Final Report on Mega trials of the Steering Committee on Justice Efficiencies and Access to the Criminal Justice System to the F/P/T Deputy Ministers Responsible for Justice

I. BACKGROUND

At the F/P/T meeting in Charlevoix (September 30 and October 1, 2003) Ministers Responsible for Justice endorsed the creation of a Steering Committee on Justice Efficiencies and Access to the Justice System (the "Steering Committee"), which brings together a number of stakeholders including the Bench and the Private Bar.

At the Steering Committee's first meeting on December 8, 2003, the search for practical and lasting solutions to improve the conduct of "mega-trials" was identified as a priority for the Steering Committee. The Steering Committee established a Subcommittee, made up of five of its members, which it mandated to examine the issue and submit a report.

During their meeting in Ottawa in January 2004, the F/P/T Deputy Ministers Responsible for Justice welcomed the recommendations of the F/P/T Heads of Prosecutions on the management of mega-cases. They referred these recommendations to the Steering Committee for immediate review by the Subcommittee.

The Subcommittee on Mega-Trials (the "Subcommittee") of the Steering Committee on Justice Efficiencies and Access to the Justice System (the "Steering Committee") met for two working sessions in Montreal and Quebec City respectively on February 18 and May 28, 2004. It also held two conference calls.

The Subcommittee submitted a progress report to the Steering Committee on March 15, 2004. It submitted its final report to the Steering Committee on June 15, 2004, and that report was then discussed among the members of the Steering Committee.

This document reflects the results of those discussions and constitutes the Steering Committee's final report to the F/P/T Deputy Ministers Responsible for Justice on the issue of mega-trials.

II. WORK OF THE STEERING COMMITTEE

The work of the Steering committee benefited from two recent documents providing the distinct perspectives of the following organizations: the F/P/T Heads of Prosecutions and the Barreau du Québec.

2.1 Recommendations of the F/P/T Heads of Criminal Prosecutions on the Management of Mega-cases

The Recommendations of the F/P/T Heads of Prosecutions provided a very valuable contribution to the work of the Steering Committee. These recommendations deal in particular with the improvements that can be made at various stages of the conduct of a mega-case, from the investigation to the trial. They discuss in a concise and thoughtful manner the important problems encountered. The Steering Committee found them to be very comprehensive and they led to fruitful discussions among the Steering Committee members. Moreover, the Steering Committee notes that many of the recommendations of the F/P/T Heads of Prosecutions are akin to the Steering Committee's proposal regarding the "exceptional trial procedure" detailed below.

2.2 Final Report of the Barreau on Mega-trials

The Final Report of the Barreau du Québec on mega-trials, prepared by the Ad Hoc Committee on Mega-Trials of the Criminal Law Committee, was published in February 2004.

The Steering Committee notes that the Final Report of the Barreau is an insightful document that complements the recommendations of F/P/T Heads of Prosecutions very well by offering a description of the characteristics as well as examining the advantages and the disadvantages of mega-trials. The Barreau also proposes many solutions to improve the conduct of this type of trial. Many of these proposals are similar to or compatible with the "exceptional trial procedure" proposed by the Steering Committee.

III. CHARACTERISTICS OF MEGA-TRIALS

Although it is impossible to provide an exact definition of the concept of a mega-trial, the Steering Committee agrees that it refers to a trial with such complex evidence or a number of accused such that one or both of these characteristics result in exceptionally long proceedings. The extraordinary length of these proceedings is an essential component of the mega-trial. A short or medium-length trial, even if it had a large number of accused or considerable amount of evidence, would not be called a "mega-trial."

The concept of a mega-trial is not limited to jury trials (the "Air India" case being a good example of that).

IV. THE "EXCEPTIONAL TRIAL PROCEDURE"

The fundamental challenges that mega-trials present are based mainly in the difficulties associated with their management. The Steering Committee believes that this type of trial requires special rules of procedure. This report proposes the establishment of a body of

procedures applicable exclusively to mega-trials, called the "exceptional trial procedure," the characteristics of which are described below.

4.1 Declaration of the Chief Judge

When it is possible that a trial could be considered a mega-trial, it is up to the Chief Judge, or any other judge he or she designates[1], to rule on the status of the case, based *inter alia* on specific non-exhaustive codified criteria (see Recommendation 1 of the Steering Committee).

The declaration of the chief judge can only be made when the case is at the trial stage and is to be heard before a judge and jury. As the Steering Committee set out specifically to reduce the work and the time required of jurors for mega-trials, it limited its "exceptional trial procedure" proposal to trials before judge and jury. The Steering Committee believes, however, that this procedure offers many advantages, such as common hearing of preliminary motions (described below), that would be just as useful in mega-trials heard before judges sitting alone. The Steering Committee also believes that it may be useful to consider practical and lasting ways to improve the management of preliminary inquiries in mega-cases.

Recommendation #1: The Steering Committee recommends that specific, non-exhaustive guidelines for the chief judge, or any other judge he or she designates, to use in determining whether a file should be considered a "mega-trial" be codified.

These provisions should provide that the chief judge, or any other judge he or she designates, may, of his own motion or at the request of the prosecution or the accused, summon the parties to a hearing on the application of the exceptional procedure for mega-trials. After hearing the arguments and, if necessary, the evidence presented by the parties, the chief judge will determine whether the hearing of this case is likely to be exceptionally long based on the following factors:

- **Number of accused;**
- **Number of counts;**
- **Complexity and amount of evidence;**
- **Investigative methods used.**

In making the determination, the chief judge may also assess, in conjunction with the factors listed above, the availability of resources in the justice system.

[1] For the purposes of clarity, in this text we will continue to refer to the "chief judge," but it should be kept in mind that this concept refers to the chief judge or to a judge he or she designates for the purposes of the mega-trial declaration.

If the chief judge considers the case to be a mega-trial, the judge issues a declaration to that effect, which sets in motion the "exceptional trial procedure." The chief judge then refers the file to the "case management judge" (hereinafter the "management judge") that he or she designates. The Steering Committee does not recommend that the decision of the chief judge be subject to an appeal.

4.2 Case management judge

4.2.1 Role of the management judge before the evidence is heard before the jury

The trial is considered to have started when the management judge begins his work. His role is to ensure the case proceeds efficiently and to rule on preliminary issues regarding the admissibility of evidence or otherwise involving the *Canadian Charter of Rights and Freedom* (the "Charter"). The management judge also deals with incidental issues such as bail or state compensation for counsel, jurors or witnesses. He makes sure that the case is quickly ready to proceed before a judge and jury and, to the extent possible, that the presentation of evidence will not be interrupted by the need to rule on latent issues.

Despite his title, the powers of the management judge go far beyond simple management of the case. This judge has the same powers as the trial judge. Thus, the management judge and the trial judge share the work. They have the same status but a different mission in pursuit of the same goal: the efficient, effective and fair conduct of a case.

4.2.2 Common hearing of related preliminary motions involving the same evidence in separate files

With a view of limiting the risk of inconsistent rulings, the Steering Committee suggests that all preliminary motions involving the same evidence in separate but related files be joined and heard at the same hearing. For example, this will be used in the case of a challenge to the validity of a search warrant that allowed evidence for several distinct files to be gathered. A single voir dire will be held and all the parties with standing will be invited to participate. Only a party who has made an admission on the given issue can decline.

The decision rendered will be considered *res judicata* in all trials involving the parties to the voir dire. It can't be revisited by trial judges.

Only if new facts are presented or under exceptional circumstances will the decisions of the management judge be reopened. If this were necessary, the management judge will be responsible for this. If the new facts of exceptional circumstances came to light during the jury trial itself, the trial judge will refer the issue to the management judge, who will in turn invite all the parties that might be affected by the new facts or the exceptional circumstances to participate. If the original decision of the management judge needs to be modified, the new ruling will apply to all the parties involved.

<u>Recommendation #2:</u> The Steering Committee recommends that provisions be enacted to codify, under the exceptional trial procedure, the common hearing before the management judge of similar preliminary motions involving the same evidence in related files.

Without necessarily adopting all the comments of the F/P/T Heads of Prosecutions on this issue, the Steering Committee notes that their Recommendation 24 reflects recommendation 2 above.

4.2.3 <u>Issues under the authority of the management judge</u>

The management judge may, among other things (see Recommendation 3):

- Consider all the issues relating to disclosure and make orders, particularly on the content and format of the disclosure and on its scheduling;
- Rule on bail applications and review of bail conditions;
- Rule on issues relating to funding for defence counsel, witnesses or jury members (see Recommendations 6 and 7);
- Permit, where necessary, access to proceeds of crime;
- Rule on applications for severance (see Recommendation 4);
- Rule on preliminary issues involving the presentation of evidence, including:
    - Admissibility of evidence;
    - Charter questions;
    - Requests of the *R. v. Corbett*[2] type (regarding the exclusion of past convictions from the evidence);
    - Expert status;
- Fix deadlines and ask the parties to report on the progress of the file;
- Invite the parties to identify the issues keeping in mind that the accused cannot be forced to make admissions (see Recommendation 5)
- Put admissions made by the parties in the file.

The parties must submit the questions of law at issue to the management judge and argue them before the management judge. Parties who fails to raise a question of law before the management judge and then wishe to raise it before the trial judge(s) must justify their failure to raise it before the management judge.

<u>Recommendation #3</u>: The Steering Committee recommends that the powers of the management judge and the issues this judge has authority over be codified.

<u>Recommendation #4</u>: The Steering Committee recommends that, as regards the exceptional trial procedure, specific guidelines be codified to

[2] [1988] 1 S.C.R. 670

direct the decision whether to grant severance of accused or counts. However, the Steering Committee believes that it is not necessary to enact a strict limit on the number of accused or charges per trial.

Without necessarily adopting all the comments of the F/P/T Heads of Prosecutions on this issue, the Steering Committee notes that their Recommendation 27 reflects in part recommendation 4 above.

Recommendation #5: The Steering Committee recommends, as regards the exceptional trial procedure, the enactment of a provision similar to the new section 536.4 of the Criminal Code.

Without necessarily adopting all the comments of the F/P/T Heads of Prosecutions on this issue, the Steering Committee notes that their Recommendation 11 reflects in part recommendation 5 above.

4.2.4 Report of the management judge to the trial judge

When the case is in order and ready to go to trial before the jury, the management judge gives the trial judge(s) a report containing the following:

- rulings on preliminary motions;
- orders about the disclosure of evidence;
- admissions made by the parties;
- issues identified by the parties.

4.2.5 Effect of the exceptional trial procedure on compensation provided by the state

The Steering Committee believes that the declaration of the chief judge that a case is a mega-trial should lead to the consideration of special compensation for jurors, witnesses and state-funded counsel. The Steering Committee refrains from commenting on the nature of this special compensation, which comes under the provinces' jurisdiction.

The Steering Committee notes that mega-trials, given their exceptional length, require an unprecedented amount of time and effort from participants in the judicial process. Members of the jury, for example, are required to abandon their regular occupations for very long periods of time. This can cause numerous significant problems: considerable loss of income, loss of job opportunities, negative impact on family responsibilities, lack of advancement in careers or education, etc. Defence counsel, for their part, may be forced to devote all their time and energy to a single case, to the detriment of their regular practice and their clients.

Witnesses may also suffer in particular ways because of their testimony in a mega-trial: repeated summons, exceptionally long examination and cross-examination (given the amount of evidence and the large number of counsel on the case), pressure from the intense media exposure, etc.

Thus, it is reasonable to conclude that the being assigned to this type of case may merit different compensation from being assigned to a shorter trial.

<u>Recommendation #6</u>: The Steering Committee recognizes that jurors and witnesses in mega-trials have exceptional obligations and specific needs. The Steering Committee recommends that they receive enhanced compensation to reflect this reality.

Without necessarily sharing all the views of the Barreau du Québec on this issue, the Steering Committee notes that, in its Final Report, the Barreau indicates "(TRANSLATION) it is certainly necessary to review the pay and allowances given to those who contribute to the administration of justice as jurors or as witnesses."[3]

The Steering Committee has not examined allowances offered in each province and recognizes that compensation, which comes under the provinces' jurisdiction, may vary from one jurisdiction to the other.

<u>Recommendation #7</u>: The Steering Committee notes that state-funded defence counsels have to deal with an exceptional workload and unprecedented mobilization of their time and efforts. The Steering Committee recommends that their compensation be adapted to this situation.

4.2.6 <u>Role of the management judge during the hearing of evidence before a jury</u>

The role of the management judge should continue during the presentation of evidence before the judge and jury. The management judge will act as facilitator for any negotiations between the prosecution and the defence, as the trial judge must refrain from participating in any such discussions. In certain circumstances, the management judge may hear guilty pleas and pass sentences. This would apply when the trial judge continues to hear evidence concerning co-accused, for example.

In addition, motions on matters filed during the trial can be referred to the management judge when they deal with matters completely separate from the evidence, or where a

[3] Final Report of the Ad Hoc Committee on Mega-trials of the Criminal Law Committee, February 2004, pp. 4-5.

ruling from the management judge may need to be reopened in light of new facts or exceptional circumstances.

Last, under certain circumstances, the management judge could be called upon to replace the trial judge under section 669.2(1) Cr.C. if the trial judge is unable to continue. The management judge's thorough knowledge of the file would enable him or her to quickly take over the proceedings, thus avoiding some of the problems faced by a new judge in a similar situation, given the size of the case.[4]

V. OTHER COMMENTS ON THE CONDUCT OF MEGA-TRIALS

5.1 Involving the prosecutor at the investigation stage

Like the F/P/T Heads of Prosecutions[5] and the Barreau du Québec[6], the Steering Committee believes that, in the current situation, the prosecutor should play a significant role as advisor to investigators in large cases likely to become mega-trials.

There are many advantages to this contribution, including:

- Prosecutors may provide advice on the admissibility of evidence and legality of investigative measures;
- The prosecution would keep up to date on the file and be very familiar with it right from the beginning of legal proceedings;
- The prosecution could ensure that the evidence is ready to be disclosed in a comprehensible and relatively complete manner when charges are laid.

However, the Steering Committee is mindful of the need to preserve the fundamental and essential distinction between the role of the police officers and that of the prosecutors who advise them at the investigation stage. Certain considerations should be kept in mind:

- Certain jurisdictions are less familiar than Quebec or British Columbia are with the concept of involving the prosecutor at the investigation stage; the Supreme Court decision in *Regan*[7] describes different approaches;
- Prosecutors must make sure they preserve their professional independence, which may be compromised by too close ties with the police.

5.2 Number of accused and charges

Like the Barreau du Québec,[8] the Steering Committee believes that it is not necessary to enact a strict limit on the number of accused or charges per trial.[9] It notes that the impact

[4] See *R. v. Beauchamp et al*, [2002] R.J.Q. 2071.
[5] See in particular Recommendation 1 of the F/P/T Heads of Prosecutions.
[6] *Supra* note 2, p. 10.
[7] [2002] 1 S.C.R. 297.
[8] *Supra* note 2, pp. 7-8.

of a large number of accused or charges varies depending on the scope and complexity of the evidence involved. Each case is unique and should be assessed by the management judge.

5.3 Alternate jurors and minimal number of jurors

The Steering Committee realizes that, because of the length of mega-trials, there is a higher risk that the number of jurors will drop below the limit of 10 allowed by the Criminal Code.[10] The Steering Committee notes that the F/P/T Heads of Prosecutions recommend that a panel of 16 jurors be sworn in at the beginning of the trial and that provisions should be enacted to reduce to 8 the minimum number of jurors that are required to render a valid unanimous verdict.[11] The Barreau du Québec proposes legislation to allow for 14 jurors to be selected while maintaining the minimum of 10 jurors. In this situation, all the jurors would attend the presentation of evidence and, in the event that 13 or 14 jurors were still sitting at the end of the trial, lots would be drawn to select the 12 individuals who would render the verdict.[12]

The Steering Committee believes that the removal of certain jurors just before deliberations poses significant problems. Consider the situation where a panel of 14 jurors is sworn in at the beginning of the trial and these 14 jurors are still sitting at the end of the instructions of the judge to the jury. Two persons would then have to be removed so that a panel of 12 jurors would deliberate. The Steering Committee seriously considered the situation of these two jurors. Would they be released from duty and if so how would they be kept from commenting on the jury and its deliberations? Furthermore, how would we ensure the safety of the released jurors with respect to, for example, members of organized crime who would want to extract information from them such as the composition of the jury or the dynamics of the group? The Steering Committee refuses to suggest that the released jurors be sequestered separately. Thus, it considered a solution other than having alternate jurors: reducing the minimum number of jurors to 9 or 8 to render a valid unanimous verdict

As mentioned above, this suggestion was proposed by the F/P/T Heads of Prosecutions. That proposal also meets some of the objectives sought by the Barreau du Québec in that it provides the "flexibility" of four jurors, two more than the current limit. The Steering Committee also notes that in *R. v. Genest,*[13] the Quebec Court of Appeal confirmed that the Charter does not guarantee the right to be judged by a jury of 12 persons.

The proposal to reduce the number of jurors to 8 or 9 to obtain a valid unanimous verdict was a matter of significant concern for some members of the Steering Committee. This committee believes that there should be a specific in-depth examination of that suggestion in particular as regards potential constitutional implications.

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[9] As stated in Recommendation 4 of this Report
[10] Subs. 644 (2) Cr.C.
[11] Recommendations 30 and 31.
[12] *Supra* note 2, p. 6.
[13] 61 C.C.C. (3d) 251.

<u>Recommendation #8:</u> The Steering Committee recommends that alternate jurors not be appointed for the duration of the trial and recommends that there be a specific and in-depth examination of the issue of reducing the minimum number of jurors to 9 or 8 to obtain a valid unanimous verdict, in particular, as regards potential constitutional implications.

5.4 <u>Alternate judge</u>

The Steering Committee notes that the Barreau du Québec[14] and the F/P/T Heads of Prosecutions[15] recommend the appointment of an alternate judge who would keep himself - or herself informed of the evidence and the course of the proceedings. This would enable the alternate judge to step in under subsection 669.2(4) Cr.C., if the trial judge was incapable of continuing. This recommendation is not retained, in particular because the Steering Committee is proposing the creation of the management judge role.

5.5 <u>Bail issues</u>

The Steering Committee is of the opinion that consideration of this recommendation goes beyond its mandate and that it would be more appropriate as part of a specific review of bail issues.

5.6 <u>Disclosure</u>

The Steering Committee notes that, although not unique to mega-trials, difficulties associated with the complete and quick disclosure of evidence are particularly experienced after long investigations. The Canadian experience has highlighted the challenges involved in, among other things, (a) the management and classification of the evidence obtained, (b) the choice and use of electronic tools to facilitate the organization, disclosure and review of the evidence obtained, and (c) the need to adapt courtrooms to permit the use of these electronic tools by the parties.

The Steering Committee notes that electronic disclosure can prove beneficial, although some members wonder about the costs associated with this undertaking. The Steering Committee insists however that, when electronic disclosure is used, the use of a standardized, high-performance and user-friendly search engine is essential. Evidence disclosed electronically, as well as the search engine, must be linked to the trial brief.

The Steering Committee notes that the federal Minister of Justice has announced his intention to introduce legislation on disclosure.

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[14] *Supra* note 2, p. 12.
[15] Recommendation no 26.

<u>Recommendation #9:</u> The Steering Committee recommends the use of electronic disclosure, if the circumstances allow it and if a standardized, high-performance and user-friendly search engine is available; evidence disclosed electronically, as well as the search engine, must be linked to the trial brief.

Without necessarily adopting all the comments of the F/P/T Heads of Prosecutions on this issue, the Steering Committee notes that their Recommendation 16 reflects in part recommendation 9 above.

5.7 Involvement of Law Societies

The Steering Committee believes that it would be a good idea to conduct a more detailed examination of the limits that could be imposed on lawyers when they address the media with regard to cases pending before the courts. The Steering Committee is pleased to note that the Barreau du Québec made similar statements in its Final Report.[16]

The Steering Committee believes that the bar associations may have a role to play in improving the management of mega-trials. For example, the Steering Committee welcomes the Barreau du Québec's suggestion of using its professional training school to better equip future lawyers to face that type of case.[17]

With respect to incidents of derogatory conduct by lawyers in a mega-trial, the Law Societies must be aware that the parties involved are not necessarily in a position to immediately file a complaint, for fear that it would jeopardize the proceedings. Furthermore, the trial judge will often hesitate to intervene fearing that his or her impartiality would be questioned.

When a complaint is filed, however, the Law Society must deal with it quickly.

<u>Recommendation #10:</u> Given the unique nature of mega-trials and the complex and difficult issues that may arise in their management for the lawyers involved, the Steering Committee recommends that the Law Societies consider their role in assisting with guidance, education and rules of professional conduct that may have particular relevance to these types of cases.

Without necessarily adopting all the comments of the F/P/T Heads of Prosecutions on this issue, the Steering Committee notes that their Recommendation 10 reflects in part recommendation 10 above.

[16] *Supra* note 2, pp. 20 et seq.
[17] Rapport final, précité, note 3, p. 20

VI. OTHER RECOMMENDATIONS OF THE STEERING COMMITTEE

Some other suggestions of the F/P/T Heads of Prosecutions have served as basis for the following Steering Committee recommendations:

<u>Recommendation #11</u>: The Steering Committee recommends that judges assigned to mega-trials receive specialized training focused on management.

<u>Recommendation #12</u>: The Steering Committee recommends that the Court be able to amend a defective direct indictment, pursuant to section 601 of the Criminal Code. In these circumstances, the Crown should not be required to obtain and file a new direct indictment.

<u>Recommendation #13</u>: The Steering Committee recommends that provisions be enacted to codify the substantive or procedural rules governing preliminary motions. It also recommends that the Criminal Code describe in more detail the process for filing these motions.

<u>Recommendation #14</u>: Section 669.2(4) of the Code should be amended to provide for specific criteria or conditions governing the decision to continue a trial under a new trial judge, and favouring such continuation in complex and lengthy proceedings, except in unusual circumstances. Such conditions could include, for example, the need for submissions by counsel and consultation with the Chief Justice.