LAW REFORM INITIATIVES RELATING TO THE MEGA TRIAL PHENOMENON

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A. Introduction

There never used to be an identifiable body of criminal justice policy work relating to the 'mega trial'. The recently coined term 'mega trial' refers to criminal proceedings that have become so long and complex that traditional criminal procedure appears to be inappropriate or unworkable. The advent of this phenomenon in the last 10 to 15 years has led to a flurry of policy development, academic commentary and law reform initiatives which seek to ameliorate the adverse consequences of the 'mega trial' through changes to traditional criminal procedure. This paper reviews the various leading studies on this topic and suggests some reforms that should be adopted by the federal government through its power over "criminal procedure" under s. 91(27) of the *Constitution Act, 1867*.

The reason for the sudden emergence of a body of policy work relating to the 'mega trial' is that there is a sense of crisis about the state of the modern criminal trial in certain influential quarters of the justice system. There is no real question that many criminal trials have become too long and that many of our procedures have become too complex. These twin forces of undue length and undue complexity produce criminal proceedings that are unmanageable and ineffective. Cases take much too long to come to trial, or break down before they reach trial or break down at trial, and the public loses faith in the competence and efficacy of the justice system.[1]

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[*] Assistant Professor, Faculty of Law, University of Toronto. I am indebted to Professor K. Roach and to Justice M. Moldaver for their many valuable comments on an early draft of this paper. I was also ably assisted by one of my students, James Wilson, who did excellent research in a number of areas. Finally, my earliest mentor, Professor M. Friedland, helpfully critiqued a later draft of the paper as did Justice B. Durno and Regional Crown Director, John Pearson.

[1] There is a real need for through empirical research, to analyze typical cases that exhibit the "mega trial" symptoms and to identify the precise causes. That much larger project is beyond the scope of this paper. In any event, it appears from the existing body of policy work reviewed in this paper that a number of immediate reforms can be identified and implemented, without awaiting the results of more detailed long term research.

The strongest voice on this topic is Mr. Justice Michael Moldaver of the Ontario Court of Appeal. He was one of the best criminal defence counsel in Ontario in the 1970s and 1980s, was then a Superior Court trial Judge in the 1990s and is now a leading member of a strong appellate Court. Accordingly, he has watched the criminal trial evolve over the past 35 years, through first hand experience, and is undoubtedly a very knowledgeable commentator. He gave a speech to the Criminal Lawyers' Association annual convention in Toronto on October 21, 2005 in which he stated:[2]

> The message I bring to you today is not a happy one. It concerns the length of criminal trials and the impact this is having on our criminal justice system and the public's faith and confidence in it.
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> I, for one, am deeply concerned. To be blunt, I don't like what I am seeing. Criminal Trials are spinning out of control. Sadly, they have taken on a life of their own and if they haven't already done so, they are fast becoming the masters of a system they are meant to serve.
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> Am I worried? You bet I am. Long criminal trials are a cancer on our criminal justice system and they pose a threat to its very existence. You see, ladies and gentlemen, if the criminal justice system does not enjoy the support and respect of those whom it is meant to serve; if criminal trials are seen by the public as little more than interminable games; if the public comes to view the system with disdain and contempt, then the system will have lost its reason for being. And the consequences, I fear will be serious.
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> [W]hen I speak of long criminal trials, I am not referring to the Air Indias or the Hells Angels. Mega trials of that nature are clearly problematic, but I see them as exceptions, and the problems associated with them will almost invariably have to be dealt with on a case-by-case basis. The long criminal trials about which I am speaking are your standard, ordinary, every-day murder trials, sexual assault

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[2] The Honourable Justice Michael Moldaver, "Long Criminal Trials: Masters of a System They are Meant to Serve" (2006) 32 C.R. (6th) 316. Also see: Anne-Marie Boisvert, "Mega-Trials: The Disturbing Situation in Quebec" (2004) 15 C.R. (6th) 178. The author, the Dean of the Faculty of Law at the University of Montreal, concludes: "Obviously, the recent events in Canada point to the necessity of a serious examination of mega-trials. We have to determine if their many short comings do not outweigh their utility. If it is decided that we continue with them, we will have to think very seriously and thoroughly about the adjustments to be made to our justice system to diminish the inconvenience linked to their length and complexity while preserving the right of the accused to a fair trial".

> trials, robbery trials, drug trials and the like. Those are the trials whose complexion has changed so dramatically over the past twenty years. Those are the trials that bear virtually no resemblance to the trials I engaged in as a defence counsel thirty years ago. To me they are almost unrecognizable.
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> ...
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> The last thing I want to do is to leave you with the impression that I am singling out the defence bar as the sole or even primary cause of lengthy trials. I am not. The problem is a collective one. It belongs to Parliament, it belongs to the judiciary, it belongs to crown attorneys, it belongs to the police, and yes, it belongs as well to the defence bar.
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> ...
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> The criminal trial process is in a state of crisis. ... We need to find solutions and we need to act on them now. The time for petty bickering has long since passed.

Justice Moldaver is not alone in expressing these views. He is simply the latest and the strongest in a long line of commentators from senior levels of the judiciary who have made similar observations over the last 10 to 15 years.[3] It is this sense of 'crisis', expressed from within the justice system, that has led to a steady stream of policy reviews and reports which attempt to respond and propose solutions. In particular, there are 5 major studies in this area, to be reviewed below, which identify 3 broad areas of consensus that should animate law reform.

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[3] See, e.g.: Chief Justice McLachlin's recent speech on March 8, 2007, titled "The Challenges We Face," in which she stated that murder trials used to take "five to seven days," in the recent past, and now "they last five to seven months," describing these problems as "urgent" and the costs as "incalculable" (The Empire Club of Canada, Toronto, Canada, online: Supreme Court of Canada <http://www.scc-csc.gc.ca>; *R. v. Durette et al.* (1992) 72 C.C.C. (3d) 421 at 440 (Ont. C.A.) where Finlayson J.A. stated, in a passage that was recently quoted with approval in *R. v. Pires and Lising* (2005) 201 C.C.C. (3d) 449 (S.C.C.), "[u]nless we, as courts, can find some method of rescuing our criminal trial process from the almost Dickensian procedural morass that it is now bogged down in, the public will lose patience with our traditional adversarial system of justice. As Jonathan Swift might have said, we are presently sacrificing justice on the shrine of process."; former Chief Justice Lamer's speech to the Empire Club on this topic on April 13, 1995, titled "The Role of Judges," wherein he 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 (in *The Empire Club of Canada Speeches 1994-1995*, ed. John A. Campion and Edward P. Badovinac, 124-136 [Toronto: The Empire Club Foundation, 1995], online: Empire Club of Canada <http://www.empireclubfoundation.com>; and former Chief Justice LeSage's statement on October 9, 1997, when announcing the establishment of the Criminal Justice Review, "We are not disposing of cases quickly enough ... Trials are taking much too long. We must find ways to make trials more efficient" (quoted in an Ontario Ministry of the Attorney General news release on that date).

Before embarking on an analysis of the 5 'mega trial' policy reviews that have been completed between 2003 and 2006, it should be noted at the outset that there are two distinct kinds of 'mega trials'. Justice Moldaver made this point in the passage from his speech quoted above and it requires emphasis because the remedies may be different for the two different kinds of 'mega trial'. First, there are cases like the Air India trial in Vancouver and the Hells Angels trial in Montreal that are bound to be long and complex because of the number of accused, the enormity of the crime, the length of the investigation or any number of additional factors that are inherent in the case itself. [4] There was such a case in Justice Moldaver's days at the bar, namely, the famous "Dredging Conspiracy". [5] These cases can be predicted in advance as ones that are bound to become 'mega trials' because of their inherent characteristics.

The second class of 'mega trial' is those cases that become too long and complex because of decisions made by the police, the parties and/or the courts. These are the cases that particularly concern Justice Moldaver and the other senior members of the judiciary who have commented on the problem. There is nothing about the case itself that justifies lengthy and complex proceedings. Rather, it is the justice system, and its various players, that have combined together to create a 'mega trial' where one need not exist.

It is important to distinguish between these two kinds of 'mega trials' because, as noted above, the solutions may be different. The 5 major policy reviews and reports, discussed below, do not always draw a clear distinction between these two classes of case and their proposals sometimes address one kind of 'mega trial' but not the other. I believe that both forms of 'mega trial' need to be addressed by law reformers. It ultimately does not matter what causes a 'mega trial'. The practical reality is that the trial becomes too long and complex and our traditional forms of criminal procedure bend and eventually break. Solutions are required for both forms of 'mega trial'.

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[4] The "Air India trial" is *R. v. Malik & Bagri* [2005] BCSC 350 (S.C). The "Hells Angels trial" is *R. v. Beauchamp et al* [2002] R. J. Q. 2071.

[5] *R. v. McNamara et al.* (No. 1) (1981) 56 C.C.C. (2d) 193 (Ont. C. A.); aff'd (1985) 19 C.C.C. (3d) 1 (S.C.C.). In that case there were 11 days of pre-trial motions, which was unusual in the 1970s. Jury selection then began on February 20, 1978. The jury rendered their verdicts on May 5, 1979 after 197 days of trial that had extended over 15 months. There were 20 accused (both individuals and corporations) charged in an indictment that alleged 7 counts of conspiracy to commit fraud involving "bid rigging" on federal government dredging contracts.

One further preliminary point to note is that the discussion in this paper is about law reform remedies to the 'mega trial' phenomenon and it should not be taken as signifying any value judgment about the legitimacy or the comparative weight of the various underlying causes. Some of the causes, such as misconduct or poor judgment by justice system players, obviously lack legitimacy and must be curbed. Other causes, such as the increasing complexity of modern legal remedies, whether at common law, under the *Charter* or under numerous new *Criminal Code* provisions, may be more legitimate but their negative effects on the trial process still need to be addressed.

The purpose of this paper is not to debate the root causes of the 'mega trial' phenomenon or to calibrate their relative weight but to accept the reality, that this phenomenon is now upon us, and to try to find solutions that will ameliorate its adverse effects. The solutions must address all of the known root causes while, at the same time, recognizing another practical reality, namely, that modern criminal trials will never be as short and as simple as they were 25 or 30 years ago. Too much has changed and so the search is for remedies that will bring relative improvement.

B. The January, 2004 Report of the Federal, Provincial and Territorial Heads of Prosecutions

After the failure of a major Hells Angels murder case in Montreal,[6] in mid-trial, the Heads of Prosecutions established a working group in 2003. It made

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[6] *R. v. Beauchamp et al.*, *supra* note 4. There were 17 accused facing various charges of murder, drug trafficking and involvement in a criminal organization. After six months, the trial judge, Boilard J., learned that he had been reprimanded by the Canadian Judicial Council (C.J.C.) for insulting one of the defendant's lawyers in an earlier bail hearing. Under the circumstances, Boilard J. concluded that he had lost the "moral authority" to oversee the trial and he recused himself. This resulted in a further referral of Boilard J.'s conduct to the C.J.C. For a brief overview of the case, see Canadian Judicial Council, Annual Report 2003-2004, at 15, online: Canadian Judicial Council <http://www.cjc-ccm.gc.ca>. For the immediate reaction of commentators, see, e.g.: "A sorry interruption of the biker trial," Editorial, The Globe and Mail, 24 July 2002. The replacement judge under s. 669.2(1) of the *Criminal Code*, Béliveau J., determined that the Court had jurisdiction to either continue the trial or order the start of a new trial (*R. v. Beauchamp et al.* [2002] R.J.Q. 2066). In a subsequent ruling (*R. v. Beauchamp et al.* [2002] R.J.Q. 2071), Béliveau J. declared a mistrial. He noted that the length of the trial had probably been doubled, due to the interruption, and that there was uncertainty as to whether some of the remaining members of the jury (already reduced to 11) would be lost before the trial's conclusion. The jury had asked the judge to impose a deadline for completion of the trial and five jurors had asked to be excused. In addition, "[i]n a letter sent to the Court, the jurors indicated that they were [translation] 'fully aware that many participants in the present case want the trial to be aborted without being held responsible for it.' This was clearly aimed at the accused, since the jurors knew that only the defence wanted the trial to be aborted." As a result, a trial that had already heard 113 witnesses during 15 weeks of hearings was aborted.

recommendations to the federal, provincial and territorial Justice Ministers in January 2004 in a report titled "Management of Mega Cases". This report was initially a confidential internal government document but it was recently revised and released in January, 2007.[7] It is the first serious policy review and report in this country that specifically focuses on the 'mega trial' phenomenon.

The Heads of Prosecutions is the forum where the senior officials responsible for criminal prosecutions, both federally and provincially, meet each year. They are the Assistant Deputy Ministers and Directors of Public Prosecutions. In other words, it is a very senior and influential group with ultimate responsibility for all criminal prosecutions initiated in this country.

A number of the recommendations in this first report respond to the specific problems that arose in the Montreal Hells Angels case where, as noted above in note 6 in greater detail, the trial Judge had recused himself in the middle of a lengthy jury trial and had to be replaced pursuant to statutory powers set out in s. 669.2(1) of the *Criminal Code*. This resulted in further delays to an already lengthy trial and a mistrial was eventually declared as the jury was unwilling to accept the ongoing delays and the new trial judge feared that the number of jurors would soon drop below the statutory minimum of ten. However, many of the report's other recommendations respond to problems that are common to most, if not all, mega-trials. Indeed, the Heads of Prosecutions had recently experienced difficulties in a number of other high profile gang-related cases which, no doubt, contributed to the concerns motivating their report.[8]

The most significant law reform proposals emerging from this first report are set out below. It will be seen that a number of these proposals recur in the four subsequent

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[7] The report has been circulated as part of the Government's consultations in this area but it is not yet publicly available on the D.O.J. website.

[8] Two noteworthy cases that proceeded with great difficulty between 1999 and 2003, that is, in the period immediately preceding the Heads of Prosecutions report, are *R. v. Pangman et al.* (2001), 154 C.C.C. (3d) 193 (Man. C.A.) and *R. v. Chan et al.* (2003), 15 C.R. (6th) 53 (Alta. Q.B.). These two cases from western Canada share a number of common features including the following: a large number of accused charged jointly in a single indictment (35 and 36 accused, respectively, in the two cases); difficulties by the Crown and the police in applying *Stinchcombe* disclosure standards to the very large amounts of potentially relevant material that exists in a 'mega case'; difficulties in applying normal Legal Aid funding regimes to the defence in a 'mega case'; extraordinary numbers of pre-trial motions, including "numerous defence challenges of dubious merit" in the *Chan* case (*supra* at pp. 162-163 C.R.); and significant delays in the pre-trial period, eventually leading to a stay of the *Chan* prosecution for unreasonable delay and to plea bargains in the *Pangman* prosecution.

reports produced by other law reform bodies. In particular, 3 common areas of law reform emerge from all 5 of the reports. A detailed discussion of the relative merits of these major recurring proposals will be reserved until later in this paper, after all 5 of the reports have been summarized. The key recommendations of the Heads of Prosecutions report were as follows:

- Legislate real pre-trial "case management" powers so that the judiciary can order counsel, at an early stage, to identify the issues, establish timetables for filing and arguing motions, summarily dismiss frivolous motions, issue early binding rulings on those motions that have merit and, finally, sanction any unprofessional conduct. These kinds of judicial powers already exist at trial and there is no need for legislation granting such powers to a "trial judge". What is unclear, however, is whether they can be exercised at an early pre-trial stage by a "case management" judge. Early judicial control of the case is, of course, the very essence of what is meant by "case management". Ss. 482.1 and 625.1 of the *Criminal Code* set out a statutory basis for case management rules and for pre-trial conferences but it is doubtful whether these provisions succeed in transferring the jurisdiction of a "trial judge" to a "pre-trial judge".[9] The Heads of

[9] This problem has its root in both the common law and the *Charter*. It was authoritatively held, in *R. v. Chabot* (1980), 18 C.R. (3d) 258 at 271 (S.C.C.), that an indictment is not preferred until "it is lodged with the trial court at the opening of the accused's trial, with a court ready to proceed with the trial". Unless the indictment is preferred, it is doubtful whether any court has jurisdiction to deal with it and make binding pre-trial rulings. See: R.E. Salhany Q.C., *Canadian Criminal Procedure*, 6th Ed., The Cartwright Group Ltd. 2007, at 6-23. Similarly, in *R. v. Mills* (1986), 26 C.C.C. (3d) 481 (S.C.C.), the Court held that motions seeking relief under the *Charter* in relation to a criminal trial must be brought before the "trial judge" (per. McIntyre J. at pp. 493-5 and LaForest J. at pp. 565-6) unless exceptional circumstances exist requiring an immediate remedy (per. Lamer J., as he then was, at pp. 516-520 and per. LaForest J. at pp. 566-7). This view was affirmed in *R. v. Rahey* (1987), 33 C.C.C. (3d) 289 (S.C.C.) where the Court stated, per. Lamer J., as he then was, at pp. 298-9: "It is the judge sitting at trial who would have jurisdiction over the person and the subject matter and would have jurisdiction to grant the necessary [*Charter*] remedy", absent exceptional circumstances requiring immediate relief. LaForest J. added, at p. 318: "The trial judge is, after all, in the best position to explore all the circumstances ... and has at his or her disposal the fullest range of criminal remedies including, for example, a reduction in sentence". Subsequent case law has followed *Chabot*, *Mills* and *Rahey* in this regard by assigning all preliminary evidentiary and procedural rulings and all *Charter* motions to the "trial judge", including the power to summarily dismiss such motions where they obviously lack merit. See: *R. v. Stinchcombe* (1991), 68 C.C.C. (3d) 1 at 12-13 (S.C.C.); *R. v. Garofoli* (1990), 60 C.C.C. (3d) 161 at 182-7 (S.C.C.); *R. v. Litchfield* (1993), 86 C.C.C. (3d) 97 at 109-113 (S.C.C.); *R. v. Zevallos* (1987), 37 C.C.C. (3d) 79 (Ont. C.A.); *R. v. Kutynec* (1992), 70 C.C.C. (3d) 289 (Ont. C.A.). A number of policy justifications are advanced in these cases, in support of consolidating all pre-trial rulings in "the trial judge", in particular the following: the trial judge is equipped to hear all the evidence; the trial judge has the full range of trial remedies available and can amend and tailor the remedies

Prosecutions report speaks of these recommended case management powers being exercised only by “the trial judge”. This concession is perhaps due to the long line of common law, statutory and *Charter* authority, cited in note 9 below, that would have to be over-ruled if aggressive case management powers were to be exercised by a separate “pre-trial judge” who did not go on to conduct the trial;

- Where a mistrial is declared, the rulings already made at the first trial should be binding on the parties at the second trial, absent some material change of circumstances;
- Statutorily codify disclosure rules and, in particular, provide for electronic disclosure and provide that the non-core materials in the possession of the Crown and the police can be disclosed by providing the defence with an opportunity to inspect and to request photocopies;[10]
- Where the Crown has severed related counts or related accused into smaller more manageable trials, or where the Court has so ordered, there should be provision

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as the trial evolves; rights of appeal only exist from the “trial court”; it is inefficient and duplicative to allow two separate judges to rule on issues relevant to one trial. Various statutory provisions have repeated this preference for having “the trial judge” decide all matters preliminary to the trial itself. See: ss. 278.3(1), 645(5), 674, 675 and 676 of the *Criminal Code*.

[10] This recommendation does not raise any constitutional issues since the s. 7 *Charter* right to full disclosure, recognized in *Stinchcombe*, *supra* note 9, does not dictate any particular form of disclosure. The leading post-*Stinchcombe* study of the law of disclosure, “The Martin Committee Report”, made this point: “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”. The Report goes on to recommend that the Crown should disclose copies of the obviously relevant core materials and that the defence should also be allowed, on request, to “inspect the investigative agency’s file in relation to the offence” and to request copies of anything useful that emerges from this inspection of non-core materials. See: The Hon. G. Arthur Martin Q.C., *Report of the Attorney-General’s Advisory Committee on Charge Screening, Disclosure and Resolution Discussions*, Queen’s Printer for Ontario 1993, at pp. 191-2 and 249-251. This sensible procedure is particularly useful in the ‘mega case’ where the police will have accumulated massive amounts of material, much of which is marginally relevant and unlikely to be useful to the defence. Because these materials broadly relate to the investigation, they may meet the very low *Stinchcombe* threshold of being not “clearly irrelevant”, even though their contents are ultimately not useful to the defence. The Crown will often make mistakes, when deciding whether to disclose this kind of material, due to uncertainties as to its relevance. Furthermore, requiring the Crown to copy large amounts of this kind of marginal material in a ‘mega case’ is a wasteful, time consuming and unnecessary exercise when the defence can easily determine what is useful by simply inspecting the file. In the “Air India” trial, there were rooms full of filing cabinets at RCMP Headquarters, both in Ottawa and Vancouver, containing endless amounts of this kind of material. Rather than copying it all, the “Martin Committee” procedure was agreed to, that is, the defence had a representative attend at these rooms, review all the files and request copies of the very small number of useful documents that emerged from the inspection. The *Chan* case, *supra* note 8, is a good example of a ‘mega case’ that encountered serious disclosure problems, arguably due to a failure to adopt the “Martin Committee” approach to the disclosure of non-core material.

for a single set of rulings on all motions and evidentiary issues that are common to the severed trials. All related trials and accused would be bound by the single set of rulings, absent some distinguishing feature;

- Provide for the appointment of an alternate trial Judge who would become familiar with the case at an early stage of the proceedings. In the event that the trial Judge has to recuse himself/herself in the midst of a lengthy jury trial, the alternate Judge could assume control of the trial pursuant to s. 669.2(1) without significant delay. The alternate judge would also be more likely to exercise the discretion in s. 669.2(4), to "continue the trial" rather than starting fresh, if he/she was already familiar with the case;
- Amend the *Criminal Code* so that a jury of 16 is empanelled in lengthy trials and so that the number of jurors can drop to 8 before the trial Judge must declare a mistrial. S. 644(2) currently sets the minimum number of jurors at 10 and s. 643 sets the maximum at 12. There is always a risk that more than two jurors will be lost during a lengthy trial and that a mistrial will have to be declared because the jury has been reduced to nine members. This recommendation obviously seeks to reduce the risk of such a mistrial but it raises the issue, to be discussed below, as to whether a jury of 8 members would comply with s. 11(f) of the *Charter of Rights.* That provision constitutionally entrenches the right to "trial by jury" but does not define the permissible size of the "jury". As a result, the question for law reformers is whether the current statutory minimum of 10 jurors is a constitutional right.

C. The February, 2004 Final Report of the Barreau du Quebec Ad Hoc Committee on Mega Trials

In addition to the Heads of Prosecutions report, summarized above, the failure of the Hells Angels 'mega-trial' in Montreal prompted the Barreau du Quebec to form an Ad Hoc Committee on Mega Trials. There had been criticism of the conduct of some members of the bar in the Montreal case, and in another related Hells Angels case, and the Barreau was naturally concerned to address these kinds of issues, especially when they were raised in two long cases with a very high public profile. Public confidence in

the professionalism of the bar had arguably been undermined by some of the reports emanating from the two trials and the Barreau responded with a "blue ribbon" committee to look into the matter.[11]

The Ad Hoc Committee was chaired by the Dean of the University of Montreal, Faculty of Law, Anne-Marie Boisvert, and it included senior members of the bar and a retired Justice of the Quebec Court, Bernard Grenier. In other words, the Committee was similar in stature to the Heads of Prosecutions and its recommendations were not that dissimilar. It reported in February, 2004, shortly after the Heads of Prosecutions report.[12]

The Ad Hoc Committee's most important law reform proposals were the following (again, any detailed discussion of the relative merits of the 3 broad areas of law reform that recur throughout all 5 reports will be left until later in this paper):

- Amend ss. 642.1, 643 and 644(1.1) of the *Criminal Code* so as to allow the court to empanel a jury of 14 in lengthy trials, but maintain the current requirement in s.

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[11] The alleged misconduct of counsel in *Beauchamp et al.*, *supra* note 6, is summarized in the sentencing judgment from the second trial (*R. v. Beauchamp* [2004] R.J.Q. 1692, at paras. 167-183), which was reversed in part on appeal (*R. v. Beauchamp* [2005] R.J.Q. 1595). In particular, the trial judge blamed counsel for the length of the trial: "Defence counsel almost completely refused to make admissions about important portions of the evidence, contrary to their clear agreement to do so during the determination as to whether a new trial was necessary. Instead of the six months expected because of the promised admissions, the length of the trial more than doubled. The lengthy delays were also caused by the many useless motions brought by the defence and by many long and unnecessary cross-examinations by defence counsel. The defence was thus largely responsible for the trial's nine-month delay." The Court of Appeal did not disagree with these factual findings but held, by a majority, that counsel's misconduct should be met with contempt citations or with disciplinary proceedings but that it could not be attributed to the accused and then remedied through the sentence imposed. It is also noteworthy that the trial judge reduced the increased legal aid fees for defence counsel that had been ordered at the first trial. As reported in the Canadian Press on January 6, 2003: "Outraged defence lawyers criticized the judge … for trying to chop their special legal-aid fees … The judge gave reasons why the lawyers weren't worth $750 a day but then slapped a publication ban on them" ("Lawyers, judge in Quebec biker mega-trial haggle over legal aid fees"). In a second related Hells Angels murder case, *R. v. Bourgouin et al.*, REJB 2003-48970, the trial judge expelled a defence lawyer, referred his conduct to the Barreau for discipline, charged him with contempt of court and ordered that his enhanced legal aid fee of $1000 a day not be paid. For media reports of the precipitating events, see, e.g., "Biker lawyer expelled from Montreal trial after contempt-of-court charge," Canadian Press, 12 February 2003, describing the lawyer's refusal to comply with an order to stop cross-examining a witness. See also, e.g., "Quebec judge in Hells Angels trial tired of 'disgraceful' defence lawyers," Canadian Press, 25 November 2002, describing the judge's mounting frustration. The trial judge is reported therein to be "fed up with belligerent defence lawyers wasting the court's time" in "'disgraceful' and 'useless' disputes"; "[t]he proceedings have been marked by defence lawyers making sarcastic comments to witnesses during interminable cross-examinations. When the judge calls them on it, they talk back to him like stubborn preschoolers." At one point, a lawyer "sarcastically told the judge he was scared of him. The judge refused to let [him] continue cross-examining a police officer, calling the questions 'trifling, futile and vexatious.'"

[12] Barreau du Québec, "Final Report of the Ad Hoc Committee on Mega-Trials of the Criminal Law Committee," February, 2004, online: Barreau du Québec <http://www.barreau.qc.ca>.

644(2) for a minimum of 10 jurors. Although the earlier Heads of Prosecutions report had recommended empanelling a slightly larger jury of 16, both reports agreed that the additional jurors (or 'alternates') would not be identified as "alternates" until it came time to deliberate at the end of the trial. At this point the final jury of 12, assuming more than 12 jurors still remained, would be randomly selected and would begin their deliberations. Most U.S. jurisdictions permit the empanelling of alternate jurors although there are a number of variations on the exact procedure;[13]

- Provide for enhanced judicial case management powers. In particular, the trial judge should begin managing the case at an early stage by setting a timetable for pre-trial motions and for the trial itself. Motions should be filed in writing and the judge must have power to summarily dismiss those that are obviously without merit. The judge should also supervise the process of making admissions, pursuant to s. 655 of the *Criminal Code*, should prevent frivolous and dilatory tactics and should penalize incivility. The Heads of Prosecutions report had recommended similar powers and had recommended that they be legislated. The Barreau du Quebec report does not expressly address the question as to whether these powers should be legislated, based in rules of court or left to the common law. Nevertheless, the substance of the Barreau's recommendations is that "more powers be given to judges for managing the trial". Like the Heads of Prosecution report, the Barreau report speaks of giving these early case management powers to "the judge appointed to preside over [the] trial", rather than to a separate judge who would be responsible only for pre-trial matters;

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[13] See: Yale Kamisar, Wayne R. LaFave, Jerold H. Israel and Nancy J. King, *Modern Criminal Procedure*, 10th Ed. (St. Paul, MN: West Group, 2002), at 1331; and the American Judicature Society, which summarizes the range of current practice in the United States as follows: "In some jurisdictions the alternate jurors are chosen at the beginning of the process and the alternate jurors are told that they have been so designated; in other jurisdictions the alternates are chosen at the outset and are known to the judge and the parties, but the jurors are not told who the alternates are (on the theory that someone who knows in advance that he/she is an alternate may not pay as much attention to the trial); and in still other jurisdictions the alternates are chosen by random selection before the jurors retire to deliberate. The use of alternate jurors is governed by statutes in each jurisdiction. The key issue for use of alternate jurors is whether the substitution of an alternate is sought before the case has been submitted to the jury for deliberation, or after" (online: American Judicature Society <http://www.ajs.org>).

- Provide for the early appointment of a replacement judge who would remain briefed about the case, as it progressed, and who would be available to take over the trial pursuant to s. 669.2 if the original trial judge was unable to continue for any reason. Once again, the Heads of Prosecutions had made a similar recommendation in their report. The Barreau du Quebec report added a somewhat related recommendation, namely, that a further judge should also be available to informally mediate disputes during the trial and to encourage settlement of the case. This latter proposal already exists in practice in a number of jurisdictions and does not require legislation. The parties can always be encouraged to settle a case at any stage of the trial, by attending in the chambers of a mediating judge who should generally not be the trial judge. However, if this kind of pre-trial or mid-trial mediation was to become mandatory, legislation would be required;
- Juries in long trials should be given written summaries of the evidence and the law, by the trial judge, to supplement the oral addresses and charge to the jury at the end of the trial; [14]

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[14] Current practice in the United States, on this point, is summarized by William W. Schwarzer in "Reforming Jury Trials," 132 F.R.D. 575 (1991), at 584-585: "Many judges are giving jurors one or more copies of the charge or a tape recording of it [Manual for Complex Litigation Second § 22.433 (1986); see also: Manual for Complex Litigation Fourth § 22.434 (2004)]. Appellate courts have approved this practice so long as jurors are instructed that they must consider the charge in its entirety [Warren K. Urbom, "Toward Better Treatment of Jurors by Judges," 61 Neb. L. Rev. 409 (1982), at 422-26]. A survey of lawyers indicates that they overwhelmingly favor allowing the jury to see the charge [*New York State Bar Association Report of the Committee on Federal Courts-Improving Jury Comprehension in Complex Civil Litigation* (1988), at 28]. Similarly, a survey of jurors showed that over three-quarters wanted access to the written instructions during deliberations; some jurors have asked to have individual copies for ready reference [*Ninth Circuit Judicial Council Survey of Jurors' Attitudes* (1986), at 9]. Availability of the written charge in the jury room is almost certain to assist the jury in arriving at an informed verdict while reducing the need to send questions to the judge and to have parts of the charge re-read." The law in Canada is less developed on this point but in *R. v. Pointras* (2002) 1 C.R. (6th) 366 (Ont. C. A.), at para. 46-47, Doherty J.A. approved of the practice and stated: "Judges must explain a variety of legal principles to a jury. Some of these principles are complex, particularly where there are multiple accused, different theories of liability and various defences advanced at trial. Complex instructions will sometimes be lengthy. Any judge who has tried to instruct a jury in a complex criminal case knows how difficult that task can be. Surely, it can be no less difficult for twelve lay people to understand, recall and apply those instructions. Juries need whatever help judges can give them. For many years, educators have accepted as self-evident the proposition that appropriate written material enhances the comprehension of oral instruction. Social science research suggests that this proposition has application to jury instructions. The time has come to embrace the use of written material to enhance juror comprehension of oral instructions, particularly where those instructions must be lengthy and complex. There is no legal impediment to the use of written material as an adjunct to oral instructions." Also see: *R. v. Menard* (1998) 125 C.C.C. (3d) 416 (S.C.C.); *A-G. Quebec v. Belmoral Mines Ltee.* [1987] R.J.Q. 290 (Que. C. A.), aff'd [1989] 1 S.C.R. 422.

- The Barreau du Quebec recognized that it (and the other provincial Law Societies) have a responsibility to mentor and discipline counsel who are unprofessional or unethical. The report acknowledges that mega-trials are particularly challenging in this regard because of the unusual pressures that they place on counsel and because of the heightened stresses that arise when relationships between adversaries extend over a long period of time. Accordingly, the need for both mentorship and professional discipline is at its highest in these cases and the report recommends the appointment of a senior representative of the Barreau du Quebec to over-see any specific mega trial where difficulties are anticipated. This representative would obviously begin by encouraging professional conduct, through mentorship, while holding out the threat of professional discipline should the mentoring fail.[15]

D. The 2004 Report on Mega Trials of the Steering Committee on Justice Efficiencies and Access to the Criminal Justice System

The first two policy reviews and reports, discussed above, were the result of committees that were formed in 2003 and that issued their reports in early 2004. A third committee was also formed in 2003 to study the phenomenon of 'mega trials' but it did not issue its report until later in 2004. Accordingly, it had the benefit of the two earlier reports and was able to respond to them. This third committee was established by the federal, provincial and territorial Ministers of Justice from across the country and was called the "Steering Committee on Justice Efficiencies and Access to the Justice System".

[15] One of the counsel for the defense in *R. v. Bourgoin et al.*, *supra* note 11, was disciplined by the Barreau for misconduct on four separate occasions during the trial, in particular, for: continuing to protest a ruling and refusing to be seated after the judge's acknowledgement of his objections and request for him to be seated; mocking the judge's efforts to manage the court calendar; flippantly dismissing a warning by comparing it to the first of "three strikes" in baseball and then telling the judge, in a cavalier tone, "I'll sit down, don't worry"; and challenging the judge on the admissibility of evidence, with the jury in attendance, after the judge had determined that the jury should be dismissed during that exchange. This conduct violated the Code of Ethics, s. 2.00.01 which provides, like all of the Rules of Professional Conduct in this country: "An advocate shall act with dignity, integrity, honour, respect, moderation and courtesy". See: *Patrick Richard v. Réal Charbonneau*, January 30, 2006, Quebec, No. 06-03-01831, Comité de discipline Barreau du Québec, online: Barreau du Québec <http://www.barreau.qc.ca> [Translated by James Wilson for the author]. The lawyer was subsequently fined $10,000 in total. See: *Patrick Richard v. Réal Charbonneau*, October 19, 2006, Quebec, No. 06-03-01831, Comité de discipline Barreau du Québec, online: Barreau du Québec <http://www.barreau.qc.ca>.

It was more broadly based than the first two committees, as it included representatives of the judiciary, the defence bar and senior Crown officials. Its members were the most senior representatives of the justice system, namely six Chief Justices or Associate Chief Justices and six Deputy or Assistant Deputy Attorneys-General from across the country, together with three senior members of the bar. The former Deputy Attorney-General (both for Canada and for Ontario at different points in his career) George Thomson, acted as the committee's facilitator.

The Steering Committee's report takes the recommendations of the two earlier reports and generally endorses them but also proposes, for the first time, that a new form of trial and pre-trial procedure be developed that would apply only to those cases requiring "exceptionally long proceedings". The Committee's report assumes that these cases will be identified in advance, either due to the complexity of the evidence, the number of charges or the number of accused. The new procedure, which would require legislative amendments to the *Criminal Code*, is referred to as "exceptional trial procedure". It would have the following key characteristics:

- A preliminary motion would have to be brought before the Court to determine whether the case is "exceptionally long" and thus subject to the new procedure;
- If a determination is made that the case will be "exceptionally long", the Court must then refer the case to a designated "case management judge";
- The "case management judge" is assigned powers that are presently given only to the trial judge, including the power to rule on disclosure issues, the admissibility of evidence, pre-trial *Charter* issues and any other pre-trial motions. In addition to these "trial judge" powers, this judge performs functions that are more traditionally thought of as a pre-trial "case management", such as establishing an expeditious timetable for the case, having the parties identify the issues and encouraging admissions, ruling on severance applications and resolving applications for state funding of counsel (the report endorses enhanced funding in these long cases for counsel, jurors and witnesses). In addition, this "case management judge" determines bail. It can be seen that this recommendation significantly expands the role of the "case management judge" at the early pre-trial stage, as the two previous reports had recommended. However, unlike the

two earlier reports, the Steering Committee boldly recommended that these enhanced powers be given to a judge who is not the "trial judge", thus departing from the long line of case law summarized above at note 9;

- Where related cases have been severed into separate trials, there should be a single consolidated pre-trial hearing where one "case management judge" rules on those common pre-trial motions that involve essentially the same evidence and issues. This common set of rulings, for example on wiretaps or search warrants or disclosure, will then bind all the parties at the related trials. If new evidence arises, the motion can be referred back to the "case management judge" for reconsideration;
- Disclosure can be made by the Crown in electronic form, provided it comes with a "user-friendly search engine" linked to the Crown's trial brief;
- The "case management judge", upon completing the above tasks, reports to the trial judge on his/her rulings on the motions, on the status of any admissions and on the issues that have been identified for trial;
- During the trial, the "case management judge" remains available to mediate disputes, to help resolve issues and to take any guilty pleas and then pass sentence. In addition, this judge should be available to speedily replace the trial judge, pursuant to s. 669.2, should the trial judge be unable to continue for any reason;
- Somewhat surprisingly, the Steering Committee rejected the recommendations of the two earlier reports concerning the need to select additional or "alternate" jurors (whether a total of 14, as the Barreau du Quebec had recommended or 16, as the Heads of Prosecutions had recommended). The Steering Committee worried about what might happen if the "alternates" had to be released at the end of the trial, without ever having participated in the jury's deliberations. The report suggests that there might be concerns for the safety of the "alternates" or for the confidentiality of information or opinions that they might hold about the remaining jurors. It should be noted that none of these concerns appear to have materialized in the United States, where "alternates" are common. Furthermore, concerns about safety and confidentiality would appear to apply with much

greater force to the 10 to 12 jurors who do deliberate at the end of the trial, rather than to the "alternates" who are dismissed without ever deliberating. As to the minimum number of jurors required to render a verdict at the end of the trial, presently set at 10 by s. 644(2), the Steering Committee advised that further study was required because of the constitutional considerations already noted above;

- Like the Barreau du Quebec report, the Steering Committee recommended that provincial Law Societies should become more involved in training and disciplining lawyers who are uncivil or unprofessional, given "the unique nature of mega trials".

One important feature of the Steering Committee's recommendations is that they really only address one of the two kinds of 'mega trials', namely, the ones that can be predicted in advance like the Air India and Hells Angels trials. In these cases a motion would be brought at an early stage, presumably by the Crown, seeking to designate the case as one requiring "exceptional trial procedure". None of this would assist the much larger second group of 'mega trials', referred to at the beginning of this paper, that are not exceptionally long by nature but become exceptionally long due to mistakes, mismanagement or misconduct by justice system participants. This shortcoming in the Steering Committee's recommendations tends to suggest that broader reforms are needed in order to address both of the two classes of 'mega trials' identified earlier in this paper.

E. The 2005 English Criminal Procedure Rules and Protocol for Long and Complex Trials

At the same time as these 3 Canadian committees were deliberating in 2003 and 2004 on the need to reform criminal pre-trial and trial procedure in 'mega cases', reforms in the same area were underway in the United Kingdom. Rather than adopting a legislative approach, as the Canadian committees had generally recommended, the English judiciary addressed the problem through new Rules of Court. The relative merits of these two distinct approaches will be discussed later in this paper.

The English reforms have their origin in a report authored by Lord Justice Auld, a judge of the Court of Appeal, Criminal Division. His report was released in September,

2001 and is titled, "Review of the Criminal Courts of England and Wales".[16] Its scope is sweeping, dealing with all aspects of the criminal justice system. Of greatest importance to the present discussion are the sections of the report on "Disclosure" and on "Case Management". In these parts of his report Justice Auld recommends the following key reforms: adoption of "standard timetables" for all cases; empowering pre-trial judges "to give binding directions or rulings" and to discipline counsel who fail to comply (by way of reprimand, costs orders, referral to the Law Society or ordering non-payment of counsel's accounts); and making the scope of prosecution disclosure contingent on "a defence statement indicating the issues that the defendant proposes to take at trial".

Justice Auld took the view that requiring the defence to identify the issues to be disputed at trial, through a pre-trial case management process, offended neither the presumption of innocence nor the right to remain silent:

> "To the extent that the prosecution may legitimately wish to fill possible holes in its case once issues have been identified … , I can understand why, as a matter of tactics, a defendant might prefer to keep his case close to his chest. But that is not a valid reason for preventing a full and fair hearing on the issues canvassed at the trial. A criminal trial is not a game under which a guilty defendant should be provided with a sporting chance. It is a search for truth in accordance with the twin principles that the prosecution must prove its case and that a defendant is not obliged to inculpate himself, the object being to convict the guilty and acquit the innocent. Requiring a defendant to indicate in advance what he disputes about the prosecution case offends neither of those principles."[17]

It should also be noted that in his chapter on "Juries", Justice Auld recommends provision for "alternate or reserve jurors" in long cases, much like the first two Canadian reports had recommended. English law allows the jury to be reduced to 9 members, before a mistrial must be declared, and so the necessity for alternates is not quite as great in England as in Canada.[18] Furthermore, Justice Auld recommends that the right to elect

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[16] Lord Justice Auld, "Review of the Criminal Courts of England and Wales," online: Criminal Courts Review <http://www.criminal-courts-review.org.uk>.
[17] *Ibid.,* c. 10 at para. 154.
[18] *Juries Act 1974*, (U.K.) 1974, c. 23, s. 16.

trial by jury be curtailed completely in long and complex frauds, in which case there would obviously be no need for alternates.[19]

The government substantially accepted Justice Auld's recommendations in a July, 2002 White Paper entitled "Justice for All".[20] It then enacted the *Courts Act 2003* which provided in ss.69 to 73 for the establishment of a Criminal Procedure Rule Committee.[21] That Committee deliberated during 2004 and submitted a new set of Criminal Procedure Rules to the Lord Chancellor and the Home Secretary in January, 2005. The new Rules came into force on April 4, 2005.[22] They were accompanied by a new Practice Direction and Protocol which were released at a hearing of the Court of Appeal, Criminal Division on March 22, 2005.[23] At that hearing the Lord Chief Justice stated that the purpose of the new Rules was to "promote a culture change in criminal case management", to "give courts explicit powers and responsibilities to manage cases actively" and to ensure that "no trial should be permitted to exceed 3 months or an outer limit of 6 months, save in exceptional circumstances". The Rules Committee clearly concluded that judges and

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[19] In this regard, Justice Auld noted that there was no "entrenched right" or "constitutional entitlement" to trial by jury under English law, unlike in Canada and the United States. See: Auld, *supra* note 16, c. 5 at paras. 7-8, 18-20, 109 and 173-206.

[20] Home Office, "Justice for All", CM 5563, July 2002, online: www.cjsonline.gov.uk.

[21] *Courts Act 2003*, (U.K.) 2003, c. 39. In response to Lord Auld's recommendations concerning the jury, the government did not enact a system of alternate jurors. Instead, it provided for an application by the prosecution to completely eliminate the jury in long or complex fraud cases and in cases where there is a danger of jury tampering. See: *The Criminal Justice Act 2003*, (U.K.) 2003, c. 44, s. 43 and 44. The test in s. 43 is whether the length or complexity of the case likely makes it too "burdensome" for trial by jury. Such a provision would encounter severe constitutional difficulties in Canada, in light of s. 11(f) of the *Charter*, and it has not yet been implemented in the U.K. due to a lack of political support in Parliament.

[22] S. I. 2005 No. 384, (L.4).

[23] See: Lord Chief Justice, Lord Woolf, "Protocol for the control and management of heavy fraud and complex criminal cases," Transcript of proceedings, 22 March 2005, online: Judiciary of England and Wales <http://www.judiciary.gov.uk>; "Control and Management of Heavy Fraud and Other Complex Criminal Cases, A Protocol Issued by the Lord Chief Justice of England and Wales," 22 March 2005, online: Judiciary of England and Wales <http://www.judiciary.gov.uk>; "Amendment No.11 to the Consolidated Criminal Practice Direction (Case Management)," 22 March, 2005, online: Her Majesty's Courts Service <http://www.hmcourts-service.co.uk>; and "The Consolidated Criminal Practice Direction", online: Her Majesty's Courts Service <http://www.hmcourts-service.co.uk>. In the following year, 2006, a further protocol was issued concerning the scope of Crown disclosure in large cases, to the general effect that the Crown should not give the "keys to the warehouse" to the defence in these cases. See: "Disclosure: A Protocol for the Control and Management of Unused Material in the Crown Court," 20 February 2006, at para. 31, online: Her Majesty's Courts Service <http://www.hmcourts-service.co.uk>. For a detailed description of the English case management procedure, see: Criminal Justice System, *The Adult Criminal Case Management Framework*, 3rd Edition, July 2007, online: Criminal Justice System <http://ccmf.cjsonline.gov.uk> (Magistrates' Courts edition; Crown Court edition forthcoming).

juries cannot retain and assess evidence properly, when trials become too long, and that public confidence in the justice system is under-mined by overly long trials.

The presumptive goal that no trial exceed 3 months or, exceptionally, 6 months is repeated in the new Protocol entitled "Control and Management of Heavy Fraud and Other Complex Criminal Cases". The Protocol states that whatever goal is adopted, "it is essential that the current length of trials is brought back to an acceptable and proper duration". In pursuit of this objective, namely, to rein in the 'mega trial', the Protocol and the accompanying Criminal Procedure Rules exhibit the following key features:

- A single judge has carriage of the case from its earliest stages until the completion of the trial. In other words, any distinction between a pre-trial "case management" judge and a "trial judge" is completely abandoned and the two functions are merged. This approach is generally similar to the first two Canadian reports, summarized above, as it consolidates all early case management powers in the trial judge. The approach of the Steering Committee was different, seeking to maintain and even enhance the separation between the two functions;
- The assigned judge holds an early plea and case management hearing to establish various timetables in every case committed for trial in the Crown Court. There must be a timetable for completion of Crown disclosure and for any defence applications for further disclosure. In addition, there is a timetable for the prosecution to deliver a written statement of its case, outlining the facts alleged and the evidence to prove those facts. The defence must respond with a "case statement" setting out which facts are admitted and which are in issue. In essence, the new English Protocol and Rules introduce formal written pleadings into the long criminal trial;
- The parties must deliver "a core reading list and a core bundle" of documents to the assigned judge so that their positions as to "the real issues in the case" can be properly assessed. The Protocol states that "the judge must read the witness statements and the documents, so that the judge can discuss case management issues with the advocates on – almost – an equal footing". It is clear that the new English Protocol and Rules for long trials abandon many of the adversary system's key assumptions, namely, that it is only counsel who really know the

case and it is only counsel who can determine what evidence should be called and how to present it. The assigned judge is expected to read all the core disclosure materials at an early "case management" stage of the proceedings in order "to exercise firm control over the conduct of the trial at all stages", as the Protocol puts it. Under the historical norms of the adversary system, of course, "the conduct of the trial" had been in counsel's hands and the trier of fact's impartiality was guarded, prior to trial, by not informing him/her as to what potential witnesses had said in their prior statements;

- After exchanging the written case statements, the assigned judge will "require" the Crown and the defence to exchange draft admissions in relation to those parts of the case that ought not to require formal proof. Although the judge cannot force the parties to make admissions, the judge can "discuss with the advocate how the trial should be structured, what can be dealt with by admissions or agreed facts, what uncontroversial matters should be proved by concise oral evidence, what timetabling can be required" under the Rules. Since the judge will have already read the disclosure materials, and will also be the eventual trial judge, his/her views as to what should be "uncontroversial", what should be "dealt with by admissions" and what requires only "concise oral evidence" will likely be quite persuasive to the parties;
- Additional pre-trial "case management" tools at the assigned judge's disposal are severance of counts or of accused and setting a "schedule" or "timetable" for the calling of evidence at trial. The Protocol states that "pruning the indictment" by severance of counts or of accused "for reasons of case management alone is perfectly proper". The Protocol also states that the "schedule" for trial must set out how long the examination-in-chief and cross-examination of each witness is expected to take and that the judge can amend it and establish "a clear target to aim at for the completion of the evidence of each witness". In other words, if the trial is likely to exceed the presumptive time limits of 3 months or 6 months, and the trial judge believes that the parties are not realistically tailoring the case to bring it within appropriate time limits, he/she can use either severance or the timetabling of the witnesses as a means of shortening the trial. The Protocol

encourages the trial judge to indicate when any given examination of a witness is "irrelevant, unnecessary or time wasting". Since the judge will know the case reasonably well, having read the disclosure, these views are likely to carry real weight;

- The Protocol anticipates that pre-trial "case management" hearings may go on for as long as "a whole week" and that considerable "reading time" for the judge will be required. In other words, the new English model for long trials is resource-intensive at the pre-trial stages, in the hopes of shortening the trial itself.

It can be seen that the new English Protocol and Rules for long trials cast the judge in a highly interventionist role that departs significantly from the longstanding traditions of the adversary system. The explicit goal of arming the judge with these new powers and duties is to shorten the overly long 'mega trial'. It should also be noted that the English Protocol, somewhat like the Steering Committee's report in Canada, appears to be directed primarily at those trials where it can be predicted in advance that they are going to be exceptionally long. This somewhat limited application of the Protocol is not surprising, given the extraordinary commitment of judicial resources that will be required to carry out the aggressive form of case management that is enshrined in the Protocol. If it were to be applied across the board to all major cases it is doubtful whether existing judicial resources would be sufficient to take on these extensive new duties.

F. <u>The 2006 Ontario Superior Court Rules</u>

In May, 2006, exactly a year after the new English Protocol and Rules had come into force, the Ontario Chief Justice's Advisory Committee on Criminal Trials in the Superior Court of Justice issued a report titled "New Approaches to Criminal Trials".[24] The Committee was made up of 6 senior judges of the Superior Court, 3 senior Crown officials and the past President of the Criminal Lawyers' Association. In other words, it was a particularly strong committee.

The Advisory Committee made it clear in the introduction to its report that the focus of their work, and of their concerns, was "the increasing length of criminal trials".

[24] Online: Ontario Courts <http://www.ontariocourts.on.ca>.

Just like the 4 previous reports, it is the 'mega trial' phenomenon that drove this particular policy review and report.

Like the English approach described above, the Ontario judiciary's Advisory Committee report emphasized new Rules of Court as its chosen means of addressing the 'mega trial' phenomenon. The Advisory Committee took the view that s. 482.1(1) of the *Criminal Code* explicitly permits rules "that would assist the court in effective and efficient case management" and that s. 482.1(2) expressly provides for enforcement of "any direction made in accordance with a rule" under s. 482.1(1). The report makes a series of recommendations which resulted in a new set of Rules of Court, released and implemented on October 16, 2006.[25] The process followed in Ontario was, therefore, very similar to the one in England.

The general substance and direction of the Ontario report's recommendations, and the resulting Rules, are also similar to the English Protocol and Rules for long trials, although not as extreme. In particular, the same general direction towards more intensive pre-trial case management by the judiciary, seen in all 4 of the earlier reports reviewed above, can be seen in the key recommendations of the Ontario report, as follows:

- Within 60 days of committal, there must be a pre-trial conference unless otherwise ordered;
- Most importantly, counsel for both the Crown and the defense must prepare comprehensive pre-trial conference forms, and serve and file them prior to the conference itself. The forms must list all pre-trial motions, evidentiary admissibility issues and expert witnesses to be called at trial. The opposing party must state their position in relation to each issue raised by the other party. Furthermore, the Crown must set out the "evidentiary basis" for the charges and how it "intends to prove the allegations"; the defense must respond by stating which areas of evidence are in dispute and the parties must then address the question of admissions. All of these early case management functions are presided over by a "pre-trial judge" who is clearly not "the trial judge". It can be seen that the Ontario recommendations and Rules, like their English counterparts, are moving towards a system of written pleadings as the basic tool for early case

[25] S.I. 92-99, online: Ontario courts <http://www.ontariocourts.on.ca>.

management.[26] This approach puts a high premium on early preparation, especially by the Crown. Any last minute changes to the "evidentiary basis" of the Crown's case, such as adding a new expert witness shortly before trial, will become more difficult under the new Rules;

- If counsel wish to deviate from the position set out in the pre-trial conference form, by bringing a new motion or deciding to contest a fact or issue that was previously said to be uncontested, then formal written notice must be given. The presumption is that the position set out in the form binds the parties, as it does in the law of civil pleadings, unless an amendment to the pleadings can be obtained;[27]
- Those pre-trial motions and evidentiary admissibility issues that are identified on the forms must then be scheduled for hearing. Written notices and supporting materials must be filed in advance, setting out a "detailed summary" of "the basis" for the application. The judge hearing the application, who is now clearly referred to as "the trial judge", must then conduct a "threshold screening" of the application and may summarily dismiss it on the basis of the written materials

[26] *Supra* note 24 at pp. 75-6 and at p. 13 of the attached "Pre-Trial Conference Report" or form. The law of criminal pleadings in this country, with rare exceptions, has not required the Crown to plead facts in its charging documents. A bare conclusory assertion of a criminal offence *simpliciter* has generally been sufficient. See, e.g.: *R. v. G.B. et al* (1990) 56 C.C.C. (3d) 200 (S.C.C.). There are exceptional cases where the Court has insisted that the Crown plead "concrete facts" in its charging documents, in order "to lift it from the general to the particular". See, e.g.: *R. v. Brodie* (1936), 65 C.C.C. 289 (S.C.C.); *R. v. Wis Developments Corp. Ltd.* (1984), 12 C.C.C. (3d) 129 (S.C.C.). However, these cases have generally been regarded as historical anachronisms, ever since *G.B.* approved of an information that alleged nothing more than that the accused "did commit a sexual assault", without pleading any of the facts that were said to constitute the sexual assault. As a result, it would be more accurate to say that the new pre-trial conference forms in Ontario introduce civil pleadings into the criminal process as the parties must now set out the facts, at a minimum, in these pre-trial forms. It is arguable that the requirement that the Crown set out "the evidentiary basis" for its case in the pre-trial form may go somewhat beyond the law of civil pleadings as the plaintiff in a civil case must plead only the facts supporting its claim and not the evidence to prove those facts. Similarly, a statement of defence in a civil case must set out what facts are in dispute but not what evidence is disputed. See: J. Walker et al., *The Civil Litigation Process* (Emond Montgomery: Toronto, 2005) pp. 93 and 333-8. Professor Walker states that the function of pleadings is to provide notice prior to trial, to define the issues in dispute and to allow the court to identify those claims that clearly lack merit. These functions, she notes, "take on renewed significance as mechanisms for the efficient administration of justice evolve", such as "case management systems requiring parties to evaluate their cases relatively early in the proceeding".

[27] See: Walker et al., *supra* note 26 at pp. 94 and 346-7.

alone if those materials do not disclose a proper "legal or evidentiary basis" for the relief sought;[28]

- The Advisory Committee's report repeats many of the themes found in the new English Protocol and Rules concerning the powers available to the judiciary to control the conduct of the case. The report notes that the "trial judge" may impose limits on oral argument, require written submissions, determine whether *viva voce* evidence is necessary in support of a motion, prevent evidence or questioning that is repetitive or abusive, direct the order of evidence and enforce standards of civility in the court room.[29] However, in order to exercise many of these powers forcefully and effectively, the judge needs to know the case. In this regard, the Advisory Committee does not go so far as the English Protocol and Rules by requiring the parties to file all the core disclosure materials so that the judge can read them and know the case almost as well as counsel. Rather, the Advisory Committee recommends that these trial management powers "be exercised sparingly and with caution", quoting from traditional common law jurisprudence to the effect that "the trial judge does not know counsel's brief" and, therefore, generally defers to counsel under the adversary system.[30]

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[28] *Supra* note 24 at pp. 89-90. These kinds of powers in the hands of "the trial judge" have existed for some time in the common law jurisprudence and are simply being codified in the new Rules. See, e.g.: *R. v. Kutynec*, *supra* note 9; *R. v. Pires and Lising*, *supra* note 3; *R. v. Vukelich* (1996) 108 C.C.C. (3d) 193 (B.C.C.A).

[29] *Supra* note 24 at pp. 106-112. Again, these "trial judge" powers have been recognized in the existing common law jurisprudence, especially in Ontario, although they are not codified anywhere. See, e.g.: *R. v. Felderhof* (2003) 180 C.C.C. (3d) 498 (Ont. C.A.).

[30] *Ibid.* The traditional common law view, that counsel controls the conduct of the case, is perhaps best captured by pronouncements like those in *Briscoe v. Briscoe*, [1966] 1 All E.R. 465 (Div. Ct.), where Karminski J. stated, "I have always thought that the duty of deciding what witnesses should be called and in what order they should be called is solely a matter for counsel. It is a grave responsibility and it rests on him and on him alone". In Canada, Brooke J.A. expressed a similar view in *R. v. Zehr* (1980), 54 C.C.C. (2d) 65 (Ont. C.A.): "There are many reasons why counsel may choose not to call a witness, and our Courts will rarely question the decision of counsel, for the system proceeds on the basis that counsel conducts the case". Binnie J. recently adopted this statement while speaking for a unanimous Court in *R. v. Jolivet* (2000), 144 C.C.C. (3d) 97 (S.C.C.). To similar effect is the famous dicta of Lord Greene M.R. in *Yuill v. Yuill*, [1945] 1 All E.R. 183 (C.A.), also adopted by a unanimous Court in *R. v. Brouillard* (1985), 17 C.C.C. (3d) 193 (S.C.C.): "It must always be borne in mind that the judge does not know what is in counsel's brief and has not the same facilities as counsel for an effective examination-in-chief or cross-examination". Also see: *R. v. Felderhof*, *supra* note 25 at pp. 509-526 which somewhat qualifies counsel's control of the case by developing an exceptional judicial power of "trial management" while stressing, unlike the new English Rules, that it is a power that "must be exercised sparingly". Traditional statements about the essential characteristics of the adversary system arguably acquire even greater force when it is

One difference between the new Ontario Rules and the English Protocol is that the Ontario approach applies across the board to all criminal cases tried in the Superior Court. This may well explain why the more aggressive form of English case management has generally not been adopted in Ontario. It would simply be impossible, from a resource perspective, for the Ontario judges to take on the extensive duties set out in the English Protocol in every single criminal case committed to trial in the Superior Court. Furthermore, the Ontario Judges appear to have decided, correctly in my view, that they had to develop rules of broad general application that would address both classes of 'mega trial' and not just the small number of exceptionally long cases that can be predicted in advance. Having made this policy decision, the much more interventionist English model of case management is likely not feasible without the injection of significant additional judicial resources.

It is also noteworthy that the Ontario Rules, unlike Lord Auld's report, do not explicitly refer to the enforcement powers to be used by the Judges. The Ontario Advisory Committee's report simply refers to s. 482.1(2) when discussing the question of "sanctions for non-compliance". Under that provision, any directions given by the Court pursuant to case management rules would appear to have the same force as a judicial order. The report clearly takes this view and states that the usual sanctions for breach of a Court order will apply if counsel fail to comply with the new Rules.[31]

Finally, the Ontario Rules differ from both the English Rules and the Steering Committee's proposals on the question of whether to maintain some separation between the traditional roles of the pre-trial "case management judge" and the "trial judge". As noted above, the English model amalgamates the two functions whereas the Steering

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noted that the adversary system itself is a constitutionally protected s. 7 principle of fundamental justice. See: *R. v. Cook* (1997), 114 C.C.C. (3d) 481 (S.C.C.); *R. v. Swain* (1991), 63 C.C.C. (3d) 481 at 504-5 (S.C.C.); *Borowski v. Canada* (1989), 47 C.C.C. (3d) 1 (S.C.C.). In the latter case, the Court stated (at p. 13): "... a court's competence to resolve legal disputes is rooted in the adversary system. The requirement of an adversarial context is a fundamental tenet of our legal system and helps guarantee that issues are well and fully argued by parties who have a stake in the outcome". Given this strong line of binding authority, it is hardly surprising that the Ontario Advisory Committee backed away from some of the more interventionist aspects of the English Rules which appear to undermine the traditional norms of the adversary system.

[31] *Supra* note 24 at pp. 56-7. Somewhat pointedly, the two cases cited in the report as to the "appropriate sanctions" against counsel deal with costs orders, contempt citations and referral of counsel to the Law Society. See: *R. v. Chapman* (2004), 204 C.C.C. (3d) 457 (Ont. C.A.); *R. v. Francis* (2006), 207 C.C.C. (3d) 536 at para. 21 (Ont. C.A.). The misconduct by counsel in *Francis* is the same kind seen in many of the 'mega cases', namely, bringing "a number of applications that were devoid of any merit".

Committee model enhances the separation of roles by giving the pre-trial case management judge extensive new powers to rule on pre-trial motions, a power that is currently held only by the “trial judge” under Canadian common law and *Charter* jurisprudence. The compromise model, found in the Ontario Rules, essentially maintains the status quo under which the “pre-trial judge” can exercise some modest case management functions, such as identifying the issues in dispute, but any real power to make binding rulings still rests with the “trial judge”.

G. Analysis: Three Broad Areas of Proposed Law Reform

The above summary of 5 major policy reviews and reports, carried out in Canada and the U.K. over the last 5 years, illustrates the extent to which all segments of the justice system have become preoccupied with the phenomenon of the ‘mega trial’. It is uniformly agreed in all 5 reports that many important trials are taking far too long and that the effectiveness of the justice system, and public confidence in it, have been threatened.

There will soon be a sixth policy review that will report and make recommendations on this issue. The “Air India Inquiry” is currently underway before former Justice Major of the Supreme Court of Canada and it is studying the question of whether traditional criminal procedure needs to be adapted in order to accommodate the size and complexity of major terrorism cases.[32]

However, it can be asserted with some confidence that the 5 policy reviews and reports summarized above have already identified 3 broad areas of law reform on which reasonable consensus exists and which do not require further study. My own analysis of the reforms that should proceed in these 3 areas is set out below.

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[32] See: “Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182”, online: Commission of Inquiry [etc.] <http://www.majorcomm.ca> (Terms of Reference, vi: “the Commissioner [shall] conduct the Inquiry specifically for the purpose of making findings and recommendations with respect to the following, namely … whether the unique challenges presented by the prosecution of terrorism cases, as revealed by the prosecutions in the Air India matter, are adequately addressed by existing practices or legislation and, if not, the changes in practice or legislation that are required to address these challenges, including whether there is merit in having terrorism cases heard by a panel of three judges…”).

(i) The size of the jury.

The number of jurors empanelled at the start of the trial needs to be expanded so that additional or "alternate" jurors are available, in the event that two or more jurors are lost in the course of a long trial. It is simply common sense to acknowledge that long trials take a toll on the jury and that sickness, stress, family or other personal circumstances may cause jurors to be discharged from their duties in mid-trial. The current minimum requirement of 10 jurors, set out in s. 644(2), is unlikely to be changed as it would cause a constitutional controversy in relation to the s. 11(f) *Charter* right to trial by jury.[33] The wisdom of reducing juries below 10 can also be questioned, as a matter of policy, since the strength of the jury system is that it embodies the collective judgment of "a group of ordinary citizens who are not legal specialists and who bring to the legal process a healthy measure of common sense".[34] The smaller the "group", the more diluted the pool of "common sense" on which the jury depends. Lord Auld noted, correctly in my opinion, that the system of trial by jury "draws much of its public support from the number of decision makers that it brings to the task of determining guilt".[35]

As a result, the best practical solution is to maintain the current minimum size of the jury but provide for "alternate" jurors in long trials, as many American jurisdictions have done, as Justice Auld recommended in the U.K. and as the first two Canadian

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[33] The actual legal result of a constitutional challenge to any legislative reduction in the minimum number of jurors is far from clear. See: *R. v. Genest* (1990) 61 C.C.C (3d) 251 (Que. C. A) where the Court held that s. 11 (f) of the *Charter* does not require a 12 member jury to deliver the verdict but did not determine whether 10 jurors is a minimum constitutional floor. Also see: *R. v. Lessard* (1992), 14 C.R. (4th) 330 (Que. C.A.). As an historical matter, the use of six member juries was common in the Yukon and North West Territories until the 1980s; prior to *Genest*, this practice was held to be unconstitutional under s. 15 of the *Charter*, on the basis that it denies Canadians a right enjoyed in other jurisdictions on arbitrary (geographical) grounds. See: *R. v. Punch* (1985), 22 C.C.C. (3d) 289 (N.W.T.S.C.); *R. v. Bailey* (1985), 14 WCB 336 (Y.T.S.C.). In the United States, juries in criminal trials may number no fewer than six. See: *Williams v. Florida*, 399 U.S. 78, 90 S.Ct. 1983 (1970); *Ballew v. Georgia*, 435 U.S. 223, 98 S.Ct. 1029 (1978). However, this right may be waived in whole or part. See: *Patton v. United States*, 281 U.S. 276, 50 S.Ct. 253 (1930); Federal Rules of Criminal Procedure, 23(b). Also see: *Blair v. State*, 698 So.2d 1210 (1997) where the Florida State Supreme Court held that under certain conditions, the right to a jury of six may be waived for a jury of five. The U.S. constitutional floor of a 6 member jury was established in *Ballew* because of concerns as to "the reliability and appropriate representation of panels smaller than six". In the United Kingdom, the jury may number no fewer than nine, under the *Juries Act 1974*, (U.K.) 1974, c. 23, s. 16. See: Sally Lloyd-Bostock and Cheryl Thomas, "Decline of the 'Little Parliament': Juries and Jury Reform in England and Wales", 62-SPG Law & Contemp. Probs. 7. However, in Scotland the jury has 15 members. See: Auld, *supra* note 16, c. 5 at para. 17. It can be seen that the minimum 10 member Canadian jury is somewhere in the middle of the pack amongst Anglo-American justice systems.

[34] *R. v. Corbett* (1988) 41 C.C.C. (3d) 385 at 400 (S.C.C.).

[35] *Supra* note 16, c. 5 at para. 17.

reports recommended. In my opinion, the concerns expressed about such a reform by the Steering Committee on Justice Efficiencies, relating to issues of safety and confidentiality, are not persuasive and appear to be speculative, as already noted above. Although any "alternates" who are eventually discharged at the end of the trial, without deliberating, will be disappointed and may feel their time has been wasted, they can be reassured that they have been like an insurance policy and have performed a valuable public service.

In any event, the status quo is simply unacceptable. The current statutory regime creates a serious risk of a mistrial in any long jury trial. Defence and Crown counsel take this risk into consideration when deciding whether to agree to a judge alone trial and when deciding whether to make admissions and the extent of such admissions. An accused who has a weak defence on the merits, in a long complex case, may not agree to admissions or to a judge alone trial because the risk of a s. 644(2) mistrial becomes part of the defence strategy. This kind of conduct is probably unethical but it introduces a completely arbitrary risk that is unacceptable and that needs to be removed from our justice system. Furthermore, when jurors become sick during a long trial the present statutory regime places great pressure on the trial judge to adjourn the trial, until the juror recovers, instead of simply replacing the sick juror with an "alternate". As a result, long trials become even longer.

It should be noted that these proposed powers, permitting the empanelling of a larger jury that includes "alternates", need not be applied to all jury trials. There simply needs to be a discretion in the trial judge to empanel additional jurors in appropriate cases. Where that discretion is exercised, and a larger jury is empanelled, it may also be necessary to allow more peremptory challenges, as provided by s. 634(2.1). Since it will require more time and result in greater costs to empanel additional jurors, the trial judge should only exercise these powers where necessary.

(ii) Case Management powers.

Perhaps the one dominant theme running through all 5 of the policy reviews discussed above is that the judiciary needs to be empowered to manage the case at its early pre-trial stages. The subject of judicial case management in criminal matters has

been extensively studied in the United States, over the past 30 years, and to a lesser extent in Canada, with generally positive results.[36]

In Canada, there is no question that "the trial judge" can broadly control the conduct of the case at trial but serious questions exist as to the extent of judicial case management powers at the pre-trial stage. The problem can be solved to some extent, as it has been in Ontario, by using the rule-making power in s. 482.1. However, this approach is unsatisfactory as it delegates an important law-making function to the judiciary and it results in uneven application of the rules of criminal procedure across the country. Some courts in some provinces have chosen to exercise the power and others have not.[37] More importantly, there are fundamental policy questions in this area that

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[36] A series of studies sponsored by The National Center for State Courts (NCSC) in the United States indicated in its initial stages that "early and continuous control over case events was the best predictor of faster case processing times". See: John Goerdt, "Examining Court Delay: The Pace of Litigation in 26 Urban Trial Courts, 1987" (Williamsburg: National Center for State Courts, 1989), at xv. However, the authors of subsequent studies have taken account of competing explanations for the faster processing times. See, e.g.: John Goerdt, Chris Lomvardias and Geoff Gallas, "Reexamining the Pace of Litigation in 39 Urban Trial Courts" (Williamsburg, National Center for State Courts, 1991), at 1. A recent study observes that "[i]n part because [more evidence is necessary], courts and professional organizations have begun to focus more on court performance than on structure and procedures"; along these lines, the authors find that quality and efficiency of case disposition are correlated, and that the culture of a courthouse is a key factor in promoting both. See: Brian J. Ostrom and Roger A. Hanson, "Efficiency, Timeliness, and Quality: A New Perspective from Nine State Criminal Trial Courts" (Williamsburg: National Center for State Courts, 1999), at 32. All of these studies are available online: The National Center for State Courts <http://www.ncsconline.org>. Marc Galanter reaches similar conclusions in his path-breaking analysis of a 30-year decline in jury trials in the United States, arguing that while more criminal proceedings are being disposed of before they reach trial, it is hard to evaluate the causes of the phenomenon because a variety of reforms to the justice system have been implemented concurrently. Nonetheless, Galanter attributes the decline in trials more broadly (i.e. civil as well as criminal) to factors including a cultural shift in the judiciary toward aggressive case management, coupled with an expansion of their discretionary powers. He also cites the increasing popularity of Alternative Dispute Resolution and the rising cost of litigation, real and perceived. See: "The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts," Journal of Empirical Legal Studies 1(3): 459–570 (November 2004), at 492-498, 515-522. In summary, while efficiency gains in the U.S. criminal courts may not be exclusively attributed to case management, the practices associated with case management are widely accepted to be a key factor in those gains. Moreover, successful arrangements may vary between courts. In 1994, the Law Reform Commission of Canada, in its working paper, *Trial Within a Reasonable Time*, concluded that "[n]o single plan can be adopted by all courts that will universally result in reduction of delay," citing U.S. research on the wide range of effective practices and techniques in use in different jurisdictions. However, the working paper also concluded that successful case management regimes generally exhibit 4 broad features: early and continuous judicial control over the case; time limits for each step in the process; constant monitoring to insure compliance; and firm dates for judicial proceedings with strict controls on adjournments. (Ottawa: Canada Communication Group, Publishing, 1994; at 15-23).

[37] The problem of uneven application of case management Rules of Court in Canada, unlike in England, begins with the fact that our criminal courts are organized provincially under s. 92(14) of the *Constitution Act*. Accordingly, we have 10 separate provincial jurisdictions, and 3 territorial jurisdictions, all with separate rule-making powers. The problem is further exacerbated in Canada because we have two separate

need to be addressed and resolved on a uniform basis through legislation. Indeed, s. 536.4 recently enacted a very modest case management power prior to the preliminary inquiry. There are much stronger justifications for legislated case management powers prior to trial.

In particular, the traditional adversarial model allows counsel for the Crown and the defence to prepare and then call the case with little or no judicial supervision. This model generally works well when counsel for both sides act responsibly in the sense that they consistently exercise good judgment and maintain an appropriate degree of independence from their client and/or from the influences of the media and popular opinion. However, it is a model that works badly in the hands of irresponsible or simply inexperienced counsel. The 'mega trial' phenomenon has placed enormous strains on court resources and has tested public confidence in the administration of justice. Protection of public resources and public confidence in the justice system ought not to be left to either irresponsible or inexperienced members of the legal profession.

The law must therefore provide for early judicial interventions, to manage and direct the case in ways that will ensure both a fair and an efficient result. The basic tools that the judiciary require to manage the case have been unanimously recommended in the 5 policy reviews summarized above, that is, by requiring counsel to identify the issues in dispute, responsibly negotiate admissions, schedule and resolve any potentially meritorious pre-trial motions in a timely way and on the basis of thorough written materials and then conduct a focused and efficient trial. I do not suggest that a new statutory code, setting out these core judicial case management powers, should be expressed in mandatory terms. There should always be discretion in the judiciary to allow counsel to conduct the case in accordance with the traditional norms of the adversary system, provided counsel are preparing and conducting the case responsibly.

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trial courts that both conduct serious criminal trials. There are now very few indictable offences that can only be tried in the Superior Court pursuant to s. 469, with murder being the only significant offence on the s. 469 list. If the Superior Court develops case management rules pursuant to s. 482.1, but the Provincial Court does not, counsel will be able to avoid case management by the simple expedient of electing trial in the Provincial Court. See, generally, on the subject of distribution of serious criminal trials between the Superior Court and the Provincial Court: C. M. Webster and A. Doob, "The Superior/Provincial Court Distinction: Historical Anachronism or Empirical Reality?" (2003) 48 C.L.Q. 77. It may well have been appropriate for England to address its 'mega trial' problem with a single set of uniform rules of court but this solution is simply unavailable in Canada.

The most difficult issue in this area, and one that will require legislation, is whether these early case management powers should be exercised by an assigned "trial judge", who must go on to preside over any ensuing trial (as under the English Rules) or by a separate "case management" judge who remains available to assist at trial in a back-up role or in a mediation role, if required, but who is not assigned to conduct the trial (as under the Steering Committee on Justice Efficiencies recommendations). There are good arguments in support of both approaches and the question should be resolved consistently in this country as it is fundamental to our criminal procedure and it arguably requires the reversal of a series of Supreme Court of Canada decisions and related statutory provisions (all of which are summarized above at note 9).

In brief, the main arguments favouring a separation of the two functions (the two judge model recommended by the Steering Committee) are that a pre-trial case management judge can generally be more effective if he/she thoroughly learns the case and then takes reasonably strong positions on the overall merits of the case, or on issues within the case. This "pre-judging" of the case makes it difficult for the case management judge to then carry on as the trial judge, unless a jury is involved. It also creates a disincentive to re-elections by the parties, to trial by judge alone, as one or both of the parties will often not be pleased with the positions taken by the judge at the pre-trial hearings.

On the other hand, educating two separate judges about one case is more resource intensive and creates some risk that the "trial judge" will disagree with the "pre-trial judge's" rulings and will reverse them if persuaded that something material has changed between the pre-trial and the trial. Only the judge who makes the pre-trial ruling really knows whether some change in circumstances would have been material to his/her original decision. Having two separate judges will inevitably encourage attempts to re-visit earlier rulings. Furthermore, assigning the case at an early stage to one judge, who must both manage the case prior to trial and then try it (the one judge model found in the English Rules), encourages that judge to take ownership of the case, work diligently to either resolve it or shorten it, and take responsibility for the efficient management of his/her overall case load.

Perhaps the decisive argument in this difficult debate between the two models is that the single judge model is administratively rigid. Once the assigned trial judge takes on the pre-trial case management role, and begins making early rulings and giving orders as under the English Rules, then that judge becomes seized of any eventual trial. That same judge will invariably take on other work in other cases and his/her calendar will then become an added complexity when scheduling the trial date. As a result, delays generated by the trial judge will ensue. Furthermore, those judges who are efficient and effective at case management will succeed in resolving or shortening their trials while judges who are inefficient or ineffective will develop backlogs in their assigned caseload.

The two judge model, recommended by the Steering Committee, is much more administratively flexible. Instead of assigning cases to a designated trial judge at their earliest stages, and rigidly keeping the case in that judge's calendar throughout, the two judge model allows the case to be assigned to any available judge for trial, once the pre-trial case management judge has completed his/her work. Furthermore, those judges who are particularly effective at pre-trial case management can be assigned a larger share of this work, without becoming seized with all the trials.[38] If a specialist "pre-trial judge" is given real powers, currently reserved for "the trial judge", including the power to make rulings on *Charter* motions and evidentiary issues, then these early rulings by judges who are particularly skilled in these areas will likely help to promote a resolution of the case.[39]

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[38] The Ontario Chief Justice's Advisory Committee report, *supra* note 24 at paras. 47 and 176, realistically acknowledged the need for judges with particular skills to be given responsibility for managing complex criminal trials, stating: "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. They should also be able to provide counsel with appropriate ranges of sentences for the offences. In addition, the judge should possess resolution skills to assist in resolving some or all of the issues in dispute. Finally, the assigned judge must have sufficient time to prepare for the pre-trial conference by reviewing all of the material filed in advance." The whole thrust of the case management models, recommended in the five policy reviews summarized above, is that the judiciary must take greater control at the early stages of long complex criminal cases. If the judiciary is to successfully take on this challenging new role, a very particular set of skills and experience will be required.

[39] In this regard, American experience appears to support the view that early pre-trial rulings on motions, especially motions to exclude evidence, promotes resolution discussions and thereby saves court resources. See: Michael Code, "American Cadillacs or Canadian Compacts: What is the Correct Criminal Procedure for s. 24 Applications under the Charter of Rights?" Part II (1991) 33 C.L.Q. 407 at 440. In its working paper, *Trial Within a Reasonable Time*, *supra* note 36 at 81-4, the Law Reform Commission of Canada argued persuasively 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

One additional advantage of the Steering Committee's two judge model is that the pre-trial case management judge remains available to assist at trial with those matters that should not be brought before the trial judge. Resolution discussions, concerning any possible guilty pleas and appropriate sentencing ranges, is one obvious example. In addition, a persistent problem in a number of the "mega trials" discussed in this paper has been the payment of enhanced state-funded fees to defence counsel who have to abandon their law practises for long periods of time in order to attend every day at a "mega trial".[40] These orders, generally referred to as *Rowbotham* or *Fisher* orders, require close judicial supervision to insure that the enhanced fees are appropriate in the first place and that they are not abused as the case proceeds.[41] The Steering Committee wisely recommended that the pre-trial case management judge, and not the trial judge, have continuing jurisdiction over this matter.

On balance, I would support the Steering Committee's recommendation to the effect that a two judge model ought to be adopted. Our current system is a rough

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could eliminate the need for trial entirely". The working paper cited American research to the effect that "Early resolution of motions is an important aspect of effective caseflow management" as it may "cause either the defence or the prosecution to reconsider whether to contest the trial". It recommended a legislative amendment to the *Criminal Code* expressly permitting the pre-trial resolution of those motions that do not depend on the evidence to be heard at trial. This recommendation, unfortunately, does not go far enough as it would exclude motions concerning the admissibility of evidence from the pre-trial judge's jurisdiction.

[40] The two Alberta "mega trials", *Chan* and *Trang*, *supra* note 8, encountered difficulties with this issue as did the Manitoba case, *Pangman*, *supra* note 8. The two Quebec Hells Angels trials, *Beauchamp* and *Bourgouin*, *supra* note 11, encountered similar difficulties when the trial judges dealt with this issue.

[41] See: *R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1 (Ont. C.A.); *R. v. Fisher*, [1997] S.J. No. 530 (Q.B.). The former order is made in "an exceptional case" where an indigent accused has been refused Legal Aid and the court determines that state-funded counsel is "essential to a fair trial." The latter order is made in an even more "unique" case where a fair trial can only be obtained by the appointment of a particular counsel and that counsel can only act if fees are paid at a level higher than the normal Legal Aid rate. Most such cases are "mega trials." See, generally: *R. v. Peterman* (2004), 19 C.R. (6th) 258 (Ont. C.A.); *Quebec v. C.(R.)* (2003), 13 C.R. (6th) 1 (Que. C.A.); *R. v. Cai* (2002); 9 C.R. (6th) 184 (Alta. C.A.); *R. v. Ho* (2003), 17 C.R. (6th) 223 (B.C.C.A.); *Winnipeg Child and Family Services v. A(J.)* (2003), 235 D.L.R. (4th) 292 (Man. C.A.). Where the Court has appointed counsel, especially counsel being paid enhanced fees above the Legal Aid rate, someone must oversee the reasonableness of the accounts submitted by counsel. For example, in the Air India case a consent *Fisher* order was negotiated with the Attorney-General and former Chief Justice MacEachern was appointed to approve or disallow the accounts submitted by counsel for the accused Bagri. When no agreement could be reached with the accused Malik, a *Rowbotham* application was commenced and was referred by the trial Judge to another judge of the Court. See: *R. v. Malik*, [2003] B.C.J. No. 2167 (S.C.). A recent notorious murder trial in the Toronto area, *R. v. Wills*, provides a good illustration of why these orders require close judicial supervision as there appears to have been no formal oversight of the reasonableness of counsel's accounts in that case. See: "The Remarkable Trial of Richard Wills," C. Blatchford, The Globe and Mail, October 31, 2007; "Unravelling the shambles of Rick Wills' legal fees", C. Blatchford, The Globe and Mail, November 3, 2007; "Taxpayers' bill: $800,000 Plus," C. Blatchford, The Globe and Mail, November 2, 2007.

compromise, as reflected in the Ontario Rules, where some modest case management powers are exercised by a pre-trial judge while the most important case management decisions are reserved for the trial judge. We have neither the benefits of the English single judge model nor the benefits of the Steering Committee's two judge model, as summarized above. The status quo is inadequate because the pre-trial judge has few real powers, relying for the most part on the power of persuasion. The trial judge does have real powers but is generally not assigned and does not take responsibility for the case until all the pre-trial steps have been completed. As a result, most cases are left in counsel's hands at the pre-trial stage and there is no real judicial control or management until the trial begins. This approach is dictated by a trilogy of Supreme Court of Canada cases that are all over 20 years old. *Chabot*, *Mills* and *Rahey* assigned all significant powers to "the trial judge" at a time in our history when pre-trial motion practise was almost non-existent and when the need for early case management of 'mega trials' was simply not an important policy consideration. These outdated cases, summarized above at note 9, do not even mention this now pressing issue and they should be reversed. We need to adopt one or the other of the two modern reform models, both of which are preferable to our current uneasy compromise. Indeed, the best solution might be permissive legislation that allows the judiciary to develop Rules that implement one or both of the two reform models, depending on the local legal culture and the needs of the particular jurisdiction.

One further aspect of pre-trial case management that requires legislation is the power to consolidate all common pre-trial rulings in related but severed trials. This sensible reform, recommended by both the Heads of Prosecutions and the Steering Committee reports, promotes consistency and efficiency in the conduct of related trials. It will also create an incentive for the Crown to sever related cases into smaller and more manageable trials. There is no doubt that one cause of the 'mega trial' phenomenon is over-loaded indictments with too many accused and too many counts. One of the main disincentives to severance under our current legislative regime is that the Crown has a legitimate interest in obtaining single consistent rulings on the major procedural issues in a big case, such as disclosure, admissibility of evidence and any arguable *Charter* breaches. It makes no sense to litigate these issues repeatedly before separate judges at

separate trials. As a result, under our current regime, the Crown understandably resists severance in order to consolidate the rulings before a single judge at a single trial. If the *Criminal Code* provided for an omnibus hearing of related motions from all related trials, severance of large cases into smaller cases would become a much more palatable remedy.[42]

Severance of accused and severance of counts is an obvious way to shorten and simplify the 'mega case', as noted in the new English Rules and Protocol. Legislative tools to make severance more attractive to the Crown and to the courts should therefore be encouraged. As our current law stands, there is a strong presumption against severance of related accused and this proposed new procedure, for a single joint hearing of all motions in related but severed trials, would go some distance towards weakening that presumption.[43]

There will be some mechanics that will need to be worked out in order to make this new procedure effective. For example, the Crown should be allowed to apply for an omnibus hearing of motions, prior to any severance application, as this will assist the Crown and the Court in determining whether to consent to or grant severance. On the other hand, if the Crown and the police voluntarily sever, at the charging stage, the Crown should still be allowed to apply for an omnibus hearing of all related motions, provided the various interested accused are all given standing on any such application.

(iii) Counsel's duties as officers of the court:

It is obvious that long and complex trials place a particularly high premium on counsel's ethical duties as officers of the court. Making responsible admissions of matters that can not realistically be disputed, refusing to make frivolous arguments that have no

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[42] A good illustration of this problem can be seen in the *Chan* case, *supra* note 8. The Crown and police had originally charged 36 accused jointly, in a single information. However, after a wise severance of this very large case into two smaller and more manageable cases (known as *Chan* and *Trang*), the defence proceeded to litigate the same motions twice before two separate judges. This conduct was severely criticized in the eventual *Chan* stay application which was, nevertheless, granted on grounds of delay.

[43] Where the Crown alleges a joint enterprise, the general rule is that all accused should be tried together at a single trial in order to avoid a multiplicity of similar proceedings and potentially inconsistent verdicts. See, e.g.: *R. v. McNamara et al.*, *supra* note 5 at pp. 260-6; *R. v. McLeod et al.* (1983), 6 C.C.C. (3d) 29 (Ont. C.A.); aff'd (1986) 27 C.C.C. (3d) 383 (S.C.C.); *R. v. Agawa and Mallett* (1975), 28 C.C.C. (2d) 379 (Ont. C.A.); *R. v. Quiring and Kuipers* (1974), 19 C.C.C. (2d) 337 (Sask. C.A.); *R. v. Suzack and Pennett* (2000), 141 C.C.C. (3d) 449 at 474-484 (Ont. C.A.).

real basis in fact or law and treating your opponent with respect and courtesy are all hallmarks of the professionally responsible lawyer. When counsel abide by these ethical duties in large complex cases, their conduct will invariably shorten and simplify the trial and the pre-trial motions. The result will be a better quality of justice for both the client and for the overall administration of justice.

It is noteworthy that the 5 reports discussed in this paper are unanimous in emphasizing the importance of counsel's duties as officers of the court. The reports recommend greater efforts to educate the bar about their duties to the court and greater vigilance by the courts themselves, and the Law Societies, in enforcing these duties. It appears that the two Montreal Hells Angels cases were marked by a lack of professionalism.[44] The conduct of certain Alberta counsel in the *Chan* and *Trang* cases was also the subject of serious criticism.[45] In addition, there have been a number of recent and notorious 'mega trials' in Ontario, and one noteworthy case in B.C., where counsel's conduct has been severely censured.[46] It is apparent that the ethical standards of the profession have not been followed in a number of these 'mega cases', which has contributed to their length and, on occasion, to their failure. Justice Moldaver suggested that this is one of the under-lying causes of the 'mega trial' phenomenon, based on his review of numerous appellate transcripts in Ontario,[47] and similar views are often expressed in confidence by leading members of the trial courts.

[44] See: notes 11 and 15, *supra*.
[45] See: note 8, *supra*.
[46] See, e.g.: *R. v. Elliott* (2003), 181 C.C.C. (3d) 118 (Ont. C.A.); *R. v. Snow* (2004), 190 C.C.C. (3d) 317 (Ont. C.A.); *R. v. Francis*, *supra* note 31; *R. v. Felderhof*, *supra* note 29; *R. v. Duong* (2007), 217 C.C.C. (3d) 143 (Ont. C.A.); *R. v. Dunbar*, [2003] 191 B.C.A.C. 223 (B.C.C.A.). Although *Snow* is an Ontario case, trial counsel was the same B.C. counsel who was censured in *Dunbar*. It should also be noted that the lack of civility and professionalism in *Snow* and *Duong* was attributed to both the presiding trial judges and to counsel.
[47] *Supra* note 2. Professor Stuart wrote a response to Justice Moldaver but did not challenge this one central assertion made by Justice Moldaver, namely, that many trials have been unduly lengthened by frivolous arguments which violate counsel's duty to the court. Indeed, Professor Stuart states that "many would recognize a problem of some defence counsel clogging courts by bringing *Charter* and other applications that lack foundation in law or fact". See: D. Stuart, "The Charter is a Vital Living Tree Not a Weed To Be Stunted – Justice Moldaver Has Overstated", (2006) 40 C.R. (6th) 280. Professor Stuart's concession on this point is, no doubt, due to the many well-known cases discussed in this paper, where counsel exhibited this precise form of misconduct. See, e.g.: all of the cases cited in note 46, as well as *Chan*, *supra* note 8, *Beauchamp*, *supra* note 11 and *Bourgouin*, *supra* note 11.

The explanation for declining standards of professionalism in some of these lengthy, complex cases may be that they are too challenging for young and inexperienced counsel. However, in those cases involving experienced counsel, it appears that there is either ignorance of counsel's duties as officers of the court or a willingness to breach those duties in a big case. Most defence counsel are acutely aware of and adhere to their fairly straightforward duty to the client. However, counsel's competing duties to the court are much more subtle and difficult to apply. As Mark Orkin put it in his leading text, *Legal Ethics, A Study of Professional Conduct*:[48]

> Failure to appreciate the dual role of the lawyer as an officer of the Court and the representative of his client has been responsible for much misunderstanding of the lawyer's true function. The bar is an important part of the Court; originally the serjeants [the earliest English barristers] were on almost an equal footing with the judges and as fellow members of the great guild which administered the law they and the judges addressed one another as "brother" and lodged together at the Serjeants' Inns. To this day the lawyer is neither the servant of his client nor of the Court. He is, in the words of Lord Eldon, "an officer assisting in the administration of justice", and his status as an officer of the Court has been one of the most important influences in formulating the ethical principles which govern his conduct.
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> …
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> The preamble to the Canons of Legal Ethics approved by the Canadian Bar Association sums up his status and responsibilities in these words:
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> > "The lawyer is more than a citizen. He is a minister of justice, an officer of the Courts, his client's advocate, and a member of an ancient, honourable and learned profession. In these several capacities it is his duty to promote the interests of the State, serve the cause of justice, maintain the authority and dignity of the Courts, be faithful to his clients, candid and courteous in his intercourse with his fellows and true to himself".

Lord Morris described counsel's complex competing duties in similarly broad and general terms in the leading case of *Rondel v. Worsley*:[49]

> I think that it must be true to say, as was said in *Swinfen v. Lord Chelmsford*, that the duty undertaken by an advocate is one in which the client, the court and the public have an interest because the due and proper and orderly administration of justice is a matter of vital public concern. The advocate has a duty to assist in ensuring that the administration of justice is not distorted or thwarted by dishonest or disreputable practices. To a certain extent every advocate is an amicus curiae.

[48] (Toronto: Cartwright & Sons Ltd., 1957) at 12-13.
[49] [1967] 3 All E.R. 993 at 1011 (H.L.).

This broad and somewhat imprecise public interest function of the "officer of the court" needs to be expressed concretely and communicated in clear terms to both counsel and the courts so that it is understood and enforced. The imprecision of the concept may account for why these duties are either ignored or are not enforced. The case law has identified a number of reasonably clear rules that all emerge from counsel's duties as officers of the court. They include, at least, the following:

- Counsel must not knowingly mislead the court on the facts applicable to a case, either by leading false evidence or, more commonly, by misstating the evidence when making argument;
- Counsel must not knowingly mislead the court on the law applicable to a case, either by misstating the governing authorities or, more commonly, by omitting a relevant case or statutory provision that is against the position being advanced;
- Counsel must not note an error of fact or law made by the trial judge and then keep it secret, to be used later as a ground of appeal, instead of drawing the matter to the trial judge's attention so that it can be immediately corrected;
- Counsel must not make frivolous arguments or call unnecessary witnesses or ask unnecessary questions of a witness or unduly protract the proceedings in any manner, for example, in order to wear down an opponent;
- Counsel must act with civility towards the court, opposing counsel and the witnesses. In particular, counsel must not make irrelevant and unfounded personal attacks against the honesty, integrity or motivation of opposing counsel.[50]

It is the latter two rules that are of the greatest importance in trying to rein in the 'mega trial' phenomenon. Making responsible admissions, not making frivolous arguments, not conducting unnecessary or abusive examinations of witnesses and communicating professionally and effectively with opposing counsel are all obvious

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[50] The leading authorities setting out these rules include the following: *Rondel v. Worsley*, *supra* note 49; *R. v. Samra* (1998), 129 C.C.C. (3d) 144 (Ont. C.A.); *R. v. Felderhof*, *supra* note 29; *R. v. Lyttle* (2004), 180 C.C.C. (3d) 476 (S.C.C.); *Giannarelli v. Wraith* (1988), 165 C.L.R. 543 (H.C. Aust).; M. Proulx and D. Layton, *Ethics and Canadian Criminal Law* (Toronto: Irwin Law, 2001) at pp. 36-7 and 146-9.

ways of shortening the 'mega trial'. In an often ignored passage from his seminal judgment in *R. v. Stinchcombe*, Justice Sopinka optimistically expressed confidence that most disputes about disclosure will "usually be resolved" because "the obligation on defence counsel as officers of the court [is] to act responsibly" and because similar obligations are placed on Crown counsel.[51] One suspects that the author of *Stinchcombe,* who was once one of our best counsel, would be shocked by the conduct of counsel in recent 'mega trials'.

It needs to be clarified that the courts have the power to enforce these particular duties, and thus to require that counsel "act responsibly", in order to ensure a fair and efficient trial. The judiciary fear intervening in this area, due to concerns about perceived partiality, and the Law Societies almost never use their discipline processes to enforce these basic tenets of professionalism, all of which are set out in the Rules of Professional Conduct.[52] As a result, counsel's ethical duties as officers of the court are rarely enforced. A clear legislative statement on the point would resolve any uncertainty about judicial powers to enjoin and sanction counsel in this sphere and would encourage enforcement of the basic requirements of professionalism. Such a statement would only need to be declaratory of the existing common law as this kind of modest approach has often been helpful in educating the bench and bar and encouraging cultural change within the justice system.[53]

H. <u>Conclusion</u>

The Minister of Justice and Parliament need to be encouraged to enact a package of legislative reforms which, at a minimum, cover the above three areas.[54] The

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[51] *Supra* note 9 at p. 12.

[52] For example, in Ontario, see: Rule 4.01, Law Society of Upper Canada, *Rules of Professional Conduct.* See, generally, on this subject: 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. The escalating judicial remedies at common law, to sanction counsel's misconduct, are reprimand, injunction, referral to the Law Society, costs and contempt.

[53] See, e.g., the recent amendments to the *Criminal Code*, adding s. 537(1.1). This provision empowers the judge at a preliminary inquiry to stop "abusive, too repetitive or otherwise inappropriate" questioning of a witness, a power which clearly existed at common law but which needed to be reinforced in legislation because it was often ignored in practise.

[54] There are additional worthwhile reforms that emerge out of the 5 policy reviews and reports discussed in this paper. For example, legislating the form of disclosure has obvious merit such that electronic disclosure and/or an opportunity to inspect marginally relevant materials would be treated as an acceptable means of

overly long criminal trial has been allowed to grow and develop, unabated by any legislative restraint, over the past 10 to 15 years. It is time for Parliament to become engaged with this subject before confidence in the administration of justice is seriously under-mined.

The one significant issue that the five reform initiatives summarized above do not discuss, let alone resolve, is whether these reforms should be part of a special trial procedure for predictably long trials or whether they should apply across the board to all major cases (for example, to all indictable trials). The Steering Committee chose the former option and the Ontario Rules chose the latter option, but neither report analyses the relative merits of these two different approaches.

From the simple perspective of available judicial resources, the English model of highly interventionist case management can only be applied selectively to the small number of 'mega trials' that can be predicted in advance (that is, the first class of 'mega trial' identified in the introduction to this paper). This limited reform fails to address the bigger problem of the second class of 'mega trial'. In my opinion, the best solution is to enact across the board reforms for all indictable trials, in the three areas discussed above, in order to insure that the problems caused by both classes of 'mega trial' are addressed. In this way, the more aggressive form of English case management, which surely eviscerates the adversary system as we know it, will be held in reserve. The more moderate approach suggested here will have the added benefit of encouraging the bar to work responsibly with a less draconian Canadian form of case management if they know that the alternative is the far more interventionist English model.

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disclosing the non-core materials outside the Crown Brief. In this regard, see the discussion at note 10, *supra* and see the 2006 English Protocol referred to at note 22. Similarly, legislation holding that a mistrial does not nullify the rulings made at the first trial, unless there is a material change in circumstance, has obvious merit. Such a provision would have been helpful in *Beauchamp*, *supra* note 6. These kinds of reforms, while helpful in resolving the 'mega trial' phenomenon, do not have the same broad impact as the three areas of reform identified in the text above.