ACKNOWLEDGEMENT

These materials, originally prepared many years ago by Morris P. Bodnar, Q. C., have been revised current to June 2006.

I thank Professor T. Quigley for his comments.

Any errors or omissions are, however, entirely mine.
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I. INTRODUCTION

This paper is intended as an aid to defending a criminal case, whether it be indictable or by summary conviction. It is not intended as a complete outline of what to do and when to do certain matters.¹ It is also not intended to be an authority of legal principles and, therefore, few cases are quoted as the intention is to give a practical approach from the beginning of a criminal case to the end. It is intended to supplement the checklists published by The Law Society of Saskatchewan, which should be accessed by every practitioner.

II. INTERVIEW OF CLIENT

Usually a lawyer has the initial contact with the client when the client is either in jail, has been released after being arrested under an undertaking, recognisance or Promise to Appear, has been served with a Summons or been dealt with by Appearance Notice. It is very important to interview the client at the earliest possible convenient time with respect to the facts of the case. This is so since the client may be more willing at the time to tell the truth and has not had time to manufacture, either consciously or not consciously, facts that may be favourable to him². The client has not had time to rehearse some facts and to forget other facts. Unfortunately, many clients believe that by impressing their lawyer with favourable facts, they are helping themselves and thus they attempt to give the most favourable version of the facts. An early interview may avoid this.

¹ Many guides as to the conduct of a trial are available. Some are cited at the end of this paper. You might also wish to consult, inter alia, the following: Thomas A. Mauet, Donald G. Casswell & Gordon P. Macdonald, Fundamentals of Trial Techniques (Boston: Little, Brown and Co., 1995); Steven Lubet, Sheila Block & Cynthia Tape, Modern Trial Advocacy: Analysis and Practice, Cdn. Ed., (National Institute for Trial Advocacy: Notre Dame, 1995).

² I have used gender specific language in this paper. References to “he” or “she” should be taken as referring to persons of either gender.
First I ensure that the client understands the charge before proceeding with the interview. Second I get a full statement from the client before asking whether she committed the offence with which she is charged. It is important to me to know whether my client has performed the act alleged and whether she intended to commit the offence. Thirdly, I analyze the charge and the facts and give my client an opinion as to her potential guilt at law. I do not decide the issue; that is up to a court. My job is to tell her the potential liability. This analysis will guide me in the way I defend the case, i.e., whether I call defence evidence, whether I call alibi evidence, whether I cross-examine crown witnesses in a certain manner or whether I make a *Seaboyer* application.\(^3\) It is improper to commence the initial interview by outlining to the client the Crown’s facts or by simply giving her the disclosure to read. This is nothing but a subtle way of trying to get the client to give a version of her story which will give an effective defence to the Crown's facts rather than giving the truth of what in fact happened. I believe that any lawyer who practices in this fashion may be, consciously or not, suborning perjury; at best, he will be undermining his preparations.

Clients often fail to distinguish between your opinion as to probability of success and your opinion as to guilt. The former, informed, clinical and detached is the most valuable service you can provide your client at this point. The latter is utterly irrelevant and good client control means convincing the client that, in order to effectively advise her, you must not let your conduct of the action be guided by your personal belief. It will destroy your professional judgment if you let your client’s cause become your own. You will be blinded to the impartial prognostication that is the essence of good advice.

Should you avoid asking the client whether she committed the act for fear that the answer might hinder your defence?\(^4\) This can be problematic for a number of reasons: an ignorant lawyer may,

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\(^3\) This is shorthand for an application to be permitted to lead evidence of sexual conduct by the complainant on occasion(s) other than that forming the substance of the charge. See s. 276 ff.

\(^4\) Really, what defence will be hindered? The only hindrance will be the ethical rule against putting a lying client on the stand, and one can hardly support this sort of behaviour!
(a) be unable to discern the best defence;
(b) embark on a wild-goose chase in search of a phantom defence; or
(c) not find out until trial that her client committed the offence. (I want to know this in advance. There are two perils. The client could take the stand and hang herself, or, alternately, the client could take the stand and lie. Either is disastrous.)

If the client did it, she may still be defended. We are not like British barristers who cannot run trials for those who admit offences. Does the client still have a defence or should she plead out? If her defence involves going to trial, a number of defences are available but must be recognized and prepared early. For example:

(a) the crown may not be able to prove identity or jurisdiction;
(b) an element of the offence charged may be unprovable; intent is fertile ground.;
(c) there may be an issue of insanity or drunkenness or colour of right.;
(d) your client’s Charter rights may have been violated or a statement taken in circumstances where voluntariness cannot be proven, thereby ripping a hole in the Crown’s case; or
(e) an essential witness or investigator might become unavailable and KGB evidence⁵ proves insufficient to fill in the gap.

This list is by no means exhaustive and is tendered only to demonstrate that the guilt of your client is determined at trial and not before, unless she so chooses.

Finally, note well that it is highly unethical to run a defence that involves falsity or misrepresentation to the court. For example, if the client admits stabbing his previous lawyer, you will not be asserting alibi, or SODDI (some other dude did it). What you get from the court and The Law Society will make you wish you were your predecessor.

⁵ This is hearsay evidence which, depending on its nature, may be admissible under the rules in KGB [1993] 1 SCR 740, Khan [1990] 2 SCR 531 and Smith [1992] 2 SCR 915. I refer you to any good evidence text for particulars. I deal with the procedural aspects below.
If the client denies the offence or if he has a good defence,⁶ do not plead him out. If he wants to do it himself, withdraw. If he is guilty, but on different facts, ask the Crown to change the allegation to match your client’s version. If the Crown will not, or a compromise cannot be reached that your client will admit, you must run a sentencing hearing.⁷ If the client wants to plead out on unadmitted facts, and will not be dissuaded, withdraw. I will have no part of pleading out the innocent, and neither should you. It is unethical to plead out an innocent person.

Once you have taken the initial statement, provide disclosure to the client so that they know what they are facing. The client’s reaction will often provide ammunition for the defence. A classic example is the outraged “Ask X, Y and Z, they will tell you I never did that, they were there!” In short order, you have potential witnesses to talk to. Appendix A contains a copy of an interview form that may be used to interview the client.

### III. ELECTION

A charge is electable if other than a pure summary conviction or pure indictable offence, an offence delineated by s. 469 (such as murder), or an indictable offence with absolute jurisdiction in the Provincial Court Judge (s. 553). If so, the lawyer must decide what mode of trial she will recommend that her client elect. If you want a Preliminary Inquiry,⁸ you will elect to be tried by a

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⁶ If a client is fully informed of his defences, has committed the offence, and after informed discussion of the defence wishes to waive it, it is fine to plead him out. To give an example, it would be unethical to plead out someone who accidentally hit another when he slipped on the ice and went over, taking another with him. However, if the same person intentionally assaulted another and the only evidence is a confession, different considerations apply. The client may well instruct you not to argue that (for example) his Charter rights were violated in the taking of the confession. He may do this to get charges dropped or to get a sweet joint submission on sentencing. It is his choice. There is nothing unethical in this.

⁷ If you are at the stage where you are going to have to run a hearing, you may well want to run a trial instead. Who knows, the Crown’s case might collapse, or the Crown might decide it is better to accept your client’s version than risk an acquittal. You are going to lose the sentencing benefit of not having put the complainant through a trial in any event. All that is left is the appeal to leniency on sentence based on your client’s guilty plea. While in theory this should have some effect, in practice some judges have held that if the Crown’s case is strong, there is little discount for the plea. (see R. v. J. S. C. MacDonnell unreported, per Tucker PCJ, 1996. Upheld on appeal, also unreported).

⁸ The rules about prelims have changed. The Criminal Law Amendment Act, 2001 made substantial changes to Part XVIII of the Criminal Code, effective June 1, 2004. The accused who elects to be tried in Queen’s Bench must now apply for a Preliminary Inquiry and delineate the issues and evidence required. A formal request is required. Not only has the procedure changed but so have the rules of evidence. For example, inadmissible evidence can be admitted under s. 540(7). Please review the changes to this part of the Code before making the decision concerning election and request for a prelim.
Queen’s Bench judge, either alone or with a jury. If you are unsure which mode of trial you wish to proceed by, elect Queen’s Bench judge without jury and proceed to a Preliminary Inquiry. After it, you will know better whether you wish to go with a jury or not. Re-electing to be tried by judge and jury is a simpler procedure than re-electing to be tried by a court composed of a judge without jury after a jury election. When re-electing to be tried by a court composed of a judge with jury, you simply have to file a Notice of Intention to Re-Elect with the Court (s. 561). Watch out for the time limit of 15 days following the Preliminary Inquiry for some re-elections. If you wish to re-elect judge without jury, you must give Notice to the Sheriff who will then arrange for a court date for re-election. You must then appear with your client for the re-election. This is a much more involved process, is time consuming and, accordingly, more expensive. If you have elected Provincial Court to start with, re-election as of right can occur not later than 14 days before the day first appointed for trial (s. 561(2)). Thereafter consent of the Crown is necessary and you will not get it. The Crown rarely consent to an extension or elaboration of proceedings. Note the bolded words. If the trial has been adjourned already, you are out of luck. Electing down from Queen’s Bench Court to Provincial Court requires Crown consent at all times. I have never had it refused, but it can happen.

When do you want to go to Queen’s Bench Court? Some factors to consider are:

(a) your client can afford the expense of a Preliminary Inquiry and trial;
(b) your client is not on remand;  
(c) the local Provincial Court judge is not good on some aspect of the case you see unfolding or is really tough on sentence for your type of case;  
(d) the case is an old one or there is some other factor that will make a Preliminary Inquiry transcript particularly valuable in weaseling out a lying witness;

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9 In some areas of the province the Provincial Court is so backed up that it can be more expeditious to elect Queen’s Bench Court, waive the Preliminary Inquiry and go to trial, judge alone, in Queen’s Bench Court.
(e) the disclosure is insufficient either detail-wise or in the sense that questions, which might have aided the defence, have not been asked. (Every barrister knows that disclosure is no substitute for testimony, despite the desperate assertions of penny-pinching reformers to the contrary);

(f) the Crown witnesses will not talk to you;

(g) you want to lead a red herring at the Preliminary Inquiry;

(h) because you can. I always elect Queen’s Bench Court unless my client is on remand or there is some other equally compelling reason. I think that Preliminary Inquiries are vital in preventing the incarceration of the innocent and I am dismayed at the current trend to eliminate them (by increasing summary maximum sentences, etc.). The big exception to this advice is where there is a big hole in the Crown’s case, of which they are unaware, and which they will patch up if given a second run at it;

(i) when you want to lay the groundwork for a Charter argument at trial. Most Charter relief is unavailable at the Preliminary Inquiry. (R. v. Mills, (1986) 26 CCC (3d) 481 (SCC)); and

(j) when you need Discovery to establish such things as “likely relevance” in order to make trial applications for, for example, disclosure of private records (see R. v. B. (E.) unreported Ont. CA, January 14, 2002).

When do you want a jury? When your tummy tells you so.

I am not being totally facetious here. There are so many exceptions to the conventional wisdoms in this area as to render them pretty useless. Jury elections involve weighing factors such as:

(a) Can your client testify? Juries want to hear accused and think little of the right to silence. Technical defences do not work in front of a jury.

(b) Does your client clean up nicely for court or is he a hard looking individual whose demeanor will take him down?

(c) Is the complainant sympathetic?

(d) Have you got a big lie you can hang the key Crown witness on?

(e) Is it a sexual matter where the jury might hunger for someone (anyone’s) blood?

(f) Is your case based on non-technical, common sense assertions?

(g) Are you hoping for sympathy?

I go with what my gut tells me after the Preliminary Inquiry.
IV. PREPARATION FOR TRIAL OR PRELIMINARY INQUIRY

Once the election has been made, preparation in earnest begins. The Crown is required to provide full disclosure to defence in accordance with Stinchcombe (infra) in order to accommodate counsel, shorten the trial, and encourage guilty pleas. You will be provided with at least the police reports, the accused’s criminal record, and all accused and witness statements. Look for inconsistencies. Look especially hard for too much consistency where stories should diverge. There is nothing sweeter than demonstrating that Crown witnesses have coordinated their stories. Read them and make complete notes of what you read. Full and timely disclosure will enable you to map out Charter arguments and the like early on. It will also allow you to avoid the embarrassment of having to withdraw at an untimely and expensive moment because of a conflict of interest with a co-accused\(^\text{10}\) or crucial Crown witness. Run a computer conflict check if you have the software. If not, check the firm’s file cards.

In order to firmly assert your client’s right to disclosure, you should ask for it in writing. I have attached a sample disclosure request used by my office when requesting disclosure. You may also wish to refer to the “Martensville” case (R. v. Sterling et al, [1993] 8 WWR 623, Sask. CA) for an exposition of really complete disclosure following a direct indictment.

The Crown seems to take a certain cruel delight in dumping 800-page packages on overworked counsel but better this than the old system. Now disclosure, particularly in drug cases, may be provided on CD-ROM. This means that data management software can be used to search large documents for particular passages. Technology cannot totally ameliorate the dismay felt by counsel in the face of, for example, 2000 pages of wiretap transcripts. The Court of Appeal now sometimes requires the filing of materials on CD-ROM.

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\(^{10}\) You may wish to review Chapter 5 of the Code of Professional Conduct, and particularly point 5 in the Commentary following.
Issues in disclosure usually revolve around:

(a) the obligation of the Crown to provide continuing disclosure (and the concomitant obligation on defence counsel to diligently seek it);

(b) the material in the police file, as the police do not always like to see their investigative methods exposed, and so may not disclose their 1624’s (continuation statements) to the Crown, let alone the defence. It has also become a practice in some places for the police to say they have not taken handwritten notes. I am skeptical of this assertion; and

(c) disclosure of third-party materials and counseling notes, whether in the control of the Crown/ police or otherwise.  

The procedure is set out at s. 278.1 to 278.91 in the Code.

If the Crown refuses to make full disclosure, write to them demanding it. If unsatisfied, make an application to the trial judge. The procedure is set out in R. v. Stinchcombe (1991), 68 C.C.C. (3d) 1, [1992] I W.W.R. 97, 83 Alta. L.R. (2d) 193 (S.C.C.). Do this ahead of time and bring it up at the pre-trial if there is one. If there is not, this sort of matter may be grounds for requesting one; it is proper case management, in my view.

Disclosure is usually encumbered by what the Crown calls trust conditions or, more recently, by what the Crown considers to be a reminder of defence counsel’s ethical duties with respect to disclosure. The “trust conditions” were inappropriate and unworkable and deserved a much earlier demise than they received. Unfortunately, the superseding reminder of counsel’s responsibility is taken out of context from R. v. Lucas. Disclosure is the right of the accused, but only in order for the making of full answer and defence. Other uses, including dissemination to third parties for reasons unconnected with advancement of the case, are not consistent with

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11 In R. v. O’Connor, [1995] 4 SCR 411 the Supreme Court refused to stay a case in a most egregious non-disclosure situation. The result is that defence counsel has not much to force the Crown with, in the unlikely event that they prove recalcitrant. These amendments were considered in Mills (1999), 139 C.C.C. 3d 321 and held to be constitutional.

12 While at trial there is discretion in the trial judge to order that the accused be permitted to see the written statements previously given by witnesses (R. v. Patterson (1971) 2 C.C.C. 227), with Stinchcombe these sorts of applications are rarely made any more.

13 R. v. Lucas, [1996] SJ No. 55, 137 SR 312, 104 C.C.C. (3d) 550 (Sask. CA), affd. [1998] 1 SCR 439. The cite used is misleading in that it does not acknowledge that Lucas was concerned with the improper dissemination of witness statements to third parties, rather than the sharing of that information with one’s client.
counsel’s duty to the court. This is most commonly an issue when providing disclosure to a remanded client. Of the tens, if not hundreds, of thousands of disclosure packages produced in the last 10 years, a handful were misused by prisoners who passed around witness statements. Accordingly, be sensitive to the privacy of complainants in these circumstances and ensure that you maintain control over statements, in particular, so this does not happen. The remand units will assist in having accused review their packages in privacy without being allowed to take them back to their cells. Accused who wish their own copies to do with as they please should be required to enter into a Muirhead (non-dissemination) order.\textsuperscript{14} If your client is this uncooperative and lacking in confidence in your advice, should you be acting for him?

Handwritten statements should be obtained (if available) as the form of the document and the character of the handwriting will give some indication of the circumstances under which the document was made.

I always ask for the RCMP continuation reports (or C-1624’s) as they are known). They contain all of the steps the police have taken to investigate the matter. They will tell you if audio or video tapes were made of statements. You will always want to review these tapes. They will tell you who was talked to, who refused to give a statement, who says they don’t remember, who was present at the scene of the offence and who was not. Obviously, they are a gold mine not to be missed. City police may or may not have equivalents depending on their policies.

It may be important to visit the scene of the alleged crime. It is much easier to prepare the trial, cross-examine the witnesses and argue a case when you are fully aware of the place where the alleged crime occurred. It is difficult to cross-examine witnesses on the occurrences at the scene when the witness knows the layout of the rooms in the house but you do not. You may discover crucial evidence while visiting the scene of an alleged crime. You may realize that if the witnesses were located where they told the police they were, then they would not have been in a position to have seen the events they say they did. You can then have a third party, like a private

detective, take photos that can be led at trial. This may be crucial in destroying the credibility of such witnesses. Evidence like this is particularly useful in drunken fight cases. If a view is not possible, get your client to draw you a map.

Get statements from potential defence witnesses early. The police will have taken statements right after the event in order to inform their charging decision. When the trial arrives, they will shove these statements under the nose of the witnesses and, hey presto, lost memory will return. The more detailed the statement, the more the witness will find it useful to refresh their memory, so put some work into it. If a witness is likely to recant, get someone else to take the statement, lest you wind up proving the statement by putting yourself on the stand in a s. 9 (2) application (see Milgaard, infra).

Preparation for trial does not necessarily mean that you must be sitting behind a desk in an office between the hours of 8:00 a.m. and 5:00 p.m. I have found that preparation for trial may occur whilst running, sailing, discussing some other matters with people or lying awake in bed all night and thinking about the case. Some of your best thoughts in handling the case may not occur in the confines of your office. This also means that there is nothing orthodox about the method of preparing for a case. Whatever procedure you prefer is the one that should be followed.\(^{15}\) The only absolute rules are:

(a) you must have the facts and law of the case fully figured out; and

(b) you must know what it is that you want to accomplish with every given witness, exhibit, or question. Everything must have an articulable purpose.

Some people like to write out questions; others do not. I write out difficult or critical questions verbatim, but cover the majority of the examinations in subject areas based on statements.

In preparing for your preliminary and trial, you should be prepared to cross-examine a witness on a previously inconsistent statement and you should be prepared to oppose an application by the

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\(^{15}\) One of the most annoying inclinations of writers in this area is to concurrently suggest that junior lawyers obtain guidance by watching senior lawyers do things, whilst insisting that juniors use their own style and not mimic anyone.
Crown to cross-examine on a previously inconsistent statement. You must know the *Canada Evidence Act* in these areas. I would suggest that you learn them and have them handy since they arise continuously in trials before both Provincial and Queen’s Bench Courts. In particular, know the Saskatchewan Court of Appeal case of *R. v. Milgaard* (1971), 2 C.C.C. (2d) 206, 14 C.R.N.S. 34 (Sask. C.A.) wherein the Court laid out the procedure. Disclosure will enable you to anticipate the existence of a statement of this nature. Consultation with your client will tell you whether or not the complainant will attempt to recant, or will develop amnesia. This may trigger an application by the Crown to firstly, refresh the memory of the witness with a statement and secondly, cross-examine their own witness based on the statement he gave to the police. As an aside, one would think that this impeachment would be devastating to the credibility of the witness, but many Crowns will proceed with it anyway, knowing that some judges are quite keen not to encourage recantations.

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16 *Martin’s Annual Criminal Code* is particularly useful in that it not only includes the said Act, but also cites the salient part of Milgaard. It reads as follows:

(1) Counsel should advise the Court that he desires to make an application under s. 9(2) of the *Canada Evidence Act*.
(2) When the Court is so advised, the Court should direct the jury to retire.
(3) Upon retirement of the jury, counsel should advise the learned trial Judge of the particulars of the application and produce for him the alleged statement in writing, or the writing to which the statement has been reduced.
(4) The learned trial Judge should read the statement, or writing, and determine whether, in fact, there is an inconsistency between such statement or writing and the evidence the witness has given in Court. If the learned trial Judge decides there is no inconsistency then that ends the matter. If he finds there is an inconsistency, he should call upon counsel to prove the statement or writing.
(5) Counsel should then prove the statement, or writing. This may be done by producing the statement or writing to the witness. If the witness admits the statement or the statement reduced to writing, such proof would be sufficient. If the witness does not so admit, counsel then could provide the necessary proof by other evidence.
(6) If the witness admits making the statement, counsel for the opposing party should have the right to cross-examine as to the circumstances under which the statement was made. A similar right to cross-examine should be granted if the statement is proved by other witnesses. It may be that he will be able to establish that there were circumstances which would render it improper for the learned trial Judge to permit the cross-examination, notwithstanding the apparent inconsistencies. The opposing counsel, too, should have the right to call evidence as to factors relevant to obtaining the statement, for the purpose of attempting to show that cross-examination should not be permitted.
(7) The learned trial Judge should then decide whether or not he will permit the cross-examination. If so, the jury should be re-called.

V. PRELIMINARY INQUIRY

Preliminary Inquiry is the time for preparing the trial case. It is during the Preliminary Inquiry that one asks all possible questions to test the evidence of the Crown and to determine what the full circumstances of the alleged offence are. All answers should be obtained whether beneficial or damaging to the accused. It is much better to receive a damaging answer at a Preliminary Inquiry than at the trial.\(^\text{18}\) Once you get to the trial, you should only be asking questions that you know the answers to. At the Preliminary Inquiry, you ask questions to which you do not necessarily know the answers. In addition, by fully canvassing the area of continuity of exhibits, the evidence of expert witnesses and similar evidence, you may then be in a position when preparing the trial to admit such evidence and thereby shorten the trial itself. It has been my experience that many trials that are scheduled for one week may be run in a period of two to three days if proper admissions are made by the defence counsel in areas that are not controversial. The courts certainly appreciate this. It allows the trier of fact to deal with the merits of the case and not deal for hours or days on trivia that is completely uncontested and to some extent irrelevant.

A Preliminary Inquiry is the right time to lay the foundation for trial applications. There is no restriction on asking a complainant about what she might have said to a therapist or counselor, whether the counselor took notes, his identity and so forth. A simple question dealing with, for example, whether a memory of sexual assault was ongoing or whether it was recovered through therapy may be absolutely essential to the defence of an historical sexual assault.

The Preliminary Inquiry is where, in a sexual offence case, you ask the difficult questions concerning exactly what happened. A complainant’s behaviours during the act may well contradict allegations that it was non-consensual. Imagine the consequence of an unsuccessful aggressive exploration of this area before a jury!

\(^{18}\) The one notable exception is where you are certain that the Crown is utterly blind to an inculpatory area and will remain so. It may be best to let sleeping dogs lie. Remember that defence is under no obligation to help the Crown, not seek the truth; counsel’s job is to represent their client ethically and forcefully and to the full extent of the law.
If your case is not already subject to a publication ban (and even if it is, out of an abundance of caution) consider requesting one at the beginning of the Preliminary Inquiry.

The Preliminary Inquiry provides an opportunity for the defence to convince the Provincial Court judge at the Preliminary Inquiry to commit the accused on a lesser-included offence. This may be a victory in and of itself since your chances of getting an outright acquittal at trial may be non-existent. By getting a committal for the lesser offence, the Crown may be then more willing to discuss disposition of the charge before trial. The Preliminary Inquiry has become very useful in dealing with murder charges where, in some cases, the Provincial Court judge will commit the accused on second-degree murder rather than first-degree murder. This is obviously important since it reduces the potential minimum mandatory imprisonment period by 15 years.

The good old days of simply letting the Crown put in their case at the Preliminary Inquiry are gone. Evidence at the Preliminary Inquiry can be used for the truth of its contents if, inter alia, the witness cannot testify at trial (s. 715). If defence counsel has not tested it resolutely at the Preliminary Inquiry, they may regret it. One will be unlikely to be able to establish that one did not have “full opportunity” to cross-examine (to use the words of s. 715). Accordingly, the discovery inherent in a Preliminary Inquiry is essential in advancing the constitutionally guaranteed right to full answer and defence. Its purpose is now much more than simply having the Crown satisfy the judge that there is sufficient evidence, which, if believed by the trier of fact, will convict the accused. Use the opportunity wisely.

Preparing for a trial involves work. You must know your case completely. Firstly, you must know the disclosure and the transcript of the Preliminary Inquiry and index it so you can make quick reference to any part of the disclosure or transcript at any time during the trial. If a witness at trial gives evidence different from what was given at the Preliminary Inquiry, you must have knowledge of this and have easy access to the portion of the transcript so that you can contradict the witness on cross-examination. This is one of the most effective tools at a trial, whether before judge or jury. The truth does not change much, whereas a lie must always be remembered if subsequent assertions are to be consistent. Accordingly, inconsistencies are important markers of truth telling.

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Secondly, interview all potential witnesses arising from the Preliminary Inquiry since these witnesses may give you very important evidence with respect to the events that occurred at the scene of the alleged crime. One of the advantages of a Preliminary Inquiry is that the Crown witnesses must respond to your questions.\(^{19}\) From these responses, you will frequently divine critical witnesses that your client had no idea existed.

Thirdly, review the transcript of the Preliminary Inquiry and make all necessary notes and follow up promising areas by, for example, lining up expert evidence, interviewing potential rebuttal witnesses and the like. If your defence is one of intoxication due to drugs or alcohol, then it is important to get all such evidence and have your client examined by an expert in the area of alcohol or drugs. A good example is evidence from a social gathering of your client’s alcohol consumption and behaviour, evidence which, upon review by an expert, will enable her to form an opinion as to your client’s level of intoxication. This may be instrumental in raising a doubt as to your client’s intent to commit the offence charged.

VI. DEFENCE

There is generally no obligation on defence counsel to disclose defences to the Crown, with three major exceptions. Firstly, as a matter of law, if you are planning to run a defence of alibi, you must notify the Crown as soon as possible - the earlier, the better. If you advise the Crown after the evidence of the Crown is in, then comment can be made to the jury that this is a new defence, just raised. The jury can consider whether such a defence is a defence manufactured to fit the facts of the case or one relied upon in desperation. The defence may do more harm than good. To avoid potential prejudice, give the Crown enough time to check out the alibi, usually by having the police interview your alibi witnesses. I do not like disclosing witnesses, but this is an exception.

\(^{19}\) While there is no property in a witness, and therefore the Crown cannot restrict your access to them, nevertheless a person has a perfect right to refuse to speak to defence counsel. Counsel are ethically bound, in my view, to identify themselves and to tell potential witnesses of this right.
Secondly, if you intend to make a *Charter* application, timely notice should be given to the Crown to avoid a request for an adjournment and accompanying expense. However, you can never know all that will arise in a case and what *Charter* opportunities might pop up. If they advance the cause, do not let lack of notice deter pursuit.\(^{20}\)

Thirdly, if one intends to call an expert,\(^ {21} \) giving the substance of anticipated testimony might avoid an adjournment for rebuttal. If you intend to rely on a report and affidavit, (s. 657.3), notice must be given in any event, and a copy of the report provided.

In any criminal case, there is usually one good defence or at most two or three. It is very unlikely that you have four or five defences in a case. Define which defences are most likely to succeed and prepare examination and cross-examination of witnesses with these in mind. By raising or attempting to raise too many defences, you may be diluting the effect of your better defences and thereby do a disservice to your client. By concentrating on one or two good defences, you will focus the jury’s attention on those defences. Every once in a while the Crown may forget to prove identity or jurisdiction or be unable to establish continuity of exhibits in a case where continuity is germane, but these are rare. Accordingly, sit down with your file well in advance and ask the questions “What is the defence?” and “How do I best advance it?” If you don’t have a defence, ask yourself what the purpose of proceeding might be. Hope springs eternal three months before trial; the night before, with Crown offers off the table, one might not be so sanguine.

Accordingly, it is essential to ask whether the case should be run. It may seem ironic, but a major element of trial preparation is deciding when to bail out. Should a plea bargain be cut? Should the matter be referred to alternative measures? You owe your client a solid professional opinion on this issue.

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\(^{20} \) The judges of the Provincial Court have been contemplating rules, among which are provisions which would govern this sort of situation. Some members of the defence bar have opposed codification of any notice requirement on the basis that the vagaries of trial work demands that counsel’s hands be neither tied, nor inhibited in any way.

\(^{21} \) Making sure, of course, that the expert’s opinion is favourable!
Accordingly, one consideration is whether your client’s is a matter for restorative justice. The potential of this process goes beyond sentencing circles. From the earliest stages, a referral to mediation, to family group or community conferencing, to a restitution worker or to treatment for your client’s issues, can work wonders in assisting you in convincing the police or the Crown that the matter should not have to go to court at all. Even if the charge has been laid and proceeded with, it may well be in the public interest to have the matter diverted and then stayed. In theory, the client can maintain innocence until the writing is on the wall, but in practice, your client cannot have it both ways; he is going to have to make an informed choice. Proceeding restoratively involves a genuine acknowledgment by your client that he has done wrong, that harm has been done. It also involves a real commitment to rectifying the harm, changing inappropriate behaviours, addressing addictions and to restoring, and if necessary creating, healthy positive relationships with his society. This is a tall, tough order. Many people who admit offending cannot make these commitments - a jail cell is a softer prospect. Make your client aware that admitting responsibility opens up new possibilities. It is then his call.

The list of potential defences is as long as the imagination of generations of trial lawyers. The Crown must, of course, prove all of the elements of the offence beyond a reasonable doubt. Which element(s) will you focus on? Read the Code section carefully and list off what must be proved. There will be physical and mental elements. In addition, there are more general defences, like self-defence, duress, defence of property, entrapment\textsuperscript{22}, alibi and the like which are either Code defined or Common Law defences incorporated by s. 8 of the Code.

\section*{VII. PRE-TRIAL CONFERENCES}

It has become the practice in many judicial centres to hold pre-trial conferences where the Queen’s Bench trial is to be of any length. The practice varies from place to place. In

\textsuperscript{22} It is not really a defence; it is a ground for a judicial stay. See Mack (1988), 44 C.C.C. 3d 513, (SCC).
Saskatoon, Provincial Court trials which are scheduled for more than one day are also pre-tried. The objectives are case management and settlement. Short non-jury trials are not generally pre-tried. Accordingly one might elect re-elect jury after the Preliminary Inquiry just to get a pre-trial conference when, for example, the Preliminary Inquiry is favourable and the Crown won’t see reason and stay the charge(s) or make a deal. Please refer to the Court of Queen’s Bench Practice Directives, the Saskatchewan Court of Queen’s Bench Rules and s. 625.1 of the Code.

With leave, attendance at the pre-trial conference may be by telephone. Your client does not usually attend. Each pre-trial judge has his or her own style; some are more interventionist than others are. Some will be frank in pointing out the deficiencies in your case and that of your opponent. Sometimes suggestions are made concerning admissions of fact that you ignore at your peril. The key to a successful pre-trial is preparation. You have to have anticipated the nature and extent of your potential applications, argument and evidence and, in particular, be in a position to advise as to the Charter arguments which will be made at trial. Proper scheduling can often avoid having expensive witnesses sitting in courtroom corridors. The judge will also ask you, as well, for a firm estimate of trial time required; be ready.

In jury trials, the pre-trial conference is the proper forum for discussing contentious points, which will require that the jury be excluded. If a trial can be organized so that Charter arguments, voir dires and the like, (in as much as it may be possible) can be dealt with in the absence of the jury, either prior to selection or after they are empanelled but on days when they are not required to attend, this should be done at the pre-trial. Counsel who force the jury into jack-in-the-box antics may find the jury unappreciative of these tactics when the time comes to render a verdict.

The trial judge will certainly appreciate counsel’s efforts to shorten the proceedings, be it by organization, admissions of uncontested facts and documents or any other way of streamlining the trial. The pre-trial conference is also the stage at which you should ensure that you have nailed down your witnesses and have served appropriate subpoenas where required, assuming that a trial date has been assigned. When in doubt, serve a subpoena. A court will look most unfavourably upon a request for an adjournment if all measures to secure attendance of witnesses have not been taken.
If evidence is to be led in electronic form, by either teleconference or “virtual presence” (s. 714.1 et seq.), 10 days notice must be given. You are going to have to line up the technology (and arrange to pay the fee: s. 714.7). Arrange this at the pre-trial conference unless there is some tactical advantage to sandbagging the court and Crown with an application of this nature. I cannot think of a single reason that will not get you rightly eviscerated, so conduct yourself accordingly.

**VIII. THE ROAD TO TRIAL**

Motions in criminal law will be dealt with elsewhere in this section of the Bar Admission Program, however, a word at this point on timing. Some motions require notice. The common ones are:

(a) Motions for Charter relief under s. 24(1) of the Charter or to have a statute or part thereof declared invalid will require notice under the provincial Constitutional Questions Act. Whether the notice requirement of the Act is itself constitutionally valid is another question. However, unless you wish to argue this as well, you are well advised to ensure at the pre-trial stage that any necessary notices under this Act have been served.

2. If a Seaboyer application (previous sexual conduct) under s. 276 of the Code is anticipated, notice should be served well in advance and an appropriate affidavit or vive voce foundation laid. While s. 276.1 (4) (b) does permit the abrogation of the seven-day time limit, there is rarely any advantage in having to fight off a judge who has formulated his or her schedule anticipating no such motion. These motions can take significant time. Out on the northern circuit I have had to schedule them for special days because of the shortage of trial time.

3. Similarly, an O’Connor application under s. 278.1 for the production of counseling records requires the same waivable seven-day notice. It also may require the serving of a subpoena on the record keeper. These are often professionals and are not happy to leave their busy practices at the best of times, let alone on short notice.

The Crown will, as a matter of course, provide a witness list along with the Indictment. It is my practice to check with the Crown to ensure that all of the witnesses will be called. If there is any doubt in my mind and the evidence of a Crown witness might be essential to my case, I will subpoena that witness as well. There is no property in a witness and I see nothing improper in
questioning Crown witnesses, indeed, it may be essential. Frequently the Crown and/or victim’s services will want to be there for the interview. They have no right to interfere. The implication, that your questioning may do them harm which the Crown’s questioning does not, is not only insulting, it is designed to paint defence counsel as an enemy - a tactic which is entirely improper. As a practical point, a witness may simply refuse to talk to you without a (to them) trusted third party being present, but otherwise, do the interview with a member of your staff.

It has become the practice in jury matters to have a number of juries chosen at the opening of the sittings. Acquaint yourself with the procedure for choosing a jury, the number of challenges which you will have and the like. A little research concerning the socioeconomic status of potential jurors is also appropriate; however, given that you may be looking at well over 100 potential jurors, the leg work may be beyond your ability (and beyond your client’s cheque book).

Very few activities are as shrouded in myth and voodoo as the selection of a jury. It has been dealt with at length in many articles and I will not belabour it. However, as a practical matter, do not forget that the jury selection is your first contact with the people who will decide your client’s fate. If counsel looks like a bumbling spiteful blowhard, the jury may respond appropriately. Similarly, if counsel’s efforts to exclude a particular racial or gender group are transparent, the jury will react accordingly. Experienced counsel does not waste this vital opportunity to befriend the trier of fact. Whatever your innermost feelings about the judge and Crown, this is not the time to show them. Cordiality and dignity should be your watchwords. Remember that these are twelve ordinary folk who, like anyone, respond to respect and common sense. When people take a juror’s oath, they do not leave behind their ordinary inclinations.

**IX. THE TRIAL**

At the commencement of a Queen’s Bench trial or at the jury selection, your client will be brought in, arraigned by being read the Indictment and asked for her plea. Stand with your client and let her enter the plea. The Crown will then make any necessary applications, such as
name suppression and the like. I make sure that Crown witnesses not testifying (other than experts) are excluded. Most Crowns will simply tell their witnesses to leave, but I like to get the order anyway. In Provincial Court, the plea has already been entered to the information. The procedure is otherwise very similar.

There are two critical guides for trial questioning:

(a) Have a theory to which all your questions will be directed. The theory will be informed by your decision as to what the defence is. If the theory does not advance the defence, change it or eliminate it. If the question or evidence does not advance the theory, change it or eliminate it. Be ruthless with irrelevance and efficacy. The trial is not a time to go on a fishing expedition to attempt to get new evidence. You will know the answers from your review of the witness statements from the Preliminary Inquiry evidence. Unless you have nothing left to lose, you should only ask questions to which you know the answer.\(^{23}\)

(b) Establish the motive a witness may have to embellish, conceal or fabricate. The trier of fact is being asked to disbelieve someone; explain why. Is there a family connection, a social obligation or a power imbalance? Sometimes the reasons are so Byzantine as to defy rational explanation (and a judge’s credulity!) but they are pivotal. Your client may well know the answer to the question “Why is X making up this story about you?” If there is no explanation, from any angle, this goes to the credibility of your case.

When the witness has answered a question in a manner favourable to you, you should not repeat the question since the witness may then alter the answer in a less favourable fashion. Once you get a favourable answer, leave it. My experience has shown me that cross-examination at a trial is usually very limited and occupies a very small percentage of the time compared to cross-examination at a Preliminary Inquiry. I would estimate my cross-examination at a trial before judge with a jury is 50% to 75% shorter than my cross-examination at a Preliminary Inquiry.

When should you lead a witness in chief? It is perfectly permissible, and indeed favoured, to lead witnesses on points not in contention. If you object to the Crown leading on a non-material point, you will look silly. If the Crown leads on the guts of the case, object quickly. Even if the

\(^{23}\) There is no more heart pounding moment than when you, as counsel, leap into the abyss and ask the question to which you do not know the answer. This rule is discarded as often as it is followed, particularly with the trend toward fewer Preliminary Inquiries, but always with great trepidation.
question has been answered before you can get to your hind legs, object. Sometimes the judge will say, “Too late”. Continue the objection and ask that the court specifically disregard the answer. It may be important on appeal. You can usually tell when the Crown is getting close.

Sometimes I will object to a near question just so that the Crown and the court know that I will allow no leading. I do not want to object successfully to a question that has the result of telling the witness what to say even if the question is struck or withdrawn. A pre-emptive strike is preferable.

On cross-examination, you should lead. You are in control and you must maintain that control. Do not let a tough witness off the hook. Working hard to get an admission from a tough witness not only gets that admission on the record, it shows the judge that the witness is reluctant to say anything that favours the defence. Think of what this says about the witness’s overall credibility! On the other hand, with easily led witnesses do not assume that because you are getting away with leading, it is doing you any good. If you put the answers in the mouth of the vulnerable witness, the judge may well discount the evidence as being that of counsel, not the witness. Similarly, an aggressive cross-examination of a simple witness, which confuses the witness into admitting propositions that are patently ridiculous, will do your case little good. There is nothing more frustrating than getting a complainant to admit that the moon is made of green cheese, only to have the trial judge discount the whole cross-examination, and accept the examination-in-chief, on the basis that the witness is a simpleton.

Bear in mind that the trial judge has discretion to allow re-examination by the Crown on new issues raised on cross-examination and, in particular, on questions that have produced inconsistent responses which might simply be the result of witness confusion. Some judges are willing to let the Crown patch up its case if this appears possible. The tactical implication is enormous. Before this sort of judge one has to risk asking the additional question(s) which might allow the witness to qualify a favourable answer simply because not to do so means that the Crown will get to do it anyway, and with gusto.
Do not ask questions of a witness who has no evidence to favour you and who has not said anything damaging to your client’s cause. If the Crown has had a difficult time in examining a witness, do not help the Crown by cross-examining the witness and eliciting the answers that the Crown wanted but could not get in chief. Do not become hostile with witnesses on cross-examination unless there is a very good reason to do so. You will catch more flies with honey than with vinegar. Be calm, courteous and mild-mannered unless a witness is continuously being obstructive or cocky. If the witness is looked upon unfavourably by the jury, the jury may then wish that you become aggressive. If the witness becomes belligerent, you may follow suit. However, carefully consider the witness’s circumstance. Beating up a child sexual abuse complainant on the stand is not only repugnant; it will usually get you nothing but well deserved reprobation. Kids may be mistaken or imaginative, but making them cry is not going to winkle these out. Being sharp with a policeman on a breathalyzer case is a different matter. If you find an opening, be aggressive.

If there are two counsel on one case representing two accused, one lawyer can take a quiet approach at the Preliminary Inquiry and obtain whatever favourable answers may be elicited from the witness. The other can take a more aggressive approach to determine how the witness reacts under such cross-examination. This will guide your style of cross-examination at trial.

If there is more than one accused in the same indictment, separate counsel should represent each individual. This is especially important if the defence intends to call evidence but in any event, avoids potential conflicts of interest. If one accused calls evidence, counsel for the other can cross-examine that particular witness and elicit favourable evidence that may not have been brought out in examination-in-chief. The importance of this is especially clear when the witness is a little reluctant or inarticulate. You can give the witness guidance by leading him whilst on the stand.

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24 The rules are so tight now that representing two co-accused is pretty dicey. It may appear that the two are identical in interest, but if a conflict should arise, you can act for neither. See the references in footnote 7. Conduct yourself accordingly.
Remember that cross-examination is not only about pulling apart the Crown’s case; it is also about building your own. Much favourable evidence can be extracted from the mouths of Crown witnesses. I am not speaking of Matlock type miracles where the witness suddenly changes everything and gives you the case on a platter. This rarely happens. Rather, consider just two examples of useful evidence.

(a) What can the witness say about other witnesses which might be adverse to your cause? Think about sight lines, sobriety, behaviour of the police toward the accused, etc.

(b) What does the witness know about your client that is not in the statement he gave to the police? Your interview of the witness before trial will assist in ascertaining if your client was behaving in a way inconsistent with commission of the offence.

There is no better guide to cross-examination than the following: Be mild with the mild, shrewd with the crafty; confiding with the honest, merciful to the young, the frail or the fearful, rough to the ruffian and a thunderbolt to the liar.

Watch out for the KGB rules. The rule is complex, but allows a massive exception to the rule which used to exclude hearsay. Now hearsay may go in for the truth of its contents if it is reliable and necessary. Accordingly, where the evidence is under oath, taken before an independent person, recorded and transcribed and if the deponent is unavailable, it may go in subject to weighing by the judge. Part of preparing for trial is finding out (as much as one can, given the vagaries of litigation) whether the Crown intends to tender any type of previously given statement for the truth of its contents. Since you will have no opportunity to cross-examine the witness, your client’s liberty may rest on attacking the reliability of the circumstances under which the statement was taken. For example, consider,

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25 I respectfully disagree with the Supreme Court’s dicta on the reliability of statements given by people who are not available for cross-examination. Cross-examination is one of the very few tools with which reliability can be ascertained. The danger of making admission commonplace, without a strict and mandatory warning as to veracity, is profound.
(a) Was the deponent sober and straight?

(b) Is the record complete? Are there inducements or threats, which precede the statement either at the time of taking or at any time before?

(c) What sort of relationship does the deponent have with the police? Has he been involved in any other matters? Has he provided the police with cooperation in other cases? Is he a suspect or accused in any current or recent matters?

(d) Has the deponent testified in other matters? Has he provided statements in other matters and then been absent from the trial?

Are you going to put your client on the stand? You should already have considered or attempted, if meritorious, a non-suit application if there was no evidence on an element of the offence at the close of the Crown’s case. If there was enough evidence to get by a non-suit, but not enough to prove beyond a reasonable doubt, you may not need to lead anything. This decision is one of the hardest to make. It is somewhat easier if the defence has evidence to lead other than the accused, but all too often the case hangs (so to speak) on your evaluation of whether the client will be convicted but for her testimony. I hate watching my client being cross-examined, but sometimes there is no choice. Clients often wish to “tell their side of the story”. If it will get her convicted, exercise client control. If it will not get her acquitted and will annoy the judge or give the judge a reason to be harsh on sentence, exercise client control. Your client deserves an unvarnished evaluation. The pressure can be immense. If you keep your client off the stand and she is convicted, even if the testimony would have been futile or worse, she may well blame you to her dying day for denying her right to her day in court. You may find yourself on the receiving end of an appeal based on your purported incompetence in this area. It has happened to very experienced counsel. All you can do is give the very best advice you can, make the call and document it with written instructions.²⁶

Each barrister has her own style of preparing the client for testimony if he is to be called. In cases where credit and credibility of the accused are critical, the preparation of one’s client is vital. Coaching one’s client by suggesting things that he should say on the stand is unethical.

²⁶ Of course, the final say is the client’s. Your job is to give options and the client has to make the call. See R. v. Edward Moore, Saskatchewan Court of Appeal CA02030 March 5th, 2002 at paragraph 48.
Encouraging one’s client to remember things that he has said to you and to say these things in a sincere and dignified way is a key method of readying your client for trial. In many cases, I will have my client write down everything that happened, like a movie on a frame by frame basis, at the earliest opportunity. People retain a great deal more when they have to go to the effort of actually putting pen to paper. I doubt the sincerity of a literate client who refuses to make even this effort in putting together his defence.

What should the client say in the examination-in-chief? The truth and all of it. What should the client say on cross-examination? The truthful answer to the question asked and nothing more. Tell the client that the cross-examination is where cases are lost, not won. Accordingly, the client should look the other lawyer in the eye, answer the question completely, and then shut up. Verbal diarrhea is more fatal than the other variety, and even more agonizing to watch.

There is nothing improper, in my view, in advising your client on demeanour and behaviour on the witness stand and, in particular, in cautioning your client to be utterly truthful, candid, direct and non-argumentative. The client should not evade a tough question. Tell the client that being evasive or imaginative on one question can taint the whole of her testimony. Tell the client not to embroider an answer or make it up. Indicate to the client that if she doesn’t know or cannot remember, say so. The client whose demeanour varies significantly between examination and cross-examination will inevitably be less worthy of belief than the witness who is as forthright to one examiner as to the other.

X. JUDGE AND JURY ADDRESSES

Jury addresses are dealt with in Appendix C to this paper, prepared by Morris P. Bodnar, Q.C. some time ago, which I commend to you. However, let me make a few brief notes. Many trials are won or lost on the address to the finder of fact. Too often counsel spend too much time preparing the examination and cross-examination of witnesses and not enough time in preparing
an address. Jury addresses, in particular, are your last opportunity to talk to the finder of fact and to put your whole case together in an orderly fashion. It is also the only opportunity you have in arguing against the other party’s case and showing the inconsistencies and fallacies of it. Do not mimic other counsel. Mimicking will make you appear artificial, unconvincing or, worse, pompous and silly. While juries like a little theatre, they prefer that it not be comedy. My way of preparing the address in anything other than a short trial is to have the address set out in point form on the last page of my trial book. It should contain the defence theory and the points of evidence, which I anticipate will come out during the trial. As they do, I check them off. If they are particularly germane, in Queen’s Bench Court I will note the tape reference number. When court reporters were abolished in Queen’s Bench, the consolation prize was a running tape counter visible to counsel. The tape is a poor substitute for a reporter. In cases that involve a lot of money, the litigants sometimes retain a private reporter. You are unlikely to do this in a criminal trial. Tape reference numbers will enable you to review the tape at the end of the day and annotate your closing address notes.

The much more common situation is the summation to the judge in Provincial Court. Unless the trial has been a lengthy one, there is rarely any need to go through the evidence. Instead, try following these guidelines. Firstly, go directly to the elements of the offence and pick out where the case has not been proven. Detail the reasons why an acquittal or conviction on a lesser offence should ensue. This means putting forward the defence theory and pointing to the facts or law which support it. Tell the judge what the defence is. If it is a legal one, put this up front and address the interpretation of the law, citing and filing cases as required.

Secondly, focus specifically on exact pieces of evidence which support the defence. What, for example, raises a reasonable doubt as to the identity of the perpetrator? “Mary Smith said that Fred was drunk…It was dark, said Joe Bloggs, the snow was thick and falling, said Harry Blagg,” etc. I will remind the judge of the onus on the Crown (not that he or she has forgotten, but one’s client sure likes to hear it) and then show how it has not been met. This involves that most desirable of advocacy skills - the ability to address the “because” element of the equation.
Get your proposition straight and then answer the question “Why should X be false?” with “because of A, B and C”. A naked assertion is not only a waste of time; it will waste your credibility. Every part of every assertion must be justifiable on the evidence. If it is not, do not assert it.

Thirdly, use hierarchical, point form organization. If you tell the judge there are two areas for the defence to argue, that the first one has three elements and that you are going to deal with each one in turn, he or she will be able to follow you. I like using numbered assertions and facts. You can take the numbering to each level of the analysis.

Fourthly, if you are getting nowhere, and you have bigger fish to fry, move on. The judge may be being obtuse, but if you cannot move him or her, move on. It may just be that you are not seeing the evidence as he or she is, or there is a point of law of which you are unaware that makes your argument unconvincing. If you are losing it on the pivotal point of your case, though, do not give up until you have to. There is generally a place in your interplay with the bench at which you can tell that the judge is no longer interested in what you have to say. This is very different from the course of interested questioning, which might seem like disagreement, which allows the judge to probe the strengths and weaknesses of your arguments.

This leads to my final point, listen to the judge. Whether at trial, in chambers or on appeal, the only insight that you will get into the judge’s thinking before the verdict is reached is by what the judge says and does. Her questions will tell you where there is doubt and where there is certainty; they are gold dust. Her body English will give you clues as to the reception that your ideas are getting. If the judge has rolled his eyes so often they are bugging out, broken his pencil in half, tossed it over his shoulder and is now turned around looking out the window, perhaps it is time to change your strategy.\textsuperscript{27} It may certainly be time to start ensuring that the record is clean for the appeal.

\textsuperscript{27} This extreme example has no basis in reality. Be aware that some judges have odd mannerisms which are no reflection on counsel. A classic example is the judge who appears to sleep but actually has a faultless memory and rarely takes a note.
As an outline on preparing jury addresses, I very strongly recommend the book entitled *The Law Society of Upper Canada Special Lectures - Jury Trials*. This book simply gives an outline of different matters to consider but I suggest they are very important. Many counsel spend too much time delivering their jury addresses. A jury address should last approximately one-half hour with a maximum of three-quarters of an hour. Anything said after this time will have little effect on the jury since their attention will have been lost by that time. If you cannot put your defence to a jury in thirty minutes, it is unlikely that you have one. One of the best ways of learning to do jury addresses (or any part of a trial) is to watch other counsel. The only problem with this is the tendency of attempting to mimic these other counsel. If this can be overcome then more can be gained by watching senior counsel addressing a jury than by reading any book or article.

**XI. SENTENCING**

There are two salient aspects to every defence:

(a) defending the client on the merits, and

(b) speaking to sentence in the event of conviction or guilty plea.

One is no more important than the other.

Be prepared for the verdict. The possibility of a conviction is real. Sentencing will follow. This is as crucial a period as any other is since it is at this time that the judge considers whether your client will be at liberty or whether he will be incarcerated. You must be prepared to speak to sentence. Preparation involves an interview of your client. Get a complete background on your client, including at least the following.\(^{28}\)

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\(^{28}\) I deal with factors specific to aboriginal people below. They are supplemental to these.
(a) age, marital status, and family structure;

(b) accused’s interests, hobbies and sports; (Be on the lookout for the unusual. There are often activities in the everyday life of the client (“drinking heavily in playgrounds” does not qualify) such as volunteer activity or caring for a relative, which will personalize the client for the court. Clients sometimes fail to appreciate their own good works because they are so commonplace.)

(c) record of employment and letters offering employment;

(d) educational background including any courses or upgrading;

(e) criminal record including time actually served and success while on early release (this will help rebut Crown submissions about the possibility of recurrence of the offence);

(f) previous medical or social issues and any treatments client may have received;

(g) condition which was prevalent at the time of committing the offence such as alcoholism, psychiatric or psychological challenges, addiction to gambling or drugs with medical or other professional reports as necessary to verify;

(h) letters of reference and names of support people;

(i) precedents regarding sentencing in similar cases; (The Court of Appeal Sentencing Digest is a most valuable resource. Generally, texts and the opinions of learned writers do not carry a lot of weight. Section 718 has codified the objectives of sentencing and should certainly be referenced.)

(j) accurate record of any time spent on remand;

(k) community, that is non-incarceral, resources available; and

(l) arguments generally as to the inappropriateness of jail to the case. (For example, you may wish to argue that for this offender and others similarly situated, jail neither deters nor punishes. I know of no area where knowing the trial judge’s proclivities is more useful. Some judges incarcerate because that is what they believe they must do. Jail never has to be justified; its efficacy is presumed without critical reflection. You must be prepared, therefore, to demonstrate to this judge, in this case, why jail is a waste of time and public money.)

I like to do a sentencing interview. Preparing for the trial proper will make you familiar with your client but you should also take the time to do the foregoing. Good preparation may result in your client not going to jail. Your client’s personal circumstances are critical to proper sentencing. Counsel’s task is to personalize the accused. She must become much more than a statistic.
XII. THE ABORIGINAL ACCUSED

It is a terrible fact that 76% of the current population of provincial jails is aboriginal.
Particularly if your clientele includes Legal Aid work (either staff or farm-out), many of your
clients will be aboriginal. The juxtaposition of demographics and socioeconomic factors makes
it highly probable. There are also systemic (and racist) factors which lead to this state of affairs.
Some of these are germane to our topic; some are not. In order to provide your client with the
best possible defence you must be cognizant of, *inter alia*, the following questions and analyses:

(a) Language:
   Some people do not speak English. You will require an interpreter for interviews
   and court proceedings. The latter should be provided by the court. Be very wary of proceedings
   interpreted by someone picked out of the crowd. Justice and Court Services have an obligation
   to provide trained translators. Untrained people often cannot keep up with the flow of words,
   cannot understand the legal concepts well enough to interpret them to your client, and may be
   motivated to hear (and translate) that which they wish they heard. Different cultures have
different words for which there are no English equivalents. For example, it takes a skilled
interpreter to transmit notions of consent correctly in sexual assault cases.

(b) Understanding:
   Even people who speak English may not do so as well as they pretend. People do
   not want to look stupid. One of the legacies of colonial disrespect for aboriginal language is that
   some indigenous people view lack of facility in English as a mark of someone less worthy.
   People like this will nod sagely at your advice, and be incapable of telling you what you just
   said. Similarly, people in this position will admit outrageous things to the police and sign things
   that they do not understand. Beware.

(c) Illiteracy:
   The natural corollary of lack of language is lack of literacy. Do not assume that your
   client can read well enough to understand letters. You will have to change your writing if your
   client’s reading is marginal. It takes a lot of time to read disclosure packages to people, and one
   reading may not be enough. This may also mean spending a lot of time at the remand unit
   working on the file.

(d) Culture:
   Every indigenous culture has its own norms. A few that affect court work a lot are:
   (i) the ethic of non-interference:
       Parents of indigenous kids may guide by example rather than by white
discipline. Watch out for this on release hearings and sentencings;
   (ii) body language:
       This involves lack of eye contact and other mannerisms, which to the
   uninformed might look shifty or evasive;
   (iii) Hesitation in answering questions: same result;
(iv) Reluctance to blame or praise;
(v) Forgiveness rather than confrontation:
   By the time a matter comes to trial, only the system is still interested.
   The parties have long since genuinely reconciled and the matter is over
   for them.

(e) Treaty and aboriginal Rights:
   Some examples are obvious, like defending a wildlife or firearms case on the basis of
   a right. Others are less so, like the use of colour of right defences for road blockades, or trapping
   rights to justify interference with an outfitter's camp.

(f) Sentencing:
   The Criminal Law Sentencing paper covers the impact of *Gladue* in his materials.
   Some judges take the position that s. 718.2 (e) really did not change the landscape; but it did.
   When running a trial, bear in mind that if you paint a picture of a client with no issues to address,
   you may have a hard time retrenching to paint him as a damaged victim should he be convicted.

XIII. FURTHER READING

In preparing for a criminal trial, you may wish to review the following:

Law Society of Upper Canada Special Lectures – *Defending a Criminal Case*

*Successful Techniques for Criminal Trials* by F. Lee Bailey and Henry B. Rothblatt, (Lawyer's
Co-operative Publishing Company)

*McWilliams on Canadian Criminal Evidence* (Canada Law Book)

*Sentencing* by Clayton Ruby (Butterworths)

Law Society of Upper Canada Special Lectures – *Jury Trials*. 
LEGAL ASSISTANT: ___________________     Date: ____________

PERSONAL INFORMATION: C.F. #1

DATE DISCLOSURE ORDERED: ________________________

1. Name of Client: _______________________________________

2. Offences: _____________________________________________

3. Others Charged: _________________________________________
   __________________________________________
   __________________________________________

APPEARANCES:

Next Appearance: Date: ______________________
Time: ______________________
Courtroom: ________________________

PERSONAL INFORMATION

4. Age: _________     Date of birth: ______________________________

5. Are you: Status Indian / Non Status Indian / Inuit / Metis / Non-Native
   Treaty Card Number: ______________________
   Band Name: ______________________________

6. Single / Married / Common-law / Separated / Divorced / Widow(er)
   Name of Spouse: ______________________________
   Date: ________________________________________
7. Children: Number: _____________ Ages: _______________________
   Who has custody: ____________________________________________
   Do any of your children have any special needs (if yes, what are they):
   __________________________________________________________________
   __________________________________________________________________

8. Home Address (include apartment number):
   __________________________________________________________________
   Telephone: ______________________
   Mailing Address: same, or ___________________________________________________________________

9. Do you live in: __ House __ Apartment __ Room and Board __Other: _____________

10. Who lives there? __________________________________________________________

11. How long at present address? _________
   Originally from? ______________________________________________________
   How long in Saskatoon? _________

12. Parents/Alternate/Emergency Address:
   Name: ________________________________________________________________
   Address: ______________________________________________________________
   Telephone: ________________________________

   **FAMILY HISTORY**

13. Mother: _____________ Address: ____________________________________________
    Father: _____________ Address: ____________________________________________

14. Number: _____ Brothers: _____ Sisters: _____ At home: _____

15. Other Care: Foster Home: _____________ Date: _____________ How Long: _____
    Other: __________________________________________________________________ Date: _____________ How Long: _____
16. Comments: ______________________________________________________________

________________________________________________________________________

________________________________________________________________________

EDUCATION AND WORK HISTORY

17. Attending / Completed / Partial Grade: ____  School: __________________________
    University/Tech School: ___________________________________________________

18. Client can: Read - Yes / No  Write - Yes / No

19. Future Educational Plans: __________________________________________________

20. Source of Income: None / SAP / INAC Band / EI / Dependant / Student Loan / Other:
    __________________________________________________

21. Working at Present: Yes / No  Employer: _______________________________________
    Position: __________________________  Date Started: ______________________
    Supervisor: ________________________  Supervisor's Phone Number: __________

22. Past Jobs (Start with most recent)

<table>
<thead>
<tr>
<th>NAME OF EMPLOYER</th>
<th>LOCATION</th>
<th>POSITION</th>
<th>DATE STARTED</th>
<th>DATE FINISHED</th>
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</table>

24. Employment Prospects:  None / Looking / No offers / Not Looking
MEDICAL HISTORY

24. Medical Problems: __________________________________________________
Medication: ________________________________________________________
Physical Disabilities: _________________________________________________

25. Client is seeing / has seen / is not seeing: psychiatrist / psychologist / counsellor - YES / NO
   Name: ___________________________ Date: __________________________
   Reason: __________________________________________________________

26. Taken treatment for: alcohol / drugs / - gambling - YES / NO

27. Past Treatment:

<table>
<thead>
<tr>
<th>NAME OF FACILITY</th>
<th>MONTH</th>
<th>YEAR</th>
<th>COMPLETED YES/NO</th>
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   Drugs - No / Yes Type: _________________ Frequency: _______________
   Problem: Alcohol - Says No / Admits Drugs - Says No / Admits
   Gaming - Says No / Admits

29. Future Treatment: Will go / Is interested / Had planned to go / Is going / Refuses to go
   NAC / Larson / Calder / St. Louis
   Comments: _______________________________________________________

COURT HISTORY

30. Probation/Parole: No / Yes Probation/Parole Officer: ______________________
    Probation ends: ________________________________

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31. Outstanding: Criminal Charges / Warrants for arrest / Fines - **Yes / No**
   Where? __________________________  For what? __________________________

32. Presently on bail: **No / Yes**  Lawyer: _________________________________
   Where? __________________________  How much? $____________

**ARREST**

33. Arrest: Date: _________________  Time: _________  Place: _______________________

34. Client is/was in custody: **Yes / No**  How long in custody? _____________

35. Police arrived and made contact: At time of offence / Within one hour of offence / More than one hour after offence.

36. Circumstances of Arrest: ___________________________________________________

37. For what Charges?: _________________  Rights read: **Yes / No**  Warning: **Yes / No**

38. Condition of Client: Normal / Drinking / Drunk / Drugs / Sick / Sleeping / Other __________

39. Property Seized? **Yes / No**  Specify: _________________________________

40. **TESTS:** - Breathalyser / Blood / Urine / Hair / Handwriting / Polygraph / Lineup
   Other: _________________________________

41. Statement requested / Given

42. J.P. appearance? **Yes / No**  How long after arrest? _______________________

**SHOW CAUSE HEARING**

41. Reverse Onus? **Yes / No**  Bail Supervision: **Yes / No**

   **Mental Health Act** Remand: **Yes / No**  Date Ordered: ______________________

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**SURETIES**

<table>
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<tr>
<th>NAME</th>
<th>ADDRESS</th>
<th>TELEPHONE</th>
<th>CASH/PROP.</th>
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42.

43. Why do you think you should be released? _______________________________________

__________________________________________________________________________

__________________________________________________________________________

44. What do you plan to do / where will you live if you are released? _____________________

__________________________________________________________________________

__________________________________________________________________________

45. **CIRCUMSTANCES OF OFFENCE**

__________________________________________________________________________

__________________________________________________________________________

__________________________________________________________________________

__________________________________________________________________________

__________________________________________________________________________

__________________________________________________________________________

__________________________________________________________________________

(Revised April 2000)
March 20, 2002

Saskatchewan Justice
Public Prosecutions
P.O. Box 5000
La Ronge, SK S0J 1L0

Dear Sir/Madam:

Re: R. v. (**)
Section (xx) of the Criminal Code
Trial – (**), 2002, at (**)

This office represents the above-named individual. Would you please provide us with complete disclosure, in accordance with R. v. Stinchcombe, without limiting the generality of the foregoing, such disclosure will include the following:

1. All informations or Indictments reciting the charge or charges against the above-named accused;

2. The criminal record of the accused;

3. A written summary of the circumstances of the charge or charges;

4. A copy of any statement made by the accused to a person in authority and recorded in writing, or a copy of such a statement if it has been recorded by electronic means, and to be informed of the nature and content of any verbal statement alleged to have been made by the accused to a person in authority and to be supplied with any memoranda in existence pertaining thereto;

5. A list of anything that the Crown proposes to introduce as an exhibit, and where practicable, copies thereof;

6. Copies of any statements made by any person who the prosecutor proposes to call as a witness or anyone who may be called as a witness, and recorded in writing or, in the absence of a statement, a written summary of the anticipated testimony of the proposed witness, or anyone who may be called as a witness;

7. Any other material or information known to the Crown and which tends to mitigate the defendant’s guilt as to the offence charged, or which would tend to reduce his punishment therefore, notwithstanding that the Crown does not intend to introduce such material or information as evidence;
8. The opportunity to inspect the electronic recording of any statement made by a person whom the prosecutor proposes to call as a witness;

9. A copy of the criminal record of any proposed witness;

10. The name and address of any other person who may have information useful to the accused, or other details enabling that person to be identified;

11. A list of those witnesses the Crown intends to call at the Preliminary Inquiry or trial pending;

12. A copy of any notes made by any police officers in relation to the investigation of the case or cases against our client;

13. Any and all Continuation Reports from the RCMP file.

We would also ask that you continue to disclose the items as above provided, as they become known to you.

Please be advised that we do not require second copies of any material already provided to us in disclosure by the police.

If providing any of the foregoing is subject to any legal privilege or limitation, please advise that your disclosure is so limited.

Yours truly,

NORTHERN LEGAL AID

PER:

(**)

(**)
26 January 1993

Public Prosecutions
Saskatoon Prosecution Unit
904, 224 – 4th Avenue South
SASKATOON, Saskatchewan
S7K 2H6

ATTENTION: Mr. (__________) and Ms. (__________)

Dear Ms. (__________) and Mr. (__________):

RE: R.v. (________________) et al

As a result of your choice to proceed by way of Direct Indictment, I will require a significant amount of additional disclosure which would have come out through the conduct of a Preliminary Inquiry. Please provide me with the following additional disclosure:

1. Copies of original Police notes of all officers involved in the investigation, including the notes of the following Police Officers:
   a) Cst. (__________)  
   b) Cst. (__________)  
   c) Sgt. (__________)  
   e) Chief (__________)  
   f) Insp. (__________)  

2. Witness statements or summaries of the evidence expected to be given by the following witnesses, all of whom appear on the list of witnesses provided:
   a) (_____________)  
   b) (_____________)  
   c) (_____________)  

3. A list of the names of all officers who comprise the present (city or town) Task Force;

4. Personnel, employment and professional records of all officers involved in the Task Force;

5. It has been suggested that Constable (__________) had medical and mental health problems prior to, during and after the conduct of this investigation. Please confirm whether this is correct and, if so, provide copies of all medical and mental health records in relation to Constable (__________)..

6. A list of all persons contacted by the (city or town) Task Force and another list confirming all persons contacted in addition to the Contact List provided previously;
January 26, 1993

7. A summary of contacts with all persons in connection with this investigation, including:
   a) The purpose for which they were contacted;
   b) When they were contacted;
   c) What information was requested of each of them;
   d) What information was provided by each of them;
   e) Copies of all correspondence sent to or received from these contacts;

Without restricting the generality of the foregoing, I request this information in connection with the following individuals:

8. Police Searches – the following additional information is required as disclosure:
   a) List of all buildings examined to determine “the place” and their location;
   b) Building plan and diagram of the (city/town) Police Station;
   c) A list of what each photo taken depicts and, where it is not readily apparent from the photo itself, the relevance of the item photographed;
   d) Confirmation as to what unexposed film was later developed by the police and, if so, confirmation as to what the developed pictures show;
   e) A list of what is actually contained on each video which has been seized and, if any are considered relevant to this case by the Crown, the relevance of those videos;
   f) The reasons for the Police seizing each other additional item and the relevance of each of those items to this case;

9. Medical Reports – Complete medical history of all child complainants;

10. School Records – copies of report cards and any other school records of all child complainants;

11. Social Services – Details of involvement by the Department of Social Services in connection with the families of any of the child complainants;

12. Mental Health – Details of any Mental Health involvement in connection with any of the child complainants;

13. History of Care of the Children – a list of who has been involved in the care of each of the child complainants prior to the date they were cared for by the (__________);

14. Mental Health – Care-Givers – Details of Mental Health involvement in connection with any of the persons who were involved in the case of the child complainants;

15. Criminal Records – copies of criminal records of all Crown witnesses and of all persons who were involved in the care of the child complainants;
16. MacNeill Clinic:
   a) Professional qualifications of each person involved with the child complainants;
   b) A list of all interview dates and times (including the start and end times of such visits);
   c) Copies of all notes prepared by those involved in the treatment of the child complainants, including details as to what was said to the child complainants or their families at any meetings held and what approach was taken by the persons involved in interviewing the child complainants;
   d) Treatment notes of (name)
   e) Copies of all notes, and treatment notes, to date;
   f) Copies of missing pages from treatment notes (based on numbering system placed on the pages, the page numbers listed here are missing);

17. Court Orientation:
   a) The training of the person conducting this court orientation;
   b) The length of time of each session;
   c) Copies of any notes prepared in connection with conduct of these sessions;

18. Expert Witnesses – a detailed list of all contacts in connection with the expect witnesses and a summary of all information as requested in paragraph 7 of this letter, event if such information is not intended to be introduced as evidence at the trial.

   The following additional information is also requested:
   a) Copies of any notes made by these professional witnesses;
   b) Details of the four day lecture conducted by Dr. (____________) with the staff of MacNeill Clinic on October 27 to October 30, 1992;
   c) Details of the meeting with Dr. (____________) on September 21, 1992;

19. Additional miscellaneous disclosure:
   a) Copy of Psychiatric Assessment of (name) conducted after his arrest on October 4, 1991;
   b) Copy of Jim (___________)'s notes regarding the complaint from (name) made on September 30, 1991;
   c) Details of comment in notes of Cst. (______________) that information on cult activity was surfacing on April 14, 1992;
   d) Details of method of investigation used by Cst. (___________), Cpl. (__________) and all members of (city/town) Task Force, in connection with investigation of complaints made, and in particular, method of interview of witnesses (particularly child complainants);
January 26, 1993

e) Details of meetings of Cpl. (__________) with Inspector (__________), Sgt. (__________) and Cst. (__________) on March 12, 1992;

f) Details of meeting Cpl. (__________) with (name) and (name) on March 17, 1992;

g) Copy of page 1 of letter regarding (__________), page 2 of which letter indicates that (__________) it is from (name);

h) Details of allegation involving (name) that one of their children was sexually assaulted by an intruder on June 3, 1992, and details of any follow-up investigation;

i) Details of any other investigations involving Ms. (__________) and confirmation of present status of this matter;

j) Details of meeting involving Insp. (__________) and the Crown Prosecutors in Saskatoon on January 21, 1992;

k) Copy of report by Insp. (__________) to Saskatchewan Police Commission on February 20, 1992;

l) Minutes of December 9, 1992, with parents of child complainants and Sgt. (______);

m) List of any other tips received by Police involving this matter and if so, what follow-up investigations were done in connection with each tip;

n) Copies of all investigation notes and Police Reports in connection with allegation by (name) of physical and sexual assault upon her by (name).

This letter acknowledges receipt of disclosure referred to in your letter of January 21, 1993, and I will indicate to you the other additional disclosure required, once I have had an opportunity to review the most recent disclosure in some detail.

Yours early attention to providing this disclosure would be appreciated, so as to enable me to properly represent my client and make full answer and defence in connection with the charges laid against him.

Yours truly,

(__________________)
Staff Solicitor

ab/mw
The purpose of this paper is to determine some of the limitations counsel must abide by in their addresses to juries and the procedures that may be adopted to correct irregularities in addresses.


“There is no doubt that it is improper for counsel, whether for the Crown or the defence to express his own opinion as to the guilt or innocence of the accused.”

Rand, J, stated at 270:

“It is difficult to reconstruct in mind and feeling the courtroom scene when a human life is at stake; the tensions, the invisible forces, subtle and unpredictable, the significance that a word may take on, are sensed at best imperfectly. It is not, then, possible to say that this reference to the Crown's action did not have a persuasive influence on the jury in reaching their verdict. The irregularity touches one of the oldest principles of our law, the rule that protects the subject from the pressures of the executive and has its safeguard in the independence of our Courts. It goes to the foundation of the security of the individual under the rule of law.

It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction; it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented; it should be done firmly and pressed to its legitimate strength, but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be sufficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.”

Locke, J. stated (at 271 - 3),

“Upon the third question, I have this to say. It has always been accepted in this country that the duty of persons entrusted by the Crown with prosecutions in criminal matters does not differ from that which has long been recognized in England.

In *R. v. Thursfield* (1838), 8 Car. & P. 268, 173 E.R. 490, counsel for the Crown stated what he considered to be his duty in the following terms: "That he should state to the jury the whole of what appeared on the depositions to be the facts of the case, as well those which made in favour of the prisoner as those which made against her, as he apprehended his duty, as counsel for the prosecution, to be, to examine the witnesses who would detail the facts to the jury, after having narrated the circumstances in such way as to make the evidence, when given, intelligible to the jury, not considering himself as counsel for any particular side or party.”

---

29 This paper was originally prepared and delivered by Morris P. Bodnar, Q.C. some years ago. In 2002, it has been edited for citation conformity only.
Baron Gurney, who presided, then said: "The learned counsel for the prosecution has most accurately conceived his duty, which is to be assistant to the Court in the furtherance of justice, and not to act as counsel for any particular person or party."

An article entitled "The Ethics of Advocacy", written by Mr. Showell Rogers, appears in 15 L.Q. Rev. 259, in which the cases upon this subject are reviewed and discussed. Speaking of the principles above referred to, the author says: "Any one who has watched the administration of the criminal law in this country knows how loyally - one might almost say how religiously - this principle is observed in practice. Counsel for the Crown appears to be anything rather than the advocate of the particular private prosecutor who happens to be proceeding in the name of the Crown. When there is no private prosecutor, and the proceedings are in the most literal sense instituted by the Crown itself, the duty of prosecuting counsel in this respect is even more strictly to be performed."

These are the principles which have been accepted as defining the duty of counsel for the Crown in this country.

In Archbold's Criminal Pleading, Evidence & Practice, 33rd ed., p. 194, the learned author says that "prosecuting counsel should regard themselves rather as ministers of justice assisting in its administration than as advocates".

It is improper, in my opinion, for counsel for the Crown to express his opinion as to the guilt or innocence of the accused. In the article to which I have referred it is said that it is because the character or eminence of a counsel is to be wholly disregarded in determining the justice or otherwise of his client's cause that it is an inflexible rule of forensic pleading that an advocate shall not, as such, express his personal opinion of or his belief in his client's case.

In an address by the late Mr. Justice Rose, which is reported in 20 C.L.T. 59 at p. 62, that learned Judge, referring to Mr. Rogers' article, pointed out a further objection to any such practice in the following terms: "Your duty to your client does not call for any expression of your belief in the justice of his cause.... The counsel's opinion may be right or wrong, but it is not evidence. If one counsel may assert his belief, the opposing counsel is put at a disadvantage if he does not state that in his belief his client's cause or defence is just. If one counsel is well known and of high standing, his client would have a decided advantage over his opponent if represented by a younger, weaker, or less well known man."

In my opinion, these statements accurately define the duty of Crown counsel in these matters."

The above statements were adopted by McKinnon, C.J.N.S., in Regina v. Turvey, 1 N.S.R. (2d) 360, 9 C.R.N.S. 212, [1970] 4 C.C.C. 146 (C.A) at 152 to 154.

In Pisani v. The Queen, [1971] S.C.R. 738, 1 C.C.C. (2d) 477, 15 D.L.R. (3d) 1, Laskin, J. at Page 478 summarized the reasons for judgment in Boucher v. The Queen as follows:

"The reasons for Judgment given separately in Boucher by Kerwin, C.J.C., Rand, Locke and Cartwright, JJ., amply point up the obligation of Crown counsel to be accurate, fair and dispassionate in conducting the prosecution and in addressing the jury. Over-enthusiasm for the strength of the case for the prosecution, manifested in addressing the jury, may be forgivable, especially -when tempered by a proper caution by the trial Judge in his charge, where it is in relation to matters properly adduced in evidence. A different situation exists where that enthusiasm is coupled with or consists of putting before the jury, as facts to be considered for conviction, matters of which there is no evidence and which come from Crown counsel's personal experience or observations. That is the present case."

Revised June 2006

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“It is the duty and right of counsel to indulge in all fair argument in favor of the right of his client; but he is outside of his duty and his right when he appeals to prejudice irrelevant to the case. Properly, prejudice has no more sanction at the bar than on the bench. But an advocate may make himself the alter ego of his client and indulge in prejudice in his favor. He may even share his client's prejudices against his adversary as far as they rest on the facts in his case. But he has neither duty nor right to appeal to prejudices, just or unjust, against his adversary, de hors the very case he has to try. The very fullest freedom of speech, within the duty of his profession, should be accorded to counsel; but it is license not freedom of speech to travel out of the record, basing his argument on facts not appearing, and appealing to prejudices irrelevant to the case and outside of the proof.”

Improper addresses do not necessarily mean that new trials will be granted on appeal. If the improprieties are such that an unfair trial has not occurred then a new trial will not be granted. Laskin, J. stated in Pizani, supra (at 478),

“I do not consider that the familiar observation or reminder to the Jury that they alone are judges of the facts and that they may disregard any comments, whether of the trial Judge or of counsel, on the facts in evidence, can meet a situation where Crown counsel, who addresses the jury last, puts extraneous prejudicial matters to the jury as if such matters were part of the record of evidence.

Of course, there can be no unyielding general rule that an inflammatory or other improper address to the jury by Crown counsel is per se conclusive of the fact that there has been an unfair trial and that a conviction thereat cannot stand. The issues in a case and the evidence that is presented are highly relevant in this connection, as is the supervision exercised by the trial Judge in relation to the addresses of counsel and in the course of his charge.”

The impropriety must bear directly to the central issue of the case and be so prejudicial in respect of that issue as to deprive the accused of his right to a fair trial. See Pizani, supra at 478-479.

Also, it appears that the improprieties may in some circumstances be corrected by the trial Judge. See:

The Queen v. Maruska (1981), 20 C.R. (3d) 168 (Que. S.C.)
The Queen v. Lappin (1976), 40 C.R.N.S. 77 (Ont. C.A.)
The Queen v. Roberts (1973), 14 C.C.C. (2d) 368 (Ont. C.A.)
The concerns the courts have shown may be categorized into the following areas:

(a) inflammatory statements;
(b) personal opinions of counsel;
(c) reference to penalty;
(d) misrepresenting facts;
(e) referring to facts not proven in evidence; and
(f) quoting from decided cases.

(a) Inflammatory Statements

For an inflammatory statement to result in a new trial, it must bear "so directly on the central issue in the case" and be "so prejudicial in respect of that issue, ...[so] as to deprive the accused of his right to a fair trial." Pizani, supra, at 478 - 479.

To deal with inflammatory statements it is best to give examples of what courts have considered to be such statements that would warrant new trials and those that did not so warrant. It should be noted that in some cases the inflammatory statements appear in combination with other improprieties, resulting in new trials.

In Dunn v. The Queen, [1981] C.A. 201, 64 C.C.C. (2d) 253 (Que. C.A.) the prosecutor called the accused a "murderer" and a "shameless liar" while also expressing his own opinion on the facts and asking the jury not to give the accused the benefit of doubt. The trial judge did not correct the prosecutor's comments. A new trial was ordered.

In Dupuis v. The Queen (1967), 3 C.R.N.S. 75 (Que. C.A.) the Crown had inflamed the jury by making unfavourable reflections on the accused's character when unsupported by evidence, by expressing his own opinion and by making sarcastic attacks upon the accused. He had "sought to render the appellant ridiculous and odious in the jurymen's eyes. For this purpose he employed sarcasm, invective, and all the resources of a dangerous eloquence" (at 83). The judge's address had not corrected the Crown's remarks. The court concluded it was unable to say that the result would necessarily have been the same if the question of the appellant's guilt had been properly
put to the jury. Also, the Court said that the Crown's duty was to assist the judge and jury in dispensing justice and therefore requiring moderation and impartiality without appealing to passions or going beyond what the evidence revealed.

In *The Queen v. Turvey*, 1 N.S.R. (2d) 360, 9 C.R.N.S. 212, [1970] 4 C.C.C. 146 (C.A.) the Crown had told the jury "that there is no possible way you can justify your existence and sit in that box without finding this man guilty." A new trial was ordered. The employing of inflammatory language reference to a statement not in evidence, and reference to a proper verdict being one of guilty denied the accused of a trial according to law.

Where the prosecutor in a murder trial said "if all those jilted lovers did what the accused did the streets would be red with blood" and indicated to the jury that it had to account to the community, an accused's appeal was not successful in light of the trial judge's fair and proper address: *The Queen v. Roberts* (1973), 14 C.C.C. (2d) 368 (Ont. C.A.).

On a charge of murdering a police officer the Crown suggested that in neighbouring Detroit, the society was "reasonably sick" with the only way of protecting Canada's society from similar decay was law and the police officer "a man's best friend". He also said that the defence was an insult to the jury's intelligence. The comments were held not to be so lacking in moderation so as to have inflamed the jury or prejudiced a fair trial: *The Queen v. Rosik*, [1971] 2 O.R. 47, 13 C.R.N.S. 129, 13 Cr. L.Q. 224, 2 C.C.C. (2d) 351, affirmed [1971] 2 O.R. 89n, 14 C.R.N.S. 400, 2 C.C.C. (2d) 393n (Can.).

It is not inflammatory for the Crown to point out inferences the Jury can draw in assessing credibility of witnesses: *The Queen v. Desjarlais* (1979), 1 Sask. R. 360, (Sask. C.A.).

Statements by the Crown that if the accused's version of the circumstances was accepted by the jury then they must conclude that the Crown witnesses perjured themselves was held not to be a ground for setting aside a conviction: Leblanc v. *The Queen* (1927), 42 Que. K.B. 503, 49 C.C.C. 207 (Que. C.A.) The validity of this decision may be in doubt in light of the Supreme Court decision in *The Queen v. Nadeau* (1985), 42 C.R. (3d) 305 where the Court said a judge erred in law when he instructed the jury to choose the more persuasive version of facts presented. Lamer, J. said (at 310):
“Moreover, the jury does not have to choose between two versions. It is not because they would not believe the accused that they would then have to agree with Landry's version. The jurors cannot accept his version, or any part of it, unless they are satisfied beyond all reasonable doubt, having regard to all the evidence, that the events took place in this manner; otherwise, the accused is entitled, unless a fact has been established beyond a reasonable doubt, to the finding of fact the most favourable to him, provided of course that it is based on evidence in the record and not mere speculation.”

The same should apply to a prosecutor addressing a jury.

The Ontario Court of Appeal has held that choosing between two versions of evidence is a misapplication of the principle of proof beyond a reasonable doubt: *The Queen v. P.M.* (1983), 32 C.R. (3d) 11.

(b) Personal Opinions of Counsel

In *Boucher, supra*, Cartwright, J. pointed out that, "There is no doubt that it is improper for counsel, whether for the Crown or the defence to express his own opinion as to the guilt or innocence of the accused." Kerwin, C.J.C. summed up the Crown prosecutor's position as follows:

"It is the duty of Crown counsel to bring before the court the material witnesses as explained in *Lemay v. The King*, 14 C.R. 89, [1952] 1 S.C.R. 232, 102 C.C.C. 1, 1952 Can. Abr. 194. In his address he is entitled to examine all the evidence and ask the jury to come to the conclusion that the accused is guilty as charged. In all this he has a duty to assist the jury, but he exceeds that duty when he expresses, by inflammatory or vindictive language, his own personal opinion that the accused is guilty."


Even though personal opinions should not be expressed, some substantial wrong will have to be shown before a conviction is set aside: *The Queen v. Moke*, 12 Alta. L.R. 18, [1917] 3 W.W.R. 575, 28 C.C.C. 296, 38 D.L.R. 441 (Alta. C.A.). Also see *The Queen v. Murphy* (1981), 43 N.S.R. (2d) 676, 81 A.P.R. 676, 58 C.C.C. (2d) 338 (N.S.S.C.).

A judge may correct the wrong created by the prosecutor in expressing his opinion by telling the jury to disregard the prosecutor's opinion: *The Queen v. Adams* (1978), 30 N.S.R. (2d) 47, 49 A.P.R. 47 (N.S. C.A.). Also see *The Queen v. Boyko* (1975), 28 C.C.C. (2d) 193 (B.C.C.A.).
(c) Reference to Penalty
Where defence counsel repeatedly referred to the seriousness of the offence and the penalty and made other errors, the court considered the reference to penalties as one fact in ordering a new trial. All the errors by defence were so misleading that the judge could not correct them in his charge:


In *The Queen v. Darwin* (1973), 13 C.C.C. (2d) 432 (B.C.C.A.) where defence counsel stated that the jury should not send his client "away for life" the Court of Appeal refused to order a new trial. The trial judge had not instructed the jury to disregard the statement. This was held to be a non-reviewable discretionary decision.

In *The Queen v. Schwartz* (1978), 25 N.S.R. (2d) 335, 40 C.C.C. (2d) 161, 36 A.P.R. 335 (N.S.C.A.) the trial judge did instruct the jury to disregard a statement by defence counsel that arson carried a maximum 14 year term. It was held that no miscarriage of justice had occurred.

(d) Misrepresenting Facts
Counsel should be most cautious not to mislead juries by misrepresenting facts since such behaviour will result in a new trial being granted.

In *Clarke v. The Queen*, [1981] 6 W.W.R. 417, 32 A.R. 92 (sub nom. *R. v. Clarke*), 63 C.C.C. (2d) 224 (Alta. C.A.), leave to appeal to S.C.C. refused (1981), 63 C.C.C. (2d) 224n, 34 A.R. 270n, 41 N.R. 445 (S.C.C.), the Crown referred to the accused's blackouts being disclosed "all of a sudden" or "for the first time" two months after the murder. In fact, the blackouts had been disclosed to police in earlier statements ruled inadmissible at trial. The jury was left with the impression that the blackouts were a concoction. A new trial was ordered.

The Crown left the jury with the impression that the accused would be released in a few days if found not guilty by reason of insanity. The trial judge did not correct this. A new trial was ordered: *The Queen v. St. Louis* (1973), 24 C.R.N.S. 77 (Que. C.A.).
Where the Crown corrects an incorrect statement of fact by withdrawing it in the presence of the jury, it was held that the jury was not misled. The judge struck the offending remarks from the record: *The Queen v. Green* (1972), 20 C.R.N.S. 340, 5 N.S.R. (2d) 41, 9 C.C.C. (2d) 289 (N.S.C.A.).

In *The Queen v. Hay* (1982), 30 C.R. (3d) 37, 70 C.C.C. (2d) 286, 17 Sask. R. 252 (Sask. C.A.) the Crown in its address to the jury had implied that the accused and the registered owner of a car were one and the same when the Crown had evidence that could show that the accused and the registered owner were different persons. The remarks of Crown counsel were therefore improper and unfair. This combined with errors in the judge's charge resulted in the accused being "prejudiced in his defence" with a new trial being ordered.

(e) Referring to Facts Not Proven in Evidence

It is the right of an accused to be tried and to have his guilt or innocence decided upon the sworn evidence admitted at trial alone without being affected or influenced by statements of fact by the prosecutor: *Maxwell v. D. P. P.*, [1935] A.C. 309, 24 Cr. App. R. 152.

In *Boucher, supra*. Rand, J. stated (at 8):

“It is the antithesis of the impression that should be given to them: they only are to pass on the issue and to do so only on what has been properly exhibited to them in the course of the proceedings. It is difficult to reconstruct in mind and feeling the courtroom scene when a human life is at stake; the tensions, the invisible forces, subtle and unpredictable, the significance that a word may take on, are sensed at best imperfectly. It is not, then, possible to say that this reference to the Crown's action did not have a persuasive influence on the jury in reaching their verdict.”

Where a prosecutor in his address made statements of fact which were not supported by the evidence and which related directly on the question of the guilt of the accused, the court held that the defence was substantially prejudiced and directed a new trial: *R. v. Turvey, supra*.

In *Dupuis v. The Queen, supra*, the Crown, among other things, made unfavourable reflections on the accused's character when this was unsupported by the evidence. This was one factor considered in ordering a new trial especially when the trial Judge had failed to correct the improprieties of the crown.
In England, a resolution of the judges, November 26, 1881: *The Queen v. Shimmin* (1682), 15 Cox 122 states:

"In the opinion of the judges it is contrary to the administration and practice of the criminal law as hitherto allowed, that counsel for prisoners should state to the jury as alleged existing facts matters which they have been told in their instructions, on the authority of the prisoner, but which they do not propose to prove in evidence."

The question arises as to whether counsel can comment on evidence not called by other counsel. Arthur Maloney in ‘*Addressing the Jury in Criminal Cases*’: at 385 to 386, said the following:

“May you comment on a statement by the accused not tendered in evidence by the Crown? I have frequently been disappointed by the Crown's failure to offer evidence of an exculpatory statement made by a client to the investigating police officers. The decided cases indicate that the Crown is quite within its rights when it decides not to tender a statement of the accused. It seems that the matter is within the discretion of the Crown. Defence counsel may not prove it because to do so would be to offend against the rule prohibiting the use of self-serving evidence. Has it ever occurred to you, however, that you may have the right to mention in your address to the jury that such a statement was made?

“It is my belief that you have every right. You certainly have the right in your examination of the police officers to prove the fact that a statement was made, although you are prohibited from bringing out its contents. And, in your address to the jury, there can be no impropriety in reminding them that the production of the statement rested solely in the discretion of counsel for the Crown and that, no matter how strongly you may wish to inform them of what the accused said at the moment of his arrest, the law prevents you from proving it. In the days when the accused was not permitted to testify, leading counsel, as the records of their speeches show, were always heard to lament the rule which prevented them putting their client in the witness box to explain the evidence against him. I can see little difference between the two situations."

Also, in *The Queen v. Henry Kinakin*, (unreported, February, 1985, Court of Queen's Bench, Saskatoon), Mr. Justice I. Grotsky ruled that defence counsel may comment on the failure of Crown counsel to call co-accused on the armed robbery trial where the sole defence was one of identity.

(f) Quoting from Decided Cases

Counsel may state a principle of law which he deems applicable insofar as it is necessary to make the defence clear. Extensive reference to cases does nothing but confuse the jury: *Cashin, supra.*

Reference by Crown counsel to a case with similar facts where a conviction was upheld was held to be highly improper and a new trial was ordered: *Richard v. The Queen (No. 1)* (1957), 126 C.C.C. 255 (N.B.C.A.).