

PRACTICE DIRECTION - COMPLEX CASES – HOW TO IDENTIFY AND MANAGE THEM (PC RULE 4 – Case Management)

Applicable Provincial Court Rule

- 4.1 When conducting a hearing or trial, the Court has power to make any order or direction in relation to the conduct of the case that would assist in ensuring that it is conducted fairly, reasonably and efficiently.

Practice Direction: Upon Crown and Defence identifying a case as complex at any stage of the proceeding, the presiding judge will schedule a pre-trial conference and direct that the Complex Case Pre-trial Report (Appendix “B”) or Focus Hearing Form 4.1A be completed.

Guiding Principles and Practice Directions

What May Identify a Case as Complex?

[1] A complex case is likely to have several of the features identified in **Appendix “A”** – “Identifying a Complex Case”. Creating a definition of a complex case is not a profitable approach.¹

[2] A determination that a case is “complex” for purposes of this Practice Direction is not an acknowledgement that the case is of sufficient complexity to qualify as exceptional for the purpose of adjudicating a s. 11(b) application under *Jordan*.²

Managing a Complex Case – First Principles

[3] The British Columbia Supreme Court has observed in the context of its pre-trial conference project how much our judicial system has changed as a reflection of the fact that “we live in a much more complicated and sophisticated society than existed 50 or even 30 years ago. The trial process reflects that increase in complexity and sophistication.”³

[4] The expeditious conduct of the trial and maintaining a focus on the real issues must be of interest to both Crown and Defence⁴. Aspirations toward more efficient and timely criminal justice processes must adhere faithfully to the fundamental principles of the criminal justice system: the presumption of innocence and the requirement that the Crown prove its case beyond a reasonable doubt in a fair and public trial before an independent and impartial decision maker.⁵

Meeting the Challenges – Making Better Use of Existing Tools

[5] The objective of making the management of complex cases in the criminal justice system more efficient and effective is well-served by judges, Crown prosecutors and Defence lawyers making better use of available mechanisms that have been designed for precisely this purpose. Dealing effectively with complex cases is a shared responsibility. Case management pre-trials, focus hearings, and, if agreed to by the judge, and where judicial resources allow, resolution conferences [SEE PARAGRAPHS 20 to 22 BELOW] are tools that can be employed to manage the challenges presented by the complex case. Some complex cases may be candidates for the appointment of a case management judge under section 555.1.⁶

[6] Rigorous and contextualized case management of complex cases is essential to avoid proceedings becoming unwieldy and protracted. The effectiveness of existing procedures can be enhanced and new approaches undertaken.

Complex Case Pre-trial conferences

[7] The purpose of pre-trial conferences, as described in section 625.1 of the *Criminal Code*, is to “promote a fair and expeditious hearing...” A pre-trial conference is: “...an important procedural step – it cannot be perfunctory – all participants must be prepared, organized and committed to the objectives of such a hearing.”⁷

[8] Pre-trial conferences ensure the court, crown counsel, defence counsel and accused focus on the case and its issues. PTC's can also be useful for focusing a client's attention on the issues.

[9] Complex Case pre-trial conferences should be on the record or a record created of the positions taken by parties. In some cases, all agreements will be noted on the Complex Case Pre-trial Report (Appendix "B") which has been filed by counsel. In most cases, further issues are raised and/or resolved at the pre-trial conference. Where the pre-trial is not conducted on the record, it is important that notes be kept and that a summary be circulated to the parties to confirm accuracy.

[10] A pre-trial conference provides an opportunity for the judge:

- to discuss with counsel the order of any applications to be made.
- to explore whether any application or applications the Defence is intending to bring will be determinative. If so, the court can explore whether trial dates should only be set once the application/applications are heard and decided.
- set deadlines for the proposed application/applications to be made and not made by the deadline(s) the focus will be on trial readiness.
- to explore the merits of Crown counsel drafting trial admissions for the Defence to review. ("The Crown, the party with the burden of proof and production in commencing a criminal trial, should...regularly advance matters for the defence to consider admitting...")⁸

[11] Lesage and Code noted that counsel for both the Crown and Defence are "under an ethical duty to make reasonable admissions of facts that are not legitimately in dispute." They said the court

...should encourage...efforts to frame reasonable admissions.

When the Defence fully admits facts alleged by the Crown, the

court has the power to require the Crown to accept a properly framed admission and to exclude evidence on that issue.⁹

[12] In relation to a complex case pre-trial conference it is expected that:

- Crown and defence counsel should have had discussions on substantive issues prior to the PTC.
- Assigned Crown and defence counsel shall be present at the pre-trial conference, except in unusual circumstances.
- Counsel attending a complex case pre-trial conference (whether assigned counsel or an alternate) must be informed and instructed about matters in issue in the case, must be able to identify and discuss those issues and any matters relevant to the orderly conduct of the trial or hearing, and must be able to make representations and decisions on behalf of the Crown or the accused as applicable.
- Unless otherwise directed by the judge, counsel will be permitted to attend the pre-trial conference by telephone or video link.
- The accused should be present at a complex case pre-trial conference and shall be present if self-represented.

Focus Hearings for Complex Cases

[13] Section 536.3 of the *Criminal Code* obliges Crown and Defence¹⁰ to provide the court (and each other) with a statement of issues and witnesses. “Focus hearings” are governed by section 536.4 and seek to “assist the parties” to identify the issues and witnesses for a preliminary inquiry. The judge is to “encourage the parties to consider any other matters that would promote a fair and expeditious inquiry.”

[14] Focus hearings can provide the opportunity to arrive at a reasonably accurate estimate of the time required for the preliminary inquiry by setting “reasonable

targets for the completion of each witnesses' evidence..." with the objective of completing the preliminary inquiry "at one continuous sitting without adjournments."¹¹

[15] A Complex Case focus hearing shall be on the record.

[16] A focus hearing provides the opportunity for the judge:

- To explore with counsel well ahead of the preliminary inquiry what issues are to be focused on and what witnesses are being sought.
- To explore if the Crown is examining in direct the witnesses being called.
- To explore if the Crown is intending to conduct the preliminary inquiry by using section 540(7) of the *Criminal Code* - what is often referred to as a "paper" inquiry¹² - and to deal with any issues arising out of the Crown seeking to proceed on this basis.
- To determine if committal will be in issue.

[17] Focus hearings for complex cases will be most effective if Crown and Defence have had substantive discussions prior to the focus hearing.

[18] In relation to a complex case focus hearing it is expected that:

- Assigned Crown and defence counsel shall be present at the focus hearing except in unusual circumstances.
- Counsel attending a complex case focus hearing (whether assigned counsel or an alternate) must be briefed on the file, informed and instructed about matters to be discussed at the focus hearing and able to make representations and decisions on behalf of the Crown or the accused as applicable.
- An accused who is not represented by counsel shall be present for the focus hearing.

- Unless otherwise directed by the judge, counsel will be permitted to attend the pre-trial conference by telephone or video link.
- Prior to attending the focus hearing, the requesting party must have filed Form 4.1 (identifying witnesses and issues) in Court at the time the preliminary inquiry was set, or as the Court directed.
- Any admissions of fact or agreements reached at a focus hearing shall be recorded in Form 4.1B by the Judge conducting the hearing, unless Form 4.1A suffices.

[19] A Judge conducting a COMPLEX CASE focus hearing pursuant to s. 536.4 of the *Code* may inquire as to:

- a) the identification and simplification of such issues as remain to be contested at the preliminary inquiry;
- b) the identification of witnesses to be heard at the inquiry;
- c) the identification of any special needs and circumstances of witnesses;
- d) the possibility of obtaining admissions and agreements so as to facilitate an expeditious, fair and just determination of the proceedings;
- e) the estimated duration of the preliminary inquiry proceedings;
- f) the advisability of fixing the hearing date, in the event that a hearing date has not been set for any reason;
- g) any application to be made at the preliminary inquiry pursuant to s. 540(7) of the *Code* and any issues arising out of the Crown decision to proceed on this basis including but not limited to:
 - i. procedure;
 - ii. a determination of what is “credible and trustworthy” evidence;
 - iii. leave to cross-examine;
 - iv. filing dates

- h) any other matter that may assist in promoting a fair, just and expeditious hearing; and
- i) the possibility of resolving the matter before trial.

Resolution Conference

[20] Resolution conferences may be available upon request by Crown and defence.

[21] Resolution conferences must be conducted by a judge other than the assigned trial judge. In single-judge locations, another judge will have to be brought in to conduct the resolution conference which creates logistical challenges.

[22] If resolution conferences are undertaken by any members of the Court at the request of Crown and Defence, Nova Scotia Supreme Court Practice Memorandum No. 7 “Resolution Conferences – Criminal Trials” should be used as a guideline for their conduct in Provincial Court.

Trial Management - Procedure

[23] Trial management should be, in the succinct words of Justice Casey Hill, “Realistically, and practically...a shared responsibility between the court and counsel.”¹³

[24] Justice Hill has identified other trial processes that may be subject to the exercise of judicial trial management: “scheduling, enforcing compliance with rules of court and procedure, setting time limits for oral argument, intervention to clarify evidence, to focus submissions, to prevent prejudicial or irrelevant evidence, to eliminate unnecessary evidence, to avoid repetitive or confusing questions by counsel or abuse of witnesses, and maintenance of civility.”¹⁴

[25] Active case management in complex cases may identify applications¹⁵ that are conducive to rulings in advance of the trial proper.¹⁶ Applications that may be best suited to early disposition include:

- disclosure;
- third party records;
- s. 11(b) *Charter* delay;
- wiretap admissibility;
- statements and confessions;
- search and seizure;
- similar fact;
- severance.

[26] Evidentiary issues will not always be appropriate for early pre-trial rulings because the relevant evidence may need to be led at trial, to contextualize the issues on the application.

[27] Applications will proceed most efficiently if “each party...clearly knows in advance of the application what is at issue, what evidence will be led, what arguments will be made and what case law will be presented.”¹⁷ Where written briefs have been filed on an application, the parties should not expect “the judge to allow the oral hearing to be anything more than an occasion to highlight concisely their arguments and answer any questions the court may have of them...” Applications should not be allowed to drag on.¹⁸

[28] Give the principle that court proceedings are presumptively open, in high profile cases, the Court and counsel should consider, proactively, issues relating to media such as access to exhibits through a media access protocol and/or order of the court.¹⁹ The “open court” principle, privacy, and fair trial rights will have to be addressed.

Trial Management – the Trial Judge

[29] Statutory courts “have implicit powers that derive from the court’s authority to control its own process.”²⁰ In the context of the criminal trial as an adversarial process with the trial judge, Crown and Defence all occupying specific well-defined roles, it is the court that

...bears responsibility for control of the trial process, achievement of a just result, and maintenance of respect for the administration of criminal justice. Avoidance of delay, efficient management of limited court time and resources...compliance with rules of court and judicial directions designed to promote trial fairness, minimizing inconvenience, establishing a professional and civil forum for trying a case without distraction or personal disputes, and encouragement of public respect for the process, all legitimize a trial judge’s authority to effectively manage a criminal trial.²¹

[30] Justice Hill has elaborated on what “judicial management of litigation” means in the 21st century:

Originally cast in terms of inherent authority to control the processes of the court and prevention of abuse of the process, it is today recognized that a trial judge has a duty to *manage* the trial process balancing fairness to the parties as well as efficient and orderly discharge of court process. Judicial management of litigation recognizes that "there is more at stake than just the interests of the accused". Management involves control, direction and administration in the conduct of a trial. This power,

settled within a broad discretion, relates to the entirety of the trial proceeding extending beyond the scope of pre-trial case management rules designed for "effective and efficient case management."²²

[31] A trial judge is no "mere arbiter allowing parties to conduct their case as they see fit."²³ The judge in a complex case will be actively engaged in the shared objective of ensuring an orderly and fair trial. This may mean using trial management powers to:

...place reasonable limits on oral submissions, to direct that submissions be made in writing, to require an offer of proof before embarking on a lengthy *voir dire*, to defer rulings, to direct the manner in which a *voir dire* is conducted, especially whether to do so on the basis of testimony or in some other form, and exceptionally to direct the order in which evidence is called...²⁴

[32] The judge should conduct periodic case management sessions during the trial as a stock-taking exercise on the progress of the trial, relevance of proposed witnesses, procedure to be followed, etc.²⁵

Unrepresented Accused

[33] Cases may be made complex where the accused is unrepresented either from the start of the trial or as a result of events that occur once the trial is underway. Lesage and Code recommended that:

Trial Judges should exercise their common law power to appoint *amicus curiae* in any long complex trial where the accused is unrepresented or chooses to be self-represented and where such

appointment is likely to assist in ensuring the fairness of the trial. Wherever possible, the appointment should be made at an early stage, to prevent delays of the trial. The *amicus* should generally be allowed to play an expanded role, including the examination and cross-examination of witnesses, whenever feasible.²⁶

[34] With or without an appointment of an *amicus*, the trial judge has a duty to provide “a measure of assistance” to an unrepresented accused “to the extent that this is possible and consistent with the judge’s role as an impartial decision-maker.”²⁷ An accused who is unrepresented does not have

...any special status before the Court. While the judge is bound to provide appropriate assistance, the scope of that assistance is limited to what is reasonable and does not extend to the kind of advice counsel would be expected to provide.²⁸

¹ This was the view expressed in the Lesage/Code Report of November 2008 where the authors noted that various definitions exist but did not attempt to develop a definition for the complex criminal case: Report of the Review of Large and Complex Criminal Case Procedures, page 5

² *R. v. Jordan*, 2016 SCC 27

³ Supreme Court of British Columbia Criminal Pre-Trial Conference Project Information Sheet, page 3

⁴ “It cannot be in the interests of any defendant for his good points to become lost in the welter of uncontroversial or irrelevant evidence.” Control and management of heavy fraud and other complex criminal cases – A protocol issued by the Lord Chief Justice of England and Wales – 22 March 2005.

⁵ Supreme Court of British Columbia Criminal Pre-Trial Conference Project Information Sheet, page 4

⁶ A case management judge may be appointed by the Chief Judge on application by the Crown, the accused or on the Chief Judge's own motion. (section 551.1, *Criminal Code*)

⁷ *Judicial Pre-Trial Conferences Scheduled for Tuesday, October 11, 2016 (Re)*, 2016 ONSC 6398, para. 12

⁸ *Judicial Pre-Trial Conferences Scheduled for Tuesday, October 11, 2016 (Re)*, *supra*, para. 24

⁹ Lesage and Code, Report of the Review of Large and Complex Criminal Case Procedures, Recommendation 18

¹⁰ The obligations under section 536.3 of the *Criminal Code* do not apply to unrepresented accused.

¹¹ Lesage and Code, Report of the Review of Large and Complex Criminal Case Procedures, Recommendation 16

¹² As of March 2017, the Working Group that provided input into this document, which included representation from the Public Prosecution Service of Canada, was advised that the PPSC has moved, presumptively, to using section 540(7) of the *Criminal Code* for preliminary inquiries.

¹³ Justice Casey Hill, "The Duty to Manage a Criminal Trial", April 2012, National Judicial Institute

¹⁴ Justice Casey Hill, *supra*, endnote 14

¹⁵ In the Provincial Court of Nova Scotia, *Charter Applications* are subject to a Practice Direction under Provincial Court Rule 2.

¹⁶ Lesage and Code, Report of the Review of Large and Complex Criminal Case Procedures, Recommendation 11

¹⁷ *R. v. Sipes*, 2008 BCSC 1257, para. 31

¹⁸ Control and Management of heavy fraud and other complex criminal cases – Criminal Procedure Rules – A protocol issued by Lord Chief Justice of England and Wales – 22 March 2005

¹⁹ *R. v. Sipes*, 2011 BCSC 918; *R. v. Huth*, 2013 BCSC 2123

²⁰ *R. v. Anderson*, 2014 SCC 41, para. 58; *R. v. Cunningham*, [2010] S.C.J. No. 10, para. 19

²¹ Justice Casey Hill, *supra*, endnote 14

²² Justice Casey Hill, *supra*, endnote 14

²³ *R. v. Auclair*, 2013 QCCA 671, para. 55

²⁴ *R. v. Felderhoff*, [2003] O.J. No. 4819, paragraph 57 (C.A.) The Ontario Court of Appeal observed that directing the order in which evidence is called is a power to “be exercised sparingly because the trial judge does not know counsel’s brief.” See also: *R. v. Anderson*, para. 59

²⁵ See, for example: *R. v. Colpitts*, 2017 NSSC 22; 2017 NSSC 24; and 2017 NSSC 40

²⁶ Lesage and Code, Report of the Review of Large and Complex Criminal Case Procedures, Recommendation 40

²⁷ *R. v. Schneider*, 2004 NSCA 99, para. 57.

²⁸ *R. v. Schneider*, *supra*, para. 70