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**Address to the International Symposium on
the Prevention and
Control of Financial Fraud
Beijing, China, October 21, 1998**

By the Honourable Chief Justice Bryan Williams
Supreme Court of British Columbia

I

Mr. President, etc. I am pleased to have this opportunity as a Canadian to address this distinguished international meeting.

Canadians like other countries have their own characteristics and idiosyncrasies. I am reminded of a United Nations story which may capture these differences between countries - it involves a teacher teaching the sons and daughters of diplomats at the United Nations. She asked each pupil to write an essay on elephants.

The American pupil said "elephants and how to make money out of them".

The British student said "elephants and how to build an empire with them".

The German student said "elephants and how to make them march".

The French student said "elephants and their sexual activities".

The Canadian student said "elephants - are they a national or provincial responsibility?"

II

As international business and commercial transactions become more and more complex and more regulated, technology becomes more difficult to understand by the average businessman and regulator and so judgment calls by professionals, (accountants and lawyers etc.), become looser and more discretionary, with the

result that a clever commercial criminal can get away with much more and for a much longer time now than he ever could before.

Commercial crime both nationally and internationally has become one of the biggest problems facing all nations, and a huge problem for our justice system in Canada.

Finding the facts to establish a crime is itself a daunting task, but then the prosecuting authority must

- (a) find the criminal or criminals wherever they may be,
- (b) determine which law should apply and
- (c) in which venue the trial should take place before the real problem of evidence even begins.

My task today has nothing to do with the difficult problems I have just referred to. My topic is titled "Financial Fraud Trials and Special Procedures" or - what happens after you have found the crime, the criminals, the law and the venue.

In the world of financial fraud, truth is such a valued commodity, it is only paraded out on rare occasions - these players often do have a conscience but it is a little thing inside their bodies which feels bad, when all the other parts feel so good.

III

Fraud trials whether civil or commercial in Canada are prepared and tried in generally the same manner as any other type of trials except for the discreet problems which arise and must be dealt with because of the nature of fraud:

Such trials call for a judge with a fairly extensive grounding in commercial experience - perhaps even more specific - say the stock market or the real estate market, etc.

Unlike many trials there are usually hundreds, thousands or in some cases millions of documents which have to be categorized, organized, and if relevant disclosed and produced at trial.

Detailed particulars with respect to the indictment must be given and understood.

Special attention must be paid to wire tape evidence and document seizure.

Where jury trials are called for these, problems can be multiplied by ten.

Case Management - It is imperative in almost all cases of commercial fraud the judge appointed to try the case should proactively manage it.

A. As early as possible the judge should call a pre-trial conference whether by telephone by video or face to face. At this first conference all of the issues should be canvassed.

The date when the indictment is issued.

Commitments from both counsel on things being done by a certain deadline.

The date of the next case management conference and what is to be done for that conference.

B. It is important that the judge prepare a memorandum reciting what has happened at that conference and what commitments were made by whom for the next one so that it can be used as an agenda at the next conference and so he or

she knows they will be required to deal with whether or not they have fulfilled their commitments.

I should say here that although under our law the accused cannot be required to commit to anything, most counsel knowing that the trial has to go ahead and be done with, will cooperate as much as possible, and if not, at least the conference has the effect of ensuring that the Prosecution is organized. That memo also provides a record for future purposes.

C. The Prosecution must be required to (and usually will cooperate) in providing particulars of the charges. If the Prosecution doesn't cooperate the defence should be urged to make an application.

D. Disclosure - this is one of the toughest parts of all. The Prosecution must be asked whether they have made full disclosure of everything relevant in their possession both for and against the accused except for privileged or confidential documents. The Prosecution may answer "yes" but the next question is have the police made full disclosure to the Prosecution. In some cases there are stacks of documents. Has somebody, somewhere been through all of those documents and therefore able to tell the court that there is nothing more of relevance therein. If the Prosecution is not willing to go through the labourious selection process, then perhaps the defence will have to do so on their own.

Another problem which crops up in disclosure is selective investigation. The Prosecution may produce documents from, for example only one brokerage house used by an issuer of securities, which would lead to the inference that the accused is guilty. However the accused may have dealt with 10 other brokerage companies and if those files had been seized there may have been nothing indicative of guilt. Should the Prosecution in fairness respond to a defence request that other

brokerage house records be looked at, or should the defence be left to subpoena those brokerage houses and documents themselves?

E. Purchased Evidence

What happens when the Prosecution relies upon a co-conspirator to testify in consideration for a promise of no prosecution or a lower sentence? Well, since the Prosecution is required to disclose everything relevant to an issue in the case found in its possession it follows that it must disclose any material it has bearing on the credibility of this witness. The details of the cooperation received and the negotiations required to get the testimony must be disclosed. What happens where the co-conspirator has files from other cities relevant to credibility? Even where the Prosecution is willing sometimes police forces from elsewhere will not produce their material, what then? What if in Canada or what if in other country.

It is obvious that these along with all of the other disclosure issues must be dealt with early in the case - that's the key!.

F. Admissibility Issues

It is very important that questions of admissibility be dealt with wherever possible before the trial commences. We have in Canada as there are in other jurisdictions two processes I wish to comment on. The preliminary hearing and the *voire dire*.

The preliminary hearing is a "trial run" or "dress rehearsal" by the Prosecution which has the effect of showing the defence what the Prosecution's case is. Usually the Prosecution witnesses are called and the defence has an opportunity to cross examine. A record of the preliminary hearing is available to counsel for the trial. Here since the defence knows what the Prosecution's evidence is (but isn't required to adduce any of its own) they have an opportunity to challenge on the basis of

admissibility and that is done through a procedure known as the "voire dire". The voire dire is a pre-trial or trial within a trial hearing for the specific purpose of determining admissibility. It may held and is often held with respect to the admissibility of seized documents to test whether the seizure was proper and therefore whether those documents are admissible. This is also common in respect of wire tap evidence which was obtained *ex parte* on the basis of affidavit material that can later be challenged before the trial judge. Issues such as informed consent or privilege on seized documents, or the accuracy of the affidavit are there brought in issue.

G. Trial Scheduling

All trials are difficult to schedule. Lengthy, complex trials take even more time and difficulty in scheduling.

I begin by asking Prosecution Counsel about two to three weeks before the trial to prepare a list of witnesses, the order in which the witnesses will be called, a time estimate of how long the direct examination of that witness will take, documents, etc.

This estimate is sent to the defence, who are asked to provide a time estimate on the length of time for cross examination of each witness, what objections they plan to take at trial, if any, on the admissibility of the evidence and if they are prepared to disclose what evidence they propose to call and how long it will take. This is done without any commitment on the part of counsel.

The total time plus an allowance for contingencies establishes a reasonable estimate for the length of the trial.

It is important that in all of the pre-trial and case management procedures the control of the process rest with the Court, and not left to counsel alone.

H. The Trial

I don't propose to deal at length with jury trials although under our system the accused has a right to elect a trial by jury on any offence which has a maximum penalty of 5 years or more. This will usually include a fraud trial. There is no right in the Prosecution to apply to strike the jury and if the Prosecution were to go by direct indictment there would be no right in the accused to strike the jury.

Jury trials in complicated commercial fraud matters can turn out to be a nightmare for everyone including the jury but since our *Charter* guarantees the right to trial by jury there is no answer to how this problem can easily be handled. It is simply there. Fortunately very few commercial fraud cases are tried before a jury.

Those tried by a judge alone are handled like most other trials, I try to have the Prosecution give a detailed rather than generalized opening address which sets the tone for the trial and gives us a bit of road map. It is important that the documents be organized and well organized into books, either in a chronological or some other sensible order. Certain things to think about are real time reporting, a document index on computer disk, etc. etc.

After the trial is completed it is my practice to adjourn the trial until a later date when judgment may be given in the presence of the accused. The judgment written out but read it orally.

I. Sentencing

Sentencing in commercial fraud cases or the question of exemplary damages in civil cases differentiates these cases from others.

Many offenders are stock brokers, accountants, lawyers and business men with a good reputation in the community who perhaps yielded to temptation but have no criminal record.

Typically these offenders are middle aged or older and often not in good health.

Many are offenders who have never done anything wrong before and are unlikely do it again.

On the other hand, while sending drug addicts to jail seems to have little deterrent effect on others, sending stock brokers and lawyers to jail certainly does. Deterrence is very effective and so in most cases where the crime is a devious one, a serious one, a lot of money involved, a lot of profit made, apart from any order that may be made disgorging profits, a jail term is certainly appropriate.

Well, I do hope that what we do in my province of British Columbia and how we have learned to handle these things for our purposes may be of some use to others, but in this world of fraud and justice,(not the same thing) and particularly international crime, we learn from each other and I would be most appreciative if anyone here wishes to ask any questions or make any comparisons with their own system and indeed when back home if they wish to send me any material they may have which would be helpful to us. I would appreciate it.

And now I will stop before I am accused of what Lord Bryon said of his mother in law:

She has lost the art of conversation but not alas the gift of speech.

Thank you.