



NON-DISCLOSURE ORDER APPLICATION PROCEDURES IN CRIMINAL CASES REPORT ON CONSULTATION MEMORANDUM 12.15

(To be published as part of a composite report
from the Criminal Rules Working Committee)

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PREFACE

This final report represents a pre-cursor to what is hoped will be new criminal rules dealing with the matter of non-disclosure orders. The report represents the final policy positions of the working group, following the publication of, and consultation on, Consultation Memorandum 12.15, one of a series which the Institute has issued as part of its Rules of Court Project.

The working group will now proceed with other subject areas, but we thought it important that the legal community be aware of the final policy positions, even though it may take some time for the them to find their way into final rules format.

We thank the working group for its work and deliberations, and look forward to their further proposals in other areas. The members of the Criminal Rules Committee are:

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NON-DISCLOSURE Order Application Procedures in Criminal Case Report on Consultation Memorandum 12.15

[1] At its meeting on April 27, 2005, the Criminal Rules Working Committee considered the comments received from the bench and bar on the proposals set out Consultation Memorandum 12.15, *Non-Disclosure Order Application Procedures in Criminal Cases* (“CM 12.15”).¹ Following discussion of the comments and, once again, the merits of the issues, the Committee decided to maintain its proposals.

[2] For a civil Rules Working Committee, the next step would be the preparation of “drafting instructions.” The Committee, however, determined that it would not be appropriate to issue drafting instructions at this time. As indicated in Part B of Chapter 1 of CM 12.15, rules made under s. 482 of the *Criminal Code* must meet the drafting standards established under the *Statutory Instruments Act*. This would entail the preparation of rules in both official languages, according to federal legislative drafting standards (not provincial legislative drafting standards, as apply to civil rules of court). In light of the contingencies surrounding the acceptance of Alberta Court of Queen’s Bench and Court of Appeal criminal rules generally and the rules proposed in CM 12.15 in particular, the expenses of translation, the retaining of an additional legislative drafter, and extended time frames involved in satisfying the Clerk of the Privy Council and the Department of Justice of the suitability of the drafting, the Committee decided that the preparation of formal drafting instructions should be deferred.

[3] Instead, the Committee offers this Final Report as a summary of its proposals and as a foundation for any future drafting instructions. Detailed discussions bearing on the proposals are found in CM 12.15.

¹ “Non-disclosure orders” include publication bans orders, certain sealing orders, and *in camera* orders. The Committee’s proposals concerned only orders made under discretionary common law or statutory authority.

ISSUE No. 1

In the present circumstances, should reform efforts respecting procedures for non-disclosure orders be put on hold?

[4] While the Committee would accept as a principle that “if it ain’t broke, don’t fix it,” there is evidence that members of the bench and bar (especially counsel for the media) are not satisfied with the current regulation of non-disclosure order practice. The Court of Queen’s Bench committee dealing with non-disclosure orders in criminal matters has not yet issued its proposals. Hence, proposals for reform offered by the Committee are neither untimely nor unnecessary.

ISSUE No. 2

If additional procedural rules are necessary, in what form should they be established?

[5] The Committee remains of the view that non-publication order practice should be regulated by rules of court, rather than by (in particular) practice notes. Practice notes can be difficult to locate; they may be changed rapidly, rendering knowledge and strategy obsolete. Indeed, the transient nature of practice notes is an invitation to change – which is contrary to the stability that we should expect in the criminal law. Moreover, practice notes in the criminal procedure area have a suspect quality, relating to such issues as the persons entitled to issue practice notes, the proper subjects of practice notes (as opposed to rules of court or legislation), and the legal effects of practice notes. Too heavy reliance on practice notes in the criminal context runs counter to the delegation of procedural authority in s. 482 of the *Criminal Code*, which contemplates the establishment of rules of court. The creation of rules governing applications for non-disclosure orders would respond to the invitations made by both Alberta’s Queen’s Bench Practice Note 4 and Lamer C.J.C. in *Dagenais*: “Given that I have concluded that motions for publication bans made in the context of criminal proceedings are criminal in nature, the solution to these practical problems is to be found in the provincial rules of criminal procedure and the relevant case law.”²

² *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 at 869.

ISSUE No. 3

Should new rules apply to all forms of non-disclosure orders?

[6] The consensus remains that new rules should govern applications for all types of common law and discretionary statutory non-disclosure orders (but not to mandatory non-disclosure orders) including

- (a) “*in camera*” orders;
- (b) sealing orders, respecting court exhibits or entire court files;
- (c) orders permitting the use of pseudonyms;
- (d) inherent jurisdiction publication bans;
- (e) discretionary statutory publication bans, respecting
 - (i) judicial interim release hearings (on prosecutorial application),
 - (ii) the identities of certain persons, or
 - (iii) investigative hearings; or
- (f) orders permitting participants in judicial proceedings to testify in a manner that prevents their identification.

[7] The Committee departs from the approach of providing separate treatment for applications to seal entire court files found in the Provincial Court of Alberta Notice to the Profession of March 2, 2004 [PCNTP] and Alberta Court of Queen’s Bench Civil Practice Note 12 [Civil PN]. In the Committee’s view, these applications should be subject to the same general procedural rules as other non-disclosure order applications.

[8] Applications to set aside or vary sealing orders (whether respecting parts of a court record or an entire file) or other non-disclosure orders do have distinct procedural implications, since the applicants would usually be the media. Hence, these applications should be treated separately, as indicated in the Civil PN:

An application . . . to set aside a sealing order must be made to the Chief Justice, the Associate Chief Justice, or a judge they have authorized to hear such applications, who will give directions regarding notice and service.

[9] Questions have been raised as to the nature of the applicant and the appropriate procedure to be followed if a judge brings up the non-disclosure issue. In this

circumstance, the judge neither is nor could be the applicant; instead, the applicant would be the Crown or defence, as the case may be.

ISSUE No. 4

Which judges should be entitled to hear non-disclosure order applications?

[10] In the view of the Committee, the following “order of precedence” is preferable:

Subject to any contrary legislative provisions, the application should be made

- (i) to the judge assigned to hear the case,
- (ii) if the trial judge has not been appointed, to a judge of the same level of court in the judicial district in which the case shall be heard, or
- (iii) if the trial court level has not been established, to a Court of Queen’s Bench justice in the judicial district in which the case shall be heard.

[11] This position is consistent with *Dagenais*.

ISSUE No. 5

Should new rules specify notice application forms?

[12] No submissions disputed the need for application forms. Form A to the Civil PN provides a reasonable starting point for the drafting of a form for criminal proceedings. The PCNTP electronic notice form establishes a reasonable starting point for a Queen’s Bench electronic notification form (as the Provincial Court’s website explains, this is but a notice form, and is not a substitute for the application).

[13] The form (along the lines of Civil Form A) should require disclosure of the order sought, the grounds for the order, and an indication of the evidence that will be relied upon, so that the respondent and the media will have adequate notice of the nature of the application.

[14] It should be emphasized that the Committee has not purported to regulate the evidential foundations for applications. Successful applications (and successful oppositions to applications) will depend on the requisite evidence being put before the

court in the appropriate manner. The nature and form of that evidence are governed by the substantive law and judicial discretion respecting the oversight of proceedings. The Committee's proposals should not be read as either reducing or heightening evidential burdens.

ISSUE No. 6

What notice period should apply to applications for non-disclosure orders?

[15] In the Committee's view, the PCNTP and Civil PN approach of at least "2 clear days before the trial, application, proceeding or matter to which the ban or order is to apply" is appropriate. With the expected amendments to the Rules of Court, the reference to "clear days" should be eliminated in favour of a simple reference to at least "2 days" notice.

[16] The 2 days notice provision would be preceded by a proviso such as "except with leave of the Court", to deal with situations that arise *ex improviso*, where justice would be served by allowing the application to be made without the 2 days notice.

[17] The Committee notes that the "2 days notice" is a presumptive minimum, not a maximum. If counsel are lax in applying for a non-disclosure order, the information in question could be legitimately published before the order is sought, and a non-disclosure order would become pointless. If the non-disclosure order issues are complicated and cannot be adequately addressed within 2 days before trial, bringing the application risks causing an adjournment.

ISSUE No. 7

Should new rules expressly confirm the discretion of the court respecting notice issues?

[18] Again, no dissenting voices were heard on the issue of preserving judicial discretion respecting notice issues.

[19] A provision such as is found in s. 5 of the Civil PN should be maintained: “The Applicant may apply to the Court for further directions as to the parties to be served and the manner of service.”

ISSUE No. 8

Should new rules specify the consequences of violating the rules?

[20] The Committee does acknowledge that it is generally worthwhile to specify the consequences of violating rules.

[21] The Committee is leery, however, of imposing “penal” consequences on accuseds or on expanding the liabilities of the Crown. The Committee, moreover, is of the view that the Courts retain their inherent jurisdiction to control proceedings and their jurisdiction respecting contempt of court; this authority does not require confirmation by a rule, and this authority should be sufficient to deal with rule-breakers, whether Crown, accused, or media.

[22] In any event, if “penal” provisions are warranted, it would be best to create general provisions as part of a broader set of rules governing criminal procedure, rather than particular penal provisions for the particular proposed rules.

[23] Hence, the Committee maintains its proposal that new rules not specify consequences for their violation - at least with respect to the particular rules contemplated.

[24] The Committee notes that it has devoted significant discussion to the issue of whether rules should provide for an award of costs against the Crown in favour of third parties, such as the media.

ISSUE No. 9

Should new rules provide that the information that is the subject of an application may not be published without leave of the court prior to the application?

[25] The Committee maintains its proposal that new rules contain an “interim non-disclosure” provision. This sort of provision has the virtue of making interim non-disclosure clear, and brings that rule to the attention of parties. The language in s. 7 of the Civil PN is a good model: “The Information that is the subject of the initial application may not be published without leave of the Court until that application is heard.”

[26] One qualification is that the provision should allow for “publication” for the purposes of responding to the application, so that (e.g.) counsel could communicate information to their clients, or *vice versa*. Subsections 486(3.1) and (4.2) of the *Criminal Code* permit this: “an order . . . does not apply in respect of the disclosure of information in the course of the administration of justice if it is not the purpose of the disclosure to make the information known in the community” (s. (4.2.)).

[27] The language of s. 7 of the Civil PN does not create an absolute interim non-publication requirement; information may not be published *without leave of the Court*. In appropriate circumstances, then, counsel (e.g. for the media) could apply for pre-hearing publication or could apply to the Court for clarification respecting the information subject to interim non-disclosure. Leave of the Court could also be obtained so that counsel could have access to materials for the purposes of responding to the application.

[28] Of course, if a non-disclosure order is not granted, information respecting the matter at issue may be legally published.

ISSUE No. 10

Should new rules declare that the media are “interested parties?”

[29] The Committee does not accept that the “media” should have “automatic standing.” *Dagenais* does not require that the media have standing. Lamer C.J.C. did

state in *Dagenais* that “the judge should give the media standing (if sought);”³ but he also indicated that “[i]f the media wish to oppose a motion for a ban ... they should attend at the hearing on the motion, argue to be given status, and if given status, participate in the motion.”⁴ Based on the actual media attendances, the judge can sort out which organizations (if not all) should be given standing, and the degree of participation that those organizations should be permitted.

[30] The media are stepping into proceedings in which they are not original parties. The judge (which will usually be the trial judge) should remain entitled to manage the trial process. In a very high-profile case, for example, the judge may wish to grant standing of a representative nature to certain media outlets alone.

[31] Denying automatic standing should not place undue burdens on the media. The role of the media in a properly functioning democracy has been highlighted by the Supreme Court. The “credentials” of particular media organizations (those likely to seek standing) should be readily apparent to all, and should be the legitimate subject of judicial notice. In many if not most cases, it would not be necessary for media organizations to file affidavits in support of their “credentials.” The denial of automatic standing is only an affirmation of the inherent jurisdiction of the Court. A rule creating automatic standing or a presumption of standing would involve substantive regulation beyond the authority of rules. Furthermore, in an age of ever-increasing media plurality, an automatic standing rule could spawn practical difficulties.

[32] The key, in the Committee’s view, is not to confer automatic standing on the media, but to ensure that the media receive adequate notification of non-disclosure order applications, through hard-copy or electronic means or both (as discussed in relation to the next two Issues), or as directed by the judge in his or her discretion. Media organizations that receive notice may then apply at the application for standing, and the particular terms of standing may be determined at the application. The Committee would not impose any requirements for a formal application for standing on the media. The formalities should be as directed by the hearing judge.

³ *Ibid.* at 890; see also 872.

⁴ *Ibid.* at 872.

ISSUE No. 11

Should new rules retain the current technique of hard-copy notification through posting at a specified location?

[33] In the Committee’s opinion, there is no good reason to dispense with the hard-copy form of notice. Paragraph 3(b) of the Civil PN provides model language: “notice to the media is given by filing Form A with the Clerk of the Court, who will post the notice at the place reserved for such notice at the courthouse where the application is to be heard.”

ISSUE No. 12

Should new rules provide for electronic notice of applications for non-disclosure orders?

[34] No one has disputed the desirability of some form of electronic notification for the media.

[35] The distinction between the requirement to provide electronic notice to the media and the particular technological means used to provide electronic notice to the media may be captured in this way: The rules should set out the requirement to provide electronic, computer-based notice to the media, in the prescribed form with the prescribed information. The rules should authorize the Chief Justice to specify the particular manner of giving notice, which will depend on particular technological solutions and experience with the practicalities of providing notice.

ISSUE No. 13

In an electronic notification regime, should the media be notified directly or notified through counsel?

[36] The Committee maintains its view that media organizations should be entitled to be notified directly, if they so choose; but that they should have the option of directing that notification may be given to counsel.

[37] Hence, the form of electronic notice should allow the media to receive direct notification. The Committee notes that an e-registration system similar to that established

under the PCNTP would permit the media the option of direct notification or notification through counsel.

ISSUE No. 14

Should new rules provide that once a non-disclosure order is granted, notice of the order should be entered on the court file?

[38] The Committee maintains its view that a notification provision be included in a new rule, as is currently required by the Notice to the Profession of November 4, 2001: “applications for Publication Bans and similar orders shall be accompanied by a written Notification to the Media using the attached form. Once the order is granted, the document will be signed by the Judge and placed on the Clerk’s file.”

[39] The rules could also provide that the Court may direct the Crown to take such steps as are appropriate to ensure that exhibits are dealt with consistently with any non-disclosure order.

ISSUE No. 15

Should new rules be developed for applications for non-disclosure orders in the Court of Appeal?

[40] The position of the Committee remains that some standardized guidance for Court of Appeal practice is desirable.

ISSUE No. 16

If new rules should be developed for applications for non-disclosure orders in the Court of Appeal, should those rules provide a relatively detailed procedural framework, parallel to the Court of Queen’s Bench rules?

[41] The Committee’s view remains that the “standardized guidance” should be very simple: a rule should simply provide that in the case of applications for non-disclosure orders, the Court of Appeal shall follow the procedures established in the rules of court, with the necessary changes.

[42] Two areas that may “necessitate changes” may be electronic notice (which may require customization) and permitting a justice or panel of justices to hear non-disclosure order applications.

ISSUES ON WHICH THE COMMITTEE HAS OFFERED NO PROPOSALS

- [43] The Committee has offered no proposals respecting the following matters:
- (a) whether rules should provide that all non-disclosure orders must be reduced to writing;
 - (b) whether rules should provide that all published reasons for judgment should contain a notification of any relevant non-disclosure orders respecting the case (this would confirm the usual Alberta practice; and it should be noted that the *Canadian Guide to the Uniform Preparation of Judgments* does contain rules respecting the posting of appropriate warnings on judgments);
 - (c) whether an electronic or hard-copy “registry” or list of granted non-disclosure orders should be created which would be accessible to the media; and
 - (d) whether the rules governing appeals by third parties (such as the media) should be reformed.



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