REPORT OF THE REVIEW OF LARGE AND COMPLEX CRIMINAL CASE PROCEDURES

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CHAPTER 1: History of the Review

On February 25, 2008, Attorney General Chris Bentley appointed us to conduct "a review of large and complex criminal case procedures." He asked us to "identify issues and recommend solutions to move large, complex cases through the justice system faster and more effectively." We agreed to prepare a written report, after conducting "focused discussions with defence and Crown counsel, the judiciary, Legal Aid Ontario, police agencies and others involved in large, complex criminal cases." We also agreed to deliver our Report to the Attorney General within six months and the Attorney General advised that it would be made public.[1]

Lynn Mahoney was appointed as our counsel and we are greatly indebted to her. She worked tirelessly and effectively, both at our many consultations and in our research and writing. We were also ably assisted by five University of Toronto law students who prepared excellent research memos on a wide variety of topics. These students, Brian Duong, Matthew Gourlay, Nicole Henderson, Andrew Midwood and Fred Schumann, were especially helpful with the "case studies" that we conducted, which will be described below. Laura Metrick, counsel in the Policy Division of the Ministry of the Attorney General, was our liaison with the Ministry and with other government agencies. She also provided invaluable assistance in reviewing and analysing the existing body of policy work and publications relating to the topic of our Review. Finally, we are indebted to Iris Wordsworth who worked diligently preparing drafts and redrafts of each Chapter that we produced.

Our work during the six month period of the Review can be divided into four distinct phases. First, we conducted a series of interviews with leading justice system participants, to help us identify the key issues and focus our broad mandate. At the same time, we conducted a preliminary review of the available literature on the subject of long complex trial procedure. We completed this preliminary work during March and April 2008 and on April 30, 2008 we issued an eleven page document titled "Preliminary List of Issues for Consultation". The document identified four main issues, and was later expanded to five issues, on which we requested

[1] "Attorney General Launches Complex Criminal Case Procedure Review," News Release, February 25, 2008 Online: http://www.ontario.ca/attorneygeneral

submissions from justice system participants. We made it clear that we would welcome discussion of any important additional issues that the parties might identify.

The second phase of our work, during May and June, 2008, consisted primarily of a long series of consultations with defence counsel, federal and provincial Crown counsel, police officers, judges, justices of the peace, Legal Aid officials, Crown managers, senior judges with administrative responsibilities, Law Society officials, police managers, federal and provincial justice policy advisors and various justice system organizations. There were approximately 25 of these consultations which generally followed the outline in our "Preliminary List of Issues". In addition, we received written submissions from many of these parties and from other interested individuals and organizations.

During this second phase we also began an analysis of the relevant case law, publications and policy work, relating to the so-called "mega-trial phenomenon". Given that the six month time frame for our Report did not permit any kind of comprehensive empirical study of this phenomenon, it was suggested to us that we should examine the Court of Appeal records of a number of recent "mega-trials". The persons with whom we consulted suggested some examples of very long complex trials that had already proceeded through the Court of Appeal. Accordingly, their trial records would be available to us without delay. We reviewed these suggestions with four members of the Ontario Court of Appeal and they generously agreed to facilitate speedy access to the Court's records. In the result, we obtained the transcripts, facta and Appeal Books for four major cases and began an in-depth study of each one.[2]

By the end of this second phase, we were struck by the relatively high degree of consensus that appeared to exist amongst most participants as to potential solutions to many of the key problems associated with the "mega-trial phenomenon". The parties attending our consultations exhibited high standards of professionalism. They appeared to pragmatically accept that there is joint responsibility, amongst all justice system participants, to try to make these long complex cases more efficient. It was suggested to us, and we agreed, that it would be useful to circulate a second consultation document, setting out the possible solutions that had

[2] The four cases were: *R. v. Kporwodu and Veno* (2003), 176 C.C.C. (3d) 97 (Ont. S.C.J.), aff'd (2005), 195 C.C.C. (3d) 501 (Ont. C.A.); *R. v. Khan and Fatima* 2007 ONCA 779, 230 O.A.C. 174; *R. v. Sauve and Trudel* (2004), 182 C.C.C. (3d) 321 (Ont. C.A.); *R. v. Trudel*, [2007] O.J. No. 113 (Ont. S.C.J.), staying the re-trial; *R. v. Mallory and Stewart* (2007), 217 C.C.C. (3d) 266 (Ont. C.A.).

emerged to the key problems, in order to determine whether there was, in fact, a reasonable degree of consensus.

The third phase of our work, therefore, was to prepare a 24 page document titled “Some Tentative Proposals” which was circulated to the participants on July 21, 2008. It attempted to identify a set of recommendations for reform that would be broadly supported by all justice system participants. We then held a series of “roundtable discussions”, in the last week of July, to debate these proposals. During the earlier consultation phase, we had met with the various groups separately, in order to encourage candour. During this further “roundtable” phase, in July, we brought the participants together in the hopes of encouraging pragmatic compromise and consensus.

We believe this third phase of our work achieved its purpose. Many of our proposals were widely accepted by the participants. In other cases, detailed revisions were suggested but the broad principles were accepted. Finally, in some cases we were persuaded to make changes to our proposals.

As a result of the above process, we were able to move to the fourth and final phase of our work, in August, namely, the drafting of this Report.

We wish to thank all of the participants who made submissions to us, either in writing or in person at our consultations and roundtables. They are all listed in Appendix A to this Report. We hope that our work reflects their many insights and invaluable contributions. As stated above, we were impressed throughout by the highly professional and responsible way in which these justice system participants have responded to the challenges of long complex trials.

We conclude this introductory chapter by acknowledging a possible weakness in our process. Some participants urged us to engage in thorough empirical research, by analysing a statistically significant representative sample of long complex cases. For example, it was suggested that we ought to select a sample of 50 to 100 of these cases, extending over a five year period, and study the transcripts of those cases in order to determine the incidence and magnitude of the “mega-trial phenomenon”.

We agree that this kind of research and report would be ideal. It was simply not feasible in the six month time period available for our Review. As will be seen, some of our

recommendations include the need for after-the-fact case reviews, audits or *post-mortems* of long complex trials, where the public perceives that the case should have been conducted more speedily and efficiently. If these recommendations are accepted, the justice system will begin to develop a body of in-depth research on cases that have proceeded through the courts in a less than satisfactory manner. Of course, we would endorse the call for more thorough empirical research on this topic and encourage justice system participants to commission this kind of work. For a start, it would be very helpful if better statistical data were kept on the length of pre-trial motions and trials so that comparative analysis could be undertaken in future years.

Not only did we lack the time to do this kind of thorough empirical research but, in any event, we believe that many improvements can be made to the justice system without waiting until further research is completed. We were satisfied, based on our extensive consultations, our review of the case law and the literature published in this field, and our four case studies that certain recurring problems are identifiable. It does not matter how many times these problems occurred in the past or continue to occur in future cases. The fact that they have already been exhibited in a number of major cases has caused significant harm to the effectiveness of the criminal justice system and to confidence in that system. When broad consensus exists as to the solutions to these problems, and we believe such consensus does exist, the justice system should take steps to prevent their recurrence. It is on that basis that we have proceeded.

It must be remembered that the long complex cases are, generally speaking, the most high profile cases. They attract intense media scrutiny and are, therefore, communicated widely to the public. They come to be seen as exemplars for the broader justice system. Every time one of these cases is seen to be inordinately delayed or dysfunctional it has a significant impact on public confidence in the efficiency and effectiveness of the justice system. Accordingly, we must address the problems associated with these cases, regardless of whether there are five or 10 or 100 of them each year.

CHAPTER 2: The Context and Culture in which Long Complex Cases have Arisen

A. Do We Need to Begin with a Definition of "Long Complex Cases?"

We have not attempted to settle on a definition of what we mean by the "long complex criminal case". Various definitions exist, for example, the Ontario Superior Court has developed a "Special Assignment Court" practice for cases likely to take three weeks or more of trial time. Legal Aid Ontario (LAO) has a special case management procedure for cases likely to cost $75,000 or more in fees payable to defence counsel (it would generally require a two to three week preliminary inquiry followed by a six to seven week trial to reach and exceed this budget). In the United Kingdom, various special practices and procedures have been developed for "Very High Cost Cases" which are defined as trials lasting over 41 days (or about eight weeks).

These regimes will be discussed in greater detail in our Report. However, we do not think it useful to debate whether one definition is preferable to another. It is beyond dispute that all criminal trials have become much longer and the criminal trial process has become much slower in the last 20 to 30 years. This phenomenon is not limited to a particular class of case and the solutions that we propose to make the system more efficient and effective need not be limited to a particular length of complex case, whether three weeks or six weeks or eight weeks.

If our recommendations are accepted, they can be implemented incrementally, as available resources and institutional capacity permit. We have not concerned ourselves with detailed implementation plans. Rather, we have made broad structural proposals for change to legal procedures and practices and to the legal culture. When it comes to the implementation stage, definitions may become useful as to which group of cases will be addressed first. At that stage, we recommend the kinds of definitions described above.

B. The Legal or Law Reform Causes of Long Complex Trials

We wish to stress at the outset that no one should be surprised that criminal trials have become increasingly long and complex in the last 20 to 30 years. Both elected lawmakers and

judicial lawmakers are themselves responsible for much of the transformation that we have witnessed and it is now a well known phenomenon.

Leaders within the courts have been expressing concern about the problem for some time. In a speech to the Empire Club on March 8, 2007, titled "The Challenges We Face", Chief Justice McLachlin stated that murder trials used to take "five to seven days," in the recent past, and now "they last five to seven months." She described these changes as giving rise to "urgent" problems and "incalculable" costs.[3] In a similar but much earlier speech to the Empire Club on April 13, 1995, titled "The Role of Judges", former Chief Justice Lamer described "complexity and prolixity in legal proceedings" as "our greatest challenge" and one that could render the justice system "simply irrelevant" unless it is solved.[4] Finally, in a recent unanimous judgment dealing with a particularly complex species of wiretap motion, the Supreme Court of Canada adopted a much earlier pronouncement of Justice Finlayson, made in the Ontario Court of Appeal in 1992, to the effect that "our criminal trial process" has become "bogged down" in an "almost Dickensian procedural morass" and that the public would soon "lose patience with our traditional adversarial system of justice."[5]

Senior government officials, and the Attorneys General across the country, have expressed similar concerns about the phenomenon of overly long criminal trials and their unduly complex processes. These concerns culminated at the most recent meeting of Federal, Provincial and Territorial Ministers Responsible for Justice and Public Safety, at Winnipeg on November 15, 2007, when the following Communiqué was issued[6]:

> Ministers also agreed with the recommendations from officials to improve the way large and complex trials are conducted. The officials recommended legislative amendments to reduce the risk of mistrials and address some of the difficulties associated with the management of mega-trials, among others. Ministers agreed to

[3] The Empire Club of Canada, Toronto, Canada. Online: http://www.scc-csc.gc.ca

[4] John Campion and Edward Badovinac, eds. *The Empire Club of Canada Speeches 1994-1995* (Toronto: The Empire Club Foundation, 1995), pp. 124-136. Online: http://www.empireclub foundation. com.

[5] *R. v. Pires and Lising* (2005), 201 C.C.C. (3d) 449 (S.C.C.), quoting Finlayson J.A. in *R. v. Durette et al* (1992), 72 C.C.C. (3d) 421 at 440 (Ont. C.A.), revd. *sub.nom. R. v. Farinacci et al*. 88 C.C.C. (3d) 1 (S.C.C.).

[6] For a review of the various policy initiatives in Canada and the U.K. during the past five years, which eventually led to the Winnipeg communiqué, see Michael Code, "Law Reform Initiatives Relating to the Mega Trial Phenomenon" (2008), 53 C.L.Q. 421. The Ministers' Communiqué can be found at: *Federal, Provincial and Territorial Ministers Responsible for Justice and Public Safety Meeting*, Doc. 830-926/004 (Winnipeg: 14-16 November 2007), Online: http://www.scics.gc.ca/ cinfo07/830926004_e.html

> refer the report to the Department of Justice Canada for the detailed policy work necessary to move the initiative forward.

We will comment later in our Report on the legislative proposals that were put to Ministers at the Winnipeg meeting.

We believe there were three major events that played a significant role in transforming the modern criminal trial, from the short efficient examination of guilt or innocence that existed in the 1970's, to the long complex process described in the above communiqué, speeches and cases. These three causal events were the passage of the *Charter of Rights and Freedoms*, the reform of evidence law by the Supreme Court of Canada, and the addition of many new complex statutory provisions to the *Criminal Code* and other related statutes. These three developments were brought about by the courts themselves and by our elected lawmakers who may not have foreseen their combined impact on the criminal trial process. We discuss these three causal events below, not to be critical, but simply to explain the very different and challenging legal context in which the modern criminal trial now operates. The problems associated with long complex trials, and their solutions, arise from that context.

The first transformative event was the constitutionalization of criminal law and criminal procedure which occurred in 1982 with the passage of the *Charter of Rights and Freedoms*. The *Charter* articulated longstanding rights, added some new rights and, most importantly, introduced a new set of remedies. Many of these rights and remedies were specifically directed at the criminal trial. Indeed, ss. 7 to 14 of the *Charter* can be seen as a constitutional code of criminal procedure. These developments inevitably led to a broad range of procedural motions that had not previously existed, in order to enforce the rights and remedies now entrenched in the *Charter*. All of these motions were complex, both factually and legally, and each one took additional time to hear and resolve.

For example, one of our case studies, *Khan and Fatima*, was a murder case involving allegations that the two accused had killed and dismembered their young child. The trial itself was relatively speedy, lasting about 35 court days. The preliminary inquiry had taken seven days.

However, the pre-trial motions extended over a two and a half year period. Many of the pre-trial motions involved *Charter* issues.[7]

An important related aspect to the essentially political decision to constitutionalize the criminal trial was the judicial approach to interpreting and applying the new *Charter* rights and remedies. In particular, that jurisprudence made certain personalized factors very relevant to the determination of whether a *Charter* remedy should be granted. For example, the leading authorities on s. 24(2) of the *Charter* established a test for excluding evidence that involved consideration of whether there had been "bad faith" or "egregious" conduct, including "such questions as: was the violation deliberate, wilful or flagrant, or was it committed in good faith?"[8] In a similar vein, the jurisprudence interpreting and applying s. 7 *Charter* rights held that "the most relevant considerations are the conduct and intention of the Crown", that "a finding of flagrant and intentional Crown misconduct may make it significantly more likely that a stay of proceedings will be warranted" and that "conspicuous evidence of improper motives or of bad faith" is essential to a successful s. 7 motion for a stay of proceedings.[9] Section 7 *Charter* motions relating to disclosure are a major cause of delay in long complex cases. We deal with this problem at some length in Chapter 3.

This personalized approach to *Charter* remedies inevitably "led to an unfortunate escalation of the rhetoric" in criminal trials, as the Ontario Court of Appeal put it, and a culture of personal attacks and animosity between the parties became a more frequent feature of court room conduct. This, in turn, contributed to the length and complexity of criminal trials.[10]

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[7] *Supra* note 2. The pre-trial proceedings commenced before the trial judge on June 19, 2001 but jury selection did not commence until January 12, 2004. The trial commenced before the jury on January 29, 2004 and the accused were convicted on April 22, 2004. During the two and a half year period of pre-trial motions, it appears from the Court records that approximately 50 motions were argued. See, generally, M.L. Friedland, "Criminal Justice in Canada Revisited" (2004), 48 C.L.Q. 419 at pp. 445-458. In particular, Professor Friedland argues, in relation to *Charter* motions practice, that:

> "…courts do not like drawing fixed lines, but rather use a large number of factors to determine the outcome of the case before them, often resulting in long legal arguments and lengthy proceedings in future cases at both the appeal and, particularly, the trial level. In a recent speech, Chief Justice Beverley McLachlin warned the Canadian Bar Association that "proceedings in criminal cases are crumbling under the weight of pre-trial motions". To a great extent, this is the result of court decisions that require very close analysis and complex arguments."

[8] *R. v. Kokesch* (1990), 61 C.C.C. (3d) 207 at 226 (S.C.C.); *R. v. Therens* (1985), 18 C.C.C. (3d) 481 at 512 (S.C.C.); *R. v. Collins* (1987), 33 C.C.C. (3d) 1 at 20 (S.C.C.).

[9] *R. v. O'Connor* (1995), 103 C.C.C. (3d) 1 at 42 (S.C.C.); *R. v. Keyowski* (1988), 40 C.C.C. (3d) 481 at 483 (S.C.C.); *R. v. Power* (1994), 89 C.C.C. (3d) 1 at 10 (S.C.C.).

[10] *R. v. Felderhof* (2003), 180 C.C.C. (3d) 498 at 518-520 and 533-540 (Ont. C.A.).

The second causal event that inevitably contributed to the long complex trials of the modern era was the Supreme Court of Canada's decision to fundamentally reform the law of evidence. These reforms had the general effect of broadening the scope of admissibility by replacing the old rules-based approach of the common law with a much more flexible principles-based approach. For example, the hearsay rule was significantly changed such that certain out-of-court statements that would never have been admissible under the pre-existing common law now became admissible.[11] Similarly, the "voluntariness" test for confessions was changed in a way that has sometimes led to the admissibility of statements made by the accused, after repeated, lengthy and forceful interrogations, that most Crown counsel would likely not have attempted to introduce into evidence in an earlier era.[12] Finally, the law of privilege was reformed pursuant to the "principled approach" so that exceptions to existing privileges could be developed and new claims of privilege or even "partial privilege" could be recognized, based on "the particular circumstances of each case."[13]

These significant changes to evidence law led to their own set of motions, in addition to the new *Charter* motions. These motions concerning the admissibility of evidence at common law were now characterized by much greater flexibility than the old rules-based approach. The Supreme Court of Canada, when developing these new principles, would typically identify a number of factors or criteria to be considered while making it clear that the factors were not exhaustive, that "rare" or "exceptional" substitutes for these factors might be found and that, in any event, there was to be a great deal of discretion in applying the factors as they "must be interpreted flexibly, taking account of the circumstances of the case." This new "principled approach" was subtle, nuanced and uncertain. It became very hard to predict the likely result of one of these motions and a great deal of evidence was often led on the motion itself because the factors were so uncertain and so case specific.[14]

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[11] *R. v. Khan* (1990), 59 C.C.C. (3d) 92 (S.C.C.); *R. v. Smith* (1992), 75 C.C.C. (3d) 257 (S.C.C.); *R. v. B. (K.G.)* (1993), 79 C.C.C. (3d) 257 (S.C.C.).
[12] *R. v. Oickle* (2000), 147 C.C.C. (3d) 321 (S.C.C.); *R. v. Singh* (2007), 225 C.C.C. (3d) 103 (S.C.C.).
[13] *R. v. Gruenke* (1991), 67 C.C.C. (3d) 289 at 303-307 (S.C.C.); *M. (A.) v. Ryan* (1997), 143 DLR (4th) 1 (S.C.C.); *Smith v. Jones* (1999), 132 C.C.C. (3d) 225 (S.C.C.); *R. v. McClure* (2001), 151 C.C.C. (3d) 321 (S.C.C.); *R. v. Brown* (2002), 162 C.C.C. (3d) 257 (S.C.C.).
[14] *F. v. U (F.J.)* (1995), 101 C.C.C. (3d) 97 at 113-114 (S.C.C.); *R. v. Khelawon* (2005), 194 C.C.C. (3d) 161 (Ont. C.A.), aff'd 215 C.C.C. (3d) 161 (S.C.C.); *R. v. Blackman*, [2008] S.C.J. No. 38 (S.C.C.).

These developments caused lawyers to take their chances when deciding whether to bring an evidentiary motion, and the motions themselves often became longer or as long as the trial. Many commentators correctly predicted that a by-product of "the principled approach" to evidence law would be "longer trials, more delays and increased costs of litigation." One leading commentator presciently noted in 1994 that "Trial judges simply do not have the luxury to spend hours, let alone days, pondering the reliability of a particular piece of evidence … What is required is a set of rules which can be applied to most situations."[15]

The third causal event that contributed to the development of long complex trials was the continuous stream of statutory amendments that took place at the same time as the above developments in the common law and in *Charter* remedies. Over the past 20 years Parliament has constantly altered and added to the existing body of statute law found in the *Criminal Code*, the *Canada Evidence Act*, the previous *Young Offenders Act* and the new *Youth Criminal Justice Act*. The *Criminal Code* is about double the size it was 30 years ago. The new legislation is complex, unfamiliar and untested and it too has led to lengthy new proceedings.

The new legislation was invariably passed in response to some significant social problem. For example, when gang-related violence began to increase in the 1990's, especially in Quebec, the new "criminal organizations" provisions of the *Criminal Code* were added. When disclosure rules relating to sexual assault prosecutions were seen to threaten the privacy interests of complainants, also in the 1990's, the new "third party records" provisions were added to the *Criminal Code*. Finally, the events of September 11, 2001 caused widespread concern about crimes of terrorism and Parliament responded by enacting a large number of new offences and new procedures in the *Anti-Terrorism Act*.

These three sets of statutory amendments are only examples. There were many others but the above three are good illustrations of the impact that statutory law reform has had on the length and complexity of criminal trials.

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[15] Marc Rosenberg, "Developments in the Law of Evidence: The 1992-93 Term: Applying the Rules" (1994), 5 Sup. Ct. L. Rev. (2d) 421 at 427; Rollie Thompson, "The Supreme Court Goes Hunting and Nearly Catches a Hearsay Woozle" (1995), 37 C.R. (4th) 282; Bruce Archibald, "The Canadian Hearsay Revolution: Is Half a Loaf Better Than No Loaf at All?" (1999), 25 Queen's L.J. 1; Justice David Doherty, "The Admissibility of Evidence in Criminal Proceedings: A Principled Approach in a Post *Charter* World", LSUC Special Lectures 2003: The Law of Evidence, p.1; Michael Code, "Problems of Process in Litigating Privilege Claims Under the Flexible Wigmore Model", LSUC Special Lectures 2003: The Law of Evidence, p. 251; Peter Sankoff, "The Search for a Better Understanding of Discretionary Power in Evidence Law" (2007), 32 Queen's L.J. 487.

Beginning with the 1997 "criminal organization" legislation, as amended in 2001, its effect on the substantive criminal law was to add three new offences, set out in ss. 467.11, 467.12 and 467.13. All three offences require the commission or planned commission of some already existing indictable offence such as murder, robbery, extortion, or drug trafficking. Generally speaking, the three new provisions then add a further element, to the effect that the existing offences or planned offences must be committed by a "criminal organization" or "for the benefit of…the criminal organization." If this added element can be proved, s. 467.14 then provides that the sentence for the new "criminal organization" offence is to be served consecutively to any sentence for the original or underlying *Criminal Code* offence. In other words, the general effect of the legislation is to enact an aggravated form of already existing offences, if they can be proved to be part of a "criminal organization", which is a new statutory term defined in s. 467.1.

These offences have become a major feature of the modern "mega-trial" in Ontario, many of which are gang-related, and they obviously require considerable additional trial time to prove the additional aggravating "criminal organization" element, which can then result in a lengthy consecutive sentence. A simple illustration of this point is found in the leading "criminal organization" case in Ontario, where the underlying offence was a relatively straightforward extortion that the Crown was able to prove, without much difficulty, in little more than a week. The "criminal organization" portion of the trial then lasted for a further period of approximately six weeks with complex lengthy evidence about the Hells Angels.[16]

The 2001 anti-terrorism legislation led to a similar lengthening of the traditional criminal trial. It created a number of new offences based on an entirely new statutory concept, "terrorist activity", with its own lengthy definition found in s. 83.01. Like the "criminal organization" definition, the new statutory concept of "terrorist activity" is built on existing offences to some extent, such as "intentionally causes death" or "intentionally causes substantial property damage." However, the definition goes on to require proof of entirely new elements, including "a political, religious or ideological purpose" and "the intention of intimidating the public…or compelling a person, a government or a domestic or an international organization to do or to

[16] *R. v. Lindsay and Bonner* (2004), 182 C.C.C. (3d) 301 (Ont. S.C.J.), 2005 Can Lii 24240 (Ont. S.C.J.). The transcripts filed on the appeal include approximately 700 pages devoted to the extortion and approximately 3700 pages devoted to the "criminal organization" aspect of the case.

refrain from doing any act." If the Crown successfully proves the new aggravating element of "terrorist activity", as part of any of the new offences, lengthy consecutive sentences are required by s. 83.26 in the same manner as under the "criminal organization" legislation. These complex new elements and offences will obviously require additional trial time, beyond the time needed to prove any ordinary underlying *Criminal Code* offence or offences.[17]

However, an additional complicating factor with the new terrorism offences is the procedure under s. 38 of the *Canada Evidence Act* for disclosure and use of any evidence that implicates "national security." These new provisions are long and complicated, occupying between 11 and 17 pages in the leading annotated statutes. Their most important feature, in terms of lengthening the modern criminal trial, is s. 38.04 which gives exclusive jurisdiction to the Federal Court to decide these issues, and s. 38.09 which provides for interlocutory appeals by either party to the Federal Court of Appeal. The obvious effect of these provisions is to bifurcate and delay the modern criminal terrorism trial, by removing certain disclosure and evidentiary issues from the jurisdiction of the trial court and by permitting interlocutory appeals. Recent terrorism cases have been delayed by a year or more because of these collateral proceedings.[18]

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[17] *R. v. Khawaja* (2006), 214 C.C.C. (3d) 399 (Ont. S.C.J.).

[18] *R. v. Ribic* (2004), 185 C.C.C. (3d) 129 (Fed. C.A.), *R. v. Ribic* 2004 Carswell Ont 2410 (Ont. S.C.J.); *R. v. Khawaja* (2007), 219 C.C.C. (3d) 305 (Fed. Ct.), revsd. in part, 228 C.C.C. (3d) 1 (Fed. C.A.); *R. v. Khawaja* 2008 FC 560. In *Ribic*, the Crown closed its case before the jury and the defence proceeded to call two witnesses on October 23, 2002, as well as seeking to tender a videotape through one of the witnesses. The federal Attorney General objected to this evidence on national security grounds, thus invoking the s. 38 procedure. Notices of Application were filed in the Federal Court on November 5 and December 18, 2002. Blanchard J. heard the motions and ruled on January 9 and 17, 2003, permitting partial disclosure of the evidence but prohibiting the two witnesses from testifying. The accused appealed these orders to the Federal Court of Appeal which heard the appeal on April 24, 2003 and issued reasons on June 4, 2003 dismissing the appeal. In the result, a trial in the Ontario Superior Court was delayed for over seven months while the Federal Court proceedings resolved the national security privilege claim. The trial judge, Cunningham J., as he then was, declared a mistrial on January 20, 2003 after keeping the jury waiting for three months, in the hope that the Federal Court proceedings would conclude. The re-trial then commenced before Rutherford J. in April, 2004 with motions concerning any unfairness caused by the Federal Court rulings and concerning delay. The trial began in June, 2004, over five years after the charges were laid. In *Khawaja*, the accused was arrested on March 29, 2004; at the same time, seven other accused were arrested in the U.K. and Pakistan in relation to the same terrorist plot. The trial of the seven accused in the U.K. commenced on March 21, 2006 and five were convicted by a jury on April 30, 2007. In Canada, the federal Attorney General commenced s. 38 proceedings in the Federal Court on November 1, 2006, while the U.K. trial was proceeding. On February 15, 2007, Mosley J. was designated to hear the motion which involved a claim of national security privilege over 506 documents. On May 7, 2007 he ordered partial disclosure and both sides appealed. On October 31, 2007 the Federal Court of Appeal partially amended Mosley J.'s order. Between December 19, 2007 and April 2, 2008 the federal Attorney General filed four further Notices claiming privilege over various additional documents. On April 30, 2008 Mosley J. declined to order further disclosure. The Canadian trial then commenced in June, 2008, over two years after the U.K. trial and over four years after the charges were laid. Some 18 months had been spent litigating the s. 38 claims in Federal Court.

The final illustration of the impact of federal legislative amendments on the length and complexity of criminal trials is the "third party records" provisions added to the *Criminal Code* in 1997. Once again, these provisions are complicated. They define "record" broadly in s. 278.1 as any record "for which there is a reasonable expectation of privacy" and then establish a two-step judicial procedure for disclosure of such records. The first step is set out in s. 278.5 and requires the trial judge to be satisfied that the record is "likely relevant" and "necessary" but this initial determination must be made without actually examining the record or records. In addition, the judge must consider a long list of eight separate factors enumerated in the statute when deciding "likely relevance" and "necessity". If satisfied on this initial issue, the judge may then personally inspect the record or records. Finally, the judge may order production to the accused but only if satisfied under s. 278.7 that any document or part of a document to be produced is "likely relevant" and "necessary". Furthermore, the same list of eight factors must be considered again in relation to the production of each document or part of a document, as well as "the salutary and deleterious effects" on the accused's "right to make full answer and defence and on the right to privacy and equality of the complainant or witness."

A crucial aspect of these provisions is s. 278.4 which grants standing rights to the custodian of the records, the complainant or witness and "any other person to whom the record relates." As a result of this provision, it is not unusual to have multiple lawyers representing multiple parties at these hearings. The lawyers are entitled to make repeated submissions to the trial judge at this complex multi-step hearing where the issue involves the repeated weighing of eight competing factors. It can be seen that Parliament has adopted the Supreme Court of Canada's approach to evidence law where clear rules have been replaced with broad and uncertain discretionary balancing of competing principles or factors.[19] This all takes time and many recent cases illustrate the delays brought about by these complex "third party records" procedures.[20]

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[19] Indeed much of the substance and procedure set out in these statutory provisions is taken from the Court's earlier decision in *R .v. O'Connor* (1995), 103 C.C.C. (3d) 1 (S.C.C.).

[20] For example, in *R. v. Kporwodu and Veno*, *supra* note 2, a "third party records" motion was brought under the *O'Connor* common law regime in a murder case where the Crown's chief pathologist was Dr. Charles Smith. The defence sought production of 17 criminal autopsy files and six non-criminal autopsy files, in 23 unrelated cases where Dr. Smith had also been the pathologist and where there was some suggestion that his work had been less than competent. The defence also sought production of certain College of Physicians and Surgeons records relating to Dr. Smith's competence. The motion "took up several weeks of court time" at the preliminary inquiry, simply establishing the factual basis for the motion and determining that there was a legitimate privacy interest in the

In conclusion, it can be seen that the criminal trial courts have had to absorb a continuing onslaught of new *Charter* remedies, new common law evidence principles, new legislative procedures and new offences over the past 20 to 30 years. It is hardly surprising, in these circumstances, that the short, simple and efficient criminal trial of the 1970's has been replaced by the long, complex and often inefficient criminal trial of the 21st century.

As stated earlier, we do not make these observations in order to be critical of the *Charter* or of the Supreme Court of Canada or of Parliament. On the contrary, we believe that the three transformative initiatives described above were understandable. Strong arguments exist in favour of entrenched constitutional rights, principles-based evidence law, "criminal organization" offences, "terrorist" offences and "third party records" procedures to protect the privacy interests of complainants and witnesses. We do not recommend turning back the clock on these initiatives. They represented legitimate policy choices, even though they came with significant costs to trial efficiency.

What we do wish to note is that the convergence of all three of these major developments, during a discrete period of time in our history, has placed an enormous burden on the trial courts. It appears that none of the law reformers, both in the Supreme Court of Canada and in Parliament, who initiated these profound changes to the law, ever stepped back and asked whether the justice system could effectively and efficiently absorb all of these changes at once. Every one of the three major changes summarized above had the effect of creating longer and more complex court proceedings. Cumulatively, their impact on trial length, efficiency and delay has been very significant.

We therefore begin with the realization that the criminal trial will never be what it was in the 1970's. We are operating today in a very different legal context.

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records, which meant that they were covered by the "third party records" regime and were properly within the jurisdiction of the trial judge. At trial, the production motion began on October 28, 2002 and concluded in part on December 4, 2002 when the trial judge ordered production of the 17 criminal autopsy files. After various adjournments, the trial resumed on April 7, 2003. On May 13, 2003 the trial judge ruled on the remaining production issues. The two accused, the Crown, Dr. Smith, the College of Physicians and Surgeons and the Ontario Chief Coroner's Office were granted standing and were all represented by separate counsel on these motions. Efforts were also made, as a result of the trial judge's order, to notify the families of the victims in the 23 autopsies, to determine whether they wished standing on the motion. These efforts caused much of the delay at trial. In the result, it appears that approximately 8 weeks of court time was devoted to this issue, spread over many months. See: 176 C.C.C. (3d) at 150-155 and 158-173; 195 C.C.C. (3d) at 533-535.

C. Within this Changed Legal Context, the Justice System Needs to do Better

Unfortunately, the many significant changes to the criminal trial summarized above have been exacerbated by certain weaknesses within the justice system. In particular, we note three systemic or cultural tendencies that seem to be worse today than they were in an earlier era. It is in these broad areas, we believe, that the justice system can improve significantly. The three observations that we make in this section of our Report are admittedly broad and impressionistic. We do not wish to refer to specific cases in support of our observations, as we believe that it would be unfair to single anyone out for criticism.

Our first observation is that the new *Charter* remedies, new evidence law motions and new statutory procedures (like s. 38 of the *Evidence Act* and s. 278 of the *Criminal Code*), as summarized above, all share one common feature. They generally involve pre-trial proceedings. Our impression is that the trial itself, in most cases, remains relatively straightforward today, as it always was, involving the proof or lack of proof of a criminal event or allegation. What has changed most in modern criminal proceedings is the development of elaborate pre-trial motions practice which has the effect of delaying the trial.

The justice system has not responded well to this phenomenon of delaying the trial. Indeed, a somewhat complacent culture seems to have developed. There appears to be an attitude within the justice system that motions will inevitably go on for months, cross-examinations and examinations of witnesses and legal arguments will inevitably go on for days and trials will inevitably take years to commence. Furthermore, when the slightest new development occurs in a case, counsel for the defence or Crown reflexively seek adjournments and they are often granted. Whenever counsel brings a motion, the Court patiently listens to it, no matter how unfounded or fanciful it may be. In addition, Legal Aid will pay counsel for arguing any motion in court, regardless of its merits or utility to the case, thus building in a financial incentive for endless motions.

We believe this culture must change and that lawyers and judges must aspire to the standards of an earlier era where these kinds of delays were not tolerated. We believe that legal arguments should be succinct and focused, as should examinations and cross-examinations of witnesses, and that adjournments should only be granted where some truly significant development arises unexpectedly. Resourceful counsel for the Crown or defence can adapt and

adjust to most developments in a case without the need for delays. We also believe that frivolous motions should be dismissed summarily.

Many of our recommendations below are directed at managing the pre-trial phase of the case more forcefully and efficiently and encouraging and requiring counsel to conduct their cases in a disciplined and focused manner. In particular, Chapter 4 is directed at developing more effective case management practices, especially at the pre-trial phase, and Chapter 5 deals with Legal Aid's responsibilities in this regard. As a result of reforms in these two areas, we hope that the trial of the merits will be reached in a more timely way. The modern culture of delay causes great harm to public confidence in the justice system and it needs to change.

The second broad cultural phenomenon that seems to have emerged from the intense period of law reform, summarized above, is that the system has become both error-prone and fearful of error. The avalanche of new and complex legal procedures, whether from the *Charter*, from the evidence law "revolution" or from continuous statutory amendments, has created a system with too many difficult and nuanced decision points. It is hardly surprising that errors are made in this new legal environment. In addition, we observe that judges and lawyers seem to be afraid of these kinds of errors and so they proceed in an overly cautious manner, calling more evidence than they need to, including marginally useful evidence, listening to more argument than they need to, disclosing more information than they need to, taking too long to rule and then ruling in the most protective way, out of undue concern for appellate review. All of these trends contribute to overly long trials.

Again, many of our recommendations below are directed at trying to reverse this phenomenon of exhaustive and exhausting lawyering and timid judging. We believe that the increasing complexity of modern criminal procedure and evidence law has created a need for judges with real expertise who will be able to effectively manage these cases, especially at the pre-trial stage. We also believe that effective case management practices can be stated clearly and simply, as rules, and not as infinitely flexible principles. Finally, we believe that the leading members of the bar and the best Crown prosecutors must be given conduct of the most serious and difficult cases so that errors are avoided.

The third and last of the broad cultural changes that we have noted is a significant increase in animosity and acrimony between counsel. Many of the recent major cases that have

gone on for far too long have been characterized by abusive and uncivil conduct from one side of the bar or the other and, on occasion, from both sides. The adversary model of trial procedure has always been one that creates opportunities for conflict, given the oppositional roles of the parties. However, the significant reforms to the system summarized above have created many new opportunities for conflict. As already noted, the way in which certain rights and remedies have been defined in the case law seems calculated to increase the potential for personal attacks as between counsel. In other words, instead of calming down the inherently combative nature of the adversary system, by fostering respect and collegiality and cohesion amongst the parties, the reforms of the modern era have contributed to an environment of greater animosity.

This is a very serious development that must be stopped. When counsel attack each other, on a personal level, the adversary system breaks down because nothing gets settled out of court. Every petty dispute is fought out in the court room in a hostile and provocative way, and the trial ceases to focus efficiently on the real issues in the case.

Again, many of our recommendations below are directed at this phenomenon by encouraging the judiciary to insist on high standards of civility in their courts, by encouraging the Law Society of Upper Canada (LSUC) to take on a strong disciplinary role in this area and by recommending that LAO exercise its statutory mandate to grant certificates only to those counsel who deliver high quality, effective and efficient legal services. In particular, Chapter 6 deals with this broad topic.

D. The Focus of our Recommendations

It can be seen from the above discussion that a mixed picture has emerged from our Review.

On the one hand, we believe that the trial courts have been subjected to enormous stresses from external forces entirely beyond their control. These external forces – the *Charter*, the "principled approach" to evidence law, and the flood of statutory amendments – have all conspired to inevitably create longer and more complex criminal trials.

On the other hand, we believe that the justice system has not responded as well as it might have to these new challenges. The inevitable lengthening of the criminal trial in the modern era has been exacerbated by weaknesses in the justice system itself. In particular, a

culture of tolerance towards delay has developed, an overly defensive approach to lawyering and judging has emerged, and acrimony and misconduct in the court room are on the increase.

We have identified five major areas where reforms or improvements are desirable. We do not say that these five areas are exhaustive. Many other sensible reforms were suggested to us. Rather, we believe that these five areas are the most responsive to the changes and developments within the justice system noted in this chapter. If the justice system can implement reforms in these five broad areas, we believe they will have a significant impact on the modern phenomenon of overly-long, much-delayed, inefficient and unfocused criminal trials.

We also believe that the reforms we have recommended in these five areas are achievable. As a result of the two stages of consultations that we conducted over the last six months, as described in Chapter 1 above, we have refined our recommendations. We have tried to be both pragmatic and principled and we believe that we have ended up with positions that are broadly accepted by the leaders of all the participants in the justice system. A bigger or more ambitious package of reforms may not achieve the same degree of broad support.

The four major players in the justice system are constitutionally independent from one another – the police, the Crown, the defence and the judiciary. The Law Society and Legal Aid also enjoy a degree of statutory independence. To achieve broad support for a set of reforms, amongst all six of these determinedly independent players, was one of our main goals. We hope that we have achieved it.

Each of the five major areas of proposed reform will be discussed in a separate chapter below. By way of summary, they are as follows:

1. Disclosure of the relevant and non-privileged information in the Crown's possession and the relationship between the police and the Crown at the pre-charge stage (Chapter 3);

2. Judicial case management, especially at the pre-trial stage (Chapter 4);

3. Legal Aid practices in setting the budget and then managing and overseeing counsel's conduct of long complex cases (Chapter 5);

4. Advising, directing and, where necessary, disciplining, individual Crown counsel and individual defence counsel who conduct long complex cases (Chapter 6); and, in addition

5. Managing the unrepresented accused in long complex cases (Chapter 7).

CHAPTER 3: Disclosure and the Pre-Charge Relationship between the Police and the Crown

A. Introduction

The accused's right to disclosure of all relevant and non-privileged information in the possession of the Crown is guaranteed by s. 7 of the *Charter*.[21] Furthermore, failure to comply with this right is closely related to the risk of miscarriages of justice.[22] For these reasons, the duty to make full disclosure is one of the most important obligations in the criminal justice system.

We do not intend to embark upon a lengthy discussion of the law of disclosure as the jurisprudence is well known. Our focus is on whether efficient and effective practices and procedures for providing disclosure presently exist in large complex cases and whether reforms are needed.

Virtually every party who made submissions to the Review agreed that disclosure is a constant source of dispute and difficulty in long complex cases in Ontario. Our analysis of the leading authorities in this area, as well as our four case studies, confirm that disclosure disputes have plagued these cases and are a serious cause of delay and inefficiency.

The problems associated with disclosure practices and procedures, on the Crown/Police side, all tend to revolve around the absence of a standard "best practice" as to the form, content and timeliness of disclosure. Some cases and some jurisdictions exhibit sound practices whereas others exhibit very poor practices. The "best practice" is obviously a well-organized, comprehensive Crown brief provided to the defence shortly after charges are laid. When disclosure is disorganized and incomplete it leads to constant follow-up requests from the defence and this leads to delays. Related issues are who pays for disclosure, who is responsible for transcribing relevant taped interviews and intercepts and who is responsible for vetting or

[21] *R. v. Stinchcombe* (1991), 68 C.C.C. (3d) 1 (S.C.C.); *R. v. Carosella* (1997), 112 C.C.C. (3d) 289 (S.C.C.).
[22] *Royal Commission on the Donald Marshall Jr. Prosecution* [*the Marshall Report*], Vol. 1, 1989 Province of Nova Scotia, at pp. 68-79 and 238-244.

editing privileged and irrelevant material from the disclosure package. Again, there is no uniform protocol or practice governing these points.

On the defence side, the most common problems with disclosure practices and procedures all tend to revolve around requests for materials that are not part of the investigation and that are at the outer edges of relevance. The *Stinchcombe* test – "not…clearly irrelevant" – has been "set quite low" and, therefore, "includes material which may have only marginal value to the ultimate issues at trial."[23] Defence requests for "marginal" materials are very difficult for the Crown to evaluate, especially if the defence fails to particularize and explain the request. These requests may also raise third party privacy interests when they seek files outside of the particular investigation. For all these reasons, lengthy litigation in court tends to ensue where the judge is required to examine large numbers of documents. Once again, no standard "best practice" has emerged to prevent these delays.

B. The Solutions to the Issues on the Crown/Police Side

The absence of any consistent standard as to the form, content and timeliness of disclosure is hard to understand, given that it is now almost 17 years since *Stinchcombe* was decided. Over 15 years ago, a broad-based committee chaired by the Honourable G. Arthur Martin, Q.C. (the Martin Committee) spent more than a year studying disclosure and other issues related to the early stages of the criminal process. The Committee's report recommended, *inter alia*, that the Solicitor General utilize the powers in s. 3(2)j of the Ontario *Police Services Act* to "issue directives and guidelines" requiring all police forces in Ontario to comply with the Attorney General's new and detailed Directive on Disclosure. This Crown Directive had been recommended earlier in the report.[24] We are not aware of any such "directives and guidelines" having been issued to police forces in Ontario although the new Directive to Crown counsel was issued, as recommended.

Six years later, another broad-based committee made similar recommendations. The Report of the Criminal Justice Review Committee, chaired by Justice Hugh Locke, Senior Judge

[23] *R. v. Dixon* (1998), 122 C.C.C. (3d) 1 at 11-12 (S.C.C.).
[24] *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure and Resolution Discussions* [*the Martin Report*], Queen's Printer for Ontario, 1993 at pp. 193-195 and 264-266. The *Police Services Act*, RSO 1990, c. P. 15.

John Evans and the present Deputy Attorney General, Murray Segal, stated the following about disclosure (in its Executive Summary):[25]

> Crown disclosure is not only a crucial component of an accused's right to make full answer and defence, it is also vital to the efficient functioning of the criminal justice system. To ensure that efficient disclosure practices are instituted and maintained across the province, police and prosecution co-operation and co-ordination must improve. A provincial co-ordinating committee should be established to develop a directive that comprehensively sets out the disclosure responsibilities of the police and prosecutors, and to address disclosure issues on an on-going basis. It is also urgent that a new and effective Memorandum of Understanding (MOU) be negotiated between police representatives and the Ministry of the Attorney General to govern the production, quality and format of police and disclosure briefs. Comprehensive policies must also be developed concerning the disclosure of audio and video taped evidence and the transcription of witness statements.

The Committee's report expressly recommended that "uniform quality control standards be implemented across the province" applicable to "all police briefs," and that "a joint directive or standing order comprehensively setting out the disclosure responsibilities of the police and prosecutors…be issued by the Solicitor General and the Attorney General."[26] Once again, we are not aware of this recommendation ever being implemented.

Although the above history may appear to be non-responsive, we are pleased to report that this is an area where substantial progress has been made in recent years. All major police forces working on large complex cases in Ontario, together with both federal and provincial prosecutors, appear to have reached a consensus on a uniform standard for disclosure in these cases. This new standard disclosure brief is welcomed by the defence bar because it is well-organized, comprehensive and timely. Accordingly, our recommendations in this area reflect a "best practice" which can easily be implemented as we are following a model that is already in

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[25] *Report of the Criminal Justice Review Committee*, Queen's Printer for Ontario, 1999 at pp. 3 and 37-48.

[26] *Ibid*, recommendations 5.1 and 5.9. The Report notes that the relevant duties of the Solicitor General are found in s. 3(2)(b), (d) and (j), requiring that he/she develop, promote and enhance "professional police practices, standards and training" as well as issue "directives and guidelines respecting policy matters" and monitor for compliance "with prescribed standards of service." For an excellent discussion of the inherent tension between police operational independence and the Solicitor General's statutory responsibility to issue policy directives see *Report of the Ipperwash Inquiry: Policy Analysis*, Vol. 2 (Toronto: Ministry of the Attorney General, Queen's Printer for Ontario, 2007), at pp. 310-348.

existence in many cases and it is a model that is supported by all parties. It simply needs to be made the subject of a directive under the *Police Services Act*, as recommended over 15 years ago by the Martin Committee, to ensure that it is implemented consistently across the province in all major cases.

The model that has emerged, and that we support, has four important features:

- First, it involves much closer collaboration between the police and the Crown at the pre-charge stage than has historically existed in our justice system. This allows the Crown and the police to consult as to the size and focus of the case, before any charges are laid, such that a manageable prosecution is more likely to emerge. It also allows the police and the Crown to begin building the disclosure brief at the pre-charge stage so that it is substantially ready once charges are laid.

- Second, it involves the use of electronic disclosure in a standard format, known as the "Major Case Management Brief". It has 52 comprehensive file folders and the same standard Adobe 8 search software for use by all parties, whether police, Crown or defence. The development of a standard disclosure brief should put an end to the uneven practices, between different jurisdictions and different cases, that presently exist. For example, police occurrence reports, witnesses' criminal records, photographs, 911 calls, radio transmissions, wiretaps and tape-recorded interviews would all be included in the initial disclosure brief instead of losing time with defence follow-up requests for these kinds of materials, as presently happens when standard comprehensive disclosure practices are not followed. The standard "Major Case Management Brief", as we understand it, contains all materials relevant to the investigation, including those mentioned above, and it therefore complies with the "quite low" *Stinchcombe* standard of relevance.

- Third, pre-charge involvement of the Crown allows for much easier and speedier resolution of some of the areas of past disagreement between the Crown and the police, such as who is responsible for vetting the brief and who determines what interviews and intercepts are relevant and should be

transcribed. Using electronic disclosure also resolves many of the difficulties surrounding costs and who should pay for disclosure.

- Fourth, and last, pre-charge involvement of the Crown speeds up the preparation of the brief and allows for timely disclosure to the defence, soon after charges are laid. In this way, realistic and prompt administrative timelines can be established for initial disclosure.

Each of these four points raises its own issues, including some important legal issues, which are discussed below together with our recommendations.

C. Closer Police and Crown Collaboration at the Pre-Charge Stage

There has been a natural evolution towards much closer police and Crown pre-charge collaboration over the past 20 to 30 years. As noted above, criminal procedure has become much more complex than it was in an earlier era. Police investigative procedures are now the subject of pre-trial motions to determine whether there has been a *Charter* violation, whether evidence will be admitted under the new "principled approach" and whether a statutory process, such as a wiretap authorization or search warrant, has been properly followed. The police have increasingly turned to Crown counsel for pre-charge legal advice in order to navigate these difficult waters. The importance and confidentiality of this advice-giving relationship has been recognized as part of solicitor and client privilege.[27] It is simply not feasible in the modern era to expect the police and Crown to work in entirely separate silos, as they once did.

At the same time, the police and the Crown remain constitutionally independent from one another. The police cannot be directed by any governmental official in their operational duties, in order to protect criminal investigations from political interference. In *Shirose*, the Court was unanimous in holding that "the Commissioner [of the RCMP] is not to be considered a servant or agent of the government while engaged in a criminal investigation. The Commissioner is not subject to political direction." The Court adopted Lord Denning's famous pronouncement, in this regard, to the effect that police officers are "independent of the executive" and, when carrying

[27] *R. v. Shirose and Campbell* (1999), 133 C.C.C. (3d) 257 (S.C.C.).

out criminal investigative duties, police officers are "not the servant of anyone, save of the law itself."[28]

Although we recommend close police and Crown collaboration at the pre-charge stage, for the obvious legal and practical reasons set out above, we do not wish to be taken as advocating a form of pre-charge screening or charge approval as practised in some other provinces. None of the participants vigorously recommended this practice and we have not studied it closely.[29] Nor should the Crown take over investigative duties which are, by constitutional convention, the responsibility of the police. The close collaboration that we recommend means advice-giving by the Crown and cooperation by the police in various areas detailed below. However, the police remain independent and it is the police who must determine, at the end of the investigation, whether to swear an Information under s. 504 of the *Criminal Code*.[30]

In the context of the large complex case, the justification for close police and Crown collaboration at the pre-charge stage goes well beyond merely providing legal advice on investigative techniques such as search warrants, wiretaps, undercover agents and tape recorded "*KGB* statements". Rather, the Crown needs to engage with the police early on as to the scope of the investigation, the targets of the investigation and the theory of the case. In other words, the

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[28] *Ibid* at p. 280, quoting Lord Denning in *R. v. Metropolitan Police Commissioner, Ex Parte Blackburn*, [1968] 1 All E.R. 763 at 769 (C.A.). The Court did not expressly state in *Shirose* that these principles are "constitutional" but they certainly appear to be longstanding "constitutional conventions", if not s. 7 "principles of fundamental justice." For an excellent discussion of police independence see *Report of the Ipperwash Inquiry*, *supra* note 26.

[29] See the *Martin Report*, *supra* note 24 at pp. 120-127 for a good discussion of whether Crown screening of the file should be pre-charge or post-charge.

[30] *R. v. Regan* (2002), 161 C.C.C. (3d) 97 (S.C.C.). The majority in *Regan*, per. LeBel J. at paras. 66-68, noted the "need for a separation between police and Crown functions," based on lessons learned from "reports [such as the *Marshall Report*] inquiring into miscarriages of justice which have sent innocent men to jail in Canada." LeBel J. held that the "distinct line appears to be that the police, not the Crown, have the ultimate responsibility for deciding which charges should be laid." Most importantly, for our purposes, LeBel J. held that the precept of keeping police and Crown functions separate could still be followed, even though the Crown and police work much more closely and collaboratively at the pre-charge stage under modern prosecutorial protocols:

> "The protocol [utilized in Nova Scotia after the *Marshall* Report] encourages a police and Crown joint assessment pre-charge: there is nothing in these recommendations that indicates that the separation between police and Crown functions must be implemented by preventing Crown contact with potential witnesses pre-charge. Therefore, while the *Marshall Report* speaks of a distinct line between police and Crown functions, it is one that may be drawn conceptually and figuratively, through conscious practice, rather than literally by the act of laying charges."

The Court reiterated this point in a subsequent case, *Re. Application under s. 83.28 of the Criminal Code, sub. nom. R. v. Bagri* (2004), 184 C.C.C. (3d) 449 at 485 (S.C.C.), where the majority referred to *Regan* and held that "the mere fact of their [Crown counsel's] involvement in the investigation need not compromise Crown counsel's objectivity."

police need pre-charge advice in these very large cases as to what a manageable or feasible prosecution would look like, if it is to emerge at the end of the investigation. There is no point in the police pursuing a sprawling unfocused investigation, with hundreds of targets, if it will lead to a case that cannot be prosecuted because there are too many accused and overwhelming disclosure problems.[31]

Indeed, it is our understanding that the current practice that is emerging, where the police and Crown are already collaborating much more closely at the pre-charge stage in many large cases, came about after bad experiences with some early "mega-trials" that had not been carefully planned in advance and that never reached trial after charges were laid. As a result, modern police investigations in large complex cases, such as those carried out by Ontario's new "Guns and Gangs Unit" and the "Combined Forces Special Enforcement Unit", may now include pre-charge Crown consultations and advice as to the theory, focus and size of the case, all with a view to creating a manageable case that can be effectively prosecuted.

In addition, there are great benefits to the post-charge disclosure process if the police and Crown collaborate closely at the pre-charge stage. In this way, the disclosure brief will be built each day, as the investigation proceeds, and will be substantially ready when charges are laid.

We note that the police/Crown relationship has evolved in a similar way in the United Kingdom. There is now much closer collaboration at the pre-charge stage in that country, while still maintaining the historic independence and separation of roles as between the police and the Crown.[32]

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[31] The best illustration of this modern evolution of pre-charge advice from the Crown in very large investigations is found in the Federal Prosecution Service Deskbook. Its policy on *Mega Case Management*, in Chapter 54 of the Deskbook, calls for close police/Crown collaboration in these cases in the following terms:

> "It should be emphasized that Crown counsel's role is to provide legal advice when advice is sought. This will involve advising investigative agencies as to how investigative choices will impact on any future prosecution, and may also involve asking hard questions designed to ensure the investigation remains focused. It does not, however, require Crown counsel to do the investigative agency's work … Crown counsel can offer insight as to how the choice of particular instruments (e.g. the number of accused, the type of charges, measures other than prosecution) may affect fulfillment of the plan. Where prosecutions are to proceed they must be financially and legally manageable."

Online: http://canada.justice.gc.ca/eng/dept-min/pub/fps-sfp/fpd/ch54.html.

[32] *The Royal Commission on Criminal Justice Report*, 1993 Cm 2263 (HMSO 1993) at p. 72 [*the Runciman Report*] concluded that the Crown Prosecution Service [CPS] should not "be put in charge of police investigations" but that the police should "seek the advice of the CPS" and "this should happen more frequently than at present." Most importantly for our purposes, the Report recommended that "the cases in which it is appropriate to seek advice should include those which are serious, complex or sensitive." The CPS has implemented this recommendation as

In conclusion on this point, we believe that early Crown involvement in the case, at the investigative stages, should help to ensure that when charges are laid the prosecution is focused and viable, many of the legal problems will have been foreseen and dealt with, and the disclosure materials will already be well-organized and close to a state where they can be provided to the defence.

Recommendation 1:

The police and Crown should collaborate much more closely in large and complex cases, at the pre-charge stage, than they have done historically in Ontario. Collaboration does not mean charge approval nor does it mean that the Crown takes over police investigative functions. Rather, it means legal advice on investigative procedures and any substantive issues, assistance with the preparation of disclosure and, finally, advice as to what would be a manageable size and focus for a successful prosecution.

D. Can the Crown Giving Pre-Charge Advice Play a Role in the Prosecution Once Charges are Laid?

If the police and the Crown adopt the above recommendation, and in some large complex cases it represents the current practice, then important questions arise concerning who should conduct any subsequent prosecution. In particular, should Crown counsel who has been heavily involved in the case at the investigative stages be allowed to make the post-charge determination as to whether a prosecution should proceed?

As with the police, the role of the Crown in deciding whether to prosecute is steeped in longstanding constitutional precepts. The Supreme Court of Canada, in its recent unanimous judgment in *Krieger*, held that "the ultimate decisions as to whether a prosecution should be brought, continued or ceased and what the prosecution ought to be for" are amongst "the core

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The Code for Crown Prosecutors provides that "Crown Prosecutors should provide guidance and advice to investigators throughout the investigative and prosecuting process" while noting that "the functions of the CPS and the police are different and distinct. In giving advice to the police, you must not assume the role of investigator or direct police operational procedures." *The Code for Crown Prosecutors* (2004). Online: http://www.cps.gov.uk/publications/docs/code2004english.pdf "CPS Relations with the Police". Online: http://www.cps.gov.uk/news/nationalnews/archive/25feb2004.html Similar developments can be seen in Australia. See Standing Committee of Attorneys-General, *Report of the Working Group on Criminal Trial Procedure* (Canberra: A.C.T., 1999) (Chair: Hon. Justice Brian Martin), at pp. 30-31.

elements of prosecutorial discretion" and that these independent Crown powers are protected from outside interference by "the fundamental principle of the rule of law under our Constitution."[33] In this regard, the Court referred with approval to the earlier decision of Binnie J. in *Regan* where he described the independent role of the Crown in these terms:[34]

> The duty of a Crown Attorney to respect his or her 'Minister of Justice' obligations of objectivity and independence is no less fundamental. It is an essential protection of the citizen against the sometime overzealous or misdirected exercise of state power. It is one of the more important checks and balances of our criminal justice system and easily satisfies the criteria [for a s. 7 principle of fundamental justice].

The *Martin Report* explains why the Crown's exercise of discretion, in deciding whether to prosecute, must be independent of the police investigation:[35]

> The mutual independence of Crown counsel and the police has many advantages. As will be discussed in greater detail below, separating the investigative and prosecutorial powers of the state is an important safeguard against the misuse of both. Such separation of power, by inserting a level of independent review between the investigation and any prosecution that may ensue, also helps to ensure that both investigations and prosecutions are conducted more thoroughly and thus more fairly.
>
> ... the independence of the Attorney General, and thus his or her agents, in deciding whether a prosecution is in the public interest and, therefore, should proceed, must be accorded due recognition, because of its important role in preventing misuse of government power, and because of the importance in ensuring that fatally flawed prosecutions do not proceed.

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[33] *Krieger et al v. Law Society of Alberta* (2002), 168 C.C.C. (3d) 97 at 110-111 and 114-115 (S.C.C.).

[34] *Ibid* at p. 110, referring with approval to *R. v. Regan, supra* note 30 at pp. 157-158. The majority judgment of LeBel J. in *Regan* did not disagree with Binnie J.'s point of law about the importance of "objectivity and independence." Indeed, LeBel J. stated, at p. 128 that both "parties agree in this case that Crown objectivity and the separation of the Crown from police functions are elements of the judicial process that must be safeguarded." LeBel J. concluded at p. 149 that "the principles of fairness and fundamental justice entitle an accused to a duty of objectivity exercised by the Crown in deciding to prosecute." Accordingly, the Court was unanimous on the constitutional requirement of Crown objectivity and independence which necessitates some degree of separation between Crown and police functions.

[35] *Supra* note 24 at pp. 37-39 and 113-120.

How are these important principles to be applied in the modern world of much closer police and Crown collaboration at the investigative stages of a case? We do not think that any bright line rule can be stated as to exactly how much Crown involvement, at the investigative stage, would fatally compromise the important constitutional duty of deciding objectively whether to proceed with a prosecution. It will always be a question of degree. For example, Crown counsel in a smaller jurisdiction, who merely gives legal advice on a search warrant or wiretap or some other investigative technique, would still remain sufficiently independent to screen the charges at the end of the police investigation.[36] On the other hand, Crown counsel in a large complex case, working out of a major urban office like the "Guns and Gangs Unit" where the police and Crown meet regularly and agree on the size, focus and theory of the case and collaborate closely on the preparation of the disclosure brief, all with a view to producing a viable prosecution, would likely not satisfy the *Regan* requirement of "Crown objectivity and the separation of the Crown from police functions."[37]

All of the parties with whom we consulted agreed, at a minimum, that it is a "best practice" in a case such as the latter example above, to assign a fresh Crown to lead any prosecution and determine independently whether to prosecute and who to prosecute. Well-resourced offices like the "Guns and Gangs Unit" in Toronto follow this "best practice" at the present time and have found that it works well. We believe that this is the correct approach in a major case where Crown counsel has been significantly involved in the investigative stages, as described above.

However, this does not mean that the pre-charge advice Crown can have no involvement at the post-charge stages. This would cause delays and would be both unwise and impractical. The pre-charge advice Crown will already know the case well and, therefore, conducting the bail

[36] The authorities cited at *supra* note 30 would seem to be dispositive of this point.

[37] *Supra* note 34. In this regard, see *R. v. Trang*, [2002] 7 W.W.R. 157 (Alta. Q.B.) where the Court dismissed a pre-trial motion seeking to remove Crown counsel from a prosecution where she had worked closely with the investigative team at the pre-charge stages. The Court noted (at para. 72) that during the investigation Crown counsel "provided legal advice, obtained judicial orders, and worked with the police in organizing disclosure," while working on a daily basis in the same police premises as the investigators. All of these functions relate to areas of traditional Crown advice. The Court also noted (at para. 71) that Crown counsel did not become involved in police investigative functions and did not "have any input as to which way the investigation would go or who should be targeted." In some major cases in Ontario, unlike in *Trang*, it is our understanding that Crown counsel do advise the police as to "which way" an investigation should go and "who should be targeted," all with a view to producing a manageable and successful prosecution. We agree that this advice is useful, and we encourage it, but it would arguably compromise the objectivity of Crown counsel in deciding, ultimately, whether a prosecution should proceed.

hearing, ensuring that the disclosure brief is completed in a timely way, providing continuity of advice to the prosecution team and supporting the lead prosecutor in other ways are all functions that can properly and effectively be taken on at the post-charge stage. What matters is that core prosecutorial discretions, like those enumerated in *Krieger*, be exercised by fresh and independent Crown counsel. In this way, the Crown will fulfill its constitutional duties and will be protected against any appearance of blind allegiance to the police investigation.

We acknowledge that our recommendation on this point may have resource implications for smaller offices where only one or two Crown counsel with sufficient skill and experience may be available to both advise the police at the investigative stage of a long complex case and conduct any subsequent prosecution. In this regard, we note the views expressed in the Federal Provincial Territorial Heads of Prosecution Committee's *Report of the Working Group on the Prevention of Miscarriages of Justice:*[38]

> With the possible exception of mega-cases, it is recommended that all jurisdictions consider adopting a "best practice" of having a different Crown Attorney prosecute the case than the Crown Attorney who provided the charging advice. This recommendation, however, must take into account the realities of some prosecution services, where there may be a single prosecutor for a large geographic area. In some communities there may be only one Crown Attorney who handles many "routine" matters and is the sole contact with the local police. This can lead to close identification between the Crown and police, and hence a reluctance to disagree. In such situations, second opinions and supervision by senior/regional Crown counsel should always be available.

Recommendation 2:

Crown counsel who have collaborated closely and significantly with the police at the investigative stages ought not to make the decision whether to prosecute. Fresh and independent counsel ought to make this important determination. This does not prevent the pre-charge advice Crown from taking on other post-charge roles such as conducting the bail hearing, completing disclosure or providing ongoing advice and assistance to any prosecution.

[38] Available Online: http://www.justice.gc.ca/eng/dept-min/pub/pmj-pej/p4.html

E. Electronic Disclosure in a Comprehensive Standard Format

The problem of inconsistent disclosure practices, as between different police forces, different Crown offices and different cases, has already been described above. The solution to this problem does not necessarily require electronic disclosure. It simply requires a directive under s. 3(2)j of the *Police Services Act* setting out an organized and comprehensive format for the Crown brief. That brief could be either a paper brief or an electronic brief. What is important is that it be consistent and comprehensive, across all cases and all jurisdictions in the province. To be comprehensive it must reflect the "quite low" *Stinchcombe* standard of relevance by including all of the materials relating to the investigation. These materials have already been summarized above in Section B of this chapter. This would put an end to the time that is presently lost due to defence follow-up requests for the investigative materials that are routinely left out of initial disclosure by some police forces or Crown offices or that are left out in some individual cases.

Although electronic disclosure is not a *necessary* solution to the problem of inconsistent disclosure practices, it is a very practical tool that assists in solving the problem. The "quite low" *Stinchcombe* standard covers a broad array of investigative materials, much of which will end up being completely insignificant or of "marginal value to the ultimate issues at trial," as Cory J. put it in *Dixon*.[39] As a result, the sheer size or quantum of materials to be disclosed can be daunting in a "mega-trial". To have police officers photocopying all of this material is wasteful of their time and it is slow and expensive. Electronic disclosure is a much faster, simpler and less expensive means of ensuring that initial disclosure is comprehensive in these large complex cases.

There were early difficulties with the introduction of electronic disclosure. Many lawyers lacked the necessary skills to access electronic disclosure and, more importantly, there were problems with the technology.[40] In spite of these technical difficulties that arose in some of the early cases, the principle that disclosure obligations could be satisfied in an electronic format

[39] *Supra* note 23.
[40] *R. v. Jarvie*, [2003] O.J. No. 5570 (Ont. S.C.J.) and *R. v. Hallstone Products Ltd. et al* (1999), 140 C.C.C. (3d) 145 (Ont. S.C.J.) are good examples of these early difficulties with electronic disclosure that was both incomplete and ineffective.

appears to have been accepted by the courts with little difficulty. The challenge was simply to find a comprehensive and readily searchable format that made the information "reasonably accessible."[41] As a matter of principle, it makes sense that disclosure can be made in an electronic format. In *Blencowe*, Watt J., as he then was, made the point succinctly by stating, "what the constitution requires is prosecutorial disclosure. It does not insist upon a particular form of disclosure as a constitutional principle" [emphasis in the original].[42] Many law reform proposals have embraced electronic disclosure, for the practical reasons discussed above, but have insisted that it must include a "user friendly search engine."[43] Recent decisions appear to increasingly accept electronic disclosure and defence motions seeking hard copy disclosure have been dismissed, provided the electronic files are well-organized, comprehensive and searchable.[44]

The submissions we received from senior federal, provincial and municipal police officers, from federal and provincial Crown prosecutors and from defence counsel were uniform in advising us that the technical problems of the past have now been overcome. The "Major Case Management" electronic format, with its comprehensive 52 file folders and Adobe 8 search software was uniformly praised by the participants in our Review as the solution to past difficulties with electronic disclosure. We observed a demonstration of its operation and concur in the submissions that we received. This format includes an index, a synopsis of the Crown's case, transcripts of relevant taped interviews and of relevant intercepts as well as "wave files" of all recorded interviews and intercepts. The notes and documents generated by the police investigation are all scanned into the appropriate file folders and this comprehensive investigative/disclosure brief is built as the investigation proceeds. To the extent that police services are able to adopt electronic notebooks there will be no need for scanning and no further concerns about legibility of notes.

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[41] *R. v. Blencowe* (1997), 118 C.C.C. (3d) 529 at 534-535 (O.C.-G.D.); *R. v. Therrien*, [2005] B.C.S.C. 592; *R. v. Borges*, [2005] O.J. No. 4137 (Ont. S.C.J.).

[42] *Ibid* at p. 539. The *Martin Report* made the same point (*supra* note 24 at pp. 191-2):

> "While the Committee recognizes that, as a practical matter, disclosure will, in most cases, be accomplished in writing, there is, in the Committee's view, no inflexible constitutional obligation to provide disclosure in this manner. As a constitutional requirement, "disclosure" retains its plain and ordinary meaning: it is not necessarily synonymous with providing copies."

[43] *Supra* note 6. In addition to these public reports, the Department of Justice issued a Consultation Paper titled "Disclosure Reform" in November 2004, seeking comments on a proposal to create a statutory presumption in favour of electronic disclosure. Online: http://canada.justice.gc.ca/eng/ cons/ref/ index.html.

[44] *R. v. Greer et al.*, [2006] B.C.S.C. 1894; *R. v. Piaskowski et al.*, [2007] 5 W.W.R. 323 (Man. Q.B.).

The electronic investigative file is stored on an external hard drive and, after appropriate editing, a copy of the external hard drive is made for disclosure to the defence. As the investigation continues, at the post-charge stage, new investigative material can be added to the appropriate file folders and new hard drives can then be produced and disclosed to the defence. Alternatively, if the additional material is brief, such as *post-mortem* reports or Centre of Forensic Science reports, paper disclosure can be made as these reports are received by the Crown.

The development of this form of electronic disclosure has been a quiet success story, in an area that has not generally been the subject of a lot of good news. The police and prosecutors who developed the "Major Case Management" model deserve a great deal of credit and we commend them.[45]

Of course, as with all technological developments, we are quite sure that the Adobe 8 search software will eventually be overtaken by something newer and better. For now, we have a sound working model and it should be mandated and implemented across the province in all major cases. When a better model emerges a new directive can be issued replacing the old one.

If our recommendation is accepted, and standardized electronic disclosure based on the "Major Case Management" format becomes the norm in large cases, this will have implications for the bar. We do not believe that any responsible counsel today would insist that he/she is unwilling to accept disclosure in this form. In any event, we concur with the views of Sinclair J. in *Piaskowski*, as follows:[46]

> It seems to me that the use of a computer today in a law practice is as much an expectation as a telephone or a photocopy machine. Surely it is today a tool of the trade one reasonably expects a lawyer to possess and employ. It could, I suppose, be argued that a

[45] The impetus to develop a standard "Major Case Management" investigative brief was, in part, due to the *Bernardo Investigative Review* conducted by Mr. Justice Archie Campbell of the Ontario Superior Court. His *Report*, issued in June, 1996, recommended "a standard computerized case management system" in all major cases "that have the potential to involve inter-jurisdictional investigation." He also recommended "Standard case management procedures … of the kind described in the Major Case Management Manual developed by the Canadian Police College" and "Early approval of one single uniform computerized case management system for mandatory use in all serial predator investigations." The objective of Justice Campbell's recommendations for standardized practices was to facilitate police collaboration in multi-jurisdictional investigations. However, it has also furthered the development of a comprehensive standard disclosure brief: Ontario, *Bernardo Investigation Review: Report of Mr. Justice Archie Campbell*, (Toronto: Ministry of the Solicitor General and Correctional Services, 1996) at pp. 338-347.

[46] *Op. Cit.* at para. 57.

> computer is today a necessity to the proper and efficient practice of law. It is however my view that if it is not a necessity, its absence is unnecessarily limiting and restricting to that proper and efficient practice. If a lawyer so wishes to restrict himself or herself that is his or her choice; but that choice ought not to restrict opposing counsel, even if it is counsel for the Crown, particularly in the circumstances of a complex, voluminous piece of litigation, whether criminal or civil.

We anticipate, based on our consultations, that the judiciary in Ontario will share these views. If the police and Crown invest in accessible and comprehensive electronic disclosure, they must not be put to the additional expense and delays involved in photocopying paper briefs for the defence.

Counsel may still wish to work from hard copies, especially when preparing for trial and when examining and cross-examining witnesses in court. Electronic disclosure allows counsel to select and print those particular documents that counsel needs for the trial brief and to bring that more selective set of documents to court. It must be remembered that the disclosure brief encompasses a broad array of materials, much of which counsel will never use at trial. The trial brief is completely separate and only emerges as a result of counsel's "work product". In this regard, we agree with Powers J. in *Greer:*[47]

> In *Therrien*, the court recognized that counsel often, if not invariably, print copies of some of the electronic disclosure. The court recognized that this is often necessary to suit counsel's particular needs and preferences. However, the court said that it does not follow from the fact that it may be necessary to create hard copies for some, but frequently not all of the materials in electronic format, that disclosure in that format is insufficient to satisfy the constitutional common law obligations of the Crown to provide disclosure.
>
> If the accused or counsel requires a hard copy of any of the material on the hard drive other than the video or audio portions it is a simple matter of printing it from the hard drive. This makes a great deal more sense than having volumes of paper that they may never need. This may be the answer for the defence counsel who is unable to learn to type and requires a paper copy to note up.

[47] *Supra* note 44 at paras. 31-32.

Our mandate was focused only on the long complex case and not on all the normal cases that make up the great majority of criminal prosecutions. However, we cannot leave the present topic without noting that we received an excellent briefing from the Ministry of the Attorney General's "Upfront Justice Project". One of the important initiatives of this Project is the development of standardized and comprehensive Crown briefs for all of the different kinds of prosecutions under the *Criminal Code*. A committee of senior prosecutors from across the province has worked extensively on this initiative for a number of years and has now completed its work. Assuming the Ministry approves of their work, it can only be implemented through cooperative efforts with the Ministry of Community Safety and Correctional Services (MCSCS) and with the Ontario Association of Chiefs of Police. We urge the adoption of standard Crown brief disclosure practices, in ordinary cases, as the natural counterpart to the adoption of the Major Case Management brief in large complex cases.

Finally, we note that the adoption of electronic disclosure in long complex cases will have significant implications for correctional authorities. Time, space and equipment will have to be made available in order to allow those accused in custody the opportunity to review disclosure, with and without counsel. Disclosure by way of external hard drive, however, does mean that correctional authorities will only need to provide a computer. The external hard drive would be provided by the Crown to the defence, who would then provide it to the jail. It could be taken away by the defence if bail is granted at any point. We have been advised by MCSCS that they recognize the importance of disclosure and will work to accommodate access to electronic disclosure. To date, they advise, they have accommodated any request regarding electronic disclosure.

Electronic disclosure may also have implications for the courts. To the extent that counsel are comfortable working with electronic exhibits, and to the extent that the courts are equipped to receive and project electronic exhibits, this would greatly expedite the process of entering exhibits at trial, especially in jury trials. The judge, of course, would need to be provided with software allowing him/her to search for and retrieve electronic exhibits. This would be particularly useful in complex commercial crime cases with large numbers of documentary exhibits. There are currently very few court rooms in Ontario that are capable of dealing with an electronically-managed and presented trial.

Recommendation 3:

A directive should be issued under the *Police Services Act* to the effect that the "Major Case Management" model of electronic disclosure, with Adobe 8 search software, should be utilized as the standard Crown brief in all long complex cases.

F. Vetting, Transcribing and Paying for Disclosure

1. Introduction

There are a number of practical problems relating to disclosure that have remained somewhat unresolved in the 15 years since the *Martin Report* was issued. We wish to briefly address three of these issues: first, who is responsible for vetting or editing the disclosure brief; second, who is responsible for transcribing the relevant taped interviews and intercepts; and third, who should pay for disclosure.

We can be brief in our discussion of these three issues because we believe they have been and will be largely resolved, in the context of the long complex case, by the adoption of our proposals set out above in Recommendations 1 and 3. We do not wish to diminish their importance, by this brief discussion, since resolving these three issues is important to speeding up the disclosure process. Nevertheless, it appears to us that the participants in our Review all agree with the resolution that we propose. Our recommendations on these points flow naturally from a system of close police and Crown collaboration at the pre-charge stage and from electronic disclosure on the "Major Case Management" model.

2. Who is Responsible for Vetting or Editing the Disclosure Brief?

The problem of vetting or editing the disclosure brief emerges from *Stinchcombe*.[48] In that case, the Court held that disclosure can be completely withheld for two reasons – relevance and privilege – and can be delayed for two further reasons – witness safety and ongoing investigation. Accordingly, there are four potential areas of editing or vetting that need to be considered before the initial disclosure brief is provided to the defence.

[48] *Supra* note 21.

As a matter of practical common sense, we believe that the four areas of editing are the joint responsibility of both the police and the Crown. It is the police who will know best what information could identify a confidential informant, what information would compromise an ongoing investigation, what information might reveal a secret police investigative technique, which witnesses have legitimate safety concerns and what personal identifiers would disclose a witness' whereabouts. It is essential that the police engage on these subjects and advise the Crown as to what should be edited. As a result, we recommend that the police do an initial review of the disclosure brief and electronically shade or highlight the parts of the brief that the police believe should be withheld or delayed, before providing disclosure. Indeed, this task can be completed on an ongoing basis, as the electronic brief is being built. It should not involve any significant additional work. However, the ultimate decisions as to editing of disclosure are legal decisions and they must be made by the Crown in accordance with the law. *Stinchcombe* is clear in this regard and so the Crown must review the police proposals for vetting and then make final decisions. In particular, the Crown will know best how to apply the relevance, privilege and witness safety criteria after receiving factual advice from the police.

When we suggested this practical joint approach to vetting the disclosure brief, all participants agreed and it was not the subject of any controversy. When the police and Crown work together in a cooperative manner, as is now the case in many large complex cases, this kind of team approach to editing is accepted and it works well. Furthermore, when electronic tools for editing are available, the time and costs incurred by blacking out and photocopying the edited brief do not become an issue.[49]

Once the vetting has been agreed upon, the police should provide two hard drives to the Crown, one that is complete and unredacted which will be kept by the Crown as a master brief, and one that is redacted for disclosure to the defence. Much of this editing can be done at the pre-charge stage, if the police and Crown are collaborating as we recommend, so that post-charge delays are avoided. All editing of the disclosure brief should be coded in the margin, so that the

[49] The Federal Prosecution Service Deskbook policy on *Mega-Case Management*, *supra* note 31, provides a good illustration of this modern cooperative approach to disclosure:

> "The most effective way of satisfying Crown counsel's ethical obligation to make full disclosure of the Crown's case is to be involved at an early stage and continue to be involved throughout the investigation. More than any other issue, the preparation of disclosure materials requires intensive cooperation between Crown counsel and the investigative agency, such that the responsibility should be viewed as a joint one."

defence knows the basis for each edit as soon as it receives initial disclosure. In this way there will be no delays caused by defence follow-up requests asking the Crown to explain the basis for the editing.

Recommendation 4:

Vetting or editing the disclosure brief is a joint responsibility of the police and the Crown. The police should do an initial edit of the brief, electronically highlighting or shading the proposed edits, and the Crown must then review the brief and make final decisions. The police will then provide a master brief to the Crown, without edits, and a disclosure brief with edits. Each edit should be coded in the margins to explain its basis to the defence. As much as possible, this cooperative approach to editing should take place at the pre-charge stage of the case.

3. Who Should Transcribe Relevant Taped Interviews and Intercepts?

Video-taping and audio-taping of witness interviews has now become widespread, especially in large cases. This is a beneficial development as it preserves an accurate record of the witness' statement and it enhances the likelihood of hearsay uses of the statement at trial.[50] However, it is difficult for the Crown and defence counsel to quickly review a tape-recorded statement and it is even more difficult to use it in court to examine or cross-examine a witness or to refresh memory. The complex procedures in ss. 9, 10 and 11 of the *Evidence Act* are particularly difficult to apply without a transcript and a great deal of court time is wasted when cross-examination is attempted with an audio or video tape. In addition, it creates a very poor record for appellate review. Accordingly, the necessity of transcribing the relevant witness interviews has become a significant new cost and source of delay. Whether this transcribing is strictly part of "disclosure", when a tape recording of the interview has already been disclosed, is a technical legal issue that we need not debate. Transcribing the important witness interviews clearly facilitates preparation of the case and any possible resolution of the case. It is beneficial to the administration of justice, regardless of whether it is required by law.

[50] *Supra* note 11.

Furthermore, many large complex cases involve wiretaps. Section 189 of the *Criminal Code* does require that "a transcript of the private communication, where it will be adduced in the form of a recording" must be served on the accused, together with notice and a schedule identifying the intercepts, prior to trial. This is not just a disclosure requirement; it is also an extremely valuable forensic tool at trial as the transcripts can be made exhibits and can be provided to the trier of the fact, both to follow along while the tapes of the intercepts are being played, and to review during deliberations.[51] It is therefore essential that the relevant intercepts be transcribed.

Once again, we are pleased to report that the difficult issue of who should be responsible for the task of transcribing the relevant intercepts and recorded interviews in these long complex cases seems to have been resolved. Where the police and Crown collaborate at the pre-charge stage, as we recommend, the Crown can and should advise the police as to which intercepts and which interviews are sufficiently important to the case that they justify the time and expense of transcription. The police should then utilize civilian employees to transcribe these particular tape recordings so that the transcripts are included in the disclosure brief. It would obviously be wasteful to transcribe all tape-recorded interviews and intercepts.

This sensible collaborative approach is presently being used effectively in many large complex cases and we recommend its uniform adoption. As with the vetting process described above, this transcribing of the relevant intercepts and interviews should take place to the greatest extent possible at the pre-charge stage in order to avoid post-charge delays. It must be recognized that this recommendation has cost implications for police services and there must be sufficient budgetary allocations made to permit the hiring of civilian employees to do the transcribing.

Recommendation 5:

Transcribing important intercepted private communications and recorded witness interviews, likely to be utilized at trial, is a joint responsibility of the police and the Crown. The Crown should advise the police as to which intercepts and which recorded witness interviews should be transcribed and the police should use civilian employees to do the transcribing. The police will then include the transcripts in the disclosure brief. As much as

[51] *R. v. Rowbotham* (1988), 41 C.C.C. (3rd) 1 at 47-50 (Ont. C.A.); *R.v.Shayesteh* (1996), 111 C.C.C. (3rd) 225 at 248-261 (Ont. C.A.)

possible, this cooperative approach to transcribing should take place at the pre-charge stage of the case.

4. Who Should Pay for Disclosure?

There is little that we can usefully add on this subject to what was said 15 years ago in the *Martin Report.* The Martin Committee was made up of 14 senior representatives of the police, Crown and defence, chaired by the Honourable G. Arthur Martin Q.C., and they all signed the final Report. The Report extensively analysed the issue of who should pay for disclosure and concluded, sensibly, that it was a shared responsibility between the police and the Crown. The police were responsible for producing a comprehensive brief to the Crown for prosecution, and should pay for it, and the Crown was responsible for producing a comprehensive disclosure brief to the defence, and should pay for it.

A patchwork of inconsistent arrangements exists across the province, although it appears that the scheme of the *Martin Report* is generally followed. Once again, these recommendations need to be entrenched in a *Police Services Act* directive so that there is no uncertainty as to the budgetary requirements of the police and Crown and so that consistent arrangements exist for all police services and all Crown offices.

The core of the *Martin Report* reasoning on this issue is as follows, and we simply adopt it:[52]

> As discussed above, in the introduction to this chapter, the duty of the police to disclose to the Crown is undoubted. This duty includes, in the Committee's view, providing to the Crown, at the expense of the police, one copy of the materials to be disclosed. Providing one copy of the material relevant to the case, perhaps in the format of a Crown Brief, is simply one aspect of the police officer's responsibilities in marshalling a case for presentation in court by Crown counsel. Crown counsel are, as discussed above, independent of the police in the conduct of prosecutions. Therefore, Crown counsel must be provided with a package of material that is sufficiently comprehensive to permit the prosecutorial functions of charge screening, providing disclosure, preparing the case, and presenting it in court to be discharged independently of the police.

[52] *Supra* note 24 at pp. 226-229.

...

> In the Committee's view, however, a different situation prevails with respect to subsequent copies of material needed for disclosure purposes. Fundamentally, disclosure to an accused person is the duty of the Crown. It is not the duty of the police, although, of course, disclosure cannot be accomplished by the Crown without the co-operation of the police. Therefore, the Committee thinks it right for the Ministry of the Attorney General to bear the actual costs of the materials needed to produce the disclosure necessary to discharge Crown counsel's obligations to an accused person.
>
> In simple terms, then, the Committee's recommendation pertaining to the sharing of costs of disclosure between the Crown and the police parallels directly the essential duties of each, with each bearing the costs of their own respective duties.

Once again, we are pleased to report that the historic difficulties in this area appear to have been resolved in the context of large complex cases. The police pay for the cost of the initial external hard drives, both edited and unedited, that are provided to the Crown at the end of the investigation. The Crown then pays for copies of the hard drives that are made for disclosure to all of the co-accused.

This resolution of the issue accords with the *Martin Report* and has undoubtedly been facilitated by the advent of modern electronic disclosure practices. If the police are continuously building the brief in electronic form as the investigation proceeds, there is only minimal additional cost involved in downloading that brief onto an external hard drive and then providing it to the Crown. The great expenditures of time and money that used to be devoted to photocopying are now a thing of the past in these large complex cases.

It can be seen how Recommendation 3 above has important spin-off benefits, especially in relation to this issue of costs.

Recommendation 6:

The police should pay for copies of the brief, both edited and unedited, to be provided to the Crown for the purpose of prosecution. The Crown should pay for copies of the brief to be provided to all co-accused for the purpose of disclosure.

G. The Timeliness of Disclosure

If the above six recommendations are adopted and implemented, we believe that they will substantially speed up delivery of the initial disclosure brief to the defence, shortly after charges are laid. As *Stinchcombe* makes clear, providing early disclosure in this manner does not preclude ongoing disclosure as the investigation proceeds and as further relevant information is received by the Crown during the post-charge period. Indeed, *Stinchcombe* uses the term "initial disclosure" to describe what must be provided prior to election and notes that the obligation "is a continuing one and disclosure must be completed when additional information is received."[53]

Although we are confident that the above six recommendations will greatly reduce delays caused by slow and inefficient disclosure practices on the police/Crown side, we wish to conclude this part of the Chapter by recommending the adoption of administrative targets for timely disclosure. All of the leading studies of trial delay have noted that establishing time limits for each step in the judicial process is one of the most effective ways of reducing delays and improving efficiency.[54] We all know from personal experience that we generally work diligently and efficiently when we are facing deadlines. If no deadlines are imposed, we put things off or give other things priority. Not surprisingly, the studies have found that the same common sense proposition applies to the underlying causes of trial delay.

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[53] *Supra* note 21 at pp. 11 and 13-14.

[54] Law Reform Commission of Canada, *Trial Within a Reasonable Time*, Ottawa: Canada Communication Group, Publishing, 1994 at pp. 15-23. For example, the American Bar Association (ABA) Task Force on Reduction of Litigation Cost and Delay recommended that incremental time standards be developed, reasoning that "Goals that are clear, focused, measurable and achievable are excellent motivators." Section 2.51(c) of the ABA's *Standards Relating to Trial Courts* implements this recommendation by stating: "Essential elements which the trial court should use to manage its cases are: by rules, conferences, or other techniques, establishment of times for conclusion of the critical steps in the litigation process, including the discovery phase." ABA Task Force, *Defeating Delay: Developing and Implementing a Court Delay Reduction Program* (Chicago: ABA, 1986) at 13-14. Online: http://www.abanet.org/jd/lawyersconf/pdf/Defeating-Delay-1986.pdf ABA, Judicial Administration Division, *Standards Relating to Trial Courts* (1992 Edition), pp. 79-80.

Accordingly, administrative goals should be set for timely initial disclosure, whether 35 days or eight weeks for long complex cases or some other number, but it is important to set goals that run from the date of the charge. These goals can be adjusted for particularly complex cases and, of course, they do not preclude ongoing disclosure of materials that emerge later. We recommend that police services and Crown offices set standard coordinated administrative goals for delivery of the brief to the Crown and then to the defence, and issue directives to this effect. We understand that many police services have already done this and the directives state that timely initial disclosure by the target date is an important police duty. Of course, if these administrative goals for initial disclosure in large complex cases are to be consistent across the province, as we believe they should be, the standards need to be fixed by directive under both the *Police Services Act* and the Crown Policy Manual so that police and Crown disclosure timelines are coordinated.

In this regard, we note that the 1999 *Report of the Criminal Justice Review Committee* recommended that "In the absence of exceptional circumstances, disclosure should be provided to the accused at his or her first court appearance."[55] The Ministry of the Attorney General's "Up Front Justice Project" has worked hard to implement this recommendation and we commend their efforts. Similarly, the Steering Committee on Justice Efficiencies, a broadly-based committee of senior judges, justice officials and defence counsel that was established by Justice Ministers, issued its *Final Report on Early Case Consideration* in February, 2006. Amongst its recommendations were the following: the first post-bail appearance should be "no later than four weeks from the date of arrest;" the police should finalize the Crown brief "no later than three weeks from the date of arrest" and provide it to the Crown "one week prior to the first appearance"; and "in the absence of exceptional circumstances full disclosure should be provided routinely to the accused…on the first appearance [where the accused is out of custody]" and "within seven to 14 days of arrest, for those accused persons in custody."[56]

It can be seen that there is broad support for the principle that disclosure should be provided on the first appearance after bail has been determined. The directives that we recommend should simply establish a standard date for the first appearance, both in ordinary cases and in complex cases, and the administrative goal should be to have "initial disclosure"

[55] *Supra* note 25, recommendation 5.4.
[56] Recommendations 22 and 23, Online: http://www.justice.gc.ca/eng/esc-cde/ecc-epd.pdf

available on that date. The judiciary should be consulted on this point as the date for a first post-bail appearance is sometimes set by the judiciary and sometimes by the police, depending on who releases the accused from custody.

Recommendation 7:

Standard administrative goals for timely initial disclosure should be set by directive under the *Police Services Act* and in the Crown Policy Manual.

H. The Solutions to the Issues on the Defence Side: Requests for Materials Outside the Investigative File

One of the most difficult issues we encountered in our Review is the problem of how best to manage defence requests for materials that fall outside the investigative file. We outlined this problem above, in the introduction to this chapter. As noted, these requests test the outer limits of *Stinchcombe* "relevance", they may also raise third party confidentiality issues and they can cause lengthy delays and complex motions before the trial court.

Typical examples of these kinds of requests include the following: past criminal investigative files relating to a Crown witness, in order to establish past disreputable conduct relevant to credibility; past work performed by a Crown expert in other cases, in order to test the expert's competence; discipline and personnel files relating to police officers, in order to discover possible misconduct relevant to credibility; and other criminal investigative files relating to miscellaneous issues such as alternative suspects, the grounds for a wiretap or an allegation of racial profiling.

We note that these kinds of materials will generally be inadmissible in evidence, as they often run afoul of the collateral facts rule.[57] *Stinchcombe* relevance for disclosure purposes does not depend on the admissibility of evidence, if the materials could be used as the basis for further

[57] *R. v. Rafael* (1972), 7 C.C.C. (2nd) 325 (Ont. C.A.); *R. v. B (A.R.)* (1998), 128 C.C.C. (3rd) 457 (Ont. C.A.); *R. v. Krause* (1986), 29 C.C.C. (3rd) 385 (S.C.C.); *R. v. Ghorvei* (1999), 29 C.R. (5th) 102 (Ont. C.A.); *R. v. Beland and Phillips* (1987), 36 C.C.C. (3d) 481 at 495 (S.C.C.).

investigations or could be helpful in formulating questions at trial.[58] Nevertheless, it must be recognized that these kinds of materials generally have limited uses and they challenge the outer edges of *Stinchcombe* relevance. They can be referred to as "marginal" in many cases, to adopt the terminology of *Dixon.*

Because these requests for materials outside the investigative file are at the outer margins of even the "low" *Stinchcombe* relevance standard, we believe that there is an onus on the defence to particularize and explain the relevance of such requests. The Crown must provide comprehensive disclosure of the investigative file, as Recommendation 3 above provides, because the investigative file is presumptively relevant. The materials beyond that file are not presumptively relevant unless the defence establishes a link.

The distinction between our approach to disclosure of the investigative file, where the onus is on the Crown to justify non-disclosure, and materials requested from sources outside the investigative file, where the onus is on the defence, is rooted in the Supreme Court of Canada's jurisprudence. In *Stinchcombe* the material being sought was witness statements that were clearly part of the investigative file. Sopinka J. famously stated that "the fruits of the investigation which are in the possession of counsel for the Crown are not the property of the Crown for use in securing a conviction but the property of the public to be used to insure that justice is done." Accordingly, he placed the onus on the Crown to establish lack of relevance.[59] Just over three years later, in *Chaplin*, the Court decided the first case that attempted to apply these same principles to materials sought from outside the investigative file. Sopinka J. again gave the unanimous judgment of the Court and stressed this particular distinction between the two cases on three separate occasions:[60]

> This appeal concerns the limits of Crown disclosure obligations in criminal prosecutions, flowing from this court's decision in *R. v. Stinchcombe*, and amplifies the procedural structure of disclosure obligations as articulated in *Stinchcombe*, and subsequent case law. Specifically, the issue is whether an accused facing trial on a criminal charge is entitled to know if he or she has been named as a primary or secondary target in <u>any wire-tap authorizations</u>

[58] *R. v. Egger* (1993), 82 C.C.C. (3rd) 193 (S.C.C.); *R. v. Carosella, supra* note 21 at pp. 308-309; *R. v. Dixon, supra* note 23 at pp. 17-18.
[59] *Supra* note 21 at pp. 7 and 12.
[60] *R. v. Chaplin and Chaplin* (1995), 96 C.C.C. (3rd) 225 at 227, 228 and 237 (S.C.C.)

> _____,
> obtained in the period from the charge up to the time of trial.
>
> ...Counsel representing the provincial and federal governments notified the appellants that:
>
> (a) there were no provincial wiretap authorizations in effect pertaining to this particular investigation during the time period in question...
>
> It is very significant that the Crown disclosed that there were no wiretap authorizations pertaining to the investigation of the charges being tried in the time-period in question.
>
> ...Applying the foregoing to this appeal, I am of the opinion that the accused failed at trial to establish a basis for the existence of wiretap authorizations or evidence derived therefrom which is potentially relevant to making full answer and defence.
>
> The critical fact here is that the Crown stated that no wiretaps had been authorized as part of the investigation leading to the charges, making this appeal fundamentally different than the situation in *Dersch*, where wiretaps in relation to the charges being tried were known to have existed. [emphasis added]

Unlike *Stinchcombe,* the Court in *Chaplin* clearly placed a burden on the defence when what was being sought was not "part of the investigation".

Some counsel do not appear to appreciate that the burden is different in relation to these "marginal" requests. We have seen a number of instances where the request is expressed in broad unqualified terms seeking whole categories of documents. They tend to resemble a shopping list rather than a considered request for relevant information made in circumstances where the burden is on the defence. In *R. v. Girimonte,* the Court of Appeal dealt with this kind of request. The defence sought "all disciplinary records, internal discipline records, documentation from personnel files, including all information pertaining to misconduct activities of each police officer and government agent including all U.S.A.T.F. police." Doherty J.A., speaking for the Court, described the request as abusive:[61]

> Disclosure demands which are no more than "fishing expeditions", seeking everything short of the proverbial kitchen sink undermine the good faith and candour which should govern the conduct of counsel. For example, counsel's demand for "documentation from

[61] (1997), 121 C.C.C. (3d) 33 at 40-41 (Ont. C.A.).

> personnel files" of all Canadian and American police officers involved in the investigation can only be described as frivolous and abusive. No reasonable person would suggest that personnel records of all police officers involved in a criminal investigation must be turned over to the defence at the outset of a prosecution. It would be obvious to anyone that the prosecution would resist compliance with such a far-fetched demand. Disclosure demands like some of those made in this case seem calculated to create needless controversy and waste valuable resources rather than to assist the accused in making full answer and defence.

Subsequent case law has been similarly dismissive of broad unqualified requests for materials outside the investigative file, referring to them as "fishing expeditions". This line of authority puts an onus on the defence, based on *Chaplin*, to show that materials outside the investigative file exist and that they could help the defence. As Sopinka J. put it in *Chaplin*, the policy purpose for placing this onus on the defence is "to preclude speculative, fanciful, disruptive, unmeritorious, obstructive and time consuming disclosure requests...Fishing expeditions and conjecture must be separated from legitimate requests for disclosure."[62]

In summary then, we believe the proper approach is to place a strong onus on the Crown to comprehensively disclose the investigative file (in Recommendation 3) but to place the onus on the defence to meet its *Chaplin* burden in relation to materials outside the investigative file. This means, at a minimum, a particularized request explaining the basis for believing that the extraneous materials exist and how they could assist the defence.

The Crown must then make a good faith effort to discuss the request with defence counsel and both sides must attempt to resolve the matter. Sopinka J.'s admonition in *Stinchcombe* should be foremost in the minds of both counsel, whenever disclosure is being discussed:[63]

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[62] *R. v. Chaplin*, *supra* note 60 at p. 236; *R. v. Toms* (2003), 174 C.C.C. (3d) 87 (Ont. C.A.) conviction reversed on other grounds but ruling at trial on disclosure motion affirmed, [2000] O.J. No. 5612 (Ont. S.C.J.); *R. v. Ngo et al.* (2006), 39 C.R. (6th) 183 (Man. Q.B.); *R. v. Dykstra* (2007), 76 W.C.B. (2d) 193 (Ont. S.C.J.). In *Chaplin* the request was for any wiretaps in unrelated investigations, in *Toms* the request was for investigative files relating to the work of an undercover police agent over the previous 21 years, in *Ngo* the request was for records relating to over 200 motor vehicle stops carried out by the arresting officer in the previous two years and in *Dykstra* the request was for all police records relating to any investigations of drug smuggling by airport employees. Also see: *R. v. Gateway Industries Ltd.*, [2004] 6 W.W.R. 329 (Man. Q.B.); *R. v. Chan* (2002), 50 C.R. (5th) 280 (Alta. Q.B.).

[63] *Supra* note 21 at p.12.

> I am confident that disputes over disclosure will arise infrequently when it is made clear that counsel for the Crown is under a general duty to disclose *all* relevant information. The tradition of Crown counsel in this country in carrying out their role as "ministers of justice" and not as adversaries has generally been very high. Given this fact and the obligation on defence counsel as officers of the court to act responsibly, these matters will usually be resolved without the intervention of the trial judge.

If both counsel remember their duties as "officers of the court" and as "ministers of justice", then it should only be in an exceptional case that disclosure requests need to be the subject of a motion in court. Most disclosure disputes are amenable to reasonable compromise and counsel on both sides have a duty to seek such compromises.

Assuming the matter cannot be resolved, defence counsel must bring a formal written motion in court seeking the requested disclosure. The judge seized with pre-trial motions (discussed below in Chapter 4) should order that all disclosure disputes must either be resolved by cooperative consultation between the parties or must be brought on for a ruling in court in a timely way. This should take place long before the trial. We agree with the practice in the United Kingdom, as set out in the Lord Chief Justice's *Protocol on the Control and Management of Heavy Fraud and Other Complex Criminal Cases:*[64]

> At the onset the judge should set a timetable for dealing with disclosure issues. In particular, the judge should fix a date by which all defence applications for specific disclosure must be made.

If there is an onus on the Crown to make timely disclosure, then there must be an onus on the defence to advise the Crown of any further disclosure requests in a timely way. *Stinchcombe* speaks of a duty on the defence to raise the matter "at the earliest opportunity."[65] If our recommendations below in Chapter 4 are accepted, concerning giving pre-trial judges the power to rule on disclosure motions, then "the earliest opportunity" will be as soon as that pre-trial judge is assigned to the case. The Court of Appeal's recent decision in *Toms* implicitly takes the same view as the Court spoke disparagingly of a "last minute motion", brought on "the eve of the first trial date", which sought "to send the Crown in pursuit of files spread across Canada over a

[64] The Protocol was issued by Lord Woolf on March 22, 2005. Online: http://www.judiciary.gov.uk; S. 4 (iv).
[65] *Supra* note 21 at p. 12.

21 year period." Not surprisingly, the Court upheld the trial judge's ruling dismissing the motion on the basis that "it was a fishing expedition."[66]

The above approach, requiring the judge assigned to the pre-trial phase of the case to set a timetable and rule on all defence disclosure requests at an early stage, should put an end to the phenomenon of disclosure requests that drag on for years. Allowing disclosure disputes to remain outstanding for long periods of time, right up to the trial, is a recipe for adjournments and delay. Again, experience in the United Kingdom is instructive on this point as the Court of Appeal recently issued a *Disclosure Protocol* which states:[67]

> There is very clear evidence that, without active judicial oversight and management, the handling of disclosure issues ... can cause delays and adjournments. The failure to comply fully with disclosure obligations, whether by the prosecution or the defence, may disrupt and in some cases even frustrate the course of justice ... undermining the overall performance and efficiency of the criminal justice system ... As part of the time tabling exercise, the judge should set a date by which any applications are to be made and should require the defence to indicate in advance of the cut-off date for specific disclosure applications what documents they are interested in and from what source.

It should be noted that defence disclosure requests can cause delay not only when they are made at the last minute, shortly before trial. They also become a source of delay if the court refuses to set a date, either for preliminary inquiry or trial, as long as some disclosure request remains unresolved. Section G of this Chapter has already dealt with the timeliness of Crown disclosure. It notes that *Stinchcombe* requires "initial disclosure" to be made prior to the accused's election. It has never been the law that full and complete disclosure must be in counsel's hands before there can be an election and a date set for preliminary inquiry or trial. It is only where some core aspect of the Crown's case has not been disclosed, and it is of such significance that it could legitimately influence the accused's election, that it is reasonable to delay setting a date for the preliminary inquiry or trial. The reality of long complex cases is that

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[66] *Supra* note 62 at pp. 90-91. The Court of Appeal's decision in *R. v. Oliver and Morrison* (2005), 194 C.C.C. (3d) 92 at 100-103 (Ont. C.A.) is also important in relation to this point. The Court held that the trial judge was entitled to set a schedule for the completion of all pre-trial motions and to refuse to adjourn the trial in order to allow counsel to bring a late motion.

[67] *Disclosure: A Protocol for the Control and Management of Unused Material in the Crown Court*, February 20, 2006 at paragraphs 5-7 and 44. Online: http://www.hmcourts-service.co.uk.

disclosure will be ongoing throughout the process. Good counsel can still prepare and make decisions, without needing adjournments, provided they have all truly significant disclosure. The courts must accept that it is unreasonable to delay setting dates because some disclosure remains outstanding. The status of outstanding disclosure should be monitored by the pre-trial judge, and motions should be ruled on where necessary, but this should not delay setting a date.

Assuming that a defence motion seeking further disclosure is brought on in a timely way and is supported by a particularized notice with supporting materials, difficult questions still remain as to the extent of the court hearing. At a minimum, the Court must rule on whether the defence has met its *Chaplin* burden and must rule on any claims of privilege raised by the Crown. But once the Court has determined that the files sought by the defence exist and that they could assist the defence in the *Chaplin* sense, and the Court has further ruled that the files are not subject to any claim of privilege raised by the Crown, we do not recommend that the Court become involved in a time-consuming document by document examination of the files. This is a poor use of judicial resources not only because it is cumbersome and time-consuming, involving argument and adjudication over each document, but because more efficient alternatives exist.

In *R. v. O'Connor,* the Supreme Court of Canada held that once the judge has made a preliminary ruling of "likely relevance," in relation to documents that are subject to third party privacy interests, the next step is that "the judge should examine the records."[68] However, in the subsequent case of *M. (A) v. Ryan,* involving a sensitive claim of privilege over a sexual assault complainant's psychiatric records, the Court seemed to resile from its earlier position and held that it was not necessary to laboriously examine each document in court. McLachlin J., as she then was, stated:[69]

> The requirement that the Court minutely examine numerous or lengthy documents may prove time-consuming, expensive and delay the resolution of the litigation. Where necessary to the proper determination of the claim for privilege, it must be undertaken. But I would not lay down an absolute rule that as a matter of law, the judge must personally inspect every document at issue in every case. Where the judge is satisfied on reasonable grounds that the interests at stake can properly be balanced without individual

[68] *Supra* note 19 at p.23.
[69] (1997), 143 DLR (4th) 1 at 15 (S.C.C.).

> examination of each document, failure to do so does not constitute error of law.

If sensitive rulings on privilege claims can be made without examining each document, as *Ryan* holds, then surely disclosure motions should not engage the judge in a "time-consuming, expensive" examination of large numbers of documents.

Once the judge has made broad rulings on relevance and privilege, then the privileged or irrelevant documents should obviously not be produced. But the remaining class of non-privileged and potentially useful documents should be inspected by the parties out of court. It is clear that disclosure obligations can be satisfied by an opportunity to inspect. In *Stinchcombe (No.2)*, the Court stated the following:[70]

> If the Crown has originals of documents which ought to be produced, it should either produce them or allow them to be inspected.

The *Martin Report* is to the same effect, recommending that core disclosure materials should be produced but that in relation to more marginal materials the defence should "inspect the investigative agency's file in relation to the offence" and request copies of anything useful that emerges from the inspection.[71] We were advised that this form of disclosure, by way of inspection of the requested file or files, has often been used successfully in Ontario and elsewhere.

Instructing counsel to obtain disclosure by an opportunity to inspect is a particularly useful and appropriate tool when dealing with materials on the outer edges of *Stinchcombe* relevance. Even if a group of files "could" be helpful to the defence, in the *Chaplin* sense, the reality is that the vast majority of individual documents will not be of interest to counsel, once they have been inspected. It is counsel who can best make this determination, quickly and efficiently, and so the onus should be on counsel to inspect the potentially relevant files and request copies of only those documents that actually are helpful, rather than ordering the Crown to photocopy thousands of documents, most of which will not be helpful.

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[70] (1995), 96 C.C.C. (3d) 318 (S.C.C.); *R. v. Blencowe*, *supra* note 41 at pp. 534-535.
[71] *Supra* note 24 at pp. 191-192 and 249-251.

An excellent example of this procedure is *R. v. Guess* where disclosure of "voluminous" wiretaps was sought by the defence. The trial judge made an order granting "access" to the wiretap logs "for so long as is reasonably necessary...to review the files...Upon review, any documents or information which Defence Counsel believe might reasonably assist the Accused in making full answer and defence to the Charge...may be identified to Crown Counsel by Defence Counsel." The order then required both counsel to attempt to reach agreement on disclosure of the selected items, failing which they could return to the Court to resolve any remaining disputes over individual documents. As Esson J.A. noted on the appeal:[72]

> The trial judge considered it impractical for him to follow the course of reviewing the material privately in order to identify any of it which should be disclosed as being possibly relevant. So he made an order allowing defence counsel, but not the accused, to have access to the material. That procedure was obviously more favourable to the defence than if he [the trial judge] had examined the documents privately.

The same procedure was adopted, with similar success, during the "Air India" trial and was subsequently referred to with apparent approval by the Supreme Court of Canada in *Charkaoui*.[73] We recommend this approach in long complex cases where there will generally be large quantities of "marginal" materials that could possibly be relevant. It is not reasonable to expect a judge to examine these materials, document by document in court while hearing submissions from counsel. A more efficient out of court procedure is available and it should be utilized. We caution that the court must make an initial ruling as to whether the broad class of documents meets the *Stinchcombe* or *Chaplin* tests for disclosure. The court must also rule as to whether any privilege exists. Disclosure by way of an opportunity to inspect should not extend to privileged documents unless, of course, the Crown consents.

If the class of potentially relevant documents raises any confidentiality issues, then the court may order that the inspection be conducted by counsel but only on an undertaking that counsel not disclose the contents of any document. Counsel would be relieved of the undertaking once the Crown agrees to provide a photocopy of any requested document or once the Court has

[72] *R.v.Guess* (2000), 148 C.C.C. (3d) 321 (BCCA).
[73] *Charkaoui et al v. Minister of Citizenship and Immigration,* [2007] 1 S.C.R. 35 at para. 78. The procedures followed in the "Air India" trial are described in Michael Code, s*upra* note 15 at pp 269-273.

ruled on any disputed document. Breach of such an undertaking ordered by the Court should, of course, be regarded as very serious professional misconduct. This is the procedure that was used successfully in *Guess* and in the "Air India" trial and that was referred to in *Charkaoui*. The use of undertakings when disclosing sensitive documents was first recommended by the Supreme Court of Canada in the *Ryan* case. In short, there is now abundant authority supporting the practice of limited or conditional disclosure by way of a right to inspect and/or by way of undertakings of confidentiality.[74]

It can be seen that there are a number of tools available to judges to shorten these long cumbersome disclosure motions and to insist that disclosure disputes be resolved early on and in an efficient manner. We have attempted to summarize all of these practical procedural tools in the following recommendation.

Recommendation 8:

Defence requests for disclosure of materials outside the investigative file should be subject to the following requirements:

- **They must be particularized in order to properly identify the files/materials in question and to explain how the files/materials could assist the defence, as required by the onus placed on the defence in *Chaplin*;**
- **There must be a real effort by the Crown and defence to discuss the request and try to resolve it pursuant to their duties as "officers of the court" and "ministers of justice";**
- **If unresolved, the defence must bring on a motion in court in a timely way before the judge seized with pre-trial motions;**
- **This judge must set strict timelines for either resolving all disclosure disputes or obtaining rulings at an early stage of the case and well in advance of the trial. Setting a date for trial or preliminary inquiry should only be delayed if the unresolved disclosure is significant in its impact on the accused's election;**

[74] *Ibid*; *M.(A.) v. Ryan*, *supra* note 69. Most of the leading authorities on the use of undertakings are reviewed in Michael Code and Kent Roach, "The Role of the Independent Lawyer and Security Certificates" (2006), 52 C.L.Q. 85 at pp. 103-111. Also see: *R. v. Blencowe*, *supra* note 41 at pp. 542-543; *The Martin Report*, *supra* note 24 at pp. 234-235.

- **The judge must rule on whether the defence has met its *Chaplin* onus in relation to the requested files/materials and must rule on any claims of privilege raised by the Crown and challenged by the defence;**
- **It is generally not necessary or advisable to take up court time with a detailed examination of each requested file or document;**
- **It is generally more appropriate, after identifying the potentially relevant and non-privileged files, for the court to order that counsel obtain disclosure by an opportunity to inspect and by requesting copies of only those documents that are determined, upon inspection, to be useful to the defence;**
- **If there are confidentiality concerns about any of the documents to be inspected, the court should order counsel to conduct the inspection on an undertaking that counsel not disclose the contents of any document. Counsel will only be relieved of the undertaking in relation to any particular document upon obtaining the Crown's agreement to provide a copy of the document or upon obtaining a further order of the court. Breach of counsel's undertaking should be treated as very serious professional misconduct;**
- **Any residual disputes about release of particular documents or parts of documents, after conducting the inspection, can be brought back to the court for a ruling.**

CHAPTER 4: Judicial Case Management, Especially at the Pre-trial Stage

A. The History of Judicial Case Management in Ontario

The subject of judicial case management has been extensively studied, especially in the United States. It is widely accepted as a key factor in successful delay reduction initiatives and increased justice system efficiency. Although there is no monolithic definition or form for what we mean by the term "judicial case management", successful regimes generally exhibit four main features: early and continuous judicial control over the case; time limits for each step in the process; constant monitoring to ensure compliance; and firm dates for judicial proceedings with strict controls on adjournments.[75]

The advent of judicial case management in Ontario and, indeed, in this country is a relatively recent phenomenon. Thirty years ago there was very little judicial control over a case at its early stages. The parties would generally appear in an assignment court and set a date, either for a plea, trial or preliminary inquiry. The court would then hear little or nothing from the parties until they appeared on the eventual date that had been set. The adversary system, in this unmanaged form, trusted the parties to either resolve the case or prepare the case for trial, and to make all necessary decisions related to its planning without any judicial assistance or oversight. It was only when the case came to court for a plea or for trial that the judiciary became involved. A few members of the bar and the judiciary still believe in this laissez-faire approach and resist attempts to introduce any judicial case management role.

However, these are the views of a minority and they have not prevailed. Both of Ontario's trial courts gradually adopted forms of case management, beginning in the late 1980's, as a result of delays and backlogs that had built up in the courts throughout that decade. The Attorney General of the day, Ian Scott, Q.C., argued with some success that the justice system was under-managed and that a concerted effort to adopt case management practices, rather than merely adding more resources, would reduce the delays and backlogs. Statistical data tended to support his argument to some extent, as far too many cases were being set for trial and contributing to the backlogs. Amongst the cases that were routinely set for trial were a large number that could easily have been resolved in advance of the trial date if there had been more

[75] *Supra* notes 6 and 54 where many of the leading studies are referenced.

aggressive judicial involvement in resolution discussions. This gradual process of reform introduced in the 1980's was greatly accelerated by the *Askov* decision in 1990.[76] That case established strict delay guidelines and both trial courts responded by introducing new Rules of Court in the 1990's that provided for much greater case management.[77]

Parliament also encouraged the development of case management practices by enacting s. 625.1 of the *Criminal Code* in 1985 and then enacting s. 482.1 in 2002. The former provision permitted pre-trial conferences and the latter provision allowed the courts to make rules "that would assist the Court in effective and efficient case management." The Superior Court recently issued a new set of rules, pursuant to this provision, that provide for a significantly enhanced form of judicial case management.[78]

B. The Need for Greater Case Management Powers

All major studies of the so-called "mega-trial" phenomenon have recommended much stronger judicial case management. There is a broad consensus amongst public policy makers that more vigorous judicial control of the early stages of these long complex cases is one of the most important ways to improve their efficiency and reduce delays.[79] As noted in Chapter 2 above, there is no doubt that the early pre-trial stages of criminal proceedings have become much more important than they ever were in the past. Accordingly, they merit greater judicial attention and control.

The essence of the problem with judicial case management in its present form is that it is designed to perform a limited role. The main rationale for its introduction 15 to 20 years ago was to solve the problem of backlogs in the trial courts. This was a serious problem in Ontario, given that 50,000 charges were withdrawn or stayed pursuant to s. 11 (b) of the *Charter* in the year

[76] *R. v. Askov et al* (1990), 59 C.C.C. (3d) 449 (S.C.C.). It was the presumptive guideline of six to eight months for post-committal systemic delay that prompted the Ontario trial courts to become much more concerned about managing their caseload.
[77] These events are set out in greater detail in Michael Code, *Trial Within a Reasonable Time,* 1992 Carswell, at pp. 98-106.
[78] S.1.92-99. Online: http://www.ontariocourts.on.ca. The new Rules were released and implemented on October 16, 2006. They were the result of an excellent report titled, *New Approaches to Criminal Trials*, written by the Ontario Chief Justice's Advisory Committee on Criminal Trials. The Committee was made up of six senior judges, three senior Crown officials and the past President of the Criminal Lawyers Association. The focus of the Committee's work was "the increasing length of criminal trials" and enhanced judicial case management was seen as one of the solutions. Their report is available Online: http://www. ontariocourts.on.ca
[79] *Supra* note 6.

following the *Askov* decision.[80] The main focus of judicial case management, when it was first introduced in this earlier era, was to resolve cases and thereby reduce the backlog of pending trials. The idea was simply that the judiciary should abandon their traditional passivity and become more actively involved in pre-trial conferences with the parties where attempts would be made to settle the case, either with guilty pleas or withdrawals. Plea negotiations, sentence negotiations and diversion were key aspects of these private sessions, held either in the judge's chambers or in a conference room. The judge would play the role of a mediator, trying to persuade the parties to adopt sensible positions about settlement of the case. Some judges were very effective in this role and Ontario's "early resolution" rate, that is, the percentage of cases in the justice system that are resolved by plea, withdrawal or diversion, without ever setting a date for trial, increased dramatically in the decade following *Askov*.[81]

These achievements are important and we do not wish to diminish the significance of early judicial assistance in settlement discussions. The more cases that can be removed from the trial courts through early resolution, the smaller the number of cases that will remain in the system seeking trial dates. This reduction in demand on the trial lists will obviously produce earlier trial dates and smaller backlogs of cases awaiting trial. This, in turn, will mean fewer s. 11(b) applications under the *Charter* due to unreasonable delay. Ontario has never had a repetition of the mass stays and withdrawals that occurred in 1991-2, immediately after *Askov*, and this is a significant achievement.

If the objective of judicial case management was simply to encourage early settlement of as many cases as possible, and thereby reduce demand on the trial courts, all that was needed was a power to summons the parties to pre-trial conferences. Parliament enacted this power in 1985, when s. 625.1 was added to the *Criminal Code*. It allowed the courts to "order" that the

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[80] *Supra* note 77 at pp. 107-116.

[81] Our Review received a very helpful briefing on the current "early resolution" rate from Ministry of the Attorney General staff. It indicates that the "early resolution" rate in the Ontario Court of Justice, where all criminal cases enter the system, has increased every year between 1999 and 2007. In 1999 the rate stood at 68.2% and in 2007 it stood at 76.4%. This means that less than 25% of the total case load is being set for trial or preliminary inquiry. In the most efficient jurisdictions in the province, which appear to be Kitchener and Peterborough, the "early resolution" rate is now over 89%. These are dramatic changes from the time of *Askov* when approximately 50% of the caseload was being resolved prior to setting a date for trial. It is hardly surprising that there were serious backlogs in the trial courts when approximately 50% of the caseload was being set down for trial. It was recently announced, on June 3, 2008, that the Ministry's statistical data from the criminal courts will be available online. We strongly support this initiative. News Release, "Ontario Targets Criminal Justice Court Delays". Online: http://www.attorneygeneral.jus.gov.on.ca.

parties attend for "a conference between the prosecutor and the accused or counsel for the accused, to be presided over by the court." The rule-making power in s. 482 was amended at the same time to allow for rules governing these new "pre-hearing conferences held pursuant to s. 625.1." The court now had the power to hold a mandatory "conference", where settlement could be discussed and any other "matters as will promote a fair and expeditious hearing."

What is singular about these new powers is they did nothing more than get the parties together in a room with a judge, well in advance of setting a date for trial. The judge was given no power to decide anything. The success or failure of the "conference" depended entirely on how effective the judge was at cajoling and persuading the parties to be reasonable.

As already noted above, the "pre-hearing conference" pursuant to s. 625.1 has achieved its objective of settling many cases and reducing backlogged trial lists. Even if a case could not be settled, this mediating judge could often persuade the parties to narrow the issues for trial, thus reducing the amount of court time needed to try the case. Once again, the success or failure of this modest case management function depended on the persuasiveness of the judge-mediator and on the reasonableness of the parties. There was no power to actually make rulings on issues in dispute which would have the effect of narrowing the issues at trial. It all depended on the consent and goodwill of the parties.

This is why modern law reformers have consistently argued for pre-trial case management in a much more robust form, with real judicial powers to make rulings.[82] In Chapter 2, we discussed at some length how modern criminal proceedings have been transformed by three major events – the *Charter of Rights,* the evidence law "revolution" and the enactment of numerous complex statutory offences and procedures. The common feature of all three of these initiatives has been an explosion of pre-trial proceedings, most of which involve subtle nuanced legal tests and highly flexible remedies. It is the expansion of these pre-trial proceedings, more than anything else, that has lengthened and delayed the modern criminal trial. These preliminary motions require early resolution because they will often determine the whole complexion of the case: if the wiretaps are excluded, the Crown will usually reassess its case and if admitted, many of the accused will often negotiate guilty pleas; if disclosure and production issues remain outstanding, the parties will be unable to complete their preparation; if the case is

[82] *Supra* note 6.

subject to a s. 11(b) delay motion or a s. 7 abuse of process motion, it may never proceed to trial or counsel may at least hope it will not proceed to trial.

For all these reasons, early rulings on many of the pre-trial motions are essential to what we mean by "judicial case management", in its full sense. These early rulings will facilitate resolution discussions, will determine whether the case proceeds at all and will determine how long it is likely to take at trial. In short, the modern criminal case is not really being managed at its early stages unless there is a judge available with power to rule on the pre-trial motions.

C. Suggested Models for Reform

Almost 15 years ago, the Law Reform Commission of Canada (LRCC) published a working paper titled *Trial Within a Reasonable Time.* It contains an excellent review of the large body of American research and writing on the subject of judicial case management. The working paper concluded that "early filing and resolutions of motions (including motions regarding admissibility of evidence)...would result in reducing the time necessary for the trial itself. Indeed, in particular cases, it would eliminate the need for trial entirely." American research was cited to the effect that "early resolution of motions is an important aspect of effective case flow management" as it may "cause either the defence or the prosecution to reconsider whether to contest the trial." The working paper recommended a legislative amendment to the *Criminal Code* expressly allowing a pre-trial case management judge to rule on certain motions.[83]

The 1994 LRCC working paper did not stand alone on this issue of early case management powers. The previous year, a sweeping report had been issued in the United Kingdom by the Royal Commission on Criminal Justice (*The Runciman Report*). Like the LRCC working paper, the *Runciman Report* recommended that pre-trial judges should have the power to manage the case at its early stages by making binding rulings[84]:

> At the preparatory hearing, the defendant should be arraigned and thereafter all matters will be part of the trial. …
>
> We recommend that a judge at a preparatory hearing should be empowered to make a ruling on any question as to the admissibility of evidence and any other question of law relating to

[83] *Supra* note 54 at pp. 81-84.
[84] *Supra* note 32 at pp. 101-109.

> the case. This may entail a change in legislation, since it is by no means clear that a judge at a pre-trial review has such powers at present. …
>
> We…recommend that the trial judge should be bound by any orders or rulings made by the judge who presides over the preparatory hearing and that counsel for the defence and the prosecution should similarly be prohibited from seeking to reopen any matter that has been decided at that hearing.

The *Runciman Report* made these recommendations after concluding that the early form of judicial case management in the United Kingdom, known as "plea and directions hearings," had proved to be ineffective. Like their Canadian counterparts, the s. 625.1 "conference", the judge at these hearings had no real powers and depended on counsel's goodwill and cooperation.

The U.K. Parliament swiftly responded to the Runciman recommendations, enacting the *Criminal Procedure and Investigations Act 1996*. In particular, s. 40 empowers "a judge…at a pre-trial hearing" to make "a ruling as to any question as to the admissibility of evidence" and "any other question of law relating to the case." Section 40 allows the ruling to be re-visited at trial but only if there is "a material change of circumstances" or "in the interests of justice."[85]

No such legislation has ever been enacted in Canada. In spite of repeated amendments to the *Criminal Code* over the past 15 years that have made the criminal trial longer and more complex, this simple amendment to facilitate speedier and more efficient criminal trials has never captured the imagination of successive federal Ministers of Justice. We hope that this unfortunate imbalance in criminal justice law reform is about to change, given the commitment made in the Communiqué from last year's meeting of Federal Provincial and Territorial Ministers Responsible for Justice and Public Safety.[86]

Without such an amendment to the *Criminal Code*, the current state of the law is to the effect that almost all important pre-trial rulings are within the sole jurisdiction of the "trial

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[85] *Criminal Procedure and Investigations Act 1996* (UK), 1996, c. 25, s. 40. Also see "Binding Rulings" . Online: http://www.cps.gov.uk/legal/section14/chapter_b.html. The English Court of Appeal (Criminal Division) has strongly supported the changes to case management regimes in that country, stating "Active, hands on case management, both pre-trial and throughout the trial itself, is now regarded as an essential part of the judge's duty." See *R. v. Jisl et al.*, [2004] EWCA Crim 696. One wonders whether the relative speed of the trial of the U.K. counterparts to Canada's *Khawaja* case reflects the U.K.'s stronger early case management powers. See note 18, *supra.*

[86] *Supra* note 6.

judge".[87] As a result, early and effective judicial management of the case, in its full sense, can only be achieved if the "trial judge" is appointed at the early stages and remains seized with the case. Most criminal courts in Ontario do not operate in this fashion. In the Ontario Court, where most criminal cases are tried, the "trial judge" is generally not assigned until very late in the proceedings. In the Superior Court, practices vary between the regions. Some regions are able to assign the "trial judge" early but in many regions, including Toronto, the "trial judge" cannot be assigned until much later. We have been told, and we accept, that assigning all major cases to particular trial judges at an early stage in the proceedings would cause enormous scheduling difficulties.[88]

Given the predominant practice in Ontario criminal trial courts, namely, assigning the "trial judge" late in the proceedings, a very important function of pre-trial case management simply does not exist because of the limited powers of the pre-trial case management judge. The rule-making power in s. 482.1 of the *Criminal Code* and the "pre-hearing conference" power in s. 625.1 have been used to empower pre-trial judges to meet with counsel, attempt to resolve the case, determine what issues are in dispute and establish a schedule for the pre-trial motions and for the trial. These are all useful functions but this pre-trial judge has no power to decide or rule on the contentious issues between the parties and relies solely on persuasion, as explained above.

In the course of our Review, a broad consensus emerged amongst all the participants in favour of reforming the current system to ensure that a judge is available to take charge of the case at its early stages, with real powers to rule on pre-trial issues. The impotence of the current system is illustrated perfectly by a case like *R. v. S. (S.).*[89] The accused was a young offender charged with a criminal offence that was proceeding through pre-trial conferences in the Ontario

[87] Current legal doctrine, assigning sole jurisdiction over pre-trial motions to the "trial judge", derives from an old line of Supreme Court of Canada jurisprudence and from a number of *Criminal Code* provisions. See: *R .v. Chabot* (1980), 55. C.C.C. (2d) 385 (S.C.C.); *R. v. Mills* (1986), 26 C.C.C. (3d) 481 at 493-495, 516-520 and 565-567 (S.C.C.); *R. v. Rahey* (1987), 33 C.C.C. (3d) 289 at 298-299 and 318 (S.C.C.); *R. v. Litchfield* (1993), 86 C.C.C. (3d) 97 at 109-113 (S.C.C.). Also see: *Criminal Code*, ss. 278.3 (1), 645(5), 674, 675 and 676. This particular problem is discussed in greater detail in Michael Code, s*upra* note 6.

[88] A simple illustration of the problem is that any given jurisdiction will have a limited number of judges assigned to long complex criminal trials. If each of those judges becomes seized with such a case, from its earliest stages, their calendar would have to be kept free of any other potentially lengthy case. If such a judge became seized of two long complex cases, the trial of one of them would likely be delayed due to the judge's calendar. The system needs the flexibility to assign the trial to whichever judge on the long complex trial team is free at the moment when the case becomes trial ready. Pre-assigning all these cases to particular judges is a rigid practice, particularly in large jurisdictions, that will result in delay due to the judge's calendar, illness or some other cause of unavailability.

[89] (1999), 136 C.C.C. (3d) 477 (Ont. S.C.J.).

Court, which was the trial court. The judge and counsel were trying to narrow the issues for trial before setting a date. Defence counsel sought an admission from the Crown on a certain factual point. If the admission was not forthcoming, counsel would have to call lengthy evidence at trial and would require substantial disclosure from the Crown in relation to the factual point. When the Crown was unable to make the requested admission in a timely way, the pre-trial conference judge ordered disclosure of the relevant material so that the defence could then prepare for trial. The Crown brought *certiorari* in the Superior Court to quash the pre-trial conference judge's disclosure order on the basis that she had no jurisdiction to rule on a pre-trial disclosure motion. The Superior Court Judge, Watt J., as he then was, granted the Crown's motion to quash. He held that the *Stinchcombe* power to order disclosure had been given to "the trial judge" and that the statutory power of the "pre-hearing conference" judge under s. 625.1 was merely "to make arrangements for decisions," that is, to schedule the motion before some future "trial judge" who had not yet been assigned.

The decision of Watt J. in *S.(S.)* is undoubtedly correct, given the current state of the law, and it illustrates how there is really no case management power, in its full sense, in Ontario. In that case, a judge of the trial court was trying to manage the case by settling admissions and disclosure at the early stages so that the issues would be narrowed and the case would be ready for trial. These are elementary aspects of judicial case management and yet she had no authority to make these rulings without first appointing a "trial judge" and bringing on "the trial".

Although there was broad consensus in our Review that the system must be reformed, to permit early rulings on motions well in advance of the trial, there was no clear consensus on how best to achieve this result. Some favoured a system requiring early appointment of the trial judge, who would remain seized of the case both at its early pre-trial stages and at a subsequent trial. Others favoured a system that separates the pre-trial case management functions, assigning them to one judge, and then allowing the subsequent trial to be assigned to another judge. As noted above, the latter system permits much greater scheduling flexibility as the trial can be assigned to any judge who is available to start it in a timely way, once the pre-trial phase is complete. The former system is more rigid and runs some risk of trial delays being caused by the judge's calendar. On the other hand, certain judicial economies favour the former system as only one judge will ever have to learn the intricacies of a case and that judge will know with certainty whether any subsequent changes in the evidence require that an earlier ruling be re-visited. This

is not an insignificant advantage when dealing with particularly large complex cases, for example, a terrorism or criminal organization case, that will require significant time and commitment before a judge can master its facts and make rulings. Some members of the judiciary favour the economies of a one judge system and others favour the flexibility of a multiple judge system.

D. The Proposals Emerging from this Review

Our conclusion on this point is that there are good arguments in favour of both models and that there is no need to adopt a monolithic solution. The justice system is characterized by a great deal of local legal culture. The *Criminal Code* is a national statute but the administration of justice is a provincial head of power. There is a great deal of inter-provincial and intra-provincial diversity in the justice system. Some jurisdictions and some cases will work best with a one judge model and other jurisdictions and other cases will work more efficiently with a multiple judge model. It will depend to some extent on the number of long complex cases in the particular jurisdiction and on the available pool of judges with expertise in difficult criminal matters. We believe that the *Criminal Code* can and should be amended in a way that flexibly permits both models. What is important is that one model or the other must be adopted for each long complex case in each jurisdiction. The current system, where the "trial judge" is rarely appointed at the early stages and where the "pre-trial judge" has no real powers, is the worst of all possible worlds. It simply leaves the case in an unmanaged state until the trial approaches.

Our conclusions on this broad issue of empowering a judge to rule at the early pre-trial stages are summarized in three recommendations. We believe that there is a general consensus amongst the participants in support of these three recommendations because they incorporate both of the favoured models and because they allow flexibility.

Recommendation 9:

Administrative judges should appoint "the trial judge" at the very early stages of a long complex case, whenever this is advisable and feasible in a particular case in a particular jurisdiction. This judge will be seized with all aspects of the case, from beginning to end,

including pre-trial motions and the trial itself. The judge's calendar will have to be protected, to some extent, from the assignment of any other major cases so that he/she is available to start the trial and sit continuously, once the case is trial ready. The scheduling of the trial and the continuity of the trial must not be disrupted by the judge being drawn away to deal with other work on other cases. This Recommendation does not require any amendment to the *Criminal Code.*

Recommendation 10:

Where early assignment of "the trial judge" is not feasible or advisable in a particular long complex case in a particular jurisdiction, a "pre-trial case management judge" must be given the power to make rulings on pre-trial issues. This Recommendation requires a *Criminal Code* amendment. In particular, s. 645 must be amended to provide that a judge, other than the judge who eventually hears the evidence at trial, has the authority to rule on pre-trial motions. The amendment to s. 645 must make it clear that "the trial" commences once any judge of the trial court begins hearing and ruling on pre-trial motions and that "the trial" is continuous, even if the judge changes. In this way, rights of appeal from "the trial court" found in ss. 675 and 676 will extend to all rulings made by the pre-trial judge and the trial judge. Prerogative relief will also be prohibited by the existing case law restricting the availability of these writs whenever an appeal is provided for at the end of "the trial".

Recommendation 11:

The kinds of motions that would benefit from early rulings, well in advance of the trial, should be in the discretion of the court. Whether the case is proceeding under a one judge model (Recommendation 9) or a multiple judge model (Recommendation 10), no closed list is needed to define or limit the motions that may be ruled on at the early stages. The *Criminal Code* should not attempt to define such a list. The court's discretion in this regard should be guided by considerations such as whether an early ruling on the motion would allow the parties to prepare properly for trial, prevent adjournments of the trial, encourage resolution of the case prior to trial or completely eliminate the need for a trial. The kinds of motions that appear most likely to benefit from early rulings include the

following: disclosure motions; third party records motions; s. 11(b) *Charter* delay motions; wiretap admissibility motions; change of venue motions; in some cases, confessions motions, search and seizure motions, similar fact motions and other evidentiary rulings; and, finally, severance motions. Severance is placed at the end of this list because most pre-trial motions will be common to all co-accused and should be determined at one hearing by one judge, prior to any severance applications. Evidentiary motions will not always be appropriate for early pre-trial rulings because, in some cases, the evidence will evolve at trial and require re-consideration of a pre-trial ruling. Nevertheless, there may still be benefit in providing an early pre-trial ruling on, for example, a confession, a search or seizure or arrest, or a similar fact motion, subject as always to the discretion of the trial judge to revisit the ruling if there is a material change. The pre-trial judge should clearly state the factual bases for any ruling. Absent a material change, for example, where different evidence emerges at trial, the rulings of the pre-trial judge are binding and must be respected by the trial judge. The *Criminal Code* should also be amended to make it clear that any rulings at a first trial, that ends in severance or in a mistrial, remain binding at a subsequent trial absent some material change.

E. The Federal Provincial Territorial Working Group Proposals

We do not wish to leave this topic without commenting briefly on the paper "Proposals for Reform: Mega-Trials" that was prepared by the Federal, Provincial and Territorial Working Group on Criminal Procedure. The paper was presented to Ministers at their Winnipeg meeting last year and led to the Communiqué that has already been referred to above.[90]

Because this policy paper went to Ministers it would normally be confidential. We are grateful to the Deputy Attorney General for arranging a briefing on the paper and for obtaining consents from his colleagues allowing us to refer to the paper in our Report. The paper deals with a number of proposed reforms that we need not comment on but it contains significant proposals relating to judicial case management in long complex trials. This is a subject that we have analyzed and consulted on at considerable length over the past five months. The Working Group's proposals on this topic largely follow the recommendations made in 2004 by the

[90] *Supra* note 6.

Steering Committee on Justice Efficiencies and Access to the Criminal Justice System in its "Final Report on Mega-Trials".[91]

We generally support the Working Group's proposals on case management because they provide for a *Criminal Code* amendment that would allow the early appointment of a "management judge" in large complex cases. This judge, who would not be the "trial judge", would have power to rule on pre-trial motions. Accordingly, the proposals are largely harmonious with our Recommendations 10 and 11. Nor would these proposals necessarily preclude our Recommendation 9 in those jurisdictions and those cases where it is both feasible and appropriate to appoint a single "trial judge" at the early stages.

Where the Working Group's and the Justice Efficiencies Committee's proposal differs from ours is that it requires a formal application to the Chief Justice or Chief Judge, or his/her designate, based on certain statutory criteria, asking the court to find that the case is a "mega-trial." Only after this judicial determination has been made at a formal court proceeding would the case then be subject to "exceptional trial procedure." This "exceptional" procedure includes the appointment of a "management judge" who is empowered to rule on pre-trial motions without becoming seized with the trial.

We believe there are two shortcomings to this requirement of a special motion to declare a "mega-trial" before the case becomes eligible for "exceptional trial procedure." First, like too many other law reform initiatives over the past 20 years, it involves unnecessarily complex court procedures that simply slow cases down. We see no need for a formal judicialized motion and much prefer the English approach which simply legislates a broad power to rule on legal and evidentiary motions at pre-trial hearings.[92] Whether the power is exercised in a given case is left to the discretion of the judge, depending on the needs of the individual case. Any large case in the system will benefit from having a judge assigned at the early stages with the discretionary power to hear the pre-trial motions and issue rulings. Whether we call the case a "mega-trial," based on some complex statutory definition, matters not. This is simply basic judicial case management that could apply in any case. It should be a routine best practice and it need not become the subject of a special "mega-trial" motion leading to "exceptional" procedure. Under

[91] Online: http://www.justice.gc.ca/eng/esc-cde/mega.pdf This report is discussed in greater detail in Michael Code, *supra* note 6.
[92] *Supra* note 85.

our proposal, as under the U.K. statute, assigning a judge to begin ruling on pre-trial motions whenever necessary and appropriate would simply be part of the ordinary administrative powers of the Court. All that is needed is an amendment to s. 645 to make it clear that a judge hearing pre-trial motions need not go on to hear the trial.

The second reason why we disagree with the Working Group's proposal, related to the first, is that it is under-inclusive. It requires the ability to predict a "mega-trial" in advance and then bring on a motion seeking a declaration to that effect, based on the apparent characteristics of the case. The experience of the justice system does not accord with this limited view of the "mega-trial." In fact, many cases become "mega-trials" solely because of the way they are conducted by the parties.[93] A relatively straightforward homicide case can turn into a four or six year long nightmare because of the way the parties chose to litigate.[94] This is why all major cases need to be subjected to early judicial control and management, so as to *prevent* them from becoming "mega-trials".

In short, the problem with the Working Group's proposal is that it *adds* new complex procedures to the *Criminal Code* when what is needed is a simple amendment to *undo* the current rigidities. The problem lies fundamentally within s. 645, and the related Supreme Court of Canada case law, all of which require that pre-trial motions be heard by the "trial judge". If this restriction was removed and, in its place, the court had a simple discretion to assign a "trial judge" or a "pre-trial judge" with real powers, the system would have the flexibility it needs to manage all of its major cases efficiently. Our proposal, like the English legislation, is both simpler and more inclusive.

In conclusion on this point, we should reiterate that we support the substantive objective of the Working Group's proposals, namely, to empower the early case management judge and to remove the rigid requirement that he/she also be the trial judge. We simply disagree with the procedure that is being recommended in order to get to this result.

[93] The Honourable Justice Michael Moldaver, "Long Criminal Trials: Masters of a System They are Meant to Serve" (2006), 32 C.R. (6th) 316.
[94] A number of our four case studies illustrate this point.

Recommendation 12:

Federal Provincial Territorial Justice Ministers ought to adopt the "mega-trial" proposal of the Working Group on Criminal Procedure, to legislate real pre-trial case management powers, but ought to simply amend s. 645 in order to achieve this end. Section 40 of the *Criminal Procedure and Investigations Act 1996* (UK) is a useful model.

F. The Common Law Case Management Powers of the Trial Judge and the Need for Expertise

If the above recommendations are accepted, the case will be in the hands of a judge with power to make rulings at its early stages. In addition, "the trial" will have commenced in a formal sense, once any judge of the trial court starts hearing motions and issuing decisions.

This development has important consequences because at common law "the trial judge" has significant case management powers, both when hearing motions at the pre-trial stage and when hearing evidence at trial. All trial courts, whether statutory courts or superior courts, have the implied power to control their own process and ensure a fair trial. It is from this broad power that the common law developed an expansive list of remedial tools designed to ensure the fairness and effectiveness of trial processes.[95]

We wish to emphasize these common law powers because they are often forgotten. Furthermore, some judges seem reluctant to exercise them perhaps due to concern about appellate review. They include the following: requiring proper written notice of a motion to allow the court and opposing counsel time to prepare; requiring supporting materials for a motion including written legal argument and an offer of proof, so that its potential merits can be properly considered; summarily dismissing those motions that obviously lack merit so as not to waste court time; placing time limits on oral argument in order to encourage disciplined and focused advocacy; insisting that motions be argued on a written record, such as a preliminary inquiry transcript or witness statements, and without *viva voce* evidence, in those cases where credibility is not a proper issue on the motion; and directing the order of motions, deferring

[95] *R. v. Romanowicz* (1999), 138 C.C.C. (3d) 225 at 244-249 (Ont. C.A.); *Canadian Broadcasting Corp. v. A-G New Brunswick* (1996), 110 C.C.C. (3d) 193 at 208 (S.C.C.); *R. v. Jewitt* (1985), 21 C.C.C. (3d) 7 (S.C.C.); *U.S.A. v. Shulman* (2001), 152 C.C.C. (3d) 294 at 308-309 (S.C.C.); *R. v. Felderhof* (2003), 180 C.C.C. (3d) 498 at 517-520 (Ont. C.A.); *R. v. Church of Scientology of Toronto* (1986), 27 C.C.C. (3d) 193 (Ont. H.C.J.).

rulings on motions and even directing the order of evidence, in exceptional cases, all for the purpose of ensuring the efficient conduct of the trial.[96]

These common law powers are very effective tools of judicial case management because they encourage efficient, focused and well-prepared lawyering. The trial courts must utilize them where appropriate. For example, insisting on proper notices of motion, with supporting materials, forces counsel to prepare properly and ensure that an argument is tenable. It also allows the opposing party and the court to prepare for the motion. When the motion comes on for hearing, if it appears weak or fanciful, the court should ask counsel to state what legal and factual propositions would emerge at the end of a completely successful hearing. If those factual and legal propositions will not support the remedy sought, such as a stay or exclusion of evidence, then the motion should be summarily dismissed.

We appreciate that it requires real knowledge, skill and judgment in relation to complex areas of law, in order to properly exercise these case management powers. There is broad agreement amongst the participants in our Review that judges assigned to long complex criminal trials, especially at the pre-trial motions stage, need to possess expertise in criminal law, evidence law and criminal procedure. They must also be willing to become fully engaged in actively and proactively managing the case. This is the inevitable result of the dramatic changes to criminal procedure and evidence law noted in Chapter 2. The Ontario Chief Justice's Advisory Committee Report recognized this modern reality, stating:[97]

> In some cases, assigned judges have little experience in criminal law, particularly in complex prosecutions, invariably resulting in longer trials...Given the enhanced significance of judicial pre-trial conferences, it is essential that, where feasible, the judges assigned to conduct pre-trial conferences should be experienced, knowledgeable and interested in criminal law.

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[96] *R. v. Felderhof*, *supra* note 95 at pp. 526 and 537; *R. v. Kutynec* (1992), 70 C.C.C. (3d) 289 (Ont. C.A.); *R. v. Loveman* (1992), 71 C.C.C. (3d) 123 (Ont. C.A.); *R. v. Leduc* (2003), 176 C.C.C. (3d) 321 at pp. 343-349 (Ont. C.A.); *R. v. Pires and Lising*, *supra* note 5; *R. v. Grundy* (2008), 231 C.C.C. (3d) 26 (Ont. C.A.).

[97] *Supra* note 78 at paras. 47 and 176. The recent *Lamer Inquiry* into three miscarriages of justice in Newfoundland similarly noted the need for "criminal law experience and expertise" and recommended that "chief justices must be cautious in assigning judges to complex criminal trials." *The Lamer Commission of Inquiry Pertaining to the Cases of: Ronald Dalton, Gregory Parsons, Randy Druken* (Report) at 164.
Online: http://www.justice.gov.n/.ca/just/lamer/LamerReport.pdf

One judicial case management power that requires special mention is the power to control unduly prolix examinations and cross-examinations. The common law powers described above are rooted in the jurisdiction of trial courts to ensure a fair, efficient and effective process. Unduly long examinations and cross-examinations undermine all of these values, as well as being poor advocacy that does little to advance one's cause. The trial judge has clear authority at common law to control and prevent "repetitiousness".[98] The more difficult issue is whether a trial judge can impose time limits. It is clear that time limits can be imposed on legal argument.[99] The experience of the courts and the bar has generally been that time limits encourage better advocacy as long as they are reasonable. Every argument has its weak points and its strong points. Time limits force counsel to focus on the strong points. They also provide a built-in deterrent against repetition.

We believe that the same general principles apply to examinations and cross-examinations of witnesses. Every examination and cross-examination will have strong points and weak points and most counsel engage in some degree of repetition. As with time limits on legal argument, time limits on examinations and cross-examinations would encourage counsel to focus on the strong points and to avoid repetition. We note that a phenomenon has developed in some long complex trials in Ontario where counsel, either for the Crown or for the defence, examine and cross-examine witnesses for 10, 15 and 20 day periods. Aside from being appallingly bad advocacy, this can never be justified.

Any discussion of the topic of placing time limits on examination-in-chief or cross-examination must begin with the Ontario Court of Appeal's 1973 decision in *R. v. Bradbury*. The Court stated the following:[100]

> One complaint arose from the fact that after a protracted cross-examination of one of the investigating officers, which cross-examination was both exhaustive and exhausting, the trial Judge warned defence counsel that he would be allowed only a specified number of minutes to complete his cross-examination, and made it clear to him that he did not have unrestricted right to continue indefinitely.

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[98] *R. v. Lyttle* (2004), 180 C.C.C. (3d) 476 at 488 (S.C.C.).
[99] *R. v. Felderhof*, *supra* note 95 at p. 526 C.C.C.
[100] (1973), 14 C.C.C. (2d) 139 (Ont. C.A.). Also see: *R. v. Wallick* (1990), 69 Man. R. (2d) 310 (Man. C.A.); *R. v. Roulette* (1972), 7 C.C.C. (2d) 244 (Man. Q.B.).

> The right and indeed the responsibility of the trial Judge to control the proceedings before him to prevent conduct which may well be or become an abuse of the process of the Court is unquestioned. It must, however, be exercised with caution so as to leave unfettered the right of the defendant, through his counsel, to subject any witness's testimony to the test of cross-examination. The disallowance of questions ruled improper, as inviting the introduction of hearsay evidence, or as being irrelevant or for the protection of a witness from unwarranted harassment falls within the scope of the trial Judge's authority.
>
> We do not consider that it is allowable, in advance, to place any restriction on the length of time to be consumed by cross-examination. The rulings of the trial Judge should be made when questions are put or about to be put and should be confined to the propriety of the question or questions in issue. However, the transcript indicates that, despite the threats to terminate it, the cross-examination, in most instances, extended well past the announced limits and it is not apparent that any pertinent area was left unexplored by reason of any improper ruling on the part of the trial Judge. [Emphasis added]

One wonders whether the Court of Appeal would make the same categorical pronouncement today as set out in the underlined portion of the judgment above. In 1973, when *Bradbury* was decided, the common law trial management power was not as well-developed as it is today. As Rosenberg J.A. put it in *Felderhof*, some 30 years after *Bradbury* was decided, much more forceful trial management is a modern necessity because the criminal trial has changed so much:[101]

> Whatever may have been the case in the past, it is no longer possible to view the trial judge as little more than a referee who must sit passively while counsel call the case in any fashion they please. Until relatively recently a long trial lasted for one week, possibly two. Now, it is not unusual for trials to last for many months, if not for years. Early in the trial or in the course of a trial, counsel may make decisions that unduly lengthen the trial or lead to a proceeding that is almost unmanageable. It would undermine the administration of justice if a trial judge had no power to intervene at an appropriate time and, like this trial judge, after hearing submissions, make directions necessary to ensure that the trial proceeds in an orderly manner. I do not see this power as a limited one resting solely on the court's power to intervene to

[101] *Supra* note 95 at p. 518.

> prevent an abuse of its process. Rather, the power is founded on the court's inherent jurisdiction to control its own process. [Emphasis added]

At the time of *Bradbury* no member of the Court of Appeal would ever have imagined that lawyers would be allowed to examine or cross-examine a single witness for 10, 15 or 20 days. We think it likely, in today's changed legal context, that *Bradbury* should and will be revisited at some point.

In any event, what *Bradbury* specifically prohibits is placing an advance time limit on counsel's examination or cross-examination of a witness. It does not prohibit a trial judge from engaging counsel in a discussion as to how long they anticipate their examination lasting and then setting a reasonable but flexible target for counsel. If the witness proves difficult or evasive or long-winded, or if some new issue arises unexpectedly during the witness' evidence, the target can be adjusted.[102] We believe that most lawyers work well under this discipline. In the rare case, where counsel is unwilling or unable to comply with a flexible target, the Court of Appeal will have to determine whether this is a reasonable application of the modern trial management

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[102] We understand that a practice along these lines has developed in long complex cases in the United Kingdom. See: *The Runciman Report, supra* note 32 at pp. 121-2 and *Protocol for Control and Management of Heavy Fraud and Other Complex Cases, supra* note 64. The latter *Protocol* provides that the trial judge should establish "a clear target to aim at for the completion of the evidence of each witness." The *Protocol* was issued by the Lord Chief Justice in 2005 and it builds on an earlier decision of the Court of Appeal (Criminal Division), *R. v. Chaaban*, [2003] EWCA Crim 1012, where the Court stated:

> "We must also consider whether the case was somehow rushed, a submission which gives this court the opportunity to highlight a significant recent change, perhaps less heralded than it might have been, that nowadays, as part of his responsibility for managing the trial, the judge is expected to control the timetable and to manage the available time. Time is not unlimited. No one should assume that trials can continue to take as long or use up as much time as either or both sides may wish, or think, or assert, they need. The entitlement to a fair trial is not inconsistent with proper judicial control over the use of time. At the risk of stating the obvious, every trial which takes longer than it reasonably should is wasteful of limited resources. It also results in delays to justice in cases still waiting to be tried, adding to the tension and distress of victims, defendants, particularly those in custody awaiting trial, and witnesses. Most important of all it does nothing to assist the jury to reach a true verdict on the evidence.
>
> In principle, the trial judge should exercise firm control over the timetable, where necessary, making clear in advance and throughout the trial that the timetable will be subject to appropriate constraints. With such necessary evenhandedness and flexibility as the interests of justice require as the case unfolds, the judge is entitled to direct that the trial is expected to conclude by a specific date and to exercise his powers to see that it does." [Emphasis added]

For Canadian cases where limits or targets have been set see: *R. v. Smith*, [1996] O.J. No. 1980 (O.C.J.); *Pereira v. Pereira*, [1988] B.C.J. No. 1949 (B.C.C.A.); *R. v. Fabrikant* (1995), 97 C.C.C. (3d) 544 (Que.C.A.). Similar proposals concerning "time limits for examination and cross-examination of witnesses and for addresses of counsel" have been made in Australia. See *Report of the Working Group on Criminal Trial Procedure, supra,* note 32 at p. 61.

power. We note that present members of the Court of Appeal, when conducting public inquiries, have imposed these kinds of flexible targets on the length of counsel's examinations and they have worked well. We believe this to be the best tool available to control the extraordinary prolixity that has developed in some long complex trials.

In the next two chapters we will discuss administrative means to regulate and prevent inefficient and ineffective practices by counsel, for example, through Legal Aid processes, but this is a separate issue from the trial judge's powers.

Recommendation 13:

Expertise should be recognized as a necessity in the long complex criminal case. In particular, judges in these cases should be skilled and knowledgeable in the exercise of their diverse common law trial management powers and in the application of those powers to pre-trial motions. These powers are effective tools that encourage counsel to be well-prepared, focused and efficient and they should be utilized by the judiciary where appropriate. These powers are listed in the text above but there is no closed list. The powers all derive from the trial judge's broad jurisdiction to ensure that the trial is conducted fairly, efficiently and effectively. New exercises of this jurisdiction will be developed over time, in the traditional common law way, on the basis of changing times and new circumstances. Developing reasonable and flexible targets that counsel must aim at, for the completion of examination and cross-examination of witnesses, is one such exercise of this broad jurisdiction. The National Judicial Institute should continue and enhance its programs for training judges in these skills.

G. Judicial Case Management in the Ontario Court when the Case is Proceeding to Preliminary Inquiry

The above recommendations apply equally to the Ontario Court and the Superior Court. Regardless of which court the accused is being tried in, that trial court must have power to make early rulings on pre-trial motions and must exercise common law trial management powers throughout.

Most long complex cases in Ontario will not proceed immediately to a trial court but will proceed initially to a preliminary inquiry in the Ontario Court. Some separate discussion is required as to the role of the Ontario Court in the management of long complex cases that proceed to a preliminary inquiry prior to trial in the Superior Court.

We do not believe there is strong support for increasing the powers of Ontario Court judges to make rulings on pre-trial motions in these cases. For example, at present a preliminary inquiry judge has no jurisdiction to rule on disclosure disputes that may be delaying a case.[103] The present law to this effect may, at first blush, seem to be rigid and inefficient and in need of reform. However, a number of Ontario Court judges argued persuasively that it would be counter-productive to increase the amount of contentious litigation in their court, for example, by amending the law to allow disclosure rulings at a preliminary inquiry. They also submitted that there is value in encouraging the parties to resolve their disclosure disputes, after receiving some mediated advice at an Ontario Court judicial pre-trial. We agree with these submissions and do not recommend any expansion of the Court's jurisdiction in this area. Of course, we commend efforts by the Ontario Court judges to give guidance and direction in relation to disclosure issues. If the parties are unable to resolve a serious disclosure dispute while a case is proceeding to a preliminary inquiry in the Ontario Court, there is constant access to the Superior Court which can provide a *Charter* remedy.[104]

The legal framework for judicial case management in the Ontario Court, in a case proceeding to preliminary inquiry, currently has two distinct tracks. Assuming the statutory law remains unchanged in this area, as we recommend, we wish to comment briefly on how best to utilize that legal framework.

The first track is the traditional "pre-hearing conference", provided for since 1985 in s. 625.1. The Ontario Court exercises its power under this provision, prior to setting a date for a preliminary inquiry in any long complex case, by ordering the parties to a "conference" to discuss resolution of the case and any other matter that would "promote a fair and expeditious hearing". We were repeatedly advised by the participants that the Ontario Court judges have used these "pre-hearing conferences" with great success to either completely resolve long

[103] *R .v. Mills, supra* note 87 at pp. 492-493; *R. v. S (S), supra* note 89 at pp. 487-488 C.C.C.; *R. v. Girimonte, supra* note 61 at p. 43; *R. v. Seaboyer and Gayme* (1991), 66 C.C.C. (3d) 321 at 410-413 (S.C.C.).
[104] *R. v. Girimonte, supra* note 61; *R. v. Blencowe, supra* note 41; *R. v. Hallstone Products Ltd. et al, supra* note 40.

complex cases or to substantially narrow the issues. One judge, in a very large gang-related case that originally charged 71 accused with 275 criminal offences, used his mediation skills to resolve most of the charges against most accused with either guilty pleas, criminal organization peace bonds or withdrawals. The justice system was saved months, if not years, of court time as a result of these efforts, providing swift justice for the accused and the community and focusing the case narrowly and efficiently on the few remaining accused who wished to proceed to preliminary inquiry and trial. Another judge negotiated a complete waiver of the preliminary inquiry and eventual guilty pleas from all accused in a very serious organized crime case involving the shooting of an innocent bystander. He persuaded the parties that Crown counsel should present her case at the "conference" by way of PowerPoint, with video and audio exhibits accompanying the PowerPoint presentation. He then had the Crown repeat the performance in front of the accused. Once the accused appreciated the strength of the Crown's case, pleas quickly ensued, once again saving the justice system a very lengthy preliminary inquiry and trial and providing the victim with closure.

We cannot commend these kinds of efforts strongly enough. They represent the very best use of the 1985 amendment to the *Criminal Code* and they need to continue. We particularly wish to encourage the kind of creativity exhibited by the PowerPoint presentation. One unintended adverse consequence of the broad sweep of *Stinchcombe* disclosure is that the defence now receives so much material that they cannot always appreciate the core of the Crown's case. The old style of Crown brief, while much more limited than what *Stinchcombe* requires, at least had the advantage of clearly setting out the Crown's case. By using the s. 625.1 "conference" as a vehicle for the Crown to explain and outline their case, in this forceful and dramatic way, the Judge helped the parties to better understand the Crown's case.

It can be seen that we are of the view that the Ontario Court is using its s. 625.1 powers in a very skilful and effective manner in long complex cases that are scheduled to proceed to a preliminary inquiry. Those who advocate greater use of direct indictments in long complex cases ought to think carefully about the advantages gained from a period of time in the Ontario Court where the case is essentially whittled down and organized so that a much more focused trial ensues.

The second track of judicial case management in the Ontario Court, when a case is proceeding to preliminary inquiry, is the new powers found in ss. 536.4, 540(7) and 540(9). These are recent additions to the *Criminal Code*, enacted in 2002. They can only be exercised by the judge "before whom a preliminary inquiry is to be held" whereas the s. 625.1 "conference" is generally held before a judge who does not conduct the preliminary inquiry. These new amendments provide for a hearing "to identify the issues... to identify the witnesses to be heard at the inquiry... [and] any other matters that would promote a fair and expeditious hearing." This so-called "focus hearing" power in s. 536.4, if interpreted as advisory and not directive, would be entirely duplicative of the traditional s. 625.1 "conference". What potentially distinguishes the "focus hearing" from the "conference" is that the preliminary inquiry judge also possesses the powers found in s. 540(7) to dispense with certain *viva voce* witnesses and admit their evidence in hearsay form at the preliminary inquiry. Presumably, Parliament intended some relationship between the two provisions such that the judge would identify "the witnesses to be heard," when conducting the s. 536.4 "focus hearing", and would then be able to rule at the preliminary inquiry that the evidence of any other witnesses could potentially be admitted in hearsay form pursuant to s. 540(7), provided their evidence was "credible or trustworthy."

These are important case management powers that supplement the s. 625.1 "conference" because the preliminary inquiry judge has the power to make rulings that shorten and focus the preliminary inquiry, provided the new s. 536.4 and s. 540(7) powers are used in a complimentary way or s. 536.4 is interpreted as enacting a power to direct "the witnesses to be heard at the inquiry." The judge at the s. 625.1 "conference" has no such powers and can only try to persuade the parties to be reasonable.

The submissions that we received from all participants were generally to the effect that the new "focus hearing" powers are not being used effectively. Indeed, in some cases and some jurisdictions it appears that these powers are not being used at all. The directions given at the "focus hearing", if there are any directions given, are treated as little more than advice offered to the parties. They are not regarded as enforceable orders of the court. In other words, the new "focus hearing" adds little to what the "conference" already does. In those cases where it is being used, it simply becomes a duplicative burden on counsel and does not appear to advance the case.

We believe that "focus hearings" can be made to work effectively in one of two ways. First, the Ontario Court could develop a set of rules to govern the "focus hearing", pursuant to s. 482.1(1), and then "any direction made in accordance with a rule" would have the same force as a court order. The parties would be bound to "comply" with it as a result of s. 482.1(2). It is clear that s. 536.4 permits rules of court to be made under s. 482.1 but no rules have yet been developed.

The other way to give the "focus hearing" real teeth is to combine its powers with the s. 540(7) hearsay admissibility powers. Any ruling at the "focus hearing", to limit the number of *viva voce* witnesses, could also permit hearsay statements from others or could direct that certain witnesses should be examined before a special examiner with the judge available to make any necessary legal rulings. Any such ruling could be re-visited later at the preliminary inquiry if circumstances were to change in a material way. In order to actually exercise s. 540(7) powers at the s. 536.4 "focus hearing," the judge would have to arraign the accused and formally commence the preliminary inquiry, so as to trigger s. 540 which only applies when a judge is "holding a preliminary inquiry." Alternatively, the judge could simply indicate at the "focus hearing" what ruling he/she will likely be making pursuant to s. 540(7) at the future date when the preliminary inquiry commences, subject to any material change in circumstances.

We note that if the "focus hearing" were to become more effective as a case management tool, in one of the above two ways, then the Court could make a more accurate assessment of how many court days will be required to complete the preliminary inquiry. This would be a significant development because the Ontario Court presently has difficulty in allowing judges and courts to sit continuously, once a long complex case commences. We have discussed this problem previously, in Recommendation 9, and emphasize how important it is that these cases not be delayed because the judge has to be assigned to another court or another case.

We therefore recommend that the "focus hearing" judge should issue an enforceable order as to how many witnesses will testify at the preliminary inquiry. In addition, if Recommendation 13 is followed and flexible targets for the completion of each witness are set, the Court will be able to estimate the time required for the preliminary inquiry in a much more accurate manner. If this initial time estimate is reasonably accurate, there are less likely to be adjournments to complete the preliminary inquiry at some future date. We strongly encourage

the Ontario Court to use its powers to manage the preliminary inquiry. The Court has difficulty sitting continuously on long complex cases and adjournments result when insufficient time is scheduled. The Court must, therefore, use all of its case management tools effectively to schedule an accurate amount of time for completion of the inquiry without adjournment.

It can be seen that our recommendation is that the "focus hearing" power be used in a manner similar to what we have recommended for pre-trial motions in the trial court. Pre-trial judges need to be empowered to make binding rulings that go beyond s. 625.1 "conferences" with their mere powers of persuasion. Similarly, "focus hearing" judges need to be empowered to make binding orders. In this way, the pre-trial judge will actually manage and shape the trial and the focus hearing judge will actually manage and shape the preliminary inquiry. Neither proceeding should have to rely on individual counsel's good will and reasonableness.

We should note that the preliminary inquiry judge will have to be assigned to any long complex case at a relatively early stage, after the s. 625.1 "conference" is completed but before setting a date for the preliminary inquiry. It is important that the "focus hearing" become an effective and enforceable tool for determining the estimated length of the preliminary inquiry in the various ways set out above. If the "focus hearing" becomes an effective case management mechanism, then the date for the preliminary inquiry ought not to be set until after the assigned preliminary inquiry judge has conducted the "focus hearing". It is our understanding that the Ontario Court is able to appoint a judge to conduct a long complex preliminary inquiry at the early stages of the case and before setting a date for the preliminary inquiry.

Finally, we strongly commend the practice of "exit pre-trials" at the end of a preliminary inquiry. A judge of the Ontario Court who has heard much of the evidence is in a very good position to assist with resolution discussions. It should be the norm in long complex cases, after deciding to commit the accused for trial but before signing the committal order, that the judge offers to help the parties in trying to resolve the case. The Ontario Court should also alert the Superior Court administrative judge at this stage of the imminent arrival of a long complex case.

Recommendation 14:

We commend the practice of "pre-hearing conferences" in the Ontario Court, prior to setting a date for preliminary inquiry in long complex cases, in order to discuss resolution

of the case and to identify and narrow the issues. We particularly commend new and creative uses of these traditional s. 625.1 powers such as asking the Crown to present its case in summary form so that counsel and the accused are better informed as to the way in which the Crown will prove its case and the strength of the case, assuming it is a strong case. We similarly commend the practice of "exit pre-trials" at the conclusion of the preliminary inquiry, together with notice to the Superior Court of the imminent arrival of a long complex case.

Recommendation 15:

The s. 536.4 "focus hearing" needs to be made effective so that enforceable orders issue at the end of the hearing rather than mere advice and persuasion that duplicates the s. 625.1 "conference". This can be achieved in one of two ways:

(i) Rules of court, pursuant to s. 482.1, should be developed so that any "direction made in accordance with a rule" as to the "witnesses to be heard at the inquiry" will have the same force as a court order. The order could, of course, be re-visited if material circumstances change; or

(ii) Rulings pursuant to s. 540 (7) should be made in conjunction with the "focus hearing" so that any evidence from a witness other than the "witnesses to be heard at the inquiry" will be admitted in hearsay form, provided it is "credible or trustworthy."

We believe the former of these two solutions is more direct and it is simpler procedurally.

Recommendation 16:

Once the "focus hearing" has determined the number of witnesses to be called at the preliminary inquiry, in one of the two ways set out above, reasonable targets for the completion of each witness' evidence should be set, allowing the court to make a reasonably accurate estimate of the time required to complete the preliminary inquiry at one continuous sitting without adjournments.

H. Managing the Bail Hearing

It must always be remembered that judicial management of a case begins with the bail hearing. The importance of this step in the proceedings cannot be stressed enough. The police and Crown must advise the Ontario Court administrative judge, in advance, of any large complex bail hearing or hearings about to arrive in his/her court. The administrative judge must have sufficient notice to arrange appropriate court space, staff and time for the timely adjudication of a large number of new and difficult bail hearings, without disrupting the ordinary bail court. We are pleased to note that steps have been taken in some judicial centres to formalize these kinds of arrangements and we commend them for province-wide adoption.

The development of these notice protocols came about because of unhappy experiences in a number of large cases, where the court system could not accommodate a sudden influx of large numbers of long complex bail hearings. The result was badly delayed bail hearings for many accused. Proper notice not only allows the administrative judge time to arrange an appropriate court to accommodate the large case or cases for timely bail hearings, it also allows a Judge to be assigned to particularly difficult bail hearings, rather than a Justice of the Peace. Finally, we note that arranging a large additional court to hear one or more complex bail hearings, in a timely way and without disrupting the ordinary bail court, may well require some assistance from the Superior Court to make one of its courts available on short notice.

The Supreme Court of Canada recently held in *Charkaoui* that s. 9 of the *Charter* guarantees a right to speedy review of any detention, even in the non-criminal law context of the national security certificates used in that case to detain foreign nationals. The Court unanimously struck down these provisions because, *inter alia*, they did not provide for prompt bail hearings:[105]

> The lack of review for foreign nationals until 120 days after the reasonableness of the certificate has been judicially determined violates the guarantees against arbitrary detention in s. 9 of the *Charter*, a guarantee which encompasses the right to prompt review of detention under s. 10(c) of the *Charter*. Permanent residents named in certificates are entitled to an automatic review within 48 hours…And under the *Criminal Code*, a person who is arrested with or without a warrant is to be brought before a judge

[105] *Charkaoui et al v. Minister of Citizenship and Immigration*, *supra* note 73, para. 91.

> within 24 hours, or as soon as possible: s. 503(1). These provisions indicate the seriousness with which the deprivation of liberty is viewed, and offer guidance as to acceptable delays before this deprivation is reviewed. [Emphasis added]

In conclusion on this point, the police, the Crown, defence counsel and both levels of the trial courts must cooperate and coordinate in order to ensure that all accused in large complex cases have access to prompt bail hearings, as guaranteed by the *Charter*.

Recommendation 17:

The police and/or the Crown must notify the administrative judge in the Ontario Court, in advance of any large complex bail hearing or hearings about to arrive in the judge's jurisdiction. The administrative judge must then take steps to ensure that appropriate court space, staff and time are available to accommodate a reasonably prompt bail hearing for the case or cases, including assigning a judge where appropriate and conferring with the Superior Court where necessary concerning court space. These steps should be taken without disrupting the ordinary bail court or placing unreasonable demands on its capacity.

I. The Power to Require Admissions

1. Introduction

One discrete aspect of judicial case management that requires some separate discussion is the topic of admissions. In the context of long complex trials, admissions have the important effect of significantly shortening and focusing the trial. Accordingly, they have great benefit to the administration of justice, and to the cause of justice, because they ensure that the trier of fact does not lose sight of the important issues in a case.

A traditional aspect of case management, since the 1985 introduction of s. 625.1 "conferences", is for the judiciary to ask the parties to identify the real issues in the case. This process is necessary in part because the law of criminal pleadings, unlike the law of civil pleadings, does not require that the Crown plead facts in the charging documents. Nor is there

any requirement for defence pleadings that set out which of the facts pleaded are in dispute.[106] The new Ontario Superior Court Rules formalize this process of using the "pre-hearing conference" to identify the issues by requiring that the parties file comprehensive pre-trial conference forms. The Crown must set out the "evidentiary basis" for the charges in their form and the defence must then set out what parts of the Crown's case are in dispute. The parties must also address the subject of admissions of those parts of the case that are not in dispute, all with the assistance of a judge-mediator.[107]

2. Counsel's Ethical Duties

We believe that there are important ethical duties that are engaged in this process of negotiating admissions. As already noted above in Chapter 3, when discussing the *Stinchcombe* duty to resolve disclosure disputes, Crown and defence counsel are "officers of the court" and Crown counsel are also "ministers of justice". They both have duties that require allegiance to the search for justice and this includes the efficient administration of justice. If the Crown insists on calling every witness and proving every factual point, even though it is admitted, then the Crown is not acting responsibly. If the defence insists on the Crown proving every factual point, even though there is no reasonable basis to dispute it, then the defence is not acting responsibly. These attitudes unnecessarily lengthen trials, they impair the pursuit of justice and they are contrary to counsel's duties.

In the leading English authority on counsel's role as an "officer of the court", *Rondel v. Worsley*, Lord Upjohn indirectly addressed the issue of admissions when he said:[108]

> Counsel is equally under a duty with a view to the proper and speedy administration of justice to refuse to call witnesses, though his client may desire him to do so, if counsel believes that they will do nothing to advance his client's case or retard that of his opponent. So it is clear that counsel is in a very special position and owes a duty not merely to his client but to the true administration of justice. It is because his duty is to the court in the public interest that he must take this attitude.

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[106] *Supra* note 6 at pp. 447-448.
[107] *Supra* note 78.
[108] [1967] 3 All E.R. 993 (H.L.). The Supreme Court of Canada recently adopted *Rondel v. Worsley* as an authoritative description of counsel's "professional duties and ethical responsibilities" in *R. v. Lyttle*, *supra* note 98 at 493-494.

Justice Rosenberg made the same point in the leading Ontario Court of Appeal case, *R. v. Samra*, referring to the approach to counsel's duties in *Rondel v. Worsley* with approval:[109]

> There is an erroneous premise underlying the appellant's submissions in this case – that defence counsel is but a mouthpiece for his client. His argument must be that counsel is bound to make submissions no matter how foolish or ill-advised or contrary to established legal principle and doctrine, provided that is what the client desires.

In Proulx and Layton's leading text on *Ethics and Canadian Criminal Law*, the authors refer to the above principle in *Samra* and in *Rondel* as "the ethical rule against frivolous arguments."[110]

Perhaps the best exposition of counsel's duty to the court, and how it applies to the task of admissions, is Chief Justice Mason's judgment in the leading Australian case, *Gianarelli v. Wraith:*[111]

> The peculiar feature of counsel's responsibility is that he owes a duty to the court as well as to his client. His duty to his client is subject to his overriding duty to the court. In the performance of that overriding duty there is a strong element of public interest.
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> …
>
> It is not that a barrister's duty to the court creates such a conflict with his duty to his client that the dividing line between the two is unclear. The duty to the court is paramount and must be performed, even if the client gives instruction to the contrary. Rather it is that a barrister's duty to the court epitomizes the fact that the course of litigation depends on the exercise by counsel of an independent discretion or judgment in the conduct and management of a case in which he has an eye, not only to his client's success, but also to the speedy and efficient administration of justice. In selecting and limiting the number of witnesses to be called, in deciding what questions will be asked in cross-examination, what topics will be covered in address and what points of law will be raised, counsel exercises an independent judgment so that the time of the court is not taken up unnecessarily, notwithstanding that the client may wish to chase every rabbit down its burrow. [Emphasis added]

[109] (1998), 129 C.C.C. (3d) 144 at 158-159 (Ont. C.A.).
[110] M. Proulx and D. Layton, *Ethics and Canadian Criminal Law*, (Toronto: Irwin Law, 2001) at 36-37 and 119-149.
[111] (1988), 165 C.L.R. 543 at 556 (H.C. Aust).

Judges presiding at s. 625.1 "pre-hearing conferences" should do their best to enforce these ethical duties by requiring counsel on both sides to agree to reasonable admissions and to limit the witnesses to those that actually advance one party's case or retard the other party's case, as Lord Upjohn put it. As noted above, the s. 625.1 judge can exercise moral suasion with counsel but has no real power to make binding rulings.

Assuming our previous recommendations in this Chapter are accepted and pre-trial judges become empowered to rule, the question that has been raised in our Review is whether the presiding judge (either at trial or at the pre-trial motions) can require admissions. It has been submitted to us that there are failings on both sides of the bar in this area and we have seen evidence of it. There have been recent examples of long complex cases in Ontario where Crown counsel have called far too much evidence, when factual issues were already well established or were not in dispute. There have also been cases where defence counsel refused to make admissions and required the Crown to prove facts that could not reasonably be disputed. We believe this conduct to be irresponsible, and perhaps unprofessional, but the issue here is whether there are judicial remedies to require that an admission be made or that it be accepted.

These are two distinct issues and we approach them separately: first, can Crown counsel be required to *accept* an admission; second, can defence counsel, be required to *make* an admission.

3. Requiring the Crown to Accept Admissions Offered by the Defence

In the 19th century, there was doubt at common law as to whether the accused was competent to make an admission of fact at trial. As a result, the *Criminal Code* enacted a statutory admissions power in the 1892 *Code* and it has remained in essentially the same form in the modern *Criminal Code*. The provision is found in s. 655 and it simply states that the accused or counsel "may admit any fact alleged against him for the purpose of dispensing with proof thereof."[112]

Modern case law is to the effect that there is also a common law power to receive admissions of fact and that s. 655 is not exhaustive. For example, s. 655 makes no provision for

[112] The old common law and the legislative history are set out in *R. v. Castellani*, [1970] 4 C.C.C. 287 at 290-291 (S.C.C.).

admissions by the Crown of facts alleged by the defence and it is also unclear as to whether s. 655 could apply to a fact that must be proved on a *voir dire* such as the voluntariness of a statement. The modern common law now fills these gaps and supplements s. 655, for pragmatic trial efficiency reasons.[113]

The leading authority on s. 655, *R. v. Castellani*, states the simple proposition that the accused cannot frame admissions of fact for his own purposes but can only admit facts alleged by the Crown:[114]

> An accused cannot admit a fact alleged against him until the allegation has been made. When recourse is proposed to be had to [s. 655] it is for the Crown, not for the defence, to state the fact or facts which it alleges against the accused and of which it seeks admission. [Emphasis added]

Read literally, this passage suggests that no admission can be made pursuant to s. 655 unless the Crown formally alleges a fact and then turns to the defence and "seeks" its admission. This would give the Crown complete control over the admissions process.

Subsequent case law has not read *Castellani* in this literal fashion. Rather, it has been held that the Crown cannot "refuse acceptance [of an admission] where its purpose in doing so is to keep an issue alive artificially." These cases emphasize that the accused must "make all necessary admissions" related to the proposed evidence and must make the admission "fully and without ambiguity." But assuming the proffered admission fully covers the facts which the Crown's evidence seeks to prove, the admission must be accepted.[115]

The above line of authority gives the Court power to mediate the process of admissions, both by requiring that the defence frame any proposed admission in a manner that fully covers the facts alleged and by requiring that the Crown accept a properly framed admission. This view of s. 655 is consistent with the modern "trial management" power developed in the Court of Appeal's recent decision in *Felderhof.*[116] As discussed above in Section F of this Chapter, the

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[113] *R. v. Picariello* (1923), 39 C.C.C. 1 (Alta. C.A.), aff'd 39 C.C.C. 229 (S.C.C.); *R. v. Dietrich* (1970), 1 C.C.C. (2d) 49 (Ont. C.A.); *R. v. Park* (1981), 59 C.C.C. (2d) 385 (S.C.C.); *R. v. Fatima and Khan* (2004), Carswell Ont 8868 (Ont. S.C.J.).
[114] *Op. cit.*
[115] *R. v. Proctor* (1992), 69 C.C.C. (3d) 436 at 447 (Man. C.A.); *R. v. Mohammed,* [1997] B.C.J. No. 2133 (B.C.S.C.).
[116] *Supra* note 95 at pp. 518 and 526.

judge can use the trial management power to actively manage the conduct of the evidence, especially when counsel are not acting responsibly. This approach is also consistent with Dean Wigmore's robust view of the judge's common law power to seek admissions and to exclude superfluous evidence:[117]

> The doctrine of Judicial Admissions has long had a large future before it, if judges would but use it adequately … the judge could freely call upon counsel to state whether a fact is in good faith disputed, i.e., should *urge* admissions to be made, where it seems probable that the fact is not actually disputed. By this method, the presentation of evidence will be confined to those matters of fact alone which the parties do dispute.
>
> It is easy to see how large a mass of needless skirmishing can thereby be eliminated, how much time would be saved, and how much confusion of the jury would be avoided. And this would be attained by the mere application of an existing principle.
>
> …
>
> A fact that is judicially admitted *needs* no evidence from the party benefiting by the admission. But his evidence, if he chooses to offer it, *may* even be *excluded*; first, because it is now as immaterial to the issues as though the pleadings had marked it out of the controversy; next, because it may be superfluous and merely cumber the trial; and furthermore, because the added dramatic force which might sometimes be gained from the examination of a witness to the fact (a force, indeed, which the admission is often designed especially to obviate) is not a thing which the party can be said to be always entitled to.
>
> Nevertheless, a colorless admission by the opponent may sometimes have the effect of depriving the party of the legitimate *moral force of his evidence*; furthermore, a judicial admission may be cleverly made with grudging limitations or evasions or insinuations (especially in criminal cases), so as to be technically but not practically a waiver of proof. Hence, there should be no absolute rule on the subject; and the trial court's discretion should determine whether a particular admission is so plenary as to render the first party's evidence wholly needless under the circumstances. [Emphasis in the original]

We agree with Dean Wigmore's view of the law of admissions and note that it is consistent with the modern trend towards stronger judicial case management. Trial judges can

[117] J. H. Wigmore, *Evidence in Trials at Common Law*, Chad. Rev. (Boston, Little Brown and Co., 1981), Vol. IX, ss. 2591 and 2597 at pp. 824-825 and 851-852.

require the Crown to accept a properly framed admission of any facts which the Crown seeks to prove, simply by excluding the Crown's *viva voce* evidence on the basis that it is now immaterial or superfluous and will take up unnecessary court time.

We would only add the caution, as does Dean Wigmore, that there may be instances where the "dramatic force" of the *viva voce* evidence will be lost on the trier of fact, if the evidence goes in in the form of a dry admission. We are not referring to any prejudicial impact of the *viva voce* evidence, which is obviously not a legitimate reason to hear it, but to the trier's greater ability to remember the evidence and appreciate it, especially in a long trial, after hearing it from a live witness. This assessment should be left to the discretion of the court which will have to consider the importance of the evidence and the sufficiency of the admission.

Recommendation 18:

Counsel for the Crown and for the defence are both under ethical duties to make reasonable admissions of facts that are not legitimately in dispute. The court should encourage and mediate efforts to frame reasonable admissions. When the defence fully admits facts alleged by the Crown, the court has the power to require the Crown to accept a properly framed admission and to exclude evidence on that issue.

4. Requiring the Defence to Make Admissions of Facts not Legitimately in Dispute

A far more difficult question is whether the Court has power to require an admission of a fact that is readily provable. Furthermore, if counsel unreasonably refuses to admit an obviously provable fact, should the law provide a remedy?

We believe that there should be consequences for counsel who conduct trials in a manner that is contrary to the professional duties discussed above. At a minimum, their eligibility to act on Legal Aid certificates in future cases should be affected, assuming the case is publicly funded, because their conduct arguably contravenes the *Legal Aid Services Act.* This topic will be dealt with in Chapter 5. In addition, if their conduct rises to the level of professional misconduct it should be referred to the Law Society of Upper Canada. This topic will be dealt with in Chapter 6. Finally, in extreme cases of misconduct before the Court, common law sanctions are

available such as costs and contempt. This topic will also be dealt with in Chapter 6. However, none of these remedies will secure the desired admission of fact.

We are not aware of any power held by the court to force the defence to admit facts that should be admitted and that would be admitted by responsible counsel. There are a number of provisions in the *Canada Evidence Act* permitting proof of certain routine facts by way of affidavit (for example, ss. 26, 29, 30 and 31). Similarly, s. 657.1 of the *Criminal Code* permits proof of certain facts in property crime cases by way of affidavit and s. 657.3 permits proof of expert evidence by way of affidavit, subject to requiring cross-examination of the affiant where some live issue exists. Another expedited form of proof utilized in the *Criminal Code* is certificate evidence in drinking and driving cases (s. 258) and in counterfeiting cases (s. 461). These provisions are all in the nature of statutory hearsay exceptions that permit proof in written form in the place of proof by *viva voce* testimony. They are somewhat akin to forced admissions.

We believe that the Federal, Provincial and Territorial Justice Ministers ought to give consideration to expanding the list of facts that can be proved in affidavit form pursuant to s. 657.1. These would obviously not include central disputed aspects of the Crown's case. Our concern is only with the peripheral facts in a case that are generally proved by witnesses who simply rely on routine records when they testify. Continuity of exhibits is a classic example of an issue where *viva voce* evidence generally adds nothing to what is recorded on an exhibit tag. Proof that a firearms examiner tested a gun and found it to be operable, as set out in his/her report, is a similar issue where live testimony is generally an unnecessary expenditure of time and resources.[118]

We have been told that some counsel insist on proof of these kinds of facts, even when they have no legitimate issue to raise in cross-examination. Counsel should be required to demonstrate that some live issue exists to justify calling the witness and challenging his/her routine report or record. This is the way s. 657.1 works and the above kinds of issues could usefully be added to it.

[118] Indeed, in most of the examples that we have in mind, the document or record on which the witness relies is probably admissible itself for the truth of its contents, under the "past recollection recorded" hearsay exception. However, this does not help in terms of shortening the trial as the witness still has to testify to establish the criteria for the exception. This should all be done in an affidavit. See: *R. v. Fliss* (2002), 161 C.C.C. (3d) 225 at 244-245 (S.C.C.); *R. v. Meddoui* (1990), 61 C.C.C. (3d) 345 (Alta. C.A.).

Recommendation 19:

Federal, Provincial and Territorial Justice Ministers ought to instruct their officials to consider expanding s. 657.1 of the *Criminal Code* to include other routine factual issues that can properly be proved by way of affidavit, subject to a right to cross-examine the affiant where some live issue exists.

J. Long Complex Terrorism Cases

We wish to briefly mention the particular problems associated with judicial case management of large complex terrorism cases. This has become a very important species of modern "mega-trial" in Ontario.

The one significant feature of terrorism prosecutions, that distinguishes them from other long complex criminal trials, is the likelihood that "national security" evidence will become part of the case. This likelihood has been significantly increased by the Supreme Court of Canada's recent decision in *Charkaoui (No. 2)* which holds that CSIS has a duty to preserve interview notes and recordings in targeted national security investigations. As the Court notes, the investigative work of CSIS and the RCMP is increasingly "converging" in cases of domestic and international terrorism.[119] It is almost inevitable that in any major terrorism prosecution CSIS will be in possession of relevant information that will lead to disclosure requests and attempts to call the evidence at trial.[120]

As a result of this intersection between CSIS and RCMP investigations in the context of terrorism offences, national security privilege claims pursuant to s.38 of the *Evidence Act* are now a common feature of these cases. These privilege claims raise very difficult case management problems. In Chapter 2 we described the two key characteristics of national security privilege claims under the s. 38 legislative scheme: first, s. 38 removes the issue from the trial court and gives the Federal Court exclusive jurisdiction; second, it permits interlocutory appeals. The inevitable effect of these two features of the legislation is to delay the trial. Recent

[119] *Charkaoui v. Minister of Citizenship and Immigration et al* 2008 S.C.C. 38 at paras. 26-28 and 39-43.
[120] See, for example, the June 7, 2002 ruling on disclosure of CSIS materials in the "Air India" case. *R. v. Malik, Bagri and Reyat*, [2002] B.C.S.C. 861 (B.C.S.C.).

experience with this legislation in the *Ribic* and *Khawaja* cases is surely cause for real concern.[121]

The issue of whether the current s. 38 procedure is the most appropriate one for resolution of national security privilege claims is squarely before the *Air India Inquiry* which is currently being conducted by the Honourable John Major, Q.C., formerly of the Supreme Court of Canada.[122] We defer to the greater expertise of that Inquiry in relation to this issue. However, we do wish to note our concern, given our mandate to find solutions to the problems of delay and complexity in long criminal trials.

Bifurcation of criminal trials and interlocutory appeals in criminal proceedings have both been regarded as an anathema for a very long time because they fragment and delay the criminal trial process. The prerogative writs, which have this very same effect on criminal cases, are met with strong judicial resistance whenever some counsel attempts to use them in the middle of criminal proceedings. In *R. v. Duvivier*, a prerogative writ application brought in the Superior Court to quash a subpoena issued by the Provincial Court, the witness claimed that she was immune from having to testify due to spousal privilege. She wished to raise this issue before the Superior Court rather than in the Provincial Court where the case was proceeding. Doherty J.A., speaking for the Court of Appeal, extensively reviewed the case law condemning the use of prerogative writs because they bifurcate and delay criminal proceedings:[123]

> Those same cases identify the policy concerns which underline the predilection against resort to the superior court for relief during criminal proceedings. Such applications can result in delay, the fragmentation of the criminal process, the determination of issues based on an inadequate record, and the expenditure of judicial time and effort on issues which may not have arisen had the process been left to run its normal course. The effective and efficient operation of our criminal justice system is not served by interlocutory challenges to rulings made during the process or by applications for rulings concerning issues which it is anticipated will arise at some point in the process. A similar policy is evident in those cases which hold that interlocutory appeals are not available in criminal matters.

[121] See: *R. v. Ribic*, *supra* note 18; *R. v. Khawaja*, *supra* note 18.
[122] Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182, online http://www.majorcomm.ca
[123] *R. v. Duvivier* (1991), 64 C.C.C. (3d) 20 at 24 (Ont. C.A.).

The same reasoning applies to s. 38 privilege claims in the Federal Court, rather than in the trial court where the case is proceeding. We urge the Federal, Provincial and Territorial Justice Ministers to consider modifications to the s. 38 procedure that would not result in bifurcation, delays and interlocutory appeals in major terrorism prosecutions. For example, assuming that terrorism trials will be conducted in the Superior Court, it should be possible to return the s. 38 jurisdiction to the Superior Court, where it previously resided, but require the Chief Justice to appoint the trial judge in terrorism cases from amongst a small pool of specialized and trained judges who can hear s. 38 claims. This should answer the concerns about lack of specialized knowledge and training that apparently led to the legislative decision to transfer all s. 38 claims into the Federal Court.[124]

Recommendation 20:

The Federal, Provincial and Territorial Ministers of Justice should consider modifications to s. 38 *Evidence Act* procedure in order to eliminate the delays caused in major terrorism prosecutions by the bifurcation of the case and by interlocutory appeals.

[124] See the comments of Rutherford J. in *Ribic*, *supra* note 18 at para.49 where he stated that "the scheme is cumbersome, and in this case was destructive of the trial process..." Also see: J. Patrick-Justice, "Section 38 and the Open Courts Principle" (2005), 54 U.N.B.L.J. 218; K. Roach, "Ten Ways to Improve Anti-Terrorism Law" (2005), 51 C.L.Q. 102; H. Stewart, "Public Interest Immunity After Bill C-36" (2003), 47 C.L.Q. 248.

CHAPTER 5: Legal Aid

A. Introduction

Most long complex criminal trials in Ontario will be publicly funded through Legal Aid Ontario (LAO). There are certainly exceptions, where well-known long complex trials have been privately funded. However, it can be safely concluded, based on LAO records, that a substantial majority of these cases are granted certificates and are then subject to LAO's statutory mandate and its regulatory controls.

There are two ways in which LAO may have contributed to the phenomenon of overly long criminal trials in Ontario, based on the work carried out by our Review. First, the steady erosion of the LAO tariff over the past 20 years, at the same time as trials were inherently becoming longer and more complex, has led to the flight of many leading members of the bar from these cases. Second, LAO has not used its statutory powers to the extent that it could to regulate the quality, efficiency and effectiveness of the work being performed by counsel on these cases. These two issues are closely related, as we will explain below.

Historically, and generally speaking, the most serious criminal cases were conducted by the leading members of the defence bar. It is a truism that leading members of the bar are known for their good judgment and forensic skills and so they could generally be counted on to focus on the real issues in a case and to conduct the trial in a responsible and efficient manner. In this ideal version of the adversary system, there is little need for oversight of counsel's conduct of the case.

Today, many leading members of the defence bar do not take on long complex criminal trials. There are, of course, exceptions but, generally, we are told that conducting a six month or longer trial at the Legal Aid tariff is simply not feasible for lawyers with mature practices and substantial overhead costs. It is one thing for a leading lawyer to defend a single accused in a one or two week Legal Aid murder trial, as was common in the past, but quite another thing to devote half a year or more to a gang-related mega-trial with six co-accused who are all represented by other counsel, especially where the other counsel do not share your views as to how best to conduct the defence. The Legal Aid tariff remains set at levels that were fixed in the late 1980's, subject to increases significantly below the rate of inflation totalling about 15%, that were

granted in the last few years. In these circumstances, the latter kind of trial would represent a significant economic sacrifice for leading members of the bar whose normal fees to private clients are at rates several times higher than the Legal Aid rate.

As a result, we appear to be trapped in a vicious circle: the longer criminal trials become, the less likely it is that leading counsel will agree to conduct them on a Legal Aid certificate; and yet having leading counsel conduct the defence in these cases is one of the solutions to the overly long trial, as it is these counsel who are most likely to conduct the trial in an efficient and focused manner.

Of course, there are many excellent counsel who are still willing to take on the defence of these cases from time to time. These lawyers require little oversight and direction concerning the appropriate expenditure of public monies. But the modern reality is that there are also inexperienced lawyers, or experienced lawyers who lack good judgment, conducting these cases. These lawyers do require advice, supervision and direction as to how to responsibly and effectively conduct the defence so that trials are not unduly protracted. Furthermore, given that LAO is responsible for the expenditure of large amounts of public monies on these cases, it is important that LAO have appropriate processes in place to ensure that the money is being well spent. In other words, completely different management processes may be appropriate depending on the skills and judgment of the lawyer who is conducting the defence.

Our four case studies illustrate this point as in some of the cases excellent counsel conducted the defence whereas in other cases the accused was represented by counsel who exercised poor judgment. In some cases, with multiple co-accused, there was a mixture of both kinds of counsel. Similar variations existed on the Crown side of these cases, a topic we will address in Chapter 6.

The data provided to us by LAO paints an unsettling picture as to which lawyers are taking on major cases in Ontario. LAO administers a Big Case Management (BCM) program for particularly large cases that are likely to exceed the cost of an average certificate. In general terms, the BCM regime covers cases that cost LAO between $20,000 and $75,000. In all these cases the lawyer must submit a budget and is subject to a greater degree of oversight than in the case of an ordinary certificate. Cases costing over $75,000 are also subject to the BCM regime but have a further degree of oversight involving advice from a panel of experts known as the

Exceptions Committee. About 25% of the LAO criminal budget is spent on BCM cases. The most recent data, collected by LAO since January 2005, indicates that 697 BCM certificates were issued to lawyers with less than four years experience, 675 BCM certificates were issued to lawyers with between four and 10 years experience and 1134 BCM certificates were issued to lawyers with over 10 years experience. In other words, approximately 55% of these large cases are being conducted by lawyers with less than 10 years experience and, even more significantly, approximately 28% are being conducted by lawyers with less than four years experience.

At the same time as these junior lawyers are taking on major cases, LAO data shows that senior lawyers (those with more than 10 years experience) are increasingly leaving Legal Aid. Between 1999 and 2007 there was a 15% decline in the number of senior lawyers who took on *any* Legal Aid cases.

B. Available Models for Reform

We believe that there are two distinctly different ways of approaching this problem of inexperienced lawyers, or experienced lawyers with poor judgment, conducting long complex Legal Aid trials and leading counsel generally declining them.

The first approach is to develop positive means and incentives to ensure that highly qualified lawyers will take on these long complex cases. This approach involves paying higher fees and restricting eligibility. A short list of highly qualified lawyers could be developed and the tariff could be substantially increased for these lawyers when they agreed to act on a long complex trial. The second approach is to accept that more junior and less qualified lawyers will inevitably gravitate to these cases. Under this latter set of assumptions, it becomes necessary to impose tight management and oversight of counsel's conduct of the defence.

As between these two broad approaches, the participants in our Review strongly favoured the former. Senior members of the judiciary, senior Crown counsel and senior police officials forcefully submitted that it is much better to conduct a long complex trial with one of the leading members of the bar because they will generally focus on the real issues in the case, they will consistently prepare in advance and they will have no reason to unduly prolong the case. We were particularly struck by the position taken by senior police officers in charge of the investigations in these cases. They noted that they pay the price for all the unnecessarily long

trials because they become caught in court for months and years instead of being allowed to investigate new cases. Police chiefs told us that they will lose two senior detectives for as long as a year, once a major homicide trial begins.

In short, there is a broad consensus that it is worthwhile to invest in a strong and capable defence. We agree with this view. It makes sense to pay the best lawyers appropriately because the return on the investment is a shorter trial that saves costs in all parts of the justice system. We do not believe that there is a sound fiscal argument for paying the defence at uneconomical rates as it often contributes to overly long trials. A poor quality lawyer being paid inadequately to conduct an unduly long trial does not save money for the justice system.

Not only was there broad support for the first approach to reform in this area – paying higher fees and restricting counsel eligibility – but there were also concerns expressed about the latter approach – placing strict controls and oversight on the conduct of the defence. There is no doubt that the second approach would be a challenge for LAO and would require significant increases in and changes to its administrative capacity. Nevertheless, we believe that improvements can be made in the way that LAO oversees and manages the budget for long complex trials. These improvements cannot be made quickly or on a broad basis, given LAO's current administrative capacity, and so implementation of our recommendations in this second area will have to be slow and incremental.

We intend to make recommendations in relation to both approaches to reform. However, we wish to be clear that the former approach should be the higher priority as it is simpler and can be implemented much more quickly and fully than the reforms we suggest under the latter approach. We also wish to caution that the two approaches may be somewhat inconsistent. If we reform the system in the first way, by paying higher fees to a short list of highly qualified counsel, the need for the latter approach becomes less pressing. Indeed, it could become a disincentive to leading counsel if they knew that their conduct of the defence was to be subject to a complex, bureaucratic system of oversight and prior approvals. The substantial new investment in LAO infrastructure and administrative capacity, under the second approach to reform, will be a major undertaking and the government should only invest in it after making every effort to pursue the first approach. A different and less costly form of oversight would be appropriate under the first approach to reform.

It would be a sad admission of defeat if the government was to acknowledge that it can never succeed in getting the leading counsel in Ontario to return to the practice of an earlier era, where these counsel generally took on the defence of the most serious and complex cases. Accordingly, we turn first to our favoured approach.

C. The First Approach to Reform: Paying Higher Fees to a Short List of Highly Qualified Counsel

Our proposals concerning the first approach are simply an attempt to attract leading members of the bar back into the Legal Aid fold on long complex trials. We propose limiting eligibility for Legal Aid funding on these cases to a short list of highly qualified lawyers and we propose paying them enhanced fees so that it is economical for them to take on the defence in such a case.

The background to these proposals requires an understanding of the history of the Legal Aid tariff in Ontario. That history, beginning in 1967, has been succinctly summarized by Professors Zemans and Stribopoulos as follows:[125]

> Although relatively modest, the compensation provided under OLAP's certificate system was perceived as fair [in the early years of the Legal Aid Plan]. It proved sufficient to attract experienced lawyers to legal aid matters. This was especially true in criminal cases, where some of the province's most experienced and respected criminal lawyers routinely acted in cases funded by legal aid. Although no one realized it at the time, the 1970's and 1980's would come to mark the "Golden Years" for legal aid in the Province of Ontario.
>
> The turning point came with the onset of a recession in the early 1990's. The economic downturn was severe and by the middle of the decade the province was running an $11 billion budget deficit. In 1994, faced with rising legal aid costs, which had more than quadrupled from $75 million to $350 million over the preceding ten years, the provincial government capped its contribution to legal aid. It committed to provide the Law Society of Upper Canada with fixed amounts of funding, on a decreasing basis, for a

[125] F. Zemans and J. Stribopoulos, "Peer Review in Canada: Results from a Promising Experiment" (2008) 46 O.H.L.J. forthcoming in the 4th issue. Also see: M.L. Friedland, "Governance of Legal Aid Schemes" in *Report of the Ontario Legal Aid Review: A Blueprint for Publicly Funded Legal Services* (Toronto: Ontario Legal Aid Review, 1997) (chair: J.D. McCamus), at pp. 1027-1028; R. Lawson, "The Ontario Legal Aid Plan in the 90's" (1998), 16 Windsor Y. B. Access Just. 252.

> four-year period. The federal government did the same. This led to severe cutbacks, with OLAP reducing the types of legal matters that it would agree to fund, reducing the number of hours that lawyers would be compensated on certain types of cases and reducing the hourly rate that lawyers could charge for legal aid services. The results were dramatic. The number of legal aid certificates issued [for both criminal and civil cases] was reduced from 231,383 in 1991/1992 to 80,000 in 1996/1997. At the same time, as one would expect given the extent of the cutbacks, there was a drastic increase in the number of "self-represented" accused persons appearing in the province's criminal courts.
>
> Not surprisingly, these changes were extraordinarily unpopular with criminal defence lawyers, most of whom had historically accepted at least some legal aid work. The cutbacks led to a crisis of confidence, with many criminal lawyers deciding to simply stop accepting legal aid. In some jurisdictions these efforts were more organized, with all lawyers in the jurisdiction taking job action and collectively withdrawing their services from legally aided clients.

In some ways, the problems of the long complex criminal trial today are a lingering by-product of the Legal Aid crisis of the 1990's. The tariff simply never recovered and, as a result, the profile of the lawyers conducting these cases has changed.

The latest data indicate that 107,300 Legal Aid certificates were issued in the last fiscal year (2007/08), including about 65,000 criminal certificates. This is less than half the number of certificates issued in 1991/92, as set out above. LAO's total budget for 2008/09 will be approximately $355 million, only slightly above the levels it had reached prior to the crisis in the early and mid-1990's. The federal government funding that was lost in the 1990's has never been restored. Federal contributions now represent about 15% of LAO's total budget. As a result, LAO has become substantially dependent on the provincial government and the Law Foundation for its funding. In fact, provincial government contributions have increased while federal contributions have decreased. The net effect is described in Professor Trebilcock's recent Report:[126]

> Crucially, on a per capita basis funding for legal aid in Ontario has declined by 9 per cent in real (inflation-adjusted) terms from 1996

[126] M. Trebilcock, *Report of the Legal Aid Review 2008* at p.73. Online: http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/

> to 2006 (from $30.76 to $27.77). In addition...the hourly tariff chargeable under legal aid certificates, has been increased only modestly over the past decade and is now seriously out of line with any relevant market reference points and with cost of living indices over a longer time period. This has led to a significant decline – 16 per cent between 1999-00 and 2006-07 – in the number of lawyers participating in the certificate system, and a staggering 29 per cent fewer family lawyers.

Most importantly, for purposes of the present discussion, the level at which the tariff is presently set does not allow leading lawyers with mature practices to take on the defence of a long complex case. The current tariff rate for such a lawyer, assuming 10 years at the bar, is $97 per hour.[127] Conducting a short one or two day trial or appeal at these rates is manageable but taking on a six month trial would likely result in a loss, or certainly no gain, for most of our leading counsel who carry substantial overhead costs.

Over 20 years ago, in 1987, the tariff for senior lawyers was $84 per hour. The $13 increase over that period of time is approximately 15%. It is substantially less than the rate of inflation over the same period.[128] Professor Trebilcock describes the impact of this erosion of the Legal Aid tariff in the following terms, which we would echo based on what we observed in our consultations:[129]

> The anger within the private bar at what they regard as grossly inadequate hourly rates for services provided by members of the private bar under certificates issued by LAO was palpable, and the sense of alienation from the legal aid system ubiquitous. They are not only outspoken in exercising voice, but more to the point are voting with their feet in exiting the system in increasing numbers. On the criteria of exit, voice and loyalty, the certificate system is in tenuous condition. The diminishing commitment by the private bar to the provision of legal aid services poses a fundamental challenge to the sustainability of the legal aid system as we have known it. This issue is one that requires urgent and immediate attention.

[127] *Ibid* at p.116. For a lawyer with less than four years experience, the tariff is $77 per hour and for a lawyer with four to 10 years experience the rate is $87 per hour. The Legal Aid tariff is set by the Lieutenant Governor in Council by regulation.
[128] *Op. cit.* at pp. 136-140. The Consumer Price Index increased by over 13% between 2001 and 2007 alone so the erosion of the tariff since 1987 has been substantial.
[129] *Supra* note 126 at p.115.

We note that the palpable "anger within the private bar" described by Professor Trebilcock is not merely a function of the economic sacrifices that Legal Aid work entails. Rather, it is based on a sense of injustice due to the fact that the federal and provincial governments have substantially increased the salaries of judges, Crown prosecutors and police officers during the same period. The defence bar perceives, with some justification, that they have been singled out for inequitable treatment among the various justice system participants.

It is also worth noting that the federal government's now longstanding failure to restore its historic levels of funding to Legal Aid reflects an anomaly in Canadian constitutional arrangements. As set out in Chapter 2, it is the federal government that has been substantially responsible for many of the changes to the criminal justice system that have led directly to increasingly long and complex trials. The enactment of the *Charter of Rights* and the continuous stream of complex *Criminal Code* and *Evidence Act* amendments are all exercises of federal power. It only seems fair that the cost implications of federal initiatives should be the subject of appropriate federal funding. Given that the administration of justice is a provincial head of power, the federal government has been allowed to cause longer and more complex trials without having to pay for the associated increases in costs. Indeed, federal contributions have declined during the same period that costs have increased. If the federal government was to restore its Legal Aid funding to previous levels, our proposals in this section would be much more feasible for the provincial government.[130]

We were greatly assisted in our work on this subject by materials provided to us by the Legal Services Society of British Columbia. We also had discussions with officials from that Society and with senior lawyers in that province. The model we propose is substantially based on the one that we understand to be working reasonably well in B.C.

[130] The financial calculations are very complicated concerning historic levels of federal contributions to criminal Legal Aid budgets. This is because Legal Aid budgets cover family law, criminal law, youth justice, immigration and refugee matters. Federal contributions to each of these areas have varied over time and it is difficult to isolate criminal Legal Aid contributions at any particular point in time. Nevertheless, the general picture is reasonably clear. The briefing that we received was as follows: starting in 1972, the federal government contributed approximately 50% to national criminal legal aid budgets, in effect, dividing the costs equally with the provinces; this regime continued for almost 20 years until 1990 when funding levels were frozen; in 1995 and 1997 there were reductions in funding as a result of federal program reviews; more recently, there have been some increases in federal contributions; the net effect is that the federal government now contributes approximately 30% to national criminal Legal Aid budgets.

It is our understanding that the ordinary tariff rates in B.C., as in Ontario, have three tiers that are based on experience. The rates for the three tiers in B.C. are $84 per hour for the least experienced, $88 per hour for the middle level of experience and $92 per hour for the most experienced.[131] In other words, the rates are comparable to Ontario's, being slightly higher at the lowest tier, almost the same at the middle tier, and slightly lower at the top tier.

Where the B.C. model differs from Ontario is that it provides a completely separate scale of fees for particularly complex cases, known as "enhanced fee cases". The tariff is $125 per hour for these cases, the eligibility criteria are much stricter and a panel of three senior members of the bar must determine that the case is of sufficient length and complexity that it merits classification as an "enhanced fee case".[132]

Finally, there is a further separate scale of fees in B.C. for "exceptional matters". These are cases where either the court has made what is known as a *Fisher* order or where the federal Department of Justice or provincial Ministry of the Attorney General and/or the Legal Services Society have negotiated a consent *Fisher* order due to the extraordinary length and complexity of the case. There is a Memorandum of Understanding between the Legal Services Society and the government concerning funding and administration of these matters.[133] The level at which fees are set varies, and it is confidential in each case, but we are advised that the rate is significantly higher than the "enhanced fee case" rate of $125 per hour. We are also advised that the counsel eligible for these "exceptional" fees are a very short list of the most able lawyers. Finally, we are advised that leading members of the bar in B.C. agree to act on these cases.

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[131] British Columbia Legal Services Society, "Fact Sheet on Case Management", May 12, 2008. Online: www.lss.bc.ca

[132] *Ibid.*

[133] *Op. Cit.* A *Fisher* order refers to a case like *R. v. Fisher*, [1997] S. J. No. 530 (Q.B.), which is so "unique" that a fair trial can only be obtained by the appointment of a particular counsel and where that counsel can only act if fees are paid at a level substantially above the Legal Aid rate. See: *R. v. Peterman* (2004), 185 CCC(3d) 352 (Ont. C.A.); *AG Quebec v. C(R)* (2003), 13 C. R. (6th) 1 (Que.C.A.); *R. v. Cai* (2002), 170 CCC (3d) 1 (Alta.C.A.); *R. v. Ho* (2003), 17 C. R. (6th) 223 (BCCA). The "Air India" trial is an example of one of these "exceptional matters" where a consent *Fisher* order was negotiated. The order was administered by former Chief Justice McEachern who had to approve any substantial work by counsel. Senior Crown counsel, Robert Wright, Q.C., advises that admissions made by defence counsel in the case reduced a list of 883 potential Crown witnesses to 85 witnesses and reduced a three to four year trial to about 150 court days. See Michael Code, note 6 at p.460. A more recent example of consent *Fisher* orders can be found in the Federal Court security certificate cases. These court orders are sealed but it is well known in the bar that the federal Department of Justice, the Federal Court and the special advocates have agreed to fees at substantially enhanced rates, given the complexity of these cases and the seniority of the lawyers involved.

It can be seen that the B.C. approach is to increase the scale of fees, as the length and complexity of the case increases, but also to restrict eligibility as the scale of fees increases. We believe this to be a common sense approach: the longer and more difficult the case, the more it requires the attention of the most able counsel; at the same time, these counsel should be remunerated at a higher scale of fees, just as they are in the marketplace, to compensate them for leaving their private practices for an extended period of time while still having to cover their overhead and make some profit. The fact that the system appears to be working in B.C., where leading counsel do take on these long complex cases, is the best proof of a well designed system. It may also be worth noting that a number of very significant mega-trials in B.C. have proceeded successfully to a verdict on the merits.

Recommendation 21:

Legal Aid Ontario and the Ministry of the Attorney General should develop a new tariff that provides for "enhanced fees" and for "exceptional fees" as the anticipated length and complexity of the case increases. The eligibility criteria should be progressively more restrictive at each of these higher levels so that only the most able counsel are eligible. A committee of LAO officials, senior lawyers and retired judges should set the lists of eligible counsel, after conducting thorough due diligence. The eligibility factors should include both experience and qualitative criteria such as those set out in Recommendation 25.

D. The Second Approach to Reform: Enhanced Oversight of the Budget for Long Complex Cases

1. The Statutory Scheme

The second set of reforms that we recommend all relate to the need to enhance LAO's regulatory control over the quality, efficiency and effectiveness of the work being performed by counsel on these long complex cases.

The *Legal Aid Services Act 1998* established LAO as an arms-length statutory corporation, responsible for providing legal aid services to the public.[134] The predecessor

[134] S. O. 1998, c. 26

legislation had given these responsibilities to the Law Society of Upper Canada. The first provision of the new statute is critically important, stating the following:

> 1. The purpose of this Act is to promote access to justice throughout Ontario for low-income individuals by means of,
>
> a) providing consistently high quality legal aid services in a cost-effective and efficient manner to low-income individuals throughout Ontario.

The statute returns to these same themes later on, creating a mandatory duty to "ensure" that such quality of services is being provided:

> 92.(1) The Corporation shall establish a quality assurance program to ensure that it is providing high quality legal aid services in a cost-effective and efficient manner.

Finally, LAO is given a broad regulation-making power under s.97(1), subject to "the approval of the Lieutenant Governor in Council". The regulations cover, *inter alia*, "the establishment of panels of lawyers" entitled to receive certificates, "investigating and resolving complaints made against lawyers", "governing the administration, cancellation, amendment and discharge of certificates" and "any matter necessary or advisable to carry out the purposes of this Act." Pursuant to this broad power, Ontario Regulation 106/99 was passed. Sections 31 and 32 of the regulation give the President of LAO power to remove a lawyer from the panel of eligible lawyers where there is "reasonable cause" to believe the lawyer does not "meet applicable standards, including standards under the Corporation's quality assurance program."

The other regulation that is relevant to our Review is Ontario Regulation 107/99, which establishes the "Big Case Management" program. The regulation provides for a "case management meeting" between counsel and the area director in large and costly cases. The purpose of the meeting is to set a budget. Most importantly, for our purposes, are the following two provisions in s.5:

> (6) The budget shall,
>
> a) list the steps in the proceeding that a reasonable applicant of modest means would authorize under a private retainer,

> if advised of the available options, the potential results and the costs involved; and
>
> b) specify an amount of money that represents the anticipated total fees and disbursements for those steps.
> …
>
> (12) The accounts for services provided under a certificate for the proceeding shall be settled in accordance with the Schedules and the budget.

The above statutory framework undoubtedly requires that lawyers working under Legal Aid certificates are expected to provide "high quality", "cost-effective" and "efficient" legal services. Furthermore, LAO is under a mandatory statutory duty to "ensure" that this quality of service is being provided. If lawyers fail to meet "quality assurance standards", their eligibility to be on the panel in future cases can be taken away. Finally, "the budget" for long complex cases must be limited to only "those steps" that a "reasonable" client of "modest means" would authorize under a private retainer and any account submitted must be settled in accordance with "the budget".

We believe that certain long complex trials in Ontario are not being conducted in accordance with this statutory scheme and that LAO is not enforcing it in an effective way. A number of the cases found in the Ontario Court of Appeal's jurisprudence, and amongst our four case studies, were not conducted in a "high quality", "cost effective" or "efficient" manner. There must be consequences when this happens and yet there are none due to certain rigidities in the way that ss.31 and 32 of Ontario Regulation 106/99 are drafted. Furthermore, LAO is not presently applying Ontario Regulation 107/99. The budget is set simply as a global amount for preparation of the case rather than an amount "for those steps" that the "reasonable" client of "modest means" would authorize. In short, there is no line item budgeting, accountability or enforcement.

Accordingly, we believe there is considerable room for improvement in terms of LAO's oversight and management of these long complex cases.

2. The Independence of the Bar

Any efforts to impose greater oversight and management as to the conduct of the defence must be sensitive to the independence of the defence bar. We have already discussed the importance of the independence of the police and the Crown, within their proper spheres, and have asserted that these are constitutional principles. There is no doubt that the same is true of the independence of the defence bar.

Dean Monahan has recently carried out a comprehensive study of this topic. He points out that "the independence of the bar" is a term that is susceptible to two distinct meanings:[135]

> Although the term "independence of the Bar" is frequently referred to in judicial opinions and legal commentary, its meaning varies with the context in which it appears. In considering the constitutional sources for the concept, it is useful to distinguish between two different senses in which the term "independence of the Bar" is often utilized.
>
> On one narrower interpretation, the "independence of the Bar" is used to refer to the freedom of individual lawyers to give advice to their clients or to act on their clients' behalf in a way counsel believes is justified by the objective situation, rather than having their advice tempered by matters that counsel does not regard as a proper consideration. Thus, this first use of the concept of independence refers to the lawyer's ability to provide effective representation of clients in litigious as well as non-litigious matters without improper external pressure.
>
> It should be recognized that a lawyer's independence can be compromised not only by improper external pressures brought to bear by government or others, but also by a failure of the lawyer to take a sufficiently independent stance in regard to his or her client's own interest.
> …
>
> There is, however a second and somewhat broader sense in which the term "independence of the Bar" is sometimes employed. This broader view refers to the independence of the profession as a whole and its status as a self-governing profession.

[135] Patrick Monahan, "The Independence of the Bar as a Constitutional Principle in Canada", in *In the Public Interest* (Toronto: Irwin Law, 2007) at 118-120.

It is the first meaning of independence that concerns us in this Review, namely, "the lawyer's ability to provide effective representation of clients...without improper external pressure."

The independence of the bar in this first sense was perhaps best described by Justice McIntyre in *Andrews v. Law Society of British Columbia* where he stated:[136]

> It is incontestable that the legal profession plays a very significant – in fact, a fundamentally important – role in the administration of justice, both in the criminal and the civil law...I would observe that in the absence of an independent legal profession, skilled and qualified to play its part in the administration of justice and the judicial process, the whole legal system would be in a parlous state. In the performance of what may be called his private function, that is, in advising on legal matters and in representing clients before the courts and other tribunals, the lawyer is accorded great powers not permitted to other professionals...By any standard, these powers and duties are vital to the maintenance of order in our society and the due administration of the law in the interest of the whole community.

Justice McIntyre stated that independence is intended to ensure that counsel is "skilled and qualified to play its part". More recently, Justice Binnie elaborated on the same point in *R. v. Neal*:[137]

> Unless a litigant is assured of the undivided loyalty of the lawyer, neither the public nor the litigant will have confidence that the legal system, which may appear to them to be a hostile and hideously complicated environment, is a reliable and trustworthy means of resolving their disputes and controversies...The value of an independent bar is diminished unless the lawyer is free from conflicting interests. Loyalty, in that sense, promotes effective representation, on which the problem-solving capability of an adversarial system rests.

Thus skill, loyalty, absence of conflicting interests and effectiveness are all hallmarks of the independent lawyer. Indeed, the requirement that counsel provide effective assistance has itself become a constitutional principle because it is so important to the correct working of the

[136] [1989] 1 SCR 143 at 187-188.
[137] (2002), 168 CCC (3d) 321 at 330-331 (SCC).

justice system. As Doherty J.A. put it in *R. v. Joanisse,*[138] in terms that were later adopted by the Supreme Court of Canada in *R. v. B. (G.D.)*:[139]

> Effective representation by counsel makes the product of the adversarial process more reliable by providing an accused with the assistance of a professional trained in the skills needed during the combat of trial. The skilled advocate can test the case advanced by the prosecution, as well as marshal and advance the case on behalf of the defence...Effective assistance by counsel also enhances the adjudicative fairness of the process in that it provides to an accused a champion who has the same skills as the prosecutor and who can use those skills to ensure that the accused receives the full benefit of the panoply of procedural protections available to an accused.
>
> Where counsel fails to provide effective representation, the fairness of the trial, measured both by reference to the reliability of the verdict and the adjudicative fairness of the process used to arrive at the verdict, suffers. In some cases the result will be a miscarriage of justice.

Our proposals in this section, to improve LAO's oversight and management of the conduct of the defence, should all be tested against these constitutional precepts. The objective must be to enhance counsel's skill, loyalty and effectiveness, and not to limit it. Otherwise, the administration of justice will suffer and the risk of miscarriages of justice will increase. We believe our proposals are all premised on the importance of an independent bar and the need to encourage and protect its crucial role in the justice system

The reforms we propose in this section fall into two broad areas: first, improving front end management of the conduct of the defence; second, improving post trial responses where the case has been conducted in a manner that appears to violate the *Legal Aid Services Act*.

3. Improving Front End Management and Oversight of the Conduct of the Defence

In terms of front end management, we have already set out Ontario Regulation 107/99 above. LAO appears to concede, and we agree, that the regulation enacts a power to identify "the steps in the proceeding that a reasonable applicant of modest means would authorize under a

[138] (1995), 102 CCC (3d) 35 at 57 (Ont.CA).
[139] (2000), 143 CCC (3d) 289 at 297-298 (SCC).

private retainer", to limit the budget to only "those steps" and to settle the account in accordance with that pre-approved budget.

However, LAO has never applied the regulation in this manner because, we are advised, it lacks the legal or administrative capacity to support the kind of decision making that would be required to fulfil this active case management role. There are approximately 1,500 BCM cases ongoing in Ontario in any given year (generally, cases with budgets over $20,000) and LAO simply does not have the staff, time or resources to actively oversee the merits of counsel's decision making in all these cases. Accordingly, LAO sets a global budget for preparation of the case but does not identify the issues that have sufficient merit to justify public funding nor limit funding to only those issues. Once the case proceeds to court, counsel will be paid for their time in court, and for four hours of preparation for each day in court, regardless of the issue being litigated. In essence, LAO does not stand in the shoes of the "reasonable" client of "modest means" but relies on counsel to make reasonable decisions.

Cases with budgets over $75,000 are subjected to somewhat greater control as LAO utilizes the expertise of an "Exceptions Committee" to advise as to the appropriate budget for the case. This committee is made up of leading counsel and they provide LAO with the best advice they can in the circumstances as to what issues ought reasonably to be pursued by the defence. However, the committee lacks the time and resources to carry out its duties in a more effective way. The members are volunteers who try to prepare for the committee's meetings in the evenings, often after they have spent the day in court, and without having read as much about the case as would be necessary to make fully informed and binding decisions. The committee advises LAO officials as to what pre-trial motions and what issues appear to have merit and ought to be pursued. In some cases, an LAO official will also attend significant judicial pre-trials to gather more information about the proposed conduct of the defence. Senior members of the judiciary advised us that this practice is very useful as counsel will often raise funding issues at the pre-trial. Having an LAO official present allows the pre-trial judge to obtain an immediate answer to any questions, directly from an LAO official.[140]

[140] Professor Trebilcock described the value of the Exceptions Committee process in his Report and recommended that its role should be expanded and its members should be paid, *supra* note 126 at pp. 156 and 159:

> "LAO has approved a proposal to create a more structured process for Exceptions Committee meetings, with stronger senior staff support and analysis and better decision-making guidelines for Exceptions Committee members. I understand that Exception Committee members are highly

The budget is then set, but once again, as with ordinary BCM cases, LAO does not limit counsel's account to only those matters that the Exceptions Committee believes have merit. Counsel can use their global preparation budget in any manner they see fit and they can argue any motion they like in court and they will be paid for it, regardless of the views of the Exceptions Committee.

We were advised that experienced lawyers on the Exceptions Committee have, on occasion, taken the view that as many as half of counsel's proposed motions are without merit and, therefore, ought not to be funded. LAO will use this advice when setting the global preparation budget but will, nevertheless, pay counsel their full fees if they proceed to argue the meritless motions in court.

In other words, even within this smaller class of very costly BCM cases, where LAO does have expert advice from a committee of leading counsel, the provisions of Ontario Regulation 107/99 are still not being applied. LAO has difficulty applying the "reasonable" client of "modest means" test, and we concede it is not an easy test to apply, and so it is only applied in a general way when setting the global preparation budget. It is not applied at all when it comes to arguing motions or issues in court. If counsel is in court on the case *for any purpose*, they are paid for their time in court and for four hours of preparation for each day in court.

In our opinion, this is not an acceptable approach to LAO's statutory mandate. In the case of privately funded criminal defences, counsel and the client engage in very pragmatic discussions about what issues have merit and, therefore, ought to be pursued. Included in these discussions is a consideration of what the client can afford. In other words, counsel and the client do a cost/benefit analysis. This practical whittling down of the case to the most meritorious issues, given that most clients cannot afford to spend money on marginal issues, has always been

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> regarded by the defence counsel who appear before them and that they act with professionalism and integrity in carrying out their role. LAO data show that the Exceptions Committee recommends budgets that are, on average, nearly 50 per cent lower than what is proposed by counsel appearing before it. Exception Committee members provide a valuable service, in the public interest, for no fee. I believe some form of remuneration may be appropriate. … With respect to a more targeted peer review, which I also propose in the previous section, it may be that Exceptions Committee cases are well suited to such a process. The Exceptions Committee is already a form of peer review and, as noted, is well respected. Its role could be expanded to include an evaluation function – at various stages of a proceeding or at the end of the trial – that would review the conduct and outcome of the case."

We agree with these recommendations.

an accepted aspect of the justice system. It is meant to focus the trial on the real issues. The statutory test of the "reasonable" client of "modest means" is meant to replicate this discussion, with LAO as the payor standing in the shoes of the client. When LAO declines to take on this role, serious anomalies result. What we create is a litigation style where anything and everything can be explored in court because no one is applying a pragmatic cost/benefit assessment. This obviously leads to unduly long criminal trials. [141]

We appreciate that LAO will have difficulty becoming more engaged in managing counsel's budget in the manner that we recommend because it does not presently have the time, resources and expertise to fully carry out its statutory duties. We regard this as an implementation issue. LAO already manages criminal appeals by rigorously assessing their merits before granting a certificate and the same approach needs to be extended and applied to any issue or motion in a long complex trial that will require counsel and the court to expend significant time and resources. LAO should begin to implement our recommendations in this area by selecting a small group of the most costly cases and by applying the letter and intent of Ontario Regulation 107/99 to these cases. As LAO develops expertise and capacity, it can expand its case management regime to the next tier of cases. There will undoubtedly be resource issues and LAO will have to work with the Ministry of the Attorney General in preparing Treasury Board submissions to properly fund these initiatives. If our Recommendation 21 is accepted, and more leading counsel begin to take on the most serious cases, there will be less need for extensive oversight and management of the budget. If the *status quo* continues, the need to implement the recommendations in this section will be much more pressing.

In our opinion, LAO's present administrative capacity is a valid justification for careful incremental implementation of these recommendations. It is not a justification for ignoring the statutory purpose of the *Legal Aid Services Act* which is to provide "high quality", "cost-effective" and "efficient" legal services. Paying counsel to pursue whatever issue they please in unduly long court proceedings does not comply with this statutory purpose. We believe LAO

[141] The statutory test of the "reasonable" client of "modest means" is not only used in Ontario Regulation 107/99 in relation to BCM cases, as set out in s.5(6) above. It is also used in section C of Schedule 1 of the same regulation dealing generally with "Fees in Criminal Matters". That section provides as follows: "This schedule is a legal aid tariff reflecting fees customarily paid by a client of modest means and except in exceptional circumstances the fees provided for shall normally apply for the described legal aid services..." It is therefore apparent that the test was intended to apply broadly to the Legal Aid tariff, whether in ordinary cases or in exceptional BCM cases.

supports our proposal for incremental implementation of more rigorous case management and, indeed, is already taking significant and commendable steps in this direction.

Recommendation 22:

In long complex criminal cases, LAO must apply Ontario Regulation 107/99 by setting a budget that identifies the issues that a "reasonable" client of "modest means" would fund under a private retainer and by agreeing to pay for a defence that is based on these issues. Counsel must particularize their dockets so that LAO only pays for work that is authorized. As new and significant issues arise, the budget can be amended. Minor issues that take little time in court need not be approved in advance. The statutory test is practical and flexible and should be used to eliminate any substantial work from the budget that has no reasonable prospect of success or that, even if successful, would not significantly advance the client's defence. Counsel, of course, is free to pursue other issues, if the client so instructs and counsel agrees, but that work ought not to be paid for from public monies.

Recommendation 23:

LAO must seek expert advice when setting the budget in long complex cases from a body like the present Exceptions Committee. That body must be properly resourced and must be allowed sufficient time to study the case in advance, to meet with and question counsel where appropriate about the proposed conduct of the defence, to deliberate, and then to advise LAO as to the issues and motions that have sufficient merit and utility to justify public funding. The members of this body should be paid for their time in carrying out these important statutory duties.

Recommendation 24:

A senior LAO official should attend significant judicial pre-trials in major cases, where feasible, in order to observe and gather information about the conduct of the case and to answer any questions from the pre-trial judge.

4. Improving Post Trial Responses Where the Case Appears to have been Conducted Contrary to the Statutory Purpose of the *Legal Aid Services Act*

Turning to the post-trial responses from LAO, when a case has been conducted in a way that appears to violate the statutory requirements of the Act, we believe that there is substantial room for improvement in this area.

There are a number of explanations for the lack of action to date on this topic. First, LAO is in the process of establishing, but has not yet finalized, quality assurance standards that address issues like efficiency and cost-effectiveness and that stress the importance of making responsible admissions, the importance of not arguing meritless motions that fail to advance the defence and the importance of focusing on the real issues in the case. Second, there are difficulties with the present draft of ss. 31 and 32 of Ontario Regulation 106/99 which provides for the removal of lawyers who fail to meet "quality assurance standards". In particular, the current regulation requires a full oral hearing before the President of LAO and it provides only the most draconian of remedies, namely, complete removal of counsel from the panel. Third, the provisions of s. 92(8) of the *Legal Aid Services Act* have caused confusion as they expressly grant the power to conduct "quality assurance audits" to the LSUC and prohibit LAO from conducting such "audits". This has led to the perception and the reality of a divided jurisdiction over "quality assurance". In the result, neither LAO nor the LSUC has ever conducted a "quality assurance audit" in the 10 years that the statute has been in force nor has any lawyer ever been removed from the panel due to a failure to meet "quality assurance standards."

We believe these to be serious deficiencies that all need to be addressed. Fortunately, LAO is supportive of change in relation to these issues and is already taking remedial steps.

Beginning with the lack of appropriate panel standards for long complex cases, LAO has developed an "Extremely Serious Matters Panel Standard" (ESM). As the name suggests, the ESM standard establishes criteria for eligibility in those cases that involve the most serious potential jeopardy to the accused, for example, all murder cases and dangerous offender applications. The criteria for admission to the panel focus almost entirely on counsel's experience, rather than their judgment and effectiveness. In particular, the ESM's standard

requires 100 days of contested trials or preliminary inquiries including one jury trial, five *voir dires* and five *Charter* motions in the past five years. These are not very demanding standards of requisite experience for a long complex trial. Furthermore, they are incomplete as "quality assurance standards" because they do not stress counsel's judgment and effectiveness, for example, in the ways set out above. LAO's objective in creating the ESM panel standard was laudable, namely, "to create a panel of 'blue chip' lawyers who could be relied upon to represent clients skilfully, responsibly, and effectively in the most serious criminal cases." To achieve this objective, LAO must develop a more rigorous and complete "quality assurance standard", as required by the statutory duty in s. 92(1). LAO agrees with this view and already has an initiative underway to revise and expand the ESM panel standard in the manner suggested.

The importance of "quality assurance standards" is not only at the eligibility stage, when determining whether counsel qualifies for entry onto the ESM panel. It is also necessary because it is a basis for *ex post* removal of counsel from any LAO panel. Section 31 of Ontario Regulation 106/99 expressly establishes failure to meet "quality assurance standards" as a basis for removal. LAO has a legitimate complaint concerning the drafting of this regulation; they argue that it needs to be amended in two ways and we agree. First, it should provide for lesser and intermediate remedies other than complete removal from the panel when a lawyer fails to perform to the standards required by the Act. Second, the requirement of a full oral hearing is not an appropriate level of natural justice for government contractors, including lawyers, who are seeking access to public funding. LAO has advised us that when they attempt to use the powers in ss. 31 and 32, to remove a lawyer from the panel, the proceedings have invariably bogged down in complex and protracted oral hearings.

Once again, the B.C. Legal Services Society has developed a useful working model which illustrates how ss. 31 and 32 could be improved. Under the B.C. "Referral Eligibility Policy",[142] the Director is the ultimate decision maker and he/she has a much broader range of sanctions than exist in Ontario for lawyers who fail to meet "applicable professional standards" or fail to provide "an acceptable quality of service". The Director may "impose conditions on, or temporarily or permanently suspend, a lawyer's eligibility to receive referrals from LSS." Under

[142] British Columbia Legal Services Society, *Referral Eligibility Policy*, September 26, 2006, revised October 9, 2007. Online: www.lss.bc.ca

this regime a lawyer could be warned or could be given a short suspension and placed on a form of probation, requiring certain steps to improve their standards of practice, prior to the ultimate sanction of permanent removal.

The B.C. policy does not require a full oral hearing prior to invoking one of these remedial measures. The procedure is for the Manager to conduct an inquiry whenever he/she has received "information suggesting that a lawyer fails to meet applicable professional standards [or] fails to provide an acceptable quality of service." After gathering this "preliminary information" the Manager must "notify the lawyer explaining the nature of LSS' concerns" and then "receive such representation from the lawyer as he or she deems appropriate and set time limits for this purpose." The Manager then issues a report with recommendations to the Director who may receive further "representations from the lawyer as he or she deems appropriate." The Director then decides what remedy, if any, to impose.[143]

This procedure was recently used to remove a lawyer in B.C. from the panel. The lawyer sought judicial review and Justice Wong upheld the B.C. processes as providing an appropriate level of natural justice, namely, "to provide disclosure and the opportunity to respond, and to give reasons for its decision." The speed and efficiency of the B.C. processes is noteworthy as the Legal Services Society took just over two months to investigate, notify the lawyer, make disclosure to him, receive his response and then remove him from the panel. The judicial review took another eight months to uphold the Director's decision.[144]

The last of the explanations for a lack of action in this area, namely, the confusion caused by s. 92(8) of the Act, is easily dealt with. It must be remembered that s. 92(1) of the Act enacts a mandatory duty in terms that bear repeating:

> The corporation shall establish a quality assurance program to ensure that it is providing high quality legal aid services in a cost-effective and efficient manner. [Emphasis added]

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[143] *Ibid*.

[144] *Wise v. Legal Services Society* 2008 BCSC 255. Prior to developing its *Referral Eligibility Policy* in September, 2006, and then revising it in October, 2007, the Legal Services Society had attempted to remove a different lawyer's eligibility and was criticized on judicial review for a lack of natural justice. See *B.A.E. and Goldberg v. Legal Services Society* 2007 BCSC 1721. The new Policy is a successful response to that decision.

This mandatory duty is placed on LAO and not on the LSUC. Section 92(2) then enacts one possible tool that "may" be used in carrying out the s. 92(1) duty, as follows:

> For the purposes of subsection (1) and subject to subsection (8), the corporation may conduct quality assurance audits of the service-providers, clinics, student legal aid services societies or other entities funded by the Corporation that provide legal aid services. [Emphasis added]

This discretionary audit power in s. 92(2) is a fairly draconian remedial tool as s. 92(3) empowers the person carrying out the audit to enter the service-provider's office without a warrant "during normal business hours and on notice" and to "review their records with respect to the provision of legal aid services". Finally, s. 92(8) provides that where the object of the audit is an individual lawyer in private practice, and not a clinic, LAO must "direct the Law Society to conduct those quality assurance audits." Section 92(12) requires the LSUC to report back to LAO on the results of the audit.

The statutory scheme therefore enacts a broad mandatory duty to "establish a quality assurance program" in order to "ensure" that legal aid services are "cost-effective and efficient." That duty is placed squarely on LAO and not on the LSUC. The fact that the most extreme means of carrying out this duty, through a discretionary warrantless power to enter the lawyer's office and search his/her files, is granted to the LSUC and not to LAO cannot detract from the broad mandatory duty. There are many ways short of warrantless searches of offices to set up a "quality assurance program". Establishing comprehensive "quality assurance standards", especially for long complex cases, would be a first step. Furthermore, if the trial judge's rulings or statements on the record, the Court of Appeal's judgment or even media reports in a given case raise questions about the quality, efficiency or effectiveness of certain lawyers' conduct in the case, one would expect LAO to have a "program" in place to look into that specific case or cases without necessarily requiring a full-scale audit by the LSUC of the lawyer's practice. In B.C., we are advised that this is what happened after the Court of Appeal was particularly critical of one counsel's conduct in a series of appeals.[145] We will refer to this case in greater detail in Chapter 6, concerning the responsibilities of the LSUC.

[145] See *R. v. Dunbar et al*. (2003), 191 B.C.A.C. 223 (BCCA).

In any event, we were told that LAO has conducted many quality assurance audits of legal aid clinics and other legal aid organizations but has never asked the LSUC to do the same in the case of an individual lawyer. Given the many trial rulings and appellate decisions that now exist in Ontario in long complex cases, raising questions about the conduct of various counsel, it seems hard to accept that there has never been cause for a s. 92(8) "quality assurance audit" of an individual lawyer. This power is simply not being used. Once again, we were advised that LAO is supportive of change in this regard and has agreed to work with the LSUC to establish a protocol for the use of the s. 92(8) quality assurance audit power.

In conclusion on this section, we wish to echo Professor Trebilcock's concerns about the need for much stronger post-case reviews by LAO of the quality, efficiency and cost-effectiveness of the work done by counsel. In particular, we agree with his view that this jurisdiction is separate and independent of the LSUC's discipline and licensing powers: [146]

> While LAO has made commendable progress in introducing significant forms of quality control in the system, in particular by establishing criteria for qualifying as members of the various LAO legal aid service panels (e.g., criminal, family law, and immigration law), in important respects these forms of entry or input controls do little, in themselves, to address issues of *ex post* competence. While LAO does maintain a complaints processing function, this appears not to be well-communicated to clients, nor is it clear to me exactly what process is followed once LAO receives such complaints. In this respect, there remains significant ambiguity as to the relative roles of LAO and the Law Society of Upper Canada in disciplining legal service providers under the various legal aid programs for which LAO is responsible. While it may well be appropriate for LAO simply to refer more serious complaints of egregious misconduct to the Law Society of Upper Canada for investigation and, if appropriate, disciplinary action, especially now that the Law Society of Upper Canada has adopted a more proactive post-entry quality assurance regime, at the very least LAO needs a well-defined process by which lawyers who have been recognized previously as qualifying for membership on the various LAO certificate panels can be removed from these panels, with any further action then remitted to the Law Society of Upper Canada. In this respect, while I do not recommend, at this

[146] *Supra* note 126 at pp.150-151. For excellent discussions of peer review as a quality assurance tool, see: F. Zemans & J. Stribopoulos, *supra* note 125; A. Paterson, "Peer Review and Quality Assurance", [2007] 13 Clinical L. Rev. 757.

> time, the highly proactive, system-wide, and costly form of peer review of legal aid service providers that has recently been initiated in the U.K., a more targeted form of peer review by LAO may well be warranted, where a pattern of client complaints or billing irregularities suggest a need for further scrutiny of a legal aid service provider's legal aid files, again with a view to re-evaluating whether such providers should remain on an LAO panel and whether referral of the case in question to the Law Society of Upper Canada for further investigation and possible disciplinary action is warranted. [Emphasis added]

We would simply add that these post-case reviews need not be triggered by client complaints. The rulings of the trial judge and the judgments of the Court of Appeal are the best indicators as to whether there are problems worthy of LAO review. In addition, reports in the media about a long case that is encountering difficulties or reports from other counsel may be sufficient cause to at least begin making inquiries.

Recommendation 25:

LAO must develop comprehensive quality assurance standards in order to meet its statutory duty under s.92(1) of the *Legal Aid Services Act*. In the context of long complex trials, these standards should stress the importance of counsel's duties as officers of the court, including counsel's independence from the client, as well as counsel's duty of loyalty to the client. In particular, the importance of making responsible admissions where issues cannot reasonably be disputed, declining to bring motions that have no real prospect of success or that fail to significantly advance the client's defence, cross-examining and examining witnesses succinctly and efficiently, and generally focusing on the important issues in the case should all be emphasized as the hallmarks of high quality legal services.

Recommendation 26:

Sections 31 and 32 of Ontario Regulation 106/99 should be amended to provide a range of remedies where the President has "reasonable cause" to believe that a lawyer fails to meet standards of professionalism or "quality assurance standards". The remedies should include placing conditions on a lawyer's panel membership, temporarily suspending the

lawyer from panel membership and permanently suspending the lawyer from panel membership. In addition, the requirement of a full oral hearing before the President should be replaced with a regime providing for notice, disclosure, written responses and reasons for the President's decision. The B.C. Legal Services Society's *Referral Eligibility Policy* is a useful model for these amendments to ss. 31 and 32.

Recommendation 27:

LAO must develop a program of individual post-case inquiries and reviews, as well as full-scale audits, pursuant to its s. 92(1) quality assurance duty. These inquiries could be triggered by complaints, rulings or statements by the trial judge, judgments of the Court of Appeal, information provided by other counsel or by the Exceptions Committee members or information learned through the media or from the LSUC. If these preliminary inquiries raise concerns about counsel's conduct of the case, then a thorough review of the case by a neutral expert should be ordered. If the review indicates broad systemic problems, then a wider audit of counsel's practice may be justified. LAO's duty to make these inquiries and conduct these reviews is independent and separate from the LSUC's jurisdiction over discipline and licensing. Depending on the results of any review, LAO should take action pursuant to ss. 31 and 32 of Ontario Regulation 106/99 concerning the particular counsel's membership on the panel.

E. Developing the Next Generation of Leading Counsel

One final topic in this chapter that needs to be addressed, regardless of whether one adopts the first or the second approach to reform, is the need to develop the next generation of leading counsel.

Our Review encountered real concerns among participants in the justice system about the decline in mentoring in the criminal bar. An important way in which young lawyers learn the skills and good judgment that will turn them into leading counsel is by watching and working with our best senior counsel. We will address this subject in greater depth in Chapter 6 but we

believe that the Legal Aid tariff can be used as a tool to foster mentorship and to help in developing the next generation of leading defence counsel.

Professor Trebilcock noted LAO's present vulnerability because of the apparent failure to develop a new generation of skilled lawyers willing to take on a large volume of even minor cases on Legal Aid certificates:[147]

> LAO relies on a small proportion of senior lawyers to provide the bulk of legal aid services...Relying on a small number of significant, experienced providers to supply the bulk of legal aid certificate services, while realizing the benefits of experience and specialization, is also quite risky. It means that even a minor reduction in the number of providers could have important consequences for client services. Those consequences will be serious if LAO loses significant providers in small or rural communities.

Within this "risky" demographic picture, the number of lawyers who are willing and capable of conducting a skilful and responsible defence, in a long complex Legal Aid trial, is equally small. Unless LAO assists in developing the next generation of lawyers who are capable of taking on these cases, the future consequences will be serious.

Long complex cases require more than one counsel, in any event, in order to conduct the defence effectively. Leading counsel will not take on these cases unless they have the support of junior counsel. This practice is also cost effective for LAO as junior counsel can do much of the preparation at a lower tariff rate than senior counsel. We understand that LAO will authorize junior counsel to help prepare the case and to attend at trial with senior counsel but that the rate of remuneration for attendance at trial is so low as to make it uneconomical.[148] LAO should increase the rate of remuneration for junior counsel to attend at trial, with senior counsel, both to achieve the benefits of mentoring and to facilitate senior counsel's ability to take on these cases. The Crown has invested in this kind of mentoring for its junior counsel and support for its senior counsel and so should LAO.

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[147] *Supra* note 126 at pp.118-119.

[148] The tariff pays junior counsel at 50% of his/her normal rate when authorized to attend at trial with senior counsel on a major case. Assuming the junior counsel has less than four years experience, this would mean that LAO pays the junior $38 per hour.

Recommendation 28:

LAO should increase the rate of remuneration for junior counsel to attend at trial with senior counsel in long complex cases.

CHAPTER 6: Advising, Directing and, Where Necessary, Disciplining Counsel for both the Crown and the Defence

A. Introduction

As discussed in Chapter 2, one noteworthy trend of the modern era has been an apparent increase in acrimonious relations between counsel. All four of our case studies were marked by open hostility, conflict, sarcasm or serious allegations of misconduct made against one counsel or another. For example, in *R. v. Mallory and Stewart*, the Court of Appeal felt it necessary to remark on the "unfortunate level of acrimony between counsel."[149] Indeed, there is now a considerable body of Court of Appeal jurisprudence in Ontario, going well beyond our four case studies, that deals directly with this phenomenon of court room incivility. *R. v. Felderhof* is the most important case on this subject.[150]

The impact of this kind of conduct on the length of criminal trials is obvious. As Justice Moldaver put it, counsel who have forgotten the professional duty of courtesy and respect between opponents will stop "communicating in a meaningful and productive way and instead, are at each other's throats."[151] However, the impact goes beyond a breakdown in communication. In *Felderhof*, Justice Rosenberg described the more profound effect when allegations of "improper motives or bad faith" are made against opposing counsel:[152]

> Those types of submissions are very disruptive to the orderly running of the trial. They sidetrack the prosecutor and the trial judge from the real issues at the trial.

When counsel stop communicating with each other, nothing gets resolved out of court and every issue is fought out in the court room. Furthermore, the court room acrimony deflects the trial from its real purposes and the judge may lose his/her focus. The inevitable result is that long hard cases become even longer and more difficult. It is probably safe to say that every dysfunctional mega-trial will have been characterized by hostile and uncivil relations between

[149] *Supra* note 2 at para. 4.
[150] *Supra* note 95 at 533-541. The larger body of case law on this topic is reviewed in Michael Code, "Counsel's Duty of Civility: An Essential Component of Fair Trials and an Effective Justice System" (2007) 11 Can. Crim. L.R. 97.
[151] *Supra* note 93.
[152] *Supra* note 95 at p. 539.

counsel. We believe that this problem is serious and it must be remedied if we are to make long criminal trials in Ontario more efficient and focused.

Incivility in the court room is unprofessional as it violates the most basic rules of professional conduct.[153] Incivility also violates counsel's common law duties as "officers of the court".[154] There have always been a small minority of uncivil and unprofessional lawyers in the criminal courts, both on the Crown side and on the defence side. When criminal trials were generally short and simple, some 30 years ago, these lawyers had minimal impact on the overall effectiveness of the justice system. Now that criminal trials have become long and complex, the damage caused by this kind of counsel is much greater. When a major case with a high public profile is conducted in an irresponsible manner, by Crown counsel or defence counsel, the financial and human costs and, more importantly, the damage to public confidence in the justice system, can be very significant. As a result, there is a more pressing need today to enforce the *Rules of Professional Conduct* and the common law duties of "officers of the court".

We wish to stress as forcefully as we can that the vast majority of criminal cases are conducted professionally by skilled and dedicated counsel on both sides. We were repeatedly told by all participants in our Review that there is only a small number of counsel, on both sides of the bar, who conduct themselves in an unprofessional or irresponsible manner. Unfortunately, they have disproportionate impact when they become involved in long complex cases.

We believe that this is another area where significant improvements can be made. It is important to differentiate at the outset between the rare case of professional misconduct and the distinct phenomenon of poor judgment, poor advocacy, inexperience or, simply lack of guidance and direction from mentors. The latter phenomenon is the more prevalent one but it too can significantly lengthen and delay a large complex case. We will address it first and then turn to the more infrequent problem of actual professional misconduct.

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[153] *R. v. Felderhof, supra* note 95 at p.540. For example the Law Society of Upper Canada, *Rules of Professional Conduct*, June 22, 2000, provides in Rule 4.01(6) that "a lawyer shall be courteous, civil, and act in good faith to the tribunal and with all persons with whom the lawyer has dealings in the course of litigation." Rule 6.03(1) enacts an even broader duty to be "courteous, civil, and act in good faith with all persons."

[154] *R. v. Felderhof, supra* note 95 at pp. 536 and 539.

B. Inexperience, Lack of Guidance, Poor Judgment and Poor Advocacy

In the previous chapter we noted that 55% of Big Case Management certificates are issued to lawyers with less than 10 years experience, including 28% that are issued to lawyers with less than four years experience. We are advised that a similar phenomenon exists on the Crown side of the bar and that major cases are increasingly being assigned to quite junior prosecutors. It should not come as a surprise that some of these counsel need guidance and advice. Furthermore, there are senior counsel in the justice system, both on the Crown and the defence side, who simply lack good judgment. They too need guidance and advice.

There are different solutions to this problem, depending on whether the lawyer in need of guidance and advice is working on the Crown side or the defence side of a case. We begin with the Crown side.

1. Oversight and Guidance of Crown Counsel in Long Complex Cases

This was a sensitive topic during our Review because our best prosecutors are generally strong personalities who take great pride in their skill and judgment and who naturally resist any suggestion that they need to have an oversight committee looking over their shoulder and second-guessing their decision-making in long complex cases. We are sympathetic to this view and so we begin by stressing that long complex cases must be assigned, in the first place, to our most able and most respected prosecutors. They are much less likely to make errors in judgment and they will require much less oversight. They are also more likely to be good communicators, who understand and accept the role of defence counsel. These are important criteria when assigning Crown counsel to a long complex case.

We know that this does not always happen and that major cases are, in fact, assigned to Crown counsel who would benefit from oversight and guidance. Accordingly, we need to design a system that is flexible and that accords considerable independence to the most able Crown counsel while watching more closely over the less able.

In designing such a system, the constitutional principle of prosecutorial discretion and the independence of Crown counsel, discussed in Chapter 3, is not an impediment. The authority to prosecute, or not prosecute, is given to the Attorney General, both at common law under the Royal Prerogative and under the various statutes establishing the Ministry of the Attorney

General and the office of Crown Attorney. The Attorney General delegates these powers to Crown counsel who act as his/her agents. The constitutional principle of independence protects *both* the Attorney and his/her agents from *outside* interference:[155]

> It is a constitutional principle in this country that the Attorney General must act independently of partisan concerns when supervising prosecutorial decisions.
>
> ...
>
> A decision of the Attorney General, or of his or her agents, within the authority delegated to him or her by the sovereign is not subject to interference by other arms of government. An exercise of prosecutorial discretion will, therefore, be treated with deference by the courts and by other members of the executive, as well as statutory bodies like provincial law societies.

Accordingly, if the Attorney General directs Ministry officials to establish an *internal* system of oversight and supervision of major prosecutions, for non-political reasons related to the efficacy of these prosecutions, there is no improper interference with prosecutorial discretion. In short, independence is an institutional principle that insulates both the Attorney General and all Crown prosecutors from political interference, improper pressures and any considerations that detract from their quasi-judicial duty to objectively evaluate each case and the steps to be taken in the case. It is not an individualized principle that insulates inexperienced or misguided counsel from direction and supervision.

As emphasized above, in the era of long complex trials the justice system cannot afford serious errors of judgment in major cases, especially when these errors could have been avoided by oversight from experienced and respected peers. The first and most important level of oversight and accountability is the Crown Attorney within the local prosecution office. In the case of certain specialized units, like the Crown Law Office and the Guns and Gangs Office in Toronto, we regard the Director as having similar responsibilities to the Crown Attorney.

The Crown Attorney has many diverse responsibilities but the most important one, in our opinion, is to supervise and oversee the major litigation in the office. If a major case has been assigned to a particularly able and experienced Crown prosecutor, the supervision can be much

[155] *Krieger et al v. Law Society of Alberta, supra* note 33 at pp. 107-111 and 114-115. The Ontario statutes are the *Ministry of the Attorney General Act*, R.S.O. 1990, M.17 and the *Crown Attorneys Act*, R.S.O. 1990, C.49.

lighter, for example, through periodic oral reports and discussions. If the case has been assigned to a more junior or less able counsel, the supervision needs to be more formal and more frequent.

We are advised that these traditions have declined in the modern era because the Crown Attorney is now burdened with substantial administrative duties and paperwork and has little time to watch over and assist with the major litigation in the office. We do not wish to diminish the importance of these administrative duties. For example, decisions relating to hiring, promotion and performance evaluation of the personnel in the office are critically important and will ultimately determine whether the office is staffed with the very best young counsel who will eventually take on these difficult cases. However, we do suggest that some administrative duties can be delegated to deputies or to non-legal staff. The only duty that should generally not be delegated, because it relates to the performance of the office's core function, is the supervision and oversight of major cases.

Sometimes the Crown Attorney will have to rein in a misguided prosecutor who has become too close to the case, has lost his/her objectivity and is unduly lengthening the proceedings or is about to make a major mistake. Other times the Crown Attorney will have to encourage a timid prosecutor who has not been pressing a position with sufficient force and vigour or who is about to abandon a case that should be prosecuted. In either case, the Crown Attorney must mentor, supervise and guide the major litigation in the office. In particularly large offices, deputies and team leaders can assist in this role.

In carrying out these duties, the Crown Attorney should reach out to the other Crown counsel in the office, to the police and to the local bench and bar so as to learn about any problems that may be developing on a major case. The Crown Attorney should also attend in court on occasion to either watch or assist. In short, the Crown Attorney needs as much information as possible about the status of the major cases in the office as this is arguably his/her most significant responsibility.

In some major cases, this local oversight by the Crown Attorney will be sufficient, especially if the case has been assigned to a very capable and experienced Crown prosecutor. However, we believe there have been and will be cases where the Crown Attorney and the Crown prosecutor are both too close to the case and are not exercising good judgment or where they simply lack experience in some of the problems associated with particularly long and

complex cases. In these circumstances, we recommend that advice and direction must be available through a group of senior respected prosecutors from outside the local office.

We were pleased to learn in our consultations that both the federal and provincial prosecution services have instituted mechanisms for this kind of greater oversight and supervision. The province has instituted a Major Case Advisory Group that provides resources and assistance to large complex cases, as well as an informal system of "scrums" where a group of senior prosecutors are brought together to advise the prosecuting Crown on the conduct of the case. The Federal Prosecution Service Deskbook has a written policy on *Mega-Case Management* that involves the approval of a prosecution plan in all "mega-cases" at the local Director level and then the presentation of that plan to a National Prosecution Advisory Committee. The federal Committee's role is "to exercise a challenge function in relation to the prosecution plan." The policy describes the purpose of this oversight in the following terms:[156]

> The lead prosecutor on any mega-case, and his/her Director, must present the plan to the Committee. It should be viewed by the prosecution team and the Director as an opportunity to get advice on the overall approach to the case, or any particularly troublesome aspects of the case. It is expected that the results of the discussions will be a strong consensus as to the soundness of the plan, and the prosecution team will gain confidence that its plan will be supported...If the plan is approved, the FPS Director remains responsible for ensuring the execution of the plan.

The experience gained in Ontario with the so-called "Kaufman Committee" provides a useful analogy.[157] That Committee, set up after the *Morin Inquiry*,[158] vets all decisions by Crown counsel to call in-custody informers as witnesses. The advice we received was that the Committee has generally been a positive force in Ontario. Its narrow function, in approving or not approving decisions to call certain potentially suspect witnesses in major cases, was not the point that was stressed to us. Rather, we were told that the peer review more generally provided a forum for Crown prosecutors to discuss their entire case with a group of seasoned and respected colleagues from across the province. The local Crown Attorney and prosecuting Crown counsel

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[156] *Supra* note 31.
[157] *Ontario Crown Policy Manual: 2005*, (Toronto, Ontario Ministry of the Attorney General, 2005), *In-Custody Informers*.
[158] Ontario, *The Commission on Proceedings Involving Guy Paul Morin* (Toronto, Ontario Ministry of the Attorney General, 1998).

who brought their cases to the Committee often found that they had been assisted in resolving any number of difficult issues. They went away more confident, feeling that they had strong institutional support concerning decisions about the conduct of their case. Federal prosecutors told us that their National Prosecution Advisory Committee has had similarly positive effects on individual Crown counsel conducting difficult cases who generally need to discuss their cases and feel confident that they are making wise decisions.

We encourage these initiatives and recommend that there be review of long complex prosecutions by a group of senior respected prosecutors from across the province. It is simply common sense that lawyers make better decisions after discussing their cases in this way. We leave the implementation details to the Ministry of the Attorney General but we offer the following four broad suggestions. First, we believe that the existing provincial model is probably too informal and that the existing federal model is probably too centralized. The kind of peer review of long complex prosecutions that we recommend needs to be mandatory but it should not be too closely connected to "head office". There is always a danger in the culture of any prosecution service that senior managerial officials, especially those at "head office" who brief the Minister and have regular contact with the Minister's political staff, may become more susceptible to extraneous influences and concerns. We recommend that peer review of these major prosecutions take place in the region where the prosecution is taking place and that the group of senior prosecutorial advisors should be drawn as much as possible from that region and from other regions with expertise in the particular kind of case. At least one Crown counsel with strong appellate expertise ought to be part of the peer review team.

Second, it is critically important that this kind of peer review ought not to become a vehicle for micro-managing the prosecution. It is the *major* decisions in the case, those that have the potential to impact on the length and cost of the case or on public confidence in the justice system, that require review by senior colleagues. Otherwise, prosecutors must be able to attend pre-trials, attend court, meet with the police, meet with defence counsel and make decisions without constantly having to look over their shoulder for approval from a committee. Presumably, the peer review should take place at a reasonably early stage of the proceedings and should only be renewed if a significant new issue arises.

Third, the advice of the prosecutorial review team ought to be followed, subject to that advice being over-ruled by the Assistant Deputy Attorney General (Criminal Law). The peer review we recommend is not optional. Although our recommendation is for a mandatory process, it can be implemented slowly and incrementally, picking a small group of very large and difficult cases to begin with and then expanding the program as institutional capacity and experience is developed. Whatever group of cases are determined to be eligible for this program, the assigned prosecutors must respect the advice that they receive.

Fourth, the peer review team and the local Crown Attorney ought to be open to receiving information from the police, from defence counsel, from Legal Aid Ontario and from the Criminal Lawyers' Association (CLA). It may be that prosecutorial practices are unnecessarily causing delays or driving up costs in other parts of the system. The Crown Attorney and the reviewing prosecutors ought to be able to consider this information before making final decisions about the conduct of the prosecution.

Recommendation 29:

The conduct of long complex criminal prosecutions must be assigned, to the greatest extent possible, to the most able and most respected prosecutors. Crown counsel's communication skills and their understanding and acceptance of the role of defence counsel are also important criteria when assigning Crown counsel to these cases.

Recommendation 30:

The local Crown Attorney or the Director of certain specialized offices must supervise and oversee the major cases in his/her office. The degree of supervision and oversight will vary, depending on the abilities and experience of the assigned prosecutor. It is the responsibility of the Crown Attorney to try to prevent any undue lengthening of the proceedings, as well as any significant errors, and this requires appropriate oversight and supervision.

Recommendation 31:

Prosecutions of long complex criminal cases ought to be subject to mandatory peer review by a group of senior respected prosecutors. The review should consider only the major or contentious issues in the case that could lead to undue lengthening of the proceedings or to significant errors. The review should take place in the local region where the prosecution is being conducted, it should receive all relevant information from any justice system participant and it should then provide advice to the Crown Attorney and to Crown counsel prosecuting the case. That advice should be followed, subject to reversal or modification by the Assistant Deputy Attorney General (Criminal Law).

2. Oversight and Guidance of Defence Counsel in Long Complex Cases

The need for greater oversight and guidance of counsel in long complex trials applies equally to the defence bar. The institutional mechanisms, however, are not as easy to put in place as they are with the Crown bar. Most defence counsel practise alone, rather than under the tutelage of a senior practitioner who could replicate the role of the Crown Attorney. Furthermore, defence counsel do not exercise delegated authority as Crown counsel do from the Attorney General.

Nevertheless, we believe that institutional mechanisms are available, through LAO and the LSUC, to ensure that defence counsel in need of guidance and direction actually receive it.

As with Crown independence, we do not believe that the independence of the defence bar is an impediment to greater oversight and direction of those counsel who need it. The constitutional principles relating to the independence of the bar, as explained in Chapter 5, are protections against extraneous influences and pressures that undermine counsel's effectiveness. Providing oversight and guidance from a group of highly skilled peers, within the defence bar, will enhance defence counsel's effectiveness rather than undermine it. We believe our recommendations in this area are firmly grounded in the ideals of an independent bar, committed to the skilled, resolute and responsible defence of the accused.

In terms of LAO's role in providing greater oversight and direction in a long complex case to counsel who lack judgment or experience, our recommendations in Chapter 5 already address this topic. If comprehensive "quality assurance standards" are developed pursuant to

LAO's s. 92(1) duty, if ss. 31 and 32 of Ontario Regulation 106/99 are amended to more effectively remove lawyers who fail to meet "quality assurance standards" and if *ex post* case reviews and audits are used to inquire into those cases that have not been conducted effectively, there should be fewer counsel working on these cases who need intensive oversight.

More importantly, an enhanced Exceptions Committee, properly resourced with the time, money and information needed to review these cases in advance, is an ideal vehicle for peer review. It should become the functional equivalent of the system of Crown peer review that we propose in Recommendation 31. If young counsel, or counsel who may lack judgment, must bring their long complex cases before an experienced and respected group of leading defence counsel to discuss their proposed defence and receive guidance and direction, the defence will undoubtedly be more effective. As with Crown peer review, this process should be mandatory and the advice of the Exceptions Committee, assuming LAO accepts it, must be enforced. It is not acceptable to pay defence counsel to raise major issues and argue major motions that an experienced group of peers has rejected as either unlikely to succeed or unlikely to advance the defence.

The LSUC must also take a greater role in this area. LAO only deals with publicly funded cases and has no powers in relation to privately funded cases. Furthermore, the enhanced LAO management and oversight of the defence that we recommend will likely be implemented slowly and incrementally, given the need for LAO to develop new institutional capacity in these areas. There will be many major cases and many counsel who need mentoring and guidance but who have no access to an empowered Exceptions Committee. The LSUC must fill this gap.

In fact, the LSUC currently has a mentoring program under which a list of senior lawyers is available to provide mentoring to any counsel who calls up and asks for help.[159] We are advised that the program is both under-communicated and under-utilized and could be improved in at least two ways. First, it is dependent on self-reporting and needs to be more proactive. Second, it resides within the LSUC and it is not surprising that lawyers are somewhat reluctant to call their professional regulator and implicitly acknowledge that they may be out of their depth on a long complex case.

[159] The Law Society of Upper Canada, *Lawyer Mentorship Program*, online: LSUC Resource Centre http://rc./suc.on.ca/jsp/mentorship/index.jsp.

We are advised that the problem of lack of mentoring in the defence bar has become quite acute and that strong remedies are needed. As noted above, most leading members of the bar who do hire and mentor junior counsel in their offices are not taking on long complex trials on Legal Aid. Furthermore, for those lawyers who do agree to act on these cases, the current tariff does not make it economical to retain junior counsel and have them assist at trial. As a result, there is less training of junior lawyers on these cases than in the past. Finally, very few defence lawyers now hire articling students and many young lawyers practise outside the supportive culture of office space that is shared with senior lawyers. It is not surprising, in these circumstances, that some lawyers in long complex cases are isolated and need support, guidance and mentoring from senior and respected members of the bar. Although our leading counsel may no longer take on the defence in long complex Legal Aid trials they would surely be willing to take on a mentoring role.

We recommend that the LSUC and the CLA collaborate on a re-invigorated mentoring program. It should be a collaboration because the LSUC has the statutory duty to ensure competence and professionalism in the bar, and it has the budgetary resources, but the CLA is more likely to administer such a program effectively. The CLA has no disciplinary or regulatory functions and so a lawyer in need of help will be more likely to turn to the CLA for guidance and direction than to the LSUC. The CLA could also implement the program on a local level.

In order to be proactive, the program should be communicated widely, including to the judiciary and the Crown Attorneys. When a lawyer is out of his/her depth on a long complex case, it will not usually rise to the level of incompetence, justifying the extreme remedy of removal of counsel. The judge should be able to suggest to the lawyer that he/she contact the CLA mentoring program or the Crown Attorney should be able to call the President of the CLA or a local Director of the CLA to advise them of the problem. In this way, counsel will be referred to someone senior and respected who they can talk to about the conduct of the defence in a difficult case. This may be all that is needed.[160]

[160] Another proactive means of providing mentoring would be to develop an "Inns of Court" program, like the one that the late Chief Justice McEachern developed in B.C. Young lawyers in the B.C. program are invited every two weeks, in the evenings after court, to a short lecture and discussion on a topic of interest, followed by a dinner. The lecture is given by a senior lawyer or judge and then a number of senior members of the bar and judiciary eat dinner with the young lawyers and allow them to discuss their practice and their cases.

These are simply some possible ideas but the main point is that a much more vigorous, proactive and restructured mentoring program is needed.

Recommendation 32:

LAO should use a body like the Exceptions Committee to provide a system of prior peer review concerning the conduct of the defence in long complex cases. This should parallel the system of Crown peer review described in Recommendation 31.

Recommendation 33:

The LSUC, in collaboration with the CLA, should develop a re-invigorated mentoring program to replace the existing LSUC program. The CLA should be the visible body that provides leading counsel as mentors, with the LSUC providing administrative support and resourcing the program. It should be a proactive program that reaches out to the bar, the judiciary and the Crown Attorneys, in order to draw in those defence counsel who need guidance and direction in a long complex case.

C. Remedial Responses to Professional Misconduct in Long Complex Trials

1. Introduction

Although professional misconduct in the courts is rare, it is probably more prevalent in long complex trials. This is because counsel in these cases are put under intense pressure over a long period of time and because their relationships with adversaries are continually tested over this extended period of time. It is easy to forgive an opponent for some isolated failing in a short trial. It is much more difficult to maintain respectful relations with an opponent over the course of a very long trial, particularly an opponent who you have come to dislike or who you perceive as flawed.

All of the leading studies of the "mega-trial phenomenon" have recommended that steps must be taken in this area, to educate counsel for the Crown and the defence about their duties as "officers of the court" and to enforce those duties.[161]

Professional misconduct in the course of a long complex criminal trial is the joint responsibility of the judiciary, the Law Society, LAO (as most of these cases are publicly funded) and the Attorney General. We state this proposition because all four bodies possess jurisdiction, in their own spheres, to respond to court room misconduct. The kind of court room conduct that can be unprofessional includes misleading the court, rude and abusive behaviour towards justice system participants, making allegations of *mala fides* that have no basis in fact or law, failing to follow judicial direction and falling below professional standards of competence. The courts possess an escalating series of common law sanctions to prevent and, in some cases, punish this kind of conduct. The LSUC possesses a broad array of professional disciplinary remedies for the same conduct. As discussed in Chapter 5, LAO has the power to remove lawyers from its panels on the basis of this kind of misconduct. Finally, the Attorney General's Ministry has internal disciplinary processes that would apply in such cases.

It is perhaps because all four bodies possess varying jurisdictions to remedy this problem that no one seems to take lead responsibility. As a result, there are almost never any serious consequences when professional misconduct occurs in the court room. We believe that all four bodies must exercise their jurisdictions in order to effectively respond to this issue. We will address the responses that are appropriate in each of their respective areas of responsibility.

2. Judicial Responses to Court Room Misconduct

All courts of record, whether statutory or superior, possess the implied power to control their own processes, to prevent abuses of their process and to ensure a fair trial.[162] As a result, trial courts can utilize an array of escalating common law remedies that are available when faced with court room misconduct that violates counsel's duties to the court and to the administration of justice. Those broad duties have already been described in Chapter 4, Section I of this Report. They require that all counsel behave responsibly and with civility. As noted by the Court of

[161] *Supra* note 6.
[162] *Supra* note 95.

Appeal in *Felderhof*, the kind of misconduct described above violates both the *Rules of Professional Conduct* and counsel's duties as "officers of the court".[163] The judicial remedies available to enforce these duties include reprimands, injunctions, costs orders, contempt citations and referral of counsel to the LSUC for discipline.[164]

The most important step that a judge can take in a long complex trial is to make it clear at the outset that high standards of professionalism are expected throughout the proceedings. We were advised that some counsel have simply never been told that they must sit when their opponent rises, that they must address the court and not address their opponent, that they must employ temperate and respectful language, even when making forceful submissions, and that they must never insult their opponent or resort to sarcasm. A trial judge should begin by educating counsel about these simple rules and, perhaps, by reminding them of their duties as explained in *Felderhof*:[165]

> Counsel are required to conduct themselves professionally as part of their duty to the court, to the administration of justice generally and to their clients. As Kara Anne Nagorney said in her article, "A Noble Profession? A Discussion of Civility Among Lawyers" (1999), 12 Georgetown Journal of Legal Ethics 815 at 816-17: "Civility within the legal system not only holds the profession together, but also contributes to the continuation of a just society...Conduct that may be characterized as uncivil, abrasive, hostile, or obstructive necessarily impedes the goal of resolving conflicts rationally, peacefully, and efficiently, in turn delaying or even denying justice." Unfair and demeaning comments by counsel in the course of submissions to a court do not simply impact on the other counsel. Such conduct diminishes the public's respect for the court and for the administration of criminal justice and thereby undermines the legitimacy of the results of the adjudication.
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> ...
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> Every counsel and litigant has the right to expect that counsel will conduct themselves in accordance with The Law Society of Upper Canada, *Rules of Professional Conduct*. Those rules are crystal clear. Counsel are to treat witnesses, counsel and the court with fairness, courtesy and respect. See Rules 4 and 6 and Commentaries. I have set out what seems to have been the genesis

[163] *Supra* notes 153 and 154.
[164] Michael Code, s*upra* note 150.
[165] *Supra* note 95 at pp. 536 and 540.

> for the acrimony between counsel in this case. Even if [defence counsel] honestly believed that the prosecution tactics were excessive and could amount to an abuse of process, this did not give him licence for the kind of submissions he made in this case...Motions based on abuse of process and prosecutorial misconduct can and should be conducted without the kind of rhetoric engaged in by defence counsel in this case.

If counsel are reminded of these duties, and the simple rules associated with them, the right tone will be set at the beginning of the trial. At the first sign of any departure from these rules, the judge must intervene and make it clear that counsel's conduct is unacceptable. In *R. v. Henderson*, a case involving Crown counsel who conducted an improper cross-examination of the accused and defence counsel who was "provoking, defiant and argumentative", the Court of Appeal held that the conduct on both sides "should not be condoned and should be addressed by the trial judge." Labrosse J.A., giving the judgment of the court, drew on his own experience as a trial judge and stated as follows:[166]

> Respect for the administration of justice is not enhanced where the courts appear to condone improper conduct...<u>At the first sign by either counsel</u> of questions which may lead to an improper cross-examination of a witness, a well-placed comment by the trial judge or <u>a more explicit reminder in the absence of the jury of the proper role of counsel</u> has, in my experience, invariably nipped any problem in the bud. If not, other means are available to the trial judge <u>to assure the proper conduct of counsel</u>. [Emphasis added]

Although the suggested "explicit reminder...of the proper role of counsel" may have to be repeated, we believe that this educative function of the trial judge is very important and it should be repeated in order to set the proper tone in the court room.

If this approach fails and, even after repeated reminders, counsel continues to misconduct himself/herself, then stronger remedies are required. An order or injunction to stop the misconduct, if it is violated, can amount to a contempt *in facie*. As Lord Goddard put it in the leading Privy Council case:[167]

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[166] (1999), 134 CCC (3d) 131 at 144-147 (Ont. C.A.).
[167] *Parashuram Detarum Shamdasani v. King-Emperor*, [1945] A.C.264 (P.C.)

> If in the course of a case a person persists in a line of conduct or use of language in spite of the ruling of the presiding judge he may very properly be adjudged guilty of contempt of court, but then the offence is the disregard of the ruling and setting the court at defiance.

Conduct akin to contempt can also give rise to a common law wasted costs order against counsel personally, in both civil and criminal cases.[168]

We recommend that trial judges use these powers with restraint for a number of reasons. First, there is an alternative remedy available, when faced with counsel who persistently engages in unprofessional conduct in the court room, namely, referral to the Law Society. Second, contempt and personal costs orders should be remedies of last resort because they are overtly punitive and they require a very high level of misconduct. Finally, counsel is generally entitled to notice and a hearing before these sanctions are imposed and this will inevitably disrupt the trial and may prejudice the client.[169]

Referral to the Law Society should be a useful intermediate remedy, where the "explicit reminder" in *Henderson* has repeatedly failed but before resorting to contempt and costs. It is a remedy that will not disrupt the trial or prejudice the client and it provides an array of sanctions that can be tailored to the misconduct. However, it does require that the Law Society take the referral seriously. This has not historically been the case and the judiciary in Ontario appears to have given up on the remedy of referral to the Law Society. We will address the Law Society's responsibilities in the next section of this chapter and the need for a more forceful disciplinary response.

The judiciary can assist in making the remedy of referral to the Law Society more effective. First, the judge at trial or on appeal who recommends referral to the Law Society should include findings of fact on the record as to what counsel did and what impact it had on the proceedings. Second, the judge should only recommend referral and should not become involved in actually sending a complaint to the LSUC. The Chief Justice, Associate Chief Justice or

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[168] *Ridehalgh v. Horsefield*, [1994] 3 All E.R. 848 (C.A.); *Young v. Young* (1990), 75 D.L.R. (4th) 46 at 99-115 (BCCA), varied 108 D.L.R. (4th) 193 at 284 (SCC); *R. v. Cronier* (1981), 63 CCC (2d) 437 (Que. C.A.); *R. v. Pawlowski* (1992), 13. C.R. (4th) 228 (Ont. Ct.-Gen. Div.), affd. (1993), 79 CCC (3d) 353 (Ont. C.A.); *R. v. Brown Shoe Co. of Canada Ltd. (No. 2)* (1984), 11 CCC (3d) 514 (Ont. H.C.); *R. v. Chapman* (2006), 204 CCC (3d) 457 (Ont. C.A.).

[169] *R. v. K. (B.)* (1995), 102 C.C.C. (3d) 18 (SCC); *R. v. Arradi* (2003), 173 C.C.C. (3d) 1 (SCC); *U.N.A. v. AG Alberta* (1992), 71 C.C.C. (3d) 225 (SCC); *R. v. Glasner* (1994), 93 C.C.C. (3d) 226 (Ont. C.A.).

Regional Senior Justice should review the matter, after receiving a transcript with the findings from the judge, and should then decide whether to actually refer counsel to the Law Society. These two simple steps produce a number of benefits. They protect the trial judge from any adversarial complainant status in the matter, they provide an opportunity for sober second thought, they should produce greater consistency as to what level of misconduct merits a referral to the Law Society, they send a message to the Law Society that the matter is serious (if the Chief Justice or other Senior Justice submits the complaint) and they provide evidence in the form of findings of fact which the Law Society can then use to immediately commence its process.

Once again, B.C. appears to be taking the lead in this area. In a matter styled *R. v. Dunbar et al*, four appeals had been argued together by one counsel as they raised a common issue. Chief Justice Finch presided over the panel and the appeals were dismissed. The Court then referred counsel to the Law Society on the basis of the following findings which were set out in an Addendum to the Court's reasons:[170]

> Regrettably, in this case, counsel's zeal blinded him to his professional responsibilities...[His materials] contain serious allegations of unprofessional conduct and substance abuse, against another lawyer or former lawyer, all of which allegations are unfounded...He used his right of audience, and the privilege surrounding judicial proceedings to make seriously damaging but completely unfounded, allegations against John Banks. This Court has held that the privilege which accompanies legal proceedings should not be used as a cloak for personal and irrelevant attack.

The Law Society in B.C. responded to this referral by the Chief Justice, accompanied by clear findings of fact, with a significant licensing penalty. We will discuss the case in greater detail below, when we come to the Law Society of Upper Canada, which has not yet responded in a similar fashion to this kind of professional misconduct.

The Ontario Court of Appeal has recently held that referral to the Law Society is an appropriate response to court room misconduct.[171] We believe that there are many advantages to

[170] *Supra* note 145 at paras. 331 and 333.

[171] *R. v. Francis* (2006), 207 C.C.C. (3d) 536 at 542-543 (Ont. C.A.). In the U.K., the *Runciman Report* recommended a report to the Bar Council as one of a number of judicial responses to incompetent or irresponsible conduct by counsel, *supra* note 32 at p.109:

this approach, as outlined above. Of course, the ultimate sanctions of contempt and costs orders against counsel personally should be held in reserve and used in the most extreme cases. However, they should generally be exercised at the end of the trial, so as not to interrupt or prejudice the client's trial. A referral to the LSUC can be recommended to the Chief Justice, at any stage of the trial, whenever it is needed to escalate the remedies imposed on counsel who repeatedly engage in misconduct.

3. The Law Society's Response to Court Room Misconduct

In response to our consultation documents, we received helpful submissions from the LSUC. Three important points emerged from these submissions.

First, the LSUC acknowledged that there has been a recent increase in complaints about declining standards of professionalism, including dishonourable, misleading and uncivil conduct. As a percentage of all complaints, this category more than doubled between 2004 and 2007, from 4.7% to 11.1%. This trend is of concern to the LSUC and it is consistent with the results of our research and the submissions that we received.

The second noteworthy point was the LSUC's characterization of complaints of incivility in the justice system, namely, that "while damaging to the administration of justice, [they] lie generally at the less serious end of the spectrum of professional discipline issues." The normal LSUC response in these cases has not been disciplinary at all but has been "remedial", in the form of an Invitation to Attend or a Letter of Advice. Since these responses are not disciplinary they are not made public.

We were advised that there have been a total of 48 Invitations to Attend and 26 Letters of Advice issued since the beginning of 2003 and that some of these cases included allegations of uncivil, misleading and dishonourable conduct. As the name suggests, an Invitation to Attend is a private meeting with a panel of benchers where the lawyer is counselled for his/her

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> "We can see no justification for lawyers refusing to do the work necessary to ensure that the system operates as effectively and as efficiently as possible, whatever grounds there may be for seeking more time to prepare in any individual case. The judge should have available a range of sanctions against poor performance or limited cooperation and should be able, after consideration of the options, to select the one appropriate to the case. The sanctions should, in our view, include a report from the judge on the competence of the lawyer to the taxing officer dealing with his or her fees; or a report to the barrister's head of chambers or to the leader of the circuit or to the Bar Council; or a wasted costs order."

misconduct. The Letter of Advice is even less intrusive as there is no formal appearance before the benchers. If the lawyer repeats the misconduct, no reference can be made to the prior Invitation to Attend or Letter of Advice at any subsequent disciplinary proceedings.

This very quiet and very lenient response to what may have been very public misconduct in a court room caused the LSUC to develop a new remedy in early 2007. The LSUC's concern was that it could be perceived to have done nothing in very public cases of court room misconduct, given that its two most common remedies were entirely private. The new remedy developed by the LSUC, known as a Regulatory Meeting, is the same as an Invitation to Attend except that it is now made public. It has been used once, on April 10, 2007, in the case of a lawyer who sat on the floor when the judge told him to be seated and who moved sideways when the judge told him to "move on". The case was a very long and dysfunctional murder trial that exhibited many of the same difficulties and failings that we have seen in our Review.

The Regulatory Hearing, as a response to the kind of misconduct that we are concerned with, remains at the very low "remedial" end of the spectrum. When lawyers disrupt or distort serious criminal trials by engaging in professional misconduct, it is a very serious matter that is worthy of real disciplinary penalties. We encountered widespread dismay amongst members of the judiciary, if not outright cynicism, on the subject of LSUC discipline for court room misconduct. There is a widespread perception that the LSUC will do little or nothing in response to these matters. That perception has considerable basis in fact. As a result, the judiciary has simply given up on referring lawyers to the LSUC when they misconduct themselves in the course of criminal proceedings.

This leads to a third point that we wish to note, emerging from the LSUC's submissions. The LSUC submitted that "there is a dearth of reported complaints" involving court room misconduct in criminal cases and observed, correctly, that "there appears to be a general reluctance to make such complaints". It, therefore, appears that we have arrived at a stalemate in this area. The LSUC has a history of treating these cases with undue leniency, and often with complete silence, and so the judiciary has given up on reporting them. The result is that the LSUC is concerned about increasing incivility in the courts but is no longer part of the solution because they are not receiving complaints. The LSUC noted that "the bar and the courts need to work together to improve reporting about misconduct in this area of practice." We certainly

agree with this observation and the Treasurer, Derry Millar, confirmed this need for a new approach in his remarks at the Opening of the Courts on September 9, 2008.

Once again, we are fortunate to be able to refer to B.C. as a jurisdiction that appears to be working much more effectively in relation to this issue. As noted earlier in this Chapter, in *Dunbar et al* the B.C. Court of Appeal conducted a lengthy hearing at which a number of related criminal appeals were heard together. In an Addendum to its reasons dismissing the appeals, the Court concluded by stating the following:[172]

> It is impossible to measure with any precision, but a reasonable estimate is that the hearing of these four appeals took twice as long as the hearing should have taken if prepared and presented in a professional way. One cannot begin to estimate how much more time and effort was wasted in the preparation of affidavits which were almost entirely inadmissible.
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> One must assume that Mr. Goldberg was paid by someone for these efforts, whether a private or public source. If so, this was a waste of money. Even if done without pay, the improper affidavit material and Mr. Goldberg's submissions were a waste of the court's time, and a waste of other counsels' time, and of the expense of having those other counsel appear.
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> We would ask counsel for the Crown, Mr. Sweeney, to draw these reasons to the attention of the Law Society of British Columbia, the Legal Services Society, or any other body who might reasonably have an interest in controlling and preventing the conduct we have described.

The Law Society in B.C. responded to this referral, not with an Invitation to Attend or a Letter of Advice, but with a three month suspension.[173] We believe this is the appropriate response to court room misconduct that has the effect of distorting, delaying or undermining the due administration of justice. These are very serious consequences and they must be met with serious penalties if the LSUC is to send a deterrent message to the bar.

It is noteworthy that the LSUC does suspend lawyers for incivility, including for three month periods, when lawyers write threatening and insulting letters or make insulting statements

[172] *Supra* note 145 at paras. 341-343.
[173] *Goldberg v. Law Society* 2008 L.S.B.C. 13. We note that this same lawyer conducted a long and acrimonious murder trial in Ontario and was subject to criticism from our Court of Appeal for "truculent and obstreperous conduct." See *R. v. Snow* (2004), 190 C.C.C. (3d) 317 at 326 (Ont.CA).

out of court.[174] The one to three month suspensions imposed in these cases, while undoubtedly appropriate, bear no relationship to the far more lenient remedies in cases of court room misconduct. The harm in the latter class of case is far greater than the harm in the former class and yet the penalties are much more lenient.

Accordingly, we recommend that the LSUC reassess its whole approach in this area and treat cases of court room misconduct as serious professional misconduct. At the same time, the judiciary must resume the practice of making referrals to the LSUC in these cases, together with findings of fact stated on the record. We do not think it is alarmist to suggest that the LSUC's record in this area, unless it changes, threatens to undermine the cause of self-regulation.

Recommendation 34:

The judiciary should insist on high standards of professionalism from all counsel in long complex trials. This should begin with educative steps, to remind counsel of the basic rules of court room behaviour and of their duties as officers of the court. At the first sign of misconduct, the judge should intervene and remind counsel of their proper role. If repeated warnings and orders have no effect, the judge should advise counsel that referral to the LSUC is being recommended to the Chief Justice (or the Associate Chief Justice or Regional Senior Justice). The judge should make findings of fact on the record concerning counsel's conduct and its impact on the proceedings. A referral to the LSUC, assuming the Chief Justice or other Senior Justice approves it, can be repeated in the course of a long trial if there is repetition of the conduct. The ultimate judicial sanctions, namely, costs orders and contempt citations, should be reserved for the most extreme forms of misconduct by counsel and should generally be exercised at the end of the trial and on notice to counsel.

Recommendation 35:

The LSUC should reconsider its present approach to court room misconduct, to the effect that it lies at the "less serious end of the spectrum of professional discipline issues" and

[174] *LSUC v. Kay*, [2006] L.S.D.D. No. 39; *LSUC v. Carter*, [2005] L.S.D.D. No. 57; *LSUC v. Wagman*, [2006] L.S.D.D. No. 79.

merits only "remedial" responses such as Letters of Advice, Invitations to Attend and Regulatory Meetings. When counsel's misconduct disrupts or distorts criminal proceedings, especially long complex trials, it causes great harm to the administration of justice and is worthy of significant penalties. We recommend the approach adopted in B.C. in *Goldberg v. Law Society*.

4. The Attorney General and Legal Aid's Responses to Court Room Misconduct

The final participants in the justice system who have jurisdiction to respond, when counsel misconduct themselves during a long complex trial, are LAO and the Ministry of the Attorney General. We have already set out in Chapter 5 our broad proposals concerning Legal Aid and need only make brief reference to the matter in this chapter.

It should go without saying that when a judge or court makes findings that a lawyer has engaged in misconduct during the course of a major criminal trial, and that lawyer has been publicly funded through LAO, there should then be an inquiry into the matter by LAO followed by real consequences. It is our understanding that this has become the practice in B.C. Indeed, it is hard to imagine any area of publicly contracted work where the contractor carries out the work in an improper manner and yet still remains eligible for similar public work in the future. LAO should follow the B.C. practice such that the very small number of lawyers who misconduct themselves during long complex cases will lose their eligibility to repeat the performance. Professor Trebilcock put it succinctly when he stated that LAO needs to "develop a well-defined process for removing lawyers from panels."[175]

The same applies to disciplinary responses within the Ministry of the Attorney General. When Crown counsel engage in misconduct in the course of a major prosecution there must be an inquiry that leads to consequences, including removal of the Crown from future long complex trials.

We stress that prevention is far more valuable than *ex post* sanctions in this area. If LAO implements our recommendations in Chapter 5 concerning comprehensive "quality assurance standards" and amends its removal processes pursuant to ss. 31 and 32 of Ontario Regulation 106/99, then those very few lawyers who have been responsible for some of the dysfunctional

[175] *Supra* note 126 at p. 159.

long complex trials in this province will simply become ineligible for Legal Aid certificates in future cases.

Similarly, the Attorney General must ensure that the most rigorous hiring, training, and promotion practices are followed within the Criminal Law Division. The position of Crown counsel is one of great responsibility and esteem. It is also well paid and brings with it attractive long term benefits. The Criminal Law Division should only be hiring and promoting the very best young lawyers, in these circumstances, and should only be assigning its most serious cases to the best senior lawyers. Included in the criteria that distinguish our best Crown counsel are their communication skills. Crown counsel must accept and understand the role of defence counsel and must have a personality that is open and communicative with the defence. When assigning Crown counsel to a long complex case, these characteristics are essential.

Finally, it was suggested to us by a number of participants, and we agree, that the respective cultures of the defence and Crown bars have become too entrenched and divided by hard ideologies and that traditions of collegiality and respect at the bar have been eroded. This, in turn, leads to poor communication, unnecessary disputes and a failure to resolve issues and shorten trials. Professionalism requires respect and courtesy towards one's opponent. These values must be taught in the law schools and they must be propagated in continuing education programs, including joint education programs. We strongly urge the Ontario Crown Attorneys' Association (OCAA) and the CLA to take on the task of rebuilding the traditions of respect and collegiality between the Crown and defence bars. These two organizations are each strong and highly respected. They both provided us with excellent submissions that were thoughtful and responsible. We believe that the OCAA and the CLA can and should work together on this vital project of breaking down some of the divisions that have grown up within the bar.

Recommendation 36:

LAO and the Ministry of the Attorney General should take disciplinary steps, within their own spheres, when counsel engage in misconduct during the course of long complex trials. They should also take proactive steps to prevent misconduct by insisting on high standards of professionalism when determining panel eligibility (at LAO) and when hiring, promoting and assigning Crown counsel (within the Criminal Law Division).

Recommendation 37:

The OCAA and the CLA should develop joint education programs in order to revive the traditions of collegiality and respect between the Crown and defence bars.

5. The Particular Problem of Incompetence

One discrete aspect of unprofessional conduct is incompetence. The lawyer owes an ethical duty of competence to the client and the *Rules of Professional Conduct* include a fairly detailed description of the duty.[176] The LSUC has recently become more engaged in policing competence after receiving criticism about non-enforcement of this important ethical duty.[177]

We encountered some uncertainty during our consultations as to whether the trial courts possess jurisdiction to remove incompetent counsel, especially in a long complex trial where particularly high levels of competence may be required. We wish to briefly address this difficult topic.

There are a number of well-known historical instances in Ontario where experienced trial judges persuaded counsel that he/she lacked the necessary level of experience or skill to conduct a major case. In each instance, counsel accepted the advice and more senior counsel were then retained to assist. No ruling or court order ever became necessary. If this kind of persuasion fails, the question that arises is whether the trial judge (or pre-trial case management judge, assuming our Recommendation 10 about empowering these judges is accepted) has the power to remove counsel incapable of conducting a long complex trial.

There is little direct authority on the point but we believe the power does exist and should be exercised where the trial judge or, preferably, the pre-trial case management judge concludes that counsel is not competent to conduct a long complex trial. Mr. Justice Hill of the Ontario Superior Court provided us with a very thorough paper on the topic, titled *Ineffective Assistance of Counsel*, prepared in December, 2002, as well as a March, 2008 presentation titled *The Under-*

[176] *Supra* note 153, Rule 2.01. Incompetence is also actionable in both tort and contract. See *Central Trust Co. v. Rafuse*, [1986] 2 SCR 147.

[177] M. Trebilcock, "Regulating Legal Competence" (2001) 34 Canadian Business Law Journal 444; H. Arthurs, "The Dead Parrott: Does Professional Self-Regulation Exhibit Vital Signs?" (1995) 33 Alta. L. Rev. 800; G. Mackenzie, *Lawyers and Ethics, Professional Responsibility and Discipline* (Toronto: Thomson Canada Ltd., 2006), 4th Ed., chapter 24.

Represented Accused, both prepared for judicial education programs. We are very grateful for the assistance that he provided.

The source of the trial court's jurisdiction to remove incompetent counsel, if such power exists, must be found in the implied power of all courts of record to control their own processes and ensure a fair trial.[178] An accused who retains counsel is constitutionally entitled to competent representation by that counsel in order to protect "the fairness of the trial, measured both by reference to the reliability of the verdict and the adjudicative fairness of the process."[179] As a matter of logic and principle, it can be concluded that the former power should be available to protect the latter right since they are both connected by the same underlying policy and purpose. Furthermore, it would be anomalous for appellate courts to unquestionably wield the power to reverse a conviction, on grounds of incompetent representation by counsel, but for trial courts to have no power to prevent this violation of rights. Trial courts have a duty to ensure that the trial proceeds without reversible error. As one American commentator put it, in instances of "manifest incompetence...the trial court cannot sit by and wait for an appeal to retrospectively remedy the harm" occasioned by the ineffective assistance of counsel.[180]

The one circumstance in which the courts have had no difficulty in asserting a power to remove counsel at trial is on the basis of conflicts of interest. In *Re Regina and Speid* the Ontario Court of Appeal stated:[181]

> The right of an accused to retain counsel of his choice has long been recognized at common law as a fundamental right...However, although it is a fundamental right and one to be zealously protected by the court, it is not an absolute right and is subject to reasonable limitations. It was hoped that these limitations would be well known to the bar, but if not honoured, the court has jurisdiction to remove a solicitor from the record and restrain him from acting.
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> In assessing the merits of a disqualification order, the court must balance the individual's right to select counsel of his own choice, public policy and the public interest in the administration of justice and basic principles of fundamental fairness. Such an order should not be made unless there are compelling reasons. This is clearly

[178] *Supra* note 95.
[179] *Supra* notes 138 and 139.
[180] G. Benson-Amram, "Protecting the Integrity of the Court: Trial Court Responsibility for Preventing Ineffective Assistance of Counsel in Criminal Cases" (2004) 29 N.Y.U. Rev. of Law and Social Change, 425 at 452.
[181] (1983), 8 C.C.C. (3d) 18 at pp. 20-21 and 22 (Ont. C.A.).

> such a case and to do otherwise would result in real mischief or real prejudice.
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> ...
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> Mr. Speid has a right to counsel. He has a right to professional advice, but he has no right to counsel who, by accepting the brief, cannot act professionally. A lawyer cannot accept a brief if, by doing so, he cannot act professionally, and if a lawyer so acts, the client is denied professional services. [Emphasis added]

Similarly, in *MacDonald Estate v. Martin*, the leading Supreme Court of Canada case on removal of counsel for conflict of interest, Sopinka J. described the source of the trial court's power in the following terms:[182]

> A code of professional conduct is designed to serve as a guide to lawyers and typically it is enforced in disciplinary proceedings...The courts, which have inherent jurisdiction to remove from the record solicitors who have a conflict of interest, are not bound to apply a code of ethics. Their jurisdiction stems from the fact that lawyers are officers of the court and their conduct in legal proceedings which may affect the administration of justice is subject to this supervisory jurisdiction. [Emphasis added]

These cases establish that there is jurisdiction to remove counsel who "cannot act professionally", in order to protect "the administration of justice." Such a jurisdiction must apply to incompetent counsel as they cannot act professionally and they undermine the proper administration of justice.

There is one Ontario case holding that any member of the Law Society has a right to appear in court and that the trial judge's power "to control his own court process does not carry with it the right to choose which counsel are to appear before him," including "the incompetent" lawyer.[183] It is the decision of a single judge and the facts of the case were weak, arguably not justifying a removal order. In any event, the Court of Appeal subsequently doubted the correctness of the decision. In *R. v. Romanowicz*, the Court held that trial courts have the power to remove paralegals on grounds of competence, leaving open the question of whether the power also extends to lawyers. The source of the trial court's jurisdiction to remove an incompetent

[182] [1990] 3 SCR 1235 at para. 21.
[183] *Re Milligan* (1991), 1 C.P.C. (3d) 12 (Ont. Ct.-Gen. Div.).

paralegal, as found by the Court of Appeal, is "the court's power to control its own process in order to maintain the integrity of that process". In principle, this power would extend to lawyers and the Court of Appeal stated that "[we] should not be taken as agreeing with Dilks J.'s observation [in *Milligan*] that trial judges are powerless to prevent representation by incompetent counsel."[184]

The great weight of principle and authority, therefore, supports the existence of such a power. Justice Hill argues in his two papers in favour of a power to prevent incompetent counsel from continuing to act in a case, as does the leading American commentator, Judge Schwarzer.[185] We agree with them that a common law power exists to intervene in a trial that is demonstrably unfair due to counsel's incompetence.

The difficulty is when and how to exercise the power. Justice Hill argues for restraint: "realistically, and practically, the trial judge is restricted to intervening to deal [only] with flagrant, manifest or egregious incompetence." He explains the reasons for this highly deferential standard, as follows:[186]

> The challenges for the trial court to identifying incompetence generally arise from the inadequacy of a total record visible to the presiding trial judge, what is often incremental exposure of substandard performance during the trial, and, the limits imposed on the court by the adversary system itself. A competence inquiry at trial is a rare event...
>
> Additionally, judicial questioning of defence counsel in an adversary system, at some level, may appear to challenge the accused's right to choose his or her own counsel, risk undermining the client's confidence in counsel, destroy the appearance of a fair trial, and any "meaningful inquiry into competence could well take the trial judge into confidential discussions" between the accused and counsel or unfairly "reveal defence strategies and tactics to the prosecution".

[184] *Supra* note 95 at paras. 58 and 72.
[185] W. Schwarzer, "Dealing with Incompetent Counsel – the Trial Judge's Role" (1980) 93 Harv. L. R. 633. Also see P. Calarco, "Not in My Court You Don't! The Right of Audience and Enforcement of Ethical Conduct" (2008) 54 C.L.Q. 130.
[186] The Honourable Mr. Justice C. Hill, "The Under-Represented Accused", March, 2008, unpublished, at pp. 27-32; "Ineffective Assistance of Counsel", December, 2002, unpublished, at pp. 27-28.

Judge Schwarzer recommends an incremental approach to remedies for "observed deficiencies before it is too late, resorting always to the least intrusive measure adequate to the need" but eventually culminating in "directing a change of counsel."[187] Justice Hill similarly advocates use of "a panoply of prophylactic or remedial measures" such as instructions, guidance, directions, recesses or adjournments. Finally, "in cases of manifest incompetence, the court should refuse to proceed in the absence of replacement counsel or an experienced counsel joining the defence team." [188]

We agree with the cautious and deferential approach of Justice Hill and Judge Schwarzer to this particularly difficult issue. The trial judge should only intervene where there is strong evidence of incompetence and the interventions should involve lesser remedies before resorting to removal.

Recommendation 38:

The trial courts possess jurisdiction to prevent incompetent counsel from proceeding, in order to protect the fairness of a long complex trial. The jurisdiction should be exercised with caution and restraint, by first adopting lesser remedies to guide counsel and to suggest that counsel obtain assistance, and should only be exercised where there is clear evidence of incompetence.

D. Post-Mortems of the Justice System's Performance When a Long Complex Case is Seen to Have Failed

Many participants in our Review recommended adoption of the practice, now prevalent in the U.K., of conducting *post-mortems* of major cases that are perceived by the public to have been conducted inefficiently or ineffectively. A neutral inquiry into the causes of these perceived failures, it was argued, could help to prevent their recurrence and to restore public confidence.

It is noteworthy that both LAO and the Ministry of the Attorney General supported this proposal. Its merit, we believe, is that there is a much greater degree of transparency and objectivity when a third party expert reviews the case. An internal LAO inquiry into the

[187] *Op. cit.* at pp. 650 and 662-664.
[188] "The Under-Represented Accused", *supra* note 184 at pp.39-49; "Ineffective Assistance of Counsel", *supra* note 184 at pp. 30-35.

performance of its counsel or an internal Ministry of the Attorney General inquiry into the performance of its counsel would necessarily be confidential and would not be perceived as independent. The U.K. model provides greater accountability to the public when a long complex case is seen to have failed. It also has the benefit of removing the case from the political arena. Finally, it avoids the delay, expense and procedural trappings of a full Public Inquiry.

The U.K. model, as we are calling it, arises from two distinct sources. One vehicle for post-case reviews in that country is found in s. 2(1)(b) of the *Crown Prosecution Service Inspectorate Act 2000* which allows the Attorney General to refer a case to an outside auditor known as the Chief Inspector of the Crown Prosecution Service.[189] A good illustration of the use of this provision was after the Crown asked that all charges be dismissed in the recent Jubilee Line case. The Chief Inspector summarized the purpose of his review in the following terms:[190]

> The collapse of the Jubilee Line case in March 2005, without the jury having been asked to consider their verdicts, was generally regarded as an expensive disaster that reflected no credit on the criminal justice system. Serious allegations had been made that personnel of London Underground had been corrupted, and that as a result the main defendants had dishonestly enriched themselves out of the public financing for that project. In the process of investigating and trying these allegations further large sums of public money were expended, but to no useful purpose, because the trial produced no adjudication on the merits of those allegations. Intolerable burdens had been placed on the jury trying the case, whose time – amounting in this case to a substantial portion of their lives, some 21 months – had in effect been wasted.
>
> Immediately following the collapse of the case, the Attorney General referred the matter to me with a view to ascertaining how this state of affairs had come about and to make recommendations designed to prevent a recurrence. In doing so he made it clear that the emphasis should be on identifying what had gone wrong and learning lessons, rather than seeking to apportion blame and criticism. I have been pleased to undertake this review and its purpose has been precisely that.

[189] *Crown Prosecution Service Inspectorate Act 2000* (U. K.), 2000, c.10, s.2(1)(b).
[190] *Review of the Investigation and Criminal Proceedings Relating to the Jubilee Line Case*, HM Chief Inspector Stephen Wooler, (London: HMCPSI, 2006) p.(i).
Online: http://www.hmcpsi.gov.uk/reports/JubileeLineReponly.pdf

A somewhat different approach, which also exists in the U.K., is to establish a broader Review Board comprised of representatives from all the major participants in the justice system and have that Board examine long complex cases that are believed to have been conducted ineffectively. Lord Falconer, the Lord Chancellor, announced that he was adopting this approach in his July 2005 Report to Parliament, titled *A Fairer Deal for Legal Aid*:[191]

> To ensure that we build on, and continually refine the way that high cost cases are managed, the key players from across the criminal justice system will have a seat on a Very High Cost Case Review Board. After cases have concluded the Board will collectively examine the reasons why the largest cases have taken so long to try, and consumed so much resources and together agree on ways that the control and management of these cases can be improved.

As a result, the Very High Cost Case Review Board was established and it now conducts post-case audits of long and expensive criminal trials in the U.K.

The Inspectorate approach is obviously more targeted, allowing the Attorney General to selectively order reviews of only those particularly troubling cases that appear to have been mishandled by the justice system. The review would presumably have to await the completion of any appeals. The Very High Cost Case Review Board approach allows for the review of more cases and it likely produces more representative results, rather than looking only at the worst cases. It also helps to develop consensus solutions because of the Board's broad representation from across all branches of the justice system. However, it would be more costly than a targeted Inspectorate.

We recommend that one model or the other should be considered, for the reasons outlined above, but with certain modifications. It would perhaps be wise to begin with an adaptation of the less costly Inspectorate model and, if it produces useful lessons and expansion seems to be merited, then move to the more expensive but more comprehensive Review Board model. We note that the U.K. legislation contemplates a permanent office for the Inspectorate

[191] *A Fairer Deal for Legal Aid*, the Secretary of State for Constitutional Affairs and Lord Chancellor (London: Department for Constitutional Affairs, 2005) at p. 26. Online: http://www.dca.gov.uk/laid/laidfullpaper.pdf

with a permanent position of Chief Inspector. We doubt this is necessary and believe that *ad hoc* appointment of Inspectors in individual cases would be the best way to begin.

Recommendation 39:

The Attorney General should possess the power to order a *post-mortem* or audit of a long complex trial, by a neutral expert, where there is a reasonable perception that the case has been conducted ineffectively or inefficiently. The *Crown Prosecution Inspectorate Act 2000* (U.K.) is a useful model, with some modifications.

CHAPTER 7: Managing the Unrepresented Accused

A. Introduction

The issue of the unrepresented or self-represented accused, while important to the broader justice system, is particularly germane in long complex cases. What might otherwise be a relatively straightforward trial can turn into a lengthy and complex proceeding, especially when the accused chooses to be self-represented. In those cases where a self-represented accused is intent on controlling and/or disrupting the trial there is a need for remedial steps which we will address in this final Chapter.

There are many reasons why an accused is unrepresented at trial or might choose to be self-represented. The main explanation for the unrepresented accused is that there are many Canadians who, because of their assets or income, do not qualify for Legal Aid, yet are not able to afford a lawyer.[192] An individual may also be unrepresented due to inability to find a lawyer willing to act on his/her behalf. Finally, an accused may choose to be self-represented because they believe, unwisely, that they are able to conduct their own defence. It is this last group that raises the most difficult challenges. If, for whatever reason, an accused is either unrepresented or chooses to be self-represented there may be an obligation on the court to secure legal representation in certain circumstances.

It is a challenging task for the trial judge to ensure a fair and efficient trial where the accused is either unrepresented or self-represented. The following description by Madam Justice Fuerst points out some of the difficulties:[193]

> Whatever the reason for his or her status, the self-represented accused is usually ill-equipped to conduct a criminal trial. He or she comes to court with a rudimentary understanding of the trial process, often influenced by misleading depictions from television shows and the movies. His or her knowledge of substantive legal principles is limited to that derived from reading an annotated *Criminal Code*. He or she is unaware of procedural and evidentiary rules. Even once made aware of

[192] Remarks of the Right Honourable Beverley McLachlin, P.C., Empire Club of Canada, Toronto, March 8, 2007, Online: http://www.scc-csc.gc.ca/court-cour/ju/spe-dis/bm07-03-08-eng.asp

[193] The Honourable Madam Justice M. Fuerst, "The Self Represented Accused: The Trial Judge's Perspective", July 2007, unpublished, at p. 2.

> the rules, he or she is reluctant to comply with them, or has difficulty doing so. The limitations imposed by the concept of relevance are not understood or are ignored, and the focus of the trial is often on tangential matters. Questions, whether in examination-in-chief or cross-examination, are not framed properly. Rambling, disjointed or convoluted questions are the norm. The opportunity to make submissions is viewed as an opportunity to give evidence without entering the witness box.

The criminal justice system often does not work as it should when an accused is not represented and cannot present or challenge the evidence in a meaningful way. In such situations the trial judge is asked to correct this imbalance. This can, however, create a conflict between the impartiality of the trial judge and the need to intervene to protect the rights of the unrepresented accused. In *R. v. McGibbon*, the Ontario Court of Appeal addressed the issue of the trial judge's general duty to assist in these cases:[194]

> Consistent with the duty to ensure that the accused has a fair trial, the trial judge is required within reason to provide assistance to the unrepresented accused, to aid him in the proper conduct of his defence, and to guide him throughout the trial in such a way that his defence is brought out with its full force and effect. How far the trial judge should go in assisting the accused in such matters as the examination and cross-examination of witnesses must of necessity be a matter of discretion.

Beyond this general duty of the trial judge to assist there are other options open to the court to deal with the difficult issues raised during the trial of a self-represented or unrepresented accused. Particularly in the context of long complex cases, the trial judge may find it necessary to appoint *amicus curiae* to assist the court or, in some exceptional circumstances, to appoint counsel for the accused in order to preserve the integrity of the process and ensure a fair trial.

B. Appointing *Amicus Curiae*

A judge has the power to appoint *amicus curiae* at the trial of an unrepresented or self-represented accused on the basis of its inherent jurisdiction to protect the fairness of the trial and

[194] *R. v. McGibbon* (1988), 45 C.C.C. (3d) 334 at 347 (Ont. C.A.). Also see *Statement of Principles on Self-Represented Litigants*, Canadian Judicial Council, 2006. Online: http://cfcj-fcjc.org/inventory/reform.php?id=46

the proper administration of justice.[195] In *R. v. Lee*, the Court set out a non-exhaustive list of factors to consider when deciding whether to appoint *amicus* in a case involving an unrepresented accused: the complexity of the case; the seriousness of the potential penalties; the accused's age and ability to understand the proceedings and to express himself; and the accused's familiarity with the trial process.[196]

The timing of an order appointing *amicus* may be important. *Amicus* should generally be appointed at the earliest opportunity in complex proceedings with an unrepresented accused. This will assist in avoiding some of the delays that may arise if the appointment is made at trial. In *R. v. W. (P.H.L.)*, the Court noted that if *amicus* had been appointed after the trial had already began, the trial judge may have been forced to declare a mistrial due to the delay caused by the late appointment.[197]

As to the role of *amicus*, the authorities disclose a spectrum of involvement in the trial. Traditionally *amicus* has not played a substantial role, simply making submissions so that the court is aware of all relevant points of law or fact, and thus helping in this limited way to ensure a fair trial. *R. v. Brown*, the "Just Desserts" murder trial, illustrates this approach. One of the three co-accused was self-represented and *amicus* was appointed but performed a very limited role. *Amicus* did not cross-examine any witnesses, give advice to the accused or receive any confidential information from the accused, and only made submissions to the court on the basis of the evidence adduced.[198] In other cases, *amicus* has taken on the role of cross-examining witnesses. This may occur when an accused is not permitted to cross-examine the witnesses himself, such as where the witnesses are minor victims of sexual crimes or otherwise vulnerable, or where *amicus'* involvement is necessary to ensure that the evidence is adequately tested.[199] Given the increasing length and complexity of criminal trials, as discussed in Chapter 2, we believe the court should consider a broad role for *amicus*. When *amicus* take on an expanded role, including examining and cross-examining witnesses, they need to consult with the client,

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[195] *R. v. Samra* (1998), 129 C.C.C. (3d) 144 at 154 (Ont. C.A.); *R. v. Tehrankari*, [2008] O.J. No. 1902 (S.C.J.). C.D. McKinnon J. also addresses the issue of funding of *amicus curiae* in the latter case.
[196] *R. v. Lee* (1998), 125 C.C.C. (3d) 363 at 365 (N.W.T.S.C.)
[197] *R. v. W. (P.H.L.)* (2004), 190 C.C.C. (3d) 60 (B.C.C.A.).
[198] *R. v. Brown*, 1999 Carswell Ont. 4700 (Gen. Div.) aff'd. (2006), 215 C.C.C. (3d) 330 (Ont. C.A.). Also see *R. v. Samra, supra*, note 195 at p. 153.
[199] *R. v. Lee, supra* note 196 at pp. 365-367; *R. v. Phung*, [2006] O.J. No. 5663 (S.C.J.).

assuming the client is willing to meet. Although *amicus* is not counsel to the accused, the courts have sensibly protected the confidentiality of these communications.[200]

Of particular interest on this point is the recent decision of the British Columbia Court of Appeal in *R. v. W. (P.H.L.),* which appears to contemplate an expanded role for *amicus.* The elderly accused was charged with a historical sexual assault of his daughters. He had been refused legal aid and a *Rowbotham* order was denied on the basis that he could afford to retain counsel. The accused chose to proceed self-represented. The Crown acknowledged the case was serious and complex. On the appeal from his conviction, the British Columbia Court of Appeal held that, as the trial progressed, it became clear the accused was not capable of defending himself effectively. He frequently brought up matters that the trial judge warned him were prejudicial to his case, he declined to cross-examine the complainants, and he eventually abandoned his closing address after objections that he was trying to adduce new evidence. The Court held that the accused could not receive a fair trial without the assistance of counsel and that the trial judge should have either entertained a fresh *Rowbotham* application or should have appointed *amicus curiae*.[201] A new *Rowbotham* application would almost certainly have failed since the accused's financial circumstances had not changed. The thrust of the Court's reasoning appears to be that in these circumstances *amicus* should have been appointed and that the role of *amicus* would include assisting the accused in the conduct of his defence so as to ensure that he received a fair trial.

We believe that the appointment of *amicus* at the early stages of a long complex trial has many benefits where the accused is either unrepresented or self-represented. *Amicus* can help to identify those issues and motions that have potential merit and those that do not. If the accused gains confidence in the *amicus,* the role can evolve into a form of representation and thus help to shorten and simplify these very difficult trials.

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[200] *R. v. Lee*, *supra* note 196 at p. 367; *R. v. Jordan* 2002 Carswell On. 6235 at para. 23 (S.C.J.). Wigmore's four criteria for the recognition of privilege on a case by case basis would seem to apply in these circumstances. See *R. v. Gruenke* (1991), 67 C.C.C. (3rd) 289 (S.C.C.).

[201] *R. v. W. (P.H.L.), supra* note 197 at pp. 65-70. Also see *R. v. Chemama* 2008 ONCJ 31 (Ont. C.J.) where Green J. denied a *Rowbotham* application but appointed *amicus*.

C. Appointing Counsel

Section 651(2) of the *Criminal Code* provides that:

> Counsel for the accused or the accused, where he is not defended by counsel, is entitled, if he thinks fit, to open the case for the defence, and after the conclusion of that opening to examine such witnesses as he thinks fit, and when all the evidence is concluded to sum up the evidence. [Emphasis added]

This provision sets out the statutory right of an accused to be self-represented. In *R. v. Swain* the Supreme Court of Canada held that the accused's right to control their own defence, including the right to be self-represented, is a constitutional principle: [202]

> Given that the principles of fundamental justice contemplate an accusatorial and adversarial system of criminal justice which is founded on respect for the autonomy and dignity of human beings, it seems clear to me that the principles of fundamental justice must also require that an accused person have the right to control his or her own defence…An accused person has control over the decision of whether to have counsel. [Emphasis added]

When accused persons exercise the right to conduct their own defence they, of course, still retain the right to a fair trial. Accordingly, the trial judge is required to assist the accused in navigating the trial process and bringing out the defence. How far the trial judge must go in assisting the self-represented accused, as discussed above, is a matter of discretion. In some cases, the trial judge may actually go so far as to assist in the cross-examination of witnesses.[203]

However, courts have consistently held that a self-represented accused is not entitled to any special advantages by virtue of that status; the accused assumes the risk of self-representation.[204] The right to self-representation and to make full answer and defence do not give the accused licence to make a mockery of the court and its process:[205]

> The right of an accused to make full answer and defence entitles the accused to adduce relevant evidence, to advance legal argument and to address the Court. It carries with it

[202] *R. v. Swain*, [1991] 1 S.C.R. 933 at 972. Also see *R. v. Vescio*, [1949] S.C.R. 139 at para. 11.
[203] *R. v. McGibbon*, *supra* note 194.
[204] *R. v. Romanowicz* (1998), 14 C.R. (5th) 100 (Ont. Gen. Div.), aff'd *supra* note 95.
[205] *R. v. Fabrikant*, *supra* note 102 at p. 574; *R. v. Pawliw* (1985), 23 C.C.C. (3d) 14 at 18 (B.C.S.C.).

> no licence to paralyse the trial process by subjecting an endless stream of witnesses to interminable examination on irrelevant matters. In this regard, an unrepresented accused enjoys no particular privilege. On purely formal matters, he, untrained in legal science, will generally be permitted reasonable latitude in putting questions, in formulating objections, and in arguing points of law. By renouncing the assistance of counsel, however, an accused gains no right to proceed by different fundamental rules.

There are, however, additional challenges caused by an unruly self-represented accused. In such a case, the appointment of *amicus* may not improve the process since the disposition and conduct of the accused is generally not conducive to accepting assistance. In these situations, the only available judicial recourse is to have the accused removed from the court room. Section 650(2)(a) of the *Criminal Code* enacts the power to remove the accused "where he misconducts himself by interrupting the proceedings so that to continue the proceedings in his presence would not be feasible".

Perhaps the best-known example of the difficulty presented by this more extreme remedy is *R. v. Fabrikant*. The headnote from the decision gives a flavour of the struggle the trial judge had in balancing the integrity of the trial process with the self-represented accused's right to be present and make full answer and defence:[206]

> The accused was charged with four counts of first degree murder, two counts of attempted murder and two counts of hostage taking, following a shooting spree at a university. There was no doubt that the accused had killed the victims and that he committed the other acts alleged. The Crown's case lasted approximately two months, although it was interrupted for a hearing to determine whether the accused was fit to stand trial. At the conclusion of the Crown's case, the accused, who had decided to act on his own behalf, began a defence which lasted over two months and involved the calling of 77 witnesses. Much of the evidence called by the accused was found by the trial judge to be irrelevant. The accused was continuously rude to the trial judge, referring to him on many occasions as a "low little crook". After approximately one month, the trial judge warned the accused that he may have to stop the calling of further defence witnesses and that the accused should be prepared to testify. In the course of the defence evidence, the

[206] *R. v. Fabrikant, supra* note 102.

> accused was found in contempt on six occasions. However, because the accused was not represented by counsel, the trial judge decided not to order the accused expelled from the courtroom. Finally, the trial judge put an end to the calling of further defence witnesses and told the accused that if he wished to testify he should do so. The accused refused. The trial judge then ended the defence case. The accused was permitted to give a jury address which lasted several days. The Crown addressed the jury and the trial judge then summed up the case.

The Quebec Court of Appeal upheld the trial judge's decision to terminate the accused's defence, calling it "inevitable" in light of his conduct; the accused was wasting the court's time calling irrelevant witnesses at great length and advancing a meritless defence of provocation. The Court found that in light of the accused's conduct, he had not been denied the right to control his defence, but rather had sacrificed his right through his failure to exercise it in a reasonable manner.[207]

Fabrikant illustrates the need, in exceptional circumstances, for the court to have greater powers. In particular, the court should be able to appoint counsel for the self-represented accused who is not only behaving in a disruptive or outrageous fashion but is also putting a fair trial at risk. This could be an intermediate remedy, short of removing the accused, or it could be a remedy that accompanies removal.

In *R. v. Pawliw*, Murray J. of the British Columbia Supreme Court described the procedure contemplated by s. 577(2)(a) (the predecessor to the current s. 650 (2)(a)) as "drastic".[208] In *Pawliw*, the self-represented accused persisted in asking improper and repetitive questions, would frequently pause for several minutes in between questions, made constant and frivolous motions to quash the indictment, refused to abide by the trial judge's rulings, and verbally abused nearly everyone in the court room. The trial judge found that the accused was deliberately attempting to delay and obstruct the proceeding. He ordered the accused removed from the court room for the remainder of the Crown's case and cross-examined witnesses himself in the accused's absence. While the trial judge noted that s. 577 had never been challenged under the *Charter*, he was satisfied that even if there was a violation of s. 7 it would

[207] *Ibid* at pp. 573-574.
[208] *Supra* note 205 at p. 17.

be justified under s. 1. He stated that any other result would lead to "chaos in the courts which could be held to ransom by any accused person who takes it upon himself to disrupt the course of justice".[209]

In *R. v. Sharp*, the accused was much more disruptive, shouting and threatening spectators in the gallery. He also fired his counsel and indicated that he did not want to be present for the proceedings. Determining that the accused posed a safety risk, the trial judge ordered that he be removed from the court room. During the Crown's case, he was presented with audio and written transcripts of evidence at the end of each day; ultimately he conducted his defence by video link to the court room. In upholding his summary conviction, the Court acknowledged that Sharp was prejudiced by not being permitted to cross-examine the Crown's witnesses, but held that he effectively chose to curtail his own right to make full answer and defence through his conduct.[210]

We believe these cases illustrate the point that trial judges must have the ability to appoint counsel for those self-represented accused who conduct their defence in such an offensive, disruptive and obstreperous manner that they put the integrity of the trial process at risk. The criminal justice system is better served by having counsel appointed, notwithstanding the wishes of an unruly accused. Removal is a serious measure and should be a last resort. Appointing counsel to assume carriage of the defence is clearly a more palatable and just solution and, in some cases, will allow the trial to proceed without disruption. The narrow wording currently contained in s. 650 (2)(a) should be amended to grant the court authority to appoint counsel for the self-represented accused in situations where the accused's conduct is impeding or disrupting the trial, and/or resulting in an unfair trial. Of course, if the accused continues to disrupt the trial after counsel is appointed he should be removed pursuant to s. 650(2)(a), although removal should be combined with an audio/video link.

There are currently provisions in the *Criminal Code* which contemplate counsel being appointed regardless of the wishes of the accused. Section 486.3 allows the court to appoint counsel to examine certain vulnerable witnesses where it is not in the best interests of justice for the self-represented accused to conduct the examination. As well, s. 672.24(1), allows the court

[209] *Ibid* at pp. 17-19.
[210] 2002 YKSC 68 at paras. 5-7, 13-15 and 19.

to appoint counsel to represent the accused where there is an issue of fitness to stand trial. We believe it is a logical extension of these powers to provide for the appointment of counsel where the conduct of the self-represented accused is impeding or disrupting the trial or when the trial judge is satisfied that the accused's conduct of the case is causing an unfair trial. If the appointment of counsel was against the wishes of the self-represented accused, it would be a violation of the s.7 *Charter* right to choose whether to have counsel, as enunciated in *Swain.* [211] However, we believe this power would be a s. 1 "reasonable limit" on the right when used in circumstances of necessity to preserve the fairness of the trial.

Recommendation 40:

Trial Judges should exercise their common law power to appoint *amicus curiae* in a long complex trial where the accused is unrepresented or chooses to be self-represented and where such appointment is likely to assist in ensuring the fairness of the trial. Wherever possible, the appointment should be made at an early stage, to prevent delays of the trial. The *amicus* should generally be allowed to play an expanded role, including the examination and cross-examination of witnesses, whenever feasible.

Recommendation 41:

The Federal, Provincial and Territorial Ministers of Justice should consider amendments to the *Criminal Code* to provide a power to appoint counsel for a self-represented accused where the accused's conduct is impeding or disrupting the trial or when the trial judge is satisfied that the accused's conduct of the case is causing an unfair trial.

[211] *Supra* note 202.

Chapter 8: Conclusion

In *R. v. Omar*, Mr. Justice Sharpe gave the judgment of the Court on an interlocutory appeal from a five week long disclosure motion relating to access to informant files. He addressed a number of the issues that we have grappled with during this Review. In particular, he stated that the trial judge should not have "entertained lengthy and repetitive submissions that became an ongoing dialogue instead of … focused submissions." He also stated that the Crown repeatedly failed to assist the Court and the defence motion should not have been allowed to proceed as it "had no foundation in the evidence" and was "based on a legal argument that was doomed inevitably to failure". Sharpe J.A. concluded:[212]

> Judicial proceedings are not designed on the basis of a cost-benefit analysis, but there surely must be an element of proportionality that informs the manner in which trials are conducted. In this case, there has been a significant expenditure of resources with no benefit that I have been able to discern. The judicial system, like all other public institutions, has limited resources at its disposal, as do the litigants and legal aid. The purpose of this appeal, of course, is not to attribute blame for how an unfortunate situation developed which resulted in several weeks court time being swallowed up on a peripheral issue. Suffice it to say that every effort must be made to keep trials focused on the essential issues. If not, there is a serious risk that our adversary trial system will simply collapse under its own weight and we will all be the poorer. It is in the interest of all constituencies - those accused of crimes, the police, Crown counsel, defence counsel, and judges both at trial and on appeal - to make the most of the limited resources at our disposal.

We are confident that if our recommendations are implemented, significant progress would be made in streamlining the long complex criminal trial and addressing the concerns expressed in *Omar*.

Some of the recommendations require legislation, including *Criminal Code* amendments, but none of the legislative amendments are lengthy or complex. Much of the policy work has already been done and we believe the necessary legislation could be drafted quickly and, hopefully, enacted in a timely manner.

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[212] *R. v. Omar* (2007), 218 C.C.C. (3d) 242 at 252-253 (Ont. C.A.).

Many of our recommendations are simply "best practices" that we recommend to the judiciary, the Crown and defence bars, LAO and the LSUC. These "best practices" could be implemented without delay, even if they were introduced incrementally.

Some of our recommendations will have resource implications. But if the recommendations are regarded as a package, and are implemented as such, we have no doubt they will result in overall cost savings to the justice system. Many of our current practices and procedures are slow, complex and inefficient and carry with them numerous hidden costs for the police, the Crown, the accused, the courts and LAO. Reform will reduce these costs.

We believe our recommendations will contribute to overall efficiencies and cost savings but, most importantly, they will improve the quality of justice. Slow, inefficient and expensive justice alienates the public and contributes to cynicism and disrespect for the rule of law. By aspiring to some of the speed and efficiency of an earlier era we will be enhancing confidence in and respect for the administration of justice.

As we said at the beginning of this Report, we believe there is broad support for our recommendations. One constituency or another may not be completely pleased with the exact framing of one recommendation or another. But when they all stood back and looked at the broad direction of the entire package of reforms, we believe there was strong consensus in favour of going forward with these recommendations. This powerful consensus is a good reason for treating these recommendations as a package.

We conclude by reiterating our thanks to all the participants in our Review. Many police, Crown counsel, defence counsel, judges, LAO officials and LSUC officials devoted significant time and energy to helping us. They are all individuals of the highest integrity who repeatedly expressed concerns about the delays and inefficiencies that presently exist in long complex trials. They all expressed a real commitment to finding solutions and we hope that we have lived up to their expectations.

We wish all justice system participants well as we move forward into an era which we hope and believe will be characterized by more effective and efficient justice. We prize this justice system and we all aspire to make it nothing less than the very best.

APPENDIX A

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APPENDIX B

Recommendations

1. The police and Crown should collaborate much more closely in large and complex cases, at the pre-charge stage, than they have done historically in Ontario. Collaboration does not mean charge approval nor does it mean that the Crown takes over police investigative functions. Rather, it means legal advice on investigative procedures and any substantive issues, assistance with the preparation of disclosure and, finally, advice as to what would be a manageable size and focus for a successful prosecution.

2. Crown counsel who have collaborated closely and significantly with the police at the investigative stages ought not to make the decision whether to prosecute. Fresh and independent counsel ought to make this important determination. This does not prevent the pre-charge advice Crown from taking on other post-charge roles such as conducting the bail hearing, completing disclosure or providing ongoing advice and assistance to any prosecution.

3. A directive should be issued under the *Police Services Act* to the effect that the "Major Case Management" model of electronic disclosure, with Adobe 8 search software, should be utilized as the standard Crown brief in all long complex cases.

4. Vetting or editing the disclosure brief is a joint responsibility of the police and the Crown. The police should do an initial edit of the brief, electronically highlighting or shading the proposed edits, and the Crown must then review the brief and make final decisions. The police will then provide a master brief to the Crown, without edits, and a disclosure brief with edits. Each edit should be coded in the margins to explain its basis to the defence. As much as possible, this cooperative approach to editing should take place at the pre-charge stage of the case.

5. Transcribing important intercepted private communications and recorded witness interviews, likely to be utilized at trial, is a joint responsibility of the police and the Crown. The Crown should advise the police as to which intercepts and which recorded witness interviews should be transcribed and the police should use civilian employees to do the transcribing. The police will then include the transcripts in the disclosure brief. As much as possible, this cooperative approach to transcribing should take place at the pre-charge stage of the case.

6. The police should pay for copies of the brief, both edited and unedited, to be provided to the Crown for the purpose of prosecution. The Crown should pay for copies of the brief to be provided to all co-accused for the purpose of disclosure.

7. Standard administrative goals for timely initial disclosure should be set by directive under the *Police Services Act* and in the Crown Policy Manual.

8. Defence requests for disclosure of materials outside the investigative file should be subject to the following requirements:

- They must be particularized in order to properly identify the files/materials in question and to explain how the files/materials could assist the defence, as required by the onus placed on the defence in *Chaplin*;

- There must be a real effort by the Crown and defence to discuss the request and try to resolve it pursuant to their duties as "officers of the court" and "ministers of justice";

- If unresolved, the defence must bring on a motion in court in a timely way before the judge seized with pre-trial motions;

- This judge must set strict timelines for either resolving all disclosure disputes or obtaining rulings at an early stage of the case and well in advance of the trial. Setting a date for trial or preliminary inquiry should only be delayed if the unresolved disclosure is significant in its impact on the accused's election;

- The judge must rule on whether the defence has met its *Chaplin* onus in relation to the requested files/materials and must rule on any claims of privilege raised by the Crown and challenged by the defence;

- It is generally not necessary or advisable to take up court time with a detailed examination of each requested file or document;

- It is generally more appropriate, after identifying the potentially relevant and non-privileged files, for the court to order that counsel obtain disclosure by an opportunity to inspect and by requesting copies of only those documents that are determined, upon inspection, to be useful to the defence;

- If there are confidentiality concerns about any of the documents to be inspected, the court should order counsel to conduct the inspection on an undertaking that counsel not disclose the contents of any document. Counsel will only be relieved of the undertaking in relation to any particular document upon obtaining the Crown's agreement to provide a copy of the document or upon obtaining a further order of the court. Breach of counsel's undertaking should be treated as very serious professional misconduct;

- Any residual disputes about release of particular documents or parts of documents, after conducting the inspection, can be brought back to the court for a ruling.

9. Administrative judges should appoint "the trial judge" at the very early stages of a long complex case, whenever this is advisable and feasible in a particular case in a particular jurisdiction. This judge will be seized with all aspects of the case, from beginning to end, including pre-trial motions and the trial itself. The judge's calendar will have to be protected, to some extent, from the assignment of any other major cases so that he/she is available to start the trial and sit continuously, once the case is trial ready. The scheduling of the trial and the continuity of the trial must not be disrupted by the judge being drawn away to deal with other work on other cases. This Recommendation does not require any amendment to the *Criminal Code.*

10. Where early assignment of "the trial judge" is not feasible or advisable in a particular long complex case in a particular jurisdiction, a "pre-trial case management judge" must be given the power to make rulings on pre-trial issues. This Recommendation requires a *Criminal Code* amendment. In particular, s. 645 must be amended to provide that a judge, other than the judge who eventually hears the evidence at trial, has the authority to rule on pre-trial motions. The amendment to s. 645 must make it clear that "the trial" commences once any judge of the trial court begins hearing and ruling on pre-trial motions and that "the trial" is continuous, even if the judge changes. In this way, rights of appeal from "the trial court" found in ss. 675 and 676 will extend to all rulings made by the pre-trial judge and the trial judge. Prerogative relief will also be prohibited by the existing case law restricting the availability of these writs whenever an appeal is provided for at the end of "the trial".

11. The kinds of motions that would benefit from early rulings, well in advance of the trial, should be in the discretion of the court. Whether the case is proceeding under a one judge model (Recommendation 9) or a multiple judge model (Recommendation 10), no closed list is needed to define or limit the motions that may be ruled on at the early stages. The *Criminal Code* should not attempt to define such a list. The court's discretion in this regard should be guided by considerations such as whether an early ruling on the motion would allow the parties to prepare properly for trial, prevent adjournments of the trial, encourage resolution of the case prior to trial or completely eliminate the need for a trial. The kinds of motions that appear most likely to benefit from early rulings include the following: disclosure motions; third party records motions; s. 11(b) *Charter* delay motions; wiretap admissibility motions; change of venue motions; in some cases, confessions motions, search and seizure motions, similar fact motions and other evidentiary rulings; and, finally, severance motions. Severance is placed at the end of this list because most pre-trial motions will be common to all co-accused and should be determined at one hearing by one judge, prior to any severance applications. Evidentiary motions will not always be appropriate for early pre-trial rulings because, in some cases, the evidence will evolve at trial and require re-consideration of a pre-trial ruling. Nevertheless, there may still be benefit in providing an early pre-trial ruling on, for example, a confession, a search or seizure or arrest, or a similar fact motion, subject as always to the discretion of the trial judge to revisit the ruling if there is a material change. The pre-trial judge should clearly state the factual bases for any ruling. Absent a material change, for example, where different evidence emerges at trial, the rulings of the pre-trial judge are binding and must be respected by the trial judge. The *Criminal Code* should also be amended to make it clear that any rulings at a first trial, that ends in severance or in a mistrial, remain binding at a subsequent trial absent some material change.

12. Federal Provincial Territorial Justice Ministers ought to adopt the "mega-trial" proposal of the Working Group on Criminal Procedure, to legislate real pre-trial case management powers, but ought to simply amend s. 645 in order to achieve this end. Section 40 of the *Criminal Procedure and Investigations Act 1996* (UK) is a useful model.

13. Expertise should be recognized as a necessity in the long complex criminal case. In particular, judges in these cases should be skilled and knowledgeable in the exercise of their diverse common law trial management powers and in the application of those powers to pre-trial motions. These powers are effective tools that encourage counsel to be well-prepared, focused and efficient and they should be utilized by the judiciary where appropriate. These powers are listed in the text above but there is no closed list. The powers all derive from the trial judge's

broad jurisdiction to ensure that the trial is conducted fairly, efficiently and effectively. New exercises of this jurisdiction will be developed over time, in the traditional common law way, on the basis of changing times and new circumstances. Developing reasonable and flexible targets that counsel must aim at, for the completion of examination and cross-examination of witnesses, is one such exercise of this broad jurisdiction. The National Judicial Institute should continue and enhance its programs for training judges in these skills.

14. We commend the practice of "pre-hearing conferences" in the Ontario Court, prior to setting a date for preliminary inquiry in long complex cases, in order to discuss resolution of the case and to identify and narrow the issues. We particularly commend new and creative uses of these traditional s. 625.1 powers such as asking the Crown to present its case in summary form so that counsel and the accused are better informed as to the way in which the Crown will prove its case and the strength of the case, assuming it is a strong case. We similarly commend the practice of "exit pre-trials" at the conclusion of the preliminary inquiry, together with notice to the Superior Court of the imminent arrival of a long complex case.

15. The s. 536.4 "focus hearing" needs to be made effective so that enforceable orders issue at the end of the hearing rather than mere advice and persuasion that duplicates the s. 625.1 "conference". This can be achieved in one of two ways:

(i) Rules of court, pursuant to s. 482.1, should be developed so that any "direction made in accordance with a rule" as to the "witnesses to be heard at the inquiry" will have the same force as a court order. The order could, of course, be re-visited if material circumstances change; or

(ii) Rulings pursuant to s. 540 (7) should be made in conjunction with the "focus hearing" so that any evidence from a witness other than the "witnesses to be heard at the inquiry" will be admitted in hearsay form, provided it is "credible or trustworthy."

We believe the former of these two solutions is more direct and it is simpler procedurally.

16. Once the "focus hearing" has determined the number of witnesses to be called at the preliminary inquiry, in one of the two ways set out above, reasonable targets for the completion of each witness' evidence should be set, allowing the court to make a reasonably accurate estimate of the time required to complete the preliminary inquiry at one continuous sitting without adjournments.

17. The police and/or the Crown must notify the administrative judge in the Ontario Court, in advance of any large complex bail hearing or hearings about to arrive in the judge's jurisdiction. The administrative judge must then take steps to ensure that appropriate court space, staff and time are available to accommodate a reasonably prompt bail hearing for the case or cases, including assigning a judge where appropriate and conferring with the Superior Court where necessary concerning court space. These steps should be taken without disrupting the ordinary bail court or placing unreasonable demands on its capacity.

18. Counsel for the Crown and for the defence are both under ethical duties to make reasonable admissions of facts that are not legitimately in dispute. The court should encourage and mediate efforts to frame reasonable admissions. When the defence fully admits facts alleged by the Crown, the court has the power to require the Crown to accept a properly framed admission and to exclude evidence on that issue.

19. Federal, Provincial and Territorial Justice Ministers ought to instruct their officials to consider expanding s. 657.1 of the *Criminal Code* to include other routine factual issues that can properly be proved by way of affidavit, subject to a right to cross-examine the affiant where some live issue exists.

20. The Federal, Provincial and Territorial Ministers of Justice should consider modifications to s. 38 *Evidence Act* procedure in order to eliminate the delays caused in major terrorism prosecutions by the bifurcation of the case and by interlocutory appeals.

21. Legal Aid Ontario and the Ministry of the Attorney General should develop a new tariff that provides for "enhanced fees" and for "exceptional fees" as the anticipated length and complexity of the case increases. The eligibility criteria should be progressively more restrictive at each of these higher levels so that only the most able counsel are eligible. A committee of LAO officials, senior lawyers and retired judges should set the lists of eligible counsel, after conducting thorough due diligence. The eligibility factors should include both experience and qualitative criteria such as those set out in Recommendation 25.

22. In long complex criminal cases, LAO must apply Ontario Regulation 107/99 by setting a budget that identifies the issues that a "reasonable" client of "modest means" would fund under a private retainer and by agreeing to pay for a defence that is based on these issues. Counsel must particularize their dockets so that LAO only pays for work that is authorized. As new and significant issues arise, the budget can be amended. Minor issues that take little time in court need not be approved in advance. The statutory test is practical and flexible and should be used to eliminate any substantial work from the budget that has no reasonable prospect of success or that, even if successful, would not significantly advance the client's defence. Counsel, of course, is free to pursue other issues, if the client so instructs and counsel agrees, but that work ought not to be paid for from public monies.

23. LAO must seek expert advice when setting the budget in long complex cases from a body like the present Exceptions Committee. That body must be properly resourced and must be allowed sufficient time to study the case in advance, to meet with and question counsel where appropriate about the proposed conduct of the defence, to deliberate, and then to advise LAO as to the issues and motions that have sufficient merit and utility to justify public funding. The members of this body should be paid for their time in carrying out these important statutory duties.

24. A senior LAO official should attend significant judicial pre-trials in major cases, where feasible, in order to observe and gather information about the conduct of the case and to answer any questions from the pre-trial judge.

25. LAO must develop comprehensive quality assurance standards in order to meet its statutory duty under s.92(1) of the *Legal Aid Services Act*. In the context of long complex trials, these standards should stress the importance of counsel's duties as officers of the court, including counsel's independence from the client, as well as counsel's duty of loyalty to the client. In particular, the importance of making responsible admissions where issues cannot reasonably be disputed, declining to bring motions that have no real prospect of success or that fail to significantly advance the client's defence, cross-examining and examining witnesses succinctly and efficiently, and generally focusing on the important issues in the case should all be emphasized as the hallmarks of high quality legal services.

26. Sections 31 and 32 of Ontario Regulation 106/99 should be amended to provide a range of remedies where the President has "reasonable cause" to believe that a lawyer fails to meet standards of professionalism or "quality assurance standards". The remedies should include placing conditions on a lawyer's panel membership, temporarily suspending the lawyer from panel membership and permanently suspending the lawyer from panel membership. In addition, the requirement of a full oral hearing before the President should be replaced with a regime providing for notice, disclosure, written responses and reasons for the President's decision. The B.C. Legal Services Society's *Referral Eligibility Policy* is a useful model for these amendments to ss.31 and 32.

27. LAO must develop a program of individual post-case inquiries and reviews, as well as full-scale audits, pursuant to its s. 92(1) quality assurance duty. These inquiries could be triggered by complaints, rulings or statements by the trial judge, judgments of the Court of Appeal, information provided by other counsel or by the Exceptions Committee members or information learned through the media or from the LSUC. If these preliminary inquiries raise concerns about counsel's conduct of the case, then a thorough review of the case by a neutral expert should be ordered. If the review indicates broad systemic problems, then a wider audit of counsel's practice may be justified. LAO's duty to make these inquiries and conduct these reviews is independent and separate from the LSUC's jurisdiction over discipline and licensing. Depending on the results of any review, LAO should take action pursuant to ss. 31 and 32 of Ontario Regulation 106/99 concerning the particular counsel's membership on the panel.

28. LAO should increase the rate of remuneration for junior counsel to attend at trial with senior counsel in long complex cases.

29. The conduct of long complex criminal prosecutions must be assigned, to the greatest extent possible, to the most able and most respected prosecutors. Crown counsel's communication skills and their understanding and acceptance of the role of defence counsel are also important criteria when assigning Crown counsel to these cases.

30. The local Crown Attorney or the Director of certain specialized offices must supervise and oversee the major cases in his/her office. The degree of supervision and oversight will vary, depending on the abilities and experience of the assigned prosecutor. It is the responsibility of the Crown Attorney to try to prevent any undue lengthening of the proceedings, as well as any significant errors, and this requires appropriate oversight and supervision.

31. Prosecutions of long complex criminal cases ought to be subject to mandatory peer review by a group of senior respected prosecutors. The review should consider only the major or contentious issues in the case that could lead to undue lengthening of the proceedings or to significant errors. The review should take place in the local region where the prosecution is being conducted, it should receive all relevant information from any justice system participant and it should then provide advice to the Crown Attorney and to Crown counsel prosecuting the case. That advice should be followed, subject to reversal or modification by the Assistant Deputy Attorney General (Criminal Law).

32. LAO should use a body like the Exceptions Committee to provide a system of prior peer review concerning the conduct of the defence in long complex cases. This should parallel the system of Crown peer review described in Recommendation 31.

33. The LSUC, in collaboration with the CLA, should develop a re-invigorated mentoring program to replace the existing LSUC program. The CLA should be the visible body that provides leading counsel as mentors, with the LSUC providing administrative support and resourcing the program. It should be a proactive program that reaches out to the bar, the judiciary and the Crown Attorneys, in order to draw in those defence counsel who need guidance and direction in a long complex case.

34. The judiciary should insist on high standards of professionalism from all counsel in long complex trials. This should begin with educative steps, to remind counsel of the basic rules of court room behaviour and of their duties as officers of the court. At the first sign of misconduct, the judge should intervene and remind counsel of their proper role. If repeated warnings and orders have no effect, the judge should advise counsel that referral to the LSUC is being recommended to the Chief Justice (or the Associate Chief Justice or Regional Senior Justice). The judge should make findings of fact on the record concerning counsel's conduct and its impact on the proceedings. A referral to the LSUC, assuming the Chief Justice or other Senior Justice approves it, can be repeated in the course of a long trial if there is repetition of the conduct. The ultimate judicial sanctions, namely, costs orders and contempt citations, should be reserved for the most extreme forms of misconduct by counsel and should generally be exercised at the end of the trial and on notice to counsel.

35. The LSUC should reconsider its present approach to court room misconduct, to the effect that it lies at the "less serious end of the spectrum of professional discipline issues" and merits only "remedial" responses such as Letters of Advice, Invitations to Attend and Regulatory Meetings. When counsel's misconduct disrupts or distorts criminal proceedings, especially long complex trials, it causes great harm to the administration of justice and is worthy of significant penalties. We recommend the approach adopted in B.C. in *Goldberg v. Law Society*.

36. LAO and the Ministry of the Attorney General should take disciplinary steps, within their own spheres, when counsel engage in misconduct during the course of long complex trials. They should also take proactive steps to prevent misconduct by insisting on high standards of professionalism when determining panel eligibility (at LAO) and when hiring, promoting and assigning Crown counsel (within the Criminal Law Division).

37. The OCAA and the CLA should develop joint education programs in order to revive the traditions of collegiality and respect between the Crown and defence bars.

38. The trial courts possess jurisdiction to prevent incompetent counsel from proceeding, in order to protect the fairness of a long complex trial. The jurisdiction should be exercised with caution and restraint, by first adopting lesser remedies to guide counsel and to suggest that counsel obtain assistance, and should only be exercised where there is clear evidence of incompetence.

39. The Attorney General should possess the power to order a *post-mortem* or audit of a long complex trial, by a neutral expert, where there is a reasonable perception that the case has been conducted ineffectively or inefficiently. The *Crown Prosecution Inspectorate Act 2000* (U.K.) is a useful model, with some modifications.

40. Trial Judges should exercise their common law power to appoint *amicus curiae* in any long complex trial where the accused is unrepresented or chooses to be self-represented and where such appointment is likely to assist in ensuring the fairness of the trial. Wherever possible, the appointment should be made at an early stage, to prevent delays of the trial. The *amicus* should generally be allowed to play an expanded role, including the examination and cross-examination of witnesses, whenever feasible.

41. The Federal, Provincial and Territorial Ministers of Justice should consider amendments to the *Criminal Code* to provide a power to appoint counsel for a self-represented accused where the accused's conduct is impeding or disrupting the trial or when the trial judge is satisfied that the accused's conduct of the case is causing an unfair trial.

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