Criminal Pre-Trial Conference Pilot Project Evaluation Report

January 18, 2012

The current members of the Criminal Law Sub-Committee are:

- Madam Justice Holmes (Chair)
- Associate Chief Justice Cullen
- Mr. Justice Williams
- Mr. Justice Smart

Over the course of the Sub-Committee's life, the following have also been members:

- Madam Justice Bennett
- Madam Justice MacKenzie
- Mr. Justice Barrow

OVERVIEW

The Criminal Pre-Trial Conference Pilot Project was developed by the Sub-Committee of the Criminal Law Committee, which was asked to study the May 2006 report of the Ontario Chief Justice's Advisory Committee on Criminal Trials in the Superior Court of Justice, entitled *New Approaches to Criminal Trials* (*"*the *Ontario Report*"). The Ontario report recommended detailed rules for procedures in pre-trial, trial, and other criminal proceedings; the Ontario Superior Court of Justice introduced those rules shortly afterwards, effective October 16, 2006.

After a review and consultation process described below, the Sub-Committee recommended, in preference to detailed procedural rules, an increased focus on pre-trial conferences ("PTC"s) and case management. The Sub-Committee saw a pre-trial conference-based approach as better able to reflect the situation and needs of the criminal trials in our Court, and to provide a flexible mechanism for ensuring that criminal trials proceed efficiently and effectively.

The Court implemented the Sub-Committee's recommendations through the one-year *Criminal Pre-Trial Conference Pilot Project*, which began on March 1, 2010, in four Court locations (Vancouver, New Westminster, Chilliwack, and Kamloops) and has remained in effect in those locations since. Key features include:

- written synopsis of Crown's case required before first PTC
- PTCs earlier in the process (timing dependent on estimated length and complexity of the trial)
- early assignment of trial judge for longer and more complex trials
- where no trial judge assigned, PTCs conducted by trial judges experienced in criminal law
- PTCs conducted in accordance with existing Criminal Rules
- counsel at PTCs expected to be informed and instructed
- PTC long form and PTC checklist (for information only).

After the Pilot Project had run for the scheduled year, the Sub-Committee evaluated it and made recommendations to the Criminal Law Committee in November 2011. In brief, the Sub-Committee and the Criminal Law Committee recommend that, with some minor adjustments (including no further use of the PTC long form and checklist), the features of the Criminal PTC Pilot Project be implemented in all of our Court locations on an indefinite basis.

This report first details the background to Criminal PTC Pilot Project, its evaluation, and the present recommendations, and then describes the recommendations in full and explains why they are made.

BACKGROUND

The Ontario Report

The Sub-Committee was established in late 2006 by the Criminal Law Committee to review the *Ontario Report* and to advise as to:

1. whether the problems identified in the *Ontario Report* arise similarly in B.C.;
2. whether the recommendations of the *Ontario Report* or other recommendations might be suitable for implementation by this Court;
3. what advice, based on the existing provisions of the *Criminal Code* and the *Supreme Court Criminal Rules*, could be provided to judges to help them improve the quality of the pre-trial conferences they conduct on assigned cases.

The Sub-Committee issued its report in May 2009 to the Criminal Law Committee and to the Court. The Sub-Committee noted some significant differences between the circumstances prevailing in our Court and those described in the *Ontario Report*. The most important difference was that there was no backlog of criminal trials in the Supreme Court. In addition, relative to the Ontario Superior Court, there are fewer mega-trials and fewer criminal trials in general.

Criminal Proceedings in British Columbia

The Sub-Committee made a number of observations about criminal proceedings in British Columbia including:

- The criminal Bar in British Columbia has a tradition which values the Crown-defence relationship and productive out-of-court discussions to resolve issues, where possible.
- there are some distinct 'cultural' differences in relation to the conduct of pre-trial conferences in Ontario. In B.C., pre-trial conferences are public and on the record. In Ontario, pre-trial conferences take place in camera, are not recorded, and involve a high degree of judicial involvement in plea negotiation that finds no counter-part in B.C.
- the statistics reveal that there is no problem of "backlog" in our Court, and trials generally conclude within their time estimates; however, there is no objective measure to assess whether criminal trials in the Supreme Court are nevertheless, "too long".
- when criminal trials do become protracted, this typically occurs at the voir dire/pre-trial stage.
- insufficient or inadequate management may result in last minute changes on jury selection days which imposes an unnecessary burden on members of the public and reflects poorly on the functioning of the criminal trial process.

- voir dire issues often arise from the nature and scope of the charges, which are of increasing complexity (e.g., conspiracy among multiple accused, offences in association with a "criminal organization") which introduce new procedural and evidentiary challenges. With increased recent emphasis on criminal gangs in British Columbia, the number of mega-trials can be expected to increase.

The Sub-Committee noted that numerous other factors contribute to the increasing length of criminal trials, including:

- *Charter* applications, which often call into question numerous aspects of the investigative process which previously were usually irrelevant to the trial of the charges
- profound changes in the law of evidence and increased emphasis on contextual decision-making, with a corresponding need for a broad evidentiary base
- new criminal offences, many with broad or complex elements (e.g. organized crime and terrorism offences, certain nuanced or detailed sexual offences) that require correspondingly extensive evidence to be led in support
- more applications after the trial under the dangerous and long-term offender provisions; these often require a detailed evidentiary groundwork during the trial
- the new mental disorder provisions (regarding the defence of NCRMD and fitness to stand trial) which require lengthy and complex hearings before and sometimes during the trial
- challenges for cause on the basis of language competency, publicity, etc which protract the jury selection process and require bigger jury panels to be summonsed and processed
- more sophisticated investigative techniques and therefore more complex evidence (e.g. DNA evidence, routine video-recording of police interviews)
- more frequent use of expert evidence, sometimes in fields of questionable expertise
- vast expansion of routine record-keeping (via electronic storage), and therefore the body of available evidence and material available to be disclosed by the Crown or sought from third parties
- more self-represented accused persons, including those with mental disorders
- *Rowbotham* and related applications that require pre-trial attention
- more accused persons who require interpreters (effectively doubling the trial time, because consecutive translation is required)
- similar effects where wiretap evidence in another language is tendered
- increasingly complex disclosure issues flowing from many of the factors identified above and others.

Sub-Committee's Recommendations

The Sub-Committee concluded that there was no need to adopt a rules-based approach as was recommended and implemented in Ontario. Rather, the Sub-Committee concluded that given the experience in British Columbia, an increased focus on pre-trial conferences would ultimately work more effectively to improve the scheduling and orderly conduct of criminal trials and their pre-trial applications. To that end, the Sub-committee made a number of recommendations including:

- Increase the classes of criminal cases for which the trial judge is assigned at an early stage
- Provide for earlier and more active pre-trial management by the assigned trial judge or one of a pool of judges with criminal law experience.
- Develop new forms and checklists which identify issues to assist judges and parties more accurately prepare for the pre-trial and trial process as efficiently and effectively as possible.
- Issue a practice direction describing the court's expectations regarding the conduct of pre-trial conferences.
- Require Crown counsel to prepare and file a written synopsis of the Crown's case and the evidence on which the Crown will rely in advance of the pre-trial conference.

Sub-Committee's Consultation with Profession - Fall 2009

Through the summer and fall of 2009, the Sub-Committee solicited feedback from those who would be affected by the Sub-Committee's recommendations. The groups from whom feedback was received included: the Criminal Justice Branch, the Public Prosecution Service of Canada, the Legal Services Society of British Columbia, the Canadian Bar Association Criminal Law subsections throughout the province and the Trial Lawyers Association of British Columbia. The Sub-Committee also worked with the Supreme Court Scheduling Managers in the proposed pilot locations to work out many of the logistical issues that arise where additional pre-trial conferences and more active case management is contemplated. Members of the Sub-Committee met and consulted with representatives of all of these groups across the province and used the information received to draft the *Criminal Pre-Trial Conference Pilot Project Practice Direction* which was issued by Associate Chief Justice Dohm on February 1, 2010.

Criminal Pre-Trial Conference Pilot Project Practice Direction

The *Criminal Pre-Trial Conference Pilot Project Practice Direction* had a number of elements:

- a pilot project would be undertaken in four registries: Vancouver, New Westminster, Chilliwack and Kamloops. These registries were chosen because they had the highest volume of criminal proceedings.
- early assignment of trial judges in proceedings which meet certain criteria
- pre-trial conferences would be scheduled as early in the proceeding as possible and within certain minimum time periods where possible

- pre-trial conferences were conducted by a designated pool of judges in the four pilot locations where possible
- Crown counsel required to provide a written synopsis of its case in advance of the pre-trial conference

The *Criminal Pre-Trial Conference Pilot Project Practice Direction* took effect on March 1, 2010 and continues to operate in the four pilot locations. During its operation, the Sub-Committee continued to work closely with the Scheduling Managers in the four pilot locations to ensure that pre-trial conferences were being scheduled as required by the practice direction and to ensure that the requirements for additional pre-trial conferences and early assignments of trial judges in accordance with the practice direction were not causing unacceptable burdens for Supreme Court Scheduling. In addition, during the pilot, the judges who conducted the pre-trial conferences in the pilot locations ("PTC Judges") and the scheduling managers in the pilot locations met regularly to discuss the operation of the pilot.

EVALUATION PROCESS

In March 2011 once the pilot project had been in operation for one year, the Sub-Committee began to evaluate the project. The Sub-Committee sought feedback from the Criminal Justice Branch, the Public Prosecution Service of Canada, the Legal Services Society of British Columbia, the Canadian Bar Association Criminal Law subsections throughout the province, the Trial Lawyers Association of British Columbia, local bar associations in the pilot registries (i.e. Vancouver, New Westminster, Chilliwack and Kamloops) as well as local bar associations in communities located near the pilot registries where members of the local bar association could be expected to practice in the pilot registries (i.e., Abbotsford, Fraser Valley, Kelowna, North Shore, Quesnel, Surrey, and Vernon) The Sub-Committee also worked with the Supreme Court Scheduling, the PTC Judges and the judges who conducted trials in the pilot locations ("Trial Judges").

The Sub-Committee asked for feedback on the operation of the pilot project generally including whether it is effective in achieving the goal of more orderly and efficient scheduling and conduct of criminal proceedings and whether counsel noticed a difference in the scheduling and efficiency of criminal proceedings in pilot project locations compared to other locations. The Sub-Committee also sought suggestions for improvements to the pre-trial conference process including:

- the Crown Synopsis (is it a valuable case management tool?)
- the PTC Form and the PTC Checklist (is it useful, helpful, etc?)
- the timing of pre-trial conferences (are they held at an appropriate stage or stages, in relation to the trial?)
- the scheduling and operation of pre-trial conferences (time of day; sufficient consultation, notice of date and time, telephone appearances?)

Feedback

General

There is widespread support for the pilot project and for the value of effective and timely pre-trial conferences and for the continuation and expansion of the pilot project. There was agreement that the Crown synopsis is a valuable case management tool. There was some concern that the pilot project demands more of the Crown than of the defence regarding the level of preparation for the pre-trial conference including having instructions on issues which could have an impact on the orderly and efficient scheduling and conduct of criminal proceedings. This has the unfortunate effect of some Crown being less enthusiastic about the entire process. It was agreed that the PTC Form and the PTC Checklist were not particularly helpful primarily because they were so comprehensive (e.g., they covered every possible issue that could ever arise) which made them too long to be useful in most proceedings.

Crown Synopsis

Counsel noted that the requirement to prepare and file the Crown synopsis creates additional work for Crown counsel; however, the Crown synopsis is a useful tool when well prepared. It would be helpful for the court to provide some direction regarding the expected content of the Crown synopsis.

The PTC Judges were strongly of the view that the Crown synopsis is an excellent tool for conducting effective and efficient pre-trial conferences. It is particularly useful for highlighting evidentiary and other issues which could impact the efficient conduct of the proceeding. The requirement that they be prepared and served in advance of the pre-trial conference assists the parties to consider their cases earlier than most otherwise would and this generally means that there are fewer, last minute, avoidable delays which jeopardize the commencement of the trial. Where witness lists or an outline of documentary or electronic evidence are provided, this information is very relevant to the discussion of trial length and organization.

The Trial Judges commented that the Crown synopsis is the most valuable part of the process and provides a very useful framework of the evidence and the issues which gives the trial judge an opportunity to quickly understand the proceeding.

There were many suggestions for the type of information that should be included in the Crown synopsis including witness lists, information about the state of disclosure, a summary of anticipated *Charter* applications, issues and defences, information about whether the case is ready to proceed on the scheduled dates and whether the time set aside for the trial (including possible *voir dires* is sufficient). a list of admissions that the Crown would like to receive.

Pre-Trial Conferences Process

The emphasis on pre-trial conferences and active case management front end loads some of the work that used to be done closer to the trial date. This is true for all of the participants; however, it is most acutely experienced by Crown counsel because of the requirement that the

synopsis be filed in advance and by the scheduling staff because of the requirements to schedule conferences within certain timelines. Despite this, all participants appear to agree that the pre-trial conferences are effective when deadlines are set and enforced so that all parties have sufficient time to consider their positions and to make proper submissions on the issues that cannot be resolved by agreement. All of the participants were satisfied with the scheduling of pre-trial conferences before the morning court sessions.

Pre-Trial Conference Forms and Checklist

Neither counsel nor the judges involved in the pilot found these forms to be particularly helpful. They noted that they were essentially too comprehensive to have practical relevance to most proceedings. At best they were a useful reminder of the issues that could arise, but more in the way of a reference document rather than a practical tool to be used at each pre-trial conference.

RECOMMENDATIONS

The Sub-Committee recommends that:

1. **With some minor revisions set out below, the Criminal Pre-Trial Conference Project's approach and features stay in place indefinitely in the pilot project locations and be expanded to include all Supreme Court registries in British Columbia.**

   The feedback from all of the participants was that more intensive case management at an earlier stage in the process results in the more efficiently run criminal proceedings with few last minute adjournments. Active case management at an early stage forces early attention to procedural issues, such as disclosure or unidentified *voir dire* issues, that can affect the readiness of the case to proceed, and helps prevent those issues later "derailing" the trial. Active case management also helps prevent undue inconvenience to members of the public (e.g. by avoiding: unnecessary summonsing of jury panels; mid-trial standing down of the jury; and delays in the scheduled appearance dates for witnesses).

2. **Adjust the terms of the Pilot Project Practice Direction to recognize that the Court needs more flexibility in the early assignment of shorter and non-complex jury trials.**

   The Pilot Project Practice Direction read as follows:

   a) The Court will assign a trial judge as early as possible in the following circumstances:
      i) All long (20+ days) and complex (whether jury or non-jury); and
      ii) All matters which proceed by way of direct indictment;

b) Where possible, any other jury trial will be assigned **at least 60 days** before the trial date. [bold added]

The Sub-Committee recommends that these timelines remain the same, except that the last category (shown in bold) be revised to 45 days. The reason for this revision is that for shorter (less than 20 days), non-complex jury trials, 45 days should allow sufficient time for the necessary case management by the assigned judge. This period is more realistic (in terms of scheduling and judicial resources) than is 60-day advance assignment. The timeline for assignments is in any event subject to what is reasonably possible, given these factors.

The new Practice Direction would therefore provide as follows:

a) The Court will assign a trial judge as early as possible in the following circumstances:

i) All long (20+ days) and complex (whether jury or non-jury); and

ii) All matters which proceed by way of direct indictment;

b) Where possible, any other jury trial will be assigned at least 45 days before the trial date

3. When possible, judges experienced in criminal law should conduct the pre-trial conferences for trials for which the trial judge is not yet assigned

Where the early assignment of the trial judge and the rota permits the trial judge to conduct the pre-trial conferences, it is preferable that he or she do so. When this is not possible, judges with knowledge, experience, and interest in criminal law and criminal case management should conduct pre-trial conferences. This provides a better opportunity to identify issues which could derail the efficient conduct of a criminal proceeding at a stage in the proceedings where there is sufficient time to address them.

4. Use Pre-Trial Conference Form and the PTC Checklist as resources rather than as agendas for pre-trial conferences

The Pre-Trial Checklist and the Form are a useful resource for the Court and counsel. During the Pilot Project they provided a useful outline of the types of matters counsel should be prepared to address at PTCs.

However, despite efforts to make clear that counsel were not expected to complete the forms at or in advance of the PTC, or to review them item-by-item during the PTC, some misunderstanding remained. The Sub-Committee therefore recommends that the PTC long form have no further formal association with the Pilot Project or its successor. The PTC checklist should remain available, to provide a comprehensive list of issues that could affect the conduct of a criminal proceeding.

5. Maintain the requirement for a Crown synopsis

From the Court's perspective, this is the most valuable feature of the Pilot Project. Counsel also appear to find it very useful. The synopsis provides the Court and defence counsel with a clear overview of the Crown's allegations and how the Crown proposes to prove them. It enables the judge to quickly learn the basics of the case, leaving more time for case management and to focus on issues that the parties are not able to resolve. The preparation and review of the Crown Synopsis forces the parties to analyze the case at an early stage in the proceeding. In the view of the Sub-Committee, this helps reduce delays and inefficiencies as well as witness inconvenience and frustration which results from late adjournment applications and order because of disclosure issues or revised time estimates.

6. **Amend the form of the Crown synopsis to clarify the type of information that the Crown is expected to provide, i.e.:**

    - Theory of the Crown
    - Types of evidence to be called (e.g. drugs seized from residence; fingerprints on inside of front door; statement of accused)
    - List of Witnesses
    - Issues Requiring a Ruling of the Court

    The feedback from the participants revealed that there was significant support for the Crown Synopsis; however, all participants noted that there was a wide variety of content in the Crown Synopsis and that more specific instructions regarding expected content and format would be useful in improving the overall quality and utility of the Crown Synopsis.

7. **Issue a new Practice Direction incorporating the Sub-Committee's recommendations**

    The Sub-Committee recommends that the Chief Justice or Associate Chief Justice issue a new Practice Direction advising of the extension and expansion of the approach of the Pilot Project, signalling the areas of revision to the former Practice Direction, and setting out anew the revised applicable guidelines and features.

    The Sub-Committee also suggests some further consultation with Ms. Friesen and scheduling staff concerning reasonable dates for implementation, particularly in registries which were not part of the Pilot Project.