lot more comfortable than, say, most of my thirty-year colleagues. It's just the way it is. (P4)

But, you know, I bet everyone is idiosyncratic about it. And I'm certain that there's lawyers that are more computer savvy than I am, that much prefer getting it all up on their laptop. Because there's prosecutors I know, and even a couple of judges, that don't take notes on paper, but that will typing up their notes on their laptop. (P5)

But, the defence lawyer I was talking to this morning, he's still old school. He prints everything. (P11)

And it's [preference for a paper disclosure package] probably because of the vintage of the prosecutors you're talking to and what their comfort level is. Where I'm kind of old school, I mean, I started, you know, in the '90s, so I've been around for quite a while, but whatever. (P15)

Periodically we'll get pushback on the electronic process, but it's usually, I hate to say it, but older people. (P16)

Resistance to Change

Participants noted that resistance to change still existed as individuals were set in their ways and not prepared for the transition.

People aren't really prepared to do the—to map their business and to make alterations to the service delivery, because, my gosh, we've been doing this for thirty-two years and it works, and we're not intending to change. (P22)

So, why were we doing disclosure on paper; because of a personal preference; but also because just not ready for that transition. (P24)

Like if you get an older Crown that's more experienced and more set in his ways, or her ways, they may have a preferred practice and perhaps they're not comfortable with a computer. (P23)

I think one of the other challenges is probably that, maybe it's not so much anymore, but has been resistance to change, probably. I think initially, when this started, we had some very seasoned or senior Crowns that probably weren't as welcoming to change. Just simply out of personality. (P12)

Use in Court

In addition to, or in combination with, the aforementioned issues raised, others noted that in some cases an individual's preference for disclosed materials to be in one format or the other was based on perceptions of the efficiency of a particular mode of disclosure, depending on what it is being used for in court (very similar to that discussed in the next organizing theme focussing on transcription).

So, I find it easier to navigate electronic disclosure. I find it easier to manage from my point of view. That being said, sometimes it's easier in a court setting, still, to have a piece of paper that you can quickly flip to. And I don't know if that's more the brain is trained a certain way after a while, that you just find it easier. So, I don't think there's—there's never any drawback to the disclosure. As long as we have it, that's the key. (P4)

I could sit there and open up a PDF. Sit there and watch my little hourglass for five or six seconds. That's just bouncing between screens. Or I can sit here and go through the paper in—I could probably do ten pages by the time it takes me to do three on a PDF, right. So, [it is about] efficiency. (P9)

It does create problems for the defence in certain situations. For instance, statements of witnesses are rarely transcribed, so, they just give you the video tape. This is what she said, what this witness said. (P10)

I don't take the stand as much as I used to, but it probably still works that the prosecutors are still working off paper copies in court. (P12)

Well, not necessarily, but when you get paper, you can flip through and visually see what you're dealing with. When you're on a disc, you don't know what you're looking at until you pull it up on the screen. And so, you know, it's time consuming to constantly reopen documents and pull them out. (P10)

Now, I still, you know, what I would do with that sort of thing is I still print it out because when I go to court I don't like bringing my computer, so I have to print it out after. (P17)

As noted by one participant, what it might really come to in many cases is how well the person is prepared before going into the courtroom.

And lots of times, we get videotapes, where I'm able to sort of cross-examine. On that basis I can move the forward. It's a little bit cumbersome, but again, if I'm properly prepared and know what I'm doing, and teed up nicely, I can say, I'm going to take you to 6:53, you're asked this question, isn't that the answer you gave? Now, you're saying the car was blue, but didn't you tell the officer the car was red? And then, I can go to the next piece at 7:14 and the next piece at 8:23, like, you can do that. So, I think it takes a little more work, but I think it's more effective. (P5)

Environmental

Two participants expressed some concern for the environmental effect that printing volumes and volumes of paper might be having.

Some Crowns want to have everything in paper format; we've put our feet in the sand and said no. Here is your electronic [copy], in a disc or in some cases; there's been a hard drive. That's yours. If you wish a paper copy, you may print it. We're not killing the tree. (P6)

You just killed half a forest when you're making a paper copy, and providing it to them. (P36)

Argument for paper is outdated

The last item raised by participants, in favour of electronic disclosure, was that based on case law the requests made for disclosure in a paper format (i.e., useable format) were outdated and no longer supported by the courts.

You know, some older lawyers, will sort of say, well look, I don't have a computer, but I don't think that works anymore. (P5)

Of the three defence [counsel], one person came to court and said, 'your Honour, I didn't get my paper package and I don't like the computer.' And the judge simply said, 'well, you better get with the times and if you need, go over to Staples and they'll print it for you.' (P6)

So in one of our cases out of Regina, he [the judge] reprimanded the defence counsel and said, 'Get in with the 21st century,' basically. (P16)

Well, I'm not printing out a hard drive. We don't have to. Our case law says we don't have to. (P3)

Going to defence, though, I mean, can they—are they permitted to, or are you obligated to, provide them all paper files or— don't think so. I'm obligated to provide them the disclosure. So, if I have it in electronic form, I think I'm obliged to provide it in electronic format. (P4)

One additional participant further noted that professional codes of conduct have also spoken to this matter and do not appear to support the previous argument for demanding paper-based disclosure requests.

Our Code of Professional Conduct, our Law Society rule, it says that you have to maintain your electronic up-to-date kind of thing. Because when I was with the federal Crown, we used to get defence lawyers who would say, well, I can't open this disc or I don't have a USB port in my computer. I mean, this is back in the floppy days. If you want to practice law now, you have to be up-to-date with your technology. (P11)

Summary

Requests, or demands, for disclosure packages in a printed hard-copy format were viewed by participants as emanating out of personal preference based on the degree of technological savvy that any given individual may have. Without any intended disrespect, many of the participants noted that this was likely due to a generational gap that exists simply due to familiarity with technology. The lack of technological awareness and comfort has led some to be resistant to embracing electronic disclosure as it is unfamiliar and uncomfortable territory. Regardless of the suggested trend toward electronic formats, many still made reference to a preference for the use of printed materials in court. Environmental concerns associated with printing were also noted by a few participants. In the end, it was suggested by the participants that case law and professional codes of conduct appear to be supportive of electronic disclosure

through removing an obligation to provide disclosure in printed form and requiring counsel to keep up with technology as part of their ongoing professional development.

Basic Theme 3: Associated Costs

The costs associated with disclosure are many and varied. Participants reported that disclosure has placed an enormous financial burden on their agencies. These include the initial and ongoing costs of *hardware and software*, costs related to the *creation* and distribution of disclosure packages, as well as *personnel costs*.

Hardware & Software Costs

The initial costs of purchasing equipment (i.e., video, audio) provides for an upfront cost related, in many cases to gathering evidence during an investigation. These are followed by ongoing costs associated with the maintenance of the equipment as well as the software that runs the applications. The storage of the volumes of evidence collected also presents agencies with financial costs.

Obviously, that has a resource impact. Putting a video camera in every police car is expensive. (4)

Maintenance costs, like software now, applications, all come with maintenance agreements, which usually run about, annual, something between ten and twelve percent of purchase cost on an annual basis to maintain, to keep your maintenance. So, it's just, it's expensive and resource intensive. (P22)

I've been around long enough to know that. So, it's a concern, and they don't want to pull a \$100,000 to buy a server, right, necessarily, and depending on who's on the Board, do they understand, you know, that. It really depends, right. (P21)

Ensuring that we keep all video forever, is expensive. (P4)

We don't have a server to store some of this stuff now. We're not serving or storing our video interviews on a server because we don't have the money to buy it at this time. So, we're making copies right away, and we're going to store those physical DVDs here right now, until we can afford to get a server, you know, to store that. Maintaining, like storing and maintaining all this data is incredibly costly, and retrieving; it is incredibly costly, and we have not kept up in our resources at all. (P21)

But, defence lawyers, what they're doing now, because of storage issues and it costs money, they like to send the disclosure back at the conclusion of the case. (P11)

It's things like, again it all comes down to money, server space for video takes huge storage capacity and it's expensive. It's massive, you know. (P22)

And maintaining it while it's there in storage and setting up the system so that they can enter into that, you know. And that's, it's something that just is not considered. (P21)

Package Creation Costs

Once a charge has been laid and the disclosure request is presented to the Crown, the disclosure package must be put together for dissemination to the defence. In cases of multiple defendants this requires packages be created for each individual accused if they are represented by more than one defence counsel.

If you have a—we've had homicide investigations where there's been six accused, seven accused. Well, each person requires a disclosure package. The Crown, our Crown, doesn't burn DVDs for—not to my knowledge, anyway. (P12)

So, we can burn, we can generate copies, you know. But, it could be this DVD doesn't work, we need another copy of a DVD. It's very time consuming. Like, you might have to go down to Exhibits, get that out of Exhibits and then burn another copy. (P12)

Ongoing disclosure and packages that go missing add to the costs, as there needs to be the creation of additional packages.

If you send a follow-up to the prosecution, they've lost the file. So you've got to do the whole package again. (P25)

What's hugely costly are those technological, what would you call them, sort of the things that, additions to the file, right, and how many copies they want and in what formats they want it. (P21)

Participants did note that there tends to be a reduction in costs when using electronic rather than print-based paper disclosure.

Well, the cost varies, because are you going to do it paper-wise and paper, printing, photocopying, especially if you want to send out colour photos, our office manager screams and rants and raves every time we use colour, but what's the point of a photo showing a bruise if it's just black and white, or it's come over the fax machine. Ah, doesn't tell me anything, you know. So, that's a cost. The RCMP giving me all these lovely USB drives, USB drives, well, they're getting cheaper, but at the beginning, they weren't. (P11)

Government's paying for it. It all comes out of our budget, and I mean, do the math. Boxes and boxes of paper, plus the shipping plus toner ink, plus everything else; versus a stack of CDs; and then getting the volumes of material all over the countryside. (P13)

Yeah, I know, but you'd make a package and then we'd run it that way. Well, the Crown said, 'Oh, we want this—we don't want the discs. We want paper copy.' [We respond] 'No, because we were paying for the paper. No, here's the disc. If you want paper copies, fill your boots. Make as many as you want, but we're not doing it. Here's your disclosure, one disc, two discs.' (P13)

Training & Personnel Costs

The personnel and time costs required managing the evidence and preparing disclosure packages in a concise, complete and organized manner is a further expense that arises in the processing of disclosure. In addition, the personnel must receive training in order to effectively and efficiently use the various software applications related to the various pieces of what is disclosed.

People tend to think of technology as a silver bullet, as that you know, we get the proper technology and we just press this little button, this little red button, like the easy button at Staples, and you get everything. Well, that's kind of true, but it takes a lot of people to manipulate and to run that—I mean, maybe not manipulate the data, because that doesn't sound right. To manage it and to massage it, all of that stuff. A lot of people in the background, you need more IT people. (P22)

Like, you just can't—we would need an army of five million people in information management to be able to follow [the Criminal Records Act] properly (P27)

So, now we have to have another person, who is entering and all of that re-entering all of that stuff. Maybe it's just a cut and paste, but it's a little bit different, but – so, that happens. So, there's taking time, again additional time, to re-bundle all the information we already have. (P22)

The court is not catching up in terms of training their staff on how to operate equipment in court. And in terms of training for the judges even, yeah, they're not keeping up. (P3)

Do you want it hyperlinked? Well, that's a skill that I don't have and time consuming training— (P9)

Well, you have to be organized and you have to be proficient in your use of electronic media. (P13)

It's—you know, the two-year constable or six month constable that one may be a computer whiz, the next guy might be some farm kid that knows how to run a combine but his fingers are too big to even hit the keyboard properly. These are some of the challenges. (P9)

Summary

There are numerous costs associated with the legal requirement for disclosure that have placed a financial burden on all of the agents associated with a criminal case. While this research did not engage in an economic analysis of what these costs are, it was generally reported by the participants that it is an enormous expense.

Basic Theme 5: Current use of Electronic Disclosure

The use of electronic disclosure in the province varies significantly from continued reliance on printed disclosure packages that might include some electronic aspects (i.e., when audio or video evidence is provided on a memory stick or disc) to a direct access portal.

Not Currently Using

In some areas of the province, electronic disclosure is not used. Furthermore, even when the police have provided disclosure in an electronic format it is still getting converted to hard copy.

It's hard copy. She delivers it personally to the office, which is just actually a block. So most mornings, she just walks up there. (P1)

Their challenge is, they have to convert it all to paper at their end. So, it's not truly, they don't have electronic disclosure, honestly. We send it over to them electronically and they print it off on paper at their end. (P22)

The use of electronic disclosure was also reported as depending on the complexity of the case; with less serious crimes, resulting in smaller files, tending to be provided in hard copy rather than electronic formats.

I'd like to say that we're trying to move into the 21st century and get the smaller cases up into the electronic format, but we're a ways from that. The more complex a file is, the more possibility that it's going to be in electronic format. (P16)

See it as the Future

There was a noted general acceptance that electronic formats are becoming the norm and garnering increasingly greater general acceptance.

The judges so far, between Saskatoon and North Battleford, Yorkton, and here, Regina, have all openly accepted electronic disclosure. (P6)

But now we're getting buy-in from all parties. (P16)

Not that long ago electronic format wasn't very— because it wasn't very useable to some of the defence counsel; because it's an investment they have to make in their office, with the way they do business. And the same with the Crown, but I think it's becoming more acceptable now that electronic is the way that everybody is going to go. (P14)

In addition, many participants reported that the evolution toward electronic disclosure was not only desirable, but also inevitable.

I think part of this and maybe I'm over-simplifying it, but this is going to evolve and change itself over time. We're going to [do] a lot more electronic disclosure to the point where the issue will go away. Right now, we're suffering those generational gaps of people that have preferences; and are very much tied to their positions on it. And over time, I think, we're going to—over the next ten, fifteen years it's going to resolve itself. We're going to struggle with that change. (P24)

Everything will be electronic before long; much of it is already. It's not, you know, we still get hard copies of lots of files, but at the same time, much of it is coming in, in electronic format. You know whether it's transcripts or document collections or so on, we'll get it in disc form and that's how we'll get it, and really eventually it all will be in that fashion. (P8)

I'm pretty sure that there's—there has been case law that I mean, electronic disclosure is the wave of the future. (P26)

I would love to see an electronic format, because Pros, which Regina uses, everybody uses a different make, but I mean; it's an electronic records management system. There is capacity to build an in court document in there. Build all—pull all the data into a— basically a PDF file or a compressed file, push it and it goes to the prosecution. The only thing you would have to then send over, for your audio and video that you can't load into a Pros file. That would be something, but a lot of it could be loaded right into it. (P25)

When they get it, would they also, or could they also, just forward the electronic copy? That's what the hope was, like, that's what it was designed to do that, we're not at that point yet. So, I don't know where—what the delay is, but for sure, that would make it a lot easier for everyone. (P12)

I can't see that's anything but the future of where we're going. It's unfathomable to me that everybody wouldn't be working towards the paperless. (P4)

Participants also alluded to the future of electronic disclosure transitioning toward a web-based system.

What I would like to see at some point, is we have this system in here that we run all of our applications on that have the capability of electronically preparing court documents. We should be able to be, in this day and age, I should be able to click a button and send it

over to the Crown. [A direct portal to the Crown], that would be the ultimate electronic [disclosure]. (P23)

And basically, everything went onto a web-based disclosure system and they unlocked it and prosecution got access and you can tell who is accessing it, when, all that wonderful stuff. And access can be controlled by only unlocking files to certain users with passwords. It's very simple. I think we need to get there. I think one of the problems is, you pointed out, is we have not gone to the same service providers, across the country. (P24)

When we get into major case management, I know they're looking at web-based disclosure, for example. (P9)

Electronic Disclosure Already Practiced

In many instances, participants provided examples of where electronic disclosure is already being used by some agencies in the province. The first example was publishing information to the Police Information Portal.

Well, PIP [Police Information Portal] was another—I don't know if you've heard about PIP. Well, PIP is—that's just police agencies that can share their files together. That's going, right now. Unfortunately, we're just not on it, but most police agencies are. We're targeting to get on it. (P12)

There's something called PIP, which is Police Information Portals, so people who can publish to that, and any other Police Service can see that I've got information on you and ask if they can see it. We aren't publishing yet because we have some IT work to do and stuff, but when we do then we can—and a lot of Police Services in Canada belong to that. So, we do, we can sort of access some information and then retrieve that from the Police Service that way. (P21)

Submissions to Crown were also identified as moving toward the use of electronic submission of disclosure packages through various means (i.e., discs, hard drives, and a portal).

But, we've [economic crime] moved to—and it was a slow process—of all disclosures done electronically. And in a number of cases we've done in the province, and a more recent one ... was all done electronically. (P6)

And then, what we do is, electronically disclose everything to our Crown. We used to have to print two copies, one for the Crown and one for defence. But now, we just submit it electronically (P12)

We're down to doing discs in most cases, but some of the bigger cases on the white-collar crime side, for instance, we disclose in hard drives, just by external hard drives. Load them up; disclose it. That's the disclosure package. The court package that goes to

Crown of course, we can maybe pare it down to a disc, so it's a bit more manageable. (P16)

I think generally it's going towards hard drives, and I mean the RCMP, you know, it's maybe five or ten years ago when we started getting discs, and I mean we still get discs, obviously, in terms of video. And now we're starting to get thumb drives from the RCMP. Instead of a huge box of disclosure, or three or four, it's like all in a little thumb drive. Punch it into your computer and there it is. It is a very efficient and less paper thing. (P17)

I don't know what IT had to do for all that special portal kind of stuff that's happening, now. But I love it. (P11)

It's really not an interface in the sense that our data goes directly into their system and in a wonderful useable format. It packages it up into a format with a cover sheet and a Table of Contents and everything telling them what it is, and they receive it over there, convert to PDF, and then they transfer it into, I think it's more of a, sort of just like a bulk folder of documents that they can put on their PIES system. (P21)

One counsel in the province provided an example of how, even while working in Saskatchewan, the higher courts outside of the province have transitioned to requiring submissions be completed electronically.

And the courts have moved to that too, I mean, when I file my factums, you know, my documents in Court of Appeal or the Supreme Court of Canada they all have to be in electronic format, everything has to go in electronically. So, the old days of having to file 29 hard copies in the Supreme Court of Canada has been replaced by filing three copies and a few discs. (P8)

Summary

While many challenges were noted in the previous basic themes presented under this organizing theme, it was readily observed by participants that electronic disclosure has already become a reality in Saskatchewan, albeit to a limited degree. The participants widely agreed that electronic disclosure was evolving and likely inevitable to become the future normalized process for disclosure submissions and transmission. It was noted by participants that some of the variation reported in the current practices might be explained by the seriousness of the offence and hence the volume of materials to be included as well as current IT issues that have yet to be overcome.

Basic Theme 6: Efficiencies Gained

The evolution toward the use of electronic disclosure was reportedly supported by many participants as a result of the potential efficiencies that its use could provide. These efficiencies included being *less resource intensive* than providing hard copies, increasing the *timeliness* of receiving the packages, and the provision of *increased access capacity*. However, there were some participants that were cautious in their response regarding efficiencies, such that electronic disclosure might *impair efficiencies* in some instances.

Less resource intensive

A number of participants suggested that the use of electronic disclosure would provide for efficiencies in a number of different ways. First of all, electronic disclosure is permanently saved on the computer. One can then pick and choose what one wants to print, saving the time it takes (and resources required) to print the entire package.

But I—it's not as much the disclosure as how we treat it at our office. So, to get one page of information, the staff have printed off five pages, copied the five pages to disclose to defence. So, you've made one piece of paper five pages, so you know, the file just keeps growing. Whereas, if you left it in the computer and only printed the page you needed—and yes, the whole disclosure's there on the computer. So, nobody can argue that we don't have full disclosure. (P11)

We have to [be able to do Crown packages electronically]. That would be huge. Can you imagine not having to make all those copies? Not having to make all the—that would be huge and much easier to control. (P27)

Cataloguing and retrieving the information using electronic search engines was also reported as increasing efficiency.

So, both in terms of manpower, it's easier to scan it in once. It's easier to catalogue, in my opinion, in that format. But, also in terms of space, staff that are involved in moving things around, it's going to be an easier use of resource if you have to carry one hard drive versus twelve boxes. (P4)

The ease of searching for documents versus, showing up with ten or fifteen boxes of documents. And if you have a jury trial, even with the judge and defence, if it's just judge alone, then you continually have to search through boxes, to pull out the documents, especially as the veracity of the evidence is being challenged, to put that forward. Whereas electronically, it's only a matter of moments, you've got it there on the screen. (P6)

And as you can appreciate, now electronically, we can—the package that they get electronically, they can go on and search for [John Doe]. And it'll—every document

that'll appear or every piece of information, it'll appear, it'll show up on the—so it makes it much easier. (P16)

Cost-savings were also reported with respect to shipping the disclosure packages.

Especially, okay, let's talk about your administrative stuff. It's a lot easier for me to go, clickety-click, copy/send or import/export to X; than having [someone stand] in front of the photocopier, or, in front of the binding machine, or you know. So, if you're talking about your people cost, I think electronic formats are cheaper and you—most people—well, we all have to have the hardware on our desks, anyway, nowadays. So, it's not like your investing anything else. (P11)

Over the last couple of years in Prince Albert, we've seen an increase in efficiencies, and that's mainly with that electronic disclosure. It's fast, it's you know, it's quick. We did work through lots of, you know, bumps through it. Well the benefit for the—well, for us is that, then it's—we're not doing the printing of the paper. So then, there's not another shipping of four banker's boxes. (P12)

And even in—like, I think about some of the remote communities. I mean, anybody can bring in a laptop and do what they need to do. Like, Cumberland House was talking about having to transport, and having to bring in the court party, and having to fly in, and all that kind of stuff. Anybody can come in with a laptop. You think about Crown and defence each coming in with six boxes of stuff and bags. Whereas if they have it on a laptop or a couple of memory sticks. (P36)

Everybody has storage issues, be it defence, Crown, or whatever. You know, what's easier to store? Something that size, the size of your recorder, or ten banker's boxes? We send back banker's boxes after banker's boxes. And just think how many more files you could fit into a banker's box, if you knew everything was just saved on a hard drive. (P11)

Timeliness

The required timeliness for the receipt of information provided to the Crown to then be provided to the defence was an issue that arose in a previous part of this research. Meeting very restrictive timelines in order to meet appearance deadlines, and also avoiding delays in court, were perceived as potentially being addressed with a transition to electronic disclosure.

I think everybody realizes the pressures that disclosure puts on, and timely disclosure puts on a file now. In investigation, you don't have time to wait for this little piddly stuff back and forth by way of the snail mail. Some talk about the time, the distance it requires to travel to deliver some of these things, packages I guess, when they're not doing it electronically. (P23)

So, instead of dealing with faxes, losing stuff, getting faded, blacked out, the electronic process just works pretty slick. For clarity alone, for timeliness, and what you do with it after that is up to the holder of the information, once you've got it. (P6)

So that, for the timeliness, I mean, the electronics and that. In the old days, waiting for disclosure was just totally ridiculous. (P11)

Because they get the files, they come in at seven o'clock, they open up the computer, there are the files right there. They're ahead of the game. So, that's our biggest challenge right now. By the time our court liaison officer goes there, it's like, nine, nine-thirty. Whereas, when we upload, part of it we do in the middle of the night, so when their staff comes at seven, it's all right there. Right, so we can transfer their files quite quickly, yes (P12)

Whatever, and for me the frustration as a prosecutor is reading a file, knowing that something's there, like it's been obtained by the police, and not having it at your fingertips. (P15)

Improved Access Capacity

There was additional recognition by some participants that having electronically disclosed and stored materials in a more centralized manner would provide benefits related to having a more efficient means to access information arising out of different locations across the province.

But, the other real benefit for the prosecutors is they're getting electronic copies. So, they save it onto their computer and then, anyone provincially, like with the prosecutors, can access this file. So, it's only the Crown that has access to it, but the Crown across the province. (P12)

Yeah, I mean, sometimes it's good to check and see if it's the same victim, if you have a repeat offender, that kind of thing [Direct Portal]. Exactly, and when you have accused people that don't just commit offences in one spot. I mean, when I can say, 'Oh, you've got charges in PA.' I can just look on our system and see what they are. It's so easy. Instead of calling over there [and asking], 'I know this file. Can you find it? Can you fax it to me?' I can [just] look at it and see if I need it. And if you have someone in custody, you have to get all their charges before the court if you're going to fight release or whatever, so that the courts [can] have the full picture in front of them. (P2)

Impair Efficiency

While there might be many back-end efficiencies garnered as a result of the use of electronic disclosure, it comes at a cost at the front end in the preparation of the disclosure packages in their electronic formats.

Like, say if we had to go in and start hyperlinking everything like we do in a major case management on a simple file, you'd never see a police car on the road. (P9)

The other thing I think that they progress to is they want it so that it's in an electronic format where if I clicked on 1, it'll take me right to that document, basically on a disc or something. And we can't do that at this time. I mean, there are ways we can do it using a PDF Pro, but it takes hours of resources to do that because they have to build links, right. You know, it's a manual process within that system to create that beautiful product, and that would just kill us if we did it on every file. It's done on occasion, on huge files, but it is hugely resource intensive, hugely. Technology is beautiful for the end user, but often technology still takes a lot of time because users have to be involved in the front end of it. You know what I'm saying. Well, we can't, there's no way we have resources to do that, absolutely no way. We barely have enough resources to do what we do now, and they still get a nice package, right. (P21)

Summary

Many advantages to the use of electronic disclosure were identified by participants that might produce efficiencies within the justice system. The provision of disclosed materials in a more expedient manner could potentially address the time constraints noted in getting the materials distributed in a timely manner prior to court. It could also save time in making information from other locations across the province more readily available. It was also noted that immediate access to disclosed materials could assist Crown in preparation for court and avoiding potential court delays while waiting for the disclosure packages to arrive. However, it was also noted that the transition to electronic disclosure could also impair efficiency in some instances and that the constant attempts to keep up with technological advances could be problematic.

Basic Theme 7: Possible Solutions

The participants provided a number of possible solutions in progressing toward the use of electronic disclosure. There was recognition that the justice system should be open to and evolve as technology also evolves. This progress, however, requires a commitment to ongoing proper resourcing. In addition, it was reported that consideration should be given to *utilizing a "systems approach"* across the entire justice system; that there was need for *better organization of electronic disclosure packages* (possible standardization); and finally, that *cost-savings through amalgamation* could prove beneficial.

Evolve with Technology

As technology evolves and case law follows, participants suggested that it is important to try and get ahead of the curve, so to speak. A number of participants were cited earlier as stating that the move to electronic was the future and the progression toward it was inevitable. Rather than trying to catch up, it was perceived that the province would be better off getting out in front of the trend.

The best thing, us as Crowns, and the police, can do is try and stay ahead of it. Try and keep the technology ahead of it. (P4)

Here's one, and I'll just—because it's—I'd like to say I'll take credit for this thought, but it's not my thought because I know it's out there. I know it's being used. But the issue will be security. I think we need to get—still going, advance into the 21st century, and we need to upload disclosure into an emailing to the cloud ultimately. Have it put into secure docs or use a password-protected environment, to a specific directory. Then you allow defence and Crown—or Crown and defence to access that directory. But this idea of being worried about a disc or a hard drive or external computer, let's get into the 21st—let's jump right into the 21st century and put—bang it up into a—Never Never Land if you want to call it, environment, but a cloud environment. (P16)

That having something in computer systems [direct connection to police files], one protects it a little bit better, because there's redundancies built in, you're not worried about somebody losing a disc. But two, that it's easily accessible to us to ensure that we have everything that's on the police file. And there's no reason to not have some sort of connector there. (P4)

They need to advance their technology to a certain level so that the transference of data is electronic. It's instant. It's—it will save resourcing from the police. And then finally you need to also include the—increasing technology in the court, so that that data can be shared there. (P25)

Cloud computing. I mean, certainly, you know, we could possibly have that stuff from all of the Police Services managed in one area from an IT way, and have a group of people extracting things as long it's just copies of particular things. You could do that. And then have your analysts who'd have to select, still stay with the, the places, but certainly all that other management could be probably amalgamated and housed in one place, and I think there should be some cost savings that way. (P21)

As technology develops and changes, there are always “new and better” ways of doing things. However, keeping up with the pace of technological advances provides its own challenges and may impair efficiency in some cases.

We don't have to embrace all advances, but where it makes sense. Where it makes sense, or where it may lead to wrongful convictions, or where it may lead to reasonable doubt. It can go a long way into assuaging reasonable doubt. The ability to upload quickly, to not have to go through a mail system or a fax system and hope things got there. The ability to upload and check something and say, yeah, it's there for them to do it and I just send them an email saying, there's new disclosure or the system generates a new email. (P4)

Well, the only—the real storage issue around electronic is the speed at which technology evolves. ... So even if you archive it electronically, you're not anywhere—you're no longer ahead of the game if you can't ever read it. ... You cannot think that every time something else comes up you're going to take everything you have and migrate it and convert it to the new, because that would be not cost or time efficient, right. (P27)

Properly Funded

The issue of resourcing electronic disclosure with proper funding was suggested by participants as critical for a transition to electronic disclosure. This was particularly evident with respect to hiring personnel in administrative and IT positions while recognizing the differential capacities of police services across the province.

Well, I think there clearly has to be recognition of the costs of managing a lot of this digital disclosure. I think that those supplements that we have now, that we never used to have, seem to be valued, and if everybody agrees, you know, that that is a value, then, we have to acknowledge the cost of that. (P21)

I think that one of our problems is that we don't have the ability in this province to resource, at any level, appropriately, in order to make things move along quicker. (P14)

It was recognized that police services are lacking the necessary administrative support to manage the evidence and prepare the disclosure packages in a timely manner consistent with the demands of the court. As a result, this has put the burden on police officers and taken them away from performing police core functions. That is not to say that officers should not be engaged in disclosure; their participation is vital. However, the role that they perform should be restricted with respect to administrative components of the process.

There are some police services that are notoriously slow, and that's not necessarily, I don't say that in the sense that they're intending to be that way, but they just are, because administratively they don't get around to it, don't have the support systems or whatever. (P8)

The only problem is the police officer is the more—and the investigator really, is the more crucial person to know what's relevant and what's not relevant. But as far as the

actual package for the defence for disclosure, you know, anybody really can do that. (P16)

I would say support staff is the—would be the most important, specific incident for us that could help. They always talk about more police, more police. I don't think we've gotten to the point where we need more officers. We just need more—the officers we have to have a little more time to be officers instead of office staff. It would have freed up a lot more time for those members to be on the road and doing—furthering other investigations. (P1)

But most people don't see that. And they did in the beginning when they changed it, so that we could have civilians whose focus was on this type of work, you know, and doing good quality work and that, and they're interested in it, and it would be less expensive than police officers doing that and the police officers could be focused on the street. (P21)

I think we met most challenges [because] we have two very highly trained and high functioning IT people. And they help us a lot, because our police cars are video, audio and video. In a lot of cases our cellblock is audio-video. I don't know we would ever survive without our IT. (P12)

If I'm the province, playing the devil's advocate, I'm the province and I look at the requests from that division for positions, for more money for positions. And one is to be a member in a detachment. One is to do violent offender registry, and one's for information management. What do you think my chances are? (P27)

We need a disclosure unit, or I think that—because then you have a full-time team that in essence, like any other unit within the police force, I mean, they know their job and they know their duty, they know the case law involved around it, because it's always changing. To have somebody or a team essentially dedicated to it that you can, I mean, I think is definitely you know, and you may not have that luxury of having those people, but at least somebody that's going to be your go-to person for the file. You need to have that and it needs to be right from the get go. And they need to be saddled with just that. I mean, they—I mean, we try to wear, and we do, we try to put too many hats on people all the time and even ourselves, we try to wear too many of them. But, I think the biggest thing we need to do is that. I mean, a full-time disclosure team would be nice because it essentially frees up people to go and investigate, which is what we're supposed to be doing. But, I mean, aside from that, having that person that's dedicated full-time to disclosure I think is going to alleviate a lot of the problems. (P26)

Recognition that there are differential resourcing capacities was identified as important, as concern was expressed that moving to electronic disclosure, creating a standard of sorts, would affect different police services (and defence counsel) differently and could potentially undermine the entire project.

I guess when I look at disclosure, I'm trying to look at it from the view of a detachment police officer, small town Saskatchewan. That really is the nuts and bolts. If the disclosure process can't work for the people in Morris, Saskatchewan, where they [only have] four members; then we're creating a process that's going to fail. It has to work—we're only as strong as our weakest link. And that's where sometimes, through just—I don't want to say lack of awareness, that's probably a good term. (P9)

[For a small police service] it would have to be planned out over a couple of years. It's a budgetary item, it really is. I mean, anything can be done, but you've got to prioritize and dollars are really tight. (P25)

Because we can—but, when I was in private practice, if I wanted to try and keep, you know, download or buy all these various apps that I would need for the various surveillance cameras in town, you would, you know; [it can be very] pricey. (P11)

So, I think that's what the government's got to do, they've got to step up to the plate and toss a few more bucks into the justice system in order to make it function. (P14)

Better Organization of Electronic Disclosure Packages

In order to obtain any of the various efficiencies previously identified, participants noted that electronic disclosure packages should be provided in the most organized, searchable manner possible. If they are not, they are no more efficient than boxes of paper files.

They don't—sometimes the stuff isn't put on in an orderly fashion. You may get police notes and reports and documents from a search, you may get all of that on one CD, as opposed to notes on one CD, reports on another CD, [and so on]. So, you just spend a long time searching through CDs to find the material. Paper material was, although it was more voluminous in that sense, was arguably easier to at least find what you're looking for, in some respects. (P10)

But what we had gotten into the practice of was separating and putting what we felt to be sensitive information in a separate folder and marked it accordingly for the Crown. So, the Crown has a method of—a heads up if you will—saying this is sensitive material, to take a look at it. (P23)

Utilize a “Systems Approach” (based on better communication)

A few participants suggested that, if there is a progression toward electronic disclosure that would involve addressing IT infrastructure issues by updating existing systems such that they are able to operate together in a seamless manner, this should be undertaken within a system-wide framework for the entire justice system.

I've been pushing for this, every time, I'm not pushing for it, but I've been lobbying for it for ten years. And I'm saying, they're building this new CGEM system now, which is to

incorporate corrections and prosecutions into one system. I'm suggesting they should make one justice system, which would include all police records management systems, prosecutions, and corrections in the same system. (P22)

In 2001, we started conversations with them about the interfaces and about batching dispositions back into our system out of their system. And they were looking at replacing their Jane [ph] system, and they were going to build a sort of a new whole big system that included Corrections and everything else, because somehow Justice thinks that they belong, they don't belong to the police, but they belong to all the rest and sort of the Justice system, right. (P21)

It's harmonizing systems that has to take place, and I don't know if that table is working today. It's not. There isn't a table where everybody's talking about doing that today. That's got to be part of it. But, that will also resolve a whole bunch of disclosure issues, because we're going to be using the same system to report information and access it. So, it becomes a lot easier to disclose and we make that transition to electronic disclosure, it's already done. You just access the file. But, until we have that discussion, we're going to continue to struggle with the rest of it. It makes sense that we would do it in one system. (P24)

But, the biggest problem is about turf and about business process. And nobody wants to change their business processes. There needs to be standardization of the system. Not of—and we've got to get past these silos, Justice, Corrections, Police. We all have the same clients, doing the same business. We're managing the same people and the same files. So, I think that that would alleviate a ton of problems. (P22)

These are all systemic questions; they're not relevant to disclosure, and whether or not disclosure's proper, or whether it should be done. If the justice system is going to move forward, I should—honestly, there is no reason why a prosecutor in most cases shouldn't get to simply open up the police file on his desktop. Disclosure should be, 'here's the file number.' And they can access that file. We unlock it. Disclosure should be us unlocking a file for prosecution and prosecution unlocking a file for defence. Some consistent access system that all parties in the process can gain access—this compartmentalized processes and systems exacerbates this problem. In my eyes, that will come. (P24)

To achieve this, however, there must be cooperation and openness to embrace change, which was noted by two participants as not necessarily being the case currently.

We have an electronic disclosure to the Crown. Now, their problem is they haven't got the ability—they have some software they're trying to get up and running to be able to import the data into their system. They don't have that ability yet, so it's all paper at their end. And so, they don't like that, because it's volumes of paper, so we've offered to give them access to our records several times, to our records management system and they're pushing back. They don't want that access. (P22)

We want to give them our [IS] system because if they were looking at it electronically, so if they went into that case file on here, it would be a lot easier for them to do a click on the name and look at that profile of that person and the history of all that person [inaudible]. They won't take that. But they could. But I think it would kill them because it would be something else they would have to learn in another system that they would do—you need to, you know, [be useful]. (P21)

Cost-Savings through Amalgamation

With a systems approach in mind, it was also suggested by one participant that there might be potential cost-savings through amalgamation. This could also potentially address some of the issues regarding the differential capacity concern previously noted.

And then sort of once you get beyond that I think you probably could do some sort of cost savings perhaps by amalgamating some of this. You know, these things can be indexed and I think probably secured by agency, probably in sort of a single storage solution, and that might save money. You'd have to talk to IT to sort of gain any real insight into that, but that would be one way to do it. And then have say, a group of people that could extract that and send it to the agencies. I don't know if that would save money in the long run or not. (P21)

But some of these things that we're managing like, just copying of all of our digital interviews or the things that we've already made, you know, selections from our video lab, or we've got 911 recordings and things like that as well, you know, that sometimes are disclosed. They have to be managed. And a single area might resolve, or at least reduce some of the costs, but it's going to have to be acknowledged that it's hugely costly, and that money has to come from somewhere. So, I don't have the answer. (P21)

Summary

A progression toward electronic was deemed both desirable and inevitable by participants, although not without its costs and challenges. In order for the province to proceed in this direction, there needs to be a willingness to embrace new technology fostered across the system. The participants suggested a proactive approach was desirable wherein the province gets out in front of the technological advances, while maintaining awareness of the constant evolution of technology and being strategic in its adoption. The costs associated with this transition were recognized by participants; however, they stated that this transition would need proper resourcing, particularly in the areas of personnel with administrative and technological savvy. An issue that emerged in a number of areas in this report, and requires addressing, is that of the quality of the disclosure packages submitted to Crown. While technological advances could potentially assist in creating these types of packages, the learning curve and time required to

create them was a cause for concern. A few participants raised the adoption of a systems-approach as a framework for consideration. There was noted concern with compartmentalization that produces barriers to efficient functioning of the justice system that could potentially be overcome if the entire system operated seamlessly. Finally, it was also suggested that cost-savings might be garnered by amalgamating many of these tasks through a more centralized approach.

Organizing Theme 4: Transcription

Table 6 provides a summary of the codes arising in the analytic process by listing the issues discussed, the basic themes that emerged from the analysis, and the more overarching organizing theme. Evidence, in the form of direct quotes from participants is provided with the discussion of each issue identified as a basic theme.

Table 6: Organizing Theme 4: TRANSCRIPTION			
Issues Discussed	Basic Theme	Organizing Theme	
<i>Increased Efficiencies</i>	Why the production of transcripts is desirable	TRANSCRIPTION	
<i>Overcoming Technological Challenges</i>			
<i>Cross-Examination and Reluctant Witnesses (KGB)</i>			
<i>Putting Forward Best Case</i>			
<hr/>			
<i>Video “Best Evidence”</i>	Taking Statements		
<i>Hand-Written Statements vs. Video/Audio Statements</i>			
<i>Interview Training</i>			
<hr/>			
<i>Language and Literacy Issues</i>	Costs Associated with Transcription		
<i>Financial and Time Burdens within Already Limited Resources</i>			
<i>Relative Costs</i>			
<i>Raises Issues in Court</i>			
<hr/>			
<i>Preference/Request for Everything</i>	What is transcribed		
<i>Relevant Interviews</i>			
<i>Nature of the Case</i>			
<i>Going to Trial</i>			
<hr/>			
<i>Processing Requests</i>	Getting Transcription Done		
<i>Prioritizing</i>			
<i>Verifying Transcripts</i>			
<hr/>			
<i>Legal Requirement: Useable Format</i>	Who Should Pay		
<i>The Debate (Police or Crown)</i>			
<hr/>			
<i>Voice-to-text Software</i>	Possible Solutions		
<i>Interview Training</i>			
<i>Bookmarking Video Statements</i>			
<i>Transcription Policy: Memorandum of Understanding (MOU)</i>			
<hr/>			

Basic Theme 1: Why the production of transcripts is desirable

The first basic theme arose from participant's reflections on the reasons why transcripts are produced. It emerged as a theme based on a number of issues that arose following the coding of the results of the interview transcripts. These issues include *increased efficiencies*, *overcoming technological challenges*, *cross-examination*, and *putting forward the best case*.

Increased Efficiencies

Throughout the investigations of a criminal offence, one efficiency, noted as resulting from transcription, was the benefit it may provide to the police in the form of an investigative tool.

It can be needed as an investigative tool ... without transcribing some of that stuff, you would never be able to investigate that, because it's so complex, so time consuming, so—you've got to transcribe it. So it's searchable, key word searches. So there's lots of stuff in that—from a police perspective, where transcriptions are needed ... to use a transcription because they feel they need it to get to the proper charge. (P25)

I find sometimes it's just easier to kind of pinpoint one particular conversation and essentially pull it out and it's—you're getting the actual conversation that happened whether, instead of me listening to it and kind of writing down notes as to what was said there. I mean, I can pull out what's actually been transcribed. (P26)

Once a charge has been laid and the investigation has progressed to the office of the Crown prosecutor, transcripts were deemed as providing efficiencies in the preparation of the case for trial. Reading through a transcript was reported by many counsel as far quicker, and therefore a more efficient use of their time, than viewing or listening to an entire recorded statement.

Most lawyers I know can read a lot faster than the time it takes a statement to play. You know, you're reading four or five pages that may take five minutes on camera. In minutes or seconds, depending on how fast someone reads, but some of us read, you know, when you're used to reading a lot, you tend to read faster. (P4)

A transcript will take me—because I'm a fast reader, having been through law school, it will take me two minutes to get through a transcript, you know, a ten-page transcript or maybe five minutes. A video is half an hour. I mean, multiply that by 300. I mean, it's just so frustrating to have to sit there and watch that video. (P3)

Trying to get things through trial time quicker, to do it more effectively, [and] to be able to prep in the limited amount of time. You know, I have so many cases on my workload, or my colleagues do. Just time. (P4)

I just think it's easier for them [the lawyers] to prepare their case, rather than having to spend hours going through a two-hour statement only to pick out this portion. (P16)
Because witnesses that are able to review their statements before, do better. They do better in court. And if they don't have time to review their statement or ... [it can affect the] outcome of case (P3)

The efficiency created by transcribed statements was then reported further along the process as they were considered a much more expedient way for police officers and witnesses to review their statements in preparation for their allotted time in court.

[It's the] same for the police. It's quicker for them to review their notes of a video than it might be this, I remember taking that video. Or to review the first five minutes and then review a transcript, saying, oh yeah, now I remember that person. Seeing them jogged my memory and now, when I read the transcript—oh yeah, that's exactly what happened. (P4)

It's nice to have a written statement because, call me old fashioned, but it's just a lot easier for a witness to refresh their memory with a written statement or a transcribed statement. (P19)

It's also valuable for, in instances where you want to refresh the memory of the witness in preparing for court. It's much easier for them, I would think, for the Crown to meet with them and provide them with a copy of a statement that was transcribed versus having them run through the video and all that stuff. (P23)

So if it's, at best, three months, if worst, a year or more, they're going to have to refresh their memory from their statement. So you either have to get them to come in and watch their video, or you hand them a transcript, which I mean, they can read on their own time and refresh their memory that way. It's a lot easier to get transcripts to do that because then when they're being subpoenaed, you can say, Please provide them with their transcript as well so that they're prepared for court. (P2)

Transcripts ... might be upfront costs, you might not refer to every transcript, but when you do have to refer to it, it saves time and money for the judge, for the—well, the court, [the] defence. (P11)

Technological Challenges

A transcript was argued by many participants as a means to provide quicker reference material within the trial itself; overcoming the hassles and technological challenges of having to employ awkward technology in the courtroom. Transcripts avoid the time-consuming activities associated with having to continuously set-up, continuously rewind and play over and over again particular segments of an interview that delay the process and break up the flow of presenting a case before the court.

You could actually, if everyone agrees if that's what the video said, and then you could file that portion of the transcript. So, then the judge, it's easier for the judge to reference, too. Then the judge doesn't have to tee up the exhibit, find that place, you know, if they want to read back, or watch it again, or whatever it is, you know. Yeah. I don't know. You know, that's the reality. If they're going to use a video statement, that's just how it is, it's going to be, it's going to delay things. (P15)

With a transcript, you wouldn't have to worry about that because then you'll just hand them all out. Again, if people are reading something, like, again, you read something and, you know, you read it again. Did I say that? And you'll read it again. You look at it again. You're dwelling on something. On a tape, you have to rewind, then you go slow, rewind, but then there's a ten—there's intervals ones. I always push the wrong [deleted] button and the stupid thing is ten minutes ahead. And I'm going argh! (P19)

Well now, if all I've got is a tape, I've got to then fire up the device, play that, go back. If I have a transcript, I can show them the transcript and it's very easy for them to follow along, and the court to follow along, and obviously for me to cross-examine and do that. (P8)

No, I don't think, like, a lot of our dockets are community centres, you know, provincial buildings, schools and offices where they're just used as a temporary facility. So, they're not equipped with the equipment on a permanent basis. So whatever's in there is portable and is brought in for the day and it's utilized and then taken out; and it goes back to being a gym or a school or whatever, right. So, it's hard to equip these things permanently with that equipment, so you end up bringing in whatever you have. You don't have to worry about equipment—if you're worried about making sure [you have] the right MP3 player or whatever you're playing. And I know there [are] some places where the police actually provide the video equipment in some courts. The court doesn't have the equipment. (P23)

So if you're listening to it, it might have taken three, or four, or five times for whoever's transcribing it to play it back and forth before they've got it right. You're not going to get that in a court environment because you're going to have to stop. (P25)

Because the video might be six hours long and all you need are these three clips out of it. So, you're the judge and I'm the Crown and that's the defence, and so I will say, "Your Honour I draw your attention to line 257," play that, he said this, so I can hear him, I can read it. "Now I draw your attention to line 573." And so if you just provide the tape or the DVD then it's kind of, "What'd he say?" you know. So, then you can see it, you've got it written down here, it's been transcribed, it's been verified, and when you hear it and read it you hear it, rather than listening to the whole six hours. Because nobody, they never play the whole six hours in court, they play what they want. And the defence has the ability to do the same thing, "But Your Honour, we draw your attention to—the Crown didn't to this part here." You know so they'll jump all over the place and if you don't have the transcript there then it's a hodgepodge, it would be difficult to do. So that's the advantage of it. (P14)

Again, it's much easier for a prosecutor to read this than to sit there and watch a video and pause, rewind, pause, rewind, to when it's on paper. That's just from my experience, especially if you're reviewing material. Could you imagine trying to click the video, stop, and find the bookmark and—as you're fiddling before the courts—it makes the flow a lot easier when it's right there, black and white. (P9)

Okay—whereas your—the witness is going south on you or contradicting himself or saying something different, and you want to refresh his memory. Well, are you going to say wait, put the disc in the computer. Okay, and then you got to find where it is on the computer to do it. So I mean, if we were more electronically adept at doing that and had the resources to do it, again, it slows the trial process down. (P18)

We have to start the video. It goes to here, there [are] always technical difficulties. Go to this time, play the video for her, stop it and then cross. Every single time she's inconsistent or he's inconsistent. And you know what? It's a lot. It just takes the trial, like, five times longer. (P3)

And you know, no one's paying for the super duper programs where you can fast-forward perfectly and you can do the frame-by-frame thing with any degree of certainty type of thing. Like they're still, you know, it's just technology from you know five, the same stuff I had like five, ten years ago in terms of advancing. (P17)

In addition to the use of transcripts in the courtroom, a few participants also noted the benefits of having transcripts for use by the jury and the judge when reviewing the evidence outside the confines of the courtroom itself.

If you have a jury, the advantage to have something in writing that they can take to the jury room with them if necessary is very helpful for the jury. Because they're, first of all, not trained in legal, the legal process, and they're going through a whole mass of evidence of a trial which may last many weeks or months, etc., and for them to recall what this audio evidence was is not going to be very easy for them to do when they come to make their decision. But if it's transcribed, they can pick up the thing and they can say, well, this is what the evidence was ... they could take it to the jury room and review it there. (P7)

I think the judges prefer that too. I mean, again, it's right in front of them. It's a hard copy. They can watch parts and—of the audio or video as it's going, but they can follow it and they can make notes on it. (P25)

Video and/or audio statements are not without their flaws. There are many instances when the clarity of the actual recording is less than ideal. A transcript that has been verified provides a significant advantage in getting through difficult-to-discern evidence on the recording.

I don't know if you listen to some of the videos. Some of them are a lot better than they used to be, but sometimes blub, blub, blub. That's all you can hear. (P19)

It's just in your face and it's—sometimes the audio is not as clear. (P25)

But, I mean, at least the, I guess with the transcript, hopefully, like I said, it's been verified. I mean, so it is an accurate reflection of what was said in there. And I mean, coupled with the video, you're going to get the true story, I guess. I mean, because again, me listening to the video, I may still hear something different. But I mean, if I go back to the transcript that's been verified, I know that's the actual conversation that went on in there, even though I think I'm hearing something different or I'm not quite understanding something. (P26)

Because, you know, a lot of times, you get down to whether there's one word and I'm not for a moment suggesting that people are going to leave stuff out of a transcript, they're doing it intentionally or anything like that, but generally you and I could hear a conversation, and even this tape, you know, I'm leaning back and moving away from the microphone, sometimes I'm mumbling, sometimes we're both talking at once. And there's going to be a lot—I don't know if it's going to be lots, but there's going to be some of it [is inaudible]. (P5)

Now, there were times when it wasn't very clear, and then maybe they, with enhancement, etc., they could have it transcribed in a paper form so that it could be used by say the jury or the judge. So, again, it's all a matter of making sure somehow or other that the disclosure is meaningful. (P7)

Cross-Examination and Reluctant Witnesses (KGB)

The use of transcripts as a valuable aide in the cross-examination process within a trial was reported by almost all of the counsel who participated in this research as well as by a number of police officers. The ability to have the witness read his or her own statement was one such way it was a benefit. In addition, it provided counsel with a quick reference point in their cross-examination of a witness, particularly reluctant witnesses wherein the transcript would link the witness to their statement in a very concrete manner.

Well, once you've got a transcript and you're, you know, if you're in a trial and you're cross-examining a witness on what they said previously, it's a little easier to have the written document, put it in front of them, say look, on page four you were asked this question; you gave this answer. (P10)

For prosecutions, they can read it. They can highlight areas where they can challenge a witness or challenge a thing or go to another witness to[corroborate], a collaborate aspect of the confession. They can follow it around if they're playing it in the courts. I mean, it's a very, very good tool that way. (P25)

And even, you know, if I'm cross-examining the witness, the Crown likes to know what's on the transcript, they can follow along making sure that I'm being fair with the witness, the court can. So, it's just way easier. (P8)

Well, it's frequent. It really is frequent. I mean, a lot of the prosecutions that we do now, gang prosecutions, violent prosecutions, you know, people will give a statement to the police and then they get cold feet because they don't want to testify. You know, it was okay to tell the police, but I'm not coming to court, or I'm not standing up there and telling you that this guy stabbed her, right. All of a sudden, it's very real, so people will say, 'No, I'm not talking to you.' And then you find yourself into that situation. Now, it cuts both ways because video statements and the prime example is the KGB, I mean, video statements are old, right, too, because on the day of or immediately following, they're telling you exactly what happened. Six months later when you're at a trial, you know, 'I lied.' 'I don't remember,' right, so it cuts both ways. (P15)

Well, do you remember giving the statement the first time to the police, your audio statement? Yeah. Well, let me just cue you and she with her laptop, went straight to a point on a page. And you know, that's kind of taking it out of context, mind you, because the whole statement wasn't before the jury, because it's been—but; that is beneficial to disclosure, okay. You have the witness listen to their statement before court, that's their voice, like, one of the witnesses just said, well, that's my voice, that's the tape, there it is. That's obviously what I said five years ago, you know. But, what I'm saying today is this (P11)

Or, the Crown, we're doing a KGB application because ... a spouse has gone sideways on the Crown and they're really not cooperative anymore, because we're seven, eight months, a year beyond and they've forgiven their spouse. They love them and they want to be back together with them and don't want to proceed with this. (P4)

And judges, especially when we're doing KGB applications, which is basically trying to, if we have to get the evidence submitted because they're saying something different, you can't do it just being written out. (P17)

It's usually on the spousals. Because this week, she loves him, or he loves her. So, why go through the costs? Especially when I just sit them down with my laptop before court, say okay, listen. That's what you said that time? Yeah. What's changed? Nothing, except, I don't want him to go to jail. (P11)

Put Forward Best Case

From a strictly police perspective, a couple of police personnel noted that given the time and effort invested in investigating a case, the idea that a transcript might be of assistance to the Crown in presenting the best possible case and ultimately lead to a conviction would be time and money well-spent. They reported a desire to provide the Crown with the best case possible.

But I think you also have police officers that have gone to a lot of work on these complex cases or lengthy cases, and they want to see a conviction. And they want to put all their evidence, here you go, here's my big binder with all my transcribed statements and the photos of the crime scene and everything here. There you go. You've got it now. Do my work for me, because we've put our heart and soul in this thing for two, three, four months. (P25)

But I think providing anything less than that to Crown or defence is detrimental to our investigations and it is tough going to court. And it's detrimental to everybody else ... I think [transcripts have] to be provided. I mean, I think we should be providing the audio, the MP3 file. But then I think there needs to be a transcription of that. Because if we're looking for our investigation to get presented in—I mean, there'd be a synopsis of it, but I think you need to provide that actual transcript of that statement. (P13)

So I think it's just that personal—some of it's personal pride. I mean, I saw it many times in major crimes, where you would actually—you know, some teams would go out of their way to build a better package for the prosecutions just because they wanted to see that finished product being class A. When I'm doing something investigative wise, when my final report's there, I want to make sure that I've got all the information that I can give the prosecution to go to court. (P25)

Summary

Most participants saw the potential value in producing transcripts as a means for saving time across a spectrum of areas including as part of a police investigation, but primarily relating to preparing the case for trial as well as the use of transcripts in court. The front-end expense of producing a transcript, while undeniably costly, provided for efficiencies further down the line in processing a criminal case. Beginning at the outset of a given case, a few participants noted that police might use transcripts as part of the investigation process to increase their efficiency in getting to a point of laying a charge. The process of Crown reviewing materials in preparing a case to go to trial was noted by many participants. The efficiency obtained by the production of transcripts was with respect to counsel's time. It was deemed significantly faster to read a transcript rather than review an entire video of the interview. When considering the use of transcripts, in the context of an actual trial being heard before the courts, the participants noted a number of ways that transcripts increase efficiency: the immediate pre-court preparation for police officers and witnesses. Efficiencies were also noted by participants regarding the technological challenges and time delays that using the actual video in the court can create with respect to court time. It was also noted by participants that transcripts are useful for judges and juries alike in following the materials presented in a video statement and putting all the pieces

together. This is especially the case where there are issues related to poor video quality, in particular the sound quality and inaudible material that inevitably occurs during an interview. The use of transcripts was also noted as a “valuable tool” when cross-examining witnesses as well as dealing with reluctant witnesses. From a police perspective, given the investment they have put into a case prior to getting to court, providing the best possible package to the Crown is both a matter of personal pride and an attempt to ensure that their work leads to the desired outcome.

Basic Theme 2: Taking Statements

The second basic theme emerging from the interviews is connected to how technology has changed business practices in the criminal justice system. Although to a greater or lesser degree depending on some differences in circumstances, the previous practice of taking handwritten statements by either the investigator or the subject, writing them out has been replaced by the use of video recordings. In addition, the benefits of this practice have garnered support in Canadian case law. The participants in this research identified that the *video is the best evidence*, using *handwritten vs. video/audio statements*, and *interview training*.

Video is the “Best Evidence”

Despite the aforementioned benefits in efficiency associated with transcripts, participants recognized that audio and/or video statements had become normalized practice in the process of taking statements. Additionally, they noted the benefits associated with what was referred to as a “pure version” statement in overcoming some of the constraints observed in conjunction with a transcript rather than the use of the actual recording.

Pure version has become the buzzword. So—and the best way to get a pure version statement is to have someone talking. (P1)

The problem with the handwritten statement today is best evidence. Again, I get back to that statement, because I’ve heard it mentioned in regards to courts. The courts expect best evidence. We talk about pure version statements. So, if I want a witness statement and I want that person to talk to me and give it to me pure version, me, got my head down and I’m trying to write it verbatim, it’s very difficult. The best way to record that, is to record it and get it direct. And so, if I want to take best evidence and I want to follow practices that is going to get the best evidence to court, I’m going to record it. (P24)

When I came here, just previous to that, I understand that there was quite a push by the prosecutions to do video statements because they said there is no better presentation in

court than to actually see the people, you know, saying these things or seeing, you know, it just was a better presentation of that information. (P21)

The video is; this is what happened, I mean, this is real life. Put it in, listen to yourselves and for yourself and I mean, it can't—I guess there's no real errors in the video ... I mean, the video is the video. This is what happened; this is what was said. I mean, I think it's the best way because the first-hand knowledge of it, whereas transcripts kind of more like a second-hand, I guess, in that aspect. So, I mean, a video is a huge benefit to disclose. (P26)

The use of video and/or audio was suggested by some participants as providing for better interviewing of witnesses and/or the accused.

When you take a video and an audio recorded statement versus handwritten because it's all there right? And if there [are] any issues around the transcription you just refer to the video. It's a version which strengthens a lot of avenues for the investigation because you can have that statement analyzed by people that are trained in doing that, it will advance your investigation or open up other avenues for you based on the content of the actual true version, the pure version, words that the person has got recorded. Where sometimes a written statement, perhaps you may miss a word or you may get behind with your handwriting and it's not as accurate as that. So, to me, for investigative purposes, there [are] advantages to taking pure version. (P23)

So, I'm not interrupting it, I'm making eye contact, I'm actively listening, and that person feels they can keep going. If I've got my head down and I'm writing, and they're watching me write, they tend to stop, they lose their place, it creates gaps in statement taking ... To me, it's a better form of interrogation than trying to deliver pointed questions, because you're directing it, rather than simply allowing it to flow from where you want to go back to. (P24)

A lot of participants (police and counsel alike) reported that video and/or audio statements can be instrumental in protecting police from allegations of improper or inappropriate interviewing techniques. Video and/or audio statements were also valuable for the court in the assessment of allegations that a statement was coerced or provided under duress which would call into question the admissibility of the statement in court.

If we don't, some of the things that we record here have been to protect the police because of the accusations, right. So, you know, it works both ways. But then again, it's sort of how do you protect yourself when you're a police agency I guess, because you're definitely subject to a lot of scrutiny, right? (P21)

We used to see accused [persons] make a claim in court that they were beaten, or they were threatened, or they were coerced into giving a statement. And so, the courts, the judges, said no, we want this videotape, because we want to be able to establish, is this a

voluntary statement, or did you—you know, we've had people back a few years, with people saying, that we ruptured some guy's bladder by punching him through a phone book, to force him to give a confession. (P22)

You know, the judges like to see the person on video [as well as] how they gave their testimony to the officer at that time. (P17)

The so-called “pure version” statements were also suggested as superior to a transcript as it is able to provide for the nuances of body language and voice inflection not readily, nor easily demonstrated when using a transcript.

The courts can read body language; the courts don't have to rely on your interpretation of it. So, that's the best evidence. If we want that best evidence represented in our courts in Canada, then we have to live with the fact that the evolution of policing has made statement-taking more complex, more time consuming, and requiring transcription. (P24)

It's the inflection in your voice that changes the meaning of things. That is not captured in a transcript. (P24)

It really does, for witnesses; [it] ties them to a story. Makes it very difficult for them to go on the stand and recant whatever they've given. (P25)

The one nice thing about the video too, is just the, I guess is to show, I mean, a piece of paper won't show the dynamics or the emphasis or the body language of a person. (P26)

We collect marvelous evidence. Unfortunately, sometimes with time constraints, they don't look at it. And honestly, the format we disclose in, transcription, becomes that text message. What do you mean by that? It's all capitalized, you're yelling at me. Well, no. It was just important, so I capitalized it. Or, you said this; you meant this. No, I meant this. [It gets lost] because the nuance of language is lost. Unfortunately, we're relying more and more on that in the form of disclosure. Well, I can highlight this, so I can go back to my highlights. But we lost the nuance of body language, we lost the nuance of the conversation, because we didn't watch the recording 'til the day of court, or we don't watch it at all. Well, we collect fabulous evidence, we're not—disclosure sometimes waters it down on us, when we transcribe and do those other things. (P24)

So, the transcripts had to go along—in some cases they ask for it because they couldn't understand what was on the recording, which I thought was ludicrous, because how will my clerk understand what's on the recording. So, we don't want to be interpreting that either, so it really put us in a predicament. Then it came back to, well, actually a written one would probably be better because it's easier to read. And so there was a bit of a discussion back and forth and they still settled in on all serious crimes that really a video statement is the best. (P21)

If I did a three-hour interview, the policeman spent three hours in that room for a reason. It wasn't to ask the one question in the middle that was relevant. It was to flesh the whole thing out and you know, get through the whole thing. It's all relevant, at the end of the day. And we're so worried about disclosure for fear of wrongful conviction and everything else. If we don't take the time to look at things in context, if we don't look at it in its entirety, are we really as a system being fair to the accused in the first place? (P24)

Handwritten Statements vs. Video/Audio Statements

As previously noted, the use of handwritten statements has, particularly in the case of serious crimes, been replaced by video and/or audio statements. Nevertheless, some participants questioned what they felt was an over-use of recorded statements and provided suggestions as to why handwritten statements might be acceptable and provide some advantages.

I think some of them think [video] is better. You get a more complete account of what it is, and more often than not, it is. But not always. The [written] statement tells you everything, other than detail. Then you don't need a videotape. I'd say to the police, videotape, but only when necessary. (P19)

I think police too often rely on a video statement because it's easier, right; easier for them than the old days where they'd have to actually write down the question and record the answer. You know, write out a question and the person would write out the answer. It's easier to hit record, right, and talk, but sometimes your statements aren't that good either, you know, because you're just rambling on and you lose your train of thought. So, there [are] all sorts of things about it, good and bad. It cuts both ways, but it definitely, I know it adds to our trial time. I'm certain of that. (P15)

Because a lot of times a written statement is a lot more focused than a transcribed statement where a person can sidetrack and talk quite a bit. (P9)

Well, you know, really, the problem is that, you know; when we got the handwritten statements, the statements were concise and it forced the officer to be focused. (P17)

I mean, I guess in many regards, like you said, in terms of the complaints, or potential complaints if they come forward, these are clear evidence that that didn't happen and it certainly works in your favour in that regard. But then, it doesn't work in your favour in terms of the time and effort to maintain them, to keep them secure, to manage them, and then, possibly at the end of the day, go through a transcription process with them. (P22)

But somewhere along the line, and it happened in Regina too, prosecutions here in Regina have had the conversation with me, is we really should be going back to just handwritten because the video recordings and all that are time consuming, not only for the police, but for prosecution. They don't have the time to review them. Most

courtrooms don't have the technology to play them. Judges don't want to watch them. (P25)

Why would we create a process that says, you have to do this? Well, no, you can't. There's always the one-off. If we're—we talk about transcription, if we're creating a system where we can't maintain it because of cost and everything else, then that's something we really need to look at. (P9)

But it's cost them a lot in regards to the disclosure pieces. I mean, we've discussed that on many occasions. Should we be going backwards to, other than the very serious cases, just taking a written statement? (P25)

Interview Training

A reported issue with the use of video and/or audio statements was the circumstance in which a less-experienced officer was the one conducting the interview. This could result in “rambling” accounts of what happened that included a lot of extraneous information not relevant to the matter at issue.

One problem, like, you can have an inexperienced person—I say you're thinking on your feet. It's like us cross-examining, you're thinking on your feet. Same with—you got to plan your video [and I have seen that] there is a tendency to cut people off, or give your view of the case. I [have] said, I don't give a damn about what your view of the case is. Neither will a judge. They want to know what this person's going to say. So let them say it. (P19)

Someone could provide a long rambling answer, which is what you get on video because, like me, I mean [the interviews] are fairly open-ended. If we had to write this out, I can tell you that, you know, what I'd have to say would be a lot shorter, and it would be more concise, and I'd use a lot less sentences, and I wouldn't go on and on, on tangents. And that's what you'd find. (P17)

You don't let people basically take control of the question and just go on and on and keep talking, you know, because you don't want to be writing for five hours, you ask, ‘Well this question, tell me about this.’ And you know, you don't perhaps get everything the person says, but you make it concise, and it's also easier too in terms of presenting it to the court. (P17)

So, you read this, you find out where the meat of it is, because like I said, on any kind of video statement it's not going to be, you know, very—you know, I understand why you have to do it with a child or something like that, but any adult you're still going to get a bunch of irrelevant stuff that you didn't care about where the guy went to school. You didn't care about, you know, how was your lunch. (P17)

So I started with statement taking, and I talked about—you know, again, you read a statement and defence—not only defence want to know. I want to know. If I read the word—let’s say three people are on scene and one of the witnesses—well, they did this and they did that and they did this. I said, ‘Well who in the hell is they?’ That’s a very common mistake. (P19)

I think, the officers doing the interviews have to be very much aware that their behaviour is also being recorded. Their body language, if they’re making certain gestures, which shouldn’t happen. And also, the whole idea of being professional, the whole idea of your demeanour and your posture, could really affect whether somebody wants to be forthcoming or not. (P6)

Accuracy of Statement Summaries

The police were noted as providing summaries of statements in some cases rather than an actual verified transcript. The veracity of some of these summaries, although certainly not considered intentional, was called into question by some counsel, hence the request for a verified transcript.

But the occurrence reports don’t always reflect what the transcripts say. Sometimes they’re wrong because officers think they hear something. Maybe they heard something that they said earlier that’s not in the transcript. For example, I had one the other day where he said the bad guy dipped his fingers in her vagina, right, dipped his fingers in the little girl’s vagina. And I went through the whole video, nope, he didn’t say that. She didn’t say that. She never said dipped his fingers. (P3)

The issue there is that a lot of the forces don’t have the time to transcribe everything, so we rely on, you know, the Continuation Reports where they give a précis of what the person says. And generally, it’s accurate; sometimes not so much. And again, it’s like, you know, what happens on serious cases, everything is transcribed, so you know, it’s a lot easier to look through. And on some smaller cases like your assault, well, your assault type cases, you know, you kind of have to rely on what they say. (P17)

Because is this an accurate reflection of what they said, or is this simply your—you know, did you put what you wanted as you wrote it out? (P24)

Even though there was monitor notes it didn’t say word for word, you know, and so they wanted the complete transcript of those things to make it faster for them to do their work when they were reviewing the file. (P21)

Summary

A number of participants made reference to the “pure version” of the statement in reference to the audio or, more often, the video recording of the statement that was taken. There were a number of advantages noted with respect to the use of these so-called “pure version”

statements that reflected what the previous literature on this topic identified including use for investigative purposes, protection of the police (from accusations of coercion), and use in court. While the advantages of video statements were made fairly clear, there were participants who commented about additional differences between the two approaches to statement taking as well as balancing the reported advantages with the issues using video. In addition, good training for officers in interviewing skills was reported as necessary in order to avoid the officer injecting personal assessments of the case into the interview as well as getting to the crux of the case in as expedient a manner as possible such that it avoided overly lengthy interviews that could end up being transcribed later. As the interviews were typically being video recorded, an officer was observed to require specialized training that would make them cognizant of their own body language and techniques. Finally, video and/or audio statements were noted as a valuable resource in that, while unintentional, summaries of statements may be prone to errors that could prove costly down the road in court.

Basic Theme 3: Costs Associated with Transcription

The third basic theme arose from participant's reflections on the costs associated with producing transcripts. It emerged as a theme based on a number of issues that arose following the coding of the results of the interviews. These issues included *language and literacy issues*, *financial and time burdens within already limited resources*, *relative costs*, and the absence of transcripts could *raise issues in court*.

Language and Literacy Issues

Language and literacy issues were raised by some participants with respect to driving up the costs of producing transcripts as well as questioning some of the advantages previously noted in using a transcript.

We deal with a lot of people whose language may—or first language may not be English, especially in northern communities. Or speak with an accent or a dialect. How's that going to work? If you're a person whose primary language is Dene and you speak with a heavy Dene accent, is it going to work? Is it going to be feasible or reasonable? (P9)

There is, because I know darn well that there's a couple of times when we've gotten stuff from the RCMP, where they put in brackets, speaks different language or unintelligible and I listen to it and I know exactly what they're saying. And it might not be Cree, it's just the way they've said it, or it's an area of the town that they've said. (P11)

We worked on several files, because we're a northern community and we get a lot of people coming from, you know, up North, way up North; and their first language is Cree or Dene and we've had situations where we've had accused people in custody and they speak in Dene or in Cree. And we've had to bring in a translator. Again, and now especially with our immigration, like, well, you want to talk about transcription costs and translation costs. (P12)

And I mean, you throw on the—you throw in the interpreter side of that too if you have somebody—you're interviewing through an interpreter, well, now I need to find somebody to transcribe that who first has the knowledge of the language. And I can only imagine with the switching back from me speaking English to the interpreter and the interpreter then speaking Vietnamese to the person and then back and forth. I mean, that's just doubling your—doubling the workload right then and there. (P26)

Because it—the other thing, okay, I'm not going to get a bunch of the audio statements from the North transcribed because some of my people can't read. So, I have a copy of your transcript. That's nice; I can sit down and listen to the audio just as quickly as anybody else. (P11)

Financial and Time Burdens within Already Limited Resources

It was widely recognized that the production of transcripts is a very costly endeavour both in terms of dollars and time spent on their production. In addition, it was reported that these expenses are having to be managed within an already stretched funding envelope.

How many hours we spent here, it would be very difficult to say. It would be a major issue [hours spent] if it ever came to the point where we would need to disclose—or to transcribe every statement at first appearance (P1)

Just time, it's the actual resource. We just don't have time to get it to you before trial. We're so backed up. That's generally the reason. I can't say that it's anything but that. That's really a manpower issue. (P4)

But then, sometimes they [Prosecution] want transcriptions when they're audio and then that's time consuming, too. Like, I know a lot of times they like to look at the audio, but then would like the transcription, too. So then, that's another whole challenge. So, literally, some of our statements are—can be up to seven hours. And there could be multiple statements that are that length. (P12)

A lot of times, the Crown will want these transcribed. Well that's a huge burden. If you've got a major, you know, case and you have, you know, you've got 30 statements taken on videos, I mean; transcribing is a huge, huge burden for the service. (P20)

But, I mean, yeah, those need to be—usually or lots of times, get transcribed. And I know, I don't even want to know how long, well I know how long that they take—for one hour it takes eight hours or something like that, it's a phenomenal amount of time. (P26)

So it's super frustrating if we don't have transcripts. On the other hand, I get that they're [police] totally under staffed right now. It would be really nice if they were more staffed on that. It's a matter of under-resourcing. (P3)

It can take, one hour of transcription, so you're going to sit down and type a one hour DVD, can take anywhere from five to 12 hours depending on the quality, depending on how clear the clarity of the people speaking and that. And it'll take them quite often a lot more than five hours to transcribe an hour. (P14)

But the Crown, the reality is the Crown probably doesn't have—if one part of the justice system, in my mind, that has not been able to keep up with resources, it'd be the Crown's office. So, they're overworked and they're—they don't have the time, or they say they don't have the time to go through all of those interviews. So, they want to be able to just find it immediately. (P22)

Police personnel, in particular, noted the effect of transcription in having to reallocate an officers' time away from carrying out “core policing functions” to address transcription-related duties. Given the expense of producing transcripts within an already limited budget (argued more so by municipal services than the RCMP) there was a sense that other services would suffer in order to produce transcripts.

Time for the interview, summary if there's one done, transcription's usually an hour to ten minutes of speaking, you're looking at an hour of transcription, then review, again. And if there's any errors, to point them out and have them corrected, or correct them yourself. That's a lot of time. That's a lot of money. Where I sit, I prefer to see—have the support staff do those things, when needed, not on all. So the investigators can still be buckled down to their cases and that way. (P6)

Again, we talked about limited resources, especially in small town detachments. If you have everyone audiotaping every statement that comes in, and now they have to be transcribed, whether it be witness and suspect, you have one person that's supposed to be answering the phone, doing data entry, now transcribing. Easily becomes overwhelming. (P9)

I feel like it's being pushed back to the municipality rather than province right now. That's, it may be just a personal feeling, but there's so much push back, and so we have, we'll be forced to ask for it in our budget until there's some agreement here. I don't know. And that's going to affect us at some point where we'll have to reduce in some other area, the services that the municipality wants to give in order to deal with just getting those things to court. (P21)

They pay X number of bucks to get a police officer to do a job, to provide service within the community. And that value for your money on the street is less and less and less as

far as a police presence on the street, because members are tied up with paperwork and with disclosure and with all kinds of things. (P13)

But, that's pretty time-consuming, as I said. When you're talking in an interview, a witness interview, or a suspect interview, probably lasting an hour, minimum, you know. That's a lot of—so, if I have to go back, so it's an hour or two investigator's time and then I've got to get a steno, five hours, to transcribe that. And if I have to get my investigators to go back, it's another two or three hours, so now, I've got eight or nine hours' resources invested into [one interview]. (P22)

They choose to spend X number of dollars on transcriptionists so they get 2 dollars a year to police the province in the rural areas. But they're taking, you know, 25 cents of that and they are paying for transcriptions. Well if they had that 25 cents back, maybe they could have two or three more police officers on the street. (P14)

I'm looking at the economics of that, because that it—that's a lot of money. That's a lot of money for those people, in our case, our people here do the transcriptions. The main duties for our support staff are now delayed. (P6)

Relative Costs

The idea of “economies of scale,” although not directly reported as such, was reported by participants when discussing the relative costs associated with transcriptions when comparing smaller police agencies with larger ones; particularly in the context of municipalities compared to the RCMP.

It's all relative scale. I suspect it would be relative to scale. If you're running Weyburn with a nineteen or seventeen man police service, you won't have nearly the volume, but you still have the same issues just on a different scale. (P22)

So the process and the amount of data is the same. It's just that it's a huge impact on a small agency because you do not have that records management resources behind it. I mean, it—in a small organization like ours, the disclosure process really starts almost at the point of the initial charge. (P25)

So, I can't talk for those agencies, but I would suspect it's got to be some—relative to scale. And, not only that, it might even be more onerous on them, because they may not have the technology and software to be able to produce it in the same manner that larger agencies are able. (P22)

And there [are] two systems in this province. The RCMP and the provincial police contract, and there's municipal police officers. The province pays the bill for provincial policing to the RCMP and they're pretty much unlimited. So, what happens is, so they provide full disclosure there, because they hire the resources and they bill the government for it. So, from a municipal perspective, we're saying—I mean, they're still struggling,

too. I mean, they have budgets as well. But, from a municipal perspective, say, I don't have that safety net. I had to go back to my taxpayers to provide the resources to do the disclosure. (P22)

So, now the question is, let's stop arguing about whether or not we [RCMP] transcribe. Because, the municipal argument is not whether or not things need to be transcribed; it's who should do it [and pay for it]. (P24)

But here now, the RCMP still transcribe. The city police don't. We think they should, but they don't. Especially on the big cases. They think it's something we should do, and we don't agree. (P19)

Raises Issues in Court

The production, or more precisely the lack of production, of transcripts has historically raised a few issues in court related to disclosure more generally. In addition, issues arising from the court have affected practice related to the use of video equipment.

But I mean, the courts and Crown recognize it and that's why they do generally give fairly significant adjournments in terms of trial dates from the date that the trial's set. (P1)

Transcripts, we were talking about that. The ultimate cost to the Crown, of course, is a finding of costs against the Crown for failing to disclose. So, that's a remedy that Provincial Court has granted for some, in some really rare cases. (P15)

[The Courts made a decision] and so, either a file gets turfed, or it gets done, or—actually, I think prosecution's actually got tagged with a couple of fines over the years for, I don't know, whether contempt of court or whatever it would be, but for not providing disclosure. (P22)

And there are, again, it gets down to the balancing act, how important is this evidence as against how much it costs and the time it takes to get it? And if the evidence is so—it may be relevant but it's so insignificant in the scheme of things, as against the cost and the time to get it, the court will probably say we'll proceed without it. Now, if it would prove the innocence of the accused, that's a different story. But that's another reason why the judge has to rule on some of these things, because the judge will determine whether or not this is sufficiently important to require production even though it might be costly and time consuming. (P7)

We used to videotape in our—breathalyser room, we used to videotape that. And we would keep those videotapes for six months, just because the volume we had, we can't keep them forever. Well, the Crown started to find out, or the prosecution, or the defence, so they would stall it and then, six months and a day, they would ask for disclosure of that videotape inside the breathalyser room. And the files would get turfed because we couldn't provide ... We pulled the recording equipment out of the breathalyser room.

Because we don't have it, we didn't have to disclose it. But, we were losing files in the late '90s, early 2000s, by that simple piece, right. (P22)

Summary

Language and literacy issues arise in varying circumstances and create additional costs for the initial taking of the statements as well as for the transcription of statements. The costs associated with requiring a translator in the transcription process increases the financial burden; and although the transcript might be useful for the professionals in the system, they are not useful for witnesses or accused persons who are illiterate. The financial burdens were noted as costly in terms of dollars by some, but primarily in terms of having to reallocate people away from other tasks in order to get transcripts completed. Regardless of whether the participants were counsel or police, they recognized that the other was under-resourced when it came to attempting to take on transcription responsibilities. In addition, the added time spent by investigators in reviewing transcripts for their veracity was also noted.

Related to the costs associated with transcriptions was the idea of relative costs. It was suggested that there is a differential affect of the costs of transcription between the RCMP and municipal police services as well as between larger and smaller services. Transcripts, or the lack of, or delay in receipt thereof, can cause delays in court which have their own additional expenses. In the worst-case scenario, this could lead to defence seeking remedies based on delay or perception of non-disclosure upon which the court would need to rule.

Basic Theme 4: What is transcribed

The fourth basic theme arose from participant's perspectives regarding the current state of transcription in the province as well as on what basis decisions are made with respect to producing a transcript. It emerged as a theme based on a number of issues that arose following the coding of the results of the interviews. These issues discussed within the framework of this basic theme include, *preference/request for everything*, *only relevant interviews*, *the nature of the case*, and whether or not the case is *going to trial*.

Preference/Request for Everything

Some participants reported a perception that there was a preference for transcripts to be provided in all cases for all recorded statements taken by police.

A lot of people want to have everything transcribed. (P9)

Every [interview] is, video and audio, and transcribed by us. (P14)

Here, in the south offices, the Regina office, they prefer to transcribe everything. (P6)

Transcription is required all the time, for the most part. If an audio statement is taken, we have to get it transcribed. (P13)

They [prosecutions] wanted everything. (P22)

Relevant Interviews

Other participants suggested that transcribing all statements was a very inefficient use of time and resources; instead, they suggested that only relevant statements should be transcribed based on what the statements would actually provide in terms of usefulness in court.

I don't want somebody's recollection of what they just heard. Yeah, the transcript accurately carries it and they can go back, listen to it again and they can refer to the words. I think there's a role for the transcript and I think it's necessary. To me, it's a question of what needs to be transcribed, is it all statements? Or, is it ones that have been determined relevant by review of the tapes? (P24)

I don't see the value of transcribing fifty interviews. I see the value in transcribing, maybe, ten key interviews and likely, that could be achieved easily in consultation with the Crown. If the Crown says they want a transcript of fifty interviews, I question, because not all fifty are going to be of equal value. (P6)

At the time I was in major crimes, we would 95 percent of the time do a transcription on an interview of the suspect or accused and that would be transcribed and given. Witnesses, unless they were really, really crucial, weren't transcribed. There would just be a written summary. Might be a lengthy written summary, but it would be a written summary, but not word for word. (P25)

Sworn statements of an accused, if they make any kind of admissions in there or you think it's going to be useful in the prosecution. (P2)

Anytime it was a key witness interview or a key suspect interview, we were cracking the video equipment on. (P16)

Well, usually what they have is they have a précis of the case. Like, they're still going to say, they still have to write down in the reports exactly, you know, basically what the person said. So, from that you can gauge who's important and who isn't. (P17)

No [not everything is transcribed], and I think we're [Prosecutors] all cognisant of the costs involved. (P2)

Nature of the Case

The nature of the case was also deemed a relevant aspect when attempting to determine if a transcript should be produced. Generally, a transcript would be deemed acceptable by the participants the more serious the crime.

I need transcripts when I'm dealing with sexual assault. I absolutely have to have them. When I'm doing a theft of potato chips, not necessarily, right. I look at it, like, how important is it? And so then you can get a grey line, spousal assault, common assault. So I'm not going to demand transcripts, basically usually, from spousal assaults down, like, in terms of level of seriousness. (P3)

Generally speaking, when it's actually a crime involving a victim, an interpersonal crime; so, sexual assault, assaults—things on that scale, I generally lean towards wanting a transcript. Especially in cases of children sex assault victims ... those extremely vulnerable people that I don't want them on the stand for any longer than they have to be. Because I don't want to be part of a revictimization and let's be frank, court process is more often than not a revictimization ... Nobody likes to go through bad things again. (P4)

If it's a serious matter, for example, you're dealing with a murder; you're dealing with a child sexual assault. (P9)

But on major cases, on major crimes, when they interview people about murders and sexual assaults, or whatever—major cases. They will get the transcripts. (P11)

And usually that's for murder cases or for very serious crimes. (P18)

I'd say for the more—the major crimes they should be done. (P19)

Going to Trial

Participants also raised concerns regarding the production of a transcript when many cases don't actually end up in court.

We had to come up with some kind of a policy, because there—you know, we'd spend a significant amount of time and money reviewing—or, first doing the transcript, reviewing the transcript, and then it would be—the person would enter a plea. And it was all for naught. And that still does happen (P12)

I don't think, without several more support staff, to make a habit of transcribing every statement we attain, because many—either the matter doesn't go anywhere, or if it does, it's a plea out and you're basically transcribing for nothing (P1)

You may not want to get into transcribing those until the not guilty plea is entered and you know that they're going to be required for disclosure and for further evidence. Then the synopsis just won't do. (P9)

Every prosecutor I think is different in what they want. I mean, optimally we would have transcripts for everything once it was set for trial. I think that that would be best. (P2)

I say, put the audio file on the thing. If this file gets reactivated, or something else happens and we need to go back, the record is there. We can transcribe it when we need it. We need not transcribe everything in the first instance. (P24)

Well, I think everything gets transcribed as far as if you're doing an investigation, you take the statement from somebody and this particular matter is going to court and you've got witness statements, I think all those should be transcribed. Because for a first appearance, you don't—yeah, you may have a summation. You may have one or two statements transcribed, the main gist of it. (P13)

When [the case is] set for trial, that's usually when the panic button hits and you say, okay, we need to get this transcribed. Usually first appearance is just a summary sheet. (P36)

Summary

Whether it is the reality or not, some participants suggested that there was either a preference for, or direct request (from the prosecution to the police) for, everything to be transcribed. Contrary to the perceptions provided above, other participants did not report that transcriptions were requested or desired for every interview. In addition, they identified the importance of identifying the most relevant interviews in conjunction with being aware of the costs associated with producing transcripts. Another factor that participants recollected as important in the determination of producing transcripts was the nature of the case. They noted that, the more serious the crime, the greater the likelihood that a request for transcripts would be forthcoming. The final consideration that participants referred to in determining whether or not a transcript would be requested or required involved the determination of whether or not the case was going to trial. In the event that there was a good reason to think that the case would be resolved through a plea bargaining process, it was reported that the process and cost of getting a transcript produced was onerous and unnecessary.

Basic Theme 5: Getting Transcription Done

The fifth basic theme arose from participant's reflections on the process of producing transcripts. It emerged as a theme based on a number of processes involved in getting interviews from the original video or audio format into a verified transcript that can be used by counsel. These issues included *processing requests*, *prioritizing requests*, and *verifying transcripts*.

Processing Requests

The process of getting transcripts completed varied across the province. In the case of the RCMP, there was a combination of using the centralized transcription unit as well as in-house transcription of shorter statements by either civilians or officers. Some municipalities produced transcripts in-house by way of civilian employees or officers doing the transcribing as well as hiring individuals outside of the service to get the job done.

Like, apparently the RCMP have a transcription policy that if it's more than, don't quote me on this, twelve pages or something, it has to go out of their office. If it's under so many pages, their stenos can do it. And then, as I said, some of my detachments—no, it's not going to happen. It's going to be the officer with his two-handed pecking at night or something, when it's a quiet shift. (P11)

[Centralized transcription service] are generally used by smaller detachments for larger matters when their local support staff are getting a little overrun. (P1)

We have a transcription unit here in this building that manages transcription as well. So, if you have, as a detachment, to do the more complex cases or, you know, a more involved investigation, there's a unit here that they can send their transcription requests to ... and lots of it's done in-house, but that again takes away from the clerical duties and the administrative functions of the support staff that are there when they're bogged down with transcriptions. So, they are able to use this unit here. (P23)

I mean, if it gets transcribed at, not at the transcription unit but at the detachment, it's usually the clerk puts on her little headset, listens to it. If the phone rings, she hits pause or goes to the front counter, nobody keeps track. (13b)

For example, I've worked five or six—six different rural detachments, and I can tell you, right off the bat, it's—you have your one lady come in to run the front counter and she's sitting there transcribing all day. (P9)

Well, we've hired people in the Territories and paid them. And in the communities quite often what we would end up doing was, the member's wives would be in the community, [did the] work. (P13)

So, and we're [municipal service] fortunate that we have a casual, a retired casual [employee]. It's very confidential stuff, too. So, you can't just go and pick somebody off the street to do it, you know, and contract it out. (P12)

Well, if [Prosecutions] sends it over and says that [they] want it; then I pretty much have to find the resources. (P21)

The DVD or whatever comes to the civilian staff here, they transcribe it. (P14)

Prioritizing

Prioritizing files for transcription was another aspect of producing transcripts in a timely fashion for use in court. Common responses in determining which statements would be produced first included the severity of the case, as well as the impending trial date.

Yeah, and certain things take priorities. I mean, they do transcriptions for everybody but, you know, if there's a murder and a hit and run, the hit and run's probably going to sit there for awhile unless it's a death involved. You know, and then we bring in other people to help us to keep on top of what we're doing so we can stay as current as possible. So, we'll sometimes have four, five people working overtime in order to keep on schedule, to keep things moving along so that the investigator can have it to disclose to the Crown, so the Crown can have it to disclose to the Defence, in an appropriate time. (P14)

They can have a fairly quick turnaround for whatever reason. And then that has to become the major priority. But then I guess they have to recognize that they might not get their statements a month or two before, but it might only be a couple of weeks. (P1)

I would say, like, 98 percent are not given to us in the initial disclosure, which makes total sense because why would you be doing a transcript if you don't know if the guy's going to plead guilty? (P3)

I don't know where the Crowns are with it in this province but, you know, if you have a straight forward investigation and you provide a summary of the—in your general reports for your investigation, which you would disclose to the Crown a narrative summary of that interview, and put the meat and potatoes in there and so they have a sense of what was said. And if there's a need for transcription as it goes to trial or whatever then they would send a request back and at that point you would dust that off and transcribe it. (P23)

Verifying Transcripts

Verifying transcripts was another issue raised by participants. The need to have accurate transcripts was deemed of vital importance. In addition, it was generally agreed that the officer

who took the original statement should be the one to verify the transcript given their proximity to the original interview.

We do occasionally get kind of unofficial transcripts, like somebody sat down and typed it up as best they can. Those are not very good because they're not accurate. Even though they get filed with the court as not being accurate, the court tends to, you know, we've got a case now, a case now going in the Supreme Court, where in the judgement the judge quoted from an unofficial transcript. (P8)

Yeah, you—and then they have to be—once they're generated, and we found this and I think you and I had discussions about this, once you get it back on a major file, where the person who trans—so, the transcripts have to be verified at some point. And I found that the person that was doing the transcription back then, she's no longer with us, but was changing words. Especially if she didn't understand them and I caught it and it totally changed the context of what was being said. So, they can't be relied on solely. (P12)

[We have a civilian do the transcription], and then right now we ask the officer to read it afterwards and sign off on it, because presumably, like we can interpret what is being said differently than he did, right. The officer in the room at the time, the officer doing the interview [should be verifying the transcript]. (P21)

The only time—a lot of—sometimes, for example, if we get a transcript back from—we're verifying it, you'll have the words in brackets, unintelligible or they can't read it. So, that's when you can go through it again, now so you've had to spend the time, not only taking the video statement, but now you've given to somebody else to transcribe, which is a huge cost and a time consuming thing, especially on a major file. (P12)

The investigator reviews it and says, 'Well I hear them say this,' and then it can be changed, because he's ultimately the one that has to go to court. And then it goes, and then the investigator has to be the one that gets on the stand and says, 'Yeah I've verified that, and yeah I can hear him say that.' (P14)

At the end of the day, that transcription has to be verified by the interviewing member and read word for word and listened to, because a lot of times there [are] inaudible [words]. The transcription person may have typed something wrong. (P9)

The additional costs, particularly with respect to the time it takes away from engaging in other policing matters was noted as an additional and significant expense imposed upon the police.

And if you want to have it verified, which means the investigator has to go back and verify everything that's said, or that's written in the transcript. So, you know, we're looking at six, seven hours for every hour of videotaped conversation and then—so, it just gets costly. (P22)

But, I mean, that comes down to the whole fact that it's put back on the investigator. That yeah, now it's been transcribed and you have to now sit down and review it to verify that

this is an accurate transcription of—and I don't think—I mean, that doesn't get done a lot. It should be done, obviously, but, I mean, yeah, that becomes the issue where you know—or it could be something as simple as not being—not knowing how to spell something and it comes out to have a different meaning. (P26)

In some cases, counsel identified that they would also spend time verifying transcripts as part of their review processes.

What you got to watch with transcription is that it's accurate, because I have—to me, well, if I'm going to rely on the transcript and defence is agreeable, I have to make sure it's an accurate record. So then, I have to—you know, you listen, you follow along. And at first—and in that case, after the first prelim, I then did that. I take them at home. I went through every line. If there's a word missing, I write it in. (P19)

Having the officer that originally took the statement verify the transcript, although receiving a modicum of criticism for logistic reasons, was generally perceived as the best way to get an accurately transcribed version of the statement.

The only argument that came back is, well, you're the interviewer that took the statement, you should be reviewing the transcript to make sure it's accurate. You were there. You're the best one to review it again, one more time, to make sure the transcript is accurate. Okay. I buy that a little bit. But, we can all listen to the audio tape. You know, if you think I remember verbatim the entire three-hour conversation so I can correct it, any better than anybody else listening to the tape. I don't think so. I'm going to listen to the tape, too, and try to make sure I've got it right. (P24)

Here, we cut the tape or disc, then within the [deleted] program, we have, if we have the time, then our support staff will do the transcription, here. Which is good, because it's in house, as you know, we're at our own location here. So, if there is some mumbling, you can get that verified pretty quickly. (P6)

Where should it be done, in terms of expense? And [considering] man-hours and those type[s] of things. And where is it best done to produce the best product? And where is it done so that it's added into the system at the most meaningful point? That may be police. It honestly may be. (P24)

Summary

Different processes for undertaking the production of transcripts were reported by participants and included using the centralized transcription unit (for the RCMP), in-house transcribing (typically completed by civilian employees, but sometimes the officers themselves), as well as hiring individuals outside of the police service to get the task completed. Given the volume of statements, it was reported that transcribing had to be prioritized based, to a limited

degree, on the severity of the case, but primarily on an impending trial date to ensure the timely delivery of the transcripts with the disclosure package. Finally, verifying the transcripts was argued as absolutely vital given some issues around recorded statements. It was generally reported that the individual in the best position to engage in this process was the investigator that actually undertook the original interview. While deemed necessary, the verification process was also reported as an additional burden to the police service in terms of cost and time spent away from other duties.

Basic Theme 6: Who Should Pay

The sixth basic theme arose from participant's comments as to who should be responsible for the financial burden that accompanies transcription. This theme arose based on a number of issues participants raised when queried about this contentious topic. The issues participants identified included, whether or not there was a *legal requirement* for transcripts found in case law, the *relative costs* to different police services or parts of police services, a longstanding *debate* in Saskatchewan between the Crown and police as to whose responsibility it is to produce and therefore pay for transcripts.

Legal Requirement: Useable Format

The first point of discussion arising from most of the participants (particularly police personnel), regarding who should pay for getting transcripts of recorded statements, was that of the acceptable format for disclosure of statements. The provision of the actual recording, in and of itself, was thought by police personnel to have met their disclosure requirements.

So, at that point, are we creating new disclosure at their request, or are we disclosing what we have? If it wasn't necessary to transcribe it for policing purposes, or for prosecution purposes, but defence wants to know what's on there, is that part of what Stinchcombe intended? Or, is it simply giving them a copy of the audio sufficient to say we've met the rules? This is the evidence we've collected. This is the format it's in. And format becomes one of those contentious issues. In what format do we make disclosure? (P24)

We've—and as far as my interpretation is, once we disclose that video, we've provided disclosure. (P12)

Police have an obligation to disclose all relevant information to a file. And I would further go on to say that we're obligated to disclose all that relevant information in the medium in which we—one copy, in the medium of which we capture. (P22)

Counsel also identified that the recorded statement is the evidence (the exhibit), a transcript is an aid, and that they are not obligated by law to provide a transcript.

And really, you don't have to do that because the evidence is still going to be what's on the video if you actually play it. Transcriptions of, you know, they are nice and they make things a lot easier, but they're not the, they're not the evidence. They [defence] can ask. We don't always have to give. Luckily, there's a case by Judge Morgan from not too long ago, where, you know, this is kind of an aide; it's not something that we have to do. (P17)

Well, probably not [required to provide defence with a transcript]. Again, and I just finished that big drug case where the prison guard took the drugs in for the inmates etc., with a jury. Well, that issue came up in that case and, first of all; the recorded device is the exhibit. (P7)

But actually, my understanding of the law and transcripts is that it's not necessary. They're just an aid. I don't think the law demands that we have transcripts. (P3)

I'm able to use that [transcript] and say to the judge, this is not an exhibit, it's just an aid that I prepared, just to help me go along, but then I can cross examine the witness and say, this is the question you were asked and this is the answer that you gave and if they say, oh, I don't think I said that, well, you play the tape back for them. (P5)

Nevertheless, the production of transcripts was noted by many participants as a regular component of the process. It was noted as being the "standard," which although difficult, time consuming and costly to produce, has resulted in a degree of expectation that they will be produced.

Well, and it doesn't matter what, you know, what the original legislation said about, you know, useable format for disclosure. So, we just do it automatically now, it's just a part of the way we do our business. And our fight has always been, 'We don't mind doing this, but we shouldn't be paying for it. The taxpayers of [the city] should not be paying for this because this is a Crown's responsibility.' (P14)

It's necessary. Let's face it. The transcript is the necessary piece of that process. You can't have the audio video and not the transcript. We've already raised the bar, the expectation is there. I think, you know—when you close the barn door after the horse is out. It's out. They want both; they use both. It's become part of the system. (P24)

If it's not functional or workable—let's use workable, if it's not workable for everybody, then it's not meeting the standard. So yeah, it is the golden standard, but there's a lot of—if you don't have the resources in place, it's a high standard to maintain; ... the golden bar that no one can reach. (P9)

I think some agencies have just started to do it because they—the culture more than anything. (P25)

I don't think it's necessary to require everyone. When we only use four percent of what's transcribed, I don't think it's necessary to, well sort of, require the Crown or the justice department in a case, to start transcribing stuff. I wouldn't want to put the State to the expense of saying, there's a rule that you have to transcribe everything. I'm a taxpayer, too. (P5)

The Debate (Police or Crown)

It was widely reported that the question of who should pay to produce transcripts has been a contentious issue between the police and Crown in Saskatchewan for a long time. The debate is focused not on whether or not a transcript should be produced, but rather on whether it should be a police or Crown expense. It all comes down to budgets and dollars.

Well, and that's the question that's been argued forever. Who is ultimately responsible for the cost? If we're transcribing for the sake of defence only, it—first of all, has our disclosure obligation been met by providing a video and a synopsis. I think there would be a good argument saying that we provided everything before the courts. We're not going to give the judge a transcribed copy of the statement; we're going to play the video. (P9)

[The court] hasn't said who is responsible for that expense. And it's a huge expense. And that becomes the contentious piece. We're trying to push around this expense and it's not really about disclosure, but who bears the cost of a proper transcript. (P24)

I maintain we're obligated to provide one copy of all relevant information in the medium we capture. His argument [The Crown] is no, he says, we're obligated to provide multiple copies of all relevant information, in the medium determined by the Crown. And then there [are] the judges, who sometimes order something totally different ... I can go around it a hundred ways, it comes back to money and resources. (P22)

Police Responsibility

The Crown will say that they can't get involved in creating disclosure, because they can't be seen as—they're independent and they can't be seen as producing the evidence. Well, that's maybe a bit of a stretch, but they're just putting it out—you know, doing their own transcriptions or whatever. You know, now they're manufacturing evidence, so they can't be seen as that. So, they're resisting. They're really resisting because they have no money. (P22)

I guess from our perspective [Crown], the police took the statement. They should—you know, ensure that it's transcribed. Send the whole disclosure package to us. Like, to—for

me, it's not up to the Crown to process the disclosure of that. It's—it should be the police. The big issue is transcription, and we want that, just for time management. (P19)

Yeah, so now what—and I think this has been an argument in the past, what is the obligation of the police to provide a transcript? And I think the answer is, we've [RCMP] just always done it. (P12)

Now if you talk to somebody in the government—it's like anything else, you know. If you [were] doing it already why would we bother to pay for it if you're already doing it. And then you have these little fights back and forth because there's only so many dollars to go around in the provincial budget. (P14)

And if you do it that way [for police investigations], then of course you need to disclose it because it's part of the package, right. So now that's a police incurred cost; because we did it through an investigative technique. (P25)

Crown Responsibility

There is no debate; it's a government responsibility. And they know, they know that we're never ever not going to do it because we've got a conscience and we want to make sure that these people get prosecuted and are prosecuted the full extent of the law. We're never ever; ever [not] going to do what has to be done to get stuff to the Crown in order for them to get it to the defence so that we can have the fairest trial. So, we're not, not going to do this. And I don't think there's any question that they understand that that's part of their responsibility. (P14)

Should we [Prosecution] have somebody up here doing it? For sure, whatever, I don't care. I just want somebody to do it. (P3)

Generally, it would be the Crown that bears the burden [for transcription]. (P7)

One of my members says that the Crown should be responsible for the financial impact of disclosure. The police are responsible to gather the investigative information, which in and of itself is a tremendous task, which can become very expensive and resource intensive. Finances should not dictate investigations, however, in some cases, they do. To then burden the police with disclosure costs related to human resources and materials, limits the ability of police to take the necessary and required steps to perform thorough investigations. (P12)

But I think, and the general consensus [among police personnel], is that transcription is not a police responsibility. The disclosure piece is the Crown, we provide the video or the audio tape to the Crown, the capacity should be with the Crown to be able to transcribe. That's the general consensus. (P23)

Eventually when times are good we might actually be able to get some reimbursement. (P14)

And I think, you know, should it be at the request of the Crown? Maybe that's one way to do it, you know, when the Crown requests it, so that we [the Crown] would have the ability to say, okay, I need it for this particular file. Then the onus would fall on us to do that in a timely fashion. (P15)

Summary

Undoubtedly, the most contentious issue raised with regard to transcription involved who should be responsible to incur the associated expenses. The first line of responses suggested that there wasn't a legal requirement that transcripts be produced for use in court. Transcripts were deemed an "aid," certainly a valuable tool, but not a requirement; suggesting that a recording of a statement is considered acceptable in meeting what was referred to in the literature review as a "useable format." The debate surrounding whether the police or Crown should be responsible for payment was argued on both sides.

Basic Theme 7: Possible Solutions

The final basic theme pulls together participants' suggestions for possible solutions in attempting to overcome the costly and somewhat haphazard way that transcription has been undertaken within the province. The use of *voice-to-text software*, increasing *interview training* for less experienced officers, using technology to *bookmark video statements*, and the need to develop a province-wide *policy or memorandum of understanding* around transcription were put forward as potentially assisting in reducing some of the burdens as well as clearly defining the roles and responsibilities surrounding the production of transcripts.

Voice-to-text Software

A few participants reported that voice-to-text software programs could provide one possible solution to the demands placed on police services resulting from transcription. They identified that various software applications are already in use by some police services.

However, it has limited capacity in its current state.

We ran some, a pilot here just recently in Fort Qu'Appelle detachment around a voice to text program, the Dragon Naturally Speaking, and we've actually got it here. But, so we ran it out into the cars and gave it to the members in Fort Qu'Appelle and they went about for, I think, it was for about a month and a half learning the system. And then started to use it to record their, capture their, I think, five or six types of investigations, like some of them were basic ones, and I guess the process was to eventually look at moving it towards doing statements. I guess what they were transcribing was not necessarily statements and stuff like that; it's their general reports and their investigative

functions. Like under the investigation—not necessarily something that would relieve any time from transcribing a statement because it’s trained for your voice right, so your statements are from other people. So, I don’t know how we’ll ever get there if we do. (P23)

One of the issues with the voice to text is; it’s great for me making investigative notes. If you turn it on your—it takes about an hour-and-a-half to—with Dragon Naturally Speaking, to get to know your voice and everything else. I’ve got to take a statement from you today, can I use voice to text, because it doesn’t know you. Okay, I want to take a statement from you. Would you stand in the recording room and just go through this hour-and-a-half script for the recorder; and then, go check the transcript of it. Well, immigration is changing and I’m not sure Dragon Naturally Speaking is going to catch onto accents as well as we’d like it to. There’s too many—yeah, language is too complex to train it all. And then, recognize all voices. We’re a long way from it; maybe someday. (P24)

So, how do you, you know, if somebody says, ‘How do you really know that that’s what was done or that’s what was said?’ Well I don’t because I never, that software picked it up. And I’m not sure, is it at a stage yet where it’s absolutely dependable? Like there was a time when it first came out you could do that but it was just all one big word because it couldn’t distinguish, you know, as you were talking. (P14)

While there are issues with the current capabilities of voice-to-text software, there was recognition that it is likely that, as with most technology these days, it will continue to evolve to a point where it might meet their needs in the future.

What will eventually happen, and probably in the next three, four, five years, is that some of the software that’s currently out there, Dragon is one, but there’s got to be others, that have that ability to be able to voice to text and read—once that gets to be a little bit more developed and where it—which I think will then get rid of the requirement for transcription units. It’ll be a matter of putting your audio thing into the program. It comes out. You proof it and say yes, this is correct. (P13)

Finally, it was expressed that for this technology to be truly effective, it would require the acceptance of the court.

Of course, in order to do that at some point in time it would have to be accepted by the court and then become a part of the way you do business. And if the court says, ‘Yeah that’s okay,’ then it’s okay, but I’m not aware of anybody that uses that. (P14)

Interview Training

Training has been an emergent issue across various areas within this report. Specifically with respect to addressing the demands associated with transcription, it was suggested that in

keeping up with the audio and/or video technology used in taking statements, that training of officers in effective and efficient interviewing techniques when employing that technology should be undertaken.

But we got to start looking at more efficiencies in that area too as well. Like, there's no point in—you know, education is good, but our young investigators are just cracking that goddamn thing [recording device] on right away. And we got a two and a half hour interview that's really—should have been down to 20 minutes. (P16)

The sooner an officer knows what questions to ask, they're going to ask them. And if that's I'm straight out of depot and I followed somebody for two months and now I'm on my own, or me and my partner are each in different rooms, talking to people, it gets tough to know what questions to ask and to know. (P4)

So that—the purpose of our being there, I reintroduce myself, I reintroduce you. I ask about a dozen questions and we finish our statement. But we don't really need a whole bunch of stuff about the weather and everything else. It's irrelevant. (P16)

Bookmarking Video Statements

While it was recognized that accurately marking (or providing time-stamped notes) to a video interview was somewhat time consuming on the front end, the marking process had potential to alleviate the costs of transcription following the interview wherein the 'important segments' of the interview could be transcribed whereas the rapport-building and other extraneous material could remain solely in video format. This would be particularly beneficial to Crown and defence counsel, although arguably they should be watching the entire video, in allocating their time to specific segments of the interview.

Probably, the best way to do is sit and watch the video, because everything's timed. And you can see where you want in the video. I do it myself, in a couple of the cases I have, I do audio interviews. I do my notes during the interview and if I hit on something, I'll pay attention to the time. If I miss it, I've still got to review the audio interview and I'll document it. And go into it that way and do the quotation myself. But, I still do my notes and do my summaries. (P6)

If they have the bookmarks, if they have the notes that go with them, then if the officer writes down building rapport, building rapport, building rapport they, presumably they could just skip to, like you said, what they saw or what they thought was important. (P21)

Great if you can tag mark different parts of your audio or go back and listen to specific pieces. That's a good chunk of—a good piece of technology. (P25)

Yeah. So that at least when they plug it in—it comes with the player, so whoever has a normal computer—I'm not sure what a normal computer is these days, but they can, when they install it, it installs the player. So, when they're playing that if they, they go to the notes portion and they want to go to the part that looks interesting, they can just click on it and automatically it takes them there. (P21)

Ah, here's the important stuff, read it. Whereas, if you were watching it on video, you have to watch the entire video. Now that could be an hour and half, where it could take you five minutes. (P17)

I know when I spoke to one defence lawyer, he says it is his practice to watch and timestamp everything that he thinks is an issue. (P24)

Yeah, I believe it. And you know, but the problem is when you're, you know, the best files that you get are the ones where the investigator goes through and gives a synopsis of the video statement, and gives a good synopsis of it, right. So, if there is a summary there that we can rely on, and we know it's accurate, that's really what you need to get over the hump of reasonable likelihood of conviction. And then as you move on to your trial, you're obligated to watch those video statements. But I would never go; I would never do a trial without having watched my video statements. You have to; you just have to. It's just the reality, and that's just how it is. It's time consuming, but that's, you know, if they opt for a video statement, I think we're obligated to watch it. (P15)

And we've worked to buy a product that would allow us to bookmark. You still have your, you can put in the monitor notes with that product so that they can just click where that note is and then hear what is being said at that time, you know, bookmarks and that. So, we've just put that in in some of our interview rooms. There'll be an officer in the monitor room while the other officer is interviewing, and it's just sort of point form. Started the interview, he said this. We left the room. We came back into the room. It's just now going over to the courts. We'll see if that reduces the need to have them transcribed, but I suspect not. And then all major crimes, we'll transcribe almost everything, right. (P21)

There's some technology now that might be able to help that. We're just starting to use now. What is it called? It's Liberty recording that is, you can bookmark your conversation and do detailed synopsis that you can go directly to. As you—as someone is actually monitoring live or post interview and you can go and benchmark and say, at this point in time, confesses. Or, saw blue truck and you can just click on that and go directly to that part of the interview. So, that will help a little bit. (P22)

Transcription Policy: Memorandum of Understanding (MOU)

At the outset, it is important to note that the same principles identified in the previous organizing theme of standardization are equally applicable with respect to the development of a memorandum of understanding regarding the production of transcripts. Furthermore, as noted above, there was recognition by virtually all participants that transcripts can be a useful tool during the entire course of a criminal case. Participants also recognized that with the production of transcripts there are associated costs.

The expense is there, we know it's there. It's never been clearly defined. This is a mandate issue that simply needs to sit down with the government and police forces and prosecutions and sit down and say, whose expense it is. I think they need to have the discussion in a room to say, what are the parameters we want to—we agree it should be done. I think that's—part of that is that, again, communication, sitting down and agreeing to some of those things. I don't think we need to transcribe everything. And I think prosecutions and defence would probably agree to that, if you caught them at a reasonable moment. That's that discussion I think we need prosecutions, defence, maybe even the judiciary to sit down and say, this is a reasonable expectation in, you know, the grey areas, this is the system to resolve it. (P24)

A number of participants, particularly police personnel, suggested that there be an MOU such that if they were going to be required to continue bearing the brunt of the financial burden that getting a policy in place would assist in their budgetary planning processes.

Yeah, I guess, for—let's say for a major investigation, let's—perhaps we're planning a project, that's something that we would have to build into our budget, right off the bat. In my old—I did integrated work with the RCMP and transcription cost was always something that we built right into our budget and I don't know how we budget for that, here. (P12)

Or if it was a standard, 'You're going to get the same money this year as you did last year,' then that money could be taken and utilized in some other fashion, perhaps not even in criminal investigations but in patrol or in traffic, in human resources. (P14)

Given the different internal approaches to the provision of transcripts by the various police services noted above, it was suggested that the MOU should be developed to be applicable to all services (as well as all regional prosecution offices), addressing the additional complication of integrated units.

If you're working on a big project, especially if it's the RCMP. A lot of times we're in integrated units with them and we have to include what they—you know, their wants and follow their policy. (P12)

The outsourcing of the production of transcripts was noted as a potential concern given the sensitive nature of the material contained therein. This suggests that if outsourcing is considered as a possible avenue during the development of an MOU, concerns regarding the sensitivity of the materials should be given their due consideration.

A lot of the projects are so secretive in nature, or at least that's the—you feel you've got to protect that information, hold it so close, that to use an outside agency on those types of things, I think, you'd have a hard time getting people to—but, I'm not saying that that's a realistic fear. But, it is a fear. (P12)

While there is certainly a lot of knowledge within police services regarding criminal matters, it was clearly articulated that Crown was more competent with respect to the determination of relevance; first in terms of providing disclosure, and second with respect to prosecuting a criminal case. It was argued that not everything needed to be transcribed and that Crown was better positioned to determine what needed to be transcribed; and furthermore, when that transcription would be required.

The funding is one of the things that's in question, but by us doing it we do absolutely everything. Now there may be, out of say 50 hours of transcript, there may only be a need to have 10 hours transcribed and the only person that would know that is the Crown. So, then the Crown could listen to the stuff and say, 'We don't need this, this, this, this. We just need this, this, this.' So, out of that 50 hours we need seven and a half hours transcribed—that's a whole lot easier to do than all 50 and throw, you know, 36 and a half hours out. Whatever, 'This is what we need to have transcribed.' Or even, 'This is what we need transcribed for the preliminary hearing, and then for the trial we're going to actually need this.' So, you might have five hours for the prelim and another seven hours for the trial, so now you've got 12 hours out of that 50 that you need. But you only need to concentrate on this. Now, we concentrate on all 50 hours to get the damn thing done right up front, so they can go [to Crown]. And so to me that's a waste of our resources, transcribing all of this stuff that never really had to be transcribed. (P14)

So, that would be a waste of time for the police to be transcribing every video statement. But yeah, if we had a process in place where, you know, the Crown would know by this time you need to request transcripts—once it's set for trial is what I'm thinking, right. (P15)

We'll just provide the oral—the verbal audio statement and let the defence, and from that part Crown, determine what the relevant portions of that statement are. (P16)

It really depends on the court or a direction from the chief prosecution head office, that transcriptions will only be used in certain cases, which has been discussed. I mean—but it needs to also get pushed down to that video will only be used in certain cases. (P25)

These discussions have already taken place; at least to some degree; so there has already been some progress toward this end that could provide a foundation for further discussion.

And then our process for the last few years has been that if they want it transcribed that they had to have it approved by the [Senior Regional Crown], or whoever at the time was the Regional Prosecutor, and he would ask me. Because it's so time consuming and we don't have the staff, and we had lots of them just wanting it for the convenience, and it shouldn't be about the convenience. Both of us are fighting for resources and, you know, they may have to review that for what they will, you know, what they want, but us transcribing it, it takes longer than viewing it. (P21)

However, an issue was raised with respect to providing “selected” parts of a statement.

I think we have an obligation sometimes to Crown, to help them be a little bit more succinct in the evidence that's going to be put forth. And we could transcribe that portion of the statement. But then the first thing defence are saying is, ‘Well, then you only transcribed the portion that you felt was relevant. There's a whole bunch of other relevancy, whatever there might be, but there's a whole bunch of other relevancy to that transcript.’ And before long, now we're obligated to transcribe the whole damn thing. Well, we were never obligated in the first place. We just did it ourselves to help the process out. But now we're getting caught up in this process and almost going the other way to just say, well, no, we're no longer going to do that. We've been doing it all this time, but we're no longer going to do that. (P16)

One participant suggested that a cost-sharing formula could be one way to consider the financing required to get transcripts completed.

I don't know. I think it's always going to be with the—it's going to be with the police and the Crown. There's going to have to be some kind of sharing formula. I mean, I—yeah, at the end of the day, I guess it's going to come from the tax payers' pockets, but is there a way we can streamline and use better—better use the money that we allot to it would be ideal, but I can't—I don't know where else it's going to fall on, unfortunately. (P26)

Others suggested a slightly different, “user-fee” type of approach, should be considered when trying to resolve the question. Those who want to use a transcript should pay for it.

The courts don't ask for the transcripts, what we're seeing is that the Crown are asking. Who should pay that bill? I believe either the Crown or the defence should pay that bill. (P6)

It can be needed as an investigative tool, and I think that is something that cost should be borne by the police departments if a police organization chooses to use a transcription because they feel they need it to get to the proper charge. [But], if it's an external request from a defence or an external request from prosecution to transcribe it, then I really think that those costs should be offloaded somewhere [not to police]. (P25)

Some defence want disclosure—they want us to—they want a transcript. And courts have found that we don't have an obligation to do a transcript. I mean, they can do their own ... So—but I have had—that I know defence have asked for that. Not a lot, because they know they're not going to get it. So they said, 'Well, we want transcripts.' Well, so would we, but—we [don't have them]. (P19)

Because certainly that burden wouldn't be placed on the defence at all, either, even if they'd made the application for disclosure. (P11)

So, I think it's really—I think it's up to the party [wanting a transcript]. If you really want to use a transcript, or if you really want to use a chunk of audio, either you can make the transcript yourself—and I've done that before, where I've just got my secretary to type out a page or two of what I wanted. (P5)

Summary

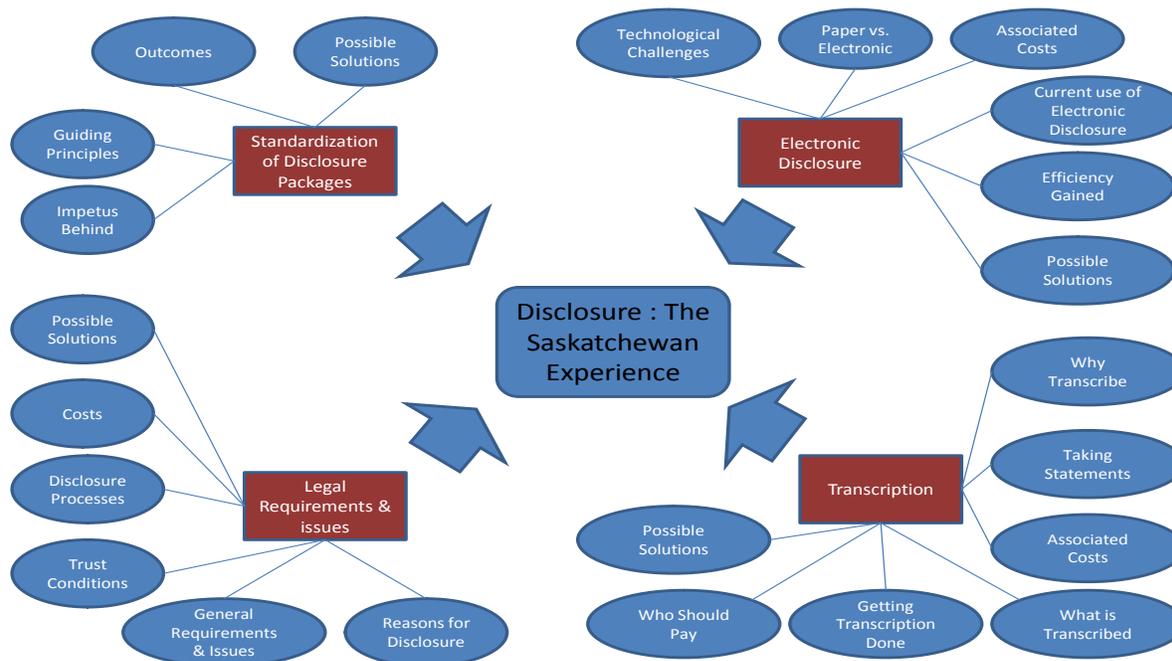
The financial costs of disclosure cannot be understated. A very conservative estimate of the transcription costs borne by police services in the province of close to one million dollars is provided later in this report. It is therefore not surprising that participants were aware of these costs. They did, nonetheless, recognize (or concede in some cases) that in some circumstances, transcripts were a very useful tool. In addition, participants agreed that something should be done to address this issue. The use of voice-to-text software was put forward as one possible avenue for consideration. Although limited in its current capabilities, this software is already useful in converting officers' recorded notes to text which would reduce the time required to either handwrite or type them in preparation for disclosure. However, the technology is not at the point where it was deemed useful in the context of taking statements. Training of the officers engaged in taking video statements, such that they can achieve the necessary results and reduce the time it takes to get them, thus reducing the length of the recording, and hence the transcription burden, was also suggested. While previously noting that video statements should ideally be watched in their entirety, the participants did suggest that bookmarking video statements could improve efficiency, as it would assist in more expediently determining key parts of the video for review and possibly transcription. Lastly, there was an expressed need to address the ongoing issues

surrounding transcription by engaging the principles provided earlier in a process to pursue a province-wide memorandum of understanding between the police and Crown.

Global Theme: Disclosure: The Saskatchewan Experience

To this point in the report, the iterative analysis of the information collected during the interviews with the Saskatchewan participants reduced all of the data into individual codes which were reassembled, based on their commonalities, into basic themes. The basic themes were explored for existing interrelationships that formed the basis for the development of the organizing themes which are “clusters of signification that summarize the principle assumptions of a group of basic themes” (Attride-Stirling, 2001, p. 389). Each organizing theme contributes to the development of the global theme. “Global Themes group sets of Organizing Themes that together present an argument, or a position or an assertion about a given issue or reality”(Attride-Stirling, 2001, p. 389).

Figure 1: Global Theme - Saskatchewan



The participants’ perspectives surrounding disclosure issues, challenges, and possible solutions in the province is encapsulated in Figure 1. This thematic map provides a visual representation of “the salient themes at each of the three levels, and illustrat[es] the relationships between them” (Attride-Stirling, 2001, p. 388). Working from the bottom left of Figure 1 in a

clockwise manner, the discussion that follows identifies how each of the organizing themes contribute to an overall understanding of the current state of disclosure in the province as well as the direction that participants suggested could be taken to address the issues previously identified within the discussion of the basic themes and their relationships to the organizing themes.

Organizing Theme 1: Legal Requirements & Issues

In order to understand the issues discussed regarding disclosure, the participants provided their perspectives on the legal requirements associated with disclosure as well as a variety of issues that these have created in their daily practices in meeting them. There was consensus that the identification and solidification, arising from the *Stinchcombe* decision, of an accused's *Charter* right for disclosure, was monumental; providing an accused with the capacity to make full answer and defence to the charges faced. Consistent with the literature review, the significance of this decision, which participants collectively agreed was sound, was nevertheless reported by participants as having a major impact on the amount of work required to meet these obligations, despite suggestions implicit in the decision that it might create some efficiencies in the justice system.

The determination of relevance was identified as a “grey area” that has not been clearly defined by the courts and one area participants reported as contributing to their increased workload as well as resulting in court delays. Follow-up requests to obtain third-party “evidence” at the request of defence counsel that was not initially in Crown's possession resulted in additional time and resources for the Crown and the police. While it was suggested that these efforts could be reduced if Crown accepted a broader interpretation of relevance from the outset; it was also reported that these requests were oftentimes “fishing expeditions” wherein disclosure-related arguments were used as a tool by the defence in the absence of arguments based on the merits of the evidence. Striking a balance between recognizing previously admissible third-party evidence based on case law and the need to protect the interests of other participants involved in the case (i.e. victims and witnesses) could save court time if there was an *a priori* agreement with respect to some of the more common types of requests.

The requirement for disclosure becomes additionally problematic with respect to timing. An accused is entitled to disclosure immediately following being charged with an offence (although a formal request for disclosure is necessary). Participants reported that providing

disclosure “in a timely manner” was a very onerous task, particularly when an accused was being held in remand, as the time between arrest, charge, and first-appearance may only be a matter of hours in some cases. The practice of providing partial disclosure, under the auspices of disclosure being an ongoing duty, wherein as much evidence as is available at the time of first-appearance will be provided with the understanding that as the investigation continues additional evidence will be disclosed. This practice, while certainly practical in terms of meeting the disclosure requirement, has resulted in issues for police and Crown with respect to tracking disclosed materials as the case proceeds, to ensure that full disclosure has been achieved.

Although the police have a first-party disclosure responsibility given their involvement in a particular case and their relationship to the Crown, the ultimate responsibility for disclosure rests with the Crown. Participants suggested that ideally, all disclosure requests from defence counsel (or directly from an unrepresented accused) should flow through the Crown. The actual practice in Saskatchewan was reported as misaligning with this ideal due to the police (specifically RCMP) functionally operating as Crown in remote and isolated communities. The practice of police operating as Crown was considered additionally problematic as police do not receive sufficient legal training to deal with the legal issues surrounding disclosure such as relevance when they arise in court.

The quality of disclosure packages, in particular the completeness of the file, transmitted from the police to the Crown was another concern brought forward by participants. In part, this issue was related to previous observation that police are not provided sufficient legal training to deal with disclosure-related issues. However, it should be noted that this was a general observation and it was recognized that many senior officers engaged in investigations had obtained this knowledge as a result of experiential learning.

In addition to the increased workload as a result of the duty to disclose, the participants provided insights into other costs that were generated by disclosure responsibilities. These included the financial costs incurred by the courts as a result of additional court time required for disclosure-related arguments and resulting delays; the potential effects on the outcomes of cases including the dropping of charges and ultimately the potential for a case to get thrown out; the costs to individual participants involved in the case (accused, victims and witnesses) with respect to financial expenses incurred, as well as the emotional toll a case might have on a person; and finally, the frustration with the criminal justice system that might emerge in the general public as

a result of hearing about the frustrations of individuals who took part in the process as well as ultimately bearing the tax burden to fund the system.

The first organizing theme incorporated a few suggestions put forward by participants to address some of the immediate issues that disclosure has created. It was recommended by a number of participants that the practice of police acting in lieu of Crown counsel should cease in order to maintain the integrity of the disclosure process. It was also recommended that less-seasoned officers who would be taking part in investigations should receive additional disclosure-specific training. It was also recommended that the province consider expanding the use of video courts. The first theme also provided the contextual framework necessary to understand how the remaining organizing themes all relate to the broader discussion of disclosure and how the associated issues might be addressed. Reference to specific issues raised by participants in this organizing theme as they pertain to the other organizing themes will be presented.

Organizing Theme 2: Standardization

The second organizing theme contributes to understanding disclosure in Saskatchewan as participants discussed its potential usefulness in addressing some of the issues raised in organizing theme one. In addition, standardization is related to the discussion in organizing themes three (electronic disclosure) and four (transcription). A standardized disclosure package could be transmitted electronically if the electronic programs/systems within the justice system are in alignment, and the production of transcripts should be completed within a memorandum of understanding that provides a standardized approach.

It was recognized by participants that a variety of processes undertaken across the province in production of disclosure packages have created disparities with regard to what the Crown in any given region of the province receives from the respective police service in terms of consistency and quality. Crown preference and, on occasion judicial preference, were noted as the largest contributors to these differences. In a given single location, this might not be problematic. However, in cases of personnel moving within their respective organizations, or if someone in another location requires information from within a given file, a lack of consistency can lead to confusion about what is required and additional work in order to meet different expectations.

Various regions have, at least to some degree, already taken up this task within their respective areas. Nevertheless, it was suggested that arriving at a province-wide standardized disclosure practice and therefore product was desirable: it was perceived by participants as potentially contributing to efficiency across the justice system. The creation of a standardized disclosure package was reported as likely to improve consistency as well as better quality disclosure packages. This would be achieved by reducing confusion regarding what is required in a disclosure package by getting everyone on the same page. By addressing the noted disparities through standardization, the clarity on the front end of the process delivers a better product on the back end that can avoid replication and duplication as well as reduce disclosure-related issues in court.

In order to achieve a standardized disclosure package it was suggested that, rather than “recreate the wheel,” the process can, and should, build on previously employed local practices. Participants encouraged those ultimately engaging in the process to recognize the value of civilian administrative personnel in filling many of these kinds of positions, as they tend to have a lesser budgetary impact than an officer does. In addition, it was suggested that while officers would nevertheless play an important role in disclosure processes, their training is designed for attending to police core functions, not administering disclosure. Another suggestion was the establishment of a position within each organization whose sole responsibility would be disclosure. This would provide a single point of contact for disclosure requests as well as a consistent review of the contents of a given disclosure package that would begin immediately upon the initiation of an investigation. Finally, the idea of creating legislation of a standardized format for disclosure was entertained. However, given the complexity of disclosure materials, the judicial discretion inherent in disclosure applications to the court, as well as the continuing evolution of case law and hence how requirements for disclosure could change, this idea was rejected by participants.

Arriving at a standardized disclosure package (as well addressing electronic disclosure and a province-wide transcription policy) was noted by participants as requiring the formation of a province-wide committee (or multiple committees so as to address electronic disclosure and transcription). The participants identified a number of guiding principles that should provide the basis for these discussions. The committee should be representative of all of the various stakeholders engaged in disclosure. This would include the police, the Crown, the defence

(private and legal aid), as well as possibly the judiciary (although it was noted that their independence would likely not permit them to do so). The participants noted the importance of including front line personnel in these discussions. The committee should be oriented around a problem-solving approach within a collaborative framework that looks at the current issues faced by all sides and finds an equitable way to solve them. Frustration with past experience wherein similar processes had been undertaken and not yielded sustainable results, led participants to suggest that leadership was considered imperative in this committee in order to create, implement and sustain a standardized disclosure package.

Organizing Theme 3: Electronic Disclosure

The exponential increase in the use of technology over the past few decades is itself the primary reason for the organizing theme of electronic disclosure arising in this research. As technology has expanded its influence and use in the daily practice within the wider society, it has required, on the front end, that policing and then further down the judicial road, that the judicial system follow suit in keeping up with technology-based demands. Much of the evidence collected by police is now collected in electronic formats. As such, the transmission of this evidence within the realm of disclosure almost requires that these materials be provided in the same medium in which they were collected, thereby preserving the evidence in its original format. As noted in the literature review, Canadian case law has documented a growing acceptance of electronic formats for conducting interviews with the accused, victims and witnesses as well as for electronic modes of disclosure more generally. In large and complex cases, Lesage and Code (2008) argued that electronic disclosure is a valuable tool. Other research (see *Swift and Secure Justice* (2012)), has also suggested that technology can increase efficiency within the justice system. The Department of Justice, Canada (2004b) went so far as to propose a legislated response supporting the use of electronic disclosure.

Electronic disclosure assists in understanding disclosure in Saskatchewan as it is already a current reality, employed in a divergent number of ways and under varying circumstances across the province. Participants did report a number of confounding issues associated with electronic disclosure including software incompatibility within the justice system as well as outside of it (particularly as it relates to proprietary issues), IT structural limitations, storage and retrieval issues, as well as concerns regarding the security of the information. In addition, they

recognized that resistance to electronic disclosure existed within the system (primarily in terms of a generation gap wherein some are neither familiar nor comfortable working in electronic mediums). Despite recognizing these multiple barriers, there was a general sense that the transition to electronic disclosure was an inevitable evolutionary process that requires the province to get ahead of the curve.

Electronic disclosure is related to the first organizing theme, as electronic evidence has raised issues within the realm of disclosure. These formats provide an increase in relatively quick and easy possibilities for the misuse of disclosed materials wherein sensitive, private information can be widely disseminated via the internet, resulting in the imposition of trust conditions on defence counsel and unrepresented accused. In addition, it was reported by participants as demonstrating great potential to address a major issue noted in the first organizing theme, timing. The provision of disclosure through electronic formats, especially if provided immediately through an information portal, can assist in getting required disclosure evidence from the Crown to the police in a much more expedient manner than through print-based formats. This is all the more important when the accused is held in custody, as the time from initial charge to first appearance can be very short. If as much evidence as is possible is provided to Crown counsel, they can make a quicker assessment of the case. They are also able to provide the defence counsel with disclosure at an earlier time, prior to the first hearing; ensuring that defence counsel is able to advise their client. This might: assist in earlier resolution of cases reducing court time if pleas are entered; avoid some additional adjournments and delays as a result of waiting for more evidence to be provided; and even reduce unnecessary remand time for the accused (also a cost savings to the province). These potential time-saving results are also connected to the second organizing theme of standardization because if a standardized package is agreed upon, to the degree it can be, it is more likely that the package presented will be as complete as it can be at that time. It will also help to identify additional materials to be disclosed upon police and/or Crown obtaining additional them.

Although originally discussed in the context of standardization, the need for the creation of a committee with the same underlying guiding principles was reported as desirable when looking at electronic disclosure. The participants clearly recognized that the transition to electronic disclosure was going to be expensive as well as a willingness throughout the system to embrace technology. It was also suggested by participants that this transition needed to be

properly financed so that any agreed upon electronic disclosure medium was workable for all players in the justice system so as to not set it up for failure if the “weakest link” were unable to meet the standard due to resourcing issues. In addition, if this process is going to be undertaken, the previously noted compartmentalization of the justice system should be addressed. A number of participants made reference to making this a system-wide initiative, inclusive of police, crown, courts, and corrections. Greater accessibility to province-wide information in a much timelier manner for all components of the system was sought through this system-wide process. Amalgamating information could reduce data redundancy and duplication by multiple partners.

The participants suggested that justice systems and processes need updating and much better alignment for electronic disclosure to be realized. In addition to systems and processes, this would also require the right personnel to be in place. This was discussed as recognizing the need either for a centralized disclosure unit, or at a minimum, a dedicated person whose sole responsibility was disclosure. It was argued that while officers provide the inputs (evidence) and counsel are the ultimate end users, there needs to be greater recognition and consideration for civilian personnel that can administrate electronic disclosure and provide the necessary technical support required to manage an electronic system. Although not discussed directly by the participants in the interviews, the literature review presented NIEM as a standardized collection process ensuring consistency of the data that is entered into the system across all police services. If a system-wide electronic approach is to be considered, it seems logical that the inputs would also be standardized at the same time.

Organizing Theme 4: Transcription

The organizing theme of transcription brings together components of the other organizing themes in the overall discussion around disclosure in Saskatchewan. The desire for transcripts is a direct result of technological advances, as police interviews are now more likely than not audio and/or video recorded. A number of reasons for this transition were provided by participants, including the perceived general requirement for videotaping statements, particularly those involving the accused. This ties back into the first organizing theme (Legal Requirements and Issues), in the clear articulation by a number of participants that the legal requirement for disclosure is the provision of disclosed materials in a useable format. The debate regarding video statements meeting the “useful format” requirement was largely put to rest by participants, who

reported that the courts have conveyed that the video statement is the best evidence and that transcripts are a tool for use by counsel in the courtroom. Transcripts are not legally required.

Participants reported that the costs of transcribing interview statements were high and that there might be ways of reducing them. Utilization of voice-to-text software was seen as a possibility in the future but not a current option given its limitations. There was also discussion as to whether or not video statements are always required and that there may be opportunities for the continued use of handwritten statements under some circumstances. In addition, further interview training might assist in reducing the need for follow-up redaction and vetting to both transcripts and videos if less personal, “tombstone” information was captured on the actual video but recorded via another means. Marking videos with timestamps wherein the content of the interview is provided in conjunction with the video might allow for partial transcription of the truly “relevant” evidence collected during the interview.

The participants suggested that a standardized approach toward transcription was needed. It should follow the same process and guiding principles as suggested for the creation of committees to address standardization of disclosure packages as well as electronic disclosure. A province-wide memorandum of understanding clarifying the business processes and the cost burden of transcription was suggested.

The next section of the report provides information directly related to transcription that furthers the examination of the contentious issue of transcripts. It involved obtaining transcript-related information from the Saskatchewan police services.

Transcription Costs in Saskatchewan

As noted in the meetings that took place at the outset of this research as well as in the interviews with participants (provincially and nationally), one of the most significant burdens arising from the duty to disclose is the cost of transcription. While the burden associated with transcription is multidimensional—including the time spent deciding what is to be transcribed, the financial expense in actually completing the transcription, and the time required reviewing the transcript to ensure its veracity—this section examined the financial costs incurred by police agencies in Saskatchewan that stem from transcription.

In 2009, representatives from the Saskatchewan Association of Chiefs of Police (SACP) and the Office of the Crown Prosecutor (Prosecutions) engaged in discussions regarding both the

process and costs of obtaining transcriptions. In a letter submitted to the Executive Director of Policing Services on 16 October 2009, requesting a Financial Assistance Agreement from the Provincial Government, the SACP noted that, “*to date the cost of this process is born exclusively by the police.*” Furthermore, they argued that, “the demand for transcriptions has increased substantially in recent years to the point where it is severely taxing both support staff and investigators to provide transcriptions in a timely fashion.” As identified in the results presented above, timely provision of transcription is a concern noted by both police and Crown prosecutors. The effect of disclosure production delays presents additional burdens to the courts, and as a result, to the Crown, the police, and the accused, resulting in additional financial and personnel costs.

The joint meetings between the SACP and Public Prosecutions Branch identified a number of issues surrounding transcription in the province. Of note was the observation of regional disparities across the province. As stated in a letter dated 16 October 2009, “each region of the province operates under a different set of guidelines and there is no uniformity within Crown Prosecutor Offices.” To address the lack of consistent practice, the Senior Crown prosecutor agreed to provide regional representatives with direction regarding guidelines (SACP Letter, 16 October 2009).

Another issue that came to the forefront in these consultation meetings was a difference in the philosophical position with respect to whose responsibility transcription, and its costs incurred, should be. While both parties clearly recognized that “transcriptions are an integral part of any successful investigation and prosecution,” there was a clear dichotomy as to whose responsibility this was. “*The police argued it is their responsibility to gather evidence and present it to the Crown for disclosure in the medium it is collected and it is then up to the Crown to disclose such.* The Crown argued that transcription of video/audio statements become evidence at trial, therefore it is a police responsibility” (SACP Letter, 16 October 2009; italics in original). Furthermore, concerns were noted by Prosecutions with respect to the perception of defence and the courts regarding the “creation of evidence,” should the Crown or a third party be used in the production of transcripts of video/audio statements (SACP Letter, 16 October 2009).

According to the SACP Letter of 16 October 2009, it was agreed that SACP and Prosecutions would submit a joint funding proposal to the Provincial Government to address

transcription costs. The proposal considered three models collaboratively reviewed by the SACP and the Public Prosecutions Branch:

1. The police would accept responsibility for transcription, and seek funding for an additional ten staff positions within police services across the province.
2. The police would create a centralized “pool of transcriptionists” employed by the provincial government to provide transcription services.
3. The police would provide material for transcription to an outside bonded vendor.

This proposal effectively “removes the administration of funding from the police and places responsibility for the budget/cost of transcription on the Crown” (SACP Letter, 16 October 2009). The proposal does not relieve the police of all burdens associated with preparation of the case file. They are to provide the Crown with supporting information to assist the Crown in determining what is required for transcription. Once the Crown has made this determination, the police send the file for transcription and provide the transcript with the disclosure package. Transcript verification by the police would be undertaken upon request from the Crown.

In order to provide a basis upon which the request for funding would be made, the SACP and Public Prosecutions Branch undertook a process to determine cost estimates, thereby demonstrating the financial burden (SACP Letter, 16 October 2009). This process was undertaken and the results presented. It should be noted that the results were considered “estimates” as, “there [had] not been any consistent tracking of transcriptions by Police Services in Saskatchewan ... [and] many Regional Crowns did not reply to the [Crown’s] survey” (SACP Letter, 16 October 2009). Nevertheless, the letter reported that for 2007/2008 a total of 10,140 hours were spent to complete transcriptions¹⁶. The financial costs resulting from completing this endeavour were estimated at approximately \$400,000¹⁷.

Current Costs and Practices within Police Services

The forms and/or response to the request were received from five agencies (Moose Jaw, Corman Park, Regina, Saskatoon, and the RCMP), four of which completed the form. In addition, four of the five services also provided cover letters or emails regarding the request

¹⁶ This figure was based on the agreement that each hour of either audio or video material required approximately five hours to transcribe and that an average file to be transcribed was approximately two hours.

¹⁷ This estimate was calculated based on the costs for support staff using the Saskatoon Police Service as a reference point. The salary was estimated at \$44,732 plus 13.84% benefits equalling \$50,923. An independent firm was also consulted with respect to the cost were they to undertake the task of transcribing and the cost was estimated within \$2000 dollars of that put forward using the police staff model.

wherein they provided commentary about their transcription processes, policies, and changes occurring during the period for which the data was requested (i.e., limitations of their estimates).

All of the services responding to the survey generally completed transcription “in-house.” For the RCMP, this is performed either within detachments or through their centralized transcription unit. Transcription is generally completed by civilian members in all Saskatchewan police services. However, there are occasions when transcription is performed by sworn members. Prince Albert has a somewhat distinct approach wherein an individual is contracted for transcription services¹⁸. The hourly salary of civilian staff performing transcription ranges from \$21.67 to approximately \$39.00 per hour. Transcription is typically completed for audio and video statements, as well as recordings of 911 calls. Transcriptions are provided to the Crown in either paper or digital format, congruent with the typical form that disclosure is provided by each service. Equipment requirements are fairly similar across the various services. All require computers (and related equipment), foot pedals, headphones, and some form of software (the Start/Stop program was used by three of the services). For the aggregated completed form, see Appendix V.

A second request for information from the police services was for their annual expenditures on transcription-related costs from 2006 to 2012 in order to see if there was a discernible trend in the number of requests and costs incurred over the previous six years. A limitation of this research is that no information was requested from the Ministry of Justice about the costs incurred by Prosecution services. Given the changes noted in some municipal police services, there has likely been an increase in expenditures on the part of Prosecution services for transcription. The analysis was complicated by a number of factors. First, complete information was not available from all the services that responded to the request, resulting in missing data. Second, the figures that were provided do not represent the entirety of the transcription process (i.e., reviewing the transcribed statement for accuracy). Finally, changes to transcription “policies” during the period under investigation make the year-to-year comparison virtually impossible. Nevertheless, the following table provides all of the available data. As revealed in Table 7, the most complete information is from 2011 and 2012.

¹⁸ This information was identified in the interviews.

**Table 7: Estimated Annual Transcription Costs:
Saskatchewan Police Services, 2006–2012**

Year/ Police Service	2006	2007	2008	2009	2010	2011	2012
Regina ¹ (# of statements)	13	33	29	64	47	60	3
Regina (costs \$)	5070	12,870	11,310	24,960	18,330	23,400	1,170
RCMP ² (# of statements)	1312	1542	1578	1878	1770	1848	1640 4399 ³
RCMP (costs \$)	230,000	328,414	318,524	333,112	361,882	371,540	341,973 526,120 ³
Saskatoon (# of statements)						257	216
Saskatoon ⁴ Hours (\$)						1665	1905 (112,400) ⁵
Total (statements)	1325	1575	1607	1942	1817	2165	6258
Total (\$)	235,070	341,284	329,834	358,072	380,212	394,940	981,663
Average \$ / Statement	\$177.41	\$216.88	\$205.25	\$184.38	\$209.25	\$182.42	\$156.86

¹ The Regina Police Service, while previously accommodating some transcription requests, has since made the decision to no longer transcribe interviews.

² These figures only represent the expense incurred through the centralized transcription unit and therefore underestimate the entire cost associated with transcription as some transcribing takes place within detachments.

³ These figures represent an estimate of transcribed files and costs incurred by the 53 detachments (including those providing municipal policing).

⁴ The hourly estimates of time provided were noted as only recording the time spent by civilian staff in the major crimes unit transcribing and proofing the interviews. It does not account for costs incurred in other units or the time spent on officers reviewing the transcript for its veracity.

⁵ This dollar figure estimate was calculated in the same manner as described in footnote 18.

It is apparent from the table that the cost of transcribing is directly associated with the number of statements requiring transcription. The average cost to transcribe an individual statement varies from \$156.86¹⁹ to \$216.88. Although the cost of transcription ebbs and flows with respect to the number of statements requiring transcription, the overall cost of transcription has risen significantly over the six-year period. Using the most consistently reported numbers (those from the RCMP transcription unit), there has been an estimated 49 percent increase in transcription costs from 2006 (\$230,000) to 2012 (\$341,973)²⁰. When considering the estimated costs incurred by the RCMP (including all of the detachments), Saskatoon and Regina, the cost for transcription is nearly one million dollars (\$981,663 per year). This is certainly not an insignificant figure and represents a very conservative estimate (e.g., as only the direct costs were estimated).

Commentary from Participants

In addition to providing the information noted above, a number of police services provided supplementary comments to the researcher. These comments provided an explanatory framework regarding the materials they provided. Their commentary is provided in the paragraphs that follow.

The response from Corman Park revealed that transcription of statements was not a relevant issue for their service, as they do not engage in criminal investigations. Although they do have video and audio equipment in their vehicles, they rarely need to produce these materials and transcription represents a negligible cost to the service.

With the exception of the RCMP transcription unit, there appears to be no official tracking system for the time or dollars spent on transcription. There is not a consistent mechanism for transcribing interview statements between or within these agencies. For example, Saskatoon noted that, “there are a number of employees with the Service performing transcription duties for a variety of independent sections.” As noted above, the RCMP has a centralized transcription unit, although it is expected that shorter interviews be transcribed by local detachments. The RCMP observed that there is no tracking process for the transcriptions being done at the detachment level and that each detachment is “required to transcribe material

¹⁹ This figure is a very conservative estimate as it includes the approximation of costs and statements taken and transcribed at the RCMP detachments which are suggested to predominantly be 20 minutes in length or less.

²⁰ This figure recognizes the lower cost incurred by the RCMP transcription unit in 2012 compared with the previous two years.

less than 20 minutes.” Based on the estimate provided in the SACP letter (5 hours of transcription for each hour of recorded information), each 20-minute statement could nevertheless require approximately 1.5 hours to transcribe.

Summary

The increasing costs of making disclosure were consistently identified as the most significant burden on stakeholders. In order to develop a working estimate of the costs associated with disclosure, Saskatchewan police services were asked to estimate their direct transcription costs (e.g., costs of support staff or contract services to transcribe interviews) between 2006 and 2012. Because they have a centralized transcription service, the RCMP was able to provide the most accurate estimates, and they revealed that the number of requests had increased by 41% (that percentage was similar to those estimated by the other responding police services). In 2012, the cost of transcription was estimated to be about one million dollars (and that did not include four larger municipal services: Estevan, Moose Jaw, Prince Albert, or Weyburn). However, that total does not include indirect costs (e.g., supervision of staff doing the transcriptions, equipment or paper costs, or an officer’s time in reviewing the transcripts). In addition to missing data, this estimate is limited by the fact that few agencies closely track these expenditures.

Altogether, the analyses of the Saskatchewan results provided the researcher with a framework from which to solicit information about this disclosure from respondents from other provinces. It was thought that by interviewing stakeholders throughout the nation that best practices related to disclosure could be identified (e.g., innovations that increased efficiency, practices that streamlined or consolidated disclosure operations, reduced case processing time, or the use of technology such as specialized software). The results of that research are presented in the section that follows.

VII. DISCLOSURE IN OTHER CANADIAN JURISDICTIONS

As part of the research process, an investigation into current practices and policies from other jurisdictions across Canada was conducted in order to identify best practices or cost-saving measures that could be used in Saskatchewan. In performing this component of the research, two approaches were undertaken: 1) a review of a sample of provincial government websites that provided materials on disclosure-related activities, as well as 2) interviews with police and government personnel from across the country. A total of eight participants were interviewed (five telephone and three face-to-face) from other provincial jurisdictions including British Columbia, Alberta, Manitoba, Ontario, and Nova Scotia. The results of these endeavours are presented below.

Web-Based Review

The Role of the Crown Counsel

The Crown counsel has a central role in facilitating an effective and comprehensive disclosure practice. The *Stinchcombe* case was pivotal in defining the Crown's disclosure obligations. In accordance with *Stinchcombe*, the Crown is required to disclose all material (both inculpatory and exculpatory), as well as evidence it intends to use at trial (Colton, 1995; Hubbard, Brault & Welsch, 1999; Martin, 2009). However, there are certain limitations to disclosure practices which are subject to matters of privilege. All provinces and the Federal Prosecution Services mandate that disclosure must be scrupulous, forthright, timely, and just in order to uphold the accused's right for a fair trial. In order to fulfill these objectives, Crown counsel must err on the side of inclusion in determining what information is relevant and therefore required to be disclosed to the accused.

The term *relevance* refers to Crown counsel's responsibility to establish whether the information gathered could be used by the defence, as well as meeting their case. In addition, the police have a legal duty to present all relevant information in their possession to the Crown counsel. For example, Manitoba specifies that relevance be defined in relation to its utility to the defence (Government of Manitoba, 2008). If the prosecutor becomes aware of additional information disclosed by the police, the Crown must provide this to the defence (Government of Manitoba, 2008). Furthermore, all provinces are in agreement that disclosure is a continuous obligation, which remains in progress throughout the entirety of the prosecution.

Once a person has been charged, Crown counsel is typically bound to disclose to the defence the information and indictment, as well as the summary of the offence and statements or reports obtained by the investigative agency or Crown counsel. Statements are permissible in a variety of forms, such as: oral statement; written notes; recording of an oral statement; a formal report or written statement; an audio tape recording; a videotaped recording; or a transcript of an audio taped or videotaped recording. Disclosure that is conducted improperly can have deleterious consequences on the justice system, causing mistrials, retrials, stays of proceedings, wrongful convictions, and lawsuits.

As mentioned, all provinces unanimously acknowledged that disclosure restrictions and or delays may exist with respect to specific exceptions, such as complying with rules of privilege and the protection of witnesses from harassment, intimidation and harm. According to the *Ontario Crown Policy Manual*, that tension may exist between the duty to disclose and the simultaneous duty to uphold privilege considerations (Government of Ontario, 2005). However, to ensure accountability, all decisions made by the Crown prosecutor with regard to withholding information are reviewable by the trial judge.

According to the practices in Newfoundland, to reduce some of the challenges or barriers that exist with respect to upholding the duty to disclose, Crown attorneys may assist and support in disclosure management by providing advice on the following: 1) the general obligations to disclose as set out in case law; 2) the structure of the disclosure process and strategy to ensure that the materials generated and collected by the investigators are in a form that meets prosecution needs and legal requirements; 3) issues of privilege (such as police informer privilege) and editing; and 4) the scope of disclosure that is required in a particular case (Government of Newfoundland and Labrador, 2007). Prince Edward Island also identified a number of ways in which the advice of prosecutors can be particularly valuable, specifically by clarifying the legalities around the constitutionality of certain investigative practices (i.e., grounds for obtaining a search warrant, the legality of warrantless searches, potential *Charter* issues and the admissibility of evidence, remand, or voir dices) (Government of Prince Edward Island, 2009).

Prince Edward Island employs a nearly identical approach to Newfoundland in its efforts to promote efficiency throughout the disclosure process. In routine cases, the issue of disclosure is most often addressed by Crown prosecutors after a charge has been laid or the investigation

has been completed. However, in complex cases where disclosure issues are to be addressed on an ongoing basis during the course of the investigation, counsel is required to advise investigators on matters pertinent to issues of disclosure and the preparation of the necessary materials (Government of Prince Edward Island, 2009). It is thought that by having these mechanisms in place to offer guidance throughout the disclosure process, the length of time, cost, errors, oversight, and mismanagement will be reduced. Furthermore, in an effort to streamline the disclosure process, prosecutors are encouraged to develop better ways of effecting disclosure, as their role in relation to disclosure practices are continuously evolving.

The Roles of Police (Investigating Agency)

The police play an integral role in the disclosure process. Namely, they are required to submit all materials relevant to a charge to Crown counsel in order to generate a timely and full disclosure package for the defence. Therefore, it is critical that the investigator is mindful of the Crown's duty to disclose all relevant and factual information. For instance, New Brunswick and Nova Scotia stipulate that the investigator must be forthright in ensuring that the prosecutor is aware of any confidentiality concerns (Government of Nova Scotia, 2011a; Government of New Brunswick, 2003). If there is any indication that the investigating agency possesses relevant information that has not been forwarded, inquiries will be made to ensure that all information is properly disclosed. In terms of the process of disclosure, most provinces deem electronic disclosure to be the preferred method for the transmission of investigative material from police to Crown counsel as long it can be accomplished in a manner consistent with constitutional obligations.

Newfoundland methodically identifies what information the police must provide to the Crown. The information includes the following: any conviction or finding of guilt under the *Canadian Criminal Code* or the *Controlled Drugs and Substances Act* for which a pardon has not been granted; any outstanding charges under the *Canadian Criminal Code* or the *Controlled Drugs and Substances Act*; any conviction or finding of guilt under any other federal or provincial statute; any finding of guilt or misconduct after a hearing under the *Royal Newfoundland Constabulary Act, 1992*, or its predecessor Act, the *Police Act*, or its predecessor Act, or the *Royal Canadian Mounted Police Act*, or its predecessor Act, that have not been expunged pursuant to section 22 of the *Police Service Regulations*; any current charge of misconduct under the *Royal Newfoundland Constabulary Act, 1992*, or the *Police Act*, or the

Royal Canadian Mounted Police Act for which a Notice of Hearing has been issued (Government of Newfoundland and Labrador, 2007). Furthermore, prosecutors have a responsibility to request the above information if it is not provided by the police agency. Finally, if the Crown is aware of any similar information that could be relevant to the case of the accused, they have an obligation to request it from the police agency. Prince Edward Island specifies that prosecutors should make investigators informed of their obligations particularly where they may be inexperienced or otherwise employed by an agency or the government (Government of Prince Edward Island, 2009).

Crown and Police Cooperation

Crown and police cooperation is essential to affecting an efficient disclosure process, as this undertaking is facilitated through a joint effort between the two parties. The police may seek advice from prosecutors about legal issues that arise during the investigation. Likewise, Crown counsel may ask for the assistance of police in conducting further investigations and in obtaining supplementary information. However, the *Ontario Crown Policy Manual* is clear in stating that despite Crown counsel and the police agencies' requirement to work in partnership, both parties have distinct and separate responsibilities (Government of Ontario, 2005). Likewise, Prince Edward Island emphasizes the importance of cooperation between these agencies as it helps to reduce the expenditure of Crown resources at the prosecution stage (Government of Prince Edward Island, 2009).

Notably, Nova Scotia (2011a) distinguished one of the prosecutor's core functions as providing advice to the police. The police and Crown's relationship is defined by mutual respect and reliance, as described at length in the *Royal Commission on the Donald Marshall, Jr. Prosecution* (Hickman et. al, 1989). To make improvements to the disclosure process, the Federal Prosecution Services has identified that ongoing education regarding police and Crown disclosure obligations should be a prominent part of educational training (Department of Justice, Canada 2004a).

In Alberta, the police first prepare a prosecution package, which is forwarded to the prosecutor's office; with the exception of Edmonton, all Crown prosecutors create disclosure packages (Government of Alberta, 2010). The Edmonton Crown prosecutors, by contrast, create disclosure packages at the request of the accused or their counsel. In order to forge successful working relationships between the Crown and the police, formal memorandums of understanding

(MOU) have been developed and agreed upon between these parties. For example, in British Columbia, the Disclosure Subcommittee and Crown Police Liaison Committee prepared an MOU on disclosure between the Provincial Prosecution Service and B.C. police services specifying the responsibilities of each party (Government of British Columbia, 2012b). Second, in Ontario the *Crown Policy Manual* stipulates the guidelines of the relationship between the Crown and police (Government of Ontario, 2005). And third, in Nova Scotia there is a requirement to document the circumstances in which advice was provided from the Crown to the police in a form titled, *Privileged and Confidential, Nova Scotia Prosecution Service, Police Advice Form*. This form is intended to reduce misunderstandings between Crown prosecutors and the police by clearly identifying and defining roles and responsibilities (Government of Nova Scotia, 2011a).

In addition to MOUs, disclosure checklists enable both parties to monitor the timing and content of disclosure. In British Columbia, for both the police and the Crown, disclosure checklists for all regulatory and criminal investigations include the following: 1) written report/narrative; 2) witness sheets that identify all witnesses and provide contact information for them, including email addresses if available; 3) exhibit reports and police notes from officer's notebook; 4) continuation reports; 5) warrants, judicial authorizations, or production orders and their supporting material; 6) scale drawings and/or accident reports; 7) witness statements; 8) statements of the accused; 9) up to date criminal record of the accused and any co-accused; 10) documentary evidence (including financial/business records, ledgers, institution file notes, cheques); 11) medical records/notes; 12) post-examination medical reports; 13) police forensic lab reports and photographs; 14) audio and video recorded statements from witnesses and/or the accused; 15) recordings made at roadside in vehicles during the execution of a search warrant; 17) recordings made as part of a re-enactment; 18) recordings made at the police detachment; 19) police surveillance videos; 20) crime scene videos; 21) security or other videos created in the police detachment, stores and/or dwelling homes; 22) audio recordings produced by witnesses (answering machines, recorded conversations); 23) copies of any photo line-up and related identification ballots, and their associated audio or video recordings; 24) copies of exhibits (both documentary and non-documentary); 25) wiretap transcripts, recordings of intercepted conversations and summaries of intercepts; 26) criminal record of any witnesses; and, 27) subject

to the terms of existing police policy or protocol, disciplinary records and criminal investigation files as may be required by *R. v. McNeil* (Government of British Columbia, 2012c).

Disclosure to the Defence

Broadly stated, the defence is entitled to the disclosure of all evidence, both inculpatory and exculpatory. As previously noted, certain exceptions to disclosure exist and they are as follows: material that is assumed to be clearly irrelevant; material subject to legal privilege; and, material that is statutorily prohibited from disclosure or where there is a realistic possibility that disclosure will jeopardize either witness safety or an ongoing investigation. Despite these exceptions, the defence will commonly be made aware of the existence of such material to decide whether or not to make an application for disclosure in court.

In British Columbia, the Criminal Justice Branch's ability to fulfill its disclosure obligation to the defence is dependent on the completeness of the police disclosure package. The *narrative* is the central document that enables the Criminal Justice Branch to establish whether it meets the defined standard for charge assessment (Government of British Columbia, 2007). Using this narrative, investigators present their preliminary theories on the circumstances surrounding the alleged offence. The narrative is vital to the cases of both the prosecution and the defence. According to this framework, the components of the narrative should include the following: brief overview of the case; background of the accused; ongoing and further investigation; list of attachments; and, items not included as attachments, but available for inspection, as well as bail comments (Government of British Columbia, 2007).

In Alberta, by contrast, Crown counsel does not have an obligation to disclose to the defence any contents of the investigative agency file. However, if defence should make a request, the Crown is then obligated to disclose to the defence the specific file, assuming it is not subject to privilege and the material is relevant.

Manitoba specifies that upon a request from the defence for disclosure, they must be provided with the following: 1) a copy of the charging document; 2) a summary of the circumstances of the offence; 3) a copy of the accused's criminal record; 4) a copy of the accused's driving record, where relevant to the specific charges before the Court; 5) statements of the accused; 6) written or verbal witness statements; 7) police notes; 8) copies of forensic, laboratory and other scientific reports should be disclosed as soon as they become available; 9) copies of all documents, photographs, films, audio or videotapes of anything other than a

statement of a person; 10) copies of criminal records of co-accused(s); 11) copy of any search warrant and the information in support; 12) particulars of any similar fact evidence that the Crown intends to rely on at trial; 13) particulars respecting any identification evidence used outside of court to identify the accused, and any information that may bear on the reliability of identification evidence relied on by the Crown; 14) any additional information received from a Crown witness during an interview conducted by a Crown prosecutor in preparation for trial, such as information that is inconsistent with any prior statements, recantations, drawings and any additional details which supplement a prior statement(s), in which there is a reasonable possibility that the information is useful to the defence; 15) interception of private communications (wiretaps); 16) all benefits requested, discussed, or provided or intended to be provided for any central witness, at any time, in relation to that central witness, should be recorded and disclosed; 17) copies of the notes of all police officers and corrections authorities who made, or were present during, any promises of benefits to, any negotiations respecting benefits with, or any benefits sought by the witness, should also be disclosed; 18) any other evidence that may assist the Defence; 19) additional material, if requested by the defence, may be disclosed at the discretion of the Crown, including copies of criminal records of witnesses; 19) videotaped witness statements of sexual-abuse/child-abuse victims (Government of Manitoba, 2008).

New Brunswick utilizes a disclosure checklist which is provided to the defence unless it contains privileged information. As soon as practicable, upon request, the Crown Attorney will make available to the defence the following materials: 1) a copy of, or an opportunity to copy, the information or indictment; 2) a copy of, or an opportunity to copy, a summary of the case; 3) a copy of, or an opportunity to copy, all written statements, and in case of verbal statements, a verbatim account of the statement or copies of notes or an audio or video recording of the statement whether favourable to the accused/defendant or not; 4) a copy of, or an opportunity to copy, the criminal record of the accused/defendant; 5) copies of, or an opportunity to copy, all written statements made by persons who have provided relevant information to the investigator, in the case of verbal statements, the investigators' notes or, where there are no notes, a summary prepared by the investigating agency of the relevant information and the name, address and occupation of the person; 6) where feasible, a copy of any audio or video recording of a witness' statement; 7) subject to the provisions of the *Youth Criminal Justice Act*, particulars (offence,

date and disposition) of the criminal record of an accomplice or an alleged accomplice, whether that person has been charged or not; 8) subject to the provisions of the *Youth Criminal Justice Act*, particulars of any information known to the Crown which the defence may legally use to impeach the credibility of a Crown witness, including the criminal record of a Crown witness where the defence requests this information and the record is relevant to an issue in the case or has probative value with respect to the credibility of the witness; 9) subject to the provisions of the *Youth Criminal Justice Act*, the criminal record of a potential defence witness where the defence requests this information; 10) copies of, or an opportunity to copy, all medical, laboratory and other expert reports in the possession of the Crown which relate to the offence, except to the extent they may contain privileged information; 11) access to any potential exhibits or other physical evidence in the possession of the Crown for the purpose of inspection; 12) a copy of, or an opportunity to copy, any search warrant and information to obtain relied on by the Crown; 13) if intercepted private communications will be tendered, a copy of the judicial authorization under which the private communications were intercepted; 14) access to the log book of interceptions; access to audio recordings made pursuant to the authorization; 15) and a copy of the transcript of the interceptions made pursuant to the authorization when it is available; 16) a copy of, or an opportunity to copy, any other document, or portion of a document contained in the investigation file and any notes of the investigator which contain the factual observations of investigators pertaining to the investigation of the alleged offence; 17) and notice of any evidence which has become lost or destroyed and a summary of the circumstances surrounding such loss or destruction prepared by the investigating agency (Government of Nova Scotia, 2011a).

In Newfoundland, once a request has been received, Crown attorneys are required to, as soon as reasonably practicable, provide disclosure. In the majority of cases, this means that the defence will be given at minimum the following: 1) charging document; 2) particulars of the offence; 3) witness statements; 4) audio or video evidence statements by witnesses; 5) statements by the accused; 6) accused's criminal record; 7) expert witness reports; 8) documentary and other evidence; 9) exhibits; 10) search warrants; 11) authorizations to intercept private communications; 12) similar fact evidence; 13) identification evidence; 14) witnesses' criminal record; 15) police misconduct materials; 16) material relevant to the case-in-chief; 17)

impeachment material; 18) information obtained during witness interviews; 19) and other material (Government of Newfoundland and Labrador, 2007).

With respect to the procedures employed in Prince Edward Island, upon receiving a request, Crown attorneys shall, as soon as reasonably practicable provide to the defence the following: 1) charging document; 2) particulars of the offence; 3) witness statements; 4) audio or video evidence statements by witnesses; 5) statements by the accused; 6) accused's criminal record; 7) expert witness reports; 8) documentary and other evidence; 9) exhibits; 10) search warrants; 11) authorizations to intercept private communications; 12) similar fact evidence; 13) identification evidence; 14) witnesses' criminal records; 15) material relevant to the case-in-chief; 16) impeachment material; 17) information obtained during witness interviews; 18) other material (i.e., additional disclosure beyond that outlined may be made at the discretion of the Crown Attorney) (Government of Prince Edward Island, 2009).

Timing of Disclosure

Prompt disclosure is integral to maintaining the effectiveness and fairness of the criminal justice system by reducing undue delays. With respect to initial disclosure, Alberta (2010) supported the notion that the prosecution's duty to disclose is routinely invoked by a request from the accused's counsel. Therefore, Crown counsel typically assumes that defence counsel will request disclosure when necessary. New Brunswick (2003) specified that initial disclosure should occur prior to the accused being summoned for election or plea. Manitoba (2008) shares a similar approach to New Brunswick in that disclosure should occur before the accused is called upon to elect the mode of trial or to plead. As a result, the prosecutor is not obligated to provide any disclosure prior to a charge being laid. Nova Scotia (2011a) also adheres to the approach that the Crown is not obligated to provide any disclosure prior to a charge being laid. However, once a charge has been laid, initial disclosure should occur before the accused is called upon to elect the mode of trial or to plea. Related to this, if the Crown intends to refer to the criminal history of the accused at a bail hearing, that information must be disclosed to the defence prior to the bail hearing. Last, the Federal Prosecution Services supports the notion that disclosure by the defence should occur within a reasonable time; however, the timing of disclosure ultimately remains within the discretion of the prosecutor (Department of Justice, Canada, 2004a).

Following initial disclosure, the prosecution's duty to disclose is regarded as an ongoing responsibility. More specifically, the standard understanding of disclosure is that the duty begins

after the charge, continues through the time of trial and beyond until the expiration of any applicable appeal limitation period. There is, however, some interprovincial variation. Saskatchewan and Manitoba both view disclosure as a continuing obligation on the Crown, and if new evidence becomes known by the Crown that may be relevant to the accused's ability to make full answer and defence, it should be disclosed in a timely fashion (Government of Manitoba, 2008). By contrast, in Nova Scotia, disclosure should continuously be made even after any appeals have been decided or the time for appealing has lapsed (Government of Nova Scotia, 2009). Additionally, any information that the investigator or Crown prosecutor becomes aware of which raises uncertainty regarding the guilt of the accused must be disclosed.

In terms of needing to provide disclosure packages more than once (i.e., the initial disclosure package has been lost or inadvertently destroyed or damaged), after disclosure has been made, the province of Alberta acknowledges that the prosecutor has discretion whether or not to provide materials to the defence a second time before, or during, the trial (Government of Alberta, 2010). There is no legal obligation requiring the Crown to provide second or subsequent copies of information, or materials previously disclosed to the defence. However, in cases where the defence makes known that the disclosure materials were unwittingly lost or destroyed, Crown counsel is strongly encouraged to exercise discretion in favour of repeated disclosure. In these circumstances, the prosecutor maintains certain discretionary recourse measures; namely, seeking recovery to minimize the cost of reproducing disclosure packages to the prosecution.

Delay of Disclosure

Despite the emphasis on timely disclosure, Crown prosecutors have the ability to delay disclosure. This discretion is typically limited to instances where justifiable concern exists regarding the safety and security of persons who have provided information, or where early disclosure might hinder the completion of an investigation (Government of New Brunswick, 2003; Government of Manitoba, 2008; Government of Prince Edward Island, 2009; Government of Newfoundland and Labrador, 2010). However, Prince Edward Island stipulated that as soon as the justification for the delay in disclosure no longer exists, the Crown must disclose the information. Additionally, the deferred disclosure should be brought to the defence's attention, without compromising the reason for the deferment (Government of Prince Edward Island, 2009). Manitoba adheres to the notion that any decision to limit or delay disclosure should be reviewed by the supervising or senior prosecutor (Government of Manitoba, 2008). Similar to

Manitoba, in Nova Scotia, a prosecutor who intends to delay disclosure must receive the written approval of the Chief Crown prosecutor or designate appointed by the Director of Public Prosecutions (Government of Nova Scotia, 2009).

In New Brunswick prior to the Crown postponing disclosure, the prosecutor must carry out a number of procedures. First, the prosecutor must inform the Regional Crown prosecutor about the information being withheld, and subsequently, the reason for delaying disclosure (Government of New Brunswick, 2003). After obtaining approval to delay disclosure, the prosecutor is required to notify the defence in writing of the “general nature of the undisclosed information” (Government of New Brunswick, 2003, p. 7). Permanent non-disclosure is only justified in circumstance where, through court orders or on judicial review, a court approves the Crown's discretion not to disclose.

Exceptions and Limiting of Disclosure

Although the scope of disclosure is extensive, certain exceptions to full disclosure exist. For instance, Nova Scotia and Newfoundland and several other provinces, mandate that disclosure may be limited to the extent necessary to comply with the rules of privilege, including informer identity privilege; to prevent the endangerment of the life or safety of witnesses, or their intimidation or harassment; or to prevent other interference with the administration of justice (Government of Newfoundland & Labrador, 2010; Government of Nova Scotia, 2011b).

For example, in Saskatchewan, there are restrictions with respect to the disclosure of child pornography. This type of subject matter involves such “extreme personal privacy interests and is so vulnerable to misuse that such material (i.e., photographs and videos) merit special consideration and protection” (Government of Saskatchewan, n.d.). As a result, there are numerous controls that have been implemented. For example, all images relevant to opinion files and/or pending court cases are to be kept by the police. “The police provide the prosecutor with a list of materials, which can and should be disclosed, but not copies of the material itself. Furthermore, complete reports with images remain at the police station” (Government of Saskatchewan, n.d.). In order to view the material, both prosecution and the defence counsel must attend the station or detachment. Moreover, if a prosecutor should require the material for court, an officer must accompany it. Other exceptions to disclosure exist with regard to police investigation materials related to third parties. Namely, the public prosecutions division is not to

divulge the criminal records of witnesses to any person except the defence counsel upon request (Government of Saskatchewan, n.d.).

In Manitoba, disclosure limitations exist with respect to “*work product privilege*,” which “protects information or documents obtained or prepared for the purpose of litigation” (Government of Manitoba, 2008, p. 8). More specifically, work product privilege includes: interdepartmental memos between Crown prosecutors; correspondence to and from the police, excluding replies to Crown requests for pre-charge information; Canadian Police Information Centre (CPIC) print-outs such as those dealing with warrants, excluding those that only pertain to court orders (e.g. the court orders to which the accused was subject); Crown legal briefs; Crown instructions to police; and Crown or police opinions about the case, including opinions about the accused, witnesses or the strength of the case (Government of Manitoba, 2008).

Prince Edward Island also recognizes that the Crown’s obligation to disclose is not absolute. However, the withholding of information relevant to the defence needs to be justified “on the basis of the existence of a legal privilege” (Government of Prince Edward Island, 2009, p. 7). In cases where the prosecutor opts not to disclose information, defence counsel must be made aware of the decision, as well as the reasoning behind the decision (i.e., type of privilege alleged), and the basic nature of the information. Should these circumstances arise, counsel is to exercise sound judgment, and refer to the Director to determine how to proceed on an individual case basis (Government of Prince Edward Island, 2009).

Furthermore, Prince Edward Island upholds the principle that disclosure is not required that might lead to the identification of a confidential police informer or confidential investigative techniques (Government of Prince Edward Island, 2009). The one exception to the police informer privilege is if there is information needed to establish the innocence of the accused. Additionally, information that may impair an ongoing police investigation should not be disclosed. While the Crown can delay disclosure in accordance with this principle, the delay cannot be indefinite. Other exceptions routinely protected from disclosure include cabinet confidences; international relations and national security; and, solicitor-client privilege (Government of Prince Edward Island, 2009).

In New Brunswick, the Crown has the discretion (reviewable by the trial judge) to withhold information that is “irrelevant or may be subject to privilege” (Government of New Brunswick, 2003, p. 4). The prosecutor may justify its refusal to disclose irrelevant information

“on the basis that there is no reasonable possibility that withholding it will impair the constitutional right of the accused to make full answer and defence” (Government of New Brunswick, 2003, p. 2). The release or withholding of information in particular situations must be done on a case-by-case basis, considering relevancy, privilege, legislation, and case law. To maintain consistency, prosecutors are to consult with their Regional Crown prosecutor when a complex disclosure issue arises (Government of New Brunswick, 2003).

Preferred Method of Disclosure

As stated above, electronic disclosure is generally preferred, especially in complex investigations. More specifically, in British Columbia the Police-Crown MOU (Government of British Columbia, 2012c), formally asserts that disclosure in electronic format is a preferred method of disclosure. The MOU also holds that although the method of disclosure may be updated, the essential responsibilities of the parties remain the same. In other words, the electronic report prepared for Crown counsel must meet the same “standards of organization required of those provided in hardcopy” (Government of British Columbia, 2012c, p. 10). One of the purposes of the MOU is to make certain that electronic disclosure is presented in a methodical manner which can be used to make charge approval decisions, address bail, prepare disclosure and prepare for trial. The accused, defence counsel, police and prosecutor have varying software, hardware and computer access and expertise, however, all must be able to open and use the disclosure. It is noted, that this may include the utilization of a secure eDisclosure device provided by Corrections for remanded or sentenced inmates. It is also acknowledged that early communication relevant to the preparation of electronic files and disclosure format is beneficial for both the police and Crown counsel (Government of British Columbia, 2012b).

According to the Government of British Columbia (2012c, p. 2), The MOU is not intended to change the obligation of police to transfer material from PRIME²¹ to JUSTIN²² through the normal processes in place. Accordingly, it is not the purpose of the MOU to “require police to resubmit materials previously delivered through the PRIME – JUSTIN Interface, as long as the material delivered is organized and can be properly referenced to an appropriate

²¹ PRIME – Police Record Information Management Environment

²² JUSTIN – Justice Information System

RTCC²³,” (Cowper, 2012, p. 2). Disclosure of the information and indictment, summary of the offence(s), criminal record(s), scientific report(s), search warrant(s) and authorization(s) are accomplished by providing the defence with a paper or electronic copy. Crown counsel reserves the right to determine whether or not to provide their copies of these materials to the defence so that they can make their own copies (Government of British Columbia, 2012b).

Similar to British Columbia, Alberta's disclosure process is now automated. Occurrence Management systems and scanners are used to produce reports and documents in an electronic format, which are subsequently amalgamated into the prosecution's package. The disclosure process in Edmonton operates in a distinctive manner. As detailed in the Alberta Justice Disclosure Process and Alberta Justice Disclosure Application (AJDA) Documentation (Government of Alberta, 2010), first, case file documents are received by the Disclosure Unit. Subsequently, a barcode label with the JOIN²⁴ file number and the first accused name is created. The case file documents are then scanned by either Alberta Learning or the Disclosure Unit. If scanned by Alberta Learning, the file documents are saved in a single electronic file as a portable document format (PDF) file. Alberta Learning sends the PDF file to the Alberta Justice server at the Neil Crawford Centre via a secure file transfer protocol (FTPS), where it is stored in a staging folder in the Disclosure Unit. The Disclosure Unit staff scans and saves these documents into a single PDF file. That file is then saved to a staging folder on the Alberta Justice server where it is read and placed in a folder for original files. If disclosure is required, a copy of the original file is saved in a folder for files to be vetted. The completed vetted file is stored, reviewed and documented using BERT²⁵. Once entry into BERT is accomplished, the completed file is moved to a folder for disclosure packages (Government of Alberta, 2010, p. 5).

In Manitoba, unless defence counsel requests disclosure in paper form, the Crown is permitted to provide defence counsel copies of documents in either a paper format (photocopies) or electronic format (e.g. by CD-ROM). However, in circumstances where the accused is unrepresented, the prosecutor generally provides copies of the documents in a paper form. Due to the need for full disclosure, it is imperative that the Crown utilizes an indexing of disclosed materials, including those pending, received and sent to the defence. The Crown provides a

²³ RTCC – Reports to Crown Counsel

²⁴ JOIN – Justice Online Information Network

²⁵ BERT is a software program developed by Alberta Justice, using Microsoft Access 2000, to “facilitate capture of disclosure package inventory information” (Government of Alberta, 2010, p. 13).

complete and accurate index of the contents of these materials to the defence. The defence is required to prepare written acknowledgement (or other confirmation) of the receipt of these materials. In complex cases, the disclosure process can become cumbersome; therefore, the investigative agency and police are encouraged to establish a common strategy for disclosure protocol, to promote effective and cost-efficient management of these materials (Government of Manitoba, 2008).

In Manitoba, Newfoundland and Prince Edward Island, Crown prosecutors provide the defence with copies of documents that are within the scope of *basic disclosure* materials, in either paper format (e.g., photocopies) or an electronic format (e.g., by CD-ROM) (Government of Prince Edward Island, 2009; Government of Manitoba, 2008; Government of Newfoundland and Labrador, 2010).

Cost of Disclosure

Although disclosure must be performed in a scrupulous and comprehensive manner, it is the desire of all parties (police, Crown, and defence) that this process can be conducted in a cost-effective manner. The provinces and Federal Prosecution Services each have their own strategies to ensure that disclosure is carried out in an efficient manner.

In British Columbia, the costs associated with disclosure are shared between police and the Criminal Justice Branch (CJB). The CJB acknowledges that electronic disclosure is more cost-effective for police. Therefore, the CJB claims that cases where hard copies are required they are limited to ones given serious consideration. In cases where the CJB requests the hard copy or copies from police, the CJB will pay for the production cost (Government of British Columbia, 2012c).

In Newfoundland and Prince Edward Island, an accused person (or his or her counsel) does not pay a fee for *basic disclosure* materials. As such, each accused is entitled to one copy of *basic disclosure* materials. However, if an accused person requests an additional copy or copies (e.g., because the original materials have been lost), the accused may be charged a fee for this service (Government of Prince Edward Island, 2009). Costs associated with the preparation of copies of materials that are not part of *basic disclosure*, (e.g., photographs) which are not intended to be introduced as exhibits by prosecutors, are considered on a case-by-case basis. In instances where requests involving substantial numbers of documents are made, it is often

deemed appropriate to shift the resource burden to the defence (and the accused) (Government of Newfoundland and Labrador, 2010; Government of Prince Edward Island, 2009).

Efficiency Boosting Strategies and Initiatives

As disclosure is recognized as a continuously evolving practice, identifying and developing innovative strategies and initiatives that are intended to streamline or enhance the process are of utmost importance. The following paragraphs highlight several of the new approaches implemented by the provinces and the Federal Prosecution Services.

British Columbia has made efforts to improve the use of information technology through implementing JUSTIN, PRIME and CORNET²⁶. The province has had a functioning Case Management System since the early 1990s. The ability of these three systems to work together is unique in Canada. This management information system allows for a comprehensive cross-referenced view of operational data, with information about clients, cases and staff. This management information can then be used for research and evaluation purposes, for the entire justice system (Government of British Columbia, 2012b).

Second, over the last several years, the British Columbia Ministry of Justice has been working in cooperation with the Complex Systems Modeling group at Simon Fraser University to develop a simulation model for the justice system. The purpose of the model is to 1) develop strategies to better allocate resources, and 2) project the impact of policy and legislative changes, prior to implementation (Government of British Columbia, 2012b).

In Alberta, the Crown developed a *file ownership* project which is based on a model originally developed by the Manitoba Provincial Court system. The file ownership program utilizes a vertical file management concept. Using this approach, a file is assigned to one Crown prosecutor who is then responsible for that file throughout the entirety of the case (Government of Alberta, 2012). This is intended to result in a more efficient assignment of cases, reduce the duplication of work, facilitate earlier communication between the Crown and defence, promote earlier case resolution, as well as better utilize court time (Government of Alberta, 2010). Also, BERT was developed by Alberta Justice to provide a means of systematically assembling, organizing, recording and reporting disclosure packages. The latest version of BERT has only

²⁶ CORNET – Corrections Network System

been implemented in the Edmonton and Calgary main disclosure centres (Government of Alberta, 2010).

In Manitoba, it is acknowledged that the specific procedures for providing disclosure vary throughout the province. The method for disclosure is determined by the local Crown prosecutor in accordance with their resources and the needs of the local defence. As a result, changes in legislation or police reporting and investigative procedures require frequent revision of these processes. Therefore, ongoing consultation with the supervising senior Crown Attorney with regard to disclosure practices is required. Prompt disclosure of the Crown's case can aid in making for “more efficient use of court time by resolving non-contentious and time-consuming issues in advance of the trial and encouraging guilty pleas to appropriate charges early in the proceedings” (Government of Manitoba, 2008 p. 12).

Federal prosecutors participate in outreach initiatives with local justice partners to improve the delivery of services. Ongoing training is provided to police services relating to search and seizure issues, wiretap law, and disclosure obligations (Department of Justice, Canada, 2004a). These outreach and training initiatives are intended to make the process of disclosure more efficient, cost-effective and to decrease problems.

Summary

Given that all provincial governments are also grappling with the issue of ensuring comprehensive, timely and cost-efficient access to disclosure it was thought that their practices might be informative for Saskatchewan. In order to carry out that research, two strategies were undertaken. First, an internet search was conducted of all provincial Ministry of Justice websites to collect information, including content that was published online as well as policy manuals and reports. Second, interviews were conducted with police and court personnel from across the country.

The web-based review revealed that there was some interprovincial variation when it came to the roles of the Crown counsel, police and defence. Prosecution branches in different provinces interpreted the responsibility to disclose in a somewhat different manner (with respect to the scope, timing and comprehensiveness of the materials shared with the defence) although one consistent safeguard for the accused was review by senior prosecutors or trial judge. When it came to the investigative agency, most provinces have clear guidelines on what materials will be shared in the disclosure process and several use disclosure checklists. Exceptions to full or

timely disclosure have an impact upon the administration of justice and this review showed that every jurisdiction had some mechanism in place to ensure that the accused was afforded the ability to make a full defence (e.g., Judicial review or case scrutiny by senior prosecutors in cases where the Crown did not disclose all materials).

A review of the information retrieved from the Ministries of Justice revealed that full disclosure was the end product of a healthy relationship between all parties involved in the process. In order to enhance understanding between these parties, some prosecution services—such as the Federal Prosecution Services—deliver disclosure specific training to the police. Some Ministries of Justice further formalized these relationships (and the expectations for both parties) through Memoranda of Understanding.

With respect to increasing cost-efficiency, the preferred method of disclosure for most police services is providing electronic rather than paper materials to the Crown. In Alberta, for example, all disclosure packages are posted on an online server dedicated for that purpose. In order to improve efficiency and access to information such as disclosure, both British Columbia and Alberta have integrated their justice information management services. There was, however, no single approach to cost sharing, and in some cases costs were shared, or borne by one party.

Interviews: Out of Province participants

With the assistance of a number of gatekeepers as well as personal exploration for potential research participants, this aspect of the research process resulted in five telephone and three face-to-face interviews with participants from other provincial jurisdictions including British Columbia, Alberta, Manitoba, Ontario, and Nova Scotia. The majority of these individuals were representatives of their province's equivalent of Saskatchewan's Ministry of Justice or were engaged in policing. These interviews, while employing many of the same questions posed to the Saskatchewan participants, were more focused toward the current practices that the participant's provinces were engaged in. The results, therefore, while mirroring in many respects the basic themes and hence organizing themes as derived in the analysis of the Saskatchewan interviews, did differ in some respects as the process continues to provide for the emergence of different issues and themes. The interviews lasted between approximately 40 and 90 minutes, the majority of which were approximately one hour in length. The interviews were digitally recorded and then transcribed. The transcribed interview data resulted in approximately 160 pages of transcript,

averaging about 20 pages per interview. Furthermore, when participants referred to specific documents in the interview, the researcher attempted to access copies of these materials.

Results

Following Attride-Stirling's (2001) thematic network analytical process the interviews were coded using the coding framework discussed above, basic themes were identified and organized into organizing themes, and a global theme emerged that represented the confluence of the organizing themes into a coherent concluding thematic map. It is important to note that the analysis of the interviews from participants outside of the province began with the utilization of the coding framework that resulted from the analysis of the interviews with the participants within the province. The discussion of the results proceeds with the provision and discussion of each of the organizing themes and the basic themes from which they were derived. Following that is the presentation and explanation of the global themes.

Organizing Theme 1: Legal Requirements and Issues

Table 8 provides a summary of the codes arising in the analytic process by listing the issues discussed, the basic themes that emerged from the analysis, and the more overarching organizing theme. Evidence, in the form of direct quotes from participants is provided with the discussion of each issue identified as a basic theme.

Table 8: Organizing Theme 1: Legal Requirements and Issues		
Issues Discussed	Basic Theme	Organizing Theme
<i>Crown and Police Roles</i>	Reasons for Disclosure	LEGAL REQUIREMENTS & ISSUES
<i>Relevance</i>	General Requirements & Issues	
<i>“In Crown’s Possession”</i>		
<i>Exceptions</i>		
<i>Timing</i>		
<i>Tool for the defence</i>		
<i>Unrepresented Accused</i>	Trust Conditions	
<i>Special Cases</i>		
<i>To Whom From Whom</i>	Disclosure Processes	
<i>Follow-up Requests</i>		
<i>Labour Intensive</i>	Cost	
<i>Court Time</i>		
<i>Reasons for Delay</i>		
<i>Effect on Cases</i>		
<i>Better Quality Disclosure Packages</i>	Possible Solutions	
<i>Disclosure-Specific Training</i>		

Basic Theme 1: Reasons for Disclosure

As a consequence of the different focus of the questions posed to the external participants, the basic theme of reasons for disclosure emerged out of a single issue raised by one participant. The other participants, while possibly alluding to some of the reasons for disclosure did not address them in specific detail.

Crown and Police Roles

The clarification of the roles of police and Crown with respect to disclosure obligations stemming from the *Stinchcombe* case (as well as others) created the constitutional obligation for disclosure.

I mean, the reality is that the police and the Crowns have a combined constitutional obligation to disclose in accordance with the *Stinchcombe* threshold. So that is our responsibility. And the court only properly under that framework, only comes in when an issue arises with respect to disclosure, namely an application is made or an issue arises from the defence perspective that they're not getting disclosure. And the court is called in to resolve that dispute and make a determination about whether or not that's correct and if so, what the remedy is. (P32)

Summary

Within this basic theme only one issue was raised, that of the Crown and police roles as defined by the case law originating with the *Stinchcombe* decision. The police and Crown, though theoretically distinct and independent entities, are one and the same when it comes to first-party disclosure obligations.

Basic Theme 2: General Requirements & Issues

As participants were addressing the ways that their respective provincial jurisdictions approached some of the issues surrounding disclosure, they also provided information regarding the legal requirements underlying what had driven the arrived-at processes. Given the nature of the various rulings, it is not surprising that the external participants discussed many of the same issues reported in the Saskatchewan context. Other than not discussing the idea that disclosure was ongoing, the same issues emerged in the interviews with those outside of Saskatchewan as those within.

Relevance

The determination of what is and is not considered relevant within the scope of required disclosure begins with all "fruits of the investigation."

I always start out from the presumption, and when I am talking with junior Crowns as well, that we have to disclose everything, all the fruits of the investigation. (P30)

The practice of prosecutorial discretion, as well as the recognition that when discretion is employed it can be subject to judicial challenge, was reported by participants.

If it's completely irrelevant, we're not giving you this information. There's lots of that where they're simply fishing expeditions for more information that we think are completely irrelevant. I often lecture the Crowns on them not being a flow-through for those requests; that they have to assess [the requests] on the principle of relevance. Is it relevant what they're asking for? (P30)

It was additionally reported that judicial review is once again noted as a balancing act, balancing the right to make full answer and defence with that of public safety.

I [also] indicated that while certainly defence can bring a motion to be considered, that [the Judge would] have to weigh the public safety and the relevance and how important are these facts in this case. Is it really—or is it just a fishing expedition? (P30)

“In Crown’s possession”

The requests for third-party evidence from defence counsel, oftentimes not in the police or Crown’s possession, were another issue raised by the interviewees. It was identified that so-called *McNeil* requests were largely considered obligatory.

The judge, and this is provincial court level, but he made some comments with respect to the Crown’s obligation and suggested that we were obliged to disclose items which were in the possession of the [Crown]. (P31)

Further inquiries by the Crown to extend potentially beyond the specific case, and by that I mean police discipline records and also beyond the police investigation if there are other government agencies where there’s the potential for receiving information. (P30)

Actually, I mean, the law is not; ... it’s on request. The law is that it [*McNeil* information containing police misconduct records] should be first part disclosure. (P31)

It was additionally recognized that obtaining third-party evidence places a burden on the prosecution and the police; however, one participant suggested that in their jurisdiction they have been fairly accommodating in providing third-party requests. This is possible due to accepting the broad responsibility required for disclosure, or it might be the result of the judiciary wanting these questions decided outside of the courtroom.

We have probably in this region, we’ve probably been a little too guilty of saying, okay, we’ll try to get that for you [third party requests], to the defence, when in fact we probably should be saying, no, you’re not entitled to that. But we’re not going to do that and force them to make a *Stinchcombe* application. Have a look at it Your Honour and—judges just don’t—I find they don’t even want to weigh into what the material is. They don’t want to have a look at it. I don’t think that’ll be met very favourably by the judges of the province. I mean, they’re not going to want to be hearing more disclosure applications. They want the Crown and defence to work this out themselves. (P31)

Exceptions

It was reported that the disclosure package transmitted to the Crown from the police could be different from that received by the defence because of some of the exceptions to disclosure provided for in case law.

From police to Crown is distinct than from Crown to defence, not necessarily the same package. (P35)

The two primary exceptions noted by participants outside of Saskatchewan were that of privacy and privilege as well as information that could jeopardize an ongoing (or future) police investigation by releasing information about police investigative techniques.

The whole area of what we are obliged to disclose is not clear, and there's—it becomes problematic when you talk about things like solicitor-client privilege, for example, with the Barrister Society and how do you respect the privilege and yet get these materials that we're being obliged to disclose. (P31)

So if there's—that would be another hard and fast exception with respect to revealing a police investigative technique, that could jeopardize further investigation. That would be another exception where we might hold back that information that would reveal a technique. (P30)

Is it appropriate for us to be requesting? A junior Crown where I had to speak to them about a request that they had made without thinking really about the consequences. And it was for the police policy on high-speed chases. (P30)

Timing

The timing required for producing disclosure was another issue raised as a concern by the participants. Disclosure requests are often perceived as being on demand given the oftentimes extremely quick need for a disclosure package to be provided for first appearance.

[Requests for disclosure] are “on demand.” (P34)

The other thing is the timing and receiving it in a timely fashion. This can be dependent on resources, on the strength of the processes for some of the police agencies, that ensure the information is all gathered and captured. The time crunch for preparing a custody file in the morning from an overnight arrest, it's quite short. (P30)

The timing issue is made all the more difficult given the volume of evidence collected, and therefore; expected to be provided in a disclosure package.

And then probably one of the other—so just sheer volume. Certainly, with *Stinchcombe* and *McNeil*, and all of that, there's enormous volume of information that is both generated that's available, and therefore expected. And so there's huge volume, which causes delays of course and the need for resources. (P30)

Tool for the defence

One interviewee reported that disclosure challenges have become a technique used by defence counsel in court. Counsel are reported to be making a disclosure argument, rather than arguing the evidentiary merits, or attempting to cause delays by making disclosure requests, as a means for launching a defence.

There's a game the defence plays of asking for more and more and more manuals and test results from the equipment that was used and all that kind of stuff, and see if they can get you into a situation where this has gone on too long and get the case tossed for unreasonable delay. Disclosure is often used frankly by the defence for—as a way of dragging things out. (P31)

Summary

The various decisions rendered by the courts have created a number of legal requirements that are reported as providing the police and Crown with disclosure related issues. The determination of relevance and its permissible exceptions (although potentially determined on a case-by-case basis, as defence can make an application for judicial review) were reported as providing ongoing challenges. Preparing timely disclosure packages as well as the reported use of disclosure as a tool by the defence were also reported by some participants.

Basic Theme 3: Trust Conditions

The potential for misuse of disclosed materials was raised as a troubling matter. However, this matter was generally addressed through the imposition of trust conditions on defence counsel and/or unrepresented accused persons.

Unrepresented Accused

Misuse of disclosed material was reported as generally more of an issue with respect to unrepresented accused, particularly in the context of disseminating the information via the internet.

Unrepresented accused will be problematic. Well, a number of reasons. Are they computer literate? Do they have access to a computer? As well as just concerns about

distributing video—copy of a video statement of somebody ratting them out, for example, and the potential for sort of Youtubing the disclosure. (P31)

Depending on the nature of the disclosure, if it's a victim's video statement, where there's more potential for mischief I suppose with respect to posting it up or something like that. (P30)

We provide disclosure on undertakings all the time and restrict the conditions upon which we'll provide information. A general trust condition saying, all material being provided is solely for the purpose of this case preparation. May not be shared with or disclosed to any other person, save the accused or a member of your staff for work related to your retainer. We put further trust conditions, more restrictive trust conditions about obviously respecting the privacy of—and keeping it somewhere safe, but then returning it upon completion and those sorts of things. (P30)

Do we need to lay that out a little more? Probably. We may actually put it, and that's a good point, we may put it right on the disc. Just be mindful of your obligation as a lawyer. [However], there's an implied undertaking from the defence that they use disclosure as a—to defend their client and that's it. And I think most defence lawyers understand that. (P31)

Special Cases

As reported by Saskatchewan participants, special cases such as that involving child pornography, was mentioned as a particularly concerning disclosure issue.

They [video recordings] will be on the disc, yes, with links. Now that brings up another area. If it's a sensitive—we have a sort of a special policy with respect to sensitive videos. So a child witnesses a sexual assault. Those will not be on there. Those will be separate, and—because those we have to have defence sign an undertaking to obtain those and promise to return them basically at the end of the matter. And also, we would not be giving those to an unrepresented accused. (P30)

Summary

Trust conditions were considered important to participants in protecting the sensitive evidence that might make up all or parts of a disclosure package. It was viewed as less problematic for defence counsel than in the circumstance of an unrepresented accused, as there exists an implied undertaking of which most counsel would be well aware. However, in special circumstances, extremely sensitive materials are provided to counsel in alternate ways.

Basic Theme 4: Disclosure Processes

Disclosure requests are processed through the Crown apart from the exceptional circumstance where a police officer is the subject of an investigation, in which case an independent counsel might be assigned.

To Whom from Whom

The participants reported that disclosure requests do not proceed through the police. It is Crown counsel that retains control over the transmission of disclosure packages to the defence.

But certainly no, the defence counsel wouldn't—the police would not provide them directly any information. (P30)

They come through the Crown. I mean, you don't have a right to disclosure until there's a charge before the court and then the Crown generally sends the request on to the police and says, we've got a request for this, that and the other thing. (P31)

Some matters go to an independent counsel. For instance, when we're prosecuting police, depending on what it's for. There may be—or something that could be perceived as a conflict for our office; would go to an independent prosecutor, which are often defence counsel. We have a few that we hire to do certain kinds of matters. (P30)

Follow-up Requests

Follow-up disclosure requests from the Crown to the police were reported by one participant as arising when additional investigation is requested.

And then once they receive this, they usually review it and they typically, as Crown will do, they'll ask for further investigation in some areas. (P33)

Summary

The participants articulated that disclosure requests are channelled through the office of the Crown. There was no indication from any participants that police ever provide disclosure directly to the defence counsel. Additional requests made of police also came from the Crown.

Basic Theme 5: Costs

The information about costs associated with disclosure was similar to those provided by participants from Saskatchewan.

Labour Intensive

It was recognized that disclosure is labour intensive for both the Crown and the police. Because in fact I think disclosure by its very nature and its inherent being, provides a resource pressure to both the Crown and the police. (P32)

Court Time

Disclosure was also reported by one participant as having an impact on court time primarily as a result of delays.

Impacts [of disclosure] can be delay, significant delay. (P30)

Reasons for Delay

The reasons providing the delay issues included obtaining the relevant evidence, particularly when requiring further investigation as well as receiving transcripts. Furthermore, court time is also affected by defence motions seeking additional disclosure materials.

Yeah, well certainly one of the impacts can be delay, significant delay, as well as cost. I mean, delay sometimes with respect to obtaining the information from the police, particularly if it actually involves further investigation [of] those things, not just disclosure of what you have. But actually you also—you didn't obtain this; you need to go and obtain this as well. Transcripts [are] probably one of the biggest ones. (P30)

Right, *O'Connor* motions, third-party motions. Those are just—I mean, I've had just *Stinchcombe* motions where, you know, my position is, it's completely irrelevant. We're not giving you this information. There's lots of that where they're simply fishing expeditions for more information that we think are completely irrelevant. So those things of course all take time to set and arrange for lawyer's schedules, etc, etc. And so court time being at a premium, those things can bring about pretty significant delay as well. (P30)

Effect on Cases

The importance of complete disclosure was not lost on the participants. They clearly recognized that while processing disclosure might be an onerous task, it is of great significance given the damage it can result in when not done properly.

I say this when I go out and lecture to new investigators. I know you didn't become a police officer to do the paperwork. But it's a necessary evil, and if you don't do all of that—provide all of that information, then you may as well not have made the arrest. (P30)

And the defence asked for materials from the Bar Society, and then from the receiver who'd been appointed to take over the law practice of the lawyer. And this just went on

and on and on, and then finally the judge just went, ‘Oh, too late. I’m throwing this out.’ And basically stayed the matter for unreasonable delay. We end up past the window of time for when the prosecution should have occurred and we end up having the matter tossed. (P31)

Summary

The costs associated with disclosure are once again reported as varied. They include the time and related costs of personnel on the part of both police and Crown. In addition, they create costs in relation to the courts with respect to the hearing of disclosure arguments, primarily regarding requests for additional materials to be disclosed, as well as causing delays associated with getting the requested materials if the defence argument is agreeable to the courts. Disclosure issues can also have a very deleterious effect on cases before the court, potentially resulting in stays.

Basic Theme 6: Possible Solutions

In seeking to address a few of the reported concerns, two avenues were presented as possible solutions. The first was the provision of better quality disclosure packages provided electronically to the Crown. The second was the suggestion for disclosure-specific training for police.

Better Quality Disclosure Packages

One participant suggested that complete, well-organized disclosure packages in an electronic form would address some of the issues previously reported.

So electronic disclosure at the time was a way for us to present a polished, finished product that Crown could easily reference not only the material that Versadex produced, but it would also reference attachments, documents, photos, video. And the way to do this was—the way we were doing this was through PDFs, Adobe PDFs specifically. And so what we would do is we would create this document from various—people would just write up sort of like an overall narrative, or maybe a narrative associated to a specific part or a specific incident. And then what we would do is we would take that narrative in a Word document, we’d PDF it and then we’d hyperlink all the attachments. So that was a very clean—it’s a very clean product at the end of the day, because Crown can read it. It can either be collated, like those PDFs and those Word documents, which are PDF’d, can be put together in a nice, clean package. They can be indexed; hyperlinks help because it’s just very easy for Crown to read through, whether it’s chronological or by incident. All they would do is they’d go through and they’d be able to access all the photos, the surveillance notes. Whatever could fit on a DVD, all the information—if it could fit on a DVD, they could hyperlink it and associate it back and forth. (P33)

Disclosure-Specific Training

A participant identified that a lot of the issues arising could be dealt with by having police personnel better versed in what disclosure is as well as what the potential consequences are when packages are not completed properly.

One of the biggest challenges is police agencies recognizing what is disclosure. [Police] they often hold back other information that we think certainly should be disclosed. The police ability to identify what needs to be disclosed and ensure that it's all provided to us, without—ideally without requests and ongoing requests for basic information. (P30)

When I lecture to the new investigators, I always say, 'Please think of it getting into the accused's hands. If you wouldn't want it to be there, please identify it for us to make sure it doesn't get missed.' [For example], on one piece of paper, there [were] the initials, HACI-the name [was provided]. That was in an officer's notes. We didn't catch that. Didn't even know what that meant. It went out and the lawyer for that person actually heard about it and called us and said, 'Are you trying to get my client killed? He's in custody right now. Why are you disclosing that he's a Hells Angels confidential informant?'" (P30)

Summary

Disclosure-specific training and, likely as a result of the training, the production of better disclosure packages (argued here in electronic format) were the two possible solutions that were proffered to address some of the previously noted issues that arise from the duty to disclose.

Organizing Theme 2: Standardization of Disclosure Packages

Table 9 provides a summary of the codes arising in the analytic process by listing the issues discussed, the basic themes that emerged from the analysis, and the more overarching organizing theme. Evidence, in the form of direct quotes from participants is provided with the discussion of each issue identified as a basic theme.

Table 9: Organizing Theme 2: Standardization of Disclosure Packages		
Issues Discussed	Basic Theme	Organizing Theme
<i>Provincial Disparities</i>	Impetus behind Standardization	Standardization of Disclosure Packages
<i>Judicial Review</i>		
<i>Seeking Efficiency</i>		
<i>Collaborative Development</i>	Guiding Principles	
<i>Problem-solving Approach</i>		
<i>Pragmatism & Flexibility</i>		
<i>Consistency</i>	Outcomes	
<i>Saves Court Time</i>		
<i>Avoid Replication and Duplication</i>		
<i>Provide a Framework for Ongoing Discussion</i>		
<i>Build on Previous Practice</i>	Additional Considerations	
<i>Properly Resourced</i>		
<i>Assigning a Dedicated Disclosure Lead</i>		
<i>Legislation</i>		

Basic Theme 1: Impetus behind Standardization

The first basic theme derived from the analysis of the interviews with the external participants focused on standardization. The participants discussed a variety of reasons why standardizing business processes occurred, including *provincial disparities* in the disclosure packages received by the Crown, stemming from *judicial reviews*, the effects of *contextual realities*, and a desire to gain *efficiency*.

Provincial Disparities

Following a meeting of officials from across the judicial sector (not including judges, given their position of independence), it was discovered that there were differences across their

provincial jurisdiction with regard to the disclosure packages transmitted to the Crown from police services as well as differences in the format in which these packages were delivered. This provided an impetus for seeking standardization.

[It was] an ongoing issue that was raised in terms of practices and processes and disparity amongst—across the province, amongst the Crown offices and the police detachments. (P32)

Judicial Review

In one jurisdiction, the impetus behind standardization came as the result of a judicial review process that identified this issue.

[The push for standardization] came about as a result of the [X case] review. (P28)

Seeking Efficiency

The search to create efficiencies within the system provided an additional reason for seeking standardized disclosure packages. Furthermore, in British Columbia, the judicial system operates within a pre-charge assessment model by Crown. This context-dependent factor was reported by one participant as driving a process for standardization in order to facilitate a more seamless transfer of disclosure materials from the police to the Crown.

I think that the obligations are constitutional obligations and we have to meet them. So this is about trying to find a way to better meet them at the front end in a—by adopting practices or methodologies that are just—that are more organized and methodical. (P32)

British Columbia is a pre-charge assessment jurisdiction. And so because of the model, it has a bit of a unique need in the sense that Crown Counsel needs a full package to the extent that it can at that point of decision making So we're looking for standardization to ease the transition between police and Crown and the transference of information. And for a pre-charge assessment model, that's really important because of the fact that there is a genuine belief, I think, that the more efficient you can be at disclosure at the very front end, the easier it is for us to conduct inquiries that we need to inquire and move forward into the courtroom ultimately with a comprehensive package. (P32)

Summary

The first basic theme suggested that there have been a number of different reasons for various jurisdictions to seek standardized practices regarding the production of disclosure packages, and to some degree, the format in which they are provided. Each of these driving forces coalesce around standardization as a means to address previously noted issues and potentially increase efficiency within the system.

Basic Theme 2: Guiding Principles

As various jurisdictions progressed toward standardization, which in British Columbia, Manitoba, Ontario and Nova Scotia involved the development of memorandums of understanding in various degrees of specificity, a number of guiding principles provided the framework under which this process took place. These guiding principles included *collaborative development, engaging the front lines, taking a problem-solving approach*, as well as a degree of *pragmatism and flexibility*.

Collaborative Development

Developing a standardized protocol for the provision of disclosure packages was reported as requiring a collaborative approach that engaged a variety of stakeholders who would be affected by the outcomes. Such an approach brings the various voices to the table which then allows for a greater potential to identify challenges faced by each group, as well as how the possible solutions identified would also impact these groups.

[The process had to be] equitable, mutually develop[ed]. I think the collaborative approach is hugely important because it allows the decision making to be much better informed. [It also sends a] message of mutual commitment and appreciation [for] the issue, a shared responsibility. (P32)

We are now working together, very closely to establish a co-operative business process and technological process to ensure there's no [future] glitches. We had to be cognizant of the concerns on the MAG side. Because you can't do this stuff in isolation. It's really got to be an integrated approach and a co-operative approach. You can't expect to create an output that causes the receiving end to end up with these process difficulties, because ultimately, their process difficulties will fall back on the sender. (P28)

Including the “front-lines,” those actually engaged in the disclosure processes as part of their daily operations, was deemed essential. This was desirable in order to facilitate workable solutions as well as demonstrate an inclusive process wherein the perspectives of all were considered.

We tried as much as possible to have frontline engagement in the process.

It sends out a demonstrable example of what can be achieved through a collaborative approach and how important that is, given our independent but interdependent roles. So it was a best effort to try to come up with a framework that we could work with that would inform the dialogue; to come up with mutually acceptable and workable solutions. (P32)

Problem-solving approach

As part of the collaborative approach, one participant additionally reported that the focus of the work of their committee was on solving problems. This suggests a forward-thinking approach where solutions to problems become the focus rather than dwelling on the issues occurring in past.

[It is] primarily a problem solving committee where issues of concern will be tabled. They assess[ed] how commonplace they [problems/issues] were. (P32)

Pragmatism & Flexibility

Standardization brings with it a number of challenges due to its potential for rigidity. Given that case law continually evolves as well as recognition of the differential capacities in different areas of the province, it was reported that whatever the “standard” approach would be; it would need to be flexible enough to account for these issues.

So we recognized that there would never be one size that fits all. [It had to be] realistic and responsive to current disclosure needs; to make sure it remained up to date and contemporary, [can address] new concerns that might arise under its application and developments in the law ... [With the] flexibility to allow for local conditions to inform the dialogue where it needed to be; [while also] keep[ing] in touch, with resource implications. (P32)

Recognizing it's a living document and has to keep pace with a law, an area of the law that changes and evolves relatively quickly. (P32)

Summary

The basic theme of guiding principles identified an underlying framework for dialogue that should accompany the development of standardized disclosure processes. The participants reported the need for participation of all of the stakeholders (including those operationally engaged in disclosure on a regular basis) in a collaborative process that identified issues and worked toward solving them. It was also reported that there must be room for flexibility that can account for differential capacities across the province as well as the continuing evolution of case law in the area of disclosure.

Basic Theme 3: Outcomes

By addressing the previously identified issues, the process of standardization of disclosure package was reported to provide a number of beneficial outcomes including *consistency, saving court time, avoiding replication and/or duplication* of disclosure work, and

finally, to *provide a framework for ongoing discussions* amongst the various stakeholders involved in disclosure processes.

Consistency

Creating standardized practices surrounding disclosure was reported as addressing the previously noted disparities across a province in regards to what was provided to Crown counsel. It was also suggested that one outcome was the provision of a consistent message as to what was expected, which alleviated previous confusion and solidified expectations.

It has standardized the process much better [which has] addressed the disparity concerns by clarity for the police in what they need to provide and how much. [Disclosure] makes it very resource intensive for the police at the front end. I get that, and in fact, that's why in part the MOU was an attempt to address that for them by making it clear how many copies they had to provide. (P32)

What we developed was a guideline for officers, so that they knew exactly [in] what categories different types of documents were to be filed. So, one through fifty-two was simply a way to categorize investigative material, so that an investigator in [X city] would be on the same page as an investigator in [X place], as was the case with [X case], and could share files, share investigative information, consistently. So again, this is an integrated approach, so that we don't talk about oranges on our side and they're talking about apples on their side. (P28)

Saves Court Time

The front-end work of creating standardized disclosure packages was reported as potentially creating efficiency within the courts. In the first instance, by providing defence with a comprehensive package, the possibility for a pre-trial resolution increases. It was also suggested that it could lessen the time spent in court by reducing administrative appearances to address disclosure-related issues.

The defence gets a much more comprehensive package that allows them to seek instructions from their client and make an informed decision on either pre-resolution or otherwise and just cuts down on the churn at the front end of the process. (P32)

[We can] move forward into the courtroom ultimately with a comprehensive package. From a process perspective, many of them will say that managing disclosure at the front end of the criminal litigation process, in terms of making sure it's organized and complete, allows for a more effective transfer of disclosure to the defence. You don't spend as much time engaged in court appearances that are primarily aimed at getting disclosure. You don't spend as much time in pre-trial motions wrapped around the issue of disclosure. (P32)

The better able you are to marshal the litigation at the front end and avoid and hopefully reduce and eliminate some of the administrative appearances and the churn associated with those before the matter is ultimately resolved. (P32)

Finally, although not implicitly about saving court time per se, the reduction in court time was also reported by one participant as reducing officers' time in court thereby providing them with more time to engage in police core functions.

But we don't have three or four officers tied up in a trial, walking the halls. Either they're on overtime, or simply just not on the road to do what they're supposed to be doing and protecting the community. (P28)

Avoid Replication and Duplication

The production of better disclosure packages resulting from standardization was reported as creating efficiency by reducing the duplication by different groups of the same work. Getting their systems aligned with respect to disclosure was instrumental in this process.

[It has] theoretically succeeded—not using the exact pro-pac, but, [avoiding] duplicating many, if not most of the process. (P35)

A standardized process was also reported by one participant as providing a useful tool in tracking disclosure requests and submissions, which ultimately prevents unnecessary duplication of packages.

Our inventory sheet that goes out, it's called Defence Counsel File Inventory Report and it tells them what items have—we have, what items we're providing to them, what date we did it, all those things. (P30)

Provide a Framework for Ongoing Discussion

One participant suggested that the process of arriving at a standardized disclosure package was in and of itself significant in that it provided a framework for ongoing collaborative dialogue between the various groups engaging in disclosure processes. Essentially, it provided a framework upon which better relationships were structured.

Most importantly, [standardization has] provided a framework for the dialogue at the local level. So it's no longer a question of, you know, one detachment saying, 'Well, I know of detachment X over here only has to do this, and detachment Y only has to do this. Why do I have to move in this direction?' And the Crown is able to say, 'Well, wait a minute here. We actually have a provincial MOU in place that everybody is expected to adhere to. Here is actually what the parameters are. Let's talk about what you need to do within that context.' (P32)

Summary

The creation of a standardized disclosure process and package was argued by participants as providing a number of beneficial outcomes. Having a standardized practice has avoided confusion on the part of police as to what has to be included in a disclosure package, which further allowed for consistent sharing of information. Standardization was also suggested to reduce court time by potentially avoiding trials as a result of defence having a complete package with which they can counsel their clients in a more effective manner, which might lead to plea discussions. Addressing disclosure issues through standardization could also alleviate court expenses by avoiding disclosure issues arising in court which require time for processing and decision-making. It might also reduce the time officers need to spend at court, therefore, when these issues arise and cause delays which impact court scheduling. The alignment of systems to receive and process a standardized disclosure package was additionally reported as beneficial in terms of tracking disclosure packages, which can reduce the need for duplication. Finally, the process of creating a standardized format was argued as instrumental in building better relationships that make them more effective across additional issues that might arise by providing a foundation for discussion that incorporated the guiding principles previously identified.

Basic Theme 4: Implementation

The implementation of the standardized practices began with the formation of a committee that would address the issues based on the guiding principles previously identified. In addition to the committee working through the process, including referring to the frontlines for their feedback, a training component based on the final standardized model was undertaken so that the information would be transmitted to all those affected by the change in practices.

Committee Formed

A committee was formed that was representative of the various groups engaged in disclosure processes. Each group had representation at the table.

Crown-Police Liaison Committee, [that included] the provincial and the federal Prosecution Services and police agencies. (P32)

There was a committee formed and the head members of each of the organizations, and they sat around the table and hashed this stuff out basically. (P31)

So the Prosecution Service, for example, would send out its working draft to get a sense of its workability from the frontline, and I presume the police did the same. (P32)

Build on Previous Practice

Participants reported that there was great benefit to be garnered by examining practices in other jurisdictions that had already been down the road, so to speak. Rather than recreating the wheel, it was noted that either adopting previously created processes or models, or adapting them within their own jurisdiction made sense.

I'm encouraging regulations to be designed more on the BC MOU model with respect to being more specific and not leaving—I just think there's just so much more room for scimmages to happen when it's open for interpretation. (P30)

[We are] using [the] Ontario MCM. And I think that almost all major case investigations are going—are sort of following the, what I would call the 52 categories model out of Ontario. (P31)

We stuck with what worked and that was the major case management folder set up and that's what we're using today, is that file management process that places all documents into this structured, standardized format, no matter whether it was a simple case of a shoplifter at a division, or all the way up to a homicide ... the only difference between the electronic packages was simply size and the number of categories that were used. Basically, what that means is there have been established roughly fifty-two management or file categories that are used in all of these cases. (P28)

Training

Providing everyone engaged in disclosure processing with training regarding the changes was considered vital in getting everyone on the same page moving forward with a clear understanding of each group's respective roles and responsibilities.

[It was important to] develop training materials making sure that when you develop something like this at an executive level, that you put support and training in place to make sure that the people at the frontline know it's in place, know what it consists of, understand what it consists of and have an opportunity to allow it to inform their discussions at the local level. Having them on the same page is critical, right; [so that they] have a fundamentally good understanding of the MOU and its requirements. Local prosecution offices would actually go and deliver training to the police detachments on the MOU. And that is why we are now moving to a place where we're looking at the creation of very specific training materials that allow both local Prosecution Services and police detachments, to use materials in a way that allow for training between the two of them and a much more concrete understanding of what the MOU requires. (P32)

Cross training was reported as an effective way of ensuring that all parties were receiving consistent information.

We're assisting them in integrating technical process[es], but as well, we're going to integrate our business processes. We're going to be providing training to the [Crown] folks, the fifty-two users, at our police college, but in, again, an integrated approach where I'll be training alongside a MAG representative and delivering consistent training to both sides. (P28)

The ideal, is that the local Prosecution offices would actually go and deliver training to the police detachments on the MOU. And at the same time, the training materials are built in a way that they are stand-alone and the detachments could use them themselves to train. (P32)

Summary

The process of implementation involved two main components. The first was the creation of a representative committee who, in conjunction with feedback from the frontlines derived the standard process and disclosure package moving forward. Then, following the creation of the standardized approach, training materials were created and cross training ensued to ensure consistency in the delivery of the expectations and roles that each group would provide.

Basic Theme 5: Additional Considerations

The basic theme of additional considerations brings together suggestions from participants regarding the standardization process.

Recognize Civilian Contributions

One participant expressed that it was important, in the context of budgetary considerations, to recognize civilianization as an approach to staffing disclosure-related positions. While recognizing that officers can be trained in disclosure protocols, it was reported that it was likely more expensive to do so, and didn't really maximize the value to be garnered from the skill set they had already developed in their initial training.

It's [project assistant] a civilian. I don't think there—to train a member to be able to do that work, you could do it, but A, it's more expensive and B, you're taking away a sworn member from what essentially is a—I guess a position that can be done by a civilian. And that's not something that I think the department wants to do. They want to make sure that their resources, especially for sworn members, are put in positions where they're really going to utilize their skills either as an investigator or in some sort of capacity where they're going to be utilizing their police training. (P33)

Creating a Dedicated Disclosure Unit

Two participants suggested that the creation of a disclosure unit whose sole responsibility was to deal with disclosure packages was effective in achieving better results.

Given all the difficulties with disclosure we have, over the last number of years, I guess in 2006 I guess it was, we created a disclosure unit where that work is all funnelled through. And it—the resourcing of that unit continued—the need anyway there, continues to seem to need to grow as—again, just it’s the information highway I guess or whatever. The more information that’s available, the more that it’s going to be sought and the more that’s going to be provided. (P30)

It provides for a single point of contact between the police, the Crown and the defence that facilitates more consistency in practices, better tracking and more timely distribution. (P34)

Legislation

One participant reported that their major case management had been legislated by the province.

Major Case Management [MCM] disclosure model [is a] legislated disclosure management process. (P28)

Summary

The final basic theme included additional commentary by participants as to what has occurred, or should be given consideration moving forward. The civilianization of disclosure-related positions was deemed worthy of consideration from a budgetary and training perspective. The creation of a dedicated disclosure unit was also presented as providing benefits. Finally, in one jurisdiction, a Major Case Management Model had moved beyond an agreed upon MOU or policy to being legislated by the province.

Organizing Theme 3: Electronic Disclosure

Table 10 provides a summary of the codes arising in the analytic process by listing the issues discussed, the basic themes that emerged from the analysis, and the more overarching organizing theme. Evidence, in the form of direct quotes from participants is provided with the discussion of each issue identified as a basic theme.

Table 10: Organizing Theme 3: Electronic Disclosure			
Issues Discussed	Basic Theme	Organizing Theme	
<i>Software Compatibility Issues & Corrupted Files</i>	Technological Challenges	ELECTRONIC DISCLOSURE	
<i>IT Infrastructure Limitations</i>			
<i>Security</i>			
<i>Storage and Retrieval</i>			
<i>Generational Gap</i>	Paper vs. Electronic		
<i>Resistance to Change</i>			
<i>Going to Court</i>			
<i>Argument for Paper is Outdated</i>			
<i>Create Crown-Friendly Packages</i>			
<i>Software Costs</i>	Associated Costs		
<i>Creation Costs</i>			
<i>Storage Costs</i>			
<i>Training Costs</i>			
<i>Resource Intensive but Critically Important</i>	Vetting		
<i>Whose responsibility, Police or Crown?</i>			
<i>Dedicated Disclosure Personnel</i>			
<i>Less Resource Intensive</i>	Efficiencies Gained		
<i>Timeliness</i>			
<i>Current State of Electronic Disclosure in Other Provinces</i>	Current use of Electronic Disclosure		
<i>Programs/Systems Currently Used</i>			

Basic Theme 1: Technological Challenges

The first basic theme encapsulates participants' reflections on various issues encountered when utilizing electronic mediums for disclosure practices. These include *software compatibility issues and corrupted files*, the *IT infrastructure limitations* of either themselves, or other justice partners, and the *security* of electronic mediums of data collection, storage and transmission.

Software Compatibility Issues & Corrupted Files

The vast array of places and circumstances where evidence may be collected in a criminal investigation suggests that there are many different electronic systems and programs that capture the evidence. Issues of incompatibility between various electronic mediums may arise with systems external to the justice system or within the varied groups participating in the justice system itself.

I guess two things with respect to, yes, the surveillance. That is a significant challenge because surveillance of course are proprietary depending whether it's a Shell gas station, a 7-Eleven store, Sears, whatever they choose to use, is going to be what the surveillance is recorded in. (P30)

Initially we could only get about 20% of the material into an electronic format, because we were using too many proprietary software applications. (P28)

We—the challenge was to—how do you take all these recordings that were basically in different formats, hundreds of different formats, and convert them into one usable format for Crown? (P33)

It comes with very complex systems issues, compatibility issues. (P32)

So we do often have to download software to be able to make use of it. We prefer the police of course to do that step and our view is that they should. Most times, they download it onto the disc for us so that we'll be able to view it when it comes in. (P30)

Yeah, and we have a default [file type]—you know, media types, which I think we say Windows Media Player is what we're going to end up with. So we are asking that the police convert. If they have any unusual file formats, that they convert them to Windows Media files and that they retain the original in native format as well. You've got to convert it to Windows Media Player so that we can play it on our machines, on our computers. But you have to retain the native format, so that—obviously for evidentiary purposes. (P31)

The issues of compatibility of software or corrupted files resulted in returning to printing hard copies as a means to address this problem.

I know I end up myself, printing off a lot of the file because too many times I've been unable to open an electronic disclosure file from the police. (P31)

IT Infrastructure Limitations

On some occasions, the technological challenge is not with respect to incompatibility per se, but rather the infrastructure limitations at some point in the disclosure process that can effectively result in choking the system.

One of the downsides—one of the challenges that [prosecutions] have here are their IT infrastructure and they—they're not able to handle much in the way of bandwidth and volume of material. (P28)

A lot of times, Crown wouldn't—they just wouldn't—they didn't have the technology up to date for that specific program, so we weren't communicating. (P33)

In addition, it was reported that it might not be the technology that is the problem, but rather the facility in which the technology was being operated that raised the issue.

This room in particular at this district station, has quite poor audio. And we've communicated with the police that—for them to address that, because we're getting charged extra money for the poor audio as far as the transcriber goes, because it takes them longer to do it obviously. (P30)

Storage and Retrieval

The sheer volume of electronically captured data as well as the court requirements for maintaining and keeping the data provided another issue for electronic disclosure.

Because of course, the obtaining of statements on video—or recorded statements of some sort has increased significantly over the last number of years. (P30)

She says, 'Well, we're only going to keep it for however long.' And I said, 'Well, what if the first lawyer says there's no issue and you don't need it. But then he fires that lawyer and the next lawyer gets on a year later.' And now it's an issue because the evidence is destroyed. [Destruction of evidence] it would certainly have the potential for a bad ruling.

Security

An initial concern with moving to electronic disclosure is that of the security of the evidence collected. This is unsurprising given the sensitive nature of what might be included in a disclosure package.

It comes with very complex systems issues ... secure—data security issues and those all have to be developed and worked out before we will get there. (P32)

I think that's the only [security]—well, not the only, but that's one of the main stumbling blocks, is how secure can we make it? And I think that you're looking at an in house server, a direct portal access through different firewalls and whatever kind of security means they can. I think that would be the main cost—or the main stumbling block, is how do we create something that is secure but yet accessed by every department, that we could actually do something like this where it's the drag and drop. (P33)

Nevertheless, some participants suggested that there might be an overly cautious stance toward electronic data as they suggested that these issues are not new; existing under the previous paper-based regime.

I think part of it is, from our perspective, just ensuring that it's secure, or sufficiently secure anyway. I mean, the fact is we handed out the paper now, so I don't know how secure that really is. We get the calls. 'My car was broken into. I had a whole bunch of files there.' Or—we see it. The papers get left in the courtrooms when they leave. So we do know—so I mean, I don't know how secure the paper exactly is either, and it's not like—most people now couldn't scan it and post it up somewhere if they wanted to. (P30)

Absolutely not. The possibility of leaving your case on public transit is far more likely than the loss of a data file. (P28)

Summary

Information technology has grown exponentially in the past decades and with it, challenges have ensued for those involved in processing electronically collected evidence. The volume of systems and programs that have emerged in this context, each with their own proprietary licenses; have created issues surrounding retrieving, collecting and processing evidence due to compatibility issues. Keeping up with technology is also an expensive endeavour which has unfortunately led to participants suggesting that the current IT infrastructure in some parts of the justice system has not kept pace with the necessary requirements for processing electronic material. The increased integration of technology into daily life has also created an immense volume of electronic data that might be collected as evidence. The requirements for storage of this data (legal and technological) have caused additional consternation on the part of participants. Security concerns resonated with participants when asked about electronic disclosure. The ability to properly protect the sensitive material that might form part of a disclosure package was highlighted as an ongoing concern that has slowed the progress toward electronic disclosure.

Basic Theme 2: Paper vs. Electronic

The second basic theme provides participants' recognition of a number of issues related to moving from the previously normalized process of using paper-based printed disclosure packages. Participants reported that this transition poses some challenges in addition to the technologically based issues presented above. These include having to address a *generational gap*, *resistance to change*, and preferences for printed materials when *going to court*. However, it was also reported that while these issues continue to exist, the *arguments* supporting them are *outdated*.

Generational Gap

Familiarity and competence with the use of technology provides for an environment wherein some of the people working in the justice system have a greater or lesser degree of confidence and ability working with technology than others do.

Well, I mean, we have this—as soon as we get a disk now, we are going to have this push and pull if you will, to print the whole thing, right. I think Crowns—my expectation is that younger Crowns may be more comfortable with using a disk and just printing off what they need. Whereas perhaps—I'm not sure if this is fair, but perhaps older Crowns will be more inclined to want the whole thing printed off and put it in files and do the things that we do—the way they always did because we used to have paper. (P31)

Resistance to Change

The transition to fully electronic disclosure might include detractors whose preference for paper files or lack of competence with technology will lead them to print materials despite the disclosure package being provided in electronic format.

I think that certainly there [are] those who will print out what they need. And that's more and more becoming the expectation, is that our disclosure unit who's preparing the files, preparing disclosure, is not going to print it out for you. But if there's portions that you want printed out, that's fine. You or your support person I suppose could print out the portions you require. (P30)

It was further reported by one participant that the police seem to be further ahead of the technological curve, so to speak, than others within the justice system. Even then, it is suggested that perhaps this transition period will not be as onerous as previously thought, as technology continues to become more and more a part of daily life thereby increasing general familiarity and competence.

The police, I must say, are very positive towards it. Crowns I think will be positive towards it. The pilot project went well with the Crowns. They were pretty favourably impressed. But—no, I think they'll be—to be perfectly honest, I think they'll [Crown] be in favour of it. I mean, we all use computers on a daily basis now, and it'll be nice to be able to just pop your file in at home and have a look at it. (P31)

Going to Court

Although external participants did not explicitly discuss the reasons, as the the Saskatchewan participants did, for the preference of paper files in court (see Organizing Theme 3: Basic Theme 2 in the previous section), this preference was nevertheless noted again by an external participant. Furthermore, it was recognized that the printing materials would be an additional cost over and above the initial costs of producing an electronic disclosure package.

Crowns will still want it printed off for them. So there's certainly some cost involved in that and having it available electronically, but still printing some of the paper file for themselves when they're going to court. (P30)

Argument for Paper is Outdated

Finally, one participant reported that providing electronically generated disclosure packages was consistent with case law. In addition, this participant suggested that there are various methods by which disclosable information can be provided in the event that there is a technological, or some other kind of issue.

The MOU is responsive to and reflective of judicial rulings on disclosure; including what it has to consist of, what form it should be in. You'll see that in the MOU, one of the issues contemplated is, in some circumstances, using—granting a right of inspection as compared to production, right. That arises out of the fact that jurisprudentially the courts have held that disclosure can be made in different ways. It can be made electronically. It can be made through access to exhibits or otherwise. It can be made in hard copy and the reproduction of material. It can be made through file inspection. (P32)

But he [judge] said, 'So long as it's organized and searchable, there is no requirement to provide disclosure in another format.' That was essentially the ruling. (P30)

A few participants also suggested that the move toward electronic disclosure was a means to provide Crown counsel with better disclosure packages than previously received when provided in paper. This benefit was also noted for judges.

So electronic disclosure at the time was a way for us to present a polished, finished product that Crown could easily reference not only the material that Versadex produced, but it would also reference attachments, documents, photos, video. And the way to do this

was—the way we were doing this was through PDFs, Adobe PDFs specifically. And so what we would do is we would create this document from various—people would just write up sort of like an overall narrative, or maybe a narrative associated to a specific part or a specific incident. And then what we would do is we would take that narrative in a Word document, we'd PDF it and then we'd hyperlink all the attachments. So that was a very clean—it's a very clean product at the end of the day, because Crown can read it. So it's just a—really easy for us to—it was—I shouldn't say that it was easy for us to produce, but it certainly made life easier for Crown. (P33)

I don't think there's a judge out there anymore who hasn't—isn't familiar with PDFs and computers. Well, there's probably a few. I shouldn't say that. But for the most part, most judges are going to know—and if we put somebody on the stand in a hearing and showed how easy it is to use electronic disclosure. (P31)

Summary

The participants identified a few stumbling blocks that continue to hamper the transition to fully electronic disclosure. An individual's familiarity and competence with various electronic applications as well as a general resistance amongst some to change their ways of doing things were reported. The preference amongst counsel for printed material for use in court was also stated. However, it was suggested that the transition period might be shorter than anticipated as familiarity with technology is increasing at a fairly good pace. In addition, as court processes and case law provide support for providing disclosure electronically, it is likely that a reliance or demand for printed files will eventually disappear.

Basic Theme 3: Associated Costs

This basic theme presents the issues identified by participants regarding the costs associated with electronic disclosure. These include *software costs*, the costs to *create* electronic disclosure packages, *training costs* required to get personnel up to speed on the electronic formats disclosure is provided in, *storage costs* of the electronic data, and *training costs*.

Software Costs

The cost for licences for software programs is both an initial and continuing cost. Obtaining the initial software is in and of itself costly; and as software becomes outdated, the costs for updating the existing software provide an additional source of economic burden.

One was actually having access to the proper Adobe program, because obviously the department would have to buy licenses for each computer, it costs money. (P33)

Systems become outdated. So that's a resource issue in and of itself. (P32)

One participant further noted that there was likely an increase in printing costs as a function of the aforementioned slow transition to electronic disclosure on the part of some prosecutors whose preference remained with paper files.

So there's going to be increased printing costs and staff time in printing this material out. And that can be pretty significant. There can be a lot of material, even on a small file. And so I don't really expect that that will save us money. (P31)

Creation Costs

Creation costs of electronic disclosure packages are made all the more problematic when additional copies are required.

I know there were a number of times where we produced disclosure a second time because somebody had changed counsel or lost the disk or something, I don't know. (P31)

Furthermore, in cases with multiple accused persons, each defence counsel is provided their own disclosure package. One participant reported that in their jurisdiction the police were responsible for bearing the cost of the initial disclosure package and the Crown for any additional copies.

Yeah, well, what—with the agreement we've reached is that—the police bear the cost basically of the first—sort of the one package of disclosure. Then—and then the Crown would bear the cost of sort of further copies. So if there's four copies of disclosure, then the Crown should bear it. Now what's happened is, for efficiency, we've said, well, let's just have the police produce all the disclosure. If there's multiple copies, they produce it and at some point they can bill us for those multiple copies and we'll pay it. (P31)

Storage Costs

The storage costs for electronically captured evidence have increased exponentially with the increased use of technology within the justice system (i.e. the installation of video cameras in police vehicles) as well as in the wider society. The massive volume of evidence that might be collected as part of an investigation must then be stored for extended periods of time creating additional storage costs.

Certainly, with *Stinchcombe* and *McNeil*, and all of that, there's [an] enormous volume of information that is both generated that's available, and therefore expected. (P30)

Collecting digital video, because we have over, I think it's over 400 uniformed police vehicles, all with in-car cameras. We also have video in our booking halls. We have video statements being taken for accused and witnesses. We have video in our cell areas, and we have five central lock ups around the city. We're very quickly approaching

petabytes for video storage. So, like that's—that would never have been thought of five years ago. (P28)

The use of audio and video recordings by police is much more prevalent now than it used to be. (P32)

Yes, the back end costs of actually keeping it for disclosure, because to keep it—to keep, let's say that amount of video, like a full shift, 12 hours, for every single person in the department, and we are 1200 strong, and patrol is about, I want to say 600. Yeah, about 600 members for patrol. For every single person to keep every single recording for every single shift for every single day in perpetuity, because they wouldn't just erase them after two years. They'd have to keep it. I think was over ten million dollars. It wasn't something that we—and that was just an estimate of the cost. (P33)

Training Costs

Having to ensure that all personnel engaged in the disclosure processes are properly trained in the use of the software programs adds to the overall cost of electronic disclosure.

We sent one of our project assistants to their office, who taught them how to use Adobe Pro and how to vet a document electronically. (P33)

Yeah, and I think the length of time it will take somebody—an end user to learn how to use this, is pretty minimal. The length of time it will take the police to put it in this format is—would be a little higher. So there's going to be more training issues for the police than there are—and the investigators for—than there are for the end users. (P31)

Summary

There is no doubt that incorporating electronic disclosure into the business practice within the justice system is an expensive undertaking. The participants reported that the associated costs aligned into the four areas of software costs, package creation costs, storage costs and training costs.

Basic Theme 5: Vetting

Protecting sensitive information within the limits imposed on disclosure regarding relevance is an important component of preparing a disclosure package. Participants reported that this process is *resource intensive but critically important*. In addition, they discussed the issue in terms of who holds the *responsibility for vetting* disclosure files.

Resource Intensive but Critically Important

Whether related to transcripts or the entirety of the file in general, the participants expressed that a great deal of work and care was required to vet the disclosure packages properly (identifying and redacting sensitive information falling within acceptable practice regarding the exception to relevance: i.e., privacy privilege, confidential informants, etc.) prior to their release to defence counsel.

That is a challenge with respect to going through and redacting certain information on recordings, particularly if a statement is a couple of hours. And we certainly had one, you know, serious matters of stalking for instance. And yet throughout, they speak specifically about their bus route home, their—you know, things that aren't just an address, but that are information that we need to look at to consider whether that needs to be redacted out, is there a concern with that information being disclosed (P30)

Probably one of the most significant issues for vetting, are confidential informants; and also personal contact information for vulnerable witnesses and those kinds of issues. Vetting and particularly with respect to privileged information, is a—is also a complex issue. And if information that should properly be vetted goes across and it's not vetted, it can give rise to very significant privacy and security concerns, right. (P32)

All personal identifiers of victims, witnesses, complainants, co-accused, that kind of thing; ... addresses, phone numbers, dates of birth, I.D. numbers, things of that nature. (P28)

The obligation to vet disclosure files is a very serious undertaking that cannot be taken lightly. As one participant recalled, the consequences can be potentially life threatening.

When I lecture to the new investigators, I always say, 'Please think of it getting into the accused's hands. If you wouldn't want it to be there, please identify it for us to make sure it doesn't get missed.' [For example], on one piece of paper, there [were] the initials, HACI—the name [was provided]. That was in an officer's notes. We didn't catch that. Didn't even know what that meant. It went out and the lawyer for that person actually heard about it, called us and said, 'Are you trying to get my client killed? He's in custody right now. Why are you disclosing that he's a Hells Angels confidential informant?'" (P30)

Whose Responsibility, Police or Crown?

The participants identified different perspectives about whose responsibility it was to vet the electronic disclosure package prior to delivery to defence counsel. In some cases, it was considered the responsibility of the police, while in another, the responsibility of the Crown.

The area of vetting of course is always a concern. And we're putting that obligation on the police to do the initial vetting of the disclosure. The view is that our Crowns just don't have time to be—on the routine files, to be taking them and vetting them before disclosure goes out. And so we're going to be relying on the police to do that. And right or wrong, that's what we're going to be doing, and we're just going to be basically making sure that they were vetted. So somebody looked at this thing and vetted it. And whether they got it all right or not, we don't know. But at least somebody vetted it, so out it goes. (P31)

The impetus behind the police having a responsibility for vetting a disclosure file is in part out of their obligations to witnesses and confidential informants. In addition, they are privy to information regarding the individuals that make up the witnesses that the Crown is not in a position to know.

And there's also, as you say, there's things that we [Prosecution] don't know. We don't know that that witness is a protected witness. They [police] have an obligation not to disclose an informant as well. There's a legal obligation on them as well by—there's often times where that information is throughout their notes and they don't catch it. (P30)

Other jurisdictions reported that vetting disclosure files was a mutual obligation wherein, as noted above, with the intimate knowledge of an investigation that police have, they are the first to review the disclosure file and mark any components they consider warranting redaction. This is followed by various review processes within the Crown offices before the vetting is considered complete and the file transferred to defence counsel.

So the MOU contemplates that the police are responsible to the extent that they can in vetting before it comes to us for the purposes of disclosure to the defence. So, it's kind of a mutual obligation, us recognizing that we have the ultimate responsibility, but also appreciating that they are in a far better position at first instance to do it. [Police] are much more intimately familiar with the files. So they are in a far better position to understand and recognize what information in that file needs to be protected from a sensitivity, investigative, or privileged perspective. You know, [Prosecution] may not see it for what it is. They are better suited to see it for what it is and call it for what it is. (P32)

The advantage of giving them [prosecutorial assistants] the marked for redaction version is that of course, they see what is underneath those markings, and can either agree with it, not agree with it and remove it, or agree with it and add to it. And then, they can cover off the legal vetting issues. They then pass that material through a Crown for review. The Crown again has the opportunity to look at the case, make sure everything was done properly as far as vetting is concerned. And then, that final version is locked down in our network, in our database, as the final version to be presented to defence counsel, to be disclosed to defence. (P28)

So, we'll have a clerk, we're calling them CDM—Centralized Disclosure Management. They—so, it's the clerical staff that will mark for redaction these disclosure packages, within a specifically [X City]-developed eJust module called the vetting module. It's not done in the other services, because [X City is] pretty much the only service in [the province] that vets first, for all cases. Then, the CMCs are going to join us in the vetting module and do the second level review for vetting, which includes catching what we missed. Human nature, we're going to miss something. But, they also look at it from a legal perspective. (P28)

We use it [referring to the {X police service} use of a bookmarked PDF] here for our electronic scanning, scanned files as well. But—and that's what—basically those are MOU and their own routine order says is that, you know, again, just highlight it for us so that we're aware of what you want. And then that way they're aware of the issues that the police may already flag, and then they may have additional ones that they would flag themselves. That's even a better—that's a better system because you got two sets of eyes looking at it. You've got the police looking at it and then the Crown's going to look at it and then say, 'okay, yay or nay.' We might not agree with you, but if you just identify it for us, because as I said, otherwise we have fairly entry-level people working on these files and at a pace that's quite significant. I mean, the time crunch for preparing a custody file in the morning from an overnight arrest, it's quite short. (P30)

Regardless of the determination of responsibility, there are still circumstances under which neither party has met their obligations.

It's interesting because it just depends on which specific Crown section and staff member or members that you're dealing with. Because each one has a different expectation or interprets the—that aspect of the MOU differently. The MOU says, we do the initial vetting at the first instance. And then we hand it over to Crown, and then it's up to Crown to finish it off or do the rest of it and then supply us with a copy of the changes or the final copy of the vetting that they've done. However, in one case [it took] one of their legal assistants, quite a bit of time to actually vet [the files]. So they would kick it back to us and say, 'Okay, can you make these changes? Take out this guy's name here. Take out this person's phone number here. Take out this woman as a witness here.' (P33)

Certainly, our memorandum of understanding with the police agencies in [X province] indicates that they should be identifying sensitive information that's not for disclosure. Generally—my answer would be generally no [they don't]. However, it's not that they're not supposed to. (P30)

Dedicated Disclosure Personnel

[I] ended up becoming the main file coordinator (P33)

And that's more and more becoming the expectation, is that our disclosure unit who's preparing the files, preparing disclosure, is not going to print it out for you. (P30)

We share the vetting responsibility with the Crowns; meaning we will mark for redaction—are you familiar with the Adobe terms mark for redaction. And apply redactions. So currently, it's officers doing that vetting, but November 5th, we are act—we have actually established a thirty-nine person sub-unit of court who are all clerical staff, and disbursed at the six different court locations, and they will literally mirror the [police] business process on the MAG side. (P28)

Defence requests for disclosure go through the disclosure unit. The file is attached and provided to the Crown assigned to the case [assignment is electronically entered and one Crown prosecutor stays with the file for the entire case] as well as the police. It is vetted and then returned for distribution. (P34)

Summary

Vetting disclosure files, to redact sensitive information that defence is not entitled to under the legally permissible exceptions to relevance, presents the police and crown with a difficult and onerous task requiring personnel resources. Nevertheless, it is a crucial component of the process as it is necessary for the protection of privacy and privileged information. The respondents appear to suggest that the ideal process is one wherein there is mutual obligation for vetting files that begins with the police, given their position of familiarity with the investigation. The process then continues with the Crown who is in a more informed position to make a legal assessment of the materials within the frameworks permissible by law. The use of Adobe Acrobat software facilitates this process as police can mark areas of concern which the prosecution can still view in their legal assessment prior to final redacting (blacking it out).

Basic Theme 6: Efficiencies Gained

Despite the aforementioned costs, the transition to electronic disclosure was reported as providing for a more efficient disclosure process and practice. Participants reported that cost savings might be achieved in two broad areas including being *less resource intensive*, the provision of disclosure in a *timelier* manner.

Less Resource Intensive

Once electronic disclosure practices have been integrated into regular practice, it was suggested that it would become less resource intensive for both police and Crown. This was reported, in part, due to some processes becoming much more automated and the reduction of data redundancy.

The more that disclosure can be made electronically, the better it is, because it's less resource intensive. But the desire is I think eventually to move towards a complete electronic disclosure and move away from paper files. I think logically everybody agrees that that would be much easier to manage. (P32)

So we adhered to that and actually created an electronic directory structure that identically mirrored the File Fifty-Two format. What we're trying to avoid is something called data redundancy. So, you make a copy here—like, you store the original here in this database and then you make a copy and make it available for the Crown's office. The Crowns are storing it and making a copy and then, they have to create an output for defence. (P28)

It's not [time consuming], because it's all done programmatically. So, there's no—there's no organizational issue or effort, because of the naming protocol. As long as they're named following the protocol, the basic computer ability places them in those orders as a matter of course. (P28)

Anyway, it's—there have been—and it is easier than—obviously than photocopying a box of material. [Additionally], we'd be downloading the cost of printing onto the defence. But if we're giving them a well organized disk that's easily accessible by somebody with limited skills and using available technology in terms of computers, then I think we will have met our obligation to disclose (P31)

Timeliness

The provision of disclosure in a timelier manner was reported by one participant. There are efficiencies to be gained on the back end of the case processing by avoiding delays in court associated with lengthy waits for disclosure packages.

That it'll be more timely disclosure, if it's coming across electronically. I mean, the benefit will be, I'm hoping that we'll get the disclosure more quickly. That it'll be more timely disclosure, if it's coming across electronically. The processing of disclosure is—I mean, at this point ... we have built that unit up to 14 people. And often if we have a couple of people leave and things like that, they often get behind. When they're at full complement for a period of time, usually they can keep up on 24 hour turnaround, which is our—I can't say expectation; but our—certainly, our goal. (P30)

The use of a court case management program was also suggested as saving police personnel costs by using the program to schedule cases for court that avoids having to have officers appear in court on scheduled time off.

This has significantly reduced overtime expenditures for the RCMP as the program tries to book court time when an officer is on-shift, thereby avoiding overtime expenses. (P34)

Summary

The automation possibilities reported by one participant suggest that electronic disclosure may result in reducing resourcing costs as it can avoid data redundancy. It was also suggested that the use of electronic disclosure would provide for timelier receipt and transmission of disclosure packages with cost savings further downstream with respect to court time.

Basic Theme 7: Current use of Electronic Disclosure

This basic theme provides the current practice wherein electronic disclosure is already undertaken. Rather than employing the same presentation approach used throughout the analysis, this section is divided up by province rather than individual themes. In addition, in this section, the reference number assigned to participants has been removed in order to protect the confidentiality they were assured of before beginning the interview.

Current State of Electronic Disclosure in other Provinces

British Columbia

We're not yet at a place, from a systems technology and compatibility perspective, where we're all on the same page.

75/25 percent of the bulk being still standard reproduction, hard copy disclosure with electronic component pieces to it. But in most of the provincial court prosecutions, so the summary conviction proceedings and the less serious indictable offences, it is predominantly paper file. And in British Columbia, I don't have the exact statistics on the top of my head, but about—around and about 90 percent of the provincial prosecution files go through provincial court. So you really do have a kind of 90/10 percent split. Now BC has an electronic case management system in place that both the police and the Crown use that allows for some material to come across electronically. But it's limited, and ultimately it forms part of the paper file.

Full electronic disclosure right now in BC is primarily used in the larger cases; which is a product of, I think, the way in which the police manage their investigations and just the volume.

What the MOU has, is a schedule attached to it that sets out essentially electronic business rules.

Drop Box, you go to this Drop Box program, you can drop your files in there, everybody can access them. So this—I think personally, that it's just—it's inevitable, and I think that other agencies, even with their limited resources, will eventually have to get on board. Because in the end, it will save them time and it will save them money.

Alberta

Alberta's moving in that direction. We have an entire court case management system, and that's part of what we're looking at as well in terms of moving toward it.

The current Court Case Management system in place allows for online court booking by Crown and defence. Integrated within that system are the RCMP shift schedules which are taken into account when there is an attempt to book court time.

Manitoba

Electronic; I mean, we are—I will say this, in theory electronic.

We have many modules of it [PRISM] and that includes disclosure. We use it for tracking our disclosure as well as for tracking our requests to the police agencies and tracking their response to our requests. Yes [also tracks defence requests to the Crown], often they will enter it in as a file note at least. Import an email into the system, so that they see exactly what the request from defence is.

And of course we will then—the plan is, we've been testing posting it up to defence counsel for them to go and get as well. Right now, they're getting paper, but the plan is for us to then post it. So we do have a Law Society arm that has got a server for us to start. And so we have started testing posting it up for them with disclosure.

[Electronic is the way it is going] I think it has to be for the timeliness factor if nothing else. And I think people are certainly becoming more and more used to, and as the generations come along, used to working on a screen.

Nova Scotia

We're moving towards electronic disclosure right now. ... So we've been getting that for a few years, and as well, on commercial crime files from the RCMP. They've been giving us electronic disclosure.

We've had a pilot project going on in Cape Breton, and that's in relation to small and medium size files. So we are hoping to, in the fall, have an amended disclosure protocol, which allows for electronic disclosure by the police on small to medium size files, so that if they produce them in a—the form—according to the standards and format that we've set, the Crown will be obligated to accept that as disclosure.

I should say that with respect to larger files, we've routinely been getting electronic disclosure on larger files for years now.

Not a direct portal link, no. So a hard drive—it's usually a disk. Usually a DVD, but we have gotten hard drives when it's big enough, when the file's huge you'll get a hard drive instead. And even on—I mean, some of the child pornography files even, you get—you

end up getting a hard drive of those ones. It's eventually—we're going to—it's going to be a portal. It's going to be on the web somewhere. That only—that makes sense.

We're—we will probably start looking at it next year in terms of our—the Justice Enterprise Initiative and whether we can put something on there that would—and allow third parties such as defence lawyers to log in and get their disclosure. But we're a long way from there, and—but I mean, that's—somebody's going to be doing it.

Ontario

Currently we use disc. We [Police] create DVDs on our side and deliver two copies, one for defence and one for Crown.

Beginning in 2011, we rolled this process out to four divisions. We have seventeen police divisions. And we have six court locations, and so we picked one court location and the four feeder divisions, who start sending electronic disclosure in this folder structure, in about 75% of the cases that were generated out of those four divisions.

They won't see a difference in the product, itself. But, the biggest issue is, now, how are they going [to] catch it. The process that we were using, was a secure FTP. A secure file transfer protocol across the internet. All of our disclosure material was sent using an off-the-shelf product called MOVEit DMZ. And it was received by the MAG network. They had MOVEit DMZ on their side, as well.

Oh, there always are [security issues]. That's why we're currently testing it here at headquarters. Our headquarters building has twelve floors. We have two floors that have the wifi set up on it, now. In a test mode. And what we're doing is, there are three levels of access. We have guest access, where the sponsor, meaning the officer who's invited someone in from outside to participate in a meeting, or whatever, would call up our help desk and a diary-dated and timed access username and password would be provided to, say, a Crown attorney coming in to discuss a case. So, that they could access the internet, VPN into their own network and work on their own documents at the same time as reviewing material with an officer. That's guest access. Then, we have officer access with non-TPS equipment. Which is another level of access and very much like a set up, say, at an internet cafe kind of thing, or your local Tim Horton's that has Wi-Fi. But it's logged and managed within our own network. And then there's—the third level is secure access, where they're using a TPS device with two-factor authentication, to gain access to the Wi-Fi network that provides them access directly to the TPS network in—excuse me—in addition to the internet access. Yeah, there are [digital footprints]—definitely, for access to our network, there are security logs that do keep a very strict eye on what's being accessed by whom. The Wi-Fi is not meant, at the court locations, for anything other than our own service employees to access. Down the road, the intent, and what we're exploring with our MAG partners, is more of a cloud delivery system.

But what we're aiming for is the ability to have an officer to attend court with a tablet. And be able to have his or her case entirely on the tablet for viewing, including

multimedia, and the ability to actually download it when they get to court, right from a Wi-Fi network. We're going to be able to do that, in any event, with our secure laptops that go live.

So you'll hear Scope 4 being rolled out in Toronto, as of, I think it's next—in the next couple of weeks. And that is meant to replace CMIS. It has the capability of disclosure tracking, case maintenance on their side as far as court dates and disclosure tracking, and correspondence between defence and Crown, and Crown case notes, and things of that nature. But, version 4 is being updated to accept RXML from eJust, which will be used to pre-fill the folders in Scope and also create a link between the associated e-brief and any other non-PDF multimedia files, that'll be kept in a server at each court location.

We will actually have fifty-two of our workstations, our computers, sitting on the desks of Crown support staff. On that TPS workstation, we will have a—what we're coining a vetting module, within the eJust application, that they will join the TPS clerical staff in and they'll also have Adobe Professional and we're also piloting at one court location with the intention of, after a successful pilot, adding to the computer image of all these fifty-two work stations, access to our digital assets management software, which is our video. As part of eJust is also an internal portal for viewing the status of disclosure, as well as the final product, which we provide all our officers with access to. So, an investigator or a case manager or even a witness officer, at any time can go into this portal and search for their case, see the next court date and see what state it's in.

The MAG aren't relying on their flawed IT infrastructure to do this work. It's all being done on our network. The advantage for TPS is that in current state, when a document goes over to MAG, and MAG makes changes to it, we don't know what they've done. So, we have officers potentially getting in the box to testify and begin talking about something that, unbeknownst to them, has been removed from the disclosure package. Which is obvious—risk to the case, risk to the service, and risk to MAG. So, what we've done is, now that we've got integrated process, we have one final version that's been worked on together, on both the police and the MAG side.

Programs/Systems Currently Used

Table 11 provides a summary of some (it is not exhaustive as there are many additional smaller pieces being used, such as adobe acrobat professional, within the broader systems noted here) of the programs/systems already being used in a number of provincial jurisdictions. Included in the table is some commentary provided by participants regarding some of the programs.²⁷

²⁷ He researcher is not well versed in technology. As such, the researcher is unable to comment or provide an assessment of the systems presented by the participants. What is reported in this section is just participant commentary.

Table 11: Electronic Programs Used in Other Provincial Jurisdictions

Province	Program Used	Participant Comments if Provided
British Columbia	Versadex	<p>That is our primary record keeping thing for the majority of the police forces, or all the police forces in BC. I think they've been mandated to use it.</p> <p>It is a great way, in my opinion, to accumulate information.</p> <p>It spits it out on a page, but it also has a lot of template pages, which serve two purposes. One, it acts as an overview for whatever the officer has written. It acts as an overview for a civilian statement. It also tracks property and usually each piece of property has its own page.</p> <p>The issue was their format, their structure for producing a final product. The only problem is, the end product it produces for Crown is basically a document that has almost—anywhere from 70 to 120 pages, with no way of—no collation, no tabs, no index.</p>
	JUSTIN	<p>Justice Information System</p> <p>integrated application for output</p>
	AVIT	<p>It allowed us to amalgamate all these different types of video, store it, convert it into a usable format. We could also produce a usable format that—to whatever format we wanted. But the unique thing about it was it allowed us to tag all the video.</p>
Alberta	PRISM	<p>Prosecution and Information Management</p>
	JOIN	<p>Justice Online Information Network</p> <p>Avenue for police to input their information. It interfaces with police systems “as is”, that is, they are able to import the information from the different systems used by the Calgary and Edmonton Police Services.</p> <p>This information is merged into PRISM</p>
	BERT	<p>a software program developed by Alberta Justice, using Microsoft Access 2000, to “facilitate capture of disclosure package inventory information”</p>

		Provides a means of systematically assembling, organizing, recording and reporting disclosure packages
Manitoba	PRISM	<p>Prosecution and Information Management</p> <p>[Alberta] they bought it from us for a dollar. I'm just sending it to Ontario as well.</p> <p>We do already have an exchange with the Winnipeg police where we receive the tombstone data. And so we receive the information that then populates in our system. That's with respect to all the involvements and the addresses and the charges, the—and a small summary with respect to the arrest report. It all populates in our electronic system from theirs. But the documents, the reports, the notes, those things, is what we're looking at now trying to receive electronically.</p> <p>We use it for tracking our disclosure as well as for tracking our requests to the police agencies and tracking their response to our requests.</p>
Ontario	Versadex	We just joined a group of seven other police services in Ontario that use Versadex as a records management system.
	Niche	The other main records management system out there in Ontario used by the OPP and a number of other services.
	eJust	<p>output application to be used in an integrated fashion with those records management systems</p> <p>Part of eJust is also an internal portal for viewing the status of disclosure, as well as the final product, which we provide all our officers with access. So, an investigator or a case manager or even a witness officer, at any time can go into this portal and search for their case, see the next court date and see what state it's in.</p>
	MOVEit DMZ	transfer files securely online
	DVAMS	DVAMS doesn't take in the video that's created in-house as discs; it absorbs it directly into a database. Okay. So, networked cameras in video suites, in cell areas, in booking areas, and in-car camera are all direct feed into a networked database. What that means is as a homicide investigator, I can finish a statement with an accused in a video suite at 3:00 p.m. and by 3:01, I can sit back at my terminal and view my video. And we're prepared to share that access with the Crown's office

		<p>The nice part about the DVAMS process that has rolled out is that all impaired cases are absorbed into the entire DVAMS process, so right from start to finish, the in-car camera, where he’s arrested, the booking, where he’s booked in before the staff, the breath exam, and the cell lodging is all absorbed within the DVAMS application, which means—and we have a fifteen day turnaround with our Crowns, in order to take advantage of the Interlock program that we have</p>
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A few participants also made reference to some of the ongoing development of electronic disclosure protocols in provinces not included in this research. One such example was that of Quebec where a major biker trial (with millions of documents) provided an impetus to develop an electronically based approach.

[They] established a relationship with a third party vendor who managed an external server that provided access to both Crown and defence, through a process not unlike internet banking, where you use the username and password. There’s a fair bit of administration involved, where I think they’ve probably got 150 defence counsel that have signed up for the service, now. It was developed for a biker project called Shark. And because they had—they literally had millions of documents to depose and so it was developed for that. And what it allowed was an administrator would provide access to defence X to okay, you—you’re representing these four clients, so when you log in, you see all of the disclosure material for those four cases. (P28)

The challenges that Quebec faced are kind of opposite to what we now face, where they don’t have a standardized records management system, they have multiple databases that they had to gather their disclosure material and then provide to the third party vendor to upload. We, on the other hand, now are moving into the realm of single source database, so it’ll be much easier for us to move in that direction, but we’re certainly not there, probably for another couple of years. We’ve little bits and pieces all the way along here, we’re doing integrated training, and we’re putting power users on both sides together to make sure that our business process is integrated. (P28)

Summary

This basic theme presented the current state of affairs with regard to the progress made toward electronic disclosure in other provincial jurisdictions. Based on the information participants provided, it appears that every province is moving toward electronic disclosure. Each province is undertaking steps toward electronic disclosure including running a number of pilot programs to test new processes and practices. Many suggested that aligning the systems and

business practices of the police and Crown were important in this transition. Internet-based disclosure was reported by most participants as the direction that they are either progressing toward currently, or they perceive disclosure to be heading in their jurisdiction.

Organizing Theme 4: Transcription

Table 12 provides a summary of the codes arising in the analytic process by listing the issues discussed, the basic themes that emerged from the analysis, and the more overarching organizing theme. Evidence, in the form of direct quotes from participants is provided with the discussion of each issue identified as a basic theme.

Table 12: Organizing Theme 4: TRANSCRIPTION		
Issues Discussed	Basic Theme	Organizing Theme
<i>Police Investigations</i>	How Transcripts are Used	TRANSCRIPTION
<i>Cross-Examination and Reluctant Witnesses (KGB)</i>		
<i>Video “Best Evidence”</i>	Recorded Statements	
<i>Cultural Barrier</i>		
<i>Handwritten Statements vs. Video/Audio Statements</i>		
<i>Interview Training</i>		
<i>Volume Effect</i>	Costs Associated with Transcription	
<i>Language Issues</i>		
<i>Financial Burdens within Limited Budgets</i>		
<i>Preference/Request for Everything</i>	What is transcribed	
<i>Relevant Interviews</i>		
<i>Nature of the Case</i>		
<i>Going to Trial</i>		
<i>Processing Requests</i>	Getting Transcription Done	
<i>Prioritizing</i>		
<i>Verifying Transcripts</i>		
<i>Legal Obligation: Useable Format</i>	Who Should Pay	
<i>The Debate (Police or Crown)</i>		

Basic Theme 1: How transcripts are used

The first basic theme presents the circumstances under which transcripts are used and therefore produced. Two circumstances were presented by participants, including transcript use for *police investigations*, and in court for *cross-examination* purposes.

Police Investigations

One participant reported that police might undertake the production of transcripts during the course of an investigation. They were deemed useful for statement analysis in comparing statements from different witnesses or the accused. They were reported as more useful in this regard than a recorded version of the statement.

[For police investigative purposes] we would transcribe for the searchability aspect of a statement, a hard copy statement. So like, as a homicide investigator, I would have an accused—sorry, got to step back from accused. I would have eyewitnesses' statements transcribed; I would have persons of interest statements transcribed, potentially, for the purposes of providing it to our statement analysis people. But, more generally, it was a case of being able to use the transcribed version to then do comparisons and word searches to our various databases and other statements. We may even want to capture portions of it and have it included as appendices to search warrants and things of that nature. (P28)

Cross-Examination

Transcripts were also produced by crown in facilitating their role in court more efficiently. This was reportedly used for the cross examination of witnesses wherein a transcript was more efficient than having to use recorded versions of the statements.

But, when you're cross examining them under the *Canada Evidence Act*, I know there's things with respect to statements [reduced to] writing, for example, in the *Canada Evidence Act*, and it's also—it's easier a lot of times to use a transcript when you're cross examining somebody. (P31)

Speaking, as a Crown, when I go to court, I certainly—there's many times where you want the transcripts. You want to be able to point to specific sections quickly with the witness on the stand. (P30)

Summary

Transcripts were reportedly produced for use by both police and Crown in facilitating their respective roles. Police might use a transcript as part of an investigation, as it provides for a quicker means to cross-reference particular aspects of a statement with other statements given that it is more easily searched than the original recorded statement. For Crown, it was suggested

that transcripts are much easier to use in court for cross-examining a witness, as transcripts are less cumbersome to refer to than a recorded statement.

Basic Theme 2: Recorded Statements

The second basic theme presents the issues raised by participants with respect to the use of recorded statements. These included that *video statements* are *considered the best evidence*, the *use of handwritten statements* compared with recorded statements, and *interview training* for police officers.

Video “Best Evidence”

Video evidence in general, and statements in particular, were considered to be the best evidence for use in court as they portray the actual event rather than someone’s interpretation or recollection of an event.

It’s generally got to be a video statement. If it’s not video, then an explanation has to be prepared and the next best evidence has to be sought out. And that is an audio version. An audiotaped version. (P28)

I’d have to say that it’s [video recordings] still generally considered—you know, to be able to see it and hear what’s going on yourself and put yourself there, would still be considered the best evidence. Same thing for either surveillance. I mean, certainly the 7-Eleven robberies, all those things where there’s evidence caught on tape, it still would be considered the best evidence, to be able to see and hear and not rely on people’s recall a year or two later. (P30)

Two participants noted that case law borders on requiring a video statement from an accused in order to get the statement submitted as an exhibit in court.

The video is—you’re—is the best evidence obviously of what the person said. Case law has pretty much gone towards—with an accused’s statement, if you don’t have a video of the accused statement, then it’s very unlikely you’re going to get it into evidence in a *voir dire*, because that’s just the way the case law’s gone. (P31)

We very seldom get away with a witness or victim’s statement in an officer’s memo book. It’s almost not done, unless it’s a traffic accident. The case law is adhered to so strictly here, that the value of a statement taken in writing is so greatly diminished, that it’s almost been a matter of course that we don’t do it, anymore. (P28)

Other participants reported that the video/audio statement as well as the transcript is often submitted as evidence to the court.

Ordinarily if you have an audio recording with a transcript, both would go in. So that the original evidence is there and the transcript and the witness who you would call as the

Crown witness to authenticate both of those, would have reviewed the transcript and would be able to confirm that it's an accurate transcription of the recording. But both would go in, so that the [indiscernible] can access both. (P32)

Often both. It certainly wouldn't be—like, it's usually the audio/video that goes in. There may be the transcript as well, if it's—certainly if it's been referred—if the person's referred to it as an exhibit. But it wouldn't be the opposite. It wouldn't be only the transcript ever that went in as an exhibit. (P30)

Cultural Barrier

In one provincial jurisdiction, the issue of a cultural barrier within the justice system was raised. The participant reported that there were provincial disparities in what different regional prosecution offices expected with respect to the inclusion of transcripts in a disclosure package, with the general expectation in one part of the province that transcript provision was normative.

There are differences between [City A] and [City B] prosecution offices around transcription expectations. Some prosecutors are used to transcripts being provided at will. (P35)

Handwritten Statements vs. Video/Audio Statements

There has been a recent debate regarding the use of handwritten and video/audio statements. In one province, there were reportedly discussions between the Crown and police wherein the Crown suggested that the police be more selective and stop recording every statement. Recorded interviews were noted as including far too much extraneous and irrelevant information, as well as information that would require additional work to redact.

But the point being that, you know, really, the officer could have written out a statement in probably ten minutes instead of going through the recording process. Which then can require—and make it more cumbersome, requiring software to then edit that statement so that in the process of disclosing, we're redacting out appropriate information. (P30)

We have asked police services to stop [video recording every statement] because there are lots of times when, you know, a less than one page statement would do. One, it would narrow the, how do I say, well, the musings, the confidential information that's often now in DVDs. Because questions—you know, all sorts of things get asked, that if you were actually writing out a written statement, I think it would be a more focused statement. Needs to be more focused, right, how it can—you know, there can be more rambling going on because it's just the recording of the conversation. Workload wise it's the redaction. It's—and I say that because I often beg the police to not put such—or be conscious when they're interviewing people, recordings, with respect to the amount of personal information that's throughout. (P30)

Interview Training

Directly related to the previous issue raised by one participant, two participants reported the need to address interview training for police as well as including a synopsis of the recording that is effectively time-stamped. This would save time in redacting sensitive materials as well as potentially avoid the need for transcripts.

So if you take out personal information related to a witness, for example, their address, out of the PDF, we have to teach the police that when they do their interview of that witness, don't ask the first question on the video as, where do you live? So I mean—because inevitably, that's what they used to—that's what they do in fact. So it's kind of—defeats the purpose, if we take it out of the PDF, but meanwhile you go and watch the interview of this person giving a statement and the first thing they say is where they live and what's their—what their telephone number is blah, blah, blah. There's no reason that can't just be kept on a separate sheet of paper and doesn't need to be on the video. And so don't mention the address six times throughout the report because that just increases the chances of it being missed sometime. (P30)

If you can just do a detailed—if you could just do detailed notes of where it is in the statement, where the good stuff is, then yes, the Crown wouldn't have to sit there and listen to it and—or we wouldn't have to order a transcription and bill it back to the police, which is what we would be allowed to do. As well, [it would] avoid the need of having transcriptions done on every—for every statement by the police. (P31)

Summary

Despite the aforementioned apparent preference for video statements by the court, the realities of working with video statements have been a source for debate. For one province it was not so much about the usefulness of the video statement, but rather that there was an expectation that transcripts would accompany the video in a disclosure package as part of the normal business practice. It was suggested that returning to the use of handwritten statements in some cases is more practical and no less valuable. One of the major issues with video statements is the noted irrelevant information that ends up being part of the interview as a matter of process. In addition, the need to redact parts of the video due to the inclusion of information that falls within the legally permissible exceptions under relevance was reported as an onerous task. Given that video statement is likely going to remain normal practice, it was suggested that providing improved interview training to police specifically to address the issues noted would be valuable and save time when working with the video.

Basic Theme 3: Costs Associated with Transcription

The participants provided their perspectives regarding what was driving the costs associated with the production of transcripts. These included a *volume effect* resulting from an ever-increasing use of audio and/or video technology for taking statements, *language issues* when encountering individuals who do not speak English, as well as the pressure that police services experience when already operating *within limited budgets*.

Volume Effect

Technology has had an effect in creating vast volumes of electronically captured evidence in general. The use of technology in taking audio and/or video statements was reported as consistent with this overall trend.

Because of course, the obtaining of statements on video—or recorded statements of some sort has increased significantly over the last number of years. (P30)

Language Issues

Language barriers have also increased the costs for transcribing (as well as the interview itself) as there is a need to hire certified translators for the process.

A translated and transcribed statement may need to be done from a reliability perspective by an accredited translator and transcriber. So they need to be both translated and then transcribed. ... But when you have a non-English language, then you have to have it—in addition to transcribed, you have to have it translated. And that's where the issue of accreditation becomes important. (P32)

Financial Burdens within Limited Budgets

Finding the personnel and generally financially resourcing transcription was reported as problematic for police within limited budgets.

The police have run into problems just with the cost of getting everything transcribed, and also even keeping hold of the personnel who are willing to do this in house. (P31)

So, if we're talking about cost to [X service], then it's clerical staff that are actually working on [X service] hours that will create a transcript. (P28)

The financial costs of police producing transcripts was further recognized as impacting smaller services with more limited budgets in a more significant way than their counterpart large services.

Complaints from small town police services are legitimate. (P29)

Summary

The costs associated with the production and provision of transcripts were noted as being in many ways a result of the inclusion of video technology as part of normal police business practices as it has created a huge increase in the volume of material collected in that format. Language issues have further exacerbated that issue as the cost for both interviewing and transcribing has increased significantly due to the need for translators when statements are taken from individuals who do not speak English. Finding resources, financial and personnel, was also reported as a problematic cost for transcribing when agencies were already facing budgetary constraints. Finally, the differential capacity of agencies to fund the production of transcripts was also mentioned as contributing to the financial burden of transcribing video and/or audio statements.

Basic Theme 4: What is transcribed

This basic theme provides the participant's experiences in their respective jurisdictions as to what materials are getting transcribed. In some places, it was suggested that *everything* is transcribed (or at least wanted), while in others it depends on a number of factors including the *relevance* of the statement to the case, the *nature of the case* itself, whether or not it is *going to trial*, and the *length of the recording*.

Preference/Request for Everything

A number of participants suggested that transcripts were often expected on the request of Crown without any real consideration of their value to the case; essentially wanting everything transcribed up front.

Just upon Crown request. (P28)

But everything—maybe not so much a hard copy, but every call would have to be transcribed, whether it's electronically, or at least reviewed, especially for wire files. They just—they—you can't get away from that. So yes, I think they all have to be transcribed, at least the projects that I've been on. I haven't come across any where they haven't been. So, a lot of the times they just ask for it all. That's typically Crowns—there's very few Crown that I have encountered in my time, as a file coordinator doing large projects, where they've actually said, 'Okay, let's sit down and let's see which ones are relevant.' They've always asked for it all. (P33)

In practice, lots of Crowns will request transcriptions even before that, just if it's—if they can't tell from the file what's in the statement. (P31)

Relevant interviews

The relevance of a particular statement, with respect to its usefulness in the presentation of a case before the court, was reported as a factor used when considering the costly process of producing a transcript.

However, if you are working in a specialty section where it's a smaller specialty investigative section, like GIU or sex crimes or robbery, it's really up to you to make the call as to whether or not you're going to transcribe, or you're going to audio tape something and then have it transcribed. (P33)

Like a statement from the accused, where there is no flexibility because everybody recognizes that for statements provided by accused persons, the Crown has to be—has to always be in a position to assess it. (P32)

Transcribing audio and video recordings of statements is very resource intensive for the police. And sometimes they may be of the view that ultimately the statement was of no relevance, and so on balance, the transcription is just too costly and too resource intensive. So the MOU gives them some flexibility to have a discussion with the Crown about whether or not it's necessary, recognizing that at the end of the day, if the Crown is of the view that it's necessary, that police must produce it, and they are responsible for the transcription. But I think they have to have a discussion with the Crown about that. (P32)

Nature of the Case

The nature of the case was also deemed a relevant aspect when determining if a transcript should be produced. Generally, a transcript would be required the more serious the crime.

Depends on the seriousness. Depends on a lot of different factors, but those are the main ones. If it's the homicide section, they will pretty much record everything, every interaction recorded, and then they will—because of the nature of their files, they will get priority to have it, when they submit it for transcription and that sort of thing. (P33)

Upon reflection and given the context of the case as a whole, I actually think a transcript is necessary. (P32)

If they haven't been [transcribed], it's only because either the charge wasn't serious enough, or it wasn't a major project. Typically victims yes, you will always do that. Witnesses, depends. [It] depends on the nature of the file. (P33)

Unless there is some—you know, I guess on homicides perhaps where you might need a transcript to assess the case. You know, a more serious matter. (P30)

Major cases, so I'm talking major sexual assaults, major homicides. (P28)

Going to Trial

If it is known that a matter is going before the courts, then it was reported that it would be reasonable to expect that a transcript would be provided given its previously recognized utility in court.

It depends on the nature of the material in the recording, the Crown Counsel's assessment about whether or not it's likely going to be tendered or admitted or whether it's going to be necessary for the witness' review of their evidence. (P32)

And I guess our protocol here is that you don't order a transcript until the matter is going to hearing. Generally, unless the matter is going to hearing, you don't order transcripts, because it is a very costly endeavour. (P30)

I think there's a recognition that a lot of cases don't go to trial, so we probably don't need to have every statement transcribed. Ideally, it's supposed to be when—once you see that this thing is going to go to trial, then you probably should be getting a transcription done. (P31)

Length of the Statement Recording

In one jurisdiction, it was reported that the length of the actual recording affected the expectation for the production of a transcript. Crown were expected to take the time to listen to and obtain the relevant information from a relatively short recorded interview.

You can listen to a five-minute recording. You don't necessarily need to get that transcribed. So if it's not—really isn't—the amount of time that it would take for them to complete the transcript request form and send it out, is probably the time it would take to review it. (P30)

Summary

Although there appears to remain a persistent desire on the part of counsel for transcripts to accompany all recorded statements, it was widely reported that a number of factors should be given consideration before engaging in a very expensive process. The relevance of the statement to the case being presented to the court was one consideration. However, it was suggested that a statement from the accused should likely get transcribed. It was also suggested that, unless there is a fairly good chance that a case was going to trial, the production of a transcript was not a good use of resources. Finally, the actual length of the recording should be taken into account before requesting or obtaining a transcript.

Basic Theme 5: Getting Transcription Done

Table 13 provides an overview of the process by which transcripts are being completed as reported by participants.

Table 13: Transcription Processes in Other Provincial Jurisdictions					
	British Columbia	Alberta	Manitoba	Ontario (Toronto)	Nova Scotia
Transcription completed by police in-house	X	?	X	X	—
Transcription completed by prosecution in-house	—	—	—	—	X
Transcription completed by third-party vendor	X	X	X	—	X
Centralized government transcription	—	?	—	—	—
Additional Comments	Provincial accreditation required for external vendors	They reported experiencing “lowest-bidder” growing pains. While in-sourcing within police services was considered, it was viewed as being an onerous burden.	RCMP is doing transcription. Municipal services are not. The Crown out-sources the files for transcription from those provided by municipal police	Toronto Police Service has an in-house civilian pool	The NS MOU requires that police provide transcripts but it has not been followed
X – signifies that it is being done ? – signifies it is/was considered					

Summary

The information provided in the tables reports a number of different approaches used to produce transcripts. The multiple processes engaged in, across and within provincial jurisdictions, reflect the array of different circumstances within each province. First of all, some provinces have formally defined the process as well as determined whose responsibility it is to have transcripts completed in province-wide memorandums of understanding. In some provinces, the police are required to produce transcripts; however, how each service produces transcripts may differ, with some choosing to get it done in-house, and others engaging a third-party vendor to provide the transcripts. In other provinces, the production of transcripts is the responsibility of the Crown. In these circumstances, the decision to employ a third-party vendor either could be the standard, normal practice or completed only when the internal capacity of the Crown office at a specific time does not permit the completion of transcripts in a timely manner.

Basic Theme 6: Who Should Pay

The sixth basic theme arose from participants' comments regarding where the responsibility to produce transcripts would be placed. The participants raised a few issues surrounding this hotly debated topic. The first was in regard to whether or not there is a *legal obligation* to produce transcripts for the court, which includes the determination of what was presented in the literature review as a *useable format*. The second component of this basic theme presents the arguments put forward regarding the *debate* as to whether police or the Crown should be responsible for the production of transcripts and the associated financial burden.

Legal Obligation: Useable Format

A number of participants articulated that there is no legal obligation to produce a transcript of an audio and/or video statement. It was suggested that providing the audio and/or video file (itself in a useable format that the end user can access) meets the disclosure obligations.

We [Crown] take the position, and we have a case law in [X Province] certainly, that we're not obliged to provide a transcript. That we're not—it's not part of the disclosure obligation. The fact that we've provided you the statement in an electronic format meets our disclosure obligations. I wouldn't do it just because they're [defence] requesting it, and that's sort of the message to Crown. That it's not appropriate, certainly at any preliminary stage. The judiciary may request transcripts—we make it clear that we believe that unless we require a transcript for the purpose of doing the prosecution; that we won't be having one made for anybody else. But if we had one made for us, we

certainly make a copy for—if it's in court, we'll make a copy for the judiciary as well. But we don't consider it our obligation to create a transcript for the judiciary, or for the defence. (P30)

If Crown hasn't transcribed, defence isn't entitled to request it. (P36)

The Debate (Police or Crown)

The question regarding who bears the burden for producing transcripts was reported as a budgetary argument rather than on some other basis.

[At the] annual meeting, senior Crown and senior police, it's ultimately a fight over costs. (P34)

In some of the jurisdictions included in this research, it was reported that police were ultimately responsible for producing and paying for transcripts.

So we wouldn't have to order a transcription and bill it back to the police, which is what we would be allowed to do. (P31)

I was going to say it almost depends on what agency it's provided. (P30)

Transcribing audio and video recordings of statements is very resource intensive for the police. The general rule is that if the police take an audio or a video recording of a statement, that a transcript needs to be produced. It is their responsibility at their cost. They provide a recording and a transcript with their disclosure package. If they don't produce a transcript, they do provide the recording. They [the police] need the flexibility to at least talk to the Crown, because as you may appreciate, the use of audio and video recordings by police is much more prevalent now than it used to be. And oftentimes the Crown will review the recording and the Crown will make a decision during the course of that whether a transcript is necessary. They let the police know that, and the police have to produce. (P32)

In other jurisdictions, the responsibility was borne by the Crown.

[The] Procurement people were horrified by the costs. Now [the production of transcripts is] managed by the Crown, they control what and when to transcribe. [It was thought that the] Crown would be more cost-aware when they make the decisions as it is coming out of their budget, reducing unnecessary transcription. (P34)

We [Crown] we get the transcript cost for the [municipal police], because they, [X police service] a number of years ago stopped providing transcripts, and the cost has been borne [by Prosecution]. (P30)

In one costing model, it was reported that the burden for the cost of transcribing depends on where the case is at when the transcript is requested.

So the way our cost recovery works here, it is—if a case is still at the investigative stage, no charges have been laid, cost is borne by the police to have statements transcribed. Whether it's statements or 9-1-1s, cost is borne by the service. If after charges are laid, a Crown request—a statement to be transcribed, then there's a cost recovery agreement with that transcription pool, where they do it after hours, on their own time, and many of them—most of them do it at home. They get the software at home. And they'll prepare the transcript and provide one—an electronic version to both the case manager and the Crown attorney [at the Crown's expense]. (P28)

It was noted by another participant that, within the framework of their MOU, different financial burdens (all related to disclosure) were assigned to both the police and the Crown wherein each engaged in activities that they were permitted to bill back to the other. It has generally resulted in a mutually agreed upon practice where neither bills the other.

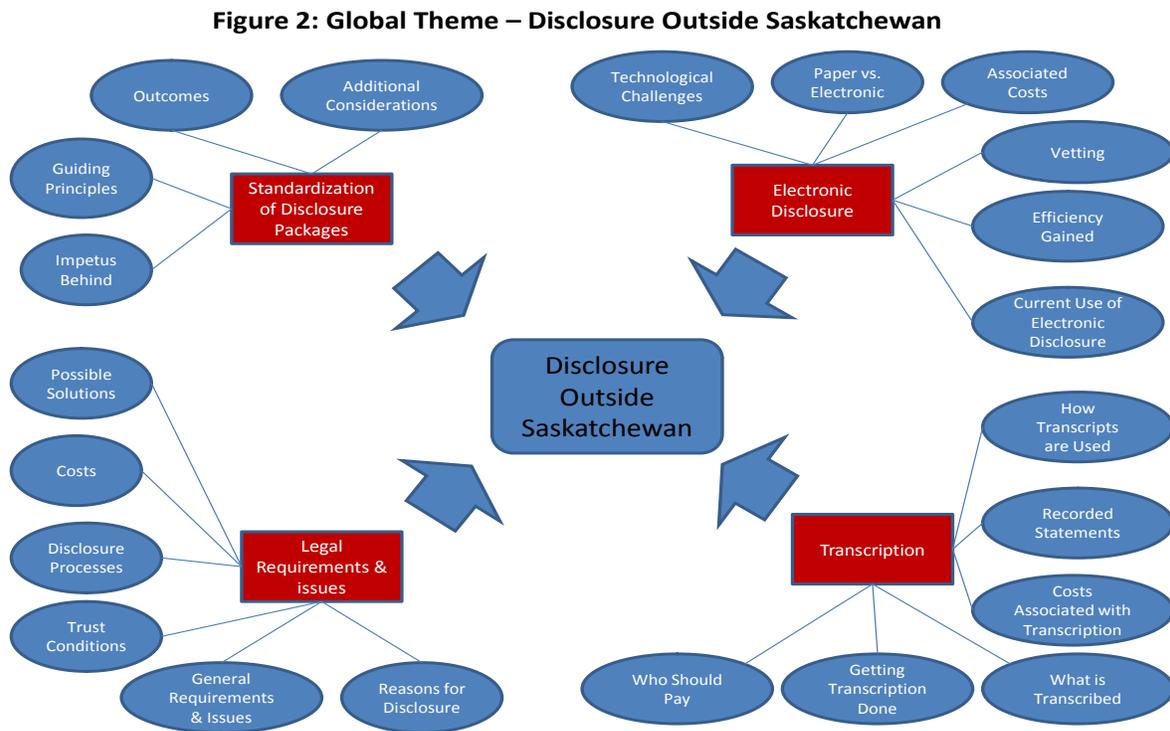
What's happened in fact is that they don't bill us for those multiple copies of disclosure, and as well, we have the right to bill them back for the transcripts. So if we get the statements transcribed, we could bill them back. That's been going on for a couple of years where it's basically, you guys don't bill us for that and we don't bill you for the statements. So we just sort of figure it balances out. So we wouldn't have to order a transcription and bill it back to the police, which is what we would be allowed to do. (P31)

Summary

The debate over who bears financial responsibility for the production of transcripts first raised the question regarding the legal obligation to provide a transcript. The participants responding to this query stated that there was not a legal requirement to provide transcripts. Unless a transcript was created for use by the prosecution, it would not be provided. This applied to the judiciary as well as the defence. Regardless of the absence of a legal requirement for producing transcripts, they are nevertheless still created. With whom the financial burden rests is different in different jurisdictions. In some cases, it is with the police, in others, it is the Crown. A third model requires that both the police and Crown pay for transcribing statements, based on what stage the case is at. If it is still in the investigation stage the police pay the costs; however, if transcripts are requested after charges are laid, the Crown then assumes the financial responsibility.

Global Theme: Disclosure Outside of Saskatchewan

Following the same process identified in the previous discussion where the global theme for the Saskatchewan participants was provided, this section presents the summative global theme for the participants from outside the province. While it ultimately became very clear that there is considerable overlap and redundancy with what the Saskatchewan respondents articulated, it was considered to be very important to clearly distinguish between the two by conducting a separate analysis (albeit building upon the coding framework and analysis already completed). The separate analysis was particularly important in identifying the different practices related to disclosure (particularly electronic disclosure and transcription) occurring outside of the province so as to inform the discussion that is likely to take place in the province following the submission of this report and its recommendations. Figure 2 provides the thematic map derived from the analysis of the interviews with the participants outside of Saskatchewan.



Organizing Theme 1: Legal Requirements and Issues

As was noted for the Saskatchewan participants, the first organizing theme provided the foundation for the discussions that followed by identifying a number of issues arising from the legal requirements for disclosure, which was the impetus behind the search for solutions. The clarification of the roles for police and Crown, their joint responsibility for first-party disclosure despite noted independence, in turn influenced discussions regarding their respective roles in the standardization of packages, electronic disclosure and transcription.

Determinations of relevance and materials in the possession of police and Crown (pertaining to third-party disclosure requests) were issues that created workload and hence financial burdens with them. It was noted in one jurisdiction, however, that this burden had become part of an accepted practice, as the courts were seeking for these issues to be dealt with outside of the court, lending itself to a broader interpretation of disclosure responsibilities than was presented (although suggested by defence counsel as appropriate) in the Saskatchewan context. Nevertheless, the so-called “exceptions” to relevance were also noted. These exceptions create additional work, particularly with respect to electronic disclosure and transcription, as there is a need for vetting and marking the materials eventually disclosed to defence. This can mean redacting parts of video statements and transcripts in accordance with the privacy, privilege, and protection of police investigative techniques and informants. Related to this was recognition by participants that electronically collected evidence can be problematic when considering the increased ease of use of the internet, particularly in the case of unrepresented accused, wherein the imposition of trust conditions was raised by participants.

The timing requirements as well as the use of disclosure-related issues by defence were also raised by the participants outside of Saskatchewan. Electronic disclosure was presented as a means to address some of these challenges, through the provision of materials from the police to the Crown in a more timely and efficient manner than print-based formats. It also recognized that much of the evidence collected existed in electronic formats which therefore made electronic disclosure all the more pragmatic. The collection of electronic statements, however, then raised the issues of transcription. The issues of timing and use of disclosure-related violations as a defence also influenced the progression toward standardizing the disclosure packages. Standardization as well as disclosure-specific training for police was suggested as providing for better disclosure packages. Ensuring the information transmitted to Crown was as complete as

possible (within a context of partial and ongoing disclosure) by using a standardized format for disclosure was argued to reduce follow-up requests (reducing future delays) and assist in moving forward in a more timely manner.

Organizing Theme 2: Standardization of Disclosure Packages

The standardization of disclosure packages arose from a search for greater efficiencies in the disclosure process, addressing disparities in what is provided by the police to the Crown, as well as, in one province, emanating from a judicial review. Where disclosure packages were standardized, either through a provincial MOU or legislation, the process for arriving at the standard format was through the creation of a committee that was inclusive of various justice stakeholders (exactly who participated across the various jurisdictions varied, especially the inclusion of the judiciary) taking a collaborative, problem-solving approach that attended to the legal requirements, while also being cognizant of pragmatic concerns, by building in some degree of flexibility where warranted. It was furthermore deemed necessary to engage front line officers and staff involved in disclosure processes in these discussions so that they could identify the challenges posed by disclosure, as well as review the proposed standard format for their input. Once completed, there would need to be the requisite cross-training on the standard format. In addition, the process of arriving at the standardized format itself was considered beneficial as it provided a framework for ongoing dialogue between the respective parties involved in its creation.

Standardization was presented by participants as a means to address a number of the issues raised by creating consistency in what was presented to Crown; which in turn saves court time as there is a lesser likelihood for follow-up requests, less court time devoted to deciding on disclosable materials, as well as potentially increasing the likelihood of avoiding court altogether due to a greater potential for pre-trial resolutions. It also was suggested as potentially increasing efficiency for the police by creating a standard that removed confusion as to what was to be included, thereby streamlining the process on the front end. It was also noted as reducing duplication and replication across the system.

In furthering our understanding of disclosure outside of Saskatchewan, the standardization of disclosure packages is related to electronic disclosure and transcription in that they all require a coordinated and collaborative approach to attain a province-wide agreed upon

format. Standardization of disclosure packages is further related to electronic disclosure as the standard format for disclosure could ultimately be in an electronic format.

Organizing Theme 3: Electronic Disclosure

With respect to furthering our understanding of disclosure in provinces outside of Saskatchewan, the organizing theme of electronic disclosure provided insight into the challenges encountered and the various steps taken within these jurisdictions to address them. As noted by participants, the ever-increasing presence of technology in society has created the need for the criminal justice system to evolve in terms of meeting the demands created by the development and use of new technologies. In addition to new technological developments, the massive volume of electronic evidence created raised issues surrounding software compatibility, IT infrastructure, as well as the storage, retrieval, transmission, and security of evidence.

A major shift in the disclosure processes includes an incremental move away from the production of disclosure packages in print or paper-based formats towards providing disclosure materials in electronic formats. While arguably presented by participants as inevitable, more efficient, and worthwhile, it has not been without resistance on the part of some individuals involved in the criminal justice system, due to so-called generational gaps, wherein there is a lack of technological savvy and proficiency, as well as a desire to maintain the status quo due to familiarity with previously used practices. The police were reported as embracing technology more readily, while it was reported that Crown maintained a preference for paper-based materials when going to court due to the oft-reported cumbersome operation of technology within the courts and a lack of IT infrastructure to support electronic formats.

The costs associated with electronic disclosure were also reported as prohibitive in some respects. Incorporating electronic disclosure within the system was reported as a very expensive endeavour. Obtaining and maintaining electronic disclosure in an ever-evolving technological environment presents financial concerns surrounding the costs of software and storage requirements, as well as training of staff in new programs. In addition, the vetting and marking of disclosure materials in congruence with the noted exceptions permitted within the legal environment are extremely labour intensive for both police and Crown when the vetting responsibilities are shared (reported as the ideal).

Despite the issues and challenges reported with electronic disclosure, the participants suggested that electronic disclosure provided benefits that outweighed the costs. In the first instance, there would be timelier transmission of disclosed materials which, from a systems perspective, while increasing some demands on the front-end of the disclosure process, provides back-end savings in court. In addition, electronic disclosure was already in use in every province and in some cases, it reportedly reduced data redundancy and replication efforts. With time, training, and increased familiarity with electronic formats, the participants suggested that electronic disclosure processes would become even more efficient. It was also suggested that the civilianization of disclosure-related positions be given greater consideration as well as implementing either dedicated disclosure personnel within each agency or a centralized disclosure unit.

It is clear from Table 11 (programs used) presented above, that the move toward electronic disclosure is an ongoing endeavour in every province. The participating provinces are all at different stages of development and range of use of electronic disclosure. The two main systems reported as being in use are Versadex (British Columbia and Ontario) and PRISM (Alberta and Manitoba). Many additional applications are being considered, being piloted, or already being used in conjunction with these two systems. It was reported by participants that having police and Crown systems and disclosure-related business practices aligned is crucial. Finally, it was suggested that some form of internet-based disclosure was seen as the likely progression to be undertaken.

Organizing Theme 4: Transcription

Transcription assists in furthering our understanding of disclosure in other provincial jurisdictions, as it creates additional costs in the disclosure process resulting from the expanded use of technology as part of the evidence-collecting process in its use in statement-taking. In addition, it was consistently reported by participants that case law in Canada has progressed to the point where audio and/or video statements are considered the “best evidence” in court, although the video and the transcript may be entered into evidence in some cases. In one provincial jurisdiction, it was reported that there were discussions regarding the potential overuse of recorded statements, as well as issues surrounding police training in taking recorded statements leading to consideration for the use of handwritten statements. They noted the excess

of extraneous information often included in recorded statements that required a considerable amount of time to review as well as redact for disclosure purposes.

There were a number of factors discussed regarding costs associated with transcripts: language issues (related to non-English speaking witnesses), the huge volume created as a result of an increase in recorded statements, and the financial burden of getting transcripts produced within strained budgets. In addition, transcripts were reportedly used by police during investigations, but the request/desire for transcripts reportedly emanates primarily from the Crown for use in court when cross-examining witnesses.

The production of transcripts, as well as who is responsible for covering the costs, was another avenue of discussion amongst the participants. It was made readily apparent that there is no legal requirement to provide transcripts as part of a disclosure package. Determining what statements would be transcribed ranged from a preference for all statements to a determination of the relevant statements. Relevance was partially determined by the nature of the case, whether or not the case was proceeding to trial, and the length of an individual statement. Different models for producing transcripts were provided by participants (see Table 12 above). Transcripts may be produced ‘in-house’ (by police or Crown depending on the province) or by using external vendors. It was also noted in one province that consideration was being given to using a centralized transcription unit housed within the ministry of justice. In some provinces, police were responsible for transcription and the associated costs (although it was reported that this was not always followed despite being formally defined); in others, it was the responsibility of the Crown; while in yet another it was suggested that it was somewhat of a hybrid model wherein anything transcribed by the police as part of their investigations would be provided, but that additional transcription requests were financed by the Crown. There was also a distinction made between police agencies in one province wherein the RCMP provided transcripts as part of their business practices, while municipal police were no longer doing so.

VIII. CONCLUSIONS AND RECOMMENDATIONS

This research was undertaken to explore the challenges faced by actors in the criminal justice system with respect to disclosure in criminal cases, leading to recommendations based on what is currently going on inside Saskatchewan as well as in other provincial jurisdictions. The conclusions that follow bring together the various elements of this research into a coherent whole. As the primary research method employed in this study involved semi-structured interviews, the recommendations are presented in a similar order as they appeared within the presentation of the organizing themes derived from the interview research components of this report. They primarily focus on the suggestions put forward by participants in Saskatchewan, while taking into account and integrating the experiences of other provincial jurisdictions.

The literature review suggested a number of issues arising from disclosure responsibilities as a result of two primary sources: case law and technological advances. Each of these factors has led to the police, Crown, defence and courts experiencing significant challenges requiring them to, in some cases, radically alter their business practices in meeting the arising demands placed upon them. The analysis of the interview data suggests that these challenges are not unique to any provincial jurisdiction. Although not expressed in exactly the same terms, there was consistency in the responses regarding the effects of case law and technology.

Despite being close to a quarter-century old, case law, particularly that arising from the *Stinchcombe*, *McNeil*, and *O'Connor* cases, continues to have an impact on disclosure business practices. The lingering and ongoing effect is largely due to lack of specificity as well as the continuing evolution of case law which makes arriving at completely consistent processes difficult as it remains somewhat of a moving target. Other than the observation by a few participants that perhaps “the pendulum had swung too far” in reference to the perception that defence counsel had manipulated the honourable and just intentions underlying the duty to disclose so that these duties became a legal loophole of sorts for the defence, there were no dissenting views with regard to the case law. No one expressed a desire to “go back” to the pre-*Stinchcombe* era, as the reasoning behind the arguments proffered in these cases was deemed sound and just.

Nevertheless, the affect of case law has raised significant challenges for police and crown with respect to their daily operations within the legally prescribed frameworks. The primary issues reported by participants in the interviews (as well as the other components of the research)

clearly reflected those identified in the literature review. Some respondents agreed with the suggestions proffered by Martin (1993) and Cowper (2012) wherein the duty to disclose might produce “downstream” efficiency in the criminal justice system associated with an increase in pre-trial resolutions. However, all participants suggested that, congruent with the reports by Malm *et al.* (2005) and the Canadian Association of Chiefs of Police (2011), disclosure requirements have significantly increased the administrative workload associated with disclosure, thereby reducing the time spent on core policing and prosecutorial activities. The most pressing issues noted by participants included: 1) determination of relevance, 2) obtaining third-party records, 3) timing, 4) the creation of disclosure packages, 5) the quality of disclosure packages, and 6) the potential misuse of disclosed materials.

Technological advances over the past number of decades were also reported as having a significant effect on disclosure practices. The effects were noted as being negative in some respects, while also providing the opportunity for solutions to some of the arising issues noted above. The first noted concern surrounded the immense volume of electronic data that is now collected as part of a criminal investigation. In addition, there were reported difficulties in keeping up with, maintaining, and training personnel in concert with rapidly evolving technology. Of particular concern were IT infrastructure limitations (particularly storage, organization, and retrieval of evidence, as well as the continued use of outdated technology), the incompatibility between different technological applications (both within and outside the criminal justice system), potential misuse of disclosed materials via the internet, and the security of electronic files. Nevertheless, electronic disclosure was recognized as the future of disclosure. It addresses the sharing of information in an efficient and timely manner crucial to meeting the legally required time restrictions for disclosure as well as generally providing better access to information within the system.

Transcription of statements taken by police is directly related to technological advancements and legal requirements. Video and/or audio statements have become the normalized practice in most cases, reportedly to be the case particularly as the severity of the crime increases. However, this practice has resulted in an increase in costs with respect to the production of transcripts. However, it should be noted that one of the limitations of this aspect of the research was that definitive costs could not be provided by many policing agencies. With the exception of the RCMP centralized transcription unit, the tracking of transcription costs is

currently ad hoc at best. Even within the RCMP, additional transcription takes place in detachments which is not included in the cost estimate. In addition, changes in police practice, wherein some municipal police services have stopped producing transcripts, affected the available data. Furthermore, this research did not look at the costs incurred by the Crown or defence in the production of transcripts for use in court. Nevertheless, the data collected from the police suggests that transcription does present a formidable expense. A conservative estimate suggests that transcription costs are approximately one million dollars each year.

In 2009, the Saskatchewan government created a committee to explore transcription costs and issues in the province. However, little, if any, progress has been made with respect to formalizing and implementing a province-wide understanding between the police and Crown regarding transcription. Regional disparities in the production of transcripts continue, as does the debate as to who should bear the financial responsibility associated with transcription. The examination of case law, as well as the feedback from participants, suggests that the audio and/or video recorded statements are considered the best evidence in court. There is no legal obligation to provide transcripts (although participants noted that some judges continue to request them). The police have met their disclosure obligations by providing the recorded statement, assuming that the recording is provided in a useable format.

Recommendation 1: Legal Requirements and Issues

The examination of the respective roles of the police and Crown concerning disclosure responsibilities in both the literature review as well as the interview research, led to the first recommendation. One of the issues arising solely in the interviews with Saskatchewan participants was the practice of RCMP members acting in prosecutorial roles in rural and remote locations. The practice was not reported as occurring in any of the other provinces. Although a long-standing convention, this practice is problematic given the Crown's ultimate responsibility for the materials disclosed to the defence. It was reported that having police acting in prosecutorial roles might lead to problems in properly tracking disclosed materials, as well as meeting the suggested ideal that all requests for disclosure be made through the Crown offices. Furthermore, the police are not necessarily adequately trained in disclosure-related matters to meet the legal requirements of disclosure issues that could negatively affect a given case.

Recommendation 1.1: Crown Counsel Assume Responsibility for Court

It is recommended that Crown Counsel assume the responsibility of providing prosecutorial services in locations currently using police officers.

The respondents recognized the operational difficulties and financial burdens that might arise from this recommendation and provided an alternative for consideration:

Recommendation 1.1a: Explore Expanding the use of Video Court

It is recommended that the Government of Saskatchewan explore expanding the use of video courts across the province.

Respondents suggested that adopting this technology might alleviate some of the burdens associated with requiring prosecutors to conduct all prosecutorial functions as well as provide an added benefit in reducing the costs for the transportation of individuals, both accused and justice officials, to physically attend rural and remote circuit courts. The participants also emphasized the importance of police officers having a basic understanding of the fundamental considerations with respect to disclosure, their role in disclosure and the potential consequences when disclosure is not properly provided.

Recommendation 1.1b: Disclosure Training for Police Officers in Saskatchewan

It is recommended that the Saskatchewan Association of Chiefs of Police ensure that their personnel receive training on disclosure requirements and the effects of incomplete disclosure on the administration of justice.

Recommendation 2: Standardization of Disclosure Packages

In order to address issues regarding a lack of consistency in the provision of disclosure packages from police to the Crown, as well as concerns regarding incomplete or poor quality disclosure packages, participants identified the need for standardization of disclosure packages. In other provinces, the creation of a broadly inclusive committee organized around the guiding principles outlined previously (e.g., collaborative, problem-solving, pragmatic, engaging front-line personnel) provides the starting point for the standardization of disclosure practices and packages. Of importance to many participants was the need for recognition of differential resource capabilities when engaging in this discussion. The success of a standardized disclosure

package was predicated on the ability of the least-resourced agency being able to meet the standard.

Recommendation 2.1: Form a Disclosure Standardization Committee²⁸

It is recommended that the Government of Saskatchewan form a committee to develop a standardized format for disclosure packages.

Ontario has created a 52-file format to provide disclosure materials to the Crown that is consistent in its format as well as consistent with Statistics Canada reporting requirements. This format has been considered by a number of other provincial jurisdictions (e.g., Manitoba).

Recommendation 2.2: Explore Ontario's 52-File Format

It is recommended that the Saskatchewan Ministry of Justice examine the feasibility of using the 52-file format employed in Ontario as a framework for the discussion of standardizing disclosure packages.

Numerous respondents expressed the importance of providing complete and professional disclosure packages in a timely manner, especially given the fiscal constraints of this requirement. Saskatchewan participants suggested that dedicated disclosure personnel from each police service, or alternatively a provincially based unit, could successfully address shortfalls identified in the disclosure process. Furthermore, many participants articulated that civilian personnel be utilized in these endeavours. For example, the province of Alberta employs a dedicated disclosure unit that collects, organizes and prepares disclosure packages, utilizing specially trained civilian staff, that might serve as a model for Saskatchewan.

Recommendation 2.3: Create a Centralized Disclosure Unit

It is recommended that the Government of Saskatchewan give consideration to the creation of a centralized disclosure unit housed within the Ministry of Justice.

In the development of a standardized approach to disclosure, it is important to identify the desired outcomes of the proposed process that would enable the proper long-term evaluation

²⁸ There are three recommendations which call for the creation of committees to explore disclosure-related practices: 2.1: Standardization Committee, 3.1: Electronic Disclosure Committee, and 4.2: Transcription Committee. In order to avoid redundancy and duplication of efforts, given that the work of these committees is highly interrelated, a single committee might suffice in addressing all three recommendations. However, subject matter experts (primarily with respect to information technology as it pertains to electronic disclosure) will be required to contribute to area-specific content.

of these services. As quality and timeliness of disclosure packages was highlighted as a major concern, timeliness and quality control should be measured following the adoption of any standardized format and/or process.

Recommendation 2.4: Develop a Disclosure Tracking Mechanism

It is recommended that the Government of Saskatchewan create a province-wide tracking system with standardized timeliness and other quality control mechanisms for early disclosure preparations, compliance with disclosure standards, and trial readiness.

The success of implementing a standardized disclosure package and process hinges on the familiarity and understanding of the personnel engaged in the process. Once the standards are created, it is crucial that all those engaged in the process are adequately trained so as to increase consistency across police services and avoid confusion, replication and duplication of efforts.

Recommendation 2.5: Provide Cross-training on the Standardized Package

It is recommended that the Government of Saskatchewan creates and undertakes the necessary steps to ensure training on the standardized format.

Criminal activity is seldom isolated within a single geographic area. Saskatchewan respondents repeatedly identified the benefits of being able to quickly and efficiently share information between police services and prosecution units. One of the keys to sharing information is that it is presented in a consistent manner. Although an issue that was not directly identified by participants, it may be desirable to share information with police services in other provinces, as well as national reporting agencies such as Statistics Canada. As such, the following recommendation is made to reduce the barriers to sharing information within and outside provincial boundaries.

Recommendation 2.6: Standardize Police Data Reporting

It is recommended that the Government of Saskatchewan, in the development of a standardized disclosure package, also consider adopting the National Information Exchange Model (NIEM) as advocated by the Canadian Association of Chiefs of Police.

It was reported that the auditing or vetting of disclosure files was an exceptionally important aspect of disclosure processes in order to protect sensitive information that falls within legally permissible exclusionary guidelines (although these remain open to judicial review upon

request from defence counsel). The ideal model for auditing files that emerged from this research was a two-stage process. The inherent familiarity of police with the investigation (e.g., their knowledge of the circumstances and witnesses) positions them exceptionally well to provide the first review with respect to vetting the disclosure files. The Crown, who has the ultimate responsibility for providing disclosure in accordance with the law, can then assess the vetting completed by the police as well as provide the legal expertise necessary to ensure compliance with the law.

Recommendation 2.7: Shared Vetting Responsibilities

It is recommended that, as part of the standardized disclosure package, police vet and mark in the first instance all disclosed materials to the Crown that fall within the legally permissible exclusions for disclosure. The Crown then engages in the final vetting of the materials prior to transmission to the defence or self-represented accused.

Recommendation 3: Electronic Disclosure

The findings in this research align with the review of the literature that suggests that the use of electronic disclosure materials are the way of the future. The sheer volume of electronically collected evidence, as well as the potential efficiencies proposed to arise from the use of electronic disclosure, particularly in the timeliness of providing disclosure as well as the sharing of information within and between provinces, suggests that electronic disclosure is inevitable. It is recommended that the Government of Saskatchewan, in undertaking a review of the criminal justice electronic information systems be forward-looking in the development of electronic disclosure processes and protocols. To this end, subject matter experts in disclosure and information technology should review the current situation and develop a long-term, sustainable approach to electronic disclosure. It would be advisable to invite members of the judiciary to participate in this exercise, as they are the [arbitrators] of the product. This should not conflict with their independent positioning, as it is not about what is disclosed but rather the manner of disclosure.

Recommendation 3.1: Form an Electronic Disclosure Committee

It is recommended that the Government of Saskatchewan form a committee to further examine, develop and implement the expanded use of electronic disclosure within the province, and that the committee establish guidelines for evaluating the success of these endeavours.

Consistency in reporting systems and easier access to the data collected within the criminal justice system in Saskatchewan was reported as a pressing need that would increase efficiency and ensure justice. In reviewing the changes to be employed in updating the provincial electronic management systems, consideration to align the systems and business practices (police, Crown and corrections) for the creation of a single reference point for information should be given consideration.

Recommendation 3.2: Employ a Systems Approach

It is recommended that the Government of Saskatchewan employ a system-wide approach in the development of electronic disclosure that aligns the business practices and protocols for police services, prosecution units, the court operations and corrections.

The following recommendation arises from a review of the current use of electronic disclosure within Saskatchewan, as well as practices outside of the province. Unlike the situation in British Columbia, where all police services use the same electronic systems, the police in Saskatchewan employ a number of different electronic programs. Participants from Saskatchewan identified that the Public Prosecutions branch has the most pressing need for updating electronic systems. The PRISM system, created in Manitoba (also used in Alberta, and currently under review in Ontario), which has the capacity to receive files from different electronic systems and merge them into a single file appears to present a more manageable approach than requiring each police service to align their systems while still updating the Crown's systems.

Recommendation 3.3: Explore the use of PRISM

It is recommended that the Government of Saskatchewan explore the PRISM disclosure system and processes currently used in Manitoba and Alberta, as a possible mechanism for use in Saskatchewan.

Respondents from across the nation all suggested that some form of internet-based disclosure (as well as other systems, i.e. court-case management) was the most likely future of disclosure. When considering the updating of the criminal justice information management systems, there should be consideration for web-based approaches while weighing the potential security risks associated with such a model.

Recommendation 3.3: Explore the possibility of an Internet-Based Format

It is recommended that the Government of Saskatchewan explore the viability of an internet-based electronic disclosure protocol.

Recommendation 4: Transcription

Despite the previous research and discussion undertaken to address issues related to transcription in the province, no province-wide definitive agreement was reached. Instead, agencies across the province have proceeded on an *ad hoc* basis. For example, the RCMP continues to provide transcripts with disclosure packages, while the provision of transcripts by municipal police services varies. Other provinces employ a variety of models for the production of transcripts establishing protocols and processes as well as clearly articulating where the financial burden lies. In some cases, these were clearly outlined in province-wide memorandums of understanding between the prosecution units and police services.

Recommendation 4.1: Form a Transcription Committee

It is recommended that the Government of Saskatchewan facilitate the formation of a committee to develop a province-wide memorandum of understanding that clearly outlines the various stakeholder roles in the production and distribution of transcripts.

The literature review and the findings that emerged from an analysis of the interviews revealed that a contentious disclosure issue exists surrounding the provision of disclosure in electronic formats that meet the “useable format” requirement as identified in case law. The findings were that the police do fully meet their legal disclosure obligations when providing Crown prosecutors with a copy of an original video and/or audio statement(s) in a useable format. As a result, this is not a technological issue. In addition, many Crown prosecutors suggested that they too have met their legally prescribed obligations to defence counsel by providing the video and/or audio statement(s), although refusing to provide a written transcript

unless they already had one in their possession. It was the consensus of the respondents that while transcripts are a useful tool, they are not legally required.

Recommendation 4.2: Ministry of Justice assume responsibility for Transcription Determination and Costs

It is recommended that the Public Prosecutions branch of the Saskatchewan Ministry of Justice make a determination as to which recorded statements, or parts thereof, will be transcribed, as well as bear the financial burdens associated with the production of those transcripts.

Recommendation 4.2.a: Police Transcript Responsibilities

It is recommended that the police provide, at no charge, any transcript produced as part of a police investigation.

Recommendation 4.2.b: Police Statement Marking Responsibilities

It is recommended that the Saskatchewan Association of Chiefs of Police instruct their personnel to provide marked (time-stamped) annotations with each recorded statement as to the information contained within recorded statements.

Recommendation 4.3: Transcription Unit or Public Tender

It is recommended that either the Government of Saskatchewan explore the creation of a Centralized Transcription Unit housed within the Ministry of Justice OR tender transcription services to a private vendor.

One of the issues arising in the research was the inability to arrive at an accurate cost estimate for transcription. Given the potential enormity of the expense, these figures should be tracked more accurately. The collection of such outcome measures would also aid in future research and program evaluation.

Recommendation 4.4: Track Transcription Costs

It is recommended that the Government of Saskatchewan create a mechanism for tracking expenditures for transcription.

The province of British Columbia has developed a comprehensive memorandum of understanding that addresses many of the topics identified in this list of recommendations. A single document akin to this type of agreement, prepared in accordance with the

recommendations of the three committees advocated in this study, could inform the structure and framework, as well as provide additional useful insights in the preparation of a similar agreement in Saskatchewan.

Recommendation 5: Province-Wide Memorandum of Understanding

It is recommended that the government of Saskatchewan request and review the memorandum of understanding created in the province of British Columbia as a reference for the creation of a province-wide memorandum understanding that addresses the multiple disclosure-related issues raised in this report.

Expenditures on public safety in Canada have increased substantially over the past ten years and between 2002 and 2012 the per capita cost of policing in Canada increased by 42% (Hutchins, 2014, p. 33). One reason for these increased costs is the demands placed on public safety agencies to comply with legal decisions, such as *Stinchombe*. Consequently there has been an interest in developing strategies to reduce operational costs while upholding legal requirements. The four broad recommendations presented above provide Saskatchewan justice system stakeholders with a number of options to deliver transcription services in a more consistent and cost-effective manner. While offering a number of options to transform the delivery of transcription services, it is recommended that any new initiatives be matched with clear objectives and strategies for data collection that make long-term evaluations of programmatic successes easier to complete.

One advantage that Saskatchewan police services and justice system stakeholders enjoy is that they have the opportunity to learn from the successes and failures of managing transcription services in other provinces. As a result, it may be worthwhile, over the long term, to meet and collaborate with officials from other jurisdictions to identify promising cost-saving strategies and determine “what works.” Although the stakes are high for police services and public prosecution units in terms of expenditures, the potential costs of not ensuring proper and timely disclosure are also high in terms of the potential for wrongful convictions and the impact on the public’s confidence in the justice system.

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Appendix I: Legal Case Review

Case Law and the Duty to Disclose:

A review of court decisions

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Case Law and the Duty to Disclose: A review of court decisions

The “duty to disclose” has been developed over considerable time, very largely by courts, with strong reinforcement from Canada’s *Charter of Rights and Freedoms*, but also by legislators. Systematic development may be said to have started in 1991, with the judgement of the Supreme Court of Canada in *R. v. Stinchcombe*, [1991] 3 S.C.R. 326. In that case, Sopinka J. – who wrote the unanimous judgement of the court (for a panel of seven judges) – examined the roots of the Crown’s duty to disclose, as elaborated in previous decisions and affirmed under section 7 of the *Charter of Rights and Freedoms*, and provided a powerful analysis and statement of the law which established the base upon which the bulk of subsequent development in this area ultimately rests.

Early Development of a Duty to Disclose

As Sopinka J. noted in *Stinchcombe*, very little of the early development of the law with respect to the Crown’s duty to disclose came through legislative action, despite the urging (on more than one occasion) of the Law Reform Commission of Canada (*R. v. Stinchcombe*, [1991] 3 S.C.R. 326, (hereafter, *Stinchcombe*) at p. 332). Instead, he observed (*Stinchcombe*, at p. 332):

Apart from the limited legislative response contained in s. 603 of the *Criminal Code*, R.S.C., 1985, c. C-46, enacted in the 1953-54 overhaul of the *Code* (which itself condensed pre-existing provisions), legislators have been content to leave the development of the law in this area to the courts.

What emerged from this judge-driven process considerably modified what had once been normal, where “Production and discovery w[as] foreign to the adversary process of adjudication ... [and] the element of surprise was one of the accepted weapons in the arsenal of adversaries” (*Stinchcombe*, at p. 332). “[C]hange” he continued, “[had] resulted from acceptance of the principle that justice was better served when the element of surprise was eliminated from the trial and parties were prepared to address issues on the basis of complete information of the case to be met” (*Stinchcombe*, at p. 332). The resultant articulation of a legal duty on the Crown to disclose “all relevant information” – a very great change from earlier practice – was not universally embraced. However, Sopinka J. indicated clearly that this was no longer an open question, when he wrote: “The arguments against the existence of such a duty are groundless while those in favour are, in my view, overwhelming” (*Stinchcombe*, at p. 333).

This position emerged from his acceptance of the “fundamental difference in the respective roles of the prosecution and the Defence” (*Stinchcombe*, at p. 333) as articulated by Rand J. in *Boucher v. The Queen*, [1955] S.C.R. 16, at pp. 23-24).

It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.

To this strong statement Sopinka J. added the observation that “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 be used to ensure that justice is done” (*Stinchcombe*, at p. 333). And, after observing that, “there is no valid practical reason to support the position of the opponents to a broad duty of disclosure” (*Stinchcombe*, at p. 336), he identified “an overriding concern that failure to disclose impedes the ability of the accused to make full answer and Defence. ... [a] common law right [which] 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.” (*Stinchcombe*, at p. 336)

In sum, *Stinchcombe* stands for the proposition that the Crown bears a broad duty to disclose. (See below for a discussion of other parties that also have a duty to disclose.) Two questions which naturally arise are: “When must disclosure be made?” and, “What must the Crown disclose?”

The Timing of Disclosure

The timing of disclosure is affected by the fact that the purpose of disclosure is to facilitate the accused in making full answer and Defence. As a result, the initial disclosure should occur sometime after the charge is laid but before the accused is called upon to enter a plea or to elect the mode of trial; ideally, disclosure will have occurred early enough that the accused will understand the Crown’s case, including its “strengths and weaknesses,” before entering a plea or making election (*Stinchcombe*, at p. 342). However, since initial disclosure occurs at the request of the accused it is possible that such a request might be delivered later than would allow full

consideration of the material disclosed before the accused is called upon to plead and elect mode of trial (*Stinchcombe*, at p. 343). If the accused is not represented, the Crown has a duty to inform the accused of the right to disclosure, and the trial judge is not to take a plea unless satisfied that this has been done (*Stinchcombe*, at p. 343).

The argument that very early disclosure might be desirable was recently considered by Popescul J. (*R. v. Trevor Anderson*, neutral citation: 2011 SKQB 456), where he observed (at para. 38) that:

[T]he courts ought to be very wary of imposing deadlines in pre-trial preparation, the police ought not [to] be criticized for seeking advice from the Crown before laying charges and it is a waste of valuable resources to require disclosure to be prepared before a decision is made about who is going to be charged with what.

The duty to disclose is not fully satisfied by the initial disclosure, since in many cases additional information will come into the hands of the Crown later: “[T]he obligation to disclose is a continuing one and disclosure must be completed when additional information is received” (*Stinchcombe*, at p. 343). The Crown’s duty to disclose does not end with the conclusion of the trial. As was clarified in *McNeil* (*R. v. McNeil*, [2009] 1 S.C.R. 66, (hereafter, *McNeil*) at para. 17):

Stinchcombe made clear that relevant information in the first party production context includes not only information related to those matters the Crown intends to adduce in evidence against the accused, but also any information in respect of which there is a reasonable possibility that it may assist the accused in the exercise of the right to make full answer and Defence (pp. 343-44). The Crown’s obligation survives the trial and, in the appellate context, the scope of relevant information therefore includes any information in respect of which there is a reasonable possibility that it may assist the appellant in prosecuting an appeal.

As will be shown below, the police may also be affected by this obligation since they may be directly involved in first party disclosure.

What Must be Disclosed

First Party Disclosure

The Crown

The Crown has a very broad duty “to disclose all relevant information in its possession to an accused” (*McNeil*, at para. 14). The lineage of this proposition is long, and, in *Stinchcombe*,

Sopinka J. approved statements made in earlier cases in support of it. Specifically, he cited (*Stinchcombe*, p. 338) Cartwright J in *Lemay v. The King*, [1952] 1 S.C.R. 232, at p. 257:

I wish to make it perfectly clear that I do not intend to say anything which might be regarded as lessening the duty which rests upon counsel for the Crown to bring forward evidence of every material fact known to the prosecution whether favourable to the accused or otherwise [Emphasis added.]

and also the observation of McEachern C.J.B.C. in *R. v. C. (M.H.)* (1988), 46 C.C.C. (3d) 142 (B.C.C.A.), at p. 155: “there is a general duty on the part of the Crown to disclose all material it proposes to use at trial and especially all evidence which may assist the accused even if the Crown does not propose to adduce it.” Emphasizing this, Sopinka J. himself wrote that: “The material must include not only that which the Crown intends to introduce into evidence but also that which it does not. No distinction should be made between inculpatory and exculpatory evidence” (*Stinchcombe*, p. 343).

It is not, however, necessarily the case that all evidence held by the Crown must (or should) be disclosed to the accused as soon as a request for disclosure is received. In *McNeil* Charron J. (writing the unanimous judgement for eight justices – Bastarache J. took no part in the judgement) wrote that: “The Crown retains discretion as to the manner and timing of disclosure where the circumstances are such that disclosure in the usual course may result in harm to anyone or prejudice to the public interest.” (*McNeil*, at para. 18)

Moreover, there are circumstances under which material in the hands of the Crown need not be disclosed at all. The current law in this regard is basically as was outlined by Sopinka J. in *Stinchcombe*. First, the Crown is not required to disclose material that is clearly irrelevant to the case at hand. Sopinka J. noted that it was appropriate for the Crown to decide what is “clearly irrelevant,” but added that, “the Crown must err on the side of inclusion” (*Stinchcombe*, p. 339). He also noted that: “Transgressions with respect to this duty [would] constitute a very serious breach of legal ethics.” (What the implications of a breach of the duty to disclose might be, in a particular case, are discussed below.)

Second, the Crown has discretion to delay disclosing some material, under certain circumstances. In particular, Sopinka J. noted that in some instances early disclosure might “impede completion of an investigation” (*Stinchcombe*, p. 339). When such was the case the

Crown may delay disclosure, but Sopinka J. observed that: “Delayed disclosure on this account is not to be encouraged and should be rare” (*Stinchcombe*, p. 339).

Third, the rules of privilege also affect what the Crown must disclose, or may choose not to disclose, to the accused (*Stinchcombe*, p. 339). Privilege may arise in a number of circumstances, and may be listed under a number of heads. In a recent judgement delivered by Popescul J., of the Saskatchewan Court of Queen’s Bench, several of these were considered (*R. v. Trevor Anderson*, neutral citation: 2011 SKQB 427). (It might be noted that the judge recognized (at para. 30) the usefulness of Robert W. Hubbard et al., *The Law of Privilege in Canada* (Aurora, Ont.: Canada Law Book, 2010), which provides a thoroughly list of the various types of privilege.) A distinction was drawn in the judgement of Popescul J. between absolute privilege and qualified privilege; the latter “requires a balancing of public and private interests involved [before deciding] whether to disclose the purportedly privileged information.” However, even absolute privilege – despite what the term might suggest – is not necessarily absolute. Solicitor-client privilege is, for example, subject to the innocence at stake exception. The stringent test to be applied by courts when determining whether to apply the innocence at stake exception was outlined by the Supreme Court of Canada in *R. v. McClure* [2001] 1 S.C.R. 445, at paras 46-61. The trial judge must ask first: “Is there some evidentiary basis for the claim that a solicitor-client communication exists that could raise a reasonable doubt about the guilt of the accused?” (at para. 52) And, if that question has been answered in the affirmative, must then ask: “Is there something in the solicitor-client communication that is likely to raise a reasonable doubt about the accused’s guilt?” (at para. 57) If that second question is also answered in the affirmative solicitor-client privilege will be overcome.

The question of privacy interests may also arise. Immediately following the decision in *Stinchcombe*, questions remained as to whether there could be privacy interests in Crown files. For example, in *R. v. O’Connor*, [1995] 4 S.C.R. 411, (hereafter, *O’Connor*) at p. 430, Lamer C.J. and Sopinka J., in dissent, held that: “As a form of “public property”, records in the possession of the Crown are simply incapable of supporting any expectation of privacy.” However, in *R. v. Mills*, [1999] 3 S.C.R. 668, the Court confirmed that there may be privacy rights in the Crown’s files and they must be considered before disclosure occurs. That case concerned medical records, and in the judgement of McLachlin and Iacobucci JJ., writing the majority judgement in a 7 – 1 decision, it was held that (*Mills*, at para. 94, emphasis added):

The right of the accused to make full answer and Defence is a core principle of fundamental justice, but it does not automatically entitle the accused to gain access to information contained in the private records of complainants and witnesses. Rather, the scope of the right to make full answer and Defence must be determined in light of privacy and equality rights of complainants and witnesses. It is clear that the right to full answer and Defence is not engaged where the accused seeks information that will only serve to distort the truth-seeking purpose of a trial, and in such a situation, privacy and equality rights are paramount. On the other hand, where the information contained in a record directly bears on the right to make full answer and Defence, privacy rights must yield to the need to avoid convicting the innocent. Most cases, however, will not be so clear, and in assessing applications for production, courts must determine the weight to be granted to the interests protected by privacy and full answer and Defence in the particular circumstances of each case. Full answer and Defence will be more centrally implicated where the information contained in a record is part of the case to meet or where its potential probative value is high. A complainant's privacy interest is very high where the confidential information contained in a record concerns the complainant's personal identity or where the confidentiality of the record is vital to protect a therapeutic relationship.

Elaborating on that decision, in *McNeil*, the court noted that (*McNeil*, at para. 19):

It should come as no surprise that any number of persons and entities may have a residual privacy interest in material gathered in the course of a criminal investigation. Criminal investigative files may contain highly sensitive material including: outlines of unproven allegations; statements of complainants or witnesses — at times concerning very personal matters; personal addresses and phone numbers; photographs; medical reports; bank statements; search warrant information; surveillance reports; communications intercepted by wiretap; scientific evidence including DNA information; criminal records, etc.

It is, therefore, well established that there may be privacy interests in the materials held in Crown files, and that those privacy interests may be sufficient to prevent disclosure to an accused. There is, however, an onus on the Crown “to justify the non-disclosure of any material in its possession” (*McNeil*, at para. 20).

Privacy legislation is also important in this regard, and may address specific instances. As the Court noted, “legislation in all 10 provinces addresses the disclosure of information contained in law enforcement files” (*McNeil*, at para. 19). In Saskatchewan, the legislation is *The Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, c. F-22.01, s. 15.

The *Criminal Code of Canada* also limits the requirement to disclose in a range of instances where the record “contains personal information for which there is a reasonable expectation of privacy” (*Criminal Code of Canada* (R.S.C., 1985 c. C-46, s. 278.1-278.9).

Finally, it should be noted that there is a limit on the Crown’s responsibility to seek materials for its files – from other parts of government, for example, or from other parts of the administration of justice – and this may be said to limit the Crown’s disclosure requirements. Specifically, Charron J., who delivered the judgement in *McNeil*, stated (*McNeil*, at para. 13):

The notion that all state authorities constitute a single indivisible Crown entity for the purposes of disclosure finds no support in law and, moreover, is unworkable in practice. Accordingly, Crown entities other than the prosecuting Crown are third parties under the *O’Connor* production regime.

Third party disclosure under the “*O’Connor* production regime” will be discussed below. However, in that same judgement Charron J. commented (*McNeil*, at para. 13):

[T]his does not relieve the prosecuting Crown from its obligation to make reasonable inquiries of other Crown entities and other third parties, in appropriate cases, with respect to records and information in their possession that may be relevant to the case being prosecuted.

And he observed that the Crown was not to be considered “a passive recipient of relevant information with no obligation of its own to seek out and obtain relevant material” (*McNeil*, at para. 48). He continued (*McNeil*, at para. 49):

The Crown is not an ordinary litigant. As a minister of justice, the Crown’s undivided loyalty is to the proper administration of justice. As such, Crown counsel who is put on notice of the existence of relevant information cannot simply disregard the matter. Unless the notice appears unfounded, Crown counsel will not be able to fully assess the merits of the case and fulfill its duty as an officer of the court without inquiring further and obtaining the information if it is reasonably feasible to do so.

Charron J. (*McNeil*, at para. 49) therefore approved of Ryan J.A. in *R. v. Arsenault* (1994), 153 N.B.R. (2d) 81 (C.A.), who observed that “Crown counsel have a duty to make reasonable inquiries of other Crown agencies or departments that could reasonably be considered to be in possession of evidence. ... [para. 15]”, and also of Doherty J.A. in *R. v. Ahluwalia* (2000), 138 O.A.C. 154, at paras. 71-72, who wrote of the Crown’s duty to investigate when there was a question about the “credibility or reliability of the witnesses in a case” (*McNeil*, at para. 50).

The Police

Police are to some extent subject to first party disclosure requirements. (For consideration of third party disclosure and police, see below.)

In *McNeil*, the Supreme Court undertook to clarify “the respective obligations of the police and the Crown to disclose the fruits of the investigation under *R. v. Stinchcombe*” (*McNeil*, at para. 14). In doing so, the Court held that there was a duty on “police (or other investigating state authority)” to participate in first party disclosure. Specifically, the Court held that (*McNeil*, at para. 14):

The Crown’s obligation to disclose all relevant information in its possession to an accused is well established at common law and is now constitutionally entrenched in the right to full answer and Defence under s. 7 of the *Canadian Charter of Rights and Freedoms*. The necessary corollary to the Crown’s disclosure duty under *Stinchcombe* is the obligation of police (or other investigating state authority) to disclose to the Crown all material pertaining to its investigation of the accused. For the purposes of fulfilling this corollary obligation, the investigating police force, although distinct and independent from the Crown at law, is not a third party. Rather, it acts on the same first party footing as the Crown.

The obligation referred to here relates to the normal “fruits of the investigation”, but there is another dimension to first party disclosure by the police. The court held that (*McNeil*, at para. 15):

[R]ecords relating to findings of serious misconduct by police officers involved in the investigation against the accused properly fall within the scope of the “first party” disclosure package due to the Crown, where the police misconduct is either related to the investigation, or the finding of misconduct could reasonably impact on the case against the accused. The Crown, in turn, must provide disclosure to the accused in accordance with its obligations under *Stinchcombe*.

It is not the duty of the Crown to obtain these materials, nor is it incumbent upon the accused to ask for them; it is the part of the duty on police to participate in first party disclosure. This was made clear later in the judgement where Charon J. wrote (*McNeil*, at para. 59):

Indeed, as discussed earlier, the disclosure of relevant material, whether it be for or against accused, is part of the police corollary duty to participate in the disclosure process. Where the information is obviously relevant to the accused’s case, it should for part of the first party disclosure package to the Crown *without prompting*. [italics in original]

As will be discussed below, police are also subject to third party disclosure, and some material that is not subject to first party disclosure will none the less be subject to third party disclosure.

Review of Discretion by Trial Judge

In *Stinchcombe*, Sopinka J. provided that the Crown's discretion with respect to disclosure is reviewable by the trial judge, at the request of counsel for the accused. He began by noting that the onus is on the Crown to defend any decision to delay disclosure or deny disclosure of material in its possession or control. He wrote that (*Stinchcombe*, at p. 340):

The discretion of Crown counsel is, however, reviewable by the trial judge. Counsel for the Defence can initiate a review when an issue arises with respect to the exercise of the Crown's discretion. On a review, the Crown must justify its refusal to disclose. Inasmuch as disclosure of all relevant information is the general rule, the Crown must bring itself within an exception to that rule.

He continued, noting that in deciding whether to require additional disclosure the reviewing judge might have to balance competing interests (*Stinchcombe*, at p. 340).

The trial judge on a review should be guided by the general principle that information ought not to be withheld if there is a reasonable possibility that the withholding of information will impair the right of the accused to make full answer and Defence, unless the non-disclosure is justified by the law of privilege. The trial judge might also, in certain circumstances, conclude that the recognition of an existing privilege does not constitute a reasonable limit on the constitutional right to make full answer and Defence and thus require disclosure in spite of the law of privilege. The trial judge may also review the decision of the Crown to withhold or delay production of information by reason of concern for the security or safety of witnesses or persons who have supplied information to the investigation. In such circumstances, while much leeway must be accorded to the exercise of the discretion of the counsel for the Crown with respect to the manner and timing of the disclosure, the absolute withholding of information which is relevant to the Defence can only be justified on the basis of the existence of a legal privilege which excludes the information from disclosure.

The trial judge may also review the Crown's exercise of discretion as to relevance and interference with the investigation to ensure that the right to make full answer and Defence is not violated.

After voicing the hope that disagreements between the Crown and counsel for the accused will be decided amicably, Sopinka J. concluded that the reviewing trial judge might have recourse to a variety of ways of proceeding. He wrote that (*Stinchcombe*, at p. 341): "This may require not only submissions but the inspection of statements and other documents and indeed, in some

cases, *viva voce* evidence. A *voir dire* will frequently be the appropriate procedure in which to deal with these matters.”

The Form of Disclosure

In *Stinchcombe*, Sopinka J. was concerned to establish “the general principles that govern the duty of the Crown to make disclosure to the Defence” (*Stinchcombe*, at p. 341). Sopinka J. continued that (*Stinchcombe*, at pp. 341-342):

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

In Saskatchewan, the Court of Appeal (*R. v. Laporte et al*, neutral citation: 1993 SKCA 6773) outlined rules leading to what is now termed the “*Laporte* inventory.” It was described by Sherstobitoff J.A. in the following terms:

A more practical way of conducting a judicial review of Crown discretion respecting disclosure is to require the Crown to produce a written, itemized inventory the information in its possession, identifying those items which it intends to disclose and those which it does not, and containing, in respect of the latter items, a statement in each case of the basis upon which the Crown proposes to withhold disclosure. Each item should be described as to its nature with sufficient detail that counsel will be enabled to make a reasoned decision as to whether to seek disclosure or not.

The *Laporte* inventory will provide a list of the materials disclosed; the materials themselves must, in order to fulfill the purpose of disclosure, be in a useable form. If accurate copies of what is in the Crown’s files is provided this should be satisfactory.

The “special problem” that could arise with respect to witness statements was considered in *Stinchcombe*. The situation with respect to those witnesses that the Crown expects to call was clear: Sopinka J. wrote that (*Stinchcombe*, at p. 344):

There is virtually no disagreement that statements in the possession of the Crown obtained from witnesses it proposes to call should be produced. In some cases the statement will simply be recorded in notes taken by an investigator, usually a police officer. The notes or copies should be produced. If notes do not exist then a

"will say" statement, summarizing the anticipated evidence of the witness, should be produced based on the information in the Crown's possession.

The conclusion reached with respect to witnesses that the Crown did not expect to call was similar, and Sopinka J. summed up the law with respect the disclosure of all witness statements when he wrote that (*Stinchcombe*, at p. 345):

I am of the opinion that, subject to the discretion to which I have referred above, all statements obtained from persons who have provided relevant information to the authorities should be produced notwithstanding that they are not proposed as Crown witnesses. Where statements are not in existence, other information such as notes should be produced, and, if there are no notes, then in addition to the name, address and occupation of the witness, all information in the possession of the prosecution relating to any relevant evidence that the person could give should be supplied.

Third Party Disclosure

The rules governing third party disclosure emerged out of *R. v. O'Connor*, [1995] 4 S.C.R. 411. That case was specifically concerned with the efforts of an accused, charged with sexual offences, to obtain access to therapeutic records of complainants; these records were held by third parties. Changes in the *Criminal Code* (discussed above) have rendered that specific question moot. "In respect of any other criminal proceeding, however, the *O'Connor* application provides the accused with a mechanism for accessing third party records that fall beyond the reach of the *Stinchcombe* first party disclosure regime." (*McNeil*, at para. 26)

The basic outline of the process to be followed was outlined in *McNeil* by Charron J. (*McNeil*, at para. 7):

In *O'Connor*, this Court set out a two-part test for production of third party records. First, the applicant must demonstrate that the information contained in the records is likely relevant. In the appellate context, it was therefore incumbent on *McNeil* to show that the targeted documents were likely relevant to his proposed application to introduce fresh evidence on his appeal from conviction. Second, if the threshold test of likely relevance is met, the court may order production of the records for its inspection. With the targeted documents before it, the court weighs "the positive and negative consequences of production, with a view to determining whether, and to what extent, production should be ordered" (*O'Connor*, at para. 137). The second part of the *O'Connor* test essentially requires a court to conduct a balancing of the third party's privacy interest in the targeted documents, if any, and the accused's interest in making full answer and Defence.

It is, therefore, incumbent upon accused to initiate any request for disclosure of materials held by a third party, and accused must demonstrate to the court that the material is likely relevant. As Charron J. noted, repeating the words of the judgement in *O'Connor*, “while the likely relevance threshold is “a significant burden, it should not be interpreted as an onerous burden upon the accused (para. 24)” (*McNeil*, at para. 29). The burden is significant because of the court’s “meaningful role in screening applications “to prevent the Defence from engaging in ‘speculative, fanciful, disruptive, unmeritorious, obstructive and time-consuming’ requests for production” (*O'Connor*, at para. 24, quoting from *R. v. Chaplin*, [1995] 1 S.C.R. 727, at para. 32)” (*McNeil*, at para. 29).

Charron J. provided the following observations on likely relevance (*McNeil*, at para. 33): “Likely relevant” under the common law *O'Connor* regime means that there is “a reasonable possibility that the information is logically probative to an issue at trial or the competence of a witness to testify” (*O'Connor*, at para. 22 (emphasis deleted)). An “issue at trial” here includes not only material issues concerning the unfolding of the events which form the subject matter of the proceedings, but also “evidence relating to the credibility of witnesses and to the reliability of other evidence in the case” (*O'Connor*, at para. 22). At this stage of the proceedings, the court cannot insist on a demonstration of the precise manner in which the targeted documents could be used at trial. The imposition of such a stringent threshold burden would put the accused, who has not seen the documents, in an impossible Catch-22 position.

If materials have passed the likely relevance test, Charron J. wrote, it will be up to the trial judge to balance the interests of the accused and privacy interests (if any) in those materials , observing that (*McNeil*, at para. 41):

at this stage of the proceedings, the court has confirmed that the production application concerns non-privileged documents. ... [And] absent an overriding statutory regime governing the production of the record in question, a third party privacy interest is unlikely to *defeat* an application for production.

Charron J. continued (*McNeil*, at para. 42):

Once a court has ascertained upon inspection that third party records are indeed relevant to the accused’s case, in the sense that they pertain to an issue in the trial as described above, the second stage balancing exercise is easily performed. In effect, a finding of true relevance puts the third party records in the same category for disclosure purposes as the fruits of the investigation against the accused in the hands of the prosecuting Crown under *Stinchcombe*. ... with few exceptions (including the *Mills* statutory scheme), the accused’s right to access information necessary to make full answer and Defence will outweigh any competing privacy

interest. The same applies with respect to relevant material in the hands of third parties. This is particularly so in respect of criminal investigation files concerning third party accused.

The dangers inherent in this regime – that disagreements over access to materials held by third parties might come to occupy a great deal of time, and that disclosure might unnecessarily harm privacy interests – were recognized. The “true relevance” test is designed to prevent the former. Charron J. wrote (*McNeil*, at para. 45): “Disclosure is intended to assist an accused in making full answer and Defence or in prosecuting an appeal, not turn criminal trials into a conglomeration of satellite hearings on collateral issues.” To address the latter, Charron J. wrote (*McNeil*, at para. 46):

[T]o ensure that only relevant material is produced and that no unwarranted invasion of privacy interests occurs, the court may find it necessary to make a production order subject to redactions or other conditions. In addition, when just and appropriate to do so, the court may well impose restrictions on the dissemination of the information produced for purposes unrelated to the accused’s full answer and Defence or prosecution of an appeal: see, for example, recommendations 34 and 35 in the Martin Report (at p. 179) and *P. (D.) v. Wagg* (2004), 239 D.L.R. (4th) 501 (Ont. C.A.), at para. 46. Absent unusual circumstances, however, the crafting of a production order should not necessitate any detailed inquiry into the precise nature or extent of the privacy interest in question. The *O’Connor* hearing should remain focussed on the criminal proceeding at hand.

The “likely relevance” threshold in *O’Connor* derived from common law, and is different from that prescribed by statute “for the production of records containing personal information in sexual assault proceedings under the *Mills* regime (see s. 278.3(4) of the *Criminal Code*)” (*McNeil*, at para. 30). The balancing required under the *Mills* regime is also different, since it is presumed that there is “a reasonable expectation of privacy ... in the types of records targeted by the statutory regime” (*McNeil*, at para. 32).

The actual procedure to be followed in non-*Mills* regime cases when access is sought to material held by third parties was outlined by Charron J. in his judgement in *McNeil* as follows (*McNeil*, at para. 27):

Stated briefly, the procedure to be followed on an *O’Connor* application is the following:

- (1) The accused first obtains a *subpoena duces tecum* under ss. 698(1) and 700(1) of the *Criminal Code* and serves it on the third party record holder. The subpoena compels the person to whom it is directed to attend court with the targeted records or materials.

- (2) The accused also brings an application, supported by appropriate affidavit evidence, showing that the records sought are likely to be relevant in his or her trial. Notice of the application is given to the prosecuting Crown, the person who is the subject of the records and any other person who may have a privacy interest in the records targeted for production.
- (3) The *O'Connor* application is brought before the judge seized with the trial, although it may be heard before the trial commences. If production is unopposed, of course, the application for production becomes moot and there is no need for a hearing.
- (4) If the record holder or some other interested person advances a well-founded claim that the targeted documents are privileged, in all but the rarest cases where the accused's innocence is at stake, the existence of privilege will effectively bar the accused's application for production of the targeted documents, regardless of their relevance. Issues of privilege are therefore best resolved at the outset of the *O'Connor* process.
- (5) Where privilege is not in question, the judge determines whether production should be compelled in accordance with the two-stage test established in *O'Connor*. At the first stage, if satisfied that the record is likely relevant to the proceeding against the accused, the judge may order production of the record for the court's inspection. At the next stage, with the records in hand, the judge determines whether, and to what extent, production should be ordered to the accused.

In *McNeil*, police misconduct records were identified as presenting a particularly difficult matter to deal with, and Charron J. made a series of recommendations to facilitate the correct handling of such records. Some would properly be forwarded “without prompting” (*McNeil*, at para. 59) to the Crown and form a part of the first party disclosure package. Others, however, would fall under the ambit of third party disclosure, and reliance would therefore have to be placed on the regime developed in *O'Connor*. This, Charron J. observed (*McNeil*, at para. 57), echoing the comment of the Honourable George Ferguson, Q.C. in his *Review and Recommendations Concerning Various Aspects of Police Misconduct* (Report prepared for the Toronto Police Service, 2033; available online at: <http://www.torontopolice.on.ca/publications/files/reports/ferguson1.pdf>), was “neither efficient nor justified” (at p. 15), and Charron J. suggested (*McNeil*, at para. 59) that, with respect to a range of types of material, police should seek the advice of Crown counsel. These had been listed by Ferguson at p 17:

- a. Any conviction or finding of guilt[t] under the *Canadian Criminal Code* or under the *Controlled Drugs and Substances Act* [for which a pardon has not been granted].
- b. Any outstanding charges under the *Canadian Criminal Code* or the *Controlled Drugs and Substances Act*.
- c. Any conviction or finding of guilt under any other federal or provincial statute.
- d. Any finding of guilt for misconduct after a hearing under the *Police Services Act* or its predecessor *Act*.
- e. Any current charge of misconduct under the *Police Services Act* for which a Notice of Hearing has been issued.

Charron J. concluded with the recommendation that (*McNeil*, at para. 60):

With respect to records concerning police disciplinary matters that do not fall within the scope of first party disclosure obligations, procedures such as those recommended in the Ferguson Report, tailored to suit the particular needs of the community in which they are implemented, can go a long way towards ensuring a more efficient streamlining of *O'Connor* applications for third party production. Trial courts seized with motions for disclosure under *Stinchcombe* or applications for third party production are well placed to make appropriate orders to foster the necessary cooperation between police, the Crown and Defence counsel.

The language used by Charron J. was not mandatory, but it would seem wise to follow his advice in this matter.

Results of a Breach of the Duty to Disclose

A breach of the duty to disclose may lead to a number of different outcomes. In some circumstances it may result in the accused seeking to change his plea from “guilty” to “not guilty” at the trial stage; this is at least potentially possible since it has been held that the trial judge has discretion to accept such a request at any time up until sentencing is complete. This view of the trial judge’s discretion finds its base in *Thibodeau v. The Queen*, [1955] S.C.R. 646, and the words of Cartwright J. (as he then was) at pp. 653-654:

[I]t is clear that at any time before sentence the Court has power to permit plea of guilty to be withdrawn. As to this it is sufficient to refer to the following cases; *R. v. Plummer* (1), *The King v. Lamothe* (2), *R. v. Guay* (3), and *R. v. Nelson* (4). These cases make it equally clear that the decision whether or not permission to withdraw a plea of guilty should be given rests in the discretion of the Judge to whom the application for such permission is made and that this discretion if exercised judicially will not be lightly interfered with.

The only restriction on the trial judge is that he must exercise this discretion judicially, which, in practical terms would appear to mean that in order for him to accept a request to change the plea there must have been something wrong with the original plea. In the case of failure to disclose properly the argument would be that the failure prevented accused from understanding fully the case against him, and that therefore a change of plea should be allowed. As was made clear in *Adgey v. R.*, [1975] 2 S.C.R. 426 a negative decision by the trial judge is appealable.

(Accused may also re-elect mode of trial, though this is as of right under s. 561 of the *Criminal Code*, R.S.C., 1985, c. C-46, rather than dependent upon a problem with disclosure).

Failure to provide adequate and timely disclosure will provide grounds for accused to seek delay in moving to trial, while adequate disclosure is made and sufficient time is allowed for accused to take account of the new material; if the trial has already begun, an adjournment may be granted for the same purpose. It is incumbent upon counsel for the accused to (*Stinchcombe*, at p. 341):

bring to the attention of the trial judge at the earliest opportunity any failure of the Crown to comply with its duty to disclose of which counsel becomes aware. Observance of this rule will enable the trial judge to remedy any prejudice to the accused if possible and thus avoid a new trial (See *Caccamo v. The Queen*, [1976] 1 S.C.R. 786). Failure to do so by counsel for the Defence will be an important factor in determining on appeal whether a new trial should be ordered.

As indicated, it is also possible that a new trial may be ordered.

Finally, where there has been a breach of the duty to disclose a judge may find that there has been a violation of the accused's rights, specifically under ss. 7 and 11(d) of the *Canadian Charter of Rights and Freedoms*. This will involve answering one of two questions: "Has the accused been denied the right to make full answer and Defence?" and "Has there been an unreasonable delay in bringing the case to trial?" A decision to the effect that the accused's rights have been breached is not determinative. Other rights may be involved and need to be balanced. The Supreme Court in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, at p. 877 held that there is no hierarchy of rights, with the result that if different rights come into conflict a balancing will be necessary. In the case of delay, a variety of factors will be considered by the court in deciding, "how long is too long." The approach the courts will take – substantially the same as that outlined in *R. v. Smith*, [1989] 2 S.C.R. 1120 and *R. v. Askov*, [1990] 2 S.C.R. 1199 – was articulated in *R. v. Morin*, [1992] 1 S.C.R. 771, at pp. 787-803). The

onus is on the accused to prove a breach of his s. 11(d) rights (*Morin*, at 788-789), and this will involve the court in a thorough examination of all of the following elements (*Morin*, at 787-788):

1. the length of the delay;
2. waiver of time periods;
3. the reasons for the delay, including
 - (a) inherent time requirements of the case,
 - (b) actions of the accused,
 - (c) actions of the Crown,
 - (d) limits on institutional resources, and
 - (e) other reasons for delay; and
4. prejudice to the accused.

In *Morin*, it was suggested that a delay of 8-10 months might be seen as reasonable (*Morin*, at p. 799; a delay of 6-8 months had been suggested two years before in *Askov*, *supra*), but no firm rule is possible, and an assessment of the various factors involved may produce a very different result. Specifically, it should be noted that actions by the accused (or his counsel) that have the effect of delaying proceedings are likely to increase the length of time that a judge will find acceptable. For example, in a recent Saskatchewan case, *R. v. Trevor Anderson*, neutral citation: 2011 SKQB 456, Popescul J. held that a delay of 42 months and 17 days in bringing the case to trial was not excessive since it stemmed from the complexity of the case and the actions of the accused.

When the judge is satisfied that the rights of the accused have been breached the judge will decide on an appropriate remedy. This may mean a stay in the proceedings.

Cases referred to:

R. v. Stinchcombe, [1991] 3 S.C.R. 326; *Boucher v. The Queen*, [1955] S.C.R. 16; *R. v. Trevor Anderson*, neutral citation: 2011 SKQB 456; *R. v. McNeil*, [2009] 1 S.C.R. 66; *Lemay v. The King*, [1952] 1 S.C.R. 232; *R. v. C. (M.H.)* (1988), 46 C.C.C. (3d) 142 (B.C.C.A.); *R. v. Trevor Anderson*, neutral citation: 2011 SKQB 427; *R. v. McClure* [2001] 1 S.C.R. 445; *R. v. O'Connor*, [1995] 4 S.C.R. 411; *R. v. Mills*, [1999] 3 S.C.R. 668; *R. v. Arsenault* (1994), 153 N.B.R. (2d) 81 (C.A.); *R. v. Ahluwalia* (2000), 138 O.A.C. 154; *R. v. Laporte et al*, neutral citation: 1993 SKCA 6773; *R. v. Chaplin*, [1995] 1 S.C.R. 727; *Thibodeau v. The Queen*, [1955] S.C.R. 646; *Adgey v. R.*, [1975] 2 S.C.R. 426; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *R. v. Smith*, [1989] 2 S.C.R. 1120; *R. v. Askov*, [1990] 2 S.C.R. 1199; *R. v. Morin*, [1992] 1 S.C.R. 771;

Appendix II: Informed Consent Form



UNIVERSITY OF
REGINA

DEPARTMENT OF JUSTICE STUDIES

343 Classroom Building
3737 Wascana Parkway
Regina, Saskatchewan, Canada S4S 0A2
Ph: (306) 585-4779 Fax: (306) 585-4815

Participant Consent Form

Project Title: The Duty to Disclose

Researcher: Dr. Nick Jones

Purpose and Objective of the Research:

In the decision rendered by the Supreme Court of Canada (herein after referred to as the “Court”) with regard to the case of R. v. *Stinchcombe*, the Court explored issues raised regarding the legal duty of disclosure by the Crown. A second case of interest in this current examination is R. v. McNeil which provided a discussion regarding the extension of the disclosure requirements provided by R. v. *Stinchcombe* to other state authorities; particularly the police. While the two aforementioned rulings clearly establish that the Crown and police have a duty to disclose, they remain silent with regard to a number of issues encompassing that duty. Preliminary discussions surrounding some of these issues in Saskatchewan include, but are not necessarily limited to: 1) the scope of the requirement for disclosure, 2) the evolution of disclosure practices in Saskatchewan, 3) current state of the practice of disclosure, 4) the costs of disclosure, and 5) the practice of disclosure in other jurisdictions in Canada. Through the examination of these issues, the intent of this research is to provide an evidence-based proposal that presents suggested solutions to address the issues.

Procedures:

The researcher will be conducting individual interviews that will take 60-90 minutes to complete. With your permission, the interviews will be digitally recorded and transcribed. The recordings and transcripts, along with notes taken during the interview, will be destroyed 5 years after the final submission of the research report.

Potential Risks:

There are no known or anticipated risks to you by participating in this research.

Follow up:

Upon completion of the research, the full document along with a short executive summary will be sent to the Ministry of Justice: Corrections and Policing. To obtain results from the study, please contact the Ministry of Justice: Corrections and Policing. It should be available to you by September 2013.

Questions or concerns:

Questions regarding the research can be directed to the principal researcher:

Nick Jones, Ph.D.
Department of Justice Studies, University of Regina
Phone: (306) 585-4862
Fax: (306) 585-4815
Email: nick.jones@uregina.ca

Consent:

THIS IS TO CERTIFY THAT I, (please print your name) _____
HERBY AGREE TO PARTICIPATE AS A VOLUNTEER IN THIS RESEARCH PROJECT.

I understand the following terms and conditions:

- 1) I have the right to decline to participate in this research from the beginning, to refuse to answer any specific questions, and to stop participating in the research at any time. I understand that I shall not be penalized if I decline nor shall I gain any favour if I agree to be part of the study;
- 2) I have been given the opportunity to ask whatever questions I desire, and that all such questions will be answered to the best of the researcher's ability;
- 3) I have been assured that anything that I say will be reported anonymously in the final report and that all efforts to protect my identity will be taken;
- 4) Only the researcher will have access to any information linking participants to their responses;
- 5) I may be asked to participate in possible follow-up interviews or phone calls for clarification purposes;
- 6) This project was approved by the Research Ethics Board, University of Regina. If research participants have any questions or concerns about their rights or treatment as subjects, they may contact the Research Ethics Board chair at 585-2775 or by email: research.ethics@uregina.ca

Participant: _____

Date: _____

Researcher: _____

Date: _____

Appendix III: University of Regina Research Ethics Board Approval



OFFICE FOR RESEARCH, INNOVATION AND PARTNERSHIP
MEMORANDUM

DATE: April 8, 2013
TO: Dr. Nicholas A. Jones
Justice Studies
FROM: Dr. Larena Hoeber
Chair, Research Ethics Board
Re: **The Duty to Disclose (File # 96R1213)**

Please be advised that the University of Regina Research Ethics Board has reviewed your proposal and found it to be:

- 1. **APPROVED AS SUBMITTED.** Only applicants with this designation have ethical approval to proceed with their research as described in their applications. For research lasting more than one year (Section 1F), **ETHICAL APPROVAL MUST BE RENEWED BY SUBMITTING A BRIEF STATUS REPORT EVERY TWELVE MONTHS.** Approval will be revoked unless a satisfactory status report is received. Any substantive changes in methodology or instrumentation must also be approved prior to their implementation.
- 2. **ACCEPTABLE SUBJECT TO MINOR CHANGES AND PRECAUTIONS (SEE ATTACHED).** Changes must be submitted to the REB and approved prior to beginning research. Please submit a supplementary memo addressing the concerns to the Chair of the REB. **** Do not submit a new application.** Once changes are deemed acceptable, ethical approval will be granted.
- 3. **ACCEPTABLE SUBJECT TO CHANGES AND PRECAUTIONS (SEE ATTACHED).** Changes must be submitted to the REB and approved prior to beginning research. Please submit a supplementary memo addressing the concerns to the Chair of the REB. **** Do not submit a new application.** Once changes are deemed acceptable, ethical approval will be granted.
- 4. **UNACCEPTABLE AS SUBMITTED.** The proposal requires substantial additions or redesign. Please contact the Chair of the REB for advice on how the project proposal might be revised.



Dr. Larena Hoeber

** supplementary memo should be forwarded to the Chair of the Research Ethics Board at the Office for Research, Innovation and Partnership (Research and Innovation Centre, Room 109) or by e-mail to research.ethics@uregina.ca

Phone: (306) 585-4775
Fax: (306) 585-4893
www.uregina.ca/research

Appendix IV: Transcription Costs - Form

The Duty to Disclose: Research Project 2013

Transcription Costs – 2006 – 2012

Background:

According to the Saskatchewan Association of Chiefs of Police (SACP), a “transcription committee” was created to review the challenges and costs associated with the duty to disclose and the resulting costs to the Services for transcriptions. They noted that the demand for transcriptions has “increased substantially” and resulted in a state which is “severely taxing both support staff and investigators.” They also noted that the costs incurred have been “born exclusively by police.”

The committee determined that the average time to complete the transcription process is approximately five hours per one hour of material to be transcribed. In 2010, the estimated time required for transcriptions was 10,140 hours at an estimated cost of \$407,384.

Purpose:

The purpose of this aspect of the data collection is to try and get a picture of how transcription is taking place within each police service as well as the associated costs.

Transcription Information			
Transcription is completed:	_____ : In-house	Completed By: ____ Sworn Member ____ Civilian Employee	Rank / Salary Expenditure _____ _____
	_____ : Third-Party Vendor	Name of Vendor _____	Rate Charged _____
Reporting Line	Who in your Service manages the flow of transcription requests?	Rank _____ _____	Salary Expenditure _____
What material is transcribed?		Please check all that apply: _____: Officer Notes _____: Voice Recordings _____: Video Recordings _____: Other (please identify) _____	If digitally recorded initially, what digital format is used for collection of these materials? Officer Notes: _____ Voice Rec.: _____ Video Rec.: _____

Transcription Format for Disclosure	In what format is material forwarded to the Crown Prosecutor?	Please check all that apply: _____: paper _____: electronic - Format: _____	If paper, what is your printing cost/page? _____: per page
Equipment Requirements	What equipment/software is / was required / purchased to facilitate transcription?	List Equipment:	Equipment Expenditures \$ _____

Annual Transcription Costs				
Year	Number of Prosecutorial Requests for Transcription	Number of Cases where transcriptions completed	Number of "Statements" Transcribed	Annual Transcription Cost Incurred
2006	_____	_____	_____	\$ _____
2007	_____	_____	_____	\$ _____
2008	_____	_____	_____	\$ _____

2009	_____	_____	_____	\$ _____
2010	_____	_____	_____	\$ _____
2011	_____	_____	_____	\$ _____
2012	_____	_____	_____	\$ _____

Appendix V: Aggregate Completed Transcription Form

Table 1: Transcription Form Information

Police Service	Completed Where:	Completed By	Salary (\$) Expenditure	Reporting Line	Material Transcribed	Digital Format	Transcription Format	Equipment Requirements
Moose Jaw	in-house	Civilian	21.67/hr	Sgt. I/C CID	Statements/ Interviews (Audio & Video)	N/A	paper (\$0.05/pg)	<ul style="list-style-type: none"> • Computer • Foot pedals • Start/stop program
Regina	in-house	Civilian	26.31/hr	Court Coordinator PIEM Manager Prosecution	Statements/ Interviews (Audio & Video) 911 calls	Cassette Mini- cassette 911 call recorder	electronic	<ul style="list-style-type: none"> • Computer • Foot pedals • Start/stop program (4 licenses @ \$250/yr)
Saskatoon	in-house	Civilian	49,440	Different in different sections	Statements/ Interviews (Audio & Video)	N/A	Mostly paper Some electronic	<ul style="list-style-type: none"> • FTR • Computer • Headphones • Foot pedals • Disc Copier
		Sworn	70,844					
RCMP	in-house (transcription unit)	Public Service Employee (STOCE- 02)	37,685 – 57,437	Manager of F-Division transcript unit	Statements/ Interviews (Audio & Video) 911 calls Crime- scene re- enactments	Sony hand- held recorders Interview rooms Video taken on scene	Electronic (MS Word)	<ul style="list-style-type: none"> • VLC media player • Start Stop Power Play • Record Player • Computer • Headphones • Foot pedals • Chair • Monitors X2 • Mouse