

**Legal Aid Ontario
Big Case Management**

Big Case Management

Report and Recommendations

August 2002

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EXECUTIVE SUMMARY

PURPOSE OF THE PROJECT

In late 1995, LAO established a Big Case Management (BCM) program. Over the past five years, criminal cases over \$20,000 have been consuming a growing percentage of the overall criminal certificate budget. In fiscal 2000/2001, LAO spent approximately \$131,768,000 on legal aid certificates. Of this, about \$16,756,500 (more than 12%) was spent on BCM cases. The amount spent on all criminal certificates in that fiscal year was about \$73,906,800, of which over 22% was spent on the 1% of certificates designated BCM. About 500 new cases are accepted into the BCM program each year.

The BCM project's purpose was to establish, for the delivery of big case management:

- a policy framework
- standards
- guidelines
- ongoing data collection methods
- priorities
- training material
- \$75,000 ceiling for fees

POLICY FRAMEWORK

The report recommends the adoption of this policy framework:

BCM is a program through which LAO identifies, budgets and monitors cases that substantially exceed the limits of a standard criminal certificate.

The goals of the program with respect to its caseload are to:

- ~ Monitor and control case cost, in accordance with the standard of a reasonable client of modest means
- ~ Increase predictability of case cost
- ~ Provide counsel with appropriate resources for high quality, effective service delivery
- ~ Ensure the criminal bar continues to accept certificates for big cases
- ~ Develop and maintain a framework of accountability and consistency

DATA COLLECTION, TRAINING MATERIALS, AND CEILING ON FEES

As part of the project, new data collection mechanisms were implemented. They need to be built upon to create a comprehensive data collection system.

A BCM Manual was developed for use by case managers, containing sections on:

- 1) introduction (goals of BCM)
- 2) accepting a case for BCM - guidelines and procedures
- 3) conducting a BCM meeting - tips
- 4) setting a BCM budget - factors to take into account - required information
- 5) glossary of common terms in BCM cases - e.g. *Corbett* application, *K.G.B.* issues
- 6) authorizing disbursements
- 7) using LAO LAW (formerly the Research Facility)
- 8) Exceptions Committee Cases
- 9) forms
 - request for counsel opinion
 - budget form
 - case not meeting threshold for inclusion in program
 - terms and conditions for BCM
 - Exceptions Committee opinion guide

The \$75,000 ceiling on fees was implemented through communications with counsel and area offices, and the creation of an Exceptions Committee to hear applications for budgets above the ceiling.

STANDARDS, GUIDELINES AND PRIORITIES

The report recommends:

- The current model of managing cases should be continued. Each case should receive individual consideration by the case manager on its merits.
- The eligibility threshold of \$20,000 for BCM should be continued, except for homicides or high profile cases involving serious offences, which should be eligible in any event.
- Case managers should not accept cases into the program which are unlikely to reach the threshold amount of \$20,000 fees and disbursements.
- LAO should hire a manager for the BCM program.
- A core group of area directors should be trained to manage all BCM cases.
- A comprehensive training session of at least a day's duration for case managers should be held, at several regional locations or centrally.
- The use of standard budget forms for communications with counsel and legal accounts should be mandatory.

- BCM data collection and analysis methods should be upgraded to include:
 - a) requirement for counsel to provide end-of-case report with their final account
 - b) regular monthly, quarterly and yearly AS/400 reports
 - c) expansion of Excel spreadsheet

- BCM communication materials should be revised to include:
 - a) opinion letter guide for counsel proposing a case for BCM
 - b) advice letter for counsel when case not accepted into program
 - c) terms and conditions document for counsel
 - d) legal accounts reporting document updating counsel on budget

1. INTRODUCTION

1.1 WHAT IS BCM?

Big case management, or BCM, was first introduced at LAO in 1995, as a means of monitoring and controlling the cost of “big” criminal cases. A big case is a more than usually expensive case, where the defence is expected to cost \$20,000 or more (the threshold is higher for murder cases and matters involving more than one accused). In BCM, the usual tariff maximums are effectively replaced by an agreed-upon budget for the case.

“Big” cases most often tend to be high profile cases, or cases involving a charge of homicide. Other candidates for big case management include cases where there are particularly complex issues or evidentiary matters, and cases involving multiple accused, such as conspiracy cases.

When a case is identified as a candidate for case management, it is referred to a case manager (one of LAO’s regional Area Directors). The case manager works with defence counsel to set a realistic budget, either for the case as a whole or, more commonly, for each stage of the matter as it progresses.

1.2 WHAT ARE THE OBJECTIVES OF THE BCM PROJECT?

1.2.1 Terms of Reference

The BCM Project was commenced pursuant to LAO's 2001/2002 business plan. The project's purpose was to establish a policy framework, standards, guidelines, ongoing data collection methods, priorities and training material for the delivery of Big Case Management. The project team also undertook the implementation of the new ceiling of \$75,000.00 for fees on BCM certificates.

1.3 HOW WAS THE PROJECT CONDUCTED?

1.3.1 Project Team

The project commenced in April 2001 and was completed in March 2002. A project team was assembled to examine and analyze the current BCM program at LAO, and was given the task of developing recommendations for the future direction of the program.

The team’s recommendations, set out in this report, are intended to help LAO identify, implement and monitor the most cost effective methods of delivering quality legal services in complex criminal cases.

In addition to data collection and analysis, the project team also carried out the following structural development initiatives, described elsewhere in this report:

- Implementation of new \$75,000 ceiling for fees
- Development and implementation of ongoing data collection methods
- Development of training manual on BCM for LAO Area Directors

1.3.2 Data collection

There were four major data collection and analysis components to the project:

1. Collection of **historical data** on the project from the legacy system (AS400) and other sources

Statistical reports from the legacy system were compiled. The reports give a snapshot of the history of Big Case Management at LAO, including:

- type of cases in the program.
- where the cases come from.
- average and total fees and disbursements.
- who has been managing the cases.
- which lawyers have been active in the program.
- changes to case cost over the years.
- BCM cases as a percentage of the whole criminal caseload

2. **Survey of area directors**

A survey was designed and mailed to all area directors, asking for their insights into BCM and seeking ideas for the future of the program. Thirty-nine completed surveys were received (of 41 mailed) and the results were compiled.

3. **detailed review** of a selection of casefiles (365 BCM cases, 100 non-BCM cases between \$10,000 and \$20,000)

A detailed analysis was done of almost 500 completed casefiles. Accounts, correspondence and supporting documents were reviewed. For each file, over 40 factors were extracted such as how many court days there were, how many counsel were involved, what was the primary defence, what was the BCM budget, what motions were brought, what was the outcome. The purpose was to identify:

- what are the primary factors driving case cost
- what are the distinctions between cases which are and are not case managed
- how often are budgets increased after being set initially
- how much is not paid as being excess to budget
- what is the rate of utilization of LAO's research facility, LAO LAW

4. examination of BCM in **other jurisdictions**

Other jurisdictions have grappled with the challenges presented by managing big cases. While their experiences are not exactly like Ontario's, it was helpful to look at the methods some of them are using to manage big cases. Consideration was given to whether models used in those legal aid systems could be successfully applied in Ontario. As well, some recent cases were looked at where, in the absence of a case management system, the courts intervened to order the AG or justice department to bear the defence costs.

2. BCM BACKGROUND

2.1 INCEPTION

Big Case Management was introduced in 1995. The regulation was amended effective December 22, 1995 to create a procedure for case management of expensive criminal cases¹. BCM applies to:

- matters other than charges of first or second-degree murder where the total fees and disbursements are likely to exceed \$20,000
- murders where the total fees and disbursements are likely to exceed \$30,000
- matters involving more than one accused where the total fees and disbursements for all accused persons are likely to exceed \$50,000
- matters where the preliminary hearing is likely to take more than two weeks

According to the regulation, counsel is obliged to notify LAO under any of these circumstances. The President or Area Director then meets with counsel and effectively replaces the tariff maximums for the charges with an agreed-upon or imposed budget for these cases. An appeal of a budget decision can be brought to the President.

A memorandum from the Deputy Director, Legal, to the Area Directors, dated January 12, 1996, set out the desired outcome of the program:

The overall goal of the process is to define the defence strategy in big cases so as to be able to effectively focus the Plan's resources to ensure that Legal Aid clients are as well represented as reasonable private fee paying clients of modest means.

.....

Once the program began, the caseload grew rapidly. Initial estimates of the number of cases per year proved to be low. By March 31, 1998, 785 cases were recorded as having been managed under BCM².

CURRENT PROCEDURES

Procedures developed gradually. During the first few years of the program, most of the very largest cases were managed by the Provincial Director. He met with counsel, in person or by telephone, usually with the area director also in attendance by conference call. While he sometimes set a budget premised on a number of hours of preparation time and an estimated number of court days, he also tried a number of other models including:

- no budget set, but issues discussed and accounts to be reviewed personally by the Provincial Director

¹ Currently O. Reg. ¹ Colin Meredith, "Project Report: 'Workplan for Evaluation of the Big Case Management Program'", May 7, 1998
107/99 s. 5

² Colin Meredith, "Project Report: 'Workplan for Evaluation of the Big Case Management Program'", May 7, 1998

- budget set as upper dollar limit, without specifying how the time would be spent
- budget set based on an upper dollar limit per month per counsel

The cumbersome process of having accounts reviewed personally by the Provincial Director was not sustainable once the volume of cases in the program began to mushroom. The delays caused in account processing were also unacceptably long.

The model which eventually prevailed for all case managers was a budget with a block of preparation time allowed at the outset, and an additional number of hours of preparation time for each additional day the trial lasted.

Meetings are conducted by the Area Directors, usually in person rather than by telephone. The process by which counsel provides information about the case to the case manager is not standardized, and varies from a simple estimate of time requirements to a detailed letter setting out every step counsel proposes to take. The case manager attempts to reach an agreement with counsel about what is required, and sets a budget on the basis of the agreement. There have been virtually no instances where an agreement could not be reached.

The budget is usually expressed in terms of a number of hours of preparation time and estimated number of court days. Most budgets are open-ended, in the sense that once the case starts, no attempt is made to limit the number of court days that will be compensated or to which the additional preparation allowance will apply. This recognizes that the length of a trial is not solely within the control of the defence.

While some case managers try to set a budget for the whole case, it is much more common for the budget to be based on only one stage of the proceeding at a time.

Budgets are subject to change. Typically, if counsel find that they have used more time than authorized, they contact the case manager and ask for an increase in hours. In the 365 certificate casefiles looked at in depth, budgets were increased at least once in about 28% of the cases³. However, in about 20% of the cases, counsel went over budget and were not compensated for at least some of the extra time. The uncompensated time, looked at as a percentage of what was paid on these files as a whole, is about 2% of the total paid. This is less than the "markdown" of approximately 5 to 8% in ordinary, non-case managed matters⁴.

Although area directors indicated in the survey that was distributed that they case manage most BCM matters which arise in their jurisdiction, there has been a widespread practice of referring matters to more experienced case managers.

A separate process developed for case managing large appeals. These budgets are generally expressed as a block of hours, and are finite unless counsel writes to ask for a change to the budget. Most of these budgets are set in consultation with the Legal Accounts Officer, and are based on written material rather than a meeting with counsel.

³ This figure excludes budgets changed to add a previously unbudgeted stage of the proceeding, e.g. where a trial budget is added to a previously authorized preliminary hearing budget

⁴ Source: Legal Aid Ontario Financial Reports, November 2001, p. 20

2.3 THE \$75,000 CEILING

2.3.1 Why put a ceiling on Big Cases?

Big criminal cases occupy a share of the criminal certificate program cost which is highly disproportionate to the number of certificates being managed. Even within the category of big cases, a few very large matters drive up the case cost averages. In fiscal 2000/2001, for example, of 530 completed BCM cases, 4% of the sample (23 cases) used up 34% of the program's dollars.

In July 2001, LAO sought to exercise greater control over the cost and conduct of these very large cases by imposing a \$75,000 ceiling on fees. Implementation of this ceiling was one of the tasks assigned to the BCM Project. The implementation has been successfully achieved and the results to date suggest that the initiative is achieving its goals.

The BCM project committee:

- made recommendations as to what form the ceiling should take
- worked out the details of how to implement the ceiling
- prepared communication materials for LAO staff and the private bar
- created and organized a special new committee to make recommendations for cases above the ceiling

2.3.2 What kind of ceiling?

The original model considered for the ceiling was derived from the British Columbia Legal Services Society, which has a hard cap of \$50,000 on fees. In that province, beginning in 1999, Legal Aid implemented a policy that no fees or disbursements would be payable once the fees in a criminal proceeding reached \$50,000 (or slightly above). If the trial is expected to continue significantly beyond the limit, counsel bring a *Rowbotham* application.

The committee's analysis suggested that there might be difficulties with imposing a hard cap in Ontario. The committee recommended a flexible ceiling as the appropriate model, with provision for allowing some cases to exceed the ceiling amount if, after close scrutiny, the expense was justified taking into account the standard of a reasonable client of modest means.

2.3.3 How was it implemented?

Materials explaining the ceiling were prepared for the area directors who would be administering it, and for the private bar. Guidelines were also prepared to assist the area directors in calculating budget costs, in order to determine whether a matter had potential to reach the ceiling. In addition, LAO created a new committee – the Exceptions Committee - for very exceptional matters where the case has potential to cost more than \$75,000 in fees to hear applications for budgets beyond the ceiling.

2.3.4 Exceptions Committee

The Exceptions Committee, assembled to hear applications for budgets above \$75,000, consists of prominent criminal lawyers from the private bar, as well as legal aid staff with experience in managing big cases. Members of the bar were approached and recruited as members of the committee, and a training session for them was organized and held in November, 2001. A binder of materials was prepared and distributed to the participants, including a Terms of Reference document, budgeting forms, and schedule for future monthly meetings.

2.3.5 Experience to Date

There is no accessible data on budgets set prior to the start of this project. As part of the project, budgets set in calendar 2001 were retrieved, reviewed and recorded, and new processes developed for ongoing data collection. So far, there is no observable trend in overall or average cost of new budgets. However, the imposition of a ceiling seems to have discouraged the setting of new budgets over \$75,000 during the six months after implementation. As of the end of February, 2002, the Exceptions Committee had heard applications concerning 12 clients (some of them co-accused). In 11 of the 12 cases, less hours were granted than counsel was seeking.

It was noted that the private bar committee members took on a mentoring role during some of the meetings, for example offering to provide one applicant counsel with precedent materials and giving advice to another on the likelihood of success of approaches to the case being proposed.

2.4 DATA COLLECTION

In the summer of 2001, it was decided that improved data collection processes for BCM cases could not wait to be implemented as part of the project recommendations. They had to be addressed while the project was ongoing, particularly in light of the need to assess the financial impact of the new \$75,000 fees ceiling.

Two new data collection methods were accordingly developed, and put into use commencing in October 2001.

2.4.1 What kind of data does LAO collect?

The AS/400, the legacy data system used by Legal Accounts, already had a field into which an entry could be made when a certificate was accepted into the BCM program. These records could then be used to produce reports showing a wide range of information on BCM cases including type of offence, case cost, defence counsel, relevant dates, etc. However, no information concerning the BCM budget was captured, so there was no tool for forecasting case cost in advance of account payment, nor for comparing budgeted cost to actual cost.

The field was reprogrammed to allow capture of increased information:

- certificate number
- client name
- date budget set
- dollar amount budgeted for fees
- dollar amount budgeted for disbursements
- stage of proceeding to which budget applied

When changes are made to the information entered on this screen, a backup screen records all changes so the system can create a report showing cumulative information on a budget as it evolves.

This measure is a considerable advance. It should be noted, however, that the AS/400 is expected to be replaced by new technology as part of LAO's TSN (total service network) process.

A spreadsheet was created by the Legal Accounts Department, to record a wide range of information on new budgets received. The information is sorted by month and includes:

- certificate number
- client name
- date budget set
- certificate issue date
- case manager
- type of offence
- federal or provincial prosecution
- young offender y/n
- counsel name
- counsel tier level
- number and type of counsel authorized
- profile of case
- number of co-accused
- linkage to co-accused
- stage of case to which budget applies
- estimated number of court days
- preparation time authorized before trial
- preparation time authorized during trial
- estimated fees budget
- estimated disbursements budget

This spreadsheet is useful in looking at new budgets. The entry of the data, however, is manual and time-consuming, and is limited by the quality of information provided by the case manager. Going forward, information requirements from case managers must become standardized, and a more automated process should be built into the TSN implementation. As well, changes to a budget need to be captured, and a mechanism is needed on payment of a final account for final case cost data to be entered.

2.5 TRAINING MATERIALS/MANUALS

A manual was developed to assist the Area Directors in managing big cases in a consistent, cost-effective way, and to provide them with tools for communicating with counsel and with Provincial Office.

The BCM Manual, which has not yet been finalized, contains sections on:

1. introduction (goals of BCM)
2. accepting a case for BCM - guidelines and procedures
3. conducting a BCM meeting - tips

4. setting a BCM budget - factors to take into account - required information
5. glossary of common terms in BCM cases - e.g. *Corbett* application, *K.G.B.* issues
6. authorizing disbursements
7. using LAO LAW
8. Exceptions Committee Cases
9. forms
 - request for counsel opinion
 - budget form
 - case not meeting threshold for inclusion in program
 - terms and conditions for BCM
 - Exceptions Committee opinion guide

3. SNAPSHOT OF THE BCM PROGRAM

3.1 HOW MANY CASES

Approximately 2,321 criminal cases were accepted into the program between July 1996 and June 2001. In 2001, an average of 46 new cases came into the program each month.

3.2 WHAT KINDS OF CHARGES

As illustrated in Table 1, most of the cases which are accepted into the program involve very serious offences. By far the largest single category of offence in the program, 38.5% of all the caseload, is homicide (1st or 2nd degree murder, manslaughter and attempt murder). The next largest group is drug cases. Cocaine/heroin and other drug offences combined constituted 17.4% of the program caseload.

TABLE 1 BREAKDOWN BY OFFENCE TYPE OF ALL BCM CASES ON WHICH PAYMENT MADE BETWEEN JULY 1996 AND JUNE 2001

TYPE OF OFFENCE	NUMBER OF CASES	PERCENTAGE OF BCM CASELOAD
Homicide	894	38.5
Cocaine/Heroin	268	11.5
Other Criminal*	227	9.7
Sexual Offences	222	9.6
Robbery	212	9.1
Other Drugs	136	5.9
Fraud	125	5.4
Assault	117	5.0
Theft	53	2.3
Break And Enter	22	1.0
Weapons	18	.8
Vehicle Offences	8	.3
Threatening	7	.3
Drunk Driving	4	.2
Mischief	3	.1
Fail To Comply	3	.1
Appeal Opinions	2	.1

* The category "other criminal" is coded for cases which do not fall into any of the other major categories. Examples of charges included in "other criminal" are many types of conspiracy, as well as arson, and federal offences like smuggling and violation of immigration laws.

3.3 WHAT DO BCM CASES COST

As noted, homicide cases are the largest single BCM offence category. They also take up more than half of the program's dollars, and have the highest average case cost.

For all BCM cases completed in 2000/2001, the average case cost was \$31,307.40. The median case cost was about \$15,700. Table 2 shows the averages for fiscal 2000/2001, by type of offence.

In fiscal 2001/2002 YTD (up to February 14, 2002), the average case cost was \$31,470.44. The median case cost was about \$18,400.

**TABLE 2 TOTAL AND AVERAGE COST BY TYPE OF OFFENCE
BCM CASES COMPLETED IN FISCAL 2000/2001**

Minor Aid	# of Cases	% of Total Cases	% of Total Cost of all Cases	Total Fees	Total Disbs.	Total Cost	Total Avg. Case Cost
1 (Murder)	182	34.33%	52.76%	\$7,643,784.01	\$1,110,872.46	\$8,754,656.47	\$48,102.50
7 (Coc./Heroin)	56	10.56%	7.70%	\$1,197,325.77	\$88,451.02	\$1,285,776.79	\$22,960.29
10 (Other)	56	10.56%	8.50%	\$1,125,774.94	\$290,261.47	\$1,416,036.41	\$25,286.36
3 (Robbery)	55	10.37%	6.80%	\$1,108,221.15	\$93,700.63	\$1,201,921.78	\$21,853.12
2 (Sex.Assault)	43	8.11%	8.90%	\$1,241,251.97	\$242,737.79	\$1,483,989.76	\$34,511.38*
9 (Fraud)	39	7.35%	5.50%	\$880,071.45	\$41,684.74	\$921,756.19	\$23,634.77
16 (Oth. Drugs)	30	5.60%	3.20%	\$518,979.17	\$20,392.55	\$539,371.72	\$17,979.05
8 (Assault)	29	5.47%	2.60%	\$396,178.28	\$38,424.93	\$434,603.21	\$14,986.31
4 (Theft)	17	3.20%	1.60%	\$251,950.40	\$17,816.48	\$269,766.88	\$15,868.64
13 (Weapons)	7	1.32%	0.30%	\$55,462.47	\$5,400.53	\$60,863.00	\$8,694.71
12 (B&E)	6	1.13%	0.60%	\$101,182.26	\$7,786.96	\$108,969.22	\$18,161.53
11 (Threat. Death)	4	0.75%	0.10%	\$25,642.93	\$2,646.91	\$28,289.84	\$7,072.46
6 (Vehicle)	3	0.56%	0.30%	\$48,654.98	\$14,436.03	\$63,091.01	\$21,030.33
15 (Fail To Comply)	1	0.18%	0.43%	\$1,688.40	\$17.00	\$1,705.40	\$1,705.40
14 (Mischief)	1	0.18%	0.11%	\$17,260.88	\$1,557.89	\$18,818.77	\$18,818.77
20 (Appl. Opinion)	1	0.18%	0.01%	\$2,852.28	\$456.54	\$3,308.82	\$3,308.82
TOTAL	530	99.85%	99.41%	\$14,616,281.34	\$1,976,643.93	\$16,592,925.27	\$31,307.41

*A single certificate in the sexual assault category cost \$762,853.46. If this certificate is excluded from the sample, the average case cost for sexual assault matters is \$18,163.18

Of the 50 most expensive criminal cases which have been through the BCM program, 46 were homicides.

The criterion for acceptance into the program is that a case is likely to exceed the monetary threshold. Many cases accepted into the program do not go on to reach that amount. In fiscal 2000/2001, more than 32% of completed BCM cases cost less than \$10,000; another 30% cost between \$10,000 and \$20,000, meaning that 62% of the cases in the program completed in that year did not in fact reach the threshold for BCM. This raises questions which are explored in more depth later in this report:

- Did the cases accepted into the program which cost less than \$20,000, ever really have the potential to exceed that amount;
- If they did have the potential to exceed \$20,000, why did they not do so.

3.4 IMPACT ON LAO BUDGET

While the number of homicide cases which cost more than \$30,000, and other criminal cases which cost more than \$20,000, have not been growing substantially as a percentage of the overall criminal caseload, these large cases have been consuming a growing percentage of the overall criminal certificate budget. The chart below shows the trend.⁵

TABLE 3 NON-HOMICIDE CASES OVER \$20,000, AND HOMICIDE CASES OVER \$30,000, AS A PERCENTAGE OF TOTAL CRIMINAL CASELOAD/ OVERALL COST

Fiscal Year	Percentage of Total Criminal Caseload	Percentage of Total Criminal Fees	Percentage of Total Criminal Disbursements	Percentage of Total Criminal Fees/Disbursements Combined
95/96	.2	6.9	13.6	7.4
96/97	.2	9.1	15.1	9.6
97/98	.3	12.96	22.17	13.74
98/99	.22	11.65	18.72	12.14
99.00	.27	15.43	31.74	16.49
00/01	.31	17.27	31.76	18.29

In fiscal 2000/2001, LAO spent approximately \$131,768,000 on legal aid certificates. Of this, about \$16,756,500 was spent on BCM cases (over 12%). The amount spent on all criminal certificates in that fiscal year was about \$73,906,800, of which over 22% was spent on BCM files.

⁵ It should be noted that the percentages in this table differ from others in this report which are based on cases designated as BCM. This particular chart does not consider whether the case went through the BCM program or not, but only whether it cost more than \$30,000 (murder) or \$20,000 (other criminal).

TABLE 4 BCM FEES/ DISBURSEMENTS AS A PERCENTAGE OF ALL CRIMINAL FEES/ DISBURSEMENTS FOR THE PAST 3 FISCAL YEARS

Fiscal Year	All Crim Cases -Fees	BCM Cases – Fees	BCM % Of Crim Fees	All Crim Cases - Disbs	BCM Cases - Disbs	BCM % Of Crim Disbs
98/99	63,004,437	11,776,364	18.7	4,673,038	1,697,613	36.3
99/00	68,921,172	12,989,841	18.8	4,615,314	1,658,601	35.8
00/01	69,011,379	15,037,267	21.8	4,895,406	1,719,236	35.1

3.5 GEOGRAPHIC AREA

Over 67% of the 530 BCM certificates completed in fiscal 2000/2001 were issued in the GTA. Another 5% were Ottawa-Carleton certificates; followed by Simcoe, with 3% of the caseload, and Hamilton-Wentworth, with 2.6%. These large urban areas combined to make up 78% of BCM cases.

The average case cost by area varies widely. The fact that a case issues out of a particular area does not mean that it was case managed by the area director for that area, as cases are frequently managed by someone other than the area director who issued the certificate.

3.6 LAWYERS

Of the 365 files reviewed in depth, 185 lawyers did only one case; 48 had two; and 21 lawyers did three or more BCM cases

Lawyers from Toronto dominate the program. Of the 530 BCM cases completed in 2000/2001, 407 cases were handled by Toronto counsel (close to 77%). This suggests that Toronto counsel rather than local GTA lawyers are handling BCM matters from across the GTA, as only 301 of the certificates (57%) were issued from Toronto (Toronto Centre, Etobicoke, Scarborough and North York). Lawyers from Ottawa handled 28 cases, which is consistent with the 26 completed BCM certificates from that region. Lawyers from all other regions combined, including the other GTA regions (Peel, Halton, Durham, York Region), handled the remaining 18% of BCM cases completed in that fiscal year.

According to the area director survey, the local bar across most of the province is aware of the BCM program.

3.7 MULTIPLE ACCUSED

When the term "case cost" is used in this paper, it refers to the cost of the individual legal aid certificate for a single client. All of LAO's case cost figures are collected on this basis. However, as part of this project the total cost of all certificates issued in respect of a single prosecution was also looked at. A single, very large prosecution can have a significant impact on LAO's budget for criminal certificates.

Almost half of the 365 BCM cases studied in depth, involved at least one co-accused. In the sample, murder cases were more likely to have less co-accused and drug conspiracy cases

tended to have more co-accused. In most cases, though not all, the co-accused individual certificates cost approximately the same amount.

TABLE 6 BREAKDOWN OF 365 BCM CASES REVIEWED IN DETAIL, ACCORDING TO NUMBER OF CO-ACCUSED

# of Legally Aided Co-Accused	Number Of Cases	Percentage of Cases
0	196	53.69
1	57	15.61
2	36	9.86
3	29	7.94
4	14	3.83
5	5	1.36
6	1	0.27
7	3	0.80
8	3	0.80
9	2	0.54
10	3	0.80
11	1	0.27
12	1	0.27
49	7	1.90
u/k	7	1.90
TOTAL	365	100.00

3.8 SUCCESSES TO DATE

The focus of this project was not to assess the success of the program to date, but to establish standards and guidelines for how big cases should be managed. In going forward, however, LAO can learn from the past.

The current program can boast a number of achievements. Targeted types of cases are being identified for inclusion in the program (serious offences, complex legal issues). Lawyers know about the program, and continue to take big cases on legal aid certificates. There is a well-developed process for paying lawyers in accordance with budget agreements. A core group of area directors has developed expertise in managing big cases, and the others continue to wish to participate. Data collection methods exist to identify cases in the program and determine their cost to LAO. There is some consistency in the size of budgets being set in different areas of the province..

A number of counsel have expressed satisfaction with the program. In the area director survey, only one AD reported that the local bar disliked the program. The balance reported that the bar either likes the program, or accepts it. The majority of area directors (74%) feel that BCM reduces case cost, by causing counsel to moderate his or her approach to the case. Other benefits to the program they identified are that it allows closer monitoring of a case (87%), provides counsel with necessary resources ((72%) and prevents problems with counsel refusing to accept certificates (56%).

The data is not available to assess whether BCM actually controls case cost. The perception of the case managers is that it does. But because of the nature and timing of the program, it is impossible to find a control sample of non-case managed matters of the same magnitude with which to compare.

4. GOALS OF THE BCM PROGRAM

4.1 ORIGINAL BCM GOALS

The management of big cases fits within the larger framework of LAO's mandate, which is:

- To promote access to justice throughout Ontario for low-income individuals by providing high quality legal aid services
- To encourage and facilitate flexibility and innovation in the provision of legal aid services
- To recognize the diverse legal needs of low-income individuals and disadvantaged communities
- To operate within a framework of accountability for the expenditure of public funds

Serious criminal charges usually involve potentially serious consequences for the individual charged, including lengthy jail sentences, and there are often complex issues which courts have recognized mandate the assistance of counsel. These cases must be covered by LAO if the client is financially eligible. The challenge for LAO is making resources available so that the solicitor can deliver high quality service, while at the same time operating within a framework of accountability for the expenditure of public funds.

One of the problems in appropriately funding big cases in a fixed-budget environment, is the disproportionality of the resources these cases consume. A single case costing \$100,000 uses up the same amount of resources as approximately 60 to 70 "routine" cases. LAO's ability to extend coverage to a broad range of cases, a key component of promoting access to justice, is dependent on keeping down costs per case.

Cost control was the main impetus behind the development of a BCM program. Although it began as a cost control measure, the objectives of the program go beyond cost control. LAO's mandate includes the provision of high quality legal aid services, and recognizes the private bar as the provider of those services in criminal matters. A report on BCM prepared in 1998⁶ articulated the program's objectives as follows:

- To reduce the costs of providing defence counsel in the most serious cases
- To enhance the predictability of the costs for these cases.
- To put accused persons on a level playing field with the state, subject to the Plan's customary "client of modest means" test
- To encourage participation of the criminal bar in the judicare system.

⁶ Colin Meredith, "Project Report", *supra*, at p. 1

Is this the correct formulation of the program's goals? Are there other objectives for a BCM program? Each of the suggested objectives, and an additional one, are discussed in more detail below.

4.2 GOAL #1: COST CONTROL

4.2.1 Analysis

4.2.1.1 What is a Big Case

LAO has effectively already defined what it considers a high cost criminal case, by establishing the cost thresholds for big case management.

4.2.1.2 Reasonable Client of Modest Means

The cost control mechanism used by LAO in non-big case managed matters is the tariff, which has specified maximum numbers of hours for different kinds of services. The available hours increase depending on the seriousness of charge, and the length of the trial. Anything above tariff hours can only be paid in exceptional circumstances. The tariff is intended to reflect "fees customarily paid by a reasonable client of modest means"⁷. This standard has in practice been extended to disbursements as well; disbursements staff consider whether a reasonable client of modest means would authorize the retainer of a particular kind of expert witness, for example.

The standard of a reasonable client of modest means is intended to promote the use, in a legal aid case, of the kind of decision-making which operates in the marketplace between a solicitor and his or her client. A reasonable client of modest means does not have infinite resources to explore every possible avenue of defence, no matter how costly, how time-consuming or how slim the chance of success. Some prioritization is done when a trial strategy is developed between counsel and the client. In addition to deciding which steps in a case have the best chance of success, counsel and the client are likely to try to find alternate ways of introducing evidence or researching a particular point, so as to minimize expense without compromising the defence case.

A legal aid plan is of course not in the same position as an individual client. There is a limited pool of resources for the payment of all cases, but it is undifferentiated as to how it can be spent. At least until the imposition of the \$75,000 ceiling on fees, there was no upper limit as to how far above tariff maximums a particular case could be allowed to go. The consequences of the large expenditure for the particular client are not felt by that client; the impact is on the rest of the caseload requiring funding from the same pool. It is imperative for LAO to have a mechanism to bring an air of reality to what can and will be spent on serious criminal matters.

4.2.2 Recommendation

No matter what the client is charged with, the standard cannot shift to that of an unreasonable client of unlimited means, without in the end compromising LAO's ability to provide service in a broad range of cases.

⁷ O. Reg. 107/99 Schedule 1, paragraph C

Goal #1
Monitor and control the costs of case managed certificates, in accordance with the standard of a reasonable client of modest means.

4.3 GOAL #2: COST PREDICTABILITY

4.3.1 Analysis

Predicting the cost of a legal aid certificate is notoriously difficult. In criminal matters, tariff maximums depend on a number of variables including Crown election, length of proceeding and seriousness of offence, even before consideration is given to additional amounts which might be paid by way of discretionary increase. The course an action will take is unpredictable, and BCM certificates have a very wide cost range.

4.3.2 Recommendation

Big case management provides an exceptional opportunity to increase the predictability of case cost for a particular category of case. Cases can be identified at an early stage as sufficiently serious, complex and/or lengthy to qualify for the program. LAO does not have to wait until the case is complete to acquire detailed, reliable information about what resources are likely to be required for the case. Estimates can be made based on information provided by counsel after a judicial pre-trial has been held, about such factors as the volume of material to be reviewed, resources being devoted to the case by the Crown, length of trial, type of motions and evidentiary issues. Budgets can be recorded and monitored as the case progresses.

As well, by studying the cases as a separate group from non-case managed criminal certificates, better predictions can be made as to what trends and factors outside LAO have an influence on case cost of these exceptional matters.

Goal #2
Increase predictability of case cost

4.4 GOAL #3: LEVEL PLAYING FIELD

4.4.1 Analysis

In a paper recently prepared for LAO⁸, the point is made that criminal cases have reached new levels of complexity and take more time to complete than in the past. While the resources required to defend a case are not completely synchronous with the resources required to prosecute it, there is an interrelation between the case the Crown presents and the work necessary to meet it. The business case for tariff reform describes the current situation:

⁸ "Legal Aid Tariff Reform: Business Case", October, 2001

Criminal law is being complicated by new case law (e.g. on Feeney warrants), new legislation (DNA collection, third party record access) and attempts at pre-trial resolutions.

Counsel are also encountering larger numbers of special needs or hard-to-serve clients who take longer to advise, need more diagnostic and treatment referrals and other help.

Analyses by MAG (Crown system) and CAS experts confirm certificate lawyers' contention that their "per case" workload has skyrocketed in recent years. In extensive interviews with Crown/Assistant Crown Attorneys and with CAS legal directors in the summer of 2001, LAO found universal agreement with private lawyers' assertions that today's cases:

- involve more, and more detailed pre-trial steps.
- require more detailed submissions for hearings such as bail and child custody.
- involve a growing percentage of hard-to-serve clients, especially people with mental health or addiction problems and language barriers.
- are harder to resolve on consent because of the increasingly strenuous risk assessment and "zero tolerance" responsibilities of Crowns and CAS.

As stated at page 9 of the business case document, "an adequately funded legal aid bar is an appropriate and necessary check and balance on the power of the state over impoverished individuals otherwise unable to exercise their constitutional rights to legal self-defence".

Big cases are always very important to the individual accused, but they often also have significance to the criminal justice system at large. Tremendous Crown resources are devoted to many of these cases, including:

- large volumes of disclosure (usually expressed in budget reports by number of banker's boxes)
- expert witnesses, sometimes controversial (e.g. "shaken baby" syndrome)
- police officers sitting in court to assist the prosecution
- lengthy wiretap investigations
- multiple statements from witnesses
- attempts to introduce similar act evidence and evidence of accused's bad character
- police and jailhouse informants
- "sting" operations

Important justice and liberty issues are at stake for every client whose case is accepted into BCM.

4.4.2 Recommendation

While the term "level playing field" is a useful concept, it implies a one-to-one matching of resources which does not accurately describe LAO's role in providing resources for the defence of a criminal case. LAO provides appropriate resources to counsel to provide the client with a full, fair defence in accordance with the standard of a reasonable client of modest

means. This may or may not involve an exercise of matching resources with the Crown, depending on the requirements of the individual case. One can imagine a situation where the Crown has devoted substantial time and effort to a case but the admissible evidence derived from their investigation is small and the case involves a narrow issue. A better articulation of the third goal of the program might be:

Goal #3
Provide appropriate resources for high quality, effective service delivery.

4.5 GOAL #4: PARTICIPATION OF THE CRIMINAL BAR

4.5.1 Analysis

There is an articulated concern that tariff rates, which have not increased since 1987, are so low as to discourage lawyers from accepting legal aid certificates. Quoting again from the business case document for tariff reform, at p. 3:

1. Lawyers' flight from legal aid work is explicitly and directly linked to the low legal aid tariff. Hourly rates for legal aid work were last changed in 1987. Inflation has eroded the real-dollar value by 32% since then, while lawyers' overhead costs have continued to rise.

LAO research and consultations indicate that the rates paid under the current legal aid tariff are making it uneconomical and unaffordable for lawyers to perform enough legal aid work to support the growing demand for legal aid services. In addition, legal aid lawyers are expressing tremendous frustration and a sense of unfairness at the low tariff level and at the fact that other lawyers in the justice system such as Crowns and Children's Aid counsel have received significant improvements to their compensation.

The situation facing counsel is even less palatable on a big case. Handling a very big case on a legal aid retainer impedes counsel's ability to supplement his or her income through private clients. While on a lengthy ongoing fraud or homicide trial, all of counsel's time is spent on a single matter. A case management system, while it does not change the applicable hourly rate, at least assures counsel that they will be paid for all of the hours of work agreed upon.

Although the regulation provides for an appeal of a BCM budget to LAO's president, there has never been an appeal of a BCM fees decision, and only one appeal of a BCM decision on a disbursement. To date, in Ontario, counsel has not attempted an external challenge to a BCM decision or to the process itself.

4.5.2 Recommendation

Ontario's Big Case Management Program can encourage the bar's participation in legal aid because it provides a process whereby counsel is given an opportunity to make a case to LAO concerning the resources required for an effective defence. Counsel receives through the BCM process an assurance, in advance, that he or she will be adequately compensated for the necessary services.

Goal #4
Ensure that the criminal bar continues to accept certificates for serious criminal cases

4.6 GOAL #5: ACCOUNTABILITY AND CONSISTENCY

4.6.1 Analysis

Big cases mandate a close level of scrutiny. Just as LAO in its internal processes requires special procedures for capital expenditures above a certain amount, LAO must be seen to be applying rigorous standards to very large expenditures on particular certificates.

Individual area directors across the province have a great deal of discretion in the setting of BCM budgets. A framework for supervision and central sign-off on budgets would provide them with support, and would help to ensure consistency across the province. The program could also benefit from more training and mentoring for case managers.

4.6.2 Recommendation

There is nothing in the findings of this report or the history of BCM to suggest that area directors misuse their discretion in BCM or fail to put the interests of LAO first in negotiations with counsel. On the contrary, there is every indication that they take the responsibility seriously and, as revealed in the survey, have given considerable thought to the issues involved in managing cost while ensuring counsel has sufficient resources to conduct the case appropriately. Nevertheless, the level of management and supervision is not consistent with LAO's mandated need to operate within a framework of accountability for the expenditure of public funds.

Goal #5
Develop and maintain a framework of accountability and consistency for budgeting big cases

5. MANAGEMENT AND STRUCTURE OF THE BCM PROGRAM

5.1 WHAT'S THE BEST MODEL FOR MANAGING BIG CASES?

5.1.1 Options

LAO gathered information about how other jurisdictions handle big cases. Only England, Australia and British Columbia had a developed model which differed from Ontario's. Several other provinces do not have issues around big cases because there simply aren't many, or because they use a staff model rather than a certificate model. Others are only now starting to scrutinize their policies for big cases, because of recent court orders removing the case from the restrictions of the tariff.

- In Quebec, for example, Commission des Services Juridiques (CSJ) has never in the past given special consideration to costly cases. Currently if a case is very costly and exceeds tariff maximums it may be paid after it is finished through a discretionary increase, but this is rare.
- Legal Aid Manitoba has just recently started extending the budget for larger than average cases. They deal with such cases by managing them as stringently as they can through negotiations with the lawyers and at the provincial office (not through area directors).
- The Legal Aid Society of Alberta has an Exceptional Accounts Committee, made up of lawyers, that reviews counsel's requests for increased funds for a given case. Counsel is asked to submit a written request to demonstrate how the case is exceptional in nature.
- The Saskatchewan Legal Commission handles 95% of its cases on a staff based system and 5% through private bar. Their budget problems are related to tracking time and fees for their salaried staff lawyers, and they have no special program in place to handle exceptionally costly cases.

England: Specialized panel

In England, the model used to manage big cases involves a special panel of lawyers. The Legal Services Commission in England has established a Serious Fraud Panel for Very High Cost Cases (VHCCs). Their experience differs from Ontario's substantially, in that fraud cases are the biggest cost.

The Legal Services Commission identifies firms that have the requisite expertise, experience and capacity to handle such cases and contracts these cases to them. There is a structured application and monitoring process. Firm performance is reviewed, and firms may be removed from the Panel. Interestingly, the right to counsel of choice is just one consideration in this process. The law in Britain has developed somewhat differently than in Canada as concerns counsel of choice.

This model is interesting. However, serious frauds are not a major cost issue in Ontario. In homicide cases and other cases involving lengthy jail sentences, choice of counsel is an important consideration.

A BCM panel would have the advantage of limiting the involvement in the program of very inexperienced lawyers, who may take longer to do the case and require more research time. However, the BCM meeting and budget-setting process should also be able to control any

increased cost from counsel's lack of experience or knowledge. The majority of big cases examined in detail were handled by tier 3 lawyers (70%). Another 19% were handled by tier 2 lawyers, and only 11% by tier 1 lawyers.

Australia: Dedicated Funds for Big Cases

This model is used in Australia, where the Government has established a special national expensive cases fund for expensive legal aid cases.

Paying for big cases from dedicated funds would have the advantage of making it easier to evaluate the real cost of smaller cases. It could be argued that since the size and scope of the prosecution drives the defence need for resources, LAO would be in a better position to negotiate for funding for big cases if both the government and LAO were in agreement about what the pool of expensive cases is, and an analysis of funding needs could be done based on that agreement.

The problem with this analysis is that it is probably not possible to isolate big cases in a way that could be agreed upon by the defence and the prosecution. Expensive cases do not necessarily differ in kind from smaller cases, but only in scope.

The other objection to paying for big cases from dedicated funds is that it ties LAO's hands. The flexibility LAO now has to absorb higher costs in some areas of the certificate program because other areas cost less than anticipated, will be lost if big cases are taken out of the general pool.

B.C.: Hard Cap, with Ontario-style case management for smaller cases

The Legal Services Society of British Columbia (LSS) has a hard cap of \$50,000 on fees. For cases under the cap, the Strategic Case Assessment Program (SCAP) was designed to control costs on large criminal trials. SCAP tried to implement early case review and budgeting. One of the objectives was streamlined authorization and billing procedures. A review panel was proposed for cases where a consensual budget could not be reached. The panel was to be composed of private bar lawyers.

The vulnerability of this model, which is dependent on the government paying for cases above the cap without recouping the expense from the LSS budget, has been demonstrated by recent events in B.C., where it appears the province now expects LSS to cover cases above its cap.

The Ontario model

The Ontario model, which involves a case manager from the geographic area where the case arose meeting with counsel and setting a budget, has the advantage of being flexible enough to fit the requirements of an individual case. The recent imposition of a \$75,000 ceiling has addressed one of the weaknesses of the program, the lack of scrutiny of the budget. The program is well-accepted by the Bar. It puts a strain on LAO staff resources only in the highest density urban areas.

5.1.2 Recommendation

The current model of managing cases should be continued; that is, each case should receive individual consideration by the case manager on its merits. No restriction should be placed on which lawyers can continue with a BCM case. BCM cases should continue to be funded out of the general certificate budget. The ceiling on fees should be subject to being exceeded by an individual case after scrutiny by the Exceptions Committee.

5.2 WHAT ARE THE CORRECT DOLLAR LIMITS FOR BCM?

5.2.1 Options

Redesign structure for BCM based on analysis of actual case cost

Part of the BCM project involved an analysis of the distribution of BCM cases by completed case cost. The findings were that there is a large cluster of cases (50% of the 365 BCM cases examined in detail) at the lower end of the cost range, under \$20,000. Only 6% of the cases fall between \$50,000 and \$75,000.

One option coming out of this analysis is that a model for BCM be adopted which better fits the actual data. This would involve creating 4 levels of case management, one for each quartile, with the following dollar limits:

1st level	\$10,000-\$15,000	basic BCM
2nd level	\$15,000-\$25,000	more support, expectation and scrutiny
3rd level	\$25,000-\$45,000	higher level of support, expectation and scrutiny
4th level	\$45,000 plus	Exceptions Committee

Maintain current financial limits pending further assessment

The analysis set out in the previous option is based on completed case cost, rather than initial budget amount. However, other considerations may apply to how LAO decides to structure the process. By no means will all cases which are accepted into the program actually go to trial. Some will not even reach the stage of a preliminary hearing. As can be seen from table 7, below, 48% of BCM cases which cost less than \$10,000 were resolved by way of negotiated resolution. The figures show that as the case cost goes up, it is doing so because the cases are going to trial, with an outcome of conviction, acquittal or stay.

Of the BCM cases which cost less than \$10,000, 79% were under the budget that had been set for them. They were candidates for the program because of their cost potential, but did not reach that potential because they resolved early, by negotiated resolution, withdrawal or change of solicitor. Resolution rates account for the large cluster of BCM cases which cost less than \$20,000.

TABLE 7 OUTCOMES IN CASE MANAGED MATTERS

OUTCOMES	UNDER 10K (%)	10K- 20K (%)	20- 75K (%)	OVER 75K (%)	TOTAL CASES (%)
Negotiated Resolution	48	38	22	9	31
Conviction on major charge(s)	0	12	19	46	17
Conviction on lesser charge(s)	2	14	19	21	13
Withdrawal of major charge(s)	21	13	4	5	11
u/k	12	7	12	0	8.5
Acquittal on major charge(s)	3	4	13	8	7
C.O.S	10	4	5	3	6
Stay on major charge(s)	0	3	3	8	3
Appeal Dismissed	4	3	0	0	2
Mistrial	0	0	3	0	1
Appeal Allowed	0	2	0	0	0.5
TOTAL :	100	100	100	100	100

Logical though it is from a data analysis standpoint, setting the cut-points for entry into the program, and for referral to the Exceptions Committee, on the basis of what cases actually cost, may place an unnecessary strain on LAO's administrative resources for the program. If the entry level for BCM is \$10,000, the number of cases on which case managers have to hold meetings will be greatly expanded.

5.2.2 Recommendations

For the present, the eligibility threshold of \$20,000 for BCM should be continued, except for homicides or high profile cases involving serious offences, which should be eligible in any event. The ceiling of \$75,000 fees should continue to be the cut-off for area director budgeting discretion until further evaluation can be done as to its effect on case cost.

Case managers should not accept cases into the program which are unlikely to reach the threshold amount of \$20,000 fees and disbursements.

5.3 HOW BEST TO ENSURE ACCOUNTABILITY AND CONSISTENCY?

5.3.1 Options

Maintain the Status Quo

The BCM program developed by evolution rather than planning. Some aspects of the program which need improvement can probably be improved under the current management structure, if the project steering committee becomes a standing committee and legal accounts staff is able to devote sufficient time to program development. However, there are improvements which are unlikely to be successfully achieved if the status quo is maintained. These improvements are either time-consuming or they require continuing development, and cannot be handled by staff with a full range of other duties.

Create a New Position

A more structured, centralized management may be necessary for BCM to develop in the directions identified. This would involve the creation of a new full-time staff position.

The BCM manager would have responsibility for implementing the identified project needs, including training case managers, further developing data collection methods, vetting budgets, making contact in appropriate cases with the Director of Crown Prosecutions or federal authorities, resolving budget disputes and organizing and monitoring the Exceptions Committee.

5.3.2 Recommendation

LAO should hire a manager for the BCM program.

5.4 WHO SHOULD MANAGE THE CASES

Under the current system, all area directors manage the cases from their own area. They have not been told they can opt out of doing so, but there have been hundreds of cases over the years referred to Toronto for management rather than being handled locally.

5.4.1 Options

All Area Directors Participate in Case Management

There is a substantial benefit to case management in having the area director's local knowledge and experience available. They know the bar, the bench and the profile of the case locally. However, the BCM meeting and the process of setting a budget is what makes or breaks the BCM program. The area director has to want to do it.

A BCM Manager Does all Case Management

This is probably an unwarranted degree of centralization. Aside from the size of the caseload for a single individual, the program is likely to stultify if only one individual's insight and ability is used to manage the entire caseload.

A Core Group of Area Directors Manage all Cases

This option has the advantage of bringing expertise and consistency to the budgeting process. However, It has the drawback of losing the understanding of local issues which the area director who issued the certificate can bring to the BCM discussion.

5.4.2 Recommendation

A core group of area directors should be trained to manage all BCM cases, with active input and participation from local area directors.

6. ANALYSING BIG CASES

6.1 INTRODUCTION

As a primary goal of big case management, the issue of cost control was targeted for particular scrutiny as part of this project. This section analyzes factors which affect case cost in big cases, and discusses cost control strategies for the program.

As described in the Introduction, a detailed review of completed case files was done to attempt to identify what factors affect case cost. LAO used over 30 variables in conducting the detailed review, such as the number of co-accused, whether a case was high profile or not, whether counsel used the LAO research facility, LAO LAW, and whether there was an early resolution to the case.

Not all variables looked at proved to have a correlation with case cost. The analysis identified 11 variables with a significant correlation with case cost (Table 8), and 7 variables with a moderate correlation (Table 9).

Once the correlations were identified, the factors were sorted according to whether they were internal or external to LAO, and whether LAO has any mechanism for control over them (Table 10).

Two factors were identified as having the most impact on certificate cost; whether the case is a homicide, and whether it is high profile.

6.2 WHY ARE SOME CASES EXPENSIVE?

A review of the data was completed to determine the statistical relationships between data variables and the cost of certificates. The sample of 365 cases was selected from certificates on which fees were paid between July 1996 and June 2001. In this sample the cost per case ranged from \$511 to \$863,766. Data reviewed was extracted from the AS/400 and from an audit of the 365 hard copy files.

6.2.1 Identifying significant cost variables

Table 9 summarizes relevant variables associated with the cost of a certificate and provides a statistical correlation between each variable and certificate costs.

The following variables have a statistically significant relationship with certificate costs.

TABLE 8 SIGNIFICANT VARIABLES - CORRELATIONS ASSOCIATED WITH CERTIFICATE COSTS

Variable	Statistical Correlation and Significance (Spearman's rho)
Number of additional counsel	.305**
Number of days of preliminary hearing	.166*
Number of days of trial	.205*
Total number of court days	.421**
Total preparation time paid	.650**
Legal research preparation time	.232*
Initial fees budgeted	.436**
Volume of disclosure	.200*
Number of motions	.252**
Homicide or not homicide cases	.245**
High profile or not high profile cases	.387**

** Correlation is significant at the .01 level (1-tailed)

* Correlation is significant at the .05 level (1-tailed)

The following set of variables demonstrated moderate correlations; however, the limited amount of data precludes any statistical significance. They appear to have some relevance to certificate costs and should also be collected in the future to more accurately determine the importance of the relationship to cost.

TABLE 9 ADDITIONAL VARIABLES - CORRELATIONS ASSOCIATED WITH CERTIFICATE COSTS

Variable	Statistical Correlation (Spearman's rho)
Number of days of transfer hearing	.453
Number of expert witnesses outside Ontario	.447
Type of defence	.384
Format of disclosure	.375
Outcome of case	.387
Reason for non-completion of case	.429
Reason for early resolution	.406

Note: the amount of data was limited and therefore no significance is identified

6.2.2 What variables are within LAO's control?

In addition to correlations, each variable was rated as an internal factor or external factor and whether or not it is possible for LAO to exercise any influence over the variable. For example, the profile of a case is an external factor outside the influence or control of LAO. The number of additional counsel, on the other hand, is determined to be an internal factor where LAO may have some legitimate influence.

The following is a list of control variables that may be influenced by the organization.

TABLE 10 CONTROL VARIABLES

Variable	Internal Factor	External Factor
	Yes	Yes
Change of solicitor	✓	
Number of additional counsel	✓	
Use of research from LAO LAW	✓	
Preparation time	✓	
Fees budgeted	✓	
Budget changes	✓	
Number of motions	✓	
Number of expert witnesses outside Ontario	✓	
Early resolution		✓
Number of days of preliminary hearing		✓
Number of days of pre-trial motions		✓
Number of days of trial		✓
Total court days		✓
Fees paid per day		✓
Disbursements paid		✓
Type of defence		✓
Number of defence witnesses		✓
Number of days of transfer hearing		✓
Number of days of defence case		✓

6.2.3 Other factors

Further analysis of all variables was completed to determine what variables or combination of variables have the most impact on certificate cost.

The results of this analysis indicate there are two variables demonstrating a significant relationship to cost of managed cases:

- a) the profile of a case and,
- b) whether or not a case is homicide.

6.2.3.1 High profile cases

High profile in this context refers to cases that capture media and community attention and where the interest of the public is heightened. All other cases were coded as “not high profile”. Analysis reveals that high profile cases are significantly more costly than cases that are not high profile.

Of the 365 cases studied, 22% or 81 are high profile and constitute 51% of the costs in this sample or a total of \$8,378,180. This compares to 284 cases that are not high profile and cost \$8,229,333.

- high profile cases on average cost \$103,434
- cases that are not high profile cost an average of \$28,977

When outliers or extreme cases below \$5000 and above \$200,000 are removed from the sample the average difference in case cost between high profile and not high profile is reduced from \$74,457 to \$41,270. Comparatively, the high profile average case cost continues to be significantly greater than the not high profile cases.

- high profile cases on average cost \$71,875
- cases that are not high profile cost an average of \$30,605

6.2.3.2 Homicide cases

The second main indicator impacting on cost is homicide. Analysis shows that 165 of the 365 cases or 45% are homicide and account for a cost of \$12,205,028. This represents 74% of the total cost of \$16,607,513 of the 365 certificates.

- on average homicide cases cost \$73,970 compared to,
- non-homicide cases at an average cost of \$22,012

Similarly, when outliers are removed the average case cost of a homicide certificate is reduced from \$73,970 to \$55,088.

The existing data does not distinguish different categories of homicide. Future data collection strategies could include the capture of homicide by category; for example, first degree, second degree, and manslaughter, to further assess the indicators of cost within the homicide variable.

The following table provides a summary regarding high profile and homicide cases.

TABLE 11 SUMMARY OF HIGH PROFILE AND HOMICIDE CASES (OUTLIERS REMOVED)

	# of cases	% of cases	Average Case Cost	Cost	% of Total Cost
High Profile	69	22%	\$71,875	\$4,959,355	39%
	Range: \$10,529-\$186,086		Median: \$102,951		
Homicide	151	47%	\$55,088	\$8,318,241	66%
	Range: \$5,369-\$186,086		Median: \$38,533		
High Profile/ Homicide	56	18%	\$76,532		34%
	Range: \$10,529-\$186,086		Median: \$53,822		

Data Source: File review extraction March 2002

High profile/homicide cases represent 18% of the sample and account for 34% of the overall costs.

In the future it will be important to gather information about the high profile indicators on a case by case basis in order to be more precise about case decisions. Not all high profile cases exceeded the \$75,000 cap.

6.3 FACTORS WITHIN LAO'S CONTROL

Using the above analysis of cost control, it can be seen that there are factors within LAO's control, such as the amount of preparation time granted and the number of counsel authorized. There are other factors which are only within LAO's control if the case manager is prepared to take a very interventionist role in the conduct of the case. An example might be the number of motions brought by the defence. Traditionally, LAO has steered clear in criminal matters of telling counsel how to do the case.

The distinction is between a cost-benefit model and a cost-effectiveness model. A cost-benefit analysis is an attempt to explicitly weigh up whether or not pursuing a particular course of action can be justified by the outcomes achieved. Cost-effectiveness studies measure how much has to be spent in order to achieve a particular fixed objective (e.g. acquittal).⁹

The concept of a cost benefit analysis is of limited use when budgeting a criminal proceeding, although it can guide the discussion by pointing counsel in the direction of prioritization of issues. A better model for what LAO is trying to achieve is cost-effective service delivery. Resources should be used efficiently to obtain the desired outcome. In more complex matters, where the defence is proposing a number of courses of action, the preferred model may include elements of cost-benefit analysis.

6.4 FACTORS OUTSIDE LAO'S CONTROL

There may be a role to play for senior management or a program manager in BCM, in dealing with the Crown or outside agencies who are impeding the defence ability to conduct the case in a cost-effective manner.

Interventions must be carefully judged so as to maintain solicitor-client confidentiality and so that LAO and the Crown are not perceived to be on the same side. But both the Crown and LAO have an interest in minimizing the cost of a case. There may be occasions where direct intervention by LAO is appropriate to assist the defence by removing unnecessary obstacles to efficiency.

⁹ Mark MacCallum, "The Economic Analysis of Criminal Justice Policy Options", Ministry of Justice, New Zealand, Sept. 1997

7. BEST PRACTICES FOR BIG CASES

7.1 INTRODUCTION

Having reviewed the history of the program, current processes, and the program goals, the next step is to apply the findings in a practical way. Set out below are proposed guidelines for steps in the case management process, to help case managers to deal with the cases so as to achieve the defined goals of big case management.

7.2 THE APPLICATION

7.2.1 Discussion

Under the regulation, counsel is obliged to notify the area director if it appears a case is likely to meet the criteria for big case management. It is in LAO's best interest that a case be managed as soon as is reasonably possible, before counsel has taken steps which move the case beyond the point where it can be managed. It is also essential that if there are co-accused, all cases should be located and co-ordinated by one case manager.

It is recommended that the area director should be pro-active in identifying cases which might be BCM as early as the application stage.

7.2.2 Best Practices: Identify cases at an early stage

According to the case cost analysis, the two greatest predictors as to whether a case will be expensive for LAO are whether the case is:

1. high profile, or
2. homicide (1st or 2nd degree murder, manslaughter, attempt murder)

These cases should always be considered as possible candidates for case management. The certificate should be issued with the wording directing counsel to advise the area director if BCM limits will be exceeded. There should be follow up within three or four months if no response has been received.

Other types of offences where the direction to counsel should be included are less-clear-cut because the surrounding circumstances of the allegation must be considered. In Toronto Centre, in addition to homicides, the following charges are always marked BCM, and it is recommended that this model be followed:

1. fail to provide necessities of life
2. aggravated sexual assault
3. criminal negligence causing death
4. any conspiracy

The next category of charges should usually contain the BCM direction to counsel, advising them to notify LAO if the case cost is likely to exceed \$20,000. However, they are only likely to qualify for the program if there are multiple accused and the crimes are alleged to be

sophisticated or organized. Police use of wiretap makes it more likely that the case will qualify for BCM.

1. trafficking
2. importing
3. fraud
4. participate in activities of criminal organization
5. counterfeiting
6. armed robbery

Here are factors which make a case more likely to qualify for BCM:

- | | |
|---------------------------|---|
| Fraud | <ul style="list-style-type: none"> • large sums of money involved • sophisticated or lengthy scheme |
| Sexual assault | <ul style="list-style-type: none"> • only if multiple charges or if single charge covers many years • previous convictions for sexual assault |
| Trafficking,
Importing | <ul style="list-style-type: none"> • sophisticated scheme, large quantity, multiple accused |
| Armed robbery | <ul style="list-style-type: none"> • several counts involving different incidents • not apprehended during or immediately after commission of offence |

7.3 ELIGIBILITY FOR BCM PROGRAM

7.3.1 Discussion

This is one of the least well-defined stages of the BCM process. As can be seen from the large quantity of cases in the BCM program which never reach \$20,000 fees and disbursements (62% of all cases in 2000/2001), more screening is needed to determine a case's real potential at the stage of its initial entry into the program.

The process usually starts with a phone call or letter from the lawyer, whether in response to an inquiry from the area office or on their own initiative. The case manager may wish to talk with counsel on the phone, to reassure them that a process is available for big cases. However, rather than immediately dealing with the matter by setting up a meeting, this is an opportunity for some initial screening of the case. It is recommended that counsel should be required to provide an opinion letter at this stage, setting out the nature of the case, including the circumstances surrounding the charges, a cost estimate, and names of co-accused clients and their counsel. A **form letter** to counsel setting out what the case manager needs to know should be provided to help counsel identify the required information.

7.3.2 Best Practices: Do an initial screening.

Some cases may never pass the initial screening. If counsel's letter reveals, for example, that the client will shortly be entering a plea of guilty, the case is unlikely to qualify for the program.

If counsel says the case will take about 100 hours to complete, plus a week of court time, the matter is likely to cost less than \$14,000 and does not qualify.

On other occasions, it may be too early in the case for counsel to provide the required information. If so, they should be asked to send a letter after they have had a pretrial, have the disclosure material and can discuss the defence strategy.

If the case is already almost finished, however much time counsel has spent on it, it should not be accepted into the program because no management is possible at that stage. BCM is not a program to validate, after the fact, the amount of time counsel spent on a case. There is no element of management under those circumstances.

Do not case manage matters which are finished or nearly finished.

LAO administrative resources, which in the larger geographic centres are taxed, can be conserved by holding a meeting only for those cases which have potential to be accepted into the program.

A comparison between case-managed and non-case managed matters which cost between \$10,000 and \$20,000, was carried out. While not conclusive (it was performed on a small sample of 100 of each type of case), the study indicates that there is no cost benefit to LAO in case managing smaller matters.

TABLE 12 COMPARISON OF A SAMPLE OF CASE-MANAGED AND NON-CASE MANAGED MATTERS WHICH COST BETWEEN \$10,000 AND \$20,000

Factors Examined	10K-20K BCM	10K-20K Non-BCM
Avg. of total fees	\$16,070.53	\$15,541.17
Avg. of total disbs.	\$2,194.45	\$2,016.38
Avg. # of court days	9.67	12.22
Avg. total cost per day	\$4,176.47	\$3,140.50
Avg. # of hours prep. Time	139.75	109.35
2 nd counsel authorized	35%	37%
Avg. hours billed but not paid	4.28	13.78

It is recommended that the instruction should be to manage all homicides and high profile cases. Other than those cases, the case manager should accept cases into the program which meet the financial threshold in that they are likely to exceed \$20,000 for fees and disbursements, or are set for a two-week preliminary hearing.

The interpretation of this policy should not be rigid. There should be some flexibility if an estimate is close to \$20,000, keeping in mind the unpredictability of a criminal case, particularly at the early stage where screening is initially attempted.

**Other than homicides and high profile cases,
case manage only matters which are likely to exceed
\$20,000 for fees and disbursements.**

Where the likely consequences of conviction will have relatively less impact on the client, a reasonable client of modest means would be unlikely to commit the kind of resources which would bring the case up to the threshold of big case management. Serious consideration should be given to refusing to accept a matter into the program where:

- if convicted, the client is likely to receive a sentence of less than 18 months incarceration
- the Crown is proceeding by summary conviction on the charges
- the most serious charge is:
 - ~ break and enter
 - ~ threatening death
 - ~ mischief to property (other than mischief endangering life)
 - ~ fail to comply
 - ~ impaired driving (other than causing death or bodily harm)
 - ~ dangerous driving (other than causing death or bodily harm)
 - ~ welfare fraud

As shown in table 1, *supra*, only a handful of offences which are normally prosecuted by summary conviction have been admitted into the program. As would be expected, those few cases also cost less than more serious offences.

Screen cases according to potential penalty.

If, after reviewing counsel's letter or even after meeting with counsel, it does not appear that a case is eligible for the program, case managers are often left with a frustrated lawyer. Usually it is clear that the tariff maximums are going to be exceeded. Counsel has already spent some time and effort communicating the difficulties of the case to the case manager, and now is left with the response that they are at the mercy of the tariff and the discretion of the legal accounts officer, exercised after they have finished the work.

The process in such cases is to forward counsel's information to Legal Accounts. Legal Accounts writes back and provides some reassurance concerning the availability of discretion after the fact. If the case manager has obtained a letter from counsel as part of the initial screening, counsel can use that same letter to advise legal accounts about the time requirements of the case. Again, a **form letter** can be put to good use to let counsel know about the process, and to remind them that if at any time there is a change of circumstances which affects their time estimates, they should contact the area director in advance of using the additional time, to once again request entry into the BCM program.

**Offer counsel a process for cases which do not
meet the financial threshold for fees and disbursements**

7.4 CASE MANAGEMENT MEETING

7.4.1 Discussion

This stage involves meeting with the lawyer and making a number of decisions, including:

- whether the case qualifies for the program
- what stage of the case to budget
- whether the case needs to be referred to the Exceptions Committee
- what the budget should be
- whether a second counsel should be authorized
- whether travel should be authorized
- what disbursements should be approved

7.4.2 Best Practices

Once a case has passed the initial screening, the big case management meeting can be held. At this stage the case manager should have correspondence in hand from counsel which provides a fairly good idea of what counsel feels are the issues and time requirements in the case. In some cases there may be an issue where it would help the case manager to check internal resources, such as research materials from LAO LAW available on the internet, to learn a little about the topic. The case manager may also want to talk with other area directors or provincial office if they need information about the lawyer, the issues or conducting the meeting.

Prepare for the meeting

Hold the meeting after the judicial pretrial

The best time to hold a meeting is generally after the judicial pretrial, when counsel has most or all of the disclosure and has at least discussed the length of the preliminary hearing or trial, even if the actual date is not yet set.

If there are legally aided co-accused, so long as conflicts of interest between the parties do not preclude it, all counsel should attend at the same meeting with the case manager.

Good decision making requires good information. The case manager should have a check list, in writing or in mind, as to what information is needed from counsel. However, the meeting generally commences by allowing counsel an opportunity to tell the case manager about the case. The successful meeting is one which is non-confrontational.

The case manager needs to know:

- is the case high profile
- what is the charge
- what are surrounding circumstances
- how much disclosure is there, in what form
- how many witnesses
- legal issues
- how is preparation time to be spent
- how long set for preliminary hearing/trial
- what motions does counsel propose to bring
- what disbursements are sought
- is the case likely to be resolved short of a preliminary hearing or trial
- what kind of sentence is the Crown seeking.

Obtain necessary information.

The discussion should always include a reference to use of LAO LAW (formerly the Research Facility). LAO LAW's recent survey of lawyers found that most lawyers responding to the survey (95 per cent) agreed that LAO's research products reduce case preparation time. Many lawyers reported that LAO LAW's general memos (85 per cent) and case-specific research (87 per cent) assist in case resolution. LAO LAW recognizes that it can play a role in reducing counsel's legal research time in big cases, and is developing a protocol with Legal Accounts to govern research in big cases.

Of the 365 BCM cases reviewed in detail, only 43% used LAO LAW for their case. An even small group (about 14%) sought specialized memoranda as opposed to the standard LAO LAW memoranda.

Refer counsel to LAO LAW.

The discussion should also include an exploration of cost-effective service delivery. For example, if there is a great deal of disclosure, does counsel have the use of a student who could do some of this work at the student rate? If there are multiple accused, can counsel split the work on some issues so that there is no duplication of effort? An experienced lawyer may be able to come up with some of his or her own ideas about how to use resources cost effectively.

In some instances, it may also be advisable to have a discussion about prioritization of issues. Would a reasonable client of modest means pursue the case in the way that counsel is suggesting? The case manager should understand why the steps in the proceeding are being taken and whether they have a reasonable prospect of success.

Discuss ways to minimize cost.

Many case managers have found that it makes sense to budget a case in stages. Counsel may present a very clear picture of the time requirements of the preliminary hearing, but have only the vaguest idea what is involved for the trial. It may not be known until after the preliminary hearing what the major trial issues will be, whether some portions of the evidence will be challenged, and most important, how long a trial is likely to take. It may not even be clear that there will be a trial, as many cases reach a resolution after the preliminary hearing, when both sides have had a chance to assess the strength of the Crown's case and the viability of the defence. Almost half of budgets received currently, are budgeted only to the end of the preliminary hearing. While this is an unavoidable practice because of the level of information available, the case manager should still discuss the rest of the case. The case manager needs some idea as to the total case cost, to determine whether the case is likely to exceed \$75,000. Cases which are likely to exceed \$75,000 in fees must be referred to the Exceptions Committee.

**Discuss the cost for the entire case,
even if budgeting only for the first stage.**

7.5 SETTING A BUDGET

7.5.1 Number of hours

7.5.1.1 Discussion

Area directors have repeatedly expressed a wish to know what a reasonable range of hours is for a set of legal services. Case management would be a much easier task if it were possible to provide a list of case components with a number of hours attached, or a range of hours for a particular type of offence, or even a dollar maximum for every day the trial is scheduled to last.

The difficulty is that with criminal cases, the number of variables is so great that no two will be completely alike. Factors occur not in isolation but in combination. Volume of disclosure, profile of case, trial strategy, consequences to the client, difficult witnesses, forensic evidence, and many other issues can co-exist in one case. Even within each factor, time requirements may differ depending on the fact situation of the particular case.

7.5.1.2 Best Practices

What is known, from the intensive file review of 365 BCM cases, is that some factors have a correlation with case cost. The case manager can start with the tariff, and add to that according to factors that are likely to make the case more expensive.

When setting a budget, there should be a relationship between the seriousness of the charge and the number of hours counsel requires. The starting point is the tariff, which ranks charges according to whether they are summary conviction, type I or type II indictable. An offence which is punishable by life imprisonment is *prima facie* more serious than one where the client is, at most, facing 18 months in jail.

In assessing the seriousness of the offence, aside from the penalties available under the Criminal Code, counsel is generally in a position to advise the case manager of the kind of sentence the Crown is seeking on conviction.

The factors which have a correlation with case cost may be useful to a case manager in assessing counsel's suggested budget. The case manager can look for these factors to determine whether the case matches the profile for a big case, and build the budget accordingly.

- additional counsel required
- long preliminary hearing
- long trial
- large volume of disclosure
- numerous motions proposed
- homicide case
- high profile case
- time-intensive type of defence
- no possibility of early resolution

Build the budget according to factors that make the case exceptional

The number of days set for preliminary hearing is a good indicator for the case manager of the complexity of the case and its time requirements. If the Crown needs only two or three days to put in its case, there is some reason to believe that the case is not especially complicated from an evidentiary standpoint.

It is useful to have counsel give some idea of how the proposed time is to be spent. If counsel needs 200 hours, how is that broken down into the tasks he or she must accomplish to prepare the case for trial? A starting point for a serious criminal offence which is not homicide, might be 50 hours of initial preparation time (six days of 8 hours each, spent by counsel reviewing a banker's box of disclosure, meeting with the client and witnesses, strategizing for the case, reviewing legal authorities, preparing written materials and meeting with the Crown). That can be added to by unusually large volumes of disclosure, the necessity to prepare expert witnesses, complex defences such as identification or DNA evidence, wiretap evidence, recanting witnesses, applications for third party records, and any number of other factors.

Another way to look at budgeting is by trying to match court time to preparation time. For a case which is big enough to qualify for the program but has few complicating factors, for example, a yardstick might be 10 hours of preparation time for every court day scheduled. If budgeting in this way, the case manager would have to calculate an overall preparation figure, taking into account whatever allowance of hours per day is agreed upon, to arrive at a global figure for preparation. The budget should still be keyed to actual length, however, to avoid excess time committed if the case resolves early.

If the budget is being set only to the end of the preliminary hearing, it is important to keep in mind that it may be premature to budget on the basis of motions which counsel will not be able to bring until the trial proper.

In a homicide case, there is likely to be a large volume of disclosure. Evidentiary issues are likely to be more complex. The stakes are very high. Counsel might justifiably spend 25 hours on a single step like applying in superior court for bail. The client is likely to be in custody, requiring jail visits which add to time spent.

7.5.2 Disbursements

7.5.2.1 Discussion

Disbursements are a significant cost factor in big cases. Over 35% of all criminal disbursements paid are in respect of BCM certificates. Disbursements as a percentage of fees in non-BCM cases average about 7%; in BCM cases the average is about 12%.

In non-BCM matters, disbursements are authorized by a small group in the Legal Accounts department. The group has expertise, not only with respect to tariff rates but also to how many hours are typically authorized for different types of expert witnesses, and the availability of expert witnesses on a particular topic.

The practice in BCM has with respect to disbursements has been left to the discretion of the case manager. If the case manager is confident that they can handle the disbursement issues, they do so as part of the budget. If they are hampered by a lack of up-to-date knowledge about disbursements, they budget only the fees portion of the case, and refer counsel to the disbursements department to handle disbursement issues.

Having the disbursements department handle all disbursement issues has the advantage of bringing their expertise and consistency to bear. The disbursements department has a number of standard letters for disbursements setting out terms and conditions, which are not used when an area director authorizes disbursements as part of BCM.

Another problem is that disbursement authorization requests frequently precede a case being accepted into big case management. The disbursements department has in the past attempted to defer disbursement decisions until after a case management has been held, so as not to interfere with the case manager's ability to control the conduct of the case. This practice caused unacceptable delays to counsel's ability to quickly retain experts in volatile situations, such as where the client's current mental state must be appraised shortly after the offence date.

On the other hand, there are obvious difficulties with predicting case cost when disbursement issues are not handled at the budgeting stage. Also, counsel frequently requires an immediate answer during the budget meeting as to disbursement questions, because the trial strategy depends on the authorization of certain disbursements.

7.5.2.2 Best Practices

The recommendation is that disbursements should be handled by the case manager, but only after there has been extensive training and a mechanism put in place for:

- ongoing updates of disbursement material for area directors, including form letters currently in use for disbursement authorizations
- consultation by area directors with legal accounts staff concerning standards, policies and hourly rates
- legal accounts to handle disbursement requests in emergency situations or before case management starts

Disbursement decisions require the case manager to have detailed, up-to-date information about LAO disbursement policies

7.5.3 Choice of counsel

The client has a choice of counsel. Even if the case manager thinks that another lawyer could do the case in less hours, they have to deal with the lawyer whom the client has retained. There are differences in practice style which are hard to judge. The fact is that the lawyer who gives a longer estimate of how much time is needed on the case, may be doing a more thorough job than someone else would, and may ultimately achieve a better result for the client. Only if the lawyer is very inexperienced or demonstrates a lack of knowledge of the case or the applicable law, is a case manager in a strong position to assert that he or she is spending an excessive amount of time on some aspect of the case. Asking the lawyer to explain how they intend to use the time may, however, give the case manager an opportunity to assess how realistic the overall estimate is.

7.5.4 Changes to the Budget

7.5.4.1 Discussion

The next decision point which is likely to face a case manager is a request for an increase to the budget. The budgeting process will not achieve its goals of increasing predictability of case cost or actually controlling cost, if budgets are subject to frequent changes. At the same time, LAO has to deal fairly with counsel who is faced with a change of circumstance beyond the defence's control. The case manager and counsel should have a mutual understanding when they leave the meeting, as to what LAO's policy is concerning budget changes.

In the 365 certificate casefiles looked at in depth, budgets were increased at least once in about 28% of the cases. The course of a criminal case is not predictable. But it is in the best interests of the program that changes should be minimized. The criterion for change should be restricted to a change of circumstances which could not reasonably be anticipated. The request for a change to the budget should be made in advance of spending the extra time.

7.5.4.2 Best Practices

There should be a "Terms of Agreement" document provided to counsel when a budget is set, which sets out LAO's policies on changes to the budget. The same document can also be used to advise counsel of LAO's expectations concerning account content, including an end of case reporting document which counsel must complete.

Changes to budgets should be granted only where there is a change of circumstance which could not reasonably be anticipated.

7.5.5 Subsequent stages in budgeting

The information needed and the decisions required at this stage are very similar those taken when the initial budget is being set. The major difference is that the preliminary hearing has

occurred, and counsel can advise with some certainty what the triable issues are and how long the trial will take. After the trial budget is set, there may again be requests for changes to the budget, which should be dealt with in the same way.

7.6 ADDITIONAL CASE MANAGER RESPONSIBILITIES

In order to be accepted by counsel, the BCM process has to be perceived as flexible, consistent and fair. This perception is largely dependent upon the BCM meeting and budget-setting process described above, but there are other measures which can help make the program attractive to counsel.

7.6.1 Promoting realistic expectations

The lawyer should know what to expect at each stage of BCM:

- what written materials are required
- how to arrange a meeting
- what will be discussed at the meeting
- confirmation of budget agreement
- what reporting is required as the case progresses
- requirements for accounts
- policy on changes to budget

This can be achieved through training case managers to incorporate these issues in their communications with counsel, and through the development and dissemination of standard forms for use by all case managers at different stages of the BCM process. Alternately, some formal communications could be generated centrally from provincial office, as part of a process for validation and confirmation of budgets.

7.6.2 Timely responses

Big case management places an onus on counsel not present in routine cases, for example to seek a BCM meeting if a case appears likely to exceed \$20,000; to do an opinion letter setting out details of the case and trial strategy; and to attend for a meeting. These necessary procedural steps should not be impeded by difficulty in identifying the correct steps to take or in communications with the case manager.

BCM should be a priority for case managers. Correspondence and telephone calls from counsel about BCM should be answered promptly. Meetings should be set up as soon as possible after the case reaches the stage where the information necessary for budgeting is available. Good records should be kept of budget discussions, and the necessary forms filled out and given to counsel and legal accounts. Area directors who are not available for case management should provide their staff with clear instructions as to where to refer BCM inquiries. Case managers should have a process for delegating BCM responsibilities to another case manager if on extended vacations or leaves of absence.

7.6.3 Identifying Litigation Support for counsel

The provision of appropriate resources has been discussed above, under section A on setting a budget. But in addition to setting a budget appropriate to the requirements of the case, there are other resources that LAO can offer counsel:

LAO LAW – an opportunity for individualized legal research which can save the lawyer time and effort.

Case co-ordination – a budget meeting in a case with co-accused provides an opportunity which might otherwise not have occurred for counsel to discuss the case with each other as well as with the case manager - a dialogue can take place which may assist all counsel in developing their trial strategy - there is also a possibility that work can be co-ordinated, with one lawyer sharing their work product with the rest to minimize the combined time requirements of the case.

Mentoring – it has been observed that the Exceptions Committee occasionally takes on a mentoring role with counsel appearing before it, providing advice or insight about the prosecution or the defence case – an experienced case manager may also fill this role.

Disbursement advice – the disbursement department may be able to provide counsel in some cases with a short list of expert witnesses in a particular field, known to accept legal aid rates, saving counsel time and effort in looking for names.

7.7 ADDITIONAL RECOMMENDATIONS

7.7.1 End of Case Reporting by Counsel

The review of 365 BCM casefiles could have been improved by information in the file about some factors which staff had identified as possibly playing a role in case cost. For example, it had been hoped that the review could identify how many hours were typically spent on certain types of motions, on legal research, on reviewing disclosure, etc. There are detailed requirements for what counsel must include in any legal aid account, but it does not include providing a breakdown of how preparation time has been spent. Information was also frequently missing as to the ultimate outcome of a case, how many witnesses were called, what portion of the case was taken up with the prosecution's case versus how much was the defence case, and who was the Crown Attorney prosecuting the case.

The problem could be addressed by requiring counsel to include with their last account a reporting document, given to them at the time they entered the program, asking for the type of information which was so hard to recover from the casefiles.

7.7.2 Mandatory Reporting by Case Managers

The budget form asks a number of questions of the case manager which would be useful when analyzing the BCM program; for example, whether the case is high profile, and what items were sought by counsel but not granted by the case manager. Unfortunately the form is not consistently used across the province. A revamped version of the budget form should be circulated to all case managers, and it should be a requirement that it be completed in full.

7.7.3 Develop Budget Change Guidelines

Predictability competes with flexibility in the budgeting process. It would be impossible to mandate that a budget cannot ever be changed. But neither should changes to the budget be the norm. There should be a requirement for a significant change of circumstance which could not reasonably have been anticipated, to minimize the number of times a budget changes. This has not been the policy to date; a shift such as this should be clearly communicated to counsel in a Terms and Conditions document when the case is accepted for BCM.

7.7.4 Disbursement Guidelines/Training

The issue of disbursements is dealt with above, in the section on setting a budget. Disbursements may not be amenable to accurate prediction. Educating the case managers about how to authorize disbursements may help with this challenging area.

8. SUMMARY OF RECOMMENDATIONS AND BEST PRACTICES

8.1 RECOMMENDATIONS

1. The policy framework of BCM should be defined as follows:

BCM is a program through which LAO identifies, budgets and monitors cases that substantially exceed the limits of a standard criminal certificate. The goals of the program with respect to its caseload are to:

- monitor and control case cost, in accordance with the standard of a reasonable client of modest means
 - increase predictability of case cost
 - provide counsel with appropriate resources for high quality, effective service delivery
 - ensure the criminal bar can continue to accept certificates for big cases
 - develop and maintain a framework of accountability and consistency
2. The current model of managing cases should be continued; that is, each case should receive individual consideration by the case manager on its merits. No restriction should be placed on which lawyers can continue with a BCM case. BCM cases should continue to be funded out of the general certificate budget. The ceiling on fees should be subject to being exceeded by an individual case after scrutiny by the Exceptions Committee.
 3. For the present, the eligibility threshold of \$20,000 for BCM should be continued, except for homicides or high profile cases involving serious offences, which should be eligible in any event. The ceiling of \$75,000 fees should continue to be the cut-off for area director budgeting discretion until further evaluation can be done as to its effect on case cost.
 4. Case managers should not accept cases into the program which are unlikely to reach the threshold amount of \$20,000 fees and disbursements.
 5. LAO should hire a manager for the BCM program.
 6. A core group of area directors should be trained to manage BCM cases.
 7. A comprehensive training session of at least a day's duration should be held at several regional locations or centrally. The area directors should be given training materials and standard forms. The use of standard budget forms for communications with counsel and legal accounts should be mandatory.

9. BCM data collection and analysis methods should be upgraded to include the following:

- a) requirement for counsel to provide end-of-case report with their final account
- b) regular monthly, quarterly and yearly AS400 reports as part of standard report production processes
- c) expansion of Excel spreadsheet to include changes to budgets and case outcome information

10. BCM communication materials should be revised to include:

- a) opinion letter guide for counsel proposing a case for BCM
- b) advice letter for counsel with case not accepted into program
- c) terms and conditions document for counsel with case entering the program
- d) legal accounts reporting document advising counsel of budget status after payment of interim account

8.2 BEST PRACTICES

1. The Application

Area directors should be proactive in identifying cases which might be BCM, as early as the application stage.

Best practices at the application stage:

- Identify cases at an early stage, based on known predictors such as the type of case (i.e., high profile or homicide cases, followed by cases involving charges of failing to provide the necessities of life, aggravated sexual assault, criminal negligence causing death, and conspiracy) and identified factors such as, for example in drug cases, the sophistication of the scheme and the number of co-accused.
- Certificates for such cases should be issued with wording directing counsel to advise the area director if BCM limits will be exceeded.

2. Eligibility for BCM Program

Because many cases which enter the BCM program never reach \$20,000 in fees and disbursements, there should be more screening at the entry stage to determine the real potential of a case.

Best practices in determining eligibility:

- Ask counsel to provide an opinion letter, setting out the nature and circumstances of the case, a cost estimate, and the names of any co-accused clients and their counsel.
- Do not case manage matters which are finished or nearly finished.
- Other than homicide and high profile cases, case manage only those matters which are likely to exceed \$20,000 for fees and disbursements.
- Cases should be screened according to the potential penalty involved, keeping in mind the standard of a reasonable client of modest means.
- Offer counsel a process for cases which do not meet the financial threshold for fees and disbursements.

3. The Case Management Meeting

At this stage the area director meets with the lawyer to make a number of decisions, including decisions on eligibility for the BCM program, and budgeting.

Best practices for the case management meeting:

- Prepare for the meeting, and hold the meeting after the judicial pretrial, when counsel has most of the disclosure.
- Obtain the necessary information about the case.
- Refer counsel to LAO LAW, for research to help reduce preparation time.
- Discuss other possible ways to minimize cost.
- Discuss the cost of the entire case, even if budgeting only for the first stage.

4. Setting a Budget

Setting a budget is difficult, because there are many variables which can occur in combination, and no two cases are completely alike.

Best practices for setting a budget:

- Build the budget according to factors that make the case exceptional. These factors include the length of the preliminary hearing, length of the trial, any requirement for additional counsel, and the volume of disclosure.
- Decisions on disbursements should be handled by the case manager, who needs to have detailed up-to-date information about LAO disbursement policies.
- Changes to the budget should be granted only where there is a change of circumstance which could not reasonably be anticipated.

5. Additional Case Manager Responsibilities

There are a number of things that case managers can do to help make the BCM program attractive to counsel.

Best practices:

- Promote realistic expectations, and let counsel know what to expect at each stage of BCM.
- Provide timely responses – case managers should make BCM a priority.
- Identify litigation support for counsel, offering resources such as research materials available from LAO LAW, mentoring, case co-ordination in cases involving co-accused, and advice available from the disbursement department.

6. Additional Recommendations

End of case reporting by counsel:

- Counsel could be asked to include, with their last account, a reporting document providing information on matters such as breakdown of preparation time, number of witnesses called, and outcome of the case.

Mandatory reporting by case managers:

- A revamped version of the budget form should be prepared, and case managers should be required to complete the form in full.

Budget change guidelines:

To minimize the number of times a budget changes, there should be a requirement for a significant change of circumstance which could not reasonably have been anticipated. This should be clearly communicated to counsel when a case is accepted for BCM.

Disbursement guidelines and training:

- Although disbursements may not be amenable to accurate predication, educating case managers in this challenging area may assist.

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