Law Society of Ontario | Barreau de l'Ontario

TAB 7

The Six-Minute Criminal Court Judge 2020

Best Practices for Case Management

The Honourable Michael Code
Superior Court of Justice

January 25, 2020

BEST PRACTICES FOR CASE MANAGEMENT

B. O'Marra J. and M.A. Code J.

A. Prior to Arraignment and Plea

- Review the Indictment with the Crown and try to persuade him/her to eliminate unnecessary counts. See, e.g., *R. v. Rowe* (2011), 281 C.C.C. (3d) 42 at paras. 53-58 (Ont. C.A.).
- Review the Crown's list of witnesses, get a brief summary of the subject of each witness' anticipated evidence, and then engage the parties in a discussion about Admissions and about reducing the number of witnesses in order to "streamline evidence or issues for trial." Encourage the parties to put Admissions in the form of a written Agreed Statement of Fact pursuant to s. 655. The trial judge's powers to encourage, and even require Admissions, is discussed in the *Report of the Review of Large and Complex Criminal Case Procedures*, Queen's Printer for Ontario 2008, at pp. 83-89. Also see: *R. v. Hamilton et al* (2011) 271 C.C.C. (3d) 208 at paras. 47-9 (Ont. C.A.); *R. v. Murray* (2017) 138 O. R. (3d) 500 at paras. 91-3 (Ont. C.A.); *R. v. Jordan* (2016) 335 C.C.C. (3d) 403 at para. 70 (S.C.C.); *R. v. Albinowski*, 2018 ONCA 1084 at para. 56.
- Advise counsel for both sides to have two copies of all documentary and photo exhibits, in order to mark a copy and give the judge a working copy. Ensure that the Crown organizes its exhibits in books so that time is not taken up introducing numerous individual photos or individual documents.
- Advise counsel to have a copy available for the judge of any prior statement/testimony on which there is likely to be cross-examination, even if it is not to be marked as an Exhibit.
- Review time estimates for trial with counsel and set a rough schedule, in order to keep the case within or under its scheduled time. Continue to address the schedule at regular intervals, throughout the trial, in order to advise counsel and the jury (and/or yourself as the trial judge) as to the anticipated timing of the case. This will also help counsel fill each day with available witnesses, so that there is no "down time" during the trial. Check with counsel each day to make sure they have scheduled and summonsed a sufficient number of witnesses to fill the day. See: *R. v. Oliver* (2005), 194 C.C.C. (3d) 92 (Ont. C.A.) concerning the power of a trial judge to set a schedule and enforce it.
- Review all anticipated legal issues with counsel that may require a Ruling, a mid-trial jury instruction, or final instructions in the Charge, so that you can begin preparing instructions, Rulings and the Charge. Revisit this list of anticipated issues at regular intervals during the trial, as the issues will inevitably evolve and change.

- Set a tone at the outset of punctuality, civility, and open communication. Encourage respectful relations between counsel, and effective communication, at any opportunity during the trial when things seem to be deteriorating, or simply when a matter could be resolved out of court by counsel who should know how to work effectively with each other.
- Make short oral Rulings with reasons to follow on most pre-trial Motions, in order to keep the trial moving to the greatest extent possible. For some long complex Motions this may not be possible.
- Jury selection can be shortened by using juror questionnaires, handed out by the staff to prospective jurors after you have grouped them. As each prospective juror is called, you can quickly review the juror's written questionnaire and determine whether there are legitimate hardship reasons to excuse, without a lengthy and difficult oral inquiry in open court. Then make sure that the questionnaire is made an Exhibit so that this part of the proceeding is public and does not run afoul of s. 650(1).

B. During the Trial

- Be sure to start promptly each day, be sure the witnesses, counsel and the accused know that you will start promptly, and be sure that your C.S.O. picks you up 5 minutes before court starts, rather than waiting until everyone has arrived in court.
- Do not take recesses if a witness is almost finished his/her evidence or if counsel is dragging out an unnecessarily long examination or cross-examination. When counsel start looking at the clock or start suggesting a recess during one of these unnecessarily prolonged examinations or cross-examinations, advise counsel that the Court will continue sitting until he/she is finished. There is no magic about taking recesses or adjourning on a fixed schedule. The schedule should adjust to the needs of the case. Sitting longer court hours is a good way to encourage efficiency and some judges will sit from 9:30 am to 5:00 pm until satisfied that the case is on schedule. Of course, you should always consult to make sure that no one has a justified need to follow a fixed schedule and you should advise a jury that the length of the court day is flexible.
- Encourage leading questions, after discussion between counsel, in all non-contentious areas.
- Strictly control and enforce the rules in relation to routine and recurring evidence law procedures, e.g., refreshing memory, cross-examination on transcripts and prior statements, ss. 9(1) and 9(2) cross-examination of hostile/adverse witnesses, and re-examination.
- Make use of the time prior to 10:00 am and after 4:30 pm to address any issues that arise and that need to be discussed in the absence of the jury.

- During the trial, mid-trial Rulings should almost always be made on the basis of an oral Ruling, either with brief oral reasons delivered at that time or with written reasons to follow.
- As the trial progresses, and the trial schedule becomes clear, advise counsel when to anticipate making their closing addresses so that they are prepared and there is no need for them to request "down time."
- Similarly, as the trial progresses and the schedule becomes clear, advise counsel as to when to anticipate the pre-charge conference. Begin to alert counsel to the kinds of issues on which you will require their assistance at the pre-charge conference and start seeking preliminary positions from them on matters that will simplify your preparation of the Charge.
- At the pre-charge conference, encourage counsel to concede that certain issues and/or elements of the offences are not realistically in dispute and do not require any fulsome or elaborate instructions, in order to shorten and simplify your Charge. However, be careful to instruct the jury that they still have to be satisfied that an essential element has been proved, even if it is conceded and even if the judge's opinion is that it is not realistically open to dispute. Similarly, encourage counsel for both the Crown and the defence to abandon marginal theories or factual issues that merely lengthen and complicate the Charge and that distract the jury from the essential issues. See: *R. v. Rodgerson* (2015), 327 C.C.C. (3d) 287 at paras. 40-54 (S.C.C.); *R. v. Gunning* (2005), 196 C.C.C. (3d) 123 at paras. 27-35 (S.C.C.).

C. <u>Prior to and During the Trial</u>

- All adjournments and delays must be kept to a minimum and must be justified on the basis of exigent standards. *R. v. Jordan* (2016), 335 C.C.C. (3d) 403 at paras. 112-117 (S.C.C.) clearly mandates a more "robust" approach to adjournments, case management, and trial scheduling than used to be taken in the past. The objective is to change "courtroom culture" and "avoid or minimize unnecessary delay".
- Conduct Motions and arguments on the basis of written records to the greatest extent possible. Be sure to mark all evidentiary documents relied on, such as the Motion Record, as Exhibits on the Motion. A *voir dire* with *viva voce* evidence should be exceptional. Similarly, frivolous arguments that have no realistic prospect of success can and should be summarily dismissed without a full hearing. See: *R. v. Vukelich* (1996) 108 C.C.C. (3d) 193 (B.C.C.A.); *R. v. Kutynec* (1992), 70 C.C.C. (3d) 289 at pp. 298 and 301 (Ont. C.A.); *R. v. Cody* (2017) 349 C.C.C. (3d) 488 at para. 38 (S.C.C.).
- Put time limits on oral argument, either explicitly by allowing a fixed period of time or implicitly by telling counsel there is only one or two issues on which you require

argument. See: *R. v. Felderhof* (2003), 180 C.C.C. (3d) 498 at paras. 40-43 and 57 (Ont. C.A.); *R. v. Bordo et al.*, February 3, 2016, Que. S.C., per Cournoyer J.

- Blending a pre-trial *Charter* Motion with a judge alone trial obviously creates efficiencies, shortens the overall proceedings, and should be encouraged. Just be careful to advert to and follow the necessary procedural and evidentiary distinctions, in particular, the following:
  - the burden is on the Crown on the trial but generally on the defence on a *Charter* Motion;
  - the standards of proof are different on the trial and on the Motion;
  - police officer's hearsay grounds for arrests and searches are critically important and admissible on the *Charter* Motion but are generally inadmissible and irrelevant on the trial;
  - the accused is entitled to elect to call evidence on the Motion but not on the trial, and *vice versa*, so put the defence to its election twice at the end of the Crown's case. In other words, once you reach the defence case it can cease to be a blended proceeding because the accused may wish to call evidence on the Motion but not on the trial, or *vice versa*;
  - be sure that the parties clearly state on the record that evidence heard on the Motion is admitted on the trial;
  - be sure that a properly particularized Notice of Motion and supporting evidence has been filed by the defence, prior to trial, so that the Crown knows what *Charter* issue/issues it is expected to respond to when calling its case in-chief on the blended trial/*Charter* Motion.

  See, generally: *R. v. Sadikov and Harding* (2013), 305 C.C.C. (3d) 421 at paras. 32-3 and 99-101 (Ont. C.A.).