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June 19, 2008

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Dear Co-Chairs Code and LeSage:

On behalf of the Ontario Bar Association I am pleased to provide you with our response to the Preliminary List of Issues for Consultation prepared for the Complex Case Review.

The submission was prepared by an OBA Working Group chaired by Crown attorney Suhail Akhtar and defence counsel Glen Sandberg.

The OBA represents more than 17,000 lawyers from every region across Ontario, making us well positioned to advise on this important issue.

I trust you will find the enclosed submission both informative and helpful.

Yours truly,

Sincerely,

Gregory D. Goulin, LSM
President
Ontario Bar Association



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OBA Submission
on the
Complex Criminal Case Review

Submitted on June 19, 2008

Submitted by:

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ABOUT THE ONTARIO BAR ASSOCIATION

The OBA is the voice of the legal profession in Ontario, representing and advancing the interests of almost 17,000 lawyers, judges, students and legal professionals, while promoting respect for the justice system and the rule of law. As the voice of the legal profession in Ontario, the OBA, among other things, advances reasoned positions to the public, governments and LSUC for the benefit of our members and to improve the law and the administration of justice, provides our members with professional and personal support and with a variety of forums in which they can participate, and promotes equality and the elimination of discrimination.

DISCLOSURE AND COOPERATION AND COLLABORATION BETWEEN POLICE AND CROWN AT THE PRE-CHARGE STAGE

DISCLOSURE (A CROWN PERSPECTIVE)

The common consensus is that the Crown should pay for disclosure. Since disclosure is the responsibility of the prosecution it only makes sense that the Crown provide the funding for it. However, one of the strengths of the criminal justice system is that local issues are settled locally. It is therefore submitted that there is no need for a standardized disclosure form or procedure. So long as the Crown fulfils its disclosure in a timely fashion, a single unified procedure is unnecessary. It is submitted that conditions vary from jurisdiction to jurisdiction and each local police force and Crown's office should tailor the disclosure procedure to the conditions that prevail in that jurisdiction.

Having said that, it is highly desirable that a "core" system of disclosure become commonplace between jurisdictions so that a "disclosure dump" is avoided. We see no reason why the police cannot organize disclosure in a comprehensive manner before providing it to the Crown. It makes sense that the body that gathers the evidence is in the best position to initially organize it. An organization of a morass of material only serves to assist the Crown and defence in getting to grips with the case more efficiently. For the same reason, it makes sense that the police, in gathering the evidence, will know what evidence is to be vetted and therefore should be tasked with this procedure.

One of the more difficult areas is that of disclosure timelines. It is submitted that rigid timelines governing both the request and provision of disclosure is highly undesirable. The law already recognises that defence counsel must pursue their disclosure requests with due diligence. The courts have also recognised that, since *Stinchcombe*, disclosure by the Crown must be provided in a timely fashion. It is difficult to understand how rigid timelines in these areas would actually improve the current situation. In fact, what is more likely to happen is that the court system would become bogged down with further procedural arguments as each side contests any disclosure requests or provision with the argument that the other side has failed to comply with the requirements. Judicial case management on a case by case basis would be of some assistance. The fears that disclosure requests are sometimes used by defence counsel to generate delay in order to successfully stay a criminal charge under section 11(b) of the *Charter* has been recognised in cases such as *R. v. Kaczmarcyk*¹ and *R. v. Munoz*².

One area that has not been addressed and is submitted would greatly expedite the disclosure process is the implementation of the actual test laid out in *Stinchcombe*. The Crown must produce to the defence anything that is not "clearly irrelevant" to the charges. This phrase has a wide, nebulous meaning which has often translated into no meaning at all. When faced with a disclosure request based on "full answer and defence", many Crown counsel feel they have no choice but to provide all material regardless of its relevance. Such a process leads to unnecessary costs and delay and permits broad

¹ [2005] O.J. No. 2318 (Ont. S.C.J.)

² [2005] O.J. No. 4582 (Ont. S.C.J.)

disclosure requests which may often prove to have very little relationship to the matter in hand. In many parts of the United States, a reverse disclosure set of provisions have allowed the Crown to gauge the defence case and properly assess any requests for disclosure. In England, a statutory regime created some 15 years ago, ensures that the Crown provides an initial disclosure package with all statements relating directly to the case. Upon receipt of this package, the accused is bound to serve a general outline of his or her defence prior to any further disclosure requests. Such an “outline” allows the Crown to properly decide what evidence is relevant or not.

The difficulty with implementing such a framework in Canada lies in the section 7 right of silence of the accused and whether or not such rules would contravene this right. It is important to recognize that the Supreme Court of Canada in *Stinchcombe* itself left the question of defence disclosure open. It is submitted that the English framework would go a long way in (a) reducing frivolous defence requests (b) allow the Crown to efficiently identify what disclosure should be produced and (c) provide the disclosure on a far more expeditious basis.

DISCLOSURE (A DEFENCE PERSPECTIVE)

Uniformity in disclosure practices is desirable in a number of ways. Some jurisdictions require varying degrees of restrictive undertakings from defence counsel, limiting what counsel may do with the materials. These range from basic recitations of the already extant obligations which counsel observe as Officers of the Court to unworkable conditions making it difficult for counsel to retain control of the defence of the case. An extreme example sought to restrict counsel in allowing staff to view or have access to the disclosure material in the normal course of their work, in allowing consultation with other counsel or experts without the permission of the Crown.

A significant problem is the large complex case with voluminous disclosure and in-custody accused. Some Crown offices hand out disclosure to unrepresented accused at first appearance court and take the position that it belongs to the accused. Others insist on some degree of undertaking as described, leading to access problems especially in large and often remote detention centres.

The limitations of institutional resources are beyond the scope of this submission, but full answer and defence is compromised where a Crown policy or protocol prohibits Counsel from providing clients with disclosure materials in custody. The oft-suggested “solution” is to have counsel or a staff member sit with the client whilst disclosure is reviewed. Certainly, there are times when counsel must do this but it is clearly unworkable from a human resource and economic perspective.

Typically, the federal DPP take a co-operative approach to this problem in large cases, allowing materials to be left in the control of the detention centre with access subject to institutional resources. It is recommended that large prosecutions conducted by the Provincial Crown adopt a similar policy uniformly.

Timelines for disclosure appear attractive on the surface, but in practice would be unwelcome and unhelpful. Every case is different and to attempt a “one-size-fits-all” timeline is to invite mini-litigation within a large case, where one party alleges a failure to meet a deadline. What remedies/recourse would avail? What does “complete” mean in a large complex case?

Similarly, the imposition of rigid time limits for defence to review disclosure and determine what, if any, further disclosure request(s) is seen as unworkable.

One of the issues for consultation addresses a “perception that some counsel use peripheral disclosure requests as an opportunity to breed more disclosure requests...” delaying the case. A suggestion that the recent English practice requiring the defence to disclose the defence prior to disclosure requests following the initial brief goes too far. A compromise wherein subsequent disclosure requests identify the relevance of the request is preferable and, indeed, often the current practice where the parties initially disagree on relevance. This may render unnecessary some of the motions where relevance and disclosure are litigated.

The opportunity for defence to attend and inspect police files as an alternative to the current practice of written requests for specific items of disclosure is to be avoided. The preceding paragraph suggests a preferable improvement. The problems accompanying this approach would include the inevitable resistance of the police to allow defence counsel to physically attend and inspect police files; access where the investigating force is remote from counsel. Large projects frequently involve accused and counsel from areas other than the locus of the investigation.

DISCLOSURE: A CONSENSUS

Although there is a divergence of viewpoint between the Crown and defence with respect to disclosure, there is equally a consensus on two significant issues:

- Timelines are unnecessary and unworkable in practice. The imposition of “deadlines” will simply lead to increased litigation following the failure of one party to comply with its allotted schedule.
- Change must occur in the disclosure request/provision process. Whilst the Crown and defence disagree on the extent of the change, there is agreement that in disclosure requests, the relevance of the material sought must be explicitly specified to allow the Crown to decide whether disclosure is required.

CROWN COLLABORATION WITH THE POLICE

One of the strengths of the criminal justice system is the independence of the Crown attorney from the investigation of criminal charges. The separation of the two aspects of

investigation and prosecution allows for a dispassionate view of the evidence by the Crown once the police have gathered it and charged an accused. On the other hand, it is a matter of routine that police often contact Crown counsel with a view to seeking legal advice on a particular investigation. Such a practice is necessary and desirable. It is something that the courts themselves have encouraged.

The current model that separates prosecution and investigation but allows advice to be sought and given is one that should be maintained. Co-operation between the Crown and the police is natural and has several advantages. It is submitted, however, that a move to the US style district attorney system should be resisted on the grounds that it would erode the necessary objectivity required when the Crown is asked to prosecute a case. To have Crown counsel formally assisting the police at the pre-charge stage would also create a risk that, at some point, counsel could become a witness in the proceedings. Such a risk might inhibit the Crown from giving advice freely in the fear that by doing so, he or she would end up in the witness stand. It goes without saying that a pre-charge Crown counsel should not be the Crown prosecuting the case. That, in itself, would partially defeat the reasons for involving Crown counsel in the first place particularly if a subsequent Crown counsel had a completely different view of the case than the first.

The position with respect to Crown advice on bail hearings is somewhat different. It does not encroach on the investigatory stage of proceedings and engages the Crown at the earliest stage of the prosecution. It is submitted that Crown involvement in the bail preparation stage should be formalised to allow for an efficient bail procedure and an orderly method of bringing large numbers of accused to court at the earliest opportunity.

JUDICIAL CASE MANAGEMENT

Rules governing the management of cases already exist in the Superior Court of Justice. *The Criminal Proceedings Rules*, co-written by Mr. Justice David Watt and Mr. Justice Bruce Durno came into force in late 2006. The impact of the Rules, in Toronto at least, has been limited by the inability of the pre-trial judge to make binding decisions on counsel appearing before him or her. Many counsel attending the pre-trial refuse to specify final positions on evidentiary matters. Deadlines for materials are often missed and motion material is provided at the last minute. The pre-trial itself, without sanction, is toothless. It is also recognized that within the Canadian judicial system, absent consent, only the “trial judge” may make binding rulings about the case. The proposal that “trial judges” be assigned in advance is very attractive and would complement the existing Criminal Proceedings Rules and its trial management provisions. The only difficulty with such a proposal is that it would require an increase in the number of judges sitting in each jurisdiction.

If the alternative is to place the case management powers in the hands of a pre-trial judge it is submitted that the following changes would need to be made:

- Judicial pre-trial judges would be empowered to make binding decisions on procedural and evidentiary issues
- A pre-trial judge would have the power to assess legal motions and decide whether or not a factum would be required and whether time limits should operate with respect to oral argument
- Defence and Crown counsel would be required to put binding positions on the record. It would be insufficient for defence counsel to raise a section 7 (right to silence) barrier to the proceedings
- Specialised criminal judges only would be able to conduct judicial pre-trials
- A costs mechanism would be required as a deterrent to unprepared or inflexible counsel who do not comply with the rules laid down by the case management judge

The changes required to be made, however run into several difficulties:

- The requirement that the defence disclose its position may run into constitutional obstacles, namely the right to silence
- Flexibility of the case may be lost. “Locking in” the Crown and defence counsel with respect to their legal positions well in advance of the actual trial may cause an unfairness to both sides at the actual trial when unforeseen circumstances occur or the evidence does not unfold as each party foresaw
- Allowing pre-trial judges to make legal rulings would contravene existing case law which places this decision making process in the hands of the trial judge
- It also raises the more difficult question: how, in the absence of full legal argument, is the pre-trial judge supposed to decide whether evidence is redundant or not?
- There would need to be a substantial increase in resources in adding both to the judiciary and the Crown’s office

Many of the “remedies” for the difficulties identified by the List for Consultation are already in existence in the Criminal Proceedings Rules and the inherent powers of the trial judge. It has been forgotten that under the present Rules a trial judge may:

- Order factums
- Set time limits on oral arguments

- Summarily dismiss arguments that, on their face have little or no merit without proceeding to a voir-dire (Rule 34.02)

One cause of the difficulties may be in the reluctance of the judges to implement the powers that they already have. The addition of new procedures and powers to the trial judge will prove meaningless if those new procedures are left unused.

It is also submitted that the use of severance powers as a case management tool may be very dangerous. The existing case law on severance already provides the ideal guidelines for severing accused and counts. One of the factors to be considered is the use of judicial resources and the cost of having several trials as opposed to a single trial. It is submitted that existing principles are sufficiently directed to the cost-benefit analysis in the bigger picture of justice. To focus the issue of severance solely for the purpose of case management would be to ignore the other equally significant factors which determine whether or not accused or charges are tried together.

LEGAL AID

The perception that some experienced and capable counsel decline these cases is real. The tariff is wholly inadequate even for the most routine of cases and prohibitive for cases such as these. Although there has been no definition of “Complex Criminal Case” identified, it is generally submitted that where multiple charges/accused and serious complex areas of law are engaged, a significantly enhanced scale of fees is required. This would be conducive to a focused, efficient approach to the conduct of the case by counsel who know what the issues are, what is not contentious, and what defences have merit rather than some inexperienced counsel who may perceive a need to advance every argument “because it’s there”.

Legal Aid Ontario (LAO) has recently created a new panel to which lawyers must belong in order to accept certificates for extremely serious criminal cases. It sets out criteria for membership based on experience. It does not, however, address the need to pay such lawyers reasonably on such cases.

It is desirable that big case management and the Exceptions Committee have as much information as possible but injecting them into the Judicial Pre-Trial (JPT) and case management meetings is an expensive proposal with little benefit. JPT’s are for counsel on the case.

There is some merit in LAO identifying in advance that it will fund certain procedures in complex cases, but a rigid and exclusive approach will be counter-productive. Although many such cases share common features, each is unique.

The current “modest means” approach to LAO qualification should be preserved.

The creation of the LAO panel for extremely serious criminal cases seems to be encouraging discretion allowing co-counsel to divide the labour and allowing junior

counsel to gain the experience they would not otherwise get. This is to be greatly encouraged. Virtually all “Complex Criminal Cases” have a prosecution “team” as well as the considerable resources of (often several) police forces who are all paid at rates above that of LAO, from the lead counsel to an officer securing the scene.

A significant increase in LAO rates generally, and in these cases, specifically is urgently required.

MISCONDUCT, INEXPERIENCE AND INEFFICIENCY BY CROWN AND/OR DEFENCE COUNSEL CONDUCTING THE CASE

It is submitted that large complex cases very rarely fall into the hands of either inexperienced Crown or defence counsel. With respect to Crown counsel, it would be very surprising, in a system of case assignment, that inexperienced Crown counsel would be given a complex case. Similarly, it would be surprising if defence counsel who was out of his or her depth would feel comfortable in proceeding with a case that demanded greater experience or expertise.

The principle of Crown independence and its role as a strong advocate in the justice system has long been recognised and was re-stated by L’Heureux-Dube J. in *R. v. Cook*:

Nevertheless, while it is without question that the Crown performs a special function in ensuring that justice is served and cannot adopt a purely adversarial role towards the defence (*Boucher v. The Queen*, [1955] S.C.R. 16; *Power*, supra, at p. 616), it is well recognized that the adversarial process is an important part of our judicial system and an accepted tool in our search for the truth: see, for example, *R. v. Gruenke*, [1991] 3 S.C.R. 263, at p. 295, per L’Heureux-Dubé J. Nor should it be assumed that the Crown cannot act as a strong advocate within this adversarial process. In that regard, it is both permissible and desirable that it vigorously pursue a legitimate result to the best of its ability.³

Such independence and flexibility must not be lightly interfered with. It is difficult to see how “oversight” will in any way assist the conduct of a complex case if the Crown that is assigned is deemed to be experienced enough to begin with. Indeed, as is the case with many of the issues, the assigned Crown will always have a superior to seek assistance from when needed. An obligatory form of supervision will erode a necessary Crown independence and, it is submitted, actually increase delay as each significant decision with respect to the case may have to be discussed with an overseer. Rather than set up a bureaucratic hierarchy of control, the Crown should be encouraged to set up a case assignment system which would allow cases to be distributed to the appropriate level of Crown counsel.

³ *R. v. Cook* (1997), 114 C.C.C. (3d) 481 (S.C.C.), Tab 28

The position of the defence is different in that unless the lawyer works for a large firm, there is no formal case assignment system. However, many of the same considerations apply. It is difficult to see how a system of oversight will, in any way, expedite matters if, every time there is a decision to be made, counsel would have to seek advice or approval from a different lawyer. The right to counsel is also engaged when there might be a difference of opinion between the trial lawyer and the supervising lawyer. Whose opinion carries the day: the lawyer who has been instructed by an accused person or the supervisor? What happens if a dispute occurs? Is the trial lawyer to conduct a trial in a manner with which he disagrees?

It is submitted that imposing a supervisory procedure would create far more problems than it would solve, not least of which would be the disincentive for counsel to make tough decisions or even be innovative in advancing his or her case. It is suggested, once again, that encouragement be given to defence counsel to seek advice from senior counsel should they so wish. In the absence of a voluntary senior counsel, consideration should be given to having a committee of senior counsel who may be contacted by counsel to seek advice and guidance in respect of issues that arise in a complex case.

MISCONDUCT BY COUNSEL

Counsel misconduct in the courtroom is a serious matter. It is agreed that there is a reluctance by the judiciary to impose appropriate sanctions where counsel misconduct themselves in the courtroom. The List for Consultation suggests a role for the Law Society of Professional Conduct when referred a matter of misconduct by the trial judge. It is suggested that if a sanction is to be imposed for courtroom misdemeanours, then the best person to do so is the trial judge. The misconduct occurs before him or her and is therefore easily identified and dealt with. In addition, if it is seen that the judge is willing to take immediate action to correct improper conduct, other counsel may be less ready to act in a manner which could constitute misconduct. A trial judge must be given the power to control his or her courtroom without undue fear of review. Referral to the Law Society of Upper Canada could also be an option, however, it seems strange that a judge who considers counsel's conduct to be so egregious feels bound to report it to the governing professional body but cannot do anything about the matter himself or herself.

It is submitted that the ultimate control of complex cases resides within the power of the judge and he or she should be free in controlling misconduct that occurs within his or her court. The difficulty arises not in the 'bluntness' of the tools as suggested by the consultation document but by the failure of judicious use at the appropriate moment. The judge is presumed to be impartial and to act judiciously. Imposing sanctions against counsel for misconduct in court does not contravene this principle.

In cases of misjudgement, whilst it is desirable in principle for a judge to be able to contact a supervising lawyer, the practical realities make such an approach difficult to implement. How does one distinguish between misjudgement and a tactical decision? How does a judge retain his appearance of impartiality and, at the same time make assessments of counsel's ability to conduct a case? It is submitted that this idea, whilst superficially attractive, may prove to be impossible to put into practice.

THE CULTURE OF THE CROWN AND THE DEFENCE BAR

There is some truth in the description of the culture of the criminal bar in the consultation document. Civility and respect in the courtroom are increasingly becoming sidelined in the heat of a long trial. Disputes and a breakdown of communication are more commonplace. Although it is submitted that this phenomenon takes place in a minority of cases, its negative impact is felt across the justice system. Some of the solutions suggested (such as joint educational programs) would certainly break some of the barriers that exist between Crown and defence counsel. A supervisory committee would, it is suggested, not have much effect on counsel whose personalities and ideology are the cause of the disputes. Once again, it is submitted that the trial judge has a role to play in encouraging admissions and resolutions to uncontroversial evidentiary matters. If a signal is sent from the bench that a “difficult” counsel will not be tolerated, there would be more than enough reasons for a counsel to remain civil and co-operative. Immediate action on rudeness and failure to follow direction is the best incentive to behave properly.

THE USE OF EXISTING POWERS

As stated earlier in these submissions, the trial judges already have considerable power to control the courtroom and trial process. Many of these powers (contained for example in the Criminal Proceedings Rules) have been forgotten. Requiring written arguments is efficient only if a time limit is placed on oral argument yet this is never done even though the Rules allow for it. The failure to do so means that a court adjourns to allow counsel to write facta and written submissions and then take up a lengthy period of court time to repeat the written arguments orally.

The notion of a “healthy respect” for appellate review is not unfounded. Judges appear to be reluctant to curtail lengthy arguments, prevent baseless motions and control verbose and hostile counsel for fear of having their trials reversed by the Court of Appeal.

OVERSIGHT BY SENIOR COUNSEL

Regarding the suggestion of supervision or overseeing by senior counsel, this is particularly problematic when applied to the defence who, unlike the Crown, are not “one and indivisible” nor are they usually clustered in offices of 20 or more counsel. They tend to practise in smaller groups or alone.

As noted in the Discussion Paper, the independence of the bar is deeply embedded in our tradition. It is difficult to balance this (which is not merely a tradition but a necessity) with any attempt to impose a type of mandatory supervision to ensure that the right decisions are made in the conduct of the case. The participation of more senior and experienced counsel in these cases (should that come about) will itself assist in this function. Beyond that it is our submission that, for defence counsel, the notion of “oversight” in these cases is unrealistic.

Traditions of collegiality and respect are fundamental and must not, as is suggested, be eroded by the adversarial nature of the system. In our submission, this is not rampant in

nature and is the product of certain personalities and characteristics. Joint education programs, such as those offered by the OBA, may be helpful. It is submitted that this can even be addressed during the process of initial legal education, perhaps in connection with the ethical component .

“Greater emphasis on lawyers’ inter-personal and communication skills” in the selection and assignment process for these cases may be helpful on the Crown side where the Crown attorney for a given centre will know which of his or her assistant Crown attorneys might be better suited for a given case, subject to the availability. Few Crowns would have the luxury of assigning their “first choice” team to every complex case.

On the defence side, it is the accused who decides whom to retain, with concern over that lawyer’s inter-personal and communication skills less than a priority,

Use of “experienced managing counsel” presents several questions. Whence will they come? How are they to be paid? By whom? More “cooks in the kitchen” is unlikely to reduce complexity in these cases. Unless these supervising Counsel are virtually full-time on the case, their greater experience may be offset by a less than complete knowledge of the case as it proceeds.

Trial judges are well equipped to control irresponsible/inexperienced counsel. There are rules already in place requiring notice. It is felt that adding more process to the process is counter-productive.

Trial judges who show and demand courtesy from the outset are invaluable. All lawyers learn by example, from the new call to the veteran. Some very new lawyers see the fractious and overly aggressive manner of some of their colleagues a few years out and feel a need to emulate. Setting the proper example ourselves, bench and bar alike will encourage a return to a more courteous and effective courtroom. It will also, one hopes, encourage more and better communication in and out of court.

RECOMMENDATIONS

1. Disclosure practices must be reformed to allow the process to become meaningful. It should be mandatory for a defence counsel to explicitly specify the relevance of the disclosure sought to the case at hand.
2. Disclosure timelines are undesirable as they are unworkable and would lead to increased delays in the trial process.

3. The police should vet disclosure before it is provided to the Crown as they are in the best position to know what should be redacted from a particular set of notes or statement.
4. Although it is highly desirable that the Crown advise the police on legal issues during an investigation, there should not be any movement towards an American type of district attorney system. The current separation between the prosecution and investigation arms of the State promote an objectivity that is essential to the administration of justice.
5. The powers of a judicial pre-trial judge must be strengthened to enforce the current rules contained in the Criminal Proceedings Rules and make the pre-trial process meaningful. Such powers should include sanctions against Crown and defence counsel who refuse to comply with the directions at the pre-trial. Judges' reluctance to enforce these rules should also be addressed.
6. Evidentiary rulings (including severance decisions) should remain the preserve of the trial judge and such rulings should not be used as a case management tool.
7. Legal Aid fees for complex cases must be increased to ensure that the accused are competently represented. Such an approach would ensure experienced counsel taking cases and running them with efficiency rather than proceeding with unmeritorious arguments.
8. Obligatory supervision of Crown and defence counsel should be avoided. Such a move will lead to the erosion of independence in advocating a case and will lead to increased delays as significant decisions may become subject to approval and second guessing. There is a significant risk of disputes between each party's trial lawyer and supervisor which will lead to ethical dilemmas.
9. However, the creation of supervisory advice panels, which may be contacted on a voluntary basis may promote a smoother running of the system so long as such panels are easily available to the lawyer in need.
10. Misconduct by counsel should be dealt with by the trial judge who already has the power to control his or her courtroom. The judges need to be assured that they are able to oversee a trial without fear of judicial review of their decisions. An

increase in a trial judge's power is unnecessary if he or she is assured that the sanctions or decisions made will not be subject to criticism or reversal by the appellate courts. This culture of "fear of reversal" should be laid to rest.

11. The culture of civility between counsel should be encouraged by greater joint programming between Crown and defence counsel. Education of both sides regarding the standards expected of the bar is also recommended. Such education would prove invaluable in removing the "confrontational" notions held by many new lawyers. Abuse and insulting behaviour should be dealt with by increased intervention of the trial judge.

12. Educational programming for the judiciary is increasingly necessary to foster the culture of controlling the courtroom. Misconduct, the curtailing of legal arguments and the efficient running of the courtroom depends entirely on the willingness of a trial judge to exercise his or her powers to do so. The judiciary must be encouraged, educated and assured about their own current powers and the fact that they should be fearless in implementing them. A trial judge who controls the courtroom sets the standard for behaviour and efficiency.