



SUPREME COURT OF NEWFOUNDLAND AND LABRADOR

PRACTICE DIRECTIVE P.D. (Crim.) No. 2018-01

RULES AFFECTED: *Criminal Proceedings Rules of the Supreme Court of Newfoundland and Labrador*, r. 6, and 9-15

EFFECTIVE DATE: July 1, 2018

The following Practice Directive is issued pursuant to Rule 1.04 of the *Criminal Proceedings Rules of the Supreme Court of Newfoundland and Labrador*.

PRE-TRIAL MANAGEMENT OF CRIMINAL PROCEEDINGS

Background and Purpose

1. The Supreme Court of Canada's decision in *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631, has emphasized the need for all players in the justice system in this country, including the courts, to do more to ensure that criminal trials are heard within a reasonable time as guaranteed by section 11(b) of the *Canadian Charter of Rights and Freedoms*.
2. One of the keys to ensuring that an accused person's right to trial within a reasonable time is respected is effective and consistent judicial pre-trial management of criminal cases. To better provide for such effective and consistent pre-trial management, this Court, in consultation with its Criminal Bar and Bench Committee¹, recently engaged in a review of its Criminal Proceedings Guidelines, which were first implemented by this Court in 2010 to provide guidance to parties in criminal matters. This review led to the finalization and approval of the *Criminal Proceedings Rules of the Supreme Court of Newfoundland and Labrador*, which will be published in the Canada Gazette on May 30, 2018, and come into force on July 1, 2018.
3. In order to set out the Court's expectations for counsel and parties under these new rules, particularly as they relate to pre-trial proceedings, the Court issues the following practice note governing the procedure respecting arraignment court appearances, pre-trial conferences, and case management conferences in criminal proceedings.

¹ The Criminal Bar and Bench Committee has representation from the judiciary of the Supreme Court and Provincial Court, the Provincial Public Prosecutions Office, the Public Prosecution Service of Canada, the Legal Aid Commission of Newfoundland and Labrador, and the private defence bar.

Practice Note

(a) *Practice on Arraignment*

4. The procedure on arraignment is governed by rule 6 of the *Criminal Proceedings Rules of the Supreme Court of Newfoundland and Labrador*. The arraignment is, typically, the accused person's first appearance in the Supreme Court. The purpose of the arraignment is the entry of a plea to the charges brought against the accused person. The entry of the plea "determines the direction of the rest of the criminal process" (*R. v. Tippett*, 2010 NLCA 49, 299 Nfld. & P.E.I.R. 174, per Green C.J. at para. 37).
5. Rule 6.02 governs the procedure at the first appearance in arraignment court and rule 6.04 governs the powers of the judge presiding at an arraignment, generally. These rules provide:
 - 6.02 (1) The accused shall make his or her first appearance in arraignment court in relation to a charge on the first sitting of arraignment court which occurs at least 10 days following the day the indictment was filed with the court.
 - (2) At the first appearance of the accused in arraignment court, the judge shall:
 - (a) consider whether a resolution conference is appropriate and, if so:
 - i. set a date; and
 - ii. where appropriate and counsel for the accused consents, make an order requiring the accused to attend the resolution conference;
 - (b) set a date for a pre-trial conference and order that the parties appear at the first sitting of arraignment court which is scheduled to occur at least 14 days following the date set for the pre-trial conference, unless the matter is ordered to be subject to case management;
 - (c) if appropriate, order the matter to be subject to case management pursuant to rules 10.02 to 10.04;
 - (d) if appropriate, set a date for trial; and
 - (e) make any other order the judge considers necessary and appropriate having regard to all the circumstances.
 - (3) The judge may set deadlines for the filing of materials to be used during any hearing or conference that are different from those set out in these Rules.

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6.04 At arraignment court, the judge may:

- (a) set hearing dates for applications which have been filed with the court;
- (b) set dates for resolution conferences and pre-trial conferences;
- (c) set deadlines for filing documents for use during any hearing or conference;
- (d) order that the proceeding be subject to case management;
- (e) set a date for trial;
- (f) hear short applications that are not required to be heard by the trial judge;
- (g) set a date for a sentencing hearing;
- (h) grant leave to file a pre-trial application;
- (i) set a further date for the accused to appear in arraignment court;
- (j) take a plea; and
- (k) make any other order the judge considers necessary and appropriate having regard to all the circumstances.

6. Under rule 6.02(1), the accused is required to appear in arraignment court in relation to a charge on the first sitting of arraignment court which occurs at least 10 days following the day the indictment was filed with the court. The expectation is that, at that time, the accused person will enter a plea. Where a guilty plea is entered, the matter will be set down for sentencing pursuant to rule 6.04(g).
7. Where a person pleads not guilty, the matter will be given either a date for a pre-trial conference, pursuant to rule 6.02(2)(b) or be ordered to be subject to case management, pursuant to rule 6.02(2)(c). In either case, a date for the trial will also be set, pursuant to rule 6.02(2)(d). A date for a resolution conference may also be assigned, where appropriate.
8. In setting the date, the judge will pay careful attention to the timelines set out in *Jordan*. To ensure that the oldest cases are accommodated first, the judge presiding on arraignment will deal with cases in the order in which their information was sworn.
9. There may, however, be legitimate reasons why an accused person cannot enter a plea at their first appearance in arraignment court. In such cases, judges may exercise their discretion to adjourn the matter to the next arraignment date pursuant to s. 606(3) of the *Criminal Code*:

606. (3) An accused is not entitled as of right to have his trial postponed but the court may, if it considers that the accused should be allowed further time to plead, move to quash or prepare for his defence or for any other reason, adjourn the trial to a later time in the session or sittings of the court, or to the next of any subsequent session or sittings of the court, on such terms as the court considers proper.

The discretion provided under that section must be exercised judicially upon consideration of the appropriate principles. An accused person who is not prepared to enter a plea at the first arraignment should be prepared to provide appropriate reasons why.

10. If, at the time of the second appearance at arraignment court, the accused is still not prepared to enter a plea, the judge may grant a further postponement in accordance with s. 606(3). While granting further postponements (beyond the first postponement) is wholly within the arraignment judge's discretion, such requests will be carefully scrutinized.

(b) Pre-trial conference practice

11. Pre-trial conferences are provided for under s. 625.1 of the *Criminal Code*. The procedure applicable on pre-trial conferences is set out in rule 9 of the *Criminal Proceedings Rules of the Supreme Court of Newfoundland and Labrador*.
12. As noted above, in proceedings that are not case managed, the date of the first pre-trial conference will be set from arraignment court at the time the trial date is set. Rule 9.02 requires that the pre-trial conference be held within 90 of the filing of the indictment, unless otherwise ordered by a judge.
13. The parties must, before their pre-trial conference, prepare a Pre-Trial Report in CR Form 9.04. At the conference, parties must be prepared to discuss the items in the report and, in particular, be prepared to discuss and schedule any required pre-trial steps. This may include deadlines to complete disclosure, or for any planned pre-trial applications.
14. Further pre-trial conferences may be set in accordance with rule 9.03(3) where necessary, to ensure that all outstanding issues may be resolved in order to avoid potential postponement applications on the eve of trial. Where a party makes an informal request to a registry clerk for a pre-trial conference under that rule, the clerk may set a time for the conference in consultation with the judge and the parties.
15. All pre-trial conferences will be held in a courtroom for recording purposes, in accordance with the procedure outlined in rule 7.05.
16. Counsel may wear business attire at a pre-trial conference, even when held in the courtroom.

(c) Case Management Practice

17. Part XVIII.1 of the *Criminal Code* and rule 10 of the *Criminal Proceedings Rules of the Supreme Court of Newfoundland and Labrador* govern the case management process in criminal proceedings.
18. Pursuant to rule 10.03, where an accused person pleads not guilty on arraignment, the Chief Justice or a judge designated under s. 551.1(1) of the *Criminal Code* will issue a case management order in each case in which:
- (a) there are multiple accused and multiple counsel involved;
 - (b) an accused is charged with more than six offences;
 - (c) the trial is anticipated to take more than 5 days to try;
 - (d) an accused is charged with an offence under sections 235, 236 or 239 of the Code;
 - (e) the case will likely be tried by a jury;
 - (f) an accused is charged with conspiracy to commit an offence under sections 5, 6 or 7 of the Controlled Drugs and Substances Act (Canada);
 - (g) the case may require the coordination of the hearing of a number of pre-trial applications;
 - (h) the number of exhibits likely requires pre-trial organization and management;
 - (i) an accused is not represented by counsel; or
 - (j) the number of expert witnesses at trial is likely to exceed six.
19. Even where a case does not fall into one of the categories above but the arraignment judge believes that the proceeding would benefit from case management, a case management judge may be assigned.
20. Unless impractical, the case management judge assigned by the Chief Justice will be the trial judge.
21. Once assigned as a case management judge, the case management judge will direct that a case management conference be scheduled under rule 10.07(1) as soon as is practical after the assignment. A notice of the time and place for the meeting will be provided to the parties from the court.
22. The parties must, before their first case management conference, prepare a Pre-Trial Report in CR Form 9.04 in accordance with rule 9.04. At the conference, parties must be

prepared to discuss the items in the report and, in particular, be prepared to discuss and schedule any required pre-trial steps. This may include deadlines to complete disclosure, or for any planned pre-trial applications.

23. Following the first case management conference, further case management conferences may be convened at the request of the case management judge or either of the parties.
24. Rule 10.06(1) provides that a registry clerk shall cause all subsequent applications and other steps taken in the proceeding to be brought to the attention of the case management judge. To ensure that the registry clerks are aware of which matters are case managed by a judge, all subsequent documents in a proceeding in respect of which a case management order has been made shall include the words immediately below the title of proceeding “A CASE-MANAGED PROCEEDING BEFORE JUSTICE” followed by the name of the case management judge assigned to that proceeding (rule 10.06(3)).
25. A case management judge’s powers at a case management conference are set out in section 551.3(1)(a)-(h) of the *Criminal Code* and rule 10.09(1) of the *Criminal Proceedings Rules of the Supreme Court of Newfoundland and Labrador*:

551.3 (1) In performing his or her duties before the stage of the presentation of the evidence on the merits, the case management judge, as a trial judge, may exercise the powers that a trial judge has before that stage, including

- (a) assisting the parties to identify the witnesses to be heard, taking into account the witnesses’ needs and circumstances;
- (b) encouraging the parties to make admissions and reach agreements;
- (c) encouraging the parties to consider any other matters that would promote a fair and efficient trial;
- (d) establishing schedules and imposing deadlines on the parties;
- (e) hearing guilty pleas and imposing sentences;
- (f) assisting the parties to identify the issues that are to be dealt with at the stage at which the evidence on the merits is presented;

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10.09 (1) At a case management conference, the case management judge may:

- (a) in consultation with the appropriate registry clerk, establish or revise any schedule for pre-trial applications, trial or other proceedings;

- (b) secure the parties' agreement or give directions about the order in which applications shall be heard;
- (c) secure the parties' agreement or give directions about the manner in which evidence will be presented on applications;
- (d) secure the parties' agreement or give directions regarding the appearance of witnesses by video conference;
- (e) secure the parties' agreement or give directions regarding expert witnesses meeting on a without prejudice basis to determine those matters on which they agree and do not agree;
- (f) secure the parties' agreement or give directions about the manner in which decisions made by a judge other than the trial judge on applications are to be incorporated into the record or other proceedings;
- (g) secure the parties' agreement or give directions about the materials to be filed in support of and in response to any applications;
- (h) establish a schedule for the service and filing of any materials required for applications;
- (i) secure the parties' agreement to or give directions about admissions of fact or other agreements about issues of fact and the attendance of witnesses on issues not in dispute;
- (j) require the prosecutor to provide a list of the names of the persons who will or may be called as witnesses for the prosecution;
- (k) secure the parties' agreement or give directions about interpreters or equipment required in the proceedings and make arrangements through a registry clerk to ensure such requirements are met;
- (l) secure the parties' agreement to or give directions about the manner in which evidence may be presented at trial to assist its comprehension by jurors;
- (m) determine whether jury selection will involve challenge for cause and if so, endeavour to establish the questions to be asked on such procedure;
- (n) attempt to resolve by agreement any outstanding issues respecting disclosure; and
- (o) identify contested issues of fact and law and explore methods to resolve them.

26. The case management judge will, in consultation with the parties, set schedules and deadlines for pre-trial procedures in light of the fixed trial dates. This may include

deadlines to complete disclosure, or for any planned pre-trial applications. Case management judges will endeavor to ensure that trial dates are maintained, absent exceptional circumstances.

27. Case management conferences will, in the normal course, be scheduled in a Courtroom for 9:15 A.M. and would be expected to last no more than 30 minutes.
28. All case management conferences will be held in a courtroom for recording purposes, in accordance with the procedure outlined in rule 7.05.
29. Counsel may wear business attire at a case management conference, even when held in the courtroom.
30. In accordance with s. 551.3(1)(g) of the *Criminal Code*, the case management judge may, at a hearing, also adjudicate matters relating to:
 - (i) the disclosure of evidence,
 - (ii) the admissibility of evidence,
 - (iii) the Canadian Charter of Rights and Freedoms,
 - (iv) expert witnesses,
 - (v) the severance of counts, and
 - (vi) the separation of trials on one or more counts when there is more than one accused.

Applications made for a hearing before the case management judge should be made in accordance with rules 11-15 of the *Criminal Proceedings Rules of the Supreme Court of Newfoundland and Labrador*, as applicable, and, as noted above in paragraph 24, shall include the words immediately below the title of proceeding “A CASE-MANAGED PROCEEDING BEFORE JUSTICE” followed by the name of the case management judge assigned to that proceeding.

31. A judge may, where necessary, convert a case management conference into a hearing in order to adjudicate an issue or make an order which may only be done at a hearing. In such a situation, the Court will be opened and the hearing will be on the record. Counsel will be required to gown.

(d) Facilitating the scheduling process

32. In order to facilitate the scheduling of hearings and trials during Court appearances, counsel may, before attending an arraignment, pre-trial conference, or case management conference, contact the Court’s registry to inquire about potentially available dates for hearings and trials.

33. Counsel are also encouraged to talk to each other to discuss dates which may be mutually agreeable before attending at the Court.

Authorized by:

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Ethel Chaulk
REGISTRAR