

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.