

# V. ONGOING ACTIVITIES

*This chapter addresses three topics:*

- *the importance of ongoing dialogue and problem solving;*
- *the need for continuing vigilance regarding statements in press conferences and other public forums;*
- *sub judice contempt rule and shield law.*

## **Establishing an Ongoing Justice-Media Liaison Committee**

### **RECOMMENDATION #14: JUSTICE-MEDIA LIAISON COMMITTEE**

The Panel recommends that the Attorney General establish an ongoing committee to:

- provide stewardship for the consideration of the Panel’s recommendations;
- oversee the development of public information and opportunities for dialogue including a public justice-media website (as described in Recommendation 13);
- serve as an ongoing mechanism for identifying and solving issues that arise between justice and the media;
- identify evaluation indicators related to both the process of the committee and its outcomes.

Representation in the ongoing committee should include government, the judiciary, legal and police organizations and media organizations.

***Issue:***

The creation of the Panel resulted in a large number of issues being raised by interested groups and individuals who welcomed the opportunity to bring them to the Panel's attention.

A permanent venue has not existed before. The range of recommendations needed to improve current operations and understanding is proof of the importance of regular dialogue, issues identification and problem solving.

***What the Panel heard:***

Many written and oral presentations made to the Panel called for a mechanism for communication, consultation and problem solving.

There are instances in the past where representatives of justice and/or media organizations have come together to tackle problems and address opportunities on a time-limited basis.

In the late 1990s, a committee examined comments to the press in criminal prosecutions. The committee was convened by the Chief Justice of Ontario, the Hon. Charles Dubin, the president of the Criminal Lawyers' Association, Bruce Durno, and the Assistant Deputy Attorney General of Criminal Law, Michael Code. The committee comprised justice representatives, including prosecution, defence and police. The committee produced a draft protocol regarding media statements for all involved in the administration of criminal justice (please see Appendix D).

While the content of the protocol is important, the protocol also makes the valuable suggestion that an advisory group be established to oversee its implementation and to field suggestions for revisions. The committee also emphasized its educative role.

In the late 1990s, the joint Bench-Bar-Media Communications Working Group, coordinated by the Canadian Journalism Foundation, conducted a "survey of the attitudes and perceptions of members of the news media, judiciary and government" to reporting on justice issues.

The recommendations that emerged related to education and training, procedural and administrative improvements and bench-bar-media relationships.

The suggestions of this committee were valuable and indeed are mostly reinforced by this Panel's findings. Again, what is pivotal to the Panel is the proposal of an ongoing structure to facilitate problem solving and education.

## ***Discussion:***

The Panel’s research points to the existence of other media-bar-bench liaison committees that allow for discussion and debate.

Nova Scotia has a Media Liaison Committee that is composed of members of the bench and media representatives. The committee meets regularly to discuss issues of mutual concern and reporters are encouraged to contact its members to raise matters for consideration.

In the United States, the National Center for the Courts and Media provides a neutral forum “to foster discussion about the inherent tensions between the right to a fair trial, as guaranteed in the Sixth Amendment of the U.S. Constitution, and the First Amendment right of the free press to conduct its work largely unfettered by governmental restrictions.” As well as providing education and training, its goals include working with judges and journalists to help improve media access to public information and to continuously explore and solve relationship issues.

The members of the Panel have lived the axiom that process is sometimes outcome. Through its deliberations, members have come to a better understanding of the issues that separate and unite the institutions at hand and to realize the value and the potential of an ongoing committee. The Panel believes that the Attorney General has the opportunity to commit to the enduring importance of the justice-media relationship by establishing a permanent liaison committee.

If the Attorney General does choose to make that commitment, then a critical part of the strategy for implementing this report would be to establish an ongoing forum to serve as the steering committee for implementation.

## **Press Conferences/Public Commentary**

### **RECOMMENDATION #15: PRESS CONFERENCES/PUBLIC COMMENTARY**

The Panel recommends that, as it is important that all participants in the justice system be scrupulous in the making and reporting of comments, both before and after arrest, that might affect fair trial interests, the 1998 document called, “Protocol Regarding Public Statements in Criminal Proceedings,” be revived and referred to the committee set out in Recommendation 14.

**Issue:**

Participants in press conferences need to be ever vigilant about the sometimes inflammatory manner in which information is conveyed to or by the media, which can be harmful to the administration of justice and to individual rights.

This issue was identified mostly in the context of police press conferences. While this was not a regular practice, it was brought to the Panel's attention. Many media presenters had a favourable view of dealing with the police. Furthermore, there is no doubt the media has a role to play in a community when a tragedy occurs. The objective is for all parties to be careful.

**What the Panel heard:**

The manner in which police and the media report information to the public is critical to ensuring fair trials and protecting privacy rights. The Panel heard of one press conference where comments made by the police went well beyond the communication of information and into the realm of opinion and were deemed acutely prejudicial to the accused person's right to the presumption of innocence. At the same time, examples were also discussed in which interviews of victims and potential witnesses by members of the media and other media reporting or commentary during the course of an investigation or trial may have had the same potential effect.

Bob LeCraw, a man whose brother James committed suicide after widely publicized charges were subsequently withdrawn, gave the Panel some practical advice about balancing the right to privacy with the public right to know: take away the inflammatory language during press conferences; ensure that press releases and conferences are not coupled with calls for increased resources; have protocols that direct police to name individuals as suspects but not as criminals; and, at the very least, the withdrawal of charges should be given as wide publicity as the arrest and charge.

The *Police Services Act* says that it is the responsibility of Police Services Boards to establish policies respecting disclosure of personal information, and that the purpose of disclosure includes keeping the public informed about the law enforcement, judicial or correctional processes about that individual.

Regulation 265/98 as amended to O. Reg. 297/05 under the *Act* also addresses what personal information about an individual may be disclosed by the police. This information includes their name, date of birth and address, the offence with which he or she is charged, the outcome of any judicial proceedings, the procedural stage of the justice process and the date of release from custody.

The role of police in the relationship with the media may be further complicated by the fact that other justice partners are more restricted in speaking in public.

There is some indication that the police have become more media savvy than others in the justice system. Many have dedicated resources to media relations and communicating with the public. “There is a very real perception,” the Ontario Association of Chiefs of Police (OACP) says, “that the justice system sees itself as being independent from public scrutiny in ways that the police and media can’t be.”

The Ontario Association of Chiefs of Police pointed out that:

[R]eluctance to provide information leads to a thirst for information by the public and the media that wrongly falls to police to address... Our police services are being put in positions where they are expected to answer for and even defend court decisions and government policies in relation to the carriage of justice. This should not be the role of a community’s police service.

The OACP went on to say that the police are taking a proactive role in providing accessible information with the help of technology, e.g., community-alert websites. The audience is the public, not reporters.

The OACP indicated that while television portrays police work as fast, it is in fact tough slogging work. That slow timeframe can fly in the face of fast-paced media deadlines.

The role of Crowns vis-à-vis the media has been outlined in Chapter II above. The role of the bar generally is set out in the Law Society of Upper Canada’s *Rules of Professional Conduct*, namely that:

4.06 The lawyer and the administration of justice:

- (1) A lawyer shall encourage public respect for and try to improve the administration of justice....

6.06 Public appearances and public statements:

- (1) Provided that there is no infringement of the lawyer’s obligations to the client, the profession, the courts, or the administration of justice, a lawyer may communicate information to the media and may make public appearances and statements.
- (2) A lawyer shall not communicate information to the media or make public statements about a matter before a tribunal if the lawyer knows or ought to know that the information or statement will have a substantial likelihood of materially prejudicing a party’s right to a fair trial or hearing.

### ***Discussion:***

The Panel believes that the answers lie in work already started, namely the “Protocol Regarding Public Statements in Criminal Proceedings.” This was brought to the Panel’s attention by the Criminal Lawyers’ Association and was developed by the Dubin Committee noted in the section above.

The guideline was approved by representatives of the prosecution, defence and police and included provisions against making “...an extrajudicial statement concerning a criminal matter that is before the courts awaiting trial or appeal, or where a warrant has [been] issued if it is reasonable to expect that the statement: i) will be disseminated by means of public communications; and ii) will have a substantial likelihood of materially prejudicing the criminal trial.” The protocol went on to enumerate the conditions under which lawyers and police officers may state information for public dissemination, without elaboration.

The guideline was not formally implemented, however, and the Panel believes it ought to be.

Policies and practices need stewardship to be maintained and refreshed over time. The Panel believes this recommendation will go a long way towards serving those purposes.

## ***Sub Judice Contempt Rule and Shield Law***

### **RECOMMENDATION #16: SUB JUDICE CONTEMPT RULE**

The Panel recommends as a general principle that all appropriate steps be taken to provide greater clarity to journalists as to what they can publish prior to and during the trial.

### **RECOMMENDATION #17: SHIELD LAW**

The Panel recommends that the Ministry of the Attorney General conduct further policy analysis of the legal issues involved in shield laws. This research should be done with a view towards the Ministry setting out the issues and declaring its direction.

## **Issues:**

The media's right of access is not absolute, particularly if it interferes with the administration of justice and a person's right to a fair trial. Judges have the power to control proceedings that are *sub judice* and, in the case of such interference, can impose limits on the media's access to information and/or ability to inform the public. Violation of those imposed limits can result in prosecution for contempt of court. Contempt at common law may arise where pre-trial publication of information interferes with the administration of justice.

The subject of shield laws – the protection or non-protection of the confidentiality of journalists' sources – garnered much attention in 2005 in the United States. The Panel recognizes it as an emerging issue in Canada as well.

## **What the Panel heard regarding the Sub Judice Contempt Rule:**

Three presentations to the Panel addressed the importance of the *sub judice* contempt rule and adherence to it.

The Association of Law Officers of the Crown said that:

Government representatives must be particularly mindful of complying with the *sub judice* rule (where a matter that is under judicial consideration or in court and not yet decided must not be commented on). They must also be careful to comply with...the *Freedom of Information and Protection of Privacy Act*, judicially ordered publication bans, judicially sealed records...[as well as]...rules of solicitor client privilege... and... Rules of Professional Conduct.

AIDWYC (Association in Defence of the Wrongly Convicted) is concerned about the trend away from a respect for the *sub judice* contempt rule to protect the fair trial rights of an accused from prejudicial media accounts. The media has the potential to greatly influence the public, including those who may serve as jurors in criminal trials. As a result of the decline in use of *sub judice* contempt power, the media now frequently contains information and commentary about the accused which could have drawn a contempt citation 15-20 years ago. This information can prejudice the fair trial rights of the accused.

The Criminal Lawyers' Association also expressed its concern about the erosion of the *sub judice* rule, especially with respect to the expanding scope of police press conferences. It suggested that media characterizations of the exclusion of evidence sometimes suggest that juries are tricked by the exclusion of evidence, instead of explaining the legal rationale for such trial rulings. The Criminal Lawyers' Association cited increased costs (for example, through changes of venue of trials), lengthier trials, miscarriages of justice and disrespect for the judicial system as consequences of failing to explicitly outline the proper parameters of justice reporting.

### ***What the Panel heard regarding Shield Law:***

Several presenters addressed the issue of the shield law. PEN Canada said that it strongly endorses the ruling of Madame Justice Mary Lou Benotto of the Ontario Superior Court who, on January 21, 2004, wrote in part:

Inherent in the concept of confidentiality is the ability of the media to protect the identity of the source. The evidence establishes that sources may “dry-up” if their identities were revealed. Without confidential sources, many important stories of considerable public interest would not have been published. Confidential sources are essential to the effective functioning of the media in a free and democratic society...

To compel a journalist to break a promise of confidentiality would do serious harm to the constitutionally entrenched right of the media to gather and disseminate information...

...the eroding of the ability of the press to perform its role in society cannot be outweighed by the Crown’s investigation...

Often the more explosive the story is, the greater the risk to the informant if he or she is exposed.

[*R. v. National Post*, 2004 CanLII 8048 (ON S.C.)]

PEN Canada urged the Panel “to recommend amendments to appropriate provincial and/or federal statutes to provide immunity from prosecution for journalists and authors who wish to protect the confidentiality of sources for their stories, based on the model that appears to work successfully in several states of the United States.”

The CBC added that:

Journalists perform a constitutionally-mandated function. A free and independent press requires freedom to collect information, which government may not want collected, and present it in a way that ensures the public is able to get access to the truth. At present in Ontario, there is no statutory protection for journalists performing their work, though there is recognition by the Supreme Court that a journalist/source relationship is one that deserves protection, and there is a common law “newspaper rule” that protects a journalist’s sources at the discovery stage of civil litigation against the journalist... Many jurisdictions have adopted general shield laws for journalists.

### ***Discussion:***

The Panel advises against the erosion of the *sub judice* rule. Guidance on its application would greatly assist journalists. At the same time, when journalists are operating within specified rules of the court, they should be able to do so without fear.