CRIMINAL TRIAL PROCEEDINGS

FINAL REPORT **100**

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Alberta Law Reform Institute

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ALRI has offices at the University of Alberta and the University of Calgary. ALRI's contact information is:

402 Law Centre
University of Alberta
Edmonton AB T6G 2H5
Phone: (780)492-5291
Fax: (780)492-1790
E-mail: reform@alri.ualberta.ca

This and other Institute reports are available to view or download at the ALRI website: www.alri.ualberta.ca.

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Hon Judge John D Bascom, Provincial Court of Alberta
Hon Justice Ronald L Berger, Court of Appeal of Alberta
Josh Hawkes QC, Alberta Justice
Hon Justice Elizabeth A Hughes, Court of Queen's Bench of Alberta
HJ Lyndon Irwin QC
Sandra Petersson
Wayne N Renke, University of Alberta
Peter J Royal QC, Royal Teskey
Laura K Stevens QC, Dawson Stevens Duckett & Shaigec
Hon Judge Donna R Valgardson, Provincial Court of Alberta

The recommendations in this report concerning procedures for *Charter* applications, non disclosure orders and general challenges for cause in criminal jury trials are the result of consultations with the bench and bar. We are grateful to the following individuals and organizations who provided general comments on these topics or specifically responded to the material and proposals put forward in the consultation memoranda:

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Patrick M Horner
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Linda McKay-Panos
Alan Pearse
Hon Justice John D Rooke
Scott Watson QC

Hon Justice Jack Watson
Arthur AE Wilson QC
Barry Zalmanowitz QC

Professor Wayne N Renke, Special Counsel prepared the consultation memoranda and incorporated the Committee's response to comments in order to develop recommendations for all three topics. Research assistance for the consultation memoranda was provided by students Darryl Douglas, Allyson Jeffs, Kristen Lewicki, Raisa MacLeod and Erin Vialla.

This final report was written by Professor Wayne N Renke and Cheryl Hunter Loewen, Counsel, with editorial and subject matter guidance provided by Sandra Petersson and members of the Committee, respectively. Students Lara Yeung and Suzette Golden-Greenwood conducted the legal research needed to update references. Lara Yeung also assisted with the final editorial review.

Ilze Hobin provided support throughout the project by coordinating the Committee meetings, maintaining project files and materials, and producing all documents, including this final report.

Summary

Purpose

The purpose of this report is to consolidate information and final recommendations concerning the procedures for making *Charter* challenges, applying for non-disclosure orders and challenging potential jurors for cause in the Court of Queen's Bench. The recommendations were developed as part of the Rules of Court Project by the Alberta Law Reform Institute with the advice and guidance of the Criminal Rules Working Committee (Committee).

The Committee identified these three areas of criminal trial procedure as having a high priority in terms of review and possible reform. This report considers only these three topics. It does not address all aspects of criminal trial procedure, or provide an exhaustive set of recommendations concerning the conduct of a criminal trial. The recommendations and supporting information in this report are intended to form the basis for drafting criminal rules of court applicable to *Charter* challenges, non-disclosure orders and general challenges for cause.

The recommendations for each of the three proceedings described in this report were developed using the same process. First, a consultation memorandum which included relevant material on the substantive law, procedural considerations associated with each topic, and preliminary proposals, was issued for public comment. Comments were discussed by the Committee and the proposals modified as necessary. An interim report on each consultation process, including discussion of which proposals were affirmed and which were modified, was prepared and reviewed by the Committee and the ALRI Board. As a last stage, materials from the original consultation memoranda and the associated reports were combined, updated and edited to publish the recommendations in a final report format.

The differences between the material contained in this final report and that which was previously published in the consultation memorandums and contained in the interim reports are not significant. The *Criminal Code* is amended on a regular basis and references to provisions which continue in force under new section numbers have been updated. Further, there were two legislative changes in 2011 which required minor alterations to the description of existing practice and some recommendations. In particular, Alberta passed legislation which consolidates and modifies provisions found in other statutes and will govern how notice of a constitutional challenge is given to the federal and provincial Attorneys General. Canada implemented new legislation

aimed at improving the conduct of complex criminal trials which added a case management Part to the *Criminal Code* and a new section which provides that a case management judge can exercise the same powers as a trial judge to resolve pre-trial issues, including adjudicating matters concerning disclosure and the *Charter*.

Report Plan

This report has five chapters. Chapter 1 - Common Principles, provides background information and includes a discussion of the principles and general recommendations common to all three criminal proceedings. Chapter 2 - *Charter* Applications, contains a brief overview of the law which governs constitutional challenges in criminal matters and then describes the recommended process for making the three main types of constitutional applications.

Chapter 3 - Non-Disclosure Orders, starts with summaries of the law, types of non-disclosure orders and the processes for granting non-disclosure orders in Alberta. The second part contains the recommended process for obtaining non-disclosure orders in the Court of Queen's Bench. Chapter 4 - Challenge for Cause, outlines the law and recommended procedures for situations where a party desires to challenge all prospective jurors on the grounds of societal or other general bias. Chapter 5 - Rule Making, notes the authority and process for implementing rules of criminal procedure.

Recommendations

COMMON PRINCIPLES

CHARTER APPLICATIONS

NON-DISCLOSURE ORDERS

CHAPTER 1
Common Principles

A. Access to Justice

[1] Finding the requirements for conducting a criminal proceeding in the Court of Queen's Bench in Alberta is challenging. These requirements are scattered among federal, provincial and court sources, including statutes, case law and court practice notes. The question of how to make these requirements more accessible was investigated in the consultations concerning non-disclosure orders and *Canadian Charter of Rights and Freedoms* [Charter] applications.[1] The three main options for documenting criminal procedures are statute, rules of court and court practice notes.

[2] Parliament has authority to legislate respecting "procedure in criminal matters."[2] The absence of rules of criminal procedure enacted under federal legislation (aside from the rules which apply to criminal appeals to the Supreme Court of Canada) allows for the development of rules under the rule making authority of the *Criminal Code* [*Code*] which reflect Alberta's specific circumstances and court practices.

[3] The federal responsibility for making law concerning procedure in criminal matters is partially delegated to the courts.[3] As a general matter, rules of court must follow the law established outside of the rules, whether in legislation or judicial decisions, and are "to facilitate and regulate the carrying into effect of the provisions of the law."[4] Rules provide details, fill in the blanks, and deal with practical steps omitted in broader statements of the law when the governing principles have already been established.

[4] From time to time, the court provides direction and guidance as to the conduct of criminal proceedings by issuing standing practice notes. Practice notes have some advantages in that they logically complement

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[1] *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

[2] *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, s. 91(27) reprinted in R.S.C. 1985, App. II, No. 5.

[3] *Criminal Code,* R.S.C. 1985, c. C-46, ss. 482, 482.1 [*Code*]. See also Chapter 5 - Rule Making which outlines the authority and process for implementing rules of criminal procedure.

[4] *R. v. H. (E.)* (1997), 33 O.R. (3d) 202 at 211 (C.A.), leave to appeal to S.C.C. refused, [1997] S.C.C.A. 274.

the guidance provided in substantive decisions of the court and can be easily tailored to reflect local circumstances. There are, however, some disadvantages. In particular, practice notes may raise legal effect issues and questions concerning: who is entitled to make practice directions; what are the proper subjects of a practice note as compared to a statute, regulation or rule of court; and, where to find the current practice note which applies to a particular criminal procedure.[5] In this regard, Lamer C.J.C. observed, for example, that rules of court are the best home for publication ban provisions:[6]

> Given that I have concluded that motions for publication bans made in the context of criminal proceedings are criminal in nature, the solution to these practical problems is to be found in the provincial rules of criminal procedure and the relevant case law.

[5] The general proposals put forward in the consultation memoranda were that the process and requirements for conducting criminal proceedings should be standardized and established in rules of court. In conjunction with these proposals, it was noted that rules can be drafted as a mix of general and specific provisions so as to provide useful guidance for the typical situations, while retaining flexibility to deal with unusual circumstances.

[6] Most of those who commented on these points acknowledged the need to consolidate the relevant procedural requirements in standardized rules. Rules of court are generally seen as striking an appropriate balance between the rigidity of legislation and the fluidity of practice notes. Further, rules appear to be a preferred method of regulating criminal court proceedings in other Canadian jurisdictions. To the extent practically possible, criminal procedures should be described in rules of court.

[7] The related matter of whether the same rules should apply when a person represents himself or herself in a criminal proceeding was briefly addressed as part of the consultation process for *Charter* applications. An accused person may choose to not retain counsel and may represent

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[5] "A practice directive does not have the force of law:" *R.* v. *Sharpe* (1999), 181 D.L.R. (4th) 246 at para. 12 (B.C.C.A.), Finch J.A. However, see *Canadian Broadcasting Corp. v. Canada (Attorney General)*, 20 11 SCC 2, [2011] 1 S.C.R. 19 at paras. 58-63 [*CBC v. Canada*] concerning a directive of the Quebec court which was found to be "prescribed by law"as it is based on, and repeats, essential elements of a rule of practice.

[6] *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 at 869 [*Dagenais*].

himself or herself in all aspects of a criminal matter, including the making of related applications such as a *Charter* challenge.

[8] The consultation document proposed that self-represented persons be subject to the same procedural rules as those who are represented by lawyers. The principles, interests and practicalities that motivate and shape *Charter*, and other, applications do not vary based on whether an accused is represented by a lawyer. Whether a person has legal representation does not, in itself, have any bearing on the design of procedural rules. This said, self-represented litigants might benefit from clearly stated, standardized, public criminal rules.

[9] One commentator suggested that self-represented litigants would not be aware of the rules for making a *Charter* application and would therefore not be likely to follow them. In this regard, it is thought that rules would be more accessible than the court decisions which currently govern *Charter*, and other, criminal applications. Rules provide a public road map which a self-represented litigant can independently review to determine the steps that he or she should take. Similarly, a judge can use rules to help direct a self-represented litigant as needed.

RECOMMENDATION 1

Standard procedures and requirements for conducting criminal proceedings in the Court of Queen's Bench should be described in rules of court.

RECOMMENDATION 2

The rules should apply to all litigants, self-represented or otherwise.

B. Judicial Discretion

[10] Rules of court are provisions of general application and should function well in most cases. However, enforcement of general standards in particular circumstances might work an injustice. In these cases, the judge

must exercise discretion to ensure that rules do not overtake constitutional or *Charter* rights.[7]

[11] The authority of a judge to manage proceedings before the court may be an independent constitutional principle, as an aspect of judicial independence. Some of the cases which provide procedural guidance concerning *Charter* applications affirm that rules should preserve the inherent authority of judges to manage proceedings before them.[8] Similarly, a publication ban case confirms that judges have discretion concerning providing notice of a non-disclosure application.[9]

[12] Deference to judicial discretion is reflected in a number of instruments. For example, the Northwest Territories rules provide: "[t]he Court may, where it considers it necessary in the interests of justice, dispense with compliance with any rule at any time."[10] Another example is found in Alberta's requirements concerning non-disclosure orders. Criminal Practice Note 4 [CPN4] states that the note is not intended to limit "the Court's inherent jurisdiction to issue a publication ban on its own motion or determine appropriate interested parties"; interested parties include "any other person named by the Court"; and that "[t]he Applicant may apply to the Court for further directions as to the persons to be served and the manner of service."[11]

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[7] *R. v. Loewen* (1998), 122 C.C.C. (3d) 198 (Man. C.A.), Helper J.A.; *R. v. Blom* (2002), 61 O.R. (3d) 51 at paras. 21, 22 (C.A.), Sharpe J.A. [*Blom*].

[8] *R. v. Kutynec* (1992), 7 O.R. (3d) 277 at 287 (C.A.), Finlayson J.A. [*Kutynec*]; *R. v. Felderhof* (2003), 68 O.R. (3d) 481 at paras. 40, 57 (C.A.); *R. v. Loveman* (1992), 8 O.R. (3d) 51 at 53-54 (C.A.).

[9] *Dagenais,* note 6, Lamer C.J.C. at 869:

> Exactly who is to be given notice and how notice is to be given should remain in the discretion of the judge to be exercised in accordance with the provincial rules of criminal procedure and the relevant case law.

[10] *Criminal Procedure Rules of the Supreme Court of the Northwest Territories*, S.I./98-78, r. 134, online: CanLII <http://www.canlii.org/en/ca/laws/regu/si-98-78/latest/si-98-78.html> [*NWT Criminal Rules*].

On the need for flexibility, see also *R. v. Domstad*, 2001 ABQB 179, 285 A.R. 105 at para. 27, Watson J. [*Domstad*]; *R. v. Lamont*, 2004 ABPC 97, 364 A.R. 51 at para. 15, Lamoureux P.C.J.; *R. v. Brosseau (F.D.)*, 2001 ABPC 220, 305 A.R. 1 at para. 30, Allen P.C.J. [*Brosseau*].

[11] Alberta Court of Queen's Bench, "Criminal Practice Note #4 - Q.B. Criminal Orders Restricting Banning Publication, Public Access or Other Non Disclosure Orders in Criminal Matters," Practice Notes (26 September 2007), at 1-2, 5, online: Queen's Bench - Alberta Courts <http://www.albertacourts.ab.ca/qb/practicenotes/CriminalPN4.pdf> [CPN4].

See also, for example, *Alberta Rules of Court,* Alta. Reg. 124/2010, r. 1.4, online: Government of Alberta <http://www.qp.alberta.ca/documents/rules2010/Rules_vol_1.pdf> which preserves judicial discretion in all procedural matters [*Rules of Court*].

[13] Judges need to exercise discretion to ensure that criminal proceedings are conducted fairly and effectively in all circumstances. In the interests of clarity, it was proposed that the authority of a judge to manage matters which are before the court should be expressly confirmed in the rules.

[14] The related matter of whether the consequences of non-compliance with a rule ought to be specified in the rules was also addressed as part of the consultation processes for *Charter* applications and non-disclosure orders. Although there is no denying that a judge may decline to hear a criminal application, it is a discretion that is likely to be used only rarely and reluctantly.[12]

[15] Ontario has implemented a strict approach to non-compliance within the rules of court. For example, an application to exclude evidence which does not satisfy the rules cannot be heard unless the presiding judge, based on consideration of a non-exhaustive list of factors, grants leave.[13] In addition, Ontario rules provide for summary dismissal based on a judge's preliminary assessment that an application fails to disclose a reasonable argument.[14] It was suggested that these non-compliance rules risk shifting the focus of applications onto formalities when it is substance that should be considered, and might encourage procedural wrangling instead of argument on the merits.

[16] As noted above, a judge has full authority to manage court proceedings, including addressing instances of procedural non-compliance, and can make directions as to how to proceed on a case by

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[12] An Alberta case, *R. v. Dwernychuk* (1992), 135 A.R. 31 (C.A.), McClung and Bracco JJ.A., McDonald J., confirms that a judge may exercise discretion in this fashion [*Dwernychuk*]. In theory, a situation could arise in which the court would not permit a *Charter* argument to proceed due to non-compliance with rules but it would be a very rare case in which such a result would be the just result: *R. v. Phillips* (2003), 2003 SKQB 330, 239 Sask. R. 161, Wilson J.

See also Chief Justice's Advisory Committee on Criminal Trials, *New Approaches to Criminal Trials: Report of the Chief Justice's Advisory Committee on Criminal Trials in the Superior Court of Justice,* (2006) at para. 311, online: Ontario Courts - Superior Court of Justice <http://www.ontariocourts.on.ca/scj/en/reports/ctr/> [*Ontario Advisory Report*].

> The trial judge has an inherent discretion to decline to hear pre-trial applications where the applicant has not complied with the rules of court or where, on the basis of the material filed, the trial judge concludes that the application could not succeed. These aspects of the case management rules are not innovations created by the committee. That the discretion already exists is well established [footnote omitted].

[13] *Criminal Proceedings Rules for the Superior Court of Justice (Ontario),* S.I./2012-7, r. 34.03, online: CanLII <http://www.canlii.org/en/ca/laws/regu/si-2012-7/latest/si-2012-7.html> [*Ontario Superior Court Criminal Rules*].

[14] *Ontario Superior Court Criminal Rules,* note 13, r. 34.02.

case basis. In the *Charter* application context, the judge may consider a variety of factors in determining the appropriate response to a failure to follow the rules, including whether:[15]

- the Crown has been prejudiced or put at an unfair disadvantage;
- the *Charter* argument is novel;
- the *Charter* argument is common in the type of proceedings;
- whether the Crown will need to call additional evidence or recall any witnesses;
- counsel acted with diligence; and
- there was any discernable attempt to engage in ambush tactics.

[17] However, it is not necessary to stipulate the consequences of rule non-compliance or to list the factors that a judge should consider when addressing instances of non-compliance in the rules. To do so seems inconsistent with the policy position that the principle of judicial discretion should be expressly acknowledged and affirmed.

[18] As part of the consultation process, it was noted that the consequences of non-compliance in the civil context often include an award of costs. In criminal cases, costs have been used much less frequently, for example, as a s. 24(1) remedy in favour of an accused against the Crown in connection with a *Charter* violation by the Crown.[16] There are a number of reasons why costs have not been used for non-compliance with criminal process requirements, including: costs should not be awarded against an accused; the Crown should not be exposed to cost liabilities to third parties; and, the *Code* may not authorize rules which permit cost awards.[17] Although the specific issue of whether rules should provide for an award of costs against the Crown in favour of third parties, such as the media, was discussed, it was determined that costs are not an appropriate consequence for non-compliance with criminal rules.

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[15] *Blom*, note 7, at paras. 22, 23, 27.

[16] See *R. v. 974649 Ontario Inc.*, [2001] 3 S.C R.575; *R. v. Robinson* (1999), 250 A.R. 201 (C.A.); *R. v. Dix* (2000), 259 A.R. 328 (Q.B.), Veit J.

[17] *Code,* s. 482(3); *Quebec (Attorney General) v. Cronier* (1981), 63 C.C.C. (2d) 437 (Que. C.A.).

[19] Non-compliance with rules of criminal procedure often involves matters such as late filing, incomplete notices or insufficient material to support an application. When one party or the other does not comply with the rules, the issue is resolved by an exercise of judicial discretion. It is not necessary or desirable to set penalties or otherwise specify consequences of non-compliance with rules of criminal procedure in the rules as these matters should continue to be resolved by the judge.

RECOMMENDATION 3

Judicial discretion respecting compliance with procedural requirements in criminal proceedings should be expressly confirmed.

RECOMMENDATION 4

The rules should provide that the court may, in the interests of justice, make any procedural order or issue any direction it considers necessary in an individual case.

RECOMMENDATION 5

The rules should provide that the court may, where it considers it necessary in the interests of justice, dispense with compliance with any rule, at any time.

C. Fair Notice

[20] The principle of fair notice could be more clearly established by formalizing the procedures for *Charter* challenge and other criminal proceedings. Prosecutors, judges, the defence bar, and the public each have somewhat distinct perspectives on fair notice. Prosecutors require adequate notice of applications so that they are not taken by surprise. Adequate notice gives prosecutors the opportunity to do research, organize arguments, and ensure that witnesses are available. In general, adequate notice permits proper preparation for the application and forestalls requests for adjournment.

[21] Similarly, judges require adequate notice of applications so that they are not taken by surprise. Adequate notice gives judges the opportunity to do research and to review legal authorities and arguments

and thus supports informed analysis and decision making. Judges have a particular responsibility, a constitutional duty, to get *Charter* decisions right.[18] In order to discharge this responsibility, they need adequate notice of the arguments, the evidence or prospective evidence in support, and the pertinent authorities.[19]

[22] Defence counsel's perspective on fair notice is different. In particular, defence counsel require the notice of application rules to be fair so they are not forced to create, file, and serve documents prematurely; so they do not face the dismissal of applications on the basis of lack of particularity when particulars will be available only through the unfolding of trial; and, so they are not required to disclose any more information than is strictly necessary for the purposes of the application.[20] Defence counsel are also interested in ensuring that notice requirements respect the accused person's right to remain silent and properly reflect the Crown's burden to make the case for conviction.

[23] The public also has a strong interest in procedures which promote fair notice, particularly in the context of *Charter* applications.[21] In general, the public has an interest in orderly and expeditious criminal trials. Although it is true that any legal decision by the courts may have far reaching effects, common law developments should be incremental.[22] *Charter* decisions, however, can have effects outside of the case in which they are made, especially given the relatively early stage of *Charter* jurisprudence. In particular, *Charter* decisions can affect many other cases, police practices, federal and provincial legislative law-making policies, and government policy in general. Moreover, *Charter* decisions have no "incremental" constraint and are not correctable or reversible by ordinary statute. It is therefore in the public interest that rules of criminal procedure should reflect the principle of fair notice and encourage the best *Charter* decisions practically attainable.

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[18] See *Brosseau*, note 10; *R. v. Mide* (1998), 1998 ABPC 126, 233 A.R. 84 [*Mide*], Fraser P.C.J.; *Kutynec*, note 8.

[19] *Mide*, note 18; *R. v. Mousseau* (2002), 324 A.R. 42 at para. 11 (Q.B.), Moen J. [*Mousseau*].

[20] *Charter* application rules should not mandate "defence disclosure": *R. v. Underwood*, [1998] 1 S.C.R. 77 at paras. 10-11, Lamer C.J.C.

[21] *Mide*, note 18; *Domstad*, note 10, at para. 31; *R. v. Baker*, 2004 ABPC 218, 372 A.R. 230 at para. 12, Allen P.C.J.

[22] *R. v. Salituro*, [1991] 3 S.C.R. 654 at 668-669, Iacobucci J.

[24] The principle of fair notice was addressed only in the consultation process concerning procedures for *Charter* applications. However, it is applicable to all criminal proceedings.

RECOMMENDATION 6

Notice requirements should reflect the principle of fair notice and enable the accused, Crown, court, and any other participant in a criminal proceeding to be fully prepared to participate in the hearing of the matter.

CHAPTER 2
Charter Applications

[25] This chapter focuses on the procedures for *Charter* applications and is arranged in two parts. The first part contains observations and principles relevant to *Charter* applications, describes the legislative and judicial guidance for such applications in Alberta, and considers the regulation of *Charter* applications in other Canadian courts. The second part addresses the need for reform and provides recommendations concerning *Charter* applications in the Court of Queen's Bench.

A. Background to *Charter* Applications

[26] A variety of applications may be made by the Crown or defence in the course of criminal litigation. The procedure for some of these applications is comprehensively regulated. For example, the *Code* establishes detailed rules governing defence applications to adduce evidence in certain sexual offence prosecutions and rules for applications concerning the production of records relating to a complainant or witness which are held by third-parties.[23]

[27] In contrast, the applications made by accused persons based on alleged violations of rights or freedoms protected by the *Charter* are not the subject of standardized national rules. *Charter* application procedure may be imposed by statute, regulation, rules of court, appellate decisions, or some combination of these mechanisms, depending on the jurisdiction. These applications may be regulated as part of a comprehensive criminal procedure scheme or may be the subject of special rules which, for example, describe the notice mechanism, content of legal memoranda, or the time periods for filing and exchanging material in support of the *Charter* application.

[28] In Alberta, the procedures for *Charter* applications in the Court of Queen's Bench are governed primarily by the Court of Appeal's guidance

[23] *Code*, ss. 276.1-276.5, 278.1-278.91. See also *R. v. Darrach*, 2000 SCC 46, [2000] 2 S.C.R. 443, Gonthier J. [*Darrach*] and *R. v. Mills*, [1999] 3 S.C.R. 668. Prior to the enactment of production rules, the Supreme Court established third-party record application procedures in *R. v. O'Connor*, [1995] 4 S.C.R. 411 which continue to apply in cases not regulated by the *Code* provisions.

in the *Dwernychuk*[24] and *Holt*[25]cases, with some applications also being subject to provincial legislation.

1. LIMITATIONS

[29] Procedural rules concerning *Charter* applications must be developed in accordance with the *Charter,* the *Criminal Code* and the applicable jurisprudence. In other words, rules cannot change substantive law. For example, rules must be consistent with the burden of proof in *Charter* applications. An accused who seeks *Charter* relief bears the burden of establishing that his or her *Charter* protected right has been violated.[26] A requirement that the accused give notice of the *Charter* issues to be advanced would be consistent with this burden of proof rule. In addition, any procedural requirements which do not reflect the fact that the burden of proof shifts from the accused to the Crown at some points in the *Charter* application process would be inconsistent with substantive law and invalid.[27]

[30] As a second example, procedural rules should also accommodate and support the court's analytical process for considering whether the admission of evidence gathered in violation of a *Charter* right would "bring the administration of justice into disrepute." In particular, the court pursues "three avenues of inquiry" and looks first to the "seriousness of the *Charter*-infringing state conduct," then assesses the "impact on the *Charter*-protected interests of the accused" and finally considers "society's interest in an adjudication on the merits."[28]

2. THREE TYPES OF *CHARTER* APPLICATION

[31] Not all *Charter* challenges that an accused person may make in a criminal matter are the same. For example, applications may be made concerning whether:

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[24] *Dwernychuk*, note 12.

[25] *R. v. Holt* (1991), 117 A.R. 218 (C.A.), McClung J.A. [*Holt*].

[26] *R. v. Collins*, [1987] 1 S.C.R. 265 at 277, Lamer J.; *Brosseau*, note 10, at para. 30. The accused person's burden is tactical, in the sense that he or she chooses whether or not to raise a *Charter* issue: *Darrach*, note 23, at paras. 46-52.

[27] *R. v. Russell*, [2003] O.J. No. 5266 (Sup. Ct. J.), Sedgwick J.

[28] *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353 at para. 71. See also paras. 72-86 for a description of the "decision tree" process; and paras. 87-128 for guidance as to how the analytical framework would be applied to consider excluding various types of evidence obtained in violation of the *Charter*.

- a statutory provision limits a *Charter* protected right or freedom;
- a violation of the right to fundamental justice under s. 7 warrants a stay of proceedings;
- the state failed to try an accused within a reasonable time, in violation of the accused person's rights under s. 11(b); or
- oral, physical or recorded evidence should be excluded from trial, because it was,
  - = obtained in a manner that infringed or denied an accused person's *Charter*-protected rights;
  - = use of the evidence at trial would violate the accused person's rights; or
  - = use would violate the accused person's right to a fair hearing.

[32] There are three main types of application which can be made under the *Charter*. An accused may make an application:

(a) challenging the validity of legislation, regulation or common law;[29]

(b) under s. 24(1) of the *Charter*, concerning an alleged violation of rights; [30] or

(c) for the exclusion of evidence under s. 24(2) or on other grounds (such as ss. 24(1) or 11(d) of the *Charter*).

[33] The nature of the legal interests at play and the different points at which the factual foundation for the application become apparent are the factors which differentiate each type of application from the others, and

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[29] *Constitution Act, 1982*, s. 52(1) being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11:

> 52(1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force and effect.

[30] *Charter,* s. 24(1)-(2):

> 24(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
>
> (2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

distinguish applications within each type. For example, a challenge to the validity of legislation may have little to do with the factual foundation of a particular criminal case as the challenge relates to the general nature or effects of the legislation, whereas a s. 24(1) application in the same case would be largely based on the facts.

[34] In terms of the point at which the need for a *Charter* application becomes apparent, some s. 24(1) applications, such as those alleging a failure to be tried within a reasonable time, may be based on facts and information which pre-dates the trial. Still others may be based on events that could not have been anticipated before trial.[31] Similarly, it may be obvious long before a trial starts that there are grounds to exclude evidence, whereas in another case, the need for an application to exclude evidence may not become apparent until testimony is entered at trial.

3. *CHARTER* APPLICATIONS IN ALBERTA

a. *Notice to the Attorney General Act*

[35] Alberta passed legislation in 2011 which, once in force, will consolidate and replace some of the statutory requirements for giving notice to the provincial and federal Crown.[32] The *Notice Act* contains the following provisions which are relevant to *Charter* applications.[33]

- The Act applies only to applications respecting the constitutional validity or applicability of a provincial or federal enactment.
- Notice of the application must be provided to the Attorney General of Canada and the Minister of Justice and Attorney General of Alberta.
- The notice must set out the grounds on which the question is to be decided.

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[31] See for example *R. v. Rae* (2005), 2005 ABCA 210, 367 A.R. 199, in which the grounds for a s. 7 based application for s. 24(1) relief in the form of an adjournment could not have been anticipated before the scheduled trial date.

[32] Bill 5, *Notice to the Attorney General Act*, 4th session, 27th Legislature (Royal Assent 29 April 2011), S.A. 2011, c. N-6.5, s. 13, [*Notice Act*] CIF on proclamation, amends the *Judicature Act*, R.S.A. 2000, c. J-2 [*Judicature Act*] by repealing section 24 which, among other things, requires that notice of a constitutional validity application be given to the federal and provincial Attorneys General 14 days before the hearing of the application.

[33] *Notice Act*, note 32, ss. 2(1), 7, 6, 10.

- The validity or applicability question cannot be decided unless notice has been given, although nothing prevents the court from taking any action the court deems necessary pending determination of any matter that is before it.
- Other than grounds, the Act does not establish any specific content or information needed to support the application or set the timing for giving notice, however, these matters may be the subject of regulations.

b. The Provincial Court of Alberta

[36] *Charter* application procedures in the Provincial Court of Alberta will also be governed by the *Notice Act* respecting challenges to the constitutionality of legislation and by the *Constitutional Notice Regulation* which has been in effect since 1999.[34] The key features of the procedure described in the *Regulation* are that:[35]

- it governs all types of constitutional applications other than those concerning the validity of legislation and thus applies to both *Charter* ss. 24(1) and 24(2) applications;
- written notice is required;
- notice must be given not less than 14 days before the proceedings in which the application is to be heard;
- notice is given to the court and office of the prosecutor having charge of the matter;
- the notice must set out
    (i) the right or freedom allegedly infringed,
    (ii) the day and place on which the application is to be argued,
    (iii) the relief sought, and
    (iv) the grounds for the application, including a concise statement of the constitutional principles and a

[34] *Constitutional Notice Regulation*, Alta. Reg. 102/99, s. 2 [*Regulation*].

[35] *Regulation,* note 34, ss. 1(1)-(5). In addition, s. 1(6) contemplates that the application may be heard by a Queen's Bench judge in limited situations.

reference to any statutory provision or rule relied upon; and

- the application will be heard in most cases by a judge of the Provincial Court.

c. Common law ss. 11(b) and 24(1)

[37] The Court of Appeal provided procedural guidance in *Holt*, which involved an application for relief under s. 24(1) of the *Charter* based on delay contrary to s. 11(b). The key passage in *Holt* is as follows:[36]

> [W]e think that a more orderly resolution of these delay cases would take place in future if the following requisites were observed. Firstly, the Crown is entitled to notice of any application for s. 11(b) judicial stays, unless the delay complained of is so glaring that it is raised by the court itself. Secondly, the application should be made returnable at least 30 days before the date set for trial. This will make some allowance for the possibility of a reserved judgment on the issue.... Thirdly, the history of the case should be presented to the court documented by transcripts (where such transcripts are available), as opposed to counsel's giving their memories (often diverging) of why earlier remands or adjournments were granted. Fourthly, while we hesitate to specify what material would serve to allow assessment of local delays with those existing in comparably-situated Canadian jurisdictions, we do say that it must be in the form of admissible evidence.

[38] To be consistent with *Holt*, an application pursuant to ss. 11(b) and 24(1) should be on notice to the Crown (unless the court raises the delay issue); returnable at least one month before trial; and supported by evidence both concerning the case specific delay and comparing the delay to that experienced in comparable jurisdictions. Section 11(b) applications are likely to turn on evidence that is available well before trial and has nothing, or little, to do with the issues at trial. Accordingly, it makes sense to dispose of a s. 11(b) application significantly in advance of trial.

[39] There is a procedural gap in *Holt.* Although the application should be heard at least 30 days before trial according to *Holt,* the case does not

[36] *Holt,* note 25, at para. 12.

specify the number of days notice required for the application.[37] An accused might, for example, bring a ss. 11(b) - 24(1) application on two days notice and be in conformity with *Holt*. A two day notice period would probably not permit the Crown or the court to prepare adequately for the application and therefore some additional procedural requirement is needed in this regard.

d. Common law s. 24(2) – *Dwernychuk*

[40] The Court of Appeal's *Dwernychuk* decision sets the general framework and provides detailed guidance concerning the appropriate procedure for s. 24(2) *Charter* applications. This case involved an application for the exclusion of evidence (a breath analyzer technician's certificate) under s. 24(2) of the *Charter* based on a violation of the accused person's s. 8 right to be secure from unreasonable search and seizure.

[41] *Dwernychuk* notes general principles that are to be considered in establishing *Charter* application procedures, including:[38]

> In deciding the procedure ... the court should also have in mind that the *Charter* is to receive a liberal and generous interpretation.... Thus, in approving one procedure and disapproving another, the court's decision should reflect a 'liberal' and a 'generous' approach ... one which will render more effective the right in issue than would otherwise be the case, and will enhance the repute of the administration of justice.

[42] A second principle is that the *Charter* application procedures should be as "uniform as possible" across provinces and territories.[39] Further, the court affirms judicial discretion by stating that the procedural guidance provided is "not intended to be treated as inflexible rules."[40]

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[37] G. Davies, *Suggestions for a Response to the Discussion Paper Entitled 'Charter Applications: Procedural Guidelines* prepared by the Canadian Bar Association – Alberta Branch: Administration of Justice Task Force (Edmonton: Criminal Lawyers Association, April 1996) [unpublished] [Davies].

[38] *Dwernychuk,* note 12, at para. 11.

[39] *Dwernychuk*, note 12, at para. 18.

[40] *Dwernychuk*, note 12, at para. 29. See also *Kutynec*, note 8, at 290, where the court expresses, "reluctance to propound a detailed judge-made rule to cover all *Charter* motions"; *R. v. Loveman* (1992), 8 O.R. (3d) 51 at 53-54 (C.A.):

> A trial judge must control the trial proceedings so as to ensure fairness to all concerned and preserve the integrity of the trial process. The specific situations in which the trial judge must exercise that power are infinitely variable and his or her order must be tailored to the particular

(continued...)

[43] One of the main issues associated with s. 24(2) applications is timing. In this regard, the court observed that:[41]

> [a] reasonable person would expect that where the defence intends to raise a *Charter* issue and seek the exclusion of evidence, the procedure followed would be such as to give the Crown and the judge reasonable notice of the intention to do so.

The court also noted that dealing with the matter before or at the start of trial gives the Crown and court adequate time to prepare and avoids the problems associated with excluding evidence that has already been presented to the court.

[44] *Dwernychuk* also provides more detailed guidance concerning timing and other aspects of s. 24(2) applications which may be summarized as follows:

(a) An application to exclude evidence should be made before or at the commencement of a trial, before evidence is called, although the trial judge may permit a later application.[42]

(b) The application should be in writing, and should set out

  (i) the *Charter* right allegedly violated,

  (ii) the nature of the alleged infringement; and

  (iii) the remedy sought (exclusion under s. 24(2)).[43]

(c) Counsel for the applicant and Crown should be prepared to summarize the evidence that supports or opposes the application, respectively.[44]

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[40] (...continued)

> circumstances. In the exercise of this inherent power, a trial judge may decline to entertain a motion where no notice, or inadequate notice, of the motion has been given to the other side.... Clearly, where a *Charter* right is at stake, a trial judge will be reluctant to foreclose an inquiry into an alleged violation. There will, however, be circumstances where no less severe order will prevent unfairness and maintain the integrity of the process.

[41] *Dwernychuk,* note 12, at para. 12. See also para. 17 which notes that allowing defence counsel to raise a *Charter* issue for the first time after the Crown has closed its case "would, in effect, force the Crown to split its case, a way of doing things which our practice does not ordinarily permit the Crown to do voluntarily."

[42] *Dwernychuk,* note 12, at paras. 25, 22, 23.

[43] *Dwernychuk,* note 12, at paras. 24, 26.

[44] *Dwernychuk,* note 12, at para. 28.

(d) The procedures apply only to s. 24(2) applications for the exclusion of evidence, not to other forms of *Charter* application in Queen's Bench.[45]

[45] Subsequent cases have elaborated on the *Dwernychuk* points, for example, by requiring that a list of authorities be provided as part of the application. As Moen J. commented, this seems like a "consistent, fair and reasonable requirement."[46]

4. *CHARTER* APPLICATIONS IN OTHER JURISDICTIONS

[46] *Charter* applications in other provinces and territories are governed by a mix of provincial statutes, rules of court and the common law. In general, other Canadian jurisdictions, including superior courts in Ontario, British Columbia and Saskatchewan take an approach similar to that described in *Dwernychuk* concerning notice of *Charter* applications.[47]

a. Provincial statutes

[47] British Columbia, Saskatchewan, Ontario, Quebec and Nova Scotia have legislation with constitutional question provisions similar to Alberta's.[48] These statutes

(a) govern applications to challenge the constitutional validity of legislation under the constitution or *Charter*, applications respecting the constitutional applicability of legislation (that is, constitutional exemption arguments), and applications for remedies under s. 24(1) of the *Charter* other than for the exclusion of evidence;

(b) require that notice be given to the provincial and federal Attorneys General; and

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[45] *Dwernychuk,* note 12, at paras. 19, 26; See also para. 27 which states that:

> [T]he Provincial Court procedures may be different, but the spirit of the points made here should nevertheless prevail. The Provincial Court of Alberta is, of course, free to set its own practice on this point.

[46] *Mousseau*, note 19, at para. 13.

[47] See e.g. *Kutynec*, note 8; *R. v. Feldman* (1994), 91 C.C.C. (3d) 256 (B.C.C.A.), Hinkson J.A.; *R. v. Vukelich* (1996), 108 C.C.C. (3d) 193 (B.C.C.A.) [*Vukelich*]; *R. v. Pelletier* (1995), 38 C.R. (4th) 242 (Sask. C.A.).

[48] *Constitutional Question Act*, R.S.B.C. 1996, c. 68; *Constitutional Questions Act*, R.S.S. 1978, c. C-29; *Courts of Justice Act*, R.S.O. 1990, c. C-43; *Code of Civil Procedure* Art. 95 C.C.P.; *Constitutional Questions Act,* R.S.N.S. 1989, c. 89.

(c) establish notice periods (14 days before the day of argument in British Columbia, Saskatchewan and Nova Scotia; 15 days in Ontario; 30 days in Quebec) which may be abridged by the court, or in the case of Quebec, notice may be waived by the Attorney General.

British Columbia, Saskatchewan, Quebec and Nova Scotia further require that the notice must include information concerning the law in question or the right or freedom alleged to have been infringed or denied and the particulars necessary to show the point to be argued.

b. Rules of Court

[48] British Columbia, Northwest Territories, Nunavut, Manitoba and Ontario have rules of court which govern *Charter* applications.[49]

i. British Columbia

[49] The *Criminal Rules of the Supreme Court of British Columbia* establish a form for "[a]ll pre-trial applications in criminal proceedings."[50] No distinction is made between *Charter* and non-*Charter*, or different types of *Charter* applications. The form requires reference to the evidence (for example, affidavits and transcripts) on which the applicant relies and requires a specification of the *Charter* section, statutory authority, or other law upon which the application is based. The notice also "set[s] forth fully the grounds upon which it is brought" and must be served at least five days before the hearing date, unless a judge otherwise directs.[51]

ii. Northwest Territories and Nunavut

[50] The *Criminal Procedure Rules of the Supreme Court of the Northwest Territories* [*NWT Criminal Rules*] set out rules governing applications generally (Part 3), applications respecting constitutional issues (Part 12),

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[49] The criminal procedure rules established for the Provincial Court of Newfoundland and Labrador are very similar to those of the Ontario Provincial Court and are not described in this final report. See *Rules of the Provincial Court of Newfoundland and Labrador in Criminal Proceedings*, S.I./2004-134, online: CanLII <http://www.canlii.org/en/ca/laws/regu/si-2004-134/latest/si-2004-134.html>.

[50] *Criminal Rules of the Supreme Court of British Columbia*, S.I.97-140, r. 2(1), online: CanLII <http://www.canlii.org/en/ca/laws/regu/si-97-140/latest/si-97-140.html> [*BC Criminal Rules*]

[51] *BC Criminal Rules*, note 50, r. 2(2)-(3).

and applications to exclude evidence (Part 13).[52] These rules apply to both the Northwest Territories and Nunavut.[53] The *NWT Criminal Rules*:

(a) establish forms for the notices of application, which, in each case, must include:[54]

  (i) the relief sought;

  (ii) the grounds to be argued, including reference to any statutory provision or rule relied upon; and

  (iii) the documentary, affidavit and other evidence to be used.

(b) establish rules for the exchange of memoranda of argument or pre-hearing briefs in Part 3 applications or Part 12 application (no factum or brief requirements are established for Part 13 applications).[55]

(c) expressly provide, in relation to Part 13 applications, that the judge may waive the requirement of written notice; confirm that "[n]othing in this Part shall be interpreted as derogating from the right of the accused to make an application at any point in the trial;" but also provide that "the failure to give timely notice... may be taken into account by the judge in determining (a) whether to hear the application forthwith or to adjourn the trial, to hear it; and (b) on what terms the judge will hear the application."[56]

(d) establish a general dispensing rule, "[t]he Court may, where it considers it necessary in the interests of justice, dispense with compliance with any rule at any time."[57]

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[52] *NWT Criminal Rules*, note 10.

[53] Nunavut Court of Justice, Notice to the Profession (December 22, 2009), online: <http://www.nucj.ca/Directives/NoticeToProfessionA-2009-12-21.pdf>.

See also Nunavut Court of Justice, Criminal Rules, online: <http://www.nucj.ca/rules/SI98-78_Criminal_Rules_of_NCJ_fed.pdf>

[54] *NWT Criminal Rules*, note 10, rr. 19, 67, 74.

[55] *NWT Criminal Rules*, note 10, rr. 25, 70.

[56] *NWT Criminal Rules*, note 10, rr. 73(3), 76.

[57] *NWT Criminal Rules*, note 10, r. 134.

iii. Manitoba

[51] The *Manitoba Court of Queen's Bench Rules (Criminal)*

(a) establish a single form for criminal motions;[58]

(b) require that the notice of motion include:[59]

(i) the relief sought,

(ii) the grounds upon which relief is sought, and

(iii) the material on which the moving party relies, including statutory provisions;

(c) provide that if a motion raises a point of law,[60]

(i) not less than 7 days before the hearing date, the applicant must file with the court and serve on the respondent a brief containing a list of documents relied on, unless the court orders that copies be filed; a list of cases and statutory provisions relied on; and a list of the points to be argued;

(ii) not less than 3 days before the hearing date, the respondent must file with the court and serve on the applicant a list of documents to be relied on (not included in the applicant's brief) and a list of cases, materials, and points to be argued (not included in the applicant's brief); and

(d) expressly provide that, "in a situation of urgency", the judge may dispense with the notice and filing requirements.[61]

iv. Ontario

[52] There are two separate sets of rules which govern *Charter* applications in Ontario, one for applications in the Ontario Superior Court and the other for those in the Ontario Provincial Court. Of note, in terms

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[58] *Manitoba Court of Queen's Bench Rules (Criminal)*, S.I./92-35, r. 5.01, online: CanLII <http://www.canlii.org/en/ca/laws/regu/si-92-35/latest/si-92-35.html> [*Manitoba Criminal Rules*].

[59] *Manitoba Criminal Rules*, note 58, rr. 5.03 and 5.04.

[60] *Manitoba Criminal Rules*, note 58, r. 5.08.

[61] *Manitoba Criminal Rules*, note 58, r. 5.09.

of *Charter* application developments which occurred after *Charter Applications in Criminal Cases*, Consultation Memorandum No. 12.19 [CM 12.19] was issued,[62] in 2006 the Ontario Court of Justice's Advisory Committee on Criminal Trials published a report containing recommendations to improve criminal proceedings in the Superior Court which resulted in amendments to the *Ontario Superior Court Criminal Rules*.[63]

Ontario Superior Court

[53] *Charter* applications in the Ontario Court of Justice (Superior Court) are governed by an extensive criminal procedure scheme which includes general rules which apply to all applications and specific rules which govern constitutional issue applications, including exclusion of evidence under s. 24(2) of the *Charter*.[64] In general, the *Ontario Superior Court Criminal Rules* require that the notice of *Charter* application include:[65]

> (a) the relief sought,
>
> (b) the grounds to be argued, including a concise statement of the constitutional issue to be raised, a statement of the constitutional principles to be argued and a reference to any statutory provision or rule upon which reliance will be placed, and
>
> (c) the documentary, affidavit and other evidence to be used at the hearing of the application.

These rules also require that the parties file and exchange other materials that are to be relied on, including factums.[66]

[54] In applications to exclude evidence, the *Ontario Superior Court Criminal Rules* require that the notice contain a detailed description of the

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[62] Alberta Law Reform Institute, *Charter Applications in Criminal Cases*, Consultation Memorandum No. 12.19 (2006) [CM 12.19].

[63] *Ontario Advisory Report*, note 12.

[64] *Ontario Superior Court Criminal Rules*, note 13, rr. 4.10, 27.01-27.10, 31.01(c). Rule 31 applies where a party seeks to exclude evidence that is presumptively admissible at common law for all issues that it is reasonably foreseeable the other party will seek to introduce in the proceedings, including: evidence of prior criminal convictions of an accused; evidence of after-the-fact or post-offence conduct; and, evidence alleged to have been obtained by constitutional infringement exclusion of which is sought under s. 24(2) of the *Charter*.

[65] *Ontario Superior Court Criminal Rules*, note 13, r. 27.03.

[66] *Ontario Superior Court Criminal Rules*, note 13, r. 27.05(7)-(9).

evidence that the applicant seeks to have excluded, a case-specific statement of grounds for exclusion, a detailed summary of the material and evidence to be relied on with a statement of how the applicant will introduce the evidence, and an estimate of the time needed to argue the application.[67]

Ontario Provincial Court

[55] The Ontario Provincial Court also has rules which apply to *Charter* applications. In the case of applications for the exclusion of evidence, the provincial court rules:[68]

> (a) establish a form for the notice of application;
>
> (b) require that the notice set out information including,
>
> (i) the anticipated evidence sought to be excluded;
>
> (ii) the grounds to be argued, including a concise statement of the exclusionary issue under the *Charter* to be raised, a statement of the exclusionary principles under the *Charter* to be argued and a reference to any statutory provision or rule upon which reliance will be placed;
>
> (iii) the documentary, affidavit or other evidence to be used at the hearing of the application;
>
> (iv) the relief sought;
>
> (c) require that service of the notice and supporting materials be done not less than 15 days before the hearing date;
>
> (d) require that additional materials be filed and served, including transcripts and an applicant's affidavit if necessary, to complete the record; and
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> (e) provide that the judge may require that factums be filed.

[56] The rules of Ontario's Superior Court and Provincial Court concerning the guiding procedural principle and retention of judicial

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[67] *Ontario Superior Court Criminal Rules*, note 13, r. 31.03(2).

[68] *Rules of the Ontario Court of Justice in Criminal Proceedings*, S.I./97-133, rr. 30.03-30.05, online: CanLII <http://www.canlii.org/en/ca/laws/regu/si-97-133/latest/si-97-133.html> [*Ontario Provincial Court Criminal Rules*].

discretion are similar. In particular, the *Ontario Superior Court Criminal Rules* state that:[69]

> 1.04(1) These rules are intended to provide for the just determination of every criminal proceeding, and shall be liberally construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay.
>
> 2.01 A judge of the court may only dispense with compliance with any rule where and to the extent it is necessary in the interests of justice to do so.

v. Summary of Charter rules in other jurisdictions

[57] Based on this survey of the rules of court which apply to *Charter* applications in other jurisdictions, a few conclusions can be drawn. First, rules for *Charter* applications are made pursuant to s. 482 of the *Code*. Second, these rules are part of general schemes which govern all criminal applications, (*Charter* and others contemplated by the *Code*), apply equally to Crown and accused applicants, and include rules respecting service. Third, some jurisdictions, namely Manitoba and British Columbia, establish only general procedures which govern all applications, while the Northwest Territories, Nunavut and Ontario have both general rules and specific sets of rules for *Charter* applications. Fourth, the Northwest Territories, Nunavut and Ontario have separate rules for s. 24(1) and s. 24(2) applications, with the s. 24(2) rules being the less rigid set.

[58] Fifth, the rules of the other jurisdictions generally require that *Charter* applications be in writing, specify the notice forms that are to be used and stipulate that the notice must set out the grounds for the application and the law relied on. The rules of Manitoba, the Northwest Territories, Nunavut, and especially Ontario, require extensive materials to be filed and served in connection with *Charter* applications, including briefs of law. Sixth, other jurisdictions typically include rules which expressly preserve judicial discretion and allow judges to waive formal requirements when justice so requires.

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[69] *Ontario Superior Court Criminal Rules*, note 13, rr. 1.04(1), 2.01. See also *Ontario Provincial Court Criminal Rules*, note 68, rr. 1.04(1), 2.01-2.02.

B. *Charter* Application Issues and Recommendations

[59] The comments received from the bench and bar on the *Charter* application proposals set out in CM 12.19 were used to support or revise the proposals and make final recommendations. Further, in accordance with the principle that procedures for making *Charter* applications should be as "uniform as possible"across provinces and territories,[70] the recommendations in this report were compared to the rules of court for making *Charter* applications in British Columbia, Manitoba, the Northwest Territories, Nunavut, and Ontario. The recommendations in this report reflect the same procedural principles and are not inconsistent with the rules in these other jurisdictions.

1. REFORM OF *CHARTER* APPLICATION PROCEDURES

[60] In 1996 the Canadian Bar Association, Alberta Branch's Administration of Justice Task Force issued a discussion paper concerning guidelines for *Charter* applications which generated comment and suggestions.[71] The Uniform Law Conference of Canada unanimously passed a resolution in 1997 calling for the creation of a committee to work on the procedures for *Charter* applications. The resulting report, titled *Regulating Charter Applications*, described the problems experienced in Ontario as follows:[72]

> Prior to January 1, 1998, the Ontario Court (Provincial Division), when sitting in criminal matters, was the only Court in the Province, trial or appellate, that did not have province-wide rules. As a result, practice within the Court was subject to a large number of different and frequently differing rules, local in nature and effect. These rules had been put into place by individual judges through a series of Practice Directions as the need had arisen and frequently dealt with those matters which are now the subject matter of the provincial Rules. They were not readily accessible and had traditionally neither been collected nor published. They often required different notices of motion, different notice periods and different supporting material depending on the type of

[70] *Dwernychuk*, note 12, at para. 18.

[71] Davies, note 37.

[72] Uniform Law Conference of Canada, *Regulating Charter Applications*, Final Report and Recommendations of the Working Group (2000), quoting Assistant Chief Judge Brian W. Lennox, online: <http://www.ulcc.ca/en/criminal/index.cfm?sec=4&sub=4a>.

> application and the court location. The new Rules were intended in part to eliminate the proliferation of individual procedural requirements and to allow counsel bringing an application covered by the Rules to be confident that there was a single standard of practice across the province.

Further, some attention was paid to *Charter* procedures in the legal journals in the 1990s and some members of the Alberta judiciary have generally indicated a preference for more definite regulation of *Charter* applications.[73]

[61] One of the arguments against procedural reform is that *Dwernychuk* provides adequate guidance.[74] Another is that applications to exclude evidence under s. 24(2) may turn on widely varying circumstances and range from straight forward applications to exclude certificates in drunk driving cases to complex gang trial applications involving multiple accused persons, thousands of constitutionally-impugned records, direct indictments, and problematic disclosure. The concern is that standardized procedures might impose an inappropriate uniformity on fact-specific and law-specific applications. Further, some argue that the establishment of rules could lead to the over-formalization of criminal procedure and the rejection of *Charter* applications on the basis of formal defects.

[62] In response to these arguments, it is noted that even if *Dwernychuk* provides adequate guidance for s. 24(2) applications and *Holt* covers ss. 11(b) and 24(1) applications, these cases do not provide complete guidance for all s. 24(1) applications.[75] In addition, although judicial decisions can facilitate the development of procedural rules and are necessary for rule interpretation, rules should not be expressed solely in court decisions for the following reasons.

- Case law is not easily accessible for self-represented individuals.

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[73] See e.g., J. Sandy Tse, "Charter Remedies: Procedural Issues" (1989) 69 C.R. (3d) 129; Michael Code, "American Cadillacs or Canadian Compacts: What is the Correct Criminal Procedure for s. 24 Applications under the Charter of Rights?" (1991) 33 Crim. L.Q. 298 (Part I), 407 (Part II); Wayne Gorman, "A Review and Analysis of Procedural Issues in Charter Applications Involving Criminal Causes or Matters: Pre-Trial, Trial and Post-Trial" (1995) 37 Crim. L.Q. 154.

[74] *R. v. Mah* (2001), 2001 ABQB 394, 294 A.R. 96 at para. 3, Sulyma J, "the procedure is best left to the good sense of counsel and the discretion of the trial judge to ensure a fair trial and maintain the integrity of the process."

[75] *Dwernychuk*, note 12; *Holt*, note 25.

- Different interpretations of decisions may result in different procedures in similar cases.
- Judicial decisions are not written in the precise style used by legislative drafters.
- Decisions are responses to particular cases, which means that the procedure described in a particular decision is likely to be skewed towards the facts before the court.

[63] Most of those who commented on CM 12.19 acknowledged the need for reform. *Charter* applications in Alberta are governed by statute and common law and the procedural guidance is neither complete nor adequately detailed. The administration of justice would benefit by more complete, detailed, standardized, and publicized guidance.

[64] Further, it was observed that other jurisdictions have rules of court for *Charter* applications and this may be evidence of a need for better regulation of the procedures. In particular, both the Ontario Superior Court and the Ontario Provincial Court have rules governing constitutional challenge, s. 24(1) and s. 24(2) applications. The *Ontario Advisory Report* noted that the lack of rules for these *Charter* applications, along with a number of other factors, impaired the operation of the criminal justice system in Ontario: "[t]he most significant contributor to the lengthening of trials is pre-trial applications by both the Crown and defence."[76] Although Ontario's criminal justice system was apparently in worse shape than Alberta's,[77] the *Ontario Advisory Report* recommendation that the regulatory system shift from case-based to rules-based should be considered.

[65] In Alberta, the non-standardized practice concerning *Charter* applications remains unsatisfactory. The court regularly receives notices of *Charter* application shortly before trial which do not provide enough information to discern the nature of the application or allow a proper assessment of the application's impact on the trial schedule. These bare notices often cause delay at the pre-trial phase or at trial. Procedural

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[76] *Ontario Advisory Report*, note 12, at para. 36. For a review of all impairing factors, see paras. 27-87.

[77] *Ontario Advisory Report*, note 12, at para. 3. See also The Honourable Justice Michael Moldaver, "The State of the Criminal Justice System in 2006: An Appellate Judge's Perspective" (Remarks to the Justice Summit - 2006, Toronto, 15 November 2006) at 4-5, online: <http://www.cjc-ccm.gc.ca/cmslib/general/Matlow_Docs/Authorities/Book%20of%20Authorities%20-%20Tab%20F%20Hon.%20Moldaver%20Remarks%20to%20Justice%20Summit%202006.pdf>.

reform respecting *Charter* applications in the Court of Queen's Bench is necessary and desirable.

2. DISTINCT *CHARTER* APPLICATION PROCEDURES – THREE TYPES

[66] Jurisdictions which have implemented rules of court in criminal matters have generally regulated all types of applications, with *Charter* applications being only one type. This suggests that *Charter* applications should be regulated within a broader procedural scheme and not as a stand-alone exercise. However, *Charter* applications have features that distinguish them from others and some jurisdictions have distinct rules for *Charter* applications.

[67] Development of a workable set of rules for *Charter* applications does not require the development of a comprehensive regulatory scheme for all criminal applications, provided that general rules concerning filing and service of application materials are part of the *Charter* set. There was no disagreement expressed by those who commented with the proposal to reform *Charter* application procedures in this manner. Specific *Charter* application procedures should be developed.

Other mechanisms

[68] Difficulties surrounding the timing and details of *Charter* applications could be worked out through case management processes or pre-trial conferences.[78] In these court-supervised processes, defence counsel could advise the Crown concerning *Charter* applications that will be brought at trial, but only to the extent particulars are known at the time of the meeting and subject to the caveat that the defence has no disclosure obligation.

[69] Case management and pre-trial conferences play an important, supplemental role in the governance of specific *Charter* applications. However, individual case management or pre-trial conferences are not likely to resolve all the difficulties associated with *Charter* applications for the following reasons.

- Not all Court of Queen's Bench criminal trials involve a pre-trial conference.

[78] See *Code*, s. 625.1.

- The grounds for s. 24(2) or other *Charter* applications may not become evident until trial or after a pre-trial conference, despite full pre-trial disclosure by the Crown.
- Case management and pre-trial conferences would likely be more successful if judges had access to the particularized information that a notice of application system provides.

[70] Only one commentator addressed this issue and confirmed that criminal pre-trial conferences are used to address *Charter* application procedures. This commentator then went on to support the proposal for procedural reform. As a point of information, the *Ontario Superior Court Rules* extensively regulate pre-hearing conferences and establish case management rules.[79] While case management and pre-trial conferences have a role in guiding some *Charter* applications, these case specific processes are not sufficient to generally solve *Charter* application problems. Standardized rules should govern *Charter* applications.

Three types of *Charter* application

[71] As discussed earlier in this chapter, there are three main types of *Charter* application which an accused person may make in a criminal proceeding:

(a) applications concerning the validity of legislation, regulation or common law;

(b) applications under s. 24(1) of the *Charter*; and

(c) applications for the exclusion of evidence under s. 24(2) of the *Charter* or on other grounds (such as ss. 24(1) or 11(d) of the *Charter*).

These three types of *Charter* application should be recognized in rules. At present, they are implicitly recognized in Alberta law with the first type partially regulated by the *Notice Act* and with the s. 24(1) and 24(2) applications governed, in part, by *Holt* and *Dwernychuk*, respectively. Further, other jurisdictions which have criminal rules of court recognize these three types and have different rules for s. 24(1) and s. 24(2) applications.

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[79] *Ontario Superior Court Criminal Rules*, note 13, rr. 28, 29; see also *Ontario Advisory Report*, note 12, at paras. 145-269.

[72] Although all three types of application should be governed by similar requirements concerning documentation and service, it was proposed that practical differences between the applications should be accommodated. Further, there is a complexity that must be recognized concerning s. 24(1) applications, that is, for certain cases (in particular, s. 11(b) "trial within a reasonable time" cases), the grounds for the application will be known well in advance of trial, whereas in others, the grounds for seeking relief under s. 24(1) may not arise until shortly before trial or even during the trial. It was therefore also proposed that the rules for s. 24(1) applications should accommodate this complexity.

[73] Those who commented did not disagree with the proposals to establish procedures for these three types of *Charter* application which reflect the practical differences between them.

RECOMMENDATION 7

Rules which accommodate practical differences should be developed to govern:

- constitutional validity applications;
- applications under s. 24(1) of the *Charter*; and
- applications for the exclusion of evidence whether under s. 24(2) of the *Charter* or on other grounds.

3. NOTICE OF *CHARTER* APPLICATION – CONTENT

[74] The main reasons for giving notice of a *Charter* application is to permit the court and the Crown to know what to expect in the application so that the impact of the application on the trial schedule can be assessed and all participants may prepare for the application hearing accordingly. The requirement to give notice may also help an accused person make a viable application.[80] With these purposes in mind, a proposal was put

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[80] *Ontario Advisory Report*, note 12, at paras. 39, 274 describes the problems associated with *Charter* applications which do not contain sufficient information:

> The notices and supporting material, if any, filed in support of applications often contain little more than boiler-plate, conclusory statements. These statements do not inform the opposing counsel or the trial judge as to what issue is being litigated. Of greater significance for the trial judge, these statements provide little insight into whether the application has a reasonable prospect of succeeding. On occasion, defence counsel seek to exclude evidence, even though the application has no realistic chance of success, and Crown Counsel seek to have ruled admissible evidence with limited, if any, probative value, or which has no reasonable prospect of being ruled admissible. In the result, judges are conducting too many unnecessary pre-trial applications [footnote omitted].
>
> In trials in the Superior Court of Justice there is no compelling reason why counsel should not

(continued...)

forward in CM 12.19 concerning what should be included in a notice of *Charter* application.

[75] In particular, CM 12.19 proposed that a standard form of notice (which would include a description of the material that should accompany the notice) suitable for any *Charter* application should be devised.[81] This said, it was also noted that rules should take into account that the grounds for a *Charter* application may not arise until the trial is underway and that, in these cases, the judge has the authority to dispense with formal notice requirements or otherwise modify the requirements in the interests of justice.

[76] The specific requirements proposed were that the notice should set out (a) the *Charter* rights allegedly violated and (b) a reasonably brief but adequate, reasonable, or sufficient description of the argument, so that the Crown and the judge can know what to expect and prepare accordingly. To ensure that descriptions of arguments are kept reasonably brief, a page limit, for example 3 pages, could be specified.

[77] It was also proposed that the notice should include a description of the materials or evidence to be relied on in the application[82] and that copies of any records containing the information supporting the application should be filed and served with the notice. These materials might include extracts from disclosure or transcripts or statements indicating anticipated testimony from witnesses for the accused or the Crown.[83] There may be instances in which an affidavit would be required. It was also proposed that the notice should include an estimate of the time required to argue the *Charter* application and an address for service.

[78] Finally, it was proposed that the notice should be accompanied by headnotes of, and extracts from, the cases relied on in the application, with the general acknowledgment that this requirement could be

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[80] (...continued)

> be required to provide in writing a concise, case-specific Notice of Application, setting out the legal basis upon which exclusion or admission is sought, as well as a summary of the evidentiary basis upon which the application is based with reasonable particularity. The notices should not be generic or of the "boiler-plate" variety.

[81] On applying points from *Dwernychuk*, note 12, to s. 24(1) applications, see *R. v. Derose*, 2002 ABPC 53, 313 A.R. 47 at para. 41 (Prov. Ct.), Allen P.C.J.

[82] *R. v. Baker*, 2004 ABPC 218, 372 A.R. 230 at para. 173, Allen P.C.J.

[83] The statements of counsel may provide sufficient information to support an application: *Vukelich*, note 47, at para. 17; *Brosseau*, note 10, at para. 31. An undertaking to adduce evidence may also be submitted: *Vukelich*, note 47, at para. 23.

dispensed with by the court. In this regard, it was contemplated that a list of cases with pinpoint citations might be sufficient.[84] As a general matter, it was suggested that the *Charter* application rules should generally include a provision for seeking advice and directions to deal with difficult cases.

[79] A number of those who commented on the notice content proposals expressed concern with the prospect of applicants being compelled to provide detailed descriptions of the evidence to be relied on in support of the application and clearly indicated a preference for describing facts, rather than the evidence that would be used to support factual findings. There is no disagreement with these comments and the final recommendation concerning *Charter* notice content has been adjusted accordingly.

[80] Further, it is observed that the *Ontario Superior Court Criminal Rules* concerning applications to exclude evidence, have content requirements that are similar to those proposed in CM 12.19. In particular, an Ontario application must include a description of presumptively admissible evidence, a specific statement of grounds on which the evidence is not admissible, a detailed summary of material to be relied on in making the application, a statement of how the material is to be introduced, and an estimate of the time needed to present the applicant's case.[85]

[81] However, Ontario's requirements concerning materials needed to support a notice of *Charter* application are more demanding than those proposed in CM 12.19 in that Ontario applicants must file and serve detailed application records and books of authorities.[86] It does not seem necessary to add all of the Ontario requirements to the notice content recommendation.

[82] By way of background, the intention of the notice content proposal was to mimic civil motions practice whereby an applicant must disclose the type or source of evidence that will be relied on in an application, for example, the testimony of officer X in the preliminary inquiry; pages A - C of document Y in the disclosure; or the testimony of witness Z. It was not intended that details of the evidence be disclosed, for example, the precise

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[84] See *Mousseau*, note 19, at para. 13; *Mide*, note 18.

[85] *Ontario Superior Court Criminal Rules,* note 13, r. 31.03(2).

[86] *Ontario Superior Court Criminal Rules,* note 13, r. 31.05.

questions and answers; the lines in the document; or particulars of the anticipated testimony. In order to maintain the facts/evidence distinction and ensure that applicants are not forced to provide more than descriptions of types or sources of evidence, the notice content recommendation in this final report does not include a requirement to attach records.

[83] One commentator drew attention to s. 657.3(3) of the *Code*, which requires that notice of the use of expert evidence be provided at least 30 days before the commencement of trial or within another period of time as may be fixed by a judge. Regardless of whether s. 657.3(3) applies to *Charter* applications, it is suggested that providing notice of expert evidence would be prudent and would help meet the policy objectives associated with giving notice of a *Charter* application. Indeed, a failure to provide adequate notice of the intent to use expert evidence in a *Charter* application would likely contribute to the difficulties that notice is meant resolve. The notice of *Charter* application should include information concerning the applicant's intent, if any, to tender expert evidence in support of the application, with sufficient detail so as to enable the other party to respond intelligently.

[84] Further, the notice content recommendation reflects the fact that the *Charter* application jurisprudence, practice and legal resources have evolved such that an applicant need only list the relevant authorities that will be relied upon, instead of being required to provide headnotes and extracts.

RECOMMENDATION 8

A notice of *Charter* application form should contain:

(a) a description of the rights allegedly violated;

(b) a reasonably brief but adequate, reasonable, or sufficient account of the grounds for the application (i.e. a statement of the facts, not evidence, supporting the application and an outline of the legal argument based on those facts);

(c) a brief description of the types or sources of materials or evidence to be relied on in the application, including information respecting any expert evidence, of the type referred to in ss. 657.3(3)(a)(i) to (iii) of the *Code*;

(d) an estimate of the time required to argue the motion; and

(e) an address for service.

RECOMMENDATION 9

The notice should be accompanied by a list of relevant authorities relied on by the applicant.

4. NOTICE OF *CHARTER* APPLICATION

[85] The notice of *Charter* application and associated materials must be filed with the clerk of the court who will transmit the notice to the appropriate judge in accordance with the court's administrative protocols. Consistent with established practice, CM 12.19 noted that the notice of *Charter* application should be served on the Crown prosecutor. In the case of a constitutional validity challenge, the *Notice Act* requires that the notice also be served on both the federal and provincial Attorneys General.[87] No commentators disputed these requirements.

RECOMMENDATION 10

The applicant must serve notice of a Charter application on the Crown prosecutor.

RECOMMENDATION 11

In the case of a constitutional validity application, the applicant must also give notice of the application as required by law.

5. SERVICE OF *CHARTER* APPLICATION DOCUMENTS

[86] In other jurisdictions, *Charter* application rules do not occur in isolation. Rather, they are supported by general procedural rules concerning, for example, filed document requirements, affidavits and service. In CM 12.19, it was proposed that Alberta's *Charter* application rules should include some general rules to govern, at least, service.

[87] In particular, it was proposed that the Crown should be served with notice of the application at the Crown office having carriage of the

[87] *Notice Act*, note 32, s. 2(1). [Previously dealt with in the *Judicature Act*, note 32, s. 24]

prosecution. Service can be accomplished by leaving a copy of the application materials at the office, or faxing a copy of the application materials to the office. Further, if a prosecutor with the Crown office having carriage of the prosecution agrees, service may be effected in another manner, such as by the delivery of the application documents by email.

[88] If the Crown wishes to serve any documents related to an application on defence counsel, it was proposed that service be effected at the applicant's address for service as indicated on the notice.

[89] None of the parties who commented disagreed with the basic proposal that there should be rules for service of a *Charter* application. However, one commentator stated that email should be as acceptable a mode of service as service by fax and further, that service by email should not require the Crown's prior agreement.

[90] These comments are appreciated. However, in light of the occasional failure of email systems and practical issues such as how to prove service, determine the appropriate email address, and ensure the legibility of electronic text, the underlying premise that the party to be served by email must agree before such service can be authorized is maintained. In addition, it should be clarified that the original proposal and recommendation in this report only contemplate e-service on the other party, not e-filing with the court.

RECOMMENDATION 12

The Crown should be served at the Crown office having carriage of the prosecution.

RECOMMENDATION 13

Service may be effected on the Crown by

(a) leaving a copy of the application materials at the office,

(b) faxing a copy of the application materials to the office, or

(c) if a prosecutor with the Crown office having carriage of the prosecution agrees, in another manner, such as by email.

RECOMMENDATION 14

If the Crown serves documents in response on the defendant applicant, service may be effected at the address for service indicated on the notice of application, which may include the defendant's lawyer, in accordance with general service requirements.

6. NOTICE PERIOD FOR *CHARTER* APPLICATIONS

[91] There are four time periods within the *Charter* application process which should be specified. These periods are: 1) the number of days before trial that notice must be given; 2) the number of days notice that must be given before an application can be initially brought before a judge; 3) the number of days that an applicant or respondent has to provide further documentation to the other party; and 4) the number of days notice that must be given before an application can be heard.

[92] Subject to the qualification that the different types of *Charter* applications dictate that each be staged somewhat differently, these four periods should be determined as follows.

- Written notice of an application should be provided 60 days before trial.[88]
- The application should be returnable before the trial judge for an initial hearing to establish the application time line and procedural requirements 7 days after the notice is filed (the initial return date).
- The number of days that an applicant or respondent has to provide additional documentation to the court and the other party is to be established by the trial judge.
- The date for the hearing of the application is to be established by the trial judge.

The following paragraphs describe how these four time periods would apply to constitutional validity applications, s. 24(1) cases governed by *Holt*, *Charter* applications where grounds are known in advance of the trial, and applications where grounds are not known in advance.

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[88] The intention is to parallel the structure of the *Regulation,* note 34, which requires that written notice of an application be made a specified number of days in advance of a proceeding.

a. Constitutional challenges

[93] In CM 12.19, it was proposed that written notice of constitutional challenges should be provided at least 60 days before trial. The following reasons for providing notice substantially in advance of the trial were noted.

- A notice given shortly before trial is likely to put the trial date in jeopardy and may not be far enough in advance for the Crown and the court to deal with serious issues.
- Counsel may have had the benefit of gathering information through a preliminary inquiry, in addition to disclosure.
- The proposal did not contradict the 14 day rule concerning the time between notice and the hearing of the application.[89]
- In most cases, counsel are likely to be aware of the available *Charter* applications substantially before trial.

[94] Once a notice of application has been filed and served, the matter should be brought expeditiously before a judge, with the initial return date being either the date of the pre-trial conference, if the conference is scheduled, or the next criminal appearance or arraignment date that is within 7 days after the date the application is filed and served.

[95] Of note, the initial return date is not the date on which the application is to be heard. Rather, the initial return date was proposed as a date when the applicant and the Crown would come before a judge so that the judge, with input from the parties, could determine whether the Crown or the applicant needs to file additional documents, establish the time line for filing additional materials, if any, and set the application hearing date.

[96] Further, it was suggested that the constitutional validity application hearing date could be the first day of trial, if no earlier date is appropriate. This said, the trial judge has discretion to conduct the constitutional validity hearing on a date that is appropriate to the

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[89] *Judicature Act*, note 32, s. 24. Section 24(2) stipulates the amount of time that must elapse between the notice and the actual hearing of the application, not a time period for filing a notice of application. In any event, 14 days could be considered a minimum, not a prudent maximum. The 14 day requirement does not appear to be continued in the *Notice Act,* note 32, but may continue in regulations.

circumstances and may also reserve his or her decision until the end of the trial, if the ruling is dependent on facts elicited during the trial.[90]

b. Holt cases – violations of s. 11(b)

[97] Applications based on s. 11(b) are arguably the most procedurally straightforward of the various s. 24(1) claims for relief. The accused person will generally know long before the trial (because it has taken a long time to get to trial) that he or she will make a s. 11(b) argument. Hence, as in the case of constitutional challenges, notice of this type of *Charter* application should be provided at least 60 days before trial.

[98] Again, the initial return date should be at the pre-trial conference or, if a conference is not set, at the next sitting of the criminal appearance or arraignment court that is within 7 days after the date of service. At the initial return date, the judge will deal with documentation matters and set filing, if any, and application hearing dates. To be consistent with *Holt*, the application hearing date should take place at least 30 days before the trial date.

c. Grounds known in advance of trial

[99] It was proposed that section 24(1) and 24(2) applications also require that notice be provided at least 60 days before trial in order to maintain a consistent initial notice period. In general, at this point in time Crown disclosure is usually complete and a preliminary inquiry has been conducted, so providing notice of *Charter* application should not create undue hardship for the accused. Further, the trial date should still be sufficiently distant to permit adequate time to reflect and prepare the *Charter* application.

[100] The initial return date should, again, be at the pre-trial conference, if scheduled, or at the next sitting of the criminal appearance or arraignment court that is within 7 days after the date of service of the notice of application. The judge may establish a process to deal with any Crown claim that the applicant's notice is defective.[91] The judge may make any order required to deal with the exchange of additional documentation. The hearing date of the application is a matter of court discretion to be set as appropriate in the circumstances. The hearing date

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[90] *R. v. DeSousa*, [1992] 2 S.C.R. 944 at 954-955, Sopinka J.

[91] By way of an illustration, see *Mousseau*, note 19.

may be for example, the first day of trial or, in the case of s. 24(1) applications based on entrapment, after the conclusion of the trial.[92]

d. Grounds not known in advance

[101] An exemption from the proposed 60 day initial notice period should always be available if the grounds for the *Charter* application are not evident in advance of the trial. In particular, if the grounds to exclude evidence under s. 24(2) or on any other *Charter* or constitutional basis are not known before trial, or if the full basis for the application is not established until evidence emerges at trial, then neither the timing or notice of application content rules should apply.[93] In these situations, the trial judge should directly manage the application process.

[102] The comments received concerning the proposed initial notice period varied. Some of those who commented approved of the 60 days before trial initial notice period, but many did not. Some of those who were opposed to the proposal were of the opinion that 60 days is too long and favoured a 14 or 15 day notice period.

[103] Other commentators indicated that the period was too short, at least for constitutional challenges or s. 11(b) applications, and suggested a 90 or 120 day notice period for applications of these types.

[104] The Ontario Superior Court settled on 30 days as the presumptive notice period for applications to exclude evidence, unless a judge otherwise orders.[94] In addition, the general 15 day notice period formerly applicable to other constitutional applications was increased to 30 days.[95] In discussing the short notice period, Ontario's Advisory Committee commented that:[96]

> On occasion, 15 days' notice has proven insufficient for opposing counsel to respond, resulting in adjournments or delays in the trial starting. If the notice and supporting material are not filed until 15 days before trial, and if either side wished a further pre-trial conference to address the

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[92] *R. v. Dikah and Naoufal* (1994), 18 O.R. (3d) 302 (C.A.), aff'd [1994] 3 S.C.R. 1020.

[93] *Dwernychuk,* note 12, at para. 23. For an example of a s. 24(2) issue arising during trial due to the failure of a Crown (police) witness to attend and testify, see *Domstad*, note 10.

[94] *Ontario Superior Court Criminal Rules*, note 13, r. 31.04(1).

[95] *Ontario Superior Court Criminal Rules*, note 13, r. 27.04(1).

[96] *Ontario Advisory Report*, note 12, at para. 287.

issues raised, it could be difficult to arrange one, given the short time.

Ontario's committee recommended 30 days notice, "subject to the discretion of the pre-trial conference judge to order either a longer period in cases where additional time will be required for the responding party to properly prepare, or a shorter period if he or she determines neither party would be prejudiced."[97]

[105] It is difficult to set an appropriate time frame for providing notice of a *Charter* application, and arguments can be made for a shorter or longer notice period. However, the 60 day time period is maintained as a compromise position that should, in most cases where grounds are known in advance of trial, facilitate the timely disposition of all three types of *Charter* applications.[98]

[106] A system containing multiple notice periods (for example, 90 days for constitutional challenges, 30 days for s. 24(2) applications) was considered but may not be beneficial as it would likely cause confusion and impede the smooth processing of *Charter* applications.

[107] Further, given the difficulties associated with scheduling the appropriate amount of time to conduct a criminal trial, especially a trial by jury, and the court's need to assess the impact of a *Charter* application on the trial schedule, 30 days advance notice does not provide enough time. One month in advance, the trial schedule has already been set, with no knowledge of the *Charter* application or any estimate as to the amount of time it will take to address it.

RECOMMENDATION 15

Notice of a *Charter* application should be filed and served two months before the date of trial.

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[97] *Ontario Advisory Report*, note 12, at para. 288.

[98] In the original consultation memoranda and subsequent discussion of comments, time periods were expressed as number of days. Current Alberta practice is to define periods of less than one month in terms of days, with periods of one month or more expressed in terms of months. The recommendations in this final report are written to conform with the current time period definition protocol.

RECOMMENDATION 16

If a pre-trial conference has been scheduled when the notice of application is filed, the notice of application should be returnable to the judge conducting the pre-trial conference. If a pre-trial conference has not been scheduled, the notice of application should be returnable before the next regularly scheduled criminal appearance or arraignment court which takes place within 7 days after the notice is filed.

RECOMMENDATION 17

At the initial return date, the judge establishes the time periods within which additional documents, if any, should be filed and sets the date for the application hearing.

7. MEMORANDUM OF LEGAL ARGUMENT – NOT MANDATORY

[108] It was not proposed that the applicant be required to file written legal arguments (a memorandum of law), in support of a *Charter* application. The reason for this is that the outline and essence of the applicant's legal argument should be clear from the notice of *Charter* application, if all the recommended information items were included in the notice.

[109] In cases where counsel wish to file, or the court requires that one or both parties file and serve memorandums, it was proposed that any uncertainty about the filing or exchange of memorandums should be resolved by an application for advice and direction, or by a judge at, or after, the initial return date.

[110] Some of those who commented on the absence of a requirement to file and serve memorandums stated that the Crown should be required to provide a written notice in response to a *Charter* application. This requirement does not seem necessary. Matters such as whether the applicant's notice of application is sufficient and whether a written response from the Crown is necessary should be left to the judge's discretion, as should related details concerning the content, timing and procedure for filing and exchange of any additional written materials.

RECOMMENDATION 18

The applicant and respondent are not required, unless otherwise directed by the court, to file and serve memorandums of law in connection with a Charter application.

8. AUTHORITY TO HEAR *CHARTER* APPLICATIONS

[111] When CM 12.19 was issued, the general view was that *Charter* applications should be heard by the trial judge.[99] CM 12.19 did not suggest an interlocutory proceeding before a motions judge, although it was acknowledged that a *Charter* application hearing may be required well in advance of the trial. Further, the assignment of a judge to conduct a trial or decide a *Charter* application is a matter of court administration. No commentators disagreed with this view.

[112] Under the *Ontario Superior Court Criminal Rules*, applications are usually heard by the trial judge, however, the parties may expressly agree that the application be heard by another judge with the ruling incorporated in the trial record.[100] In addition, the pre-trial or case-management judge may make an order giving effect to the parties' agreement.

[113] In 2011 the federal government implemented legislation aimed at improving the conduct of complex criminal trials which added a case management Part to the *Code*, including a section which provides that a case management judge can exercise powers to adjudicate issues including those concerning the *Charter*.[101] All efforts to streamline complex criminal trials should be supported and the recommendation in this report has been modified accordingly.

RECOMMENDATION 19

Charter applications should be heard by the trial judge or any other judge of the Court of Queen's Bench.

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[99] *R. v. Mills*, [1999] 3 S.C.R. 668 at para. 145; *R. v. O'Connor*, [1995] 4 S.C.R. 411 at paras. 20, 179; *R. v. Litchfield*, [1993] 4 S.C.R 333 at 353; *R. v. Mills*, [1986] 1 S.C.R. 863 at para. 68, Lamer J. (dissenting, but not on this point); *R. v. DeSousa*, [1992] 2 S.C.R. 944 at 954, Sopinka J.

[100] *Ontario Superior Court Criminal Rules*, note 13, r. 31.02(1)-(2).

[101] *Code*, s. 551.3(1)(g).

9. CONDUCT OF *CHARTER* APPLICATION HEARING

[114] The order of a *Charter* application hearing poses some particular difficulties: Who should be the first to call witnesses? Can the party calling the witness cross-examine or only examine in chief? Does it matter whether a witness is a police officer or a witness otherwise friendly to the Crown? Does it matter what issues are at stake (for example, whether s. 10(b) rights were properly implemented, or whether both common law voluntariness and s. 10(b) rights are at issue)?

[115] Different approaches to the conduct of a *Charter* application hearing are possible and have been advanced in the cases.[102] For example, the Crown might be obliged to call police witnesses and then be restricted to examining in chief, with the accused entitled to cross-examine; the accused might be obliged to call police witnesses, but then be permitted to cross-examine with the Crown being restricted to direct examination. In another situation, if the accused is relying on defence-friendly witnesses, the accused might be obliged to call the witnesses and limited to an examination in chief, with the Crown then permitted to cross-examine.

[116] In terms of deciding whether or not rules of court should specify the order of hearing, it was noted in CM 12.19 that establishing an appropriate order of hearing would be a controversial and difficult matter because there is no clear guidance from legislation or judicial decisions. Although the order of trial might serve as a useful analogy, *voir dires*, particularly *Charter voir dires*, are not bound to follow trial procedures.

[117] Moreover, establishing order of hearing rules would run the risk of fettering the trial judge's discretion concerning the procedure most appropriate in the particular circumstances of the hearing.[103] In addition, it was noted that none of the other jurisdictions regulate the order of a *Charter* application hearing, although Ontario's rules expressly state that the judge conducting the hearing establishes the process.[104]

[118] CM 12.19 proposed that Alberta similarly refrain from regulating the order of a *Charter* application hearing. None of those who commented

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[102] *R. v. Coles* (2005), 2005 ABPC 20, 28 C.R. (6th) 167, Fradsham P.C.J.; *Brosseau*, note 10, at paras. 39, 41.

[103] *R. v. Felderhof* (2003), 68 O.R. (3d) 481 at para. 57 (C.A.).

[104] *Ontario Superior Court Criminal Rules,* note 13, r. 34.01:

> The presiding judge shall determine the order in which pre-trial and other applications shall be heard and the manner in which the evidence in support of any application shall be presented.

disagreed with the proposal or suggested a standard order of hearing. The order of a *Charter* application hearing is a matter subject to judicial discretion and should not be governed by rules of court.

CHAPTER 3

Non-Disclosure Orders

[119] This chapter focuses on describing procedures for obtaining discretionary publication bans and other non-disclosure orders. The chapter is arranged in two parts. The first part identifies the substantive law principles and existing legislative provisions which govern procedures for discretionary publication bans and non-disclosure orders.[105] The second part addresses the need for reform and provides recommendations concerning non-disclosure order applications in the Court of Queen's Bench.

A. Background to Non-Disclosure Applications

[120] One of the hallmarks of a fair criminal justice system is transparency. It is not enough that justice be done, it must also be seen to be done. In this regard, public access to criminal proceedings and disclosure of the related information is crucial. However, providing appropriate public access to criminal justice information requires a balancing of factors which favour openness and disclosure against those which restrict access and non-disclosure. The rules of competence, compellability, admissibility and privilege are used to restrict information from being admitted in court. Publication bans and other non-disclosure orders are techniques used to restrict public dissemination of information that has been put before the court.

1. PRINCIPLES

[121] In criminal cases, disputes over the openness of courts and access to information must be resolved within the framework established under the *Charter*. The relevant case law sometimes supports openness and at other times supports restrictions. In each situation, the competing interests must be balanced.

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[105] For more information on principles and balancing factors, see Alberta Law Reform Institute, *Non-Disclosure Order Application Procedures in Criminal Cases*, Consultation Memorandum No. 12.15 (2004) [CM 12.15]. See also *Toronto Star Newspapers Ltd. v. Canada,* 2010 SCC 21, [2010] 1 S.C.R. 721 concerning the constitutionality of a statutory mandatory publication ban [*Toronto Star*].

Openness

[122] A fundamental principle of our criminal justice system is that court proceedings should be public. Deschamps J. states that:[106]

> The open court principle is of crucial importance in a democratic society. It ensures that citizens have access to the courts and can, as a result, comment on how courts operate and on proceedings that take place in them. Public access to the courts also guarantees the integrity of the judicial processes inasmuch as the transparency that flows from access ensures that justice is rendered in a manner that is not arbitrary, but is in accordance with the rule of law.

This means that courts should be open, parties and witnesses should be named, the public should have reasonable access to court records and exhibits, and news media should be entitled to report on criminal matters.[107] Openness helps ensure accountability.[108] The openness principle is supported by a *Charter* provision which protects freedom of expression, including freedom of the press.[109] Criminal law cases are cases of public interest. The principles engaged often reflect fundamental social standards and the public cares that these standards are confirmed and applied. Further, the openness of criminal trials may serve to promote truth, political or social participation and self-fulfilment.[110]

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[106] *CBC v. Canada*, note 5, at para. 1.

[107] *CBC v. Canada*, note 5, at para. 28; *Nova Scotia (Attorney General) v. MacIntyre*, [1982] 1 S.C.R. 175 at 185, Dickson J. [*MacIntyre*]; *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480 at para. 22, La Forest J. [*CBC v. New Brunswick*]; *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522 at paras. 1, 36, Iacobucci J. [*Sierra Club*]; *Vancouver Sun (Re)*, 2004 SCC 43, [2004] 2 S.C.R. 332 at para. 24, Iacobucci and Arbour JJ. [*Vancouver Sun (Re)*].

[108] *CBC v. Canada*, note 5, at para. 29; *R. v. Mentuck*, [2001] 3 S.C.R. 442 at para. 51, Iacobucci J. [*Mentuck*]; *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326 at 1336-37, Cory J.; *Dagenais*, note 6, at 883, Lamer C.J.C.; *Edmonton (City) v. Kara* (1995), 164 A.R. 64 at para. 6 (Q.B.), Berger J., as he then was; *Canada (Attorney General) v. O'Neill* (2004), 192 C.C.C. (3d) 255 at paras. 45, 47 (Ont. S.C.), Ratushny J. [*O'Neill*].

[109] *Charter,* note 1, s. 2(b); *CBC v. Canada*, note 5, at para. 2. The media, for the most part comprised of private commercial organizations, may be seen to have a quasi-constitutional status by virtue of its role in Canadian political life, in general, and the administration of justice, in particular. In *Canadian Newspapers Co. Ltd. v. Canada (A.G.)* (1986), 55 O.R. (2d) 737 at 748 (H.C.J.), Osler J. observes, "[i]t is easy to become impatient with the press and to criticize it for what may at times appear to be sensationalism. It is not necessary that the motives of the press be altruistic for the importance of press freedom to be apparent."

[110] *CBC v. Canada*, note 5, at para. 2. *Dagenais*, note 6, at 876-77; *Sierra Club*, note 107, at para. 75. However, Iacobucci J. points out that as the self-fulfilment aspect of freedom of expression relates to individual expression "and thus, does not closely relate to the open court principle": *Sierra Club*, note 107, at para. 80.

[123] The news media are the means by which the public gains access to criminal justice information. La Forest J. has commented:[111]

> That s. 2(b) protects the freedom of the press to comment on the courts as an essential aspect of our democratic society. It thereby guarantees the further freedom of members of the public to develop and to put forward informed opinions about the courts. As a vehicle through which information pertaining to these courts is transmitted, the press must be guaranteed access to the courts in order to gather information.

[124] The open court principle is also supported by the *Charter* provision which protects an accused person's right to a fair and public hearing, including an open court with media access and rights to report on the matter.[112] Public scrutiny, through the media,[113]

> ensures that the judicial system remains in the business of conducting fair trials, not mere show trials or proceedings in which conviction is a foregone conclusion [and]... ensures that the state does not abuse the public's right to be presumed innocent, and does not institute unfair procedures.

An open process can also "vindicate an accused person who is acquitted, particularly when the acquittal is surprising and perhaps shocking to the public."[114]

Restricted access and non-disclosure

[125] Access limitations and non-disclosure of information can also be supported by other constitutional provisions. In particular paragraph 11(d) and s. 7 of the *Charter* protect an accused person's right to a fair trial. If the accused is tried by jury, this right may be jeopardized by excessive or improper pre-trial publicity or publicity during trial and restrictions on openness may be required to preserve the right to a fair trial.[115]

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[111] *CBC v. New Brunswick*, note 107, at para. 26. "The media stand in for the public": *John Doe v. Richard Roe* (1999), 243 A.R. 146 at para. 21 (Q.B.). See also *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326 at 1339-40, Cory J.; *CBC v. New Brunswick*, note 107, at para. 23; *R. v. Quintal* (2003), 335 A.R. 14 at paras. 123, 129 (Prov. Ct.) [*Quintal*].

[112] *Charter*, note 1, s. 11(d). *Mentuck*, note 108, at para. 52.

[113] *Mentuck*, note 108, at para. 53 [emphasis in original]. See also *Dagenais*, note 6, at 879 concerning the public's interest in the preservation of fair trials.

[114] *Mentuck*, note 108, at para. 54.

[115] A pre-trial publication ban may increase the likelihood of selecting an impartial jury thereby diminishing the risk that the trial will be tainted by unfairness. Sequential, separate jury trials of

(continued...)

[126] Restrictions on openness may also be required for the appropriate administration of criminal justice.[116] For example, non-disclosure may be necessary to protect undercover police investigators, ongoing investigations or investigative techniques.[117] Non-disclosure may also: increase the likelihood that a witness will testify by eliminating publicity concerns, protecting vulnerable non-police witnesses, and preserving individual privacy;[118] encourage the reporting of sexual offences;[119] and protect national security.[120] The protection of privacy interests, particularly those of witnesses and victims, can be a legitimate objective of the "court's power to regulate the publicity of its proceedings."[121]

Balancing openness and restrictions

[127] The balancing of these considerations can be achieved in two ways. First, the law may categorically forbid access to, or disclosure of, information. Second, legislation or the common law may provide for the exercise of judicial discretion concerning restricting access to, or disclosure of, information. Both balancing methods must pass a *Charter* analysis.[122] In

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[115] (...continued)
parties to the same offence entail significant concern about whether publicity respecting one trial will taint the other trials.

If an accused does not elect trial by jury, the risk of unfairness due to pre-trial publicity is virtually eliminated. A judge is assumed to be objective, well versed concerning the prosecution's legal burden and able to disabuse herself of the prejudicial effects of publicity, *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97 at para. 139, Cory J. [*Phillips*].

[116] *Mentuck*, note 108, at para. 31; See also *Sierra Club*, note 107, at para. 54.

[117] *Mentuck*, note 108, at para. 60.

[118] In particular, the privacy of witnesses, complainants and individuals who may be referred to in evidence. Privacy of these persons may be constitutionally protected under ss. 7 or 8 of the *Charter,* as appropriate to the circumstance. See *Quintal*, note 111, at paras. 197-203; *Muir v. Alberta*, [1995] A.J. No. 1656 at paras. 42-50 (Q.B.), Veit J. [*Muir*].

[119] See *CBC v. New Brunswick*, note 107, at para. 43.

[120] *Dagenais*, note 6, at 882-83.

[121] *CBC v. New Brunswick*, note 107, at para. 39.

[122] Balancing measures are assessed under ss. 2(b), 11(d) and 7 of the *Charter* to determine whether the measure limits rights and freedoms, and then under s. 1 to determine whether the measure is a reasonable limitation of those rights and freedoms. Common law rules regulating the exercise of judicial discretion must reflect boundaries established by the *Charter*. See *Dagenais*, note 6, at 838-39, 887; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 at 1078-1079; *Michaud v. Quebec (Attorney General)*, [1996] 3 S.C.R. 3 at para. 17; *Re Vancouver Sun*, note 107, at para. 31; *O'Neill*, note 108, at para. 21.

this regard, the *Charter* does not establish a priority scheme for protected rights, rather:[123]

> A hierarchical approach to rights, which places some over others, must be avoided, both when interpreting the *Charter* and when developing the common law. When the protected rights of two individuals come into conflict, as can occur in the case of publication bans, *Charter* principles require a balance to be achieved that fully respects the importance of both sets of rights.

Similarly, if there is a conflict between the constitutionally protected rights of an individual and public policy interests, the balancing must be achieved in a manner that is consistent with the *Charter* jurisprudence.

[128] Another principle of note concerning balancing is that despite the theoretical parity of disclosure and non-disclosure interests, the burden of persuasion is on those who would limit access. In the words of Dickson, C.J.C, "covertness is the exception and openness if the rule".[124] As he went on to note, "The presumption ... is in favour of public access and the burden of contrary proof lies upon the person who would deny the exercise of the right."[125]

[129] Finally, there are a number of conditions which must be satisfied to justify restricting access to, or disclosure of, information.

- The restriction or non-disclosure must be necessary to prevent serious risk to the proper administration of justice because reasonably available and effective alternative measures will not secure the objective or reduce the risks.[126]
- The salutary effects of restriction or non-disclosure must outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to

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[123] *Dagenais*, note 6, at 877.

[124] *MacIntyre*, note 107, at 185.

[125] *MacIntyre*, note 107, at 189; See also *CBC v. New Brunswick*, note 107, at para. 22; *Re Vancouver Sun*, note 107, at para. 31; *O'Neill*, note 108, at para. 51.

[126] See *Dagenais*, note 6, at 887-88, 927-28 for a discussion of alternative measures such as adjourning the trial, changing venue, sequestering jurors, allowing challenges for cause during jury selection, and strong judicial directions to the jury. Uniform Law Conference of Canada noted that an adjournment could threaten an accused person's right to trial within a reasonable time, a right protected under s. 11(b) of the *Charter*, which suggests that the delay inherent in some alternatives could add another constitutional complication to the balancing effort: *Publication Bans* (1996), online: <http://www.ulcc.ca/en/poam2/index.cfm?sec=1996&sub=1996af>

free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.[127]

- Restriction or non-disclosure serves a legitimate objective, that is, it protects against real and substantial risks to constitutional rights or the administration of justice.[128]
- The existence of the alleged risks must be supported by evidence.[129]
- The restriction or non-disclosure has a rational connection to securing the objectives or reducing the risks.[130]
- The restriction or non-disclosure is as narrowly circumscribed as practically possible.[131]

2. PROCEDURAL GUIDANCE – *DAGENAIS*

[130] The discretionary act of balancing requires, at a minimum, an applicant who seeks to restrict access or disclosure, a court to decide the matter, materials to support the application, a notice to some respondent and a response to the application. It is the last two elements which are tricky in that criminal trials normally involve only two parties, the Crown and an accused. For balancing purposes, it may be important to have a party with a keen interest in preserving the openness of proceedings in the role of application respondent, as the Crown and accused may not have such an interest.

[131] *Dagenais,* and cases which followed, established both substantive and procedural guidelines for restricting access or disclosure.[132] In terms of substance, in the absence of an official public interest representative in the criminal trial context, *Dagenais* holds that the representative of the

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[127] *Mentuck*, note 108, at para. 32; see also *Dagenais*, note 6, at 886- 87, 889.

[128] *Dagenais*, note 6, at 878-79.

[129] *Sierra Club*, note 107, at para. 46; *O'Neill*, note 108, at para. 31.

[130] *Dagenais*, note 6, at 886-87. See also *Phillips*, note 115, at 165 which holds that pre-trial publicity is not, in itself, a sufficient basis for granting a publication ban.

[131] *Dagenais*, note 6, at 880-81, 923. See also *Mentuck*, note 108, at para. 36.

[132] *Canadian Broadcasting Corp. v. The Queen,* 2011 SCC 3, [2011] 1 S.C.R. 65, at para. 3: "The analytical approach developed in *Dagenais* and *Mentuck* applies to all discretionary decisions that affect the openness of proceedings." See also *Vancouver Sun (Re)*, note 107, at para. 31; *Toronto Star Newspapers Ltd. v. Ontario,* 2005 SCC 41, [2005] 2 S.C.R. 188 at para. 7; *Named Person v. Vancouver Sun,* 2007 SCC 43, [2007] 3 S.C.R. 253 at para. 35; *Toronto Star*, note 105 at paras. 15-16.

public interest should be the media.[133] By default, any individual media organization is entitled to represent the public interest in access and disclosure matters.[134]

[132] *Dagenais* also provided guidance concerning an appropriate process for restricting access or disclosure, as follows.[135]

- The Crown or the accused may apply to restrict access or disclosure.
- The application may be made
  - (i) to the trial judge,
  - (ii) to a judge of the same level of court at which the case shall be heard, if a trial judge has not been appointed, or
  - (iii) to a superior court judge, if the level of court for trial has not been established.
- The media should be given notice of the application, with matters such as the form of notice and relevant media outlets to be determined by the deciding judge, local rules and relevant case law.
- At least some members of the media should be granted standing to appear and make representation, with matters such as which media outlet would be granted standing and the scope of participation in the hearing to be determined by the deciding judge, local rules and relevant case law.
- A media outlet seeking standing to oppose an application to restrict access or disclosure should attend the hearing, argue for status and if granted, argue the merits of the application.

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[133] See also *Mentuck*, note 108, at para. 38 which provides that if the media are not actually present, they should be notionally present in that the judge must "take account of these interests without the benefit of argument."

[134] *R. v. Eurocopter Canada Ltd.* (2004), 71 O.R. (3d) 27 at para. 22 (Sup. Ct. J.) [*Eurocopter*]: "the CBC was granted standing as ordained by the decision of the Supreme Court of Canada in *Dagenais* ... to represent the interest of the media in freedom of expression and public access."

On the issue of media as agent for the public, see also *Blackman v. British Columbia Review Board* (1995), 95 C.C.C. (3d) 412 (B.C.C.A.) and Uniform Law Conference of Canada, *Publication Bans* (1996), online: <http://www.ulcc.ca/en/poam2/index.cfm?sec=1996&sub=1996af>.

[135] *Dagenais*, note 6, at 857, 868-69, 870, 872, 890-91, 914.

- As for hearing the application,

  (i) the application must be heard in the absence of the jury (if any),

  (ii) if, as in *Dagenais*, there are pre-existing publications which may, if broadcast, affect trial fairness, the judge should review the publications before making a determination respecting the ban.

[133] Other cases add that there must be sufficient evidence to permit the judge to assess the application. Specifically, a) if the facts are not in dispute, the statements of counsel may suffice; or b) if the facts are in dispute, the applicant may have the evidence heard privately in a *voir dire*.[136]

3. DISCRETIONARY LIMITS ON ACCESS OR DISCLOSURE

[134] *Code* provisions and common law rules permit limitations on access to the court and the non-disclosure of criminal justice information. Some limitation mechanisms involve the exercise of judicial discretion. Other limitations are mandated by circumstance and access to, or disclosure of, information is expressly forbidden. Only the situations which involve an exercise of judicial discretion would benefit from the development of standardized procedures.

[135] The three main mechanisms used to restrict access to, or prevent the disclosure of, information are *in camera* proceedings, sealing orders and publication bans. An *in camera* proceeding is one held privately before a judge with some or all members of the public excluded.[137] A sealing order is used to prevent or restrict public access to court records and can be applied at each stage of the litigation process. Sealing orders can limit access to, or disclosure of, investigatory records, court exhibits or an entire court file.

[136] A publication ban restricts the disclosure of information relating to the criminal matter or arising in the course of trial. The authority to make publication bans derives from the inherent jurisdiction of the court and

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[136] *CBC v. New Brunswick*, note 107, at para. 72; *Mentuck*, note 108, at para. 26.

[137] For example, forensic DNA warrant applications made before Provincial Court judges may be held *ex parte* – although this is not mandatory. The *ex parte* nature of these investigatory proceedings is constitutionally acceptable: *R. v. S.A.B.*, [2003] 2 S.C.R. 678 at para. 56, Arbour J.

statute. Publication bans may apply to specific types of information (e.g. a name or other information that would identify a complainant), all information arising from particular proceedings (e.g. a sexual history admissibility *voir dire*, or a trial), or the "determination" made by a judge or the judge's reasons.[138]

[137] Each mechanism includes some specific limitation measures which are implemented based on an exercise of judicial discretion and others which are mandatory.[139] The following outlines the measures for restricting access or disclosure which are obtained on a discretionary basis and should be governed by *Dagenais*.

a. In camera proceedings

[138] The main *in camera* provision is *Code*, s. 486(1) which states:

> Any proceedings against an accused shall be held in open court, but the presiding judge or justice may order the exclusion of all or any members of the public from the court room for all or part of the proceedings if the judge or justice is of the opinion that such an order is in the interest of public morals, the maintenance of order or the proper administration of justice or is necessary to prevent injury to international relations or national defence or national security.

[139] This provision involves an exercise of judicial discretion in limiting access or disclosure and applications made pursuant to this section should be governed by procedures which are consistent with *Dagenais*.[140]

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[138] *Eurocopter*, note 134, at paras. 11, 15. If a publication ban has been ordered in a case, the judge's reasons for decision must comply with that order and not make improper disclosure.

[139] For examples of mandatory a) *in camera* provisions, see *Code*, ss. 276.1(3), 276.2(1), 278.4(1), 278.6(1); b) sealing orders, see *Code*, ss. 187, 193, 196, 487.3; and c) publication bans, see *Code*, ss. 276.3., 542(2).

The law concerning restricting access to, or disclosure of, criminal justice information is complex. Discussion of the mandatory mechanisms is beyond the scope of this report as these measures are implemented without an exercise of discretion and thus, no court process is required. Further, although an application process is necessary for many discretionary restrictions on information access or disclosure, it is not appropriate in all circumstances.

For a more complete description of the mandatory, quasi-mandatory and discretionary means for restricting access or disclosure, see CM 12.15, note 105, at paras. 44-105. See also *Toronto Star*, note 105 concerning the constitutionality of a statutory mandatory publication ban.

[140] *CBC v. New Brunswick*, note 107, at paras. 51-52, 69-75.

See also *Code*, s. 672.5(6) which provides that a court or review board conducting a disposition hearing under Part XX.1 - Mental Disorder may, if the deciding body, "considers it ... in the best

(continued...)

b. Sealing court exhibits and the court file

[140] The authority to restrict access to exhibits lies within the inherent jurisdiction of the courts to supervise and protect court records.[141] The court controls access to records to ensure that the integrity of exhibits are preserved,[142] that harm does not come to innocent third parties,[143] to prevent impairment of rights to appeal,[144] and to protect national security, industrial secrets, and victims of blackmail.[145] Court ordered limitations on exhibits may include restrictions on access to exhibits, reproduction of exhibits, and the disclosure of authorized reproductions.[146]

[141] In general, the law concerning sealing court exhibits may be summarized as follows:[147]

> Access to exhibits is presumed in an open justice system; exhibits are part of the court "record". Public scrutiny of judicial process is key to the democratic control of ... government.
> ...
> In addition, Canadians, including Canadian media, have a constitutionally protected right of "freedom of expression". In

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[140] (...continued)
interests of the accused and not contrary to the public interest ... order the public or any members of the public to be excluded from the hearing or any part of the hearing."

This provision presumes that the hearing is open to the public, unless the court or review board decides to restrict access. The public may have an interest in the nature of the disposition decision, particularly since an important consideration in the hearing is "the need to protect the public from dangerous persons": *Code*, s. 672.54.

However, disposition hearings may be distinguishable from the criminal trial proceedings to which the *Dagenais* guidelines apply. A disposition hearing is not a criminal trial. Rather, it is a proceeding with special rules to govern mentally disordered persons accused of criminal offences: *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625 at paras. 52, 54, 62, McLachlin J., as she then was; see also *Code*, ss. 672-672.95.

[141] *MacIntyre*, note 107, at 189. See also *Edmonton (City) v. Kara* (1995), 164 A.R. 64 at para. 6 (Q.B.), Berger J., as he then was; *Calgary Sun v. Jondrie* (1996), 186 A.R. 313 (Q.B.), Lutz J.; *Re Canadian Broadcasting Corp.* v. *Giroux* (1995), 23 O.R. (3d) 621 (Gen. Div.), McRae J.; *Quintal*, note 111, at para. 148; *R. v. S.J.S.* (2000), 189 Sask. R. 137 at para. 8 (C.A.); *O'Neill*, note 108, at para. 51.

[142] *R. v. Warren* (1995), 122 D.L.R. (4th) 698 at para. 13 (N.W.T.S.C.), de Weerdt J.

[143] *Muir*, note 118, at paras. 43-45; *Quintal*, note 111, at paras. 197-203.

[144] *Muir*, note 118, at para. 38.

[145] *Muir*, note 118, at para. 51. See generally, *R. v. Grewall* (2000), 149 C.C.C. (3d) 557 at para. 34 (B.C.S.C.), Romilly J.; *Calgary Sun v. Jondrie* (1996), 186 A.R. 313 (Q.B.), Lutz J.

[146] *R. v. S.J.S.* (2000), 189 Sask. R. 137 at para. 14 (C.A.); *R. v. Warren* (1995), 122 D.L.R. (4th) 698 at para. 68 (N.W.T.S.C.), de Weerdt J.

[147] *Muir*, note 118, at paras. 15-17.

> order to exercise this right, the media requires access to, and the right to publish, exhibits.
>
> Therefore, any restriction on either the right of access, or the freedom to speak about what has been accessed, must be made only in the clearest of circumstances. Before imposing any limitation, the court must find that some value other than open justice or freedom of expression requires protection.

[142] The authority to restrict access to an entire court file also lies within the inherent jurisdiction of the court.[148] There seems to be no difference in principle between sealing part of a court file and sealing all of the file. In both situations, a judge's common law authority to restrict access to, or disclosure of, an exhibit or an entire court file should be regulated by the *Dagenais* substantive and procedural guidelines.

c. Publication bans

[143] A superior court judge has the authority to impose publication bans pursuant to his or her inherent jurisdiction.[149] This common law authority to impose a publication ban is exercised to ensure that justice is done in proceedings before the court.[150] A trial judge may ban publication of information in order to protect, for example, the identity of witnesses or an accused person's fair trial rights.[151] Publication bans made pursuant to the inherent jurisdiction of the court are governed by the substantive and procedural standards established in *Dagenais*.

[144] In addition, the *Code* contains a number of provisions which authorize a judge to ban disclosure of information, at the judge's discretion, based on an application to the court. In particular, there is a fairly extensive discretionary regime intended to prevent disclosure of information that would identify certain individuals involved in specific

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148 "It is within the discretion of a court to impound its files in a case and to deny public inspection of them, and that is often done when justice so requires": *Parker v. Republican Co.*, 181 Mass 329 at 396, quoted in *Sandford v. Boston Herald-Traveler Corp.* (1945), 61 N.E. (2d) 5, which were quoted in turn in *Re Attorney-General of Ontario and Yanover* (1982), 68 C.C.C. (2d) 151 at 162 (Ont. Prov. Ct.), Scullion P.C.J.

149 *R. v. Unnamed Person* (1985), 22 C.C.C. (3d) 284 (Ont. C.A.); *John Doe v. Richard Roe* (1999), 243 A.R. 146 at para. 18 (Q.B.).

150 *Dagenais*, note 6, at 875-76; *Canadian Broadcasting Corp. v. Boland* (1994), 93 C.C.C. (3d) 558 (F.C.T.D.).

151 *R. v. McArthur* (1984), 13 C.C.C. (3d) 152 (Ont. H.C.J.); *R. v. Paterson* (1998), 122 C.C.C. (3d) 254 (B.C.C.A.). *R. v. Barrow* (1989), 48 C.C.C. (3d) 308 (N.S.S.C. (T.D.)); *R. v. Church of Scientology of Toronto (No. 6)* (1986), 27 C.C.C. (3d) 193 (Ont. S.C.); *R. v. Regan* (1997), 124 C.C.C. (3d) 77 (N.S.S.C.).

types of cases.[152] For example, if an accused were to apply for a publication ban respecting the identity of a complainant, witness or other justice system participant, granting the ban would involve an exercise of the judge's discretion.

[145] The statutory requirements for obtaining these publication bans are consistent with *Dagenais* in that applications must be made in writing; to the "presiding judge or justice" or, if not determined, "to a judge of a superior court of criminal jurisdiction in the judicial district where the proceedings will take place;" set out grounds for issuing the ban; and, notice must be provided to the other parties "and any other person affected by the order that the judge or justice specifies."[153]

[146] Other examples of statutory bans involving discretion include Crown applications in connection with a judicial interim release proceeding or a preliminary inquiry and the associated information.[154]

4. NON-DISCLOSURE ORDER APPLICATIONS IN ALBERTA

[147] The procedure for non-disclosure order applications in criminal matters in the Court of Queen's Bench is described in CPN4:[155]

> 3. The procedure for the application is:
>
> a. The applicant must file three copies of the Notice of Application, prescribed in Form A, with the Clerk of the Court in the appropriate Judicial District and serve all interested parties except the media at least two clear days before the beginning of the proceeding to which the application relates.
>
> b. The applicant must also transmit an electronic copy of the Notice of Application to the electronic address of the Clerk of the Court of the appropriate Judicial District, at least two clear days before the proceeding to which the application relates.

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[152] *Code*, ss. 486.5(1)-(9).

[153] *Code*, s. 486.5(4)(a).

[154] *Code*, ss. 517(1), 539(1).

[155] CPN4, note 11. See also point 2,

> "Interested parties" include the crown, the defence, a directly affected witness, the electronic and print media, and any other person named by the Court. Any other party claiming an interest in the proceedings must apply to the Court for standing to be heard at the application.

(i) The Clerk of the Court shall re-transmit the Notice of Application electronically to the media noted on a list to be kept by the Clerk of the Court, or his/her designate.

(ii) The Clerk of the Court shall post the Notice of Application at the place reserved for giving notice at the Courthouse where the application is to be heard.(Note 1)

4. The application may be made to: a.) the trial judge, if the trial judge has been assigned; b) a Criminal Appearance Court judge; c) the supervising judge or designate.

5. The Applicant may apply to the Court for further directions as to the persons to be served and the manner of service.

6. The information that is the subject of the initial application shall not be published without leave of the Court until the application is heard.

Sealing/Unsealing Court Files

7. An application to seal the entire court file, or an application to set aside a sealing order, must be made to the Chief Justice, the Associate Chief Justice, or a designate, who may make such directions as to the parties, manner and time for service of notice that they, in their discretion, deem appropriate.

Note 1 Until the electronic method is in place, the following procedure will govern:

3. a. The Applicant must file with the Clerk of the Court three copies of the Notice of Application, as prescribed in Form A, and, except with leave of the Court, serve the interested parties, except the media, two days before the beginning of the trial, application, proceeding, or matter to which the order is to apply.

b. Unless otherwise ordered, and pending the implementation of an electronic form of notice, notice to the media is given by filing Form A with the Clerk of the Court, who will post the notice at the place reserved for such notice at the courthouse where the application is to be heard.

[148] In the Provincial Court, applications for non-disclosure orders in criminal matters are governed by a notice to the profession.[156] Rules of court govern applications for restrictions on media reporting of, and public access to, civil trials and related information.[157]

B. Non-Disclosure Issues and Recommendations

[149] The comments received on the proposals in CM 12.15 were considered and it was determined that it would be appropriate to put forward the proposals, with minor changes, as recommendations.[158]

[150] A subsequent survey of the non-disclosure order law and procedures undertaken in 2011 to update the material indicated that the practices concerning applications for non-disclosure orders are largely consistent with the original recommendations. However, a few of the recommendations are not reflected in CPN4, in particular, those concerning applications to seal an entire court file and how the media acquires standing at the hearing of the application. Further, it is suggested that the criminal practice concerning non-disclosure order applications may benefit from rules which could be drafted based on the material and recommendations contained in this final report.

1. REFORM OF NON-DISCLOSURE PROCEDURES

[151] Non-disclosure order procedures should be regulated by rules of court in order to reflect the delegation of procedural authority under the *Code,* enhance access to justice and indicate that the practices for seeking a non-disclosure order are well established. In particular, practice notes applicable to the issuance of non-disclosure orders in criminal cases in Provincial Court and the Court of Queen's Bench have been in place since 2005 and there are civil rules which govern restrictions on access to, and

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[156] Provincial Court of Alberta, "Notice to the Profession - Publication Bans (#2)," Practice Notes (12 January 2005), online: Provincial Court - Alberta Courts <http://www.albertacourts.ab.ca/pc/practicenotes/05Jan-PubBan.pdf> [PCNTP].

[157] *Rules of Court,* note 11, rr. 6.28 - 6.36.

[158] Non-disclosure orders include publication bans, certain sealing orders, and *in camera* orders. The Committee's proposals in CM 12.15, note 105, concerned procedures for orders made under discretionary common law or statutory authority and were intended to a) incorporate the procedural guidance of *Dagenais* and b) fill process gaps in the areas of scope, authority, form of notice of application, timing of application, giving notice of non-disclosure orders (including electronic notification and putting the order on court file), interim non-disclosure and interested parties/role of media.

disclosure of, civil trial information.[159] The procedures which govern non-disclosure orders in criminal matters should be described in rules of court.

2. NON DISCLOSURE ORDER PROCEDURES – SCOPE

[152] Early versions of a Queen's Bench criminal practice note concerning non-disclosure orders applied only to publication bans while Provincial Court and Queen's Bench civil practice notes covered non-disclosure orders more generally. The inclusive approach is preferred as the main issue at stake in all non-disclosure applications which rely on court discretion is the same, that is, how should the interests supporting openness or disclosure be balanced against the interests supporting restrictions on access or non-disclosure? If the issue is the same, the procedures for deciding the issue should be the same.

[153] This said, procedural rules are only needed for discretionary non-disclosure applications, whether the source of the discretion is inherent jurisdiction or statute. It was proposed that standardized procedures should govern applications for all types of common law and other discretionary non-disclosure orders including:

(a) *in camera* orders;

(b) sealing orders, respecting court exhibits and entire court files;

(c) orders permitting the use of pseudonyms;

(d) inherent jurisdiction publication bans;

(e) discretionary statutory publication bans, respecting

  (i) judicial interim release hearings (on prosecutorial application),

  (ii) the identities of certain persons, or

  (iii) investigative hearings; or

(f) orders permitting participants in judicial proceedings to testify in a manner that prevents their identification.

[154] The CPN4, *Rules of Court* and PCNTP all reflect the inclusive list noted above, with one exception. All three instruments describe a separate process for applications to seal an entire court file or to set aside a sealing

[159] See CPN4, note 11; PCNTP, note 156; *Rules of Court*, note 11.

order. Under these systems, applications must be made to the Chief, Assistant Chief, or designate, who makes directions concerning the parties to be served and the mode and timing of service.[160]

[155] The difference in principle between sealing parts of a court file and the entire file is not obvious and, in the absence of a principled distinction, it is suggested that there is no need to adopt a different process for an application to seal an entire court file.

[156] However, in the case of applications to set aside sealing orders, separate and special procedures are justified since the applicant would typically be a media organization and therefore the need to give notice to the media would be somewhat attenuated. In order to avoid the confusion that using the same procedure for both the original sealing order application and any subsequent application to set it aside would create, a different approach is suggested for the application to set aside.

[157] Applications to seal an entire court file should be subject to the same general procedural rules as other non-disclosure order applications and be heard by the trial judge.

[158] Applications to set aside or vary sealing orders or other non-disclosure orders have distinct procedural implications and should be treated differently. In particular, these should be heard by the Chief Justice, Associate Chief Justice or designate, who will give specific direction as to matters such as notice and service.

RECOMMENDATION 20

Standard procedures for non-disclosure orders should apply to all forms of discretionary non-disclosure orders.

RECOMMENDATION 21

In particular, an application to seal an entire court file should be made to a judge, rather than to the Chief Justice, Associate Chief Justice or designate as required by Criminal Practice Note 4.

[160] *Rules of Court*, note 11, r. 6.34; PCNTP note 156, at 12.

RECOMMENDATION 22

An application to set aside or vary a sealing order should be made to the Chief Justice, Associate Chief Justice or designate as required by Criminal Practice Note 4.

3. APPLICATION FORMS

[159] The CPN4 and the *Rules of Court* provide application forms for seeking a non-disclosure order, and PCNTP establishes an electronic notice of application that must be submitted online, in addition to requiring that a print copy of a Notice of Application be filed with the court. Should forms be specified or should the drafting of the application be left entirely up to counsel? The benefits of a standard form include that the information provided is consistent and the media have adequate notice of the case to meet.

[160] No one disputes the need for an application form which identifies the applicant, discloses the type and terms of the order sought, notes the grounds for the order, and indicates the evidence that will be relied upon, such that the respondent and the media have adequate notice as to the nature of the application. CPN4 Form A helps ensure that applications for non-disclosure orders contain the required information.

RECOMMENDATION 23

A non-disclosure order application form should be specified.

4. NOTICE PERIOD

[161] The CPN4 provides that the applicant "must file ... and serve all interested parties except the media at least two clear days before the beginning of the proceeding to which the application relates."[161] The PCNTP requires filing an application "at least three clear days" in advance of the proceeding that is the subject of the application.[162] The *Rules of Court* express the time period simply and most clearly as "5 days or more."[163] This expression eliminates the need to define a clear day, accommodates

[161] CPN4, note 11, at 3.a.

[162] PCNTP, note 156, at 6.

[163] *Rules of Court*, note 11, r. 6.31

days when the court is closed within the time period (yielding the same actual notice period as the clear day models) and further indicates that this is a minimum notice period.

[162] Setting a notice period for applications for non-disclosure that is close to the trial date is good practice. Counsel are likely to have prepared their case and addressed all trial issues, including the need for any restrictions on access or disclosure. However, there are situations when justice would be served by allowing an application for a non-disclosure order to be made on shorter notice. To accommodate these situations, the notice provision should provide that shorter notice may be given with court approval.

[163] The notice period should be considered as a presumptive minimum, not a maximum. One of the risks of failing to apply for a non-disclosure order in a timely manner is that the information in question could be published before the order is sought, which would make the non-disclosure order pointless. Further, if the non-disclosure issues are complicated and cannot be adequately addressed within the minimum notice period, there is a risk that the trial may be adjourned.

RECOMMENDATION 24

Notice of an application for a non-disclosure order should be filed with the court and served on the other party to the litigation at least 5 days before the beginning of the proceeding to which the application relates, unless the court permits otherwise.

5. CONFIDENTIALITY OF INFORMATION PRIOR TO NON-DISCLOSURE HEARING

[164] One of the problems to be resolved is that a non-disclosure order is granted only after a hearing. Therefore, information filed in the application or evidence presented to the court can be published with impunity and the protection afforded by the non-disclosure order may be lost through the application process.

[165] Given the seriousness of this problem, some form of interim non-disclosure provision is required in order to prevent early disclosure of information that may, depending on the outcome of the application, be

protected and to clearly inform parties of the interim non-disclosure requirements.

[166] Different mechanisms have been used to prevent premature disclosure of information. One approach is for the judge to permit only extremely limited disclosure of information to counsel for the media. The disadvantage of this approach is that counsel may not have enough information to permit them to obtain instructions or develop proper response arguments. Another approach is for information to be fully disclosed to counsel, subject to counsel undertaking not to disclose the information except for the purposes of obtaining instructions and arguing the motion. The second approach is generally preferred by members of the legal profession, although there are some issues as to disclosure of the information to a person who is not a lawyer and may not be legally bound by giving an undertaking.

[167] As a third alternative, the full disclosure with an undertaking mechanism could be coupled with, or replaced by, a discretionary interim non-disclosure application process to set a specific non-disclosure order in place, with notice to all interested parties, pending the full hearing of the motion.

[168] One qualification is that any interim non-disclosure provision should allow for publication or use of the information for the purposes of responding to the application, so that, for example, counsel can communicate with his or her clients. This qualification is authorized under the *Code*.[164] Another aspect of an interim non-disclosure provision is that the interim order restricting publication of information should be clearly communicated to the parties involved, perhaps with a warning concerning the consequences of failing to comply with the interim order.

[169] The CPN4 provides that "[t]he information that is the subject of the initial application may not be published without leave of the Court until that application is heard"[165] and the notice form used for a non-disclosure

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[164] See *Code*, ss. 486.5(3), 486.4(4). Section 486.5(3) states:

> An order made under this section does not apply in respect of the disclosure of information in the course of the administration of justice if it is not the purpose of the disclosure to make the information known in the community.

[165] CPN4, note 11, at 6. See also *Rules of Court,* note 11, r. 6.36, "[i]nformation that is the subject of the initial restricted court access application must not be published without the Court's permission."

application, CPN4 "Form A", notes that the information that is the subject of the application is not to be published without court permission.

[170] The CPN4 approach has the same effect as the undertaking or an undertaking plus interim application mechanism as noted above, without the difficulties associated with undertakings or nested applications. Further, it does not create an absolute interim non-publication requirement. A party to the criminal matter or the media could apply to the Court for leave to access information, for example, to clarify the nature of the information or prepare a response to the application.

[171] An interim non-disclosure provision modelled on the CPN4 approach should be adopted as it provides the necessary initial protection of criminal justice information and makes the interim non-disclosure requirements clear to all affected parties.

RECOMMENDATION 25

An interim non-disclosure provision should state that the information that is the subject of a non-disclosure application may not be published without leave of the court prior to the application being heard.

6. HARD COPY NOTICE OF NON-DISCLOSURE APPLICATION

[172] The practice in criminal non-disclosure applications is to post a hard copy notice of the application in the courthouse, in addition to any electronic notice that may be given.[166] Hard copy notice serves as a backup to electronic mechanisms and also enables media organizations to review notice postings in a designated place. There are no obvious reasons why the hard copy method should be abandoned.[167]

RECOMMENDATION 26

Notice of non-disclosure applications should be provided by posting a hard copy of a notice at a specified, public location, in addition to any other communication mechanisms that may be used.

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[166] CPN4, note 11, 3(b)(ii), Note 1 3.b; PCNTP, note 156, 9.b.

[167] CPN4, note 11, 3(b) provides a useful description of an appropriate hard-copy notice requirement.

7. ROLE OF THE MEDIA

[173] There are some difficulties to be overcome in order for the media to play the appropriate role in a non-disclosure application process. The media have an interest in ensuring that openness interests are respected. However, there are many media organizations – print, radio, television, internet – and no one organization or industry association has an inherent or special status as public interest watchdog.[168] *Dagenais* requires that the media be given notice of applications and have standing in non-disclosure application proceedings. However, practical questions such as how to give adequate notice and which organizations should be granted standing, must be addressed.

[174] One way to include the media is to require that media be notified through hard copy, electronic means or other mechanisms as directed by the judge. Under the notification approach, media organizations that receive notice may apply for standing at the hearing of the non-disclosure application, with the particular terms of standing to be determined at the application. Lamer C.J.C. stated in *Dagenais* that, "If the media wish to oppose a motion for a ban ... they should attend the hearing on the motion, argue to be given status, and, if given status, participate in the motion."[169] Lamer C.J.C. further noted, "At the motion for the ban, the judge should give the media standing (if sought) according to the rules of criminal procedure and the established common law principles with regard to standing."[170] The judge can sort out which organizations among those attending the hearing should be given standing, if any, and establish the appropriate degree of participation. A similar option would be to designate the media as an interested party without granting standing.

[175] *Dagenais* does not require that the media have automatic standing in any criminal proceeding. The media is rarely an original party in such matters. The judge is entitled by inherent jurisdiction to manage all aspects of the trial process, including standing in an application process. For example, in a very high profile case, the judge may wish to grant

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[168] There are national new outlets, major city daily newspapers, monthly magazines and many smaller scale and niche organizations to consider. Further, the question remains as to whether the proliferation of internet news providers has undermined the practicality of media notification.

[169] *Dagenais*, note 6, at 872.

[170] *Dagenais*, note 6, at 890.

standing of a representative nature to only some, instead of all, media outlets.

[176] A provision which creates automatic standing or a presumption of standing would involve substantive law and therefore exceed the authority of a procedural rule. Further, in an age of increasing media plurality, an automatic standing provision could cause serious practical problems.

[177] Denying automatic standing does not place an undue burden on the media. The role of the media in a properly functioning democracy has been secured by the Supreme Court of Canada. The matter of establishing the credentials of any particular media organization who seeks standing in a non-disclosure application proceeding is unlikely to be problematic as such qualifications are readily apparent to all and is the legitimate subject of judicial notice. In most cases, a media organization does not even need to file an affidavit to establish its credentials.

[178] The key to effective media participation in the process is not to create or presume automatic standing. Rather, the key is to establish provisions which ensure that the media receive adequate notice of non-disclosure order applications, provide the opportunity to apply for standing, and retain full judicial discretion to direct the standing determination, including the terms on which the media participates in the non-disclosure process.

[179] The CPN4 defines interested parties to include "the electronic and print media" and provides that notice of an application for a non-disclosure order, as distinct from a copy of the application, be provided electronically (once the electronic method is available) to a list of media maintained by the court and posted publicly in a designated place in the courthouse.[171]

[180] The *Rules of Court* have similar provisions concerning how notice is provided to the media and further state that persons who receive notice of the application have standing to be heard at the hearing of the non-disclosure application.[172]

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[171] CPN4, note 11, at 2, 3(b)(i)(ii) and, "Note 1 Until the electronic method is in place, ... 3.b."

[172] *Rules of Court,* note 11, rr. 6.32, 6.35:

> Notice to the Media
>
> 6.32 When a restricted court access application is filed, a copy of it must be served on the

(continued...)

[181] The PCNTP takes a slightly different approach in requiring that any electronic or print media who want to receive notice of a non-disclosure application may register as an interested party and must name a member of the Law Society of Alberta as its representative for purposes of receiving notice.[173] Notice to registered media is provided electronically and generally by public posting in the court where the non-disclosure application is to be heard.[174] Further, being a registered interested party does not make the media a "party to the proceedings" and the media must apply for standing to be heard at the hearing of the non-disclosure application.[175]

[182] The approach taken in Queen's Bench and Provincial Court likely do not differ much in terms of practical effect. However, the Provincial Court approach is preferred as it retains full court discretion concerning standing in the hearing of a non-disclosure order application.

RECOMMENDATION 27

The media should not be granted automatic standing in a non-disclosure application proceeding.

RECOMMENDATION 28

The media should be notified that a non-disclosure application has been made. Any such media notice should not include a copy of the non-disclosure application.

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172 (...continued)

court clerk, who must, in accordance with the direction of the Chief Justice, give notice of the application to

(a) the electronic and print media identified or described by the Chief Justice, and

(b) any other person named by the Court.

Persons having standing at the application

6.35 The following persons have standing to be heard at an application for a restricted access order:

(a) a person served or who is given notice of the application;

(b) any other person recognized by the Court who claims to have an interest in the application, trial or proceeding and whom the Court permits to be heard.

173 PCNTP, note 156, at 4.a.

174 PCNTP, note 156, at 9.a. b.

175 PCNTP, note 156, at 11, 4.

RECOMMENDATION 29

A media organization may apply at the hearing of the application for standing, with standing granted or denied and terms of participation in the hearing subject to judicial discretion.

RECOMMENDATION 30

The formalities of a media organization's application for standing, and the conduct of the hearing of such application, are matters of judicial discretion and do not need to be described in rules.

8. ELECTRONIC NOTICE TO THE MEDIA OF NON-DISCLOSURE APPLICATION

[183] It is generally agreed that some form of electronic notice to the media is desirable. However, a distinction must be made between establishing a requirement to provide electronic notice to the media and specifying a particular method by which this is to be accomplished. A requirement to provide electronic, computer based notice to the media, with prescribed content and form, together with general notice by hard-copy posting establishes an appropriate framework for giving notice to the media in ordinary cases. In unusual cases, an application for directions could be made.

[184] The particular electronic manner of giving notice should not be firmly set because communication technology changes on a regular basis. In addition, the rules concerning protection of privacy interests and security of personal information are frequently updated in light of the changes to electronic communication methods. All that could reasonably be said about the appropriate method for providing electronic notice is that the method will be as determined and specified by the court from time to time.

[185] CPN4 describes an electronic notice mechanism which requires an applicant to transmit an electronic form of notice which appears to then be broadcast or distributed via group messaging by the court to a defined list of recipients.[176]

[176] CPN4, note 11, 3(b)(i).

[186] PCNTP relies on applicants to complete and submit an online notice which registered users can then access via the same web site.[177] The PCNTP electronic notice form provides a reasonable starting point for a Queen's Bench electronic notification form as the Provincial Court's website clearly explains that this form is intended only to give electronic notice to the media and that it is not the same as, or a substitute for, the actual application. The civil rules do not specify a particular electronic notice mechanism but refer generally to distribution of notices to print and electronic media, and others, "in accordance with the direction of the Chief Justice."[178]

RECOMMENDATION 31

There should be provisions for giving notice of non-disclosure applications to the media by electronic methods.

RECOMMENDATION 32

It should be left to the Chief Justice to specify the appropriate method of giving electronic notice to the media.

9. WHO CAN RECEIVE NOTICE ON BEHALF OF THE MEDIA

[187] The PCNTP requires that media organizations register as interested parties but stipulates that a lawyer must access or receive electronic notice. The main advantage of notifying a lawyer is that interim non-disclosure requirements will be respected as a lawyer can provide the appropriate undertakings. A second advantage is that by involving counsel early in the process, a media organization's participation in a non-disclosure application proceeding can be expedited.

[188] The disadvantages are that the media must bear the cost of lawyer involvement, even in cases where the organization has no interest in the application. There may also be delay in relaying notice to the client media if the designated lawyer is not available and there is no alternate.

[189] The main risk of notifying the media directly is that the information that is the subject of the application might be published. This risk is mitigated by ensuring that the notice of application in both electronic and

[177] PCNTP, note 156, 9.a., 10.

[178] *Rules of Court*, note 11, r. 6.32.

hard copy means is the same, does not include information that is the subject of the application and that interim non-disclosure requirements are in place and well known. In non-disclosure proceedings concerning highly sensitive material, the applicant could ask for specific court advice and directions about how to give notice in the circumstances. Further, media organizations are bound by various codes of ethics which helps ensure that material that should not be published is not published.[179]

[190] From an administration of justice perspective, persons are usually served or notified directly, until such time as a lawyer has been retained and agrees to accept service on behalf of her client. Giving notice of non-disclosure applications first to counsel is different than the usual court practice and is not required in civil non-disclosure proceedings in Queen's Bench. It should be up to individual media organizations to choose to receive notice directly or through a lawyer.

RECOMMENDATION 33

A media organization should have the option to be notified directly or through counsel, as the organization sees fit.

10. AUTHORITY TO HEAR NON-DISCLOSURE APPLICATIONS

[191] The CPN4, *Rules of Court* and PCNTP provide that, as a first step, the application should be made before the judge assigned to hear the case.[180] If that judge is unknown or unavailable, CPN4 allows the application to be heard by "a Criminal Appearance Court judge."[181] The *Rules of Court* and PCNTP are more restrictive in that the second option is that the application must be heard by a case management judge assigned to the matter.[182]

[192] The third and last resort in each regime is that the application could be heard by the "supervising judge or designate," the "Chief Justice or a

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[179] See for example, Radio Television Digital News Association of Canada (RTDNA), *Code of Ethics*, Canadian Broadcast Standards Council, online: <http://www.cbsc.ca/english/codes/rtnda.php>.

[180] CPN4, note 11, at 4.(a.); *Rules of Court*, note 11, r.6.33(a); PCNTP, note 156, at 7.

[181] CPN4, note 11, at 4.(b.).

[182] *Rules of Court*, note 11, r.6.33(b); PCNTP, note 156, at 7.

judge designated ... by the Chief Justice" or the "Chief Judge, the Assistant Chief Judge or their respective designate."[183]

[193] Although the CPN4, *Rules of Court* and PCNTP approaches are consistent with the *Dagenais* guidance concerning authority to hear a non-disclosure application, it is suggested that a more general expression of the procedural principles may be appropriate.[184] Further, there do not seem to be any obvious problems that would be occasioned by allowing applications for non-disclosure orders to be made as a last resort to any Queen's Bench judge in the judicial district where the proceedings will take place.

RECOMMENDATION 34

An application for a non-disclosure order can be heard by any judge of the Queen's Bench in the judicial district where the trial will take place.

RECOMMENDATION 35

An application for a non-disclosure order should be made to:

(a) the judge assigned to try the case,

(b) if the trial judge has not been appointed, a judge of the same level of court in the judicial district in which the case shall be heard, or

(c) if the trial court level has not been established, a judge of a superior court in the judicial district in which the case shall be heard.

11. RECORD OF NON-DISCLOSURE ORDER

[194] A non-disclosure order should be reduced to writing to prevent disputes about its terms. Further, to ensure that non-disclosure orders do not place unreasonable limits on freedom of expression, the order should be as specific and narrow in scope as possible, in relation to the information, geographical area, and temporal period covered. In this

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[183] CPN4, note 11, at 4.(c.), *Rules of Court*, note 11, r.6.33(c); PCNTP, note 156, at 7, respectively.

[184] See, for example, *Code*, s. 486.5(4)(a) which states:

> An applicant for an order shall (a) apply in writing to the presiding judge or justice or, if the judge or justice has not been determined, to a judge of a superior court of criminal jurisdiction in the judicial district where the proceedings will take place.

regard, the terms of criminal non-disclosure orders may be quite specific. For example, an order can include directions to the Crown to take actions as may be necessary to restrict access to particular exhibits.

[195] Although notice of a non-disclosure application must be given to the media, there is no requirement to give notice or publish the terms of a non-disclosure order once granted. However, it is the practice of the court to record the existence and terms of non-disclosure orders as part of the court file concerning the matter.[185] These notes, which include a copy of a written order issued by the judge, ensure that the terms of a non-disclosure order are manifest to anyone reviewing the court file. Further, it is good practice for the court to inform a party's lawyer of any non-disclosure orders on file as the party or the specific lawyer may not have participated in the application and may not be aware of the order.

[196] In the event a media organization does not participate in a non-disclosure application, or for other reasons does not know whether a non-disclosure order is in place, the organization can check the court file to confirm the existence and terms of the order. The practice of noting the non-disclosure order on the court file helps to ensure compliance with the terms of these orders.

RECOMMENDATION 36

Non-disclosure orders should be issued in written format.

RECOMMENDATION 37

The existence and nature of a non-disclosure order should be noted and a copy of the non-disclosure order placed on the court file of the matter.

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[185] In a Notice to the Profession dated 4 November, 2001 (no longer in effect) the Court of Queen's Bench stated that, "[o]nce the order is granted, the document will be signed by the Judge and placed on the Clerk's file."

Recommendations concerning court decisions and orders are beyond the scope of this report. For information about how the court gives notice of non-disclosure requirements in connection with judicial decisions, see Canadian Citation Committee, *Canadian Guide to the Uniform Preparation of Judgments*, at paras. 76-77, online: <http://www.informationjuridique.ca/ccc-ccr/docs/guide.prep_en.pdf>.

12. NON-DISCLOSURE ORDERS AND CRIMINAL APPEALS

[197] A non-disclosure order issued by a trial judge continues according to its terms, even though an appeal has been initiated. A trial "order is binding and conclusive until set aside on appeal...."[186] An appeal court may set aside or vary a non-disclosure order if it determines that the trial judge acted in error or misapplied the *Dagenais/Mentuck* tests.[187]

[198] The Court of Appeal may also grant non-disclosure orders.[188] Given the rarity of non-disclosure applications on appeal (publicity issues are usually worked out before trial), some would argue that the appellate court will simply establish a process when and as needed.[189] In this regard, it seems that the Court of Appeal used a process similar to the Queen's Bench approach to decide a non-disclosure application.[190]

[199] Criminal procedures should be consistent, regardless of the level of the court deciding a matter. Consistency could be achieved either by developing detailed requirements for non-disclosure applications in the

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[186] *R. v. Litchfield*, [1993] 4 S.C.R. 333 at 348, Iacobucci J.; and see *Wilson v. The Queen*, [1983] 2 S.C.R. 594 at 599, McIntyre J:

> It has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed.

R. v. Adams, [1995] 4 S.C.R. 707 at para. 30, Sopinka J. states that a trial judge may vary or revoke his or her order, "if the circumstances that were present at the time the order was made have materially changed. In order to be material, the change must relate to a matter that justified the making of the order in the first place." See also *B.G. v. British Columbia*, 2004 BCCA 345, 242 D.L.R. (4th) 665 at paras. 19, 22, Finch C.J.

[187] In *Dagenais*, note 6, at 892, the trial judge's publication ban was held to be issued in error and set aside. In *R. v. O.N.E.*, [2001] 3 S.C.R. 478 at para. 15, Iacobucci J., a publication ban was varied.

[188] *Code*, s. 686(18), *Court of Appeal Act*, R.S.A. 2000, c. C-30, s. 2(1), *Judicature Act*, note 32, ss. 3-4. See for example, R. *v. Tremblay*, 2004 ABCA 102; *R. v. Dean,* [1997] B.C.J. No. 2996 (C.A.); *Re Regina and Lortie* (1985), 21 C.C.C. (3d) 436 at 445 (Que. C.A.).

The decision to grant a non-disclosure order is governed by the *Dagenais/Mentuck* principles. See *R. v. Tremblay* (2004) 354 A.R. 44 at para. 2 (C.A.), Berger J.A.; *R. v. Budai* (2000), 144 C.C.C. (3d) 1 at paras. 26-28 (B.C.C.A.), Donald J.A.; *R. v. Sharpe* (1999), 181 D.L.R. (4th) 246 at para 12 (B.C.C.A.), Finch J.A.

[189] The Alberta Court of Appeal does not have practice directions for non-disclosure applications, see Alberta Courts, "Court of Appeal Practice Notes/Directions", online: Alberta Courts - Court of Appeal <http://www.albertacourts.ab.ca/CourtofAppeal/PracticeNotesDirections/tabid/86/Default.aspx.>.

For an example of appellate court provisions which limit access to criminal appeal files and disclosure of information, see the Courts of British Columbia, "Criminal Practice Directives", online: Courts of British Columbia <http://www.courts.gov.bc.ca/Court_of_Appeal/practice_and_procedure/criminal_practice_directives/Access%20to%20Criminal%20Files.htm>.

[190] *R. v. Tremblay*, 2004 ABCA 102.

Court of Appeal based on the Queen's Bench process, or by providing that non-disclosure applications at the appeal level should follow the Queen's Bench procedure, with modifications as necessary. The second option is simple, avoids duplication and provides flexibility to customize the process to meet the needs of the Court of Appeal.

[200] The Court of Appeal non-disclosure order process is likely to be different in terms of who hears the application. In a recent Alberta case, the appeal tribunal took charge of the publication ban application and specified that further direction in the matter would be made either by the tribunal, or a judge who is a member of the tribunal.[191] Another difference between the two courts would likely be in the form of electronic notice provided to the media concerning non-disclosure applications. Both matters would be subject to the discretion of the appeal court.

RECOMMENDATION 38

The procedure for making a non-disclosure application in Queen's Bench, with necessary modifications, could be used for applications to the Court of Appeal.

[191] *R. v. Tremblay*, 2004 ABCA 102.

CHAPTER 4

Challenge for Cause in Criminal Jury Trials

[201] The material in this chapter is arranged in two parts. The first contains an overview of the substantive law concerning the right to an impartial jury, the nature of impartiality, the process for determining impartiality and the general challenge for cause procedures established by the *Code*. Also included in the first part are descriptions of some of the general challenge for cause practices that have emerged, including those used in other jurisdictions. The second part addresses the need for reform and provides recommendations.

A. Background to Challenges for Cause

[202] The process of jury selection in criminal cases raises a variety of issues, including the following:

(a) the selection of the array;[192]

(b) exclusions and exemptions available under Alberta's *Jury Act*;[193]

(c) excuses from jury duty;[194]

(d) judicial "pre-screening" of prospective jurors;[195]

(e) peremptory challenges;[196] and

(f) misuses of challenges for cause.[197]

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[192] *Code*, ss. 629, 630

[193] R.S.A. 2000, c. J-3, ss. 4-5..

[194] *Code*, s. 632.

[195] Peter J. Royal Q.C., "Jury Selection – Challenge for Cause: A Case Study", (Presented at the Criminal Trial Lawyers' Association Short Snappers Seminar, Law Centre, University of Alberta, 22 October 2005) at 9-10 [Royal]; *R. v. Hazlett* (2005), 205 O.A.C. 298 at para. 3 (C.A.).

[196] *Code*, s. 634; Royal, note 195, at 28-31.

[197] Royal, note 195, at 8-9; Christopher Granger, *The Criminal Jury Trial in Canada*, 2d ed. (Toronto: Carswell, 1996) at 158 [Granger]; David M. Tanovich, David M. Paciocco & Steven Skurka, *Jury Selection in Criminal Trials: Skills, Science, and the Law* (Concord, Ont.: Irwin Law, 1997) at 88 (1.5) [Tanovich].

This chapter focuses on the procedures applicable to situations where a party desires to challenge all prospective jurors on the same grounds of societal or other general bias. These challenges for cause are authorized under s. 638(1)(b) of the *Code* and in this report are referred to as general challenges to distinguish them from peremptory challenges and other inquiries which are specific to an individual potential juror.

1. THE RIGHT TO AN IMPARTIAL JURY

[203] An accused charged with an offence falling under s. 536 of the *Code* has the right to elect trial by jury. Offences listed in s. 469 must be tried by jury, unless the accused and the Attorney General consent to trial without a jury before a judge of a superior court of criminal jurisdiction.[198] Under s. 11(f) of the *Charter*, "[a]ny person charged with an offence has the right ... except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment."[199]

[204] The jury must be fair and impartial. Under s. 11(d) of the *Charter*, persons have the right "to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal."[200] An important consideration in challenge for cause cases, which often turn on issues of race or other general features of the accused or the offence, is that the guarantee of fairness and impartiality extends to all accused persons. Section 15(1) of the *Charter* provides that "[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."[201]

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[198] *Code*, ss. 471, 473.

[199] *Charter*, note 1. See Tanovich, note 197, at 1-3 (1.1) (on the justification for the jury system) and at 7- 13 (1.3) (on s. 11(f)).

[200] "A *Charter* right is meaningless, unless the accused is able to enforce it. This means that the accused must be permitted to challenge potential jurors where there is a realistic potential or possibility that some among the jury pool may harbour prejudices that deprive them of their impartiality": *R. v. Williams*, [1998] 1 S.C.R. 1128 at para 45, McLachlin J. [*Williams*]. *R. v. Spence*, 2005 SCC 71, [2005] 3 S.C.R. 458 at para 25, Binnie J. [*Spence*].

[201] "The accused person's right to be tried by an impartial jury ... may also be seen as an anti-discrimination right. The application, intentional or unintentional, of racial stereotypes to the detriment of an accused person ranks among the most destructive forms of discrimination. The

(continued...)

[205] The Crown also has an interest in a trial being conducted before a fair and impartial jury. The accused does not have the right to a trial unfairly skewed in the accused person's favour.[202]

[206] To ensure the fairness and impartiality of jury members, the *Code* establishes a number of processes, including rights extended to the accused and Crown to an unlimited number of challenges to prospective jurors on the grounds set out in s. 638(1) of the *Code*.[203] In particular, s. 638(1)(b) provides that the accused and the Crown may challenge on the ground that "a juror is not indifferent between the Queen and the accused."[204]

2. IMPARTIALITY AND PARTIALITY

a. Nature of impartiality

[207] To say that a prospective juror is "not indifferent between the Queen and the accused" is to say that the prospective juror is prejudiced, partial, or not impartial.[205] Lack of impartiality entails that the juror's:[206]

> [K]nowledge or beliefs may affect the way he or she discharges the jury function in a way that is improper or unfair to the accused. A juror who is partial or "not indifferent" is a juror who is inclined to a certain party or a certain conclusion. The synonyms for "partial" in Burton's *Legal Thesaurus* [reference omitted] illustrate the attitudes that may serve to disqualify a juror: bigoted, ... discriminatory, favorably disposed, inclined, influenced, ... interested,

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[201] (...continued)
result of the discrimination may not be the loss of a benefit or a job or housing in the area of choice, but the loss of the accused's very liberty": *Williams*, note 200, at para. 48.

[202] See *Darrach*, note 23, at para. 24:

> [T]he principles of fundamental justice enshrined in s. 7 protect more than the rights of the accused... Nor is the accused entitled to have procedures crafted that take only his interests into account. Still less is he entitled to procedures that would distort the truth-seeking function of a trial by permitting irrelevant and prejudicial material at trial.

For a Crown challenge for cause respecting potential bias against an aboriginal victim, see *R. v. Rogers* (2000), 38 C.R. (5th) 331 (Ont. S.C.J.) at paras. 3-8, R. MacKinnon J.

[203] *R. v. Find*, 2001 SCC 32, [2001] 1 S.C.R. 863 at para. 21, McLachlin C.J.C. [*Find*]; Granger, note 197, at 161.

[204] Tanovich, Paciocco & Skurka argue that, to satisfy constitutional imperatives, all juries must be impartial, competent, and representative: Tanovich, note 197, at 13-27 (1.4).

[205] *Williams*, note 200, at para. 9; *Find*, note 203, at para. 30; *R. v. Sherratt*, [1991] 1 S.C.R. 509 at 513; Tanovich, note 197, at 89 (4.6).

[206] *Williams*, note 200, at para. 9.

> jaundiced, narrow-minded, one-sided, partisan, predisposed, prejudiced, prepossessed, prone, restricted, … subjective, swayed, unbalanced, unequal, uneven, unfair, unjust, unjustified, unreasonable.

Further, the juror's partiality:[207]

> may incline a juror to believe that the accused is likely to have committed the crime alleged. It may incline a juror to reject or put less weight on the evidence of the accused. Or it may, in a general way, predispose the juror to the Crown … inclining the juror, for example, to resolve doubts about aspects of the Crown's case more readily….

[208] In the *Find* case, McLachlin C.J.C. further clarified that:[208]

> "[I]mpartiality" is not the same as neutrality. Impartiality does not require that the juror's mind be a blank slate. Nor does it require jurors to jettison all opinions, beliefs, knowledge and other accumulations of life experience as they step into the jury box. Jurors are human beings, whose life experiences inform their deliberations. Diversity is essential to the jury's functions as collective decision-maker and representative conscience of the community…

b. Presumption of impartiality

[209] The "impartiality" analysis begins with a legal rule: prospective jurors are presumed to be impartial, but a challenge for cause should be permitted if there is a reasonable possibility, reasonable potential, or air of reality to the contention that a prospective juror is not impartial. The impartiality presumption is rebuttable, on a balance of probabilities, by the party alleging partiality.[209]

[210] There is no rule "that accords an automatic right to challenge for cause on the basis that the accused is an aboriginal or member of a group that encounters discrimination…."[210] However, while there is no presumption of partiality against accused persons who are members of disadvantaged groups, Royal makes the following proposal: "[i]t is my

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[207] *Williams*, note 200, at para. 11. See also paras. 28 and 29 concerning the detrimental effects of racial prejudice.

[208] *Find*, note 203, at para. 43.

[209] *Williams*, note 200, at para. 13; *Spence*, note 200, at para. 21; Granger, note 197, at 164; Tanovich, note 197, at 100 (5.2).

[210] *Williams*, note 200, at para. 41. See also para. 52.

firm belief that if defending a member of a visible racial minority and the matter is to proceed before a judge and jury, a challenge for cause ought always be [considered]."[211] The reason for this proposal is that a challenge may uncover partiality that is not manifest but may nonetheless be profound, and that may be acknowledged on questioning:[212]

> In the *Sleigh* case we received some amazingly candid and apparently honestly held opinions from prospective jurors. I do not think they were attempting to avoid sitting on the case, rather they were simply admitting to a clear and deeply imbedded prejudice vis-à-vis Native people.

c. Types of partiality

[211] There are four main types of partiality: interest prejudice; specific prejudice; generic prejudice; and conformity prejudice.[213] McLachlin J. (as she then was) provided a thumbnail sketch of each as follows:[214]

> Interest prejudice arises when jurors may have a direct stake in the trial due to their relationship to the defendant, the victim, witnesses or outcome. Specific prejudice involves attitudes and beliefs about the particular case that may render the juror incapable of deciding guilt or innocence with an impartial mind. These attitudes and beliefs may arise from personal knowledge of the case, publicity through mass media, or public discussion and rumour in the community. Generic prejudice ... arises from stereotypical attitudes about the defendant, victims, witnesses or the nature of the crime itself. Bias against a racial or ethnic group or against persons charged with sex abuse are examples of generic prejudice. Finally, conformity prejudice arises when the case is of significant interest to the community causing a juror to perceive that there is strong community feeling about a case coupled with an expectation as to the outcome.

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[211] Royal, note 195, at 34.

[212] Royal, note 195, at 34.

[213] Neil Vidmar, "Pretrial prejudice in Canada: a comparative perspective on the criminal jury" (1996), 79 *Jud.* 249 at 252, referred to with approval in *Williams*, note 200, at para. 10; Neil Vidmar, "The Canadian Criminal Jury: Searching for a Middle Ground" (1999), 62 *Law & Contemp. Probs.* 141 at 155-157; *Find*, note 203, at para. 37; G. A. Ferguson & J.C. Bouck, *CRIMJI: Canadian Criminal Jury Instructions*, 3d ed., Vol. 1, looseleaf (Vancouver: Continuing Legal Education Society of British Columbia, 1994) at 1.00-16 - 1.00-18 [Ferguson].

[214] *Williams*, note 200, at para. 10.

[212] In the context of generic prejudice, *Find* demonstrates that establishing partiality on the basis of the nature of the crime itself will be difficult. As McLachlin C.J.C. stated:[215]

> This is not to suggest that an accused can never be prejudiced by the mere fact of the nature and circumstances of the charges he or she faces; rather, the inference between social attitudes and jury behaviour is simply far less obvious and compelling in this context, and more may be required to satisfy a court that this inference may be reasonably drawn. The nature of offence-based bias, as discussed, suggests that the circumstances in which it is found to be both widespread in the community and resistant to the safeguards of trial may prove exceptional. Nonetheless, I would not foreclose the possibility that such circumstances may arise. If widespread bias arising from sexual assault were established in a future case, it would be for the court in that case to determine whether this bias gives rise to a realistic potential for partial juror conduct in the community from which the jury pool is drawn.

3. THE PROCESS FOR DETERMINING IMPARTIALITY

[213] The process for determining whether a prospective juror is partial or impartial involves a division of labour between the trial judge and members (or potential members) of the jury. This process is regulated by statute, judicial discretion, and judicial practices.

a. *Criminal Code* provisions

[214] The *Code* establishes the following rules respecting the general challenge for cause process:[216]

> 638(1) A prosecutor or an accused is entitled to any number of challenges on the ground that ...
>
> (b) a juror is not indifferent between the Queen and the accused...
>
> 639(1) Where a challenge is made on a ground mentioned in section 638, the court may, in its discretion, require the party that challenges to put the challenge in writing.
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> (2) A challenge may be in Form 41.

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[215] *Find*, note 203, at para. 108.

[216] *Code,* ss. 638(1)(b), 639. See also *Code,* s. 635(1)-(2).

(3) A challenge may be denied by the other party to the proceedings on the ground that it is not true.

640(1) Where the ground of a challenge is that the name of a juror does not appear on the panel, the issue shall be tried by the judge on the *voir dire* by the inspection of the panel, and such other evidence as the judge thinks fit to receive.

(2) If the ground of a challenge is one that is not mentioned in subsection (1) and no order has been made under subsection (2.1), the two jurors who were last sworn — or, if no jurors have been sworn, two persons present who are appointed by the court for the purpose — shall be sworn to determine whether the ground of challenge is true.

(2.1) If the challenge is for cause and if the ground of the challenge is one that is not mentioned in subsection (1), on the application of the accused, the court may order the exclusion of all jurors — sworn and unsworn — from the court room until it is determined whether the ground of challenge is true, if the court is of the opinion that such an order is necessary to preserve the impartiality of the jurors.

(2.2) If an order is made under subsection (2.1), two unsworn jurors, who are then exempt from the order, or two persons present who are appointed by the court for that purpose, shall be sworn to determine whether the ground of challenge is true. Those persons so appointed shall exercise their duties until twelve jurors and any alternate jurors are sworn.

(3) Where the finding, pursuant to subsection (1), (2) or (2.2) is that the ground of challenge is not true, the juror shall be sworn, but if the finding is that the ground of challenge is true, the juror shall not be sworn.

(4) Where, after what the court considers to be a reasonable time, the two persons who are sworn to determine whether the ground of challenge is true are unable to agree, the court may discharge them from giving a verdict and may direct two other persons to be sworn to determine whether the ground of challenge is true.

b. Role of the trial judge

[215] The trial judge does not decide whether a prospective juror is partial or impartial. The trial judge has two roles: (a) determining whether

a challenge for cause is permitted at all;[217] and (b) if the trial judge permits a challenge, managing the challenge process.

i. Threshold issue: Whether the general challenge is permitted

[216] In deciding whether to permit a general challenge for cause, the trial judge must determine whether the applicant has established a "realistic possibility" or "realistic potential" that the prospective juror is partial (or "not impartial").[218] Again, all applicants must satisfy this test to be permitted to challenge for cause.

[217] As noted in *Williams*, "[t]he question is whether there is reason to suppose that the jury pool may contain people who are prejudiced and whose prejudice might not be capable of being set aside on directions from the judge."[219] That is, the judge must be satisfied on (a) the "attitudinal" ground – widespread bias or partiality exists in the community, and (b) the "behavioral" ground – some jurors may be incapable of setting aside this bias or partiality and rendering an impartial decision, despite trial safeguards (i.e. the jurors' oath and admonitions from the judge).[220]

[218] The relevant community is the community from which the jury pool is drawn. If it is established that, for example, racial prejudice exists at the national or provincial level, inferences may be drawn that the local community shares those prejudices. Local circumstances, however, may rebut that inference, that is, the local community may have a strong majority of individuals falling within the racial group.[221]

[219] The realistic possibility cannot be founded on mere assertion or speculation. It may be founded on

(a) evidence, including expert evidence;[222]

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[217] *Williams*, note 200, at para. 2

[218] *Williams*, note 200, at paras. 2, 14, 32; *Spence*, note 200, at para. 23; *Find*, note 203, at para. 31; Royal, note 195, at 7, 11; Tanovich, note 197, at 95 (5.1).

[219] *Williams*, note 200, at para. 32.

[220] *Spence*, note 200, at paras. 26, 35; *Find*, note 203, at para. 32.

[221] *Williams*, note 200, at para. 41.

[222] *R. v. McKenzie* (2001), 49 C.R. (5th) 123 (Ont. S.C.J.) (limitations on expert evidence respecting formulation of questions); Tanovich, note 197, at 144-147 (5.6(d) - *viva voce* evidence; 5.6(e) - affidavit evidence; 5.6(g) - expert evidence)); *R. v. Kenny* (1991), 68 C.C.C. (3d) 36 (Nfld. S.C.) (use of telephone survey by experts respecting possible prejudice in jury pool; jury simulations as a

(continued...)

(b) judicial notice;[223] or

(c) both.[224]

Royal advises as follows:[225]

> As for the need to call evidence on the application, unless you are within an exclusively race-based challenge, some evidence ought to be called. Absent a concession from your opponent that a challenge for cause is appropriate, a proper evidentiary foundation is important, although it may be established by the Court taking judicial notice.

[220] Royal also notes that counsel will not get much evidential assistance from the information the Jury Officer provides about prospective jurors:[226]

> ... [L]ocal Counsel will know that the only information we are provided with by the Jury Officer with respect to the composition of the panel are the names of the individual panellists and their occupations, if known. We used to be provided with the addresses of each of the jurors, however that is no longer the case.

[221] *Viva voce* evidence may be relied on in the application to challenge for cause. There is currently no requirement to provide to the other party a notice of intention to call a witness. Paragraph 657.3(3)(a) of the *Code* provides that "a party who intends to call a person as an expert witness shall, at least thirty days before the commencement of the trial ... give notice ... of his ... intention to do so...." It has not been determined whether this provision applies in jury selection, as opposed to proceedings after the trial has started. Regardless, the policy basis for this provision is

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[222] (...continued)
basis for expert opinion; unsuccessful application for a stay based on prejudice created by widespread pre-trial media reports).

[223] "In *Parks*, this court went outside the trial record and beyond the material submitted by the parties to find sociological and empirical support for its conclusions. That form of appellate activism, while appropriate in some cases, should be used sparingly.... Appellate analysis of untested social science data should not be regarded as the accepted means by which the scope of challenges for cause based on generic prejudice will be settled": *R. v. Alli* (1996), 110 C.C.C. (3d) 283 at 285 (Ont. C.A.); *Williams*, note 200, at para. 13; see *Spence*, note 200, at paras. 48-55 (for a discussion of judicial notice); Royal, note 195, at 8; Tanovich, note 197, at 137-144 (5.6(a)-(c)).

[224] Royal, note 195, at 11; *Find*, note 203, at para. 46.

[225] Royal, note 195, at 17. On the need for evidence, see also *R. v. Alli* (1996), 110 C.C.C. (3d) 283 at 285 (Ont. C.A.).

[226] Royal, note 195, at 27.

sound as it prevents unnecessary adjournments. Ample notice will permit the other party to retain its own expert, should that be necessary, and to assess the proposed expert evidence properly. Complying with the spirit of s. 657.3(3) in the context of jury selection makes sense.

[222] Expert witnesses in the challenge for cause context should testify orally and be subject to cross examination. In *Spence*, Binnie J. made the following observations:[227]

> I would add this comment: in *R.* v. *Malmo-Levine* ... a majority of our Court expressed a preference for social science evidence to be presented through an expert witness who could be cross-examined as to the value and weight to be given to such studies and reports....
>
> The suggestion that even legislative and social "facts" should be established by expert testimony rather than reliance on judicial notice was also made in [other] cases ... Litigants who disregard the suggestion proceed at some risk.

[223] Counsel should be cautious when seeking to rely on judicial notice to establish facts relevant to a challenge for cause. The Supreme Court has adopted strict and narrow versions of the tests for taking judicial notice:[228]

> Judicial notice is the acceptance of a fact without proof. It applies to two kinds of facts: (1) facts which are so notorious as not be the subject of dispute among reasonable persons; and (2) facts that are capable of immediate and accurate demonstration by resorting to readily accessible sources of indisputable accuracy ... The existence of racial prejudice in the community may be a notorious fact within the first branch of the rule.... Widespread racial prejudice, as a characteristic of the community, may therefore sometimes be the subject of judicial notice. Moreover, once a finding of fact of widespread racial prejudice in the community is made on evidence, as here, judges in subsequent cases may be able to take judicial notice of the fact.... It is also possible that events and documents of indisputable accuracy may permit judicial notice to be taken of widespread racism in the community under the second branch of the rule.

[224] The proof of some facts relating to challenges for cause may be difficult. These facts may be of a general or "social" nature, as opposed to the "adjudicative facts" (the who, what, when, where, with what motive,

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[227] *Spence*, note 200, at para. 68.

[228] *Williams*, note 200, at para. 54. See also *Spence*, note 200, at para. 5.

by what instrumentality) at issue between the parties.[229] As noted in an Ontario case, the "existence and extent of [biases such as] racial bias are not issues which can be established in the manner normally associated with the proof of adjudicative facts."[230] Counsel may have difficulty finding an expert to testify on the relevant points. At the same time, the facts may not be so settled that judicial notice may be taken. In the case of "social" facts, a practice has developed whereby courts have admitted learned publications, studies, or governmental reports as relevant to the proof of the facts.[231]

[225] However, relying on paper alone may be risky. As indicated above, the Supreme Court has signalled its preference for witnesses. The more critical or dispositive the issue, the less likely the paper evidence will be admissible and, in the absence of *viva voce* evidence, the more likely the court will insist that the strict judicial notice criteria be satisfied.[232] As Binnie J. stated:[233]

> When asked to take judicial notice of matters falling between the high end already discussed where the Morgan criteria will be insisted upon, and the low end of background facts where the court will likely proceed (consciously or unconsciously) on the basis that the matter is beyond serious controversy, I believe a court ought to ask itself whether such "fact" would be accepted by reasonable people who have taken the trouble to inform themselves on the topic as not being the subject of reasonable dispute *for the particular purpose for which it is to be used*, keeping in mind that the need for reliability and trustworthiness increases directly with the centrality of the "fact" to the disposition of the controversy.

Effects of facts pertaining to racial bias

[226] Evidence of the "attitudinal" component of partiality may provide proof that there is a realistic potential for partiality. Proof of attitude may be proof of behaviour consistent with that attitude. McLachlin J. indicated that "[w]here widespread racial bias is shown, it may well be reasonable for the trial judge to infer that some people will have difficulty identifying

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[229] See *Spence*, note 200, at paras. 57-69 for a discussion of judicial notice of social and legislative acts.

[230] *R. v. Parks* (1993), 84 C.C.C. (3d) 353 at 366 (Ont. C.A.).

[231] *Williams*, note 200, at paras. 54, 58; *Spence*, note 200, at para. 33.

[232] *Spence*, note 200, at para. 61; *R. v. Malmo-Levine*, 2003 SCC 74, [2003] 3 S.C.R. 571 at para. 28.

[233] *Spence*, note 200, at para. 65.

and eliminating their biases. It is therefore reasonable to permit challenges for cause."[234] And again:[235]

> Evidence of widespread racial prejudice may, depending on the nature of the evidence and the circumstances of the case, lead to the conclusion that there is a realistic potential for partiality. The potential for partiality is irrefutable where the prejudice can be linked to specific aspects of the trial, like a widespread belief that people of the accused's race are more likely to commit the crime charged. But it may be made out in the absence of such links.

[227] McLachlin J. has cautioned that the prejudice that supports a challenge for cause need not be extreme prejudice: "Extreme prejudice is not the only sort of prejudice that may render a juror partial. Ordinary 'garden-variety' prejudice has the capacity to sway a juror and may be just as difficult to detect and eradicate as hatred."[236]

Conceding the challenge

[228] The other party may agree that challenges for cause are appropriate. This concession, however, does not bind the judge, who is responsible for determining whether challenges should be permitted to go forward.[237] It has not been authoritatively determined whether, if a particular prospective juror is challenged for cause, the other party may concede the particular challenge and agree that the prospective juror be disqualified, even if this concession is made before the triers (see below) are sworn.[238] The danger is that quick acceptance by the other party gives that other party, in effect, extra peremptory challenges since cause for discharge has not been established.

ii. Management of the general challenge process

[229] If the threshold issues have been established and the trial judge permits a general challenge for cause, he or she must manage the process: "The judge has a wide discretion in controlling the challenge process, to prevent its abuse, to ensure it is fair to the prospective juror as well as the

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234 *Williams*, note 200, at para. 23; see also para. 38.

235 *Williams,* note 200, at para. 27.

236 *Williams,* note 200, at para. 39.

237 Tanovich, note 197, at 159(6.8).

238 *Williams*, note 200; *R. v. Atkinson* (1995), 167 A.R. 191 (Q.B.), Lutz J. [*Atkinson*].

accused, and to prevent the trial from being unnecessarily delayed by unfounded challenges for cause.…"[239] In particular, the trial judge determines or approves the questions to be put to the prospective jurors, decides who is entitled to ask the questions, decides (at least under current law) whether the challenge process takes place before prospective jurors, and decides what instructions to provide to the "triers". In managing the challenge for cause process, the trial judge has wide discretion.[240] He or she should bear in mind such considerations as

(a) the privacy interests of prospective jurors (e.g. questioning should not unnecessarily intrude into lifestyle or biography),[241]

(b) fairness to prospective jurors, and

(c) the need to avoid unnecessarily lengthening trials or increasing trial costs.[242]

Questions

[230] The trial judge must approve the questions to be put to prospective jurors so that they are: "relevant, succinct and fair."[243] The general rule is that the judge should permit the least number of questions requisite to deal with partiality.[244]

[231] In the *Sleigh* case, Clackson J. decided that 14 questions ought to be put to each potential juror. Royal had based many questions on questions

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[239] *Williams,* note 200, at para. 13. See also *R. v. McLean* (2002), 170 C.C.C. (3d) 330 at para. 7 (Ont. C.A.) [*McLean*].

[240] *Williams*, note 200, at para. 55; *Spence*, note 200, at para. 24; Royal, note 195, at 17, referring to *R. v. Dhillon* (2001), 158 C.C.C. (3d) 353 at para. 51 (B.C.C.A.), Low J.A [*Dhillon*].

[241] See *Atkinson*, note 238, at para. 51; *R. v. S.B.* (1996), 47 C.R. (4th) 56 (Ont. C.J. (Gen. Div.)), Hill J.; *Dhillon*, note 240, at para. 53.

[242] *Williams*, note 200, at paras. 53, 55; *Spence*, note 200, at para. 24.

[243] Granger, note 197, at 177 [footnotes omitted]. "[I]t is to determine relevancy that the trial Judge must know the basis of the challenge. The questioning should be succinct, because the issue will usually be narrow. It must not be or become a fishing expedition. Above all, it must be fair.": *R. v. Hubbert* (1975), 29 C.C.C. (2d) 279 at 294 (Ont. C.A.), [*Hubbert*] aff'd. [1977] 2 S.C.R. 267 at 267, Laskin C.J.C. "We would add that in our opinion the procedure outlined by the Court of Appeal for dealing with challenges for cause provides a useful guide for trial judges called on to deal with such challenges." See also Tanovich, note 197, at 147 (5.7).

[244] *Williams*, note 200, at para. 55: "In the case at bar, Hutchison J. at the first trial confined the challenge to two questions, subject to a few tightly controlled subsidiary questions. This is a practice to be emulated."

permitted in challenges for cause in other cases.[245] Approval in other cases, while not binding, should be persuasive.

Questioner

[232] Royal offers the following observation: "There was no suggestion in ... [the *Sleigh*] case that anyone other than the Trial Judge was the appropriate person to put the questions and this would certainly seem to be the consistent practice across the country today…."[246] The Canadian Judicial Council comments that "in some jurisdictions, in the interests of impartiality, the judge asks some or all of the questions."[247] However, some authority, including Alberta authority, supports the questioning of potential jurors by counsel.[248]

Presence of prospective jurors

[233] Current law establishes broad judicial discretion on the issue of whether prospective jurors should be present during the challenge for cause process. The Canadian Judicial Council makes the following observation:[249]

> There are variations in the procedure followed by judges in cases that involve a challenge for cause. Some judges prefer that the challenge for cause take place in the presence of the other members of the jury panel. Other judges consider that it should take place in the absence of other jury panel members to reduce the risk that prospective jurors might tailor their responses to the questions to facilitate or avoid selection as jurors or to prevent contamination of the

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[245] Royal, note 195, at 24-26. For examples of questions found proper and questions found improper, see Granger, note 197, at 178-186 and Tanovich, note 197, at 149.

[246] Royal, note 195, at 34, see also 24; *R. v. Smith*, 2003 NSSC 125, (2003) 217 N.S.R. (judge asking questions on request of defence counsel).

[247] Canadian Judicial Council, *Preliminary Instructions*, at 16, n. 9, online: <http://www.cjc-ccm.gc.ca/cmslib/general/NCJI-Jury-Instruction-Preliminary-2011-03-E.pdf> [Canadian Judicial Council].

[248] Royal, note 195, at 34; *R. v. Michael White*, 2006 ABQB 909, Moreau J. [no written decision on the procedural point has been published]; *R. v. Guerin and Pimpare* (1984), 13 C.C.C. (3d) 231 (Que. C.A.); *R. v. Proulx* (1992), 76 C.C.C. (3d) 316 (Que. C.A.); *Dhillon*, note 240, at para.47; *R. v. Lesso and Jackson* (1952), (1973) 23 C.R.N.S. 179 (Ont. S.C.).

[249] Canadian Judicial Council, note 247, at 16, n. 9. See also the Honourable Mr. Justice David Watt, *Watt's Manual of Criminal Jury Instructions* (Toronto: Thomson Carswell, 2005) at 15, n. 1 [Watt]; Granger, note 197, at 188; Tanovich, note 197, at 152-153 (6.4), 165 (8.1); *R. v. English* (1993), 84 C.C.C. (3d) 511 (Nfld. C.A.) at 533-534 [*English*]; *R. v. Moore-McFarlane* (2001), 56 O.R. (3d) 737 at para. 85 (C.A.), Charron J.A., as she then was [*Moore-McFarlane*].

> remaining jurors. The matter should be discussed with counsel before jury selection begins....
>
> If the challenge is based on pre-trial publicity, the other members of the panel should not be present. If the challenge concerns issues of race, the Supreme Court of Canada has suggested in *R.* v. *Williams*, [1998] 1 S.C.R. 1128 that the challenge should take place in front of the entire panel.

In addition, s. 640(2.1) of the *Code* confirms the authority of the judge to exclude prospective jurors from the challenge for cause process.

c. Role of jurors or prospective jurors

[234] The issue of whether a prospective juror is impartial or partial is decided by two jurors (if they have already been sworn as jurors) or two prospective jurors (members of the panel). They are known as "triers." Under s. 640(2) of the *Code*:

> ... [T]he two jurors who were last sworn - or, if no jurors have been sworn, two persons present who are appointed by the court for the purpose - shall be sworn to determine whether the ground of challenge is true.

[235] The trial judge must give the triers adequate instructions, so that they understand the nature of their tasks and the rules they must follow.[250] It appears that the first two triers need not themselves be tried. The fact that one or both later turn out to have been partial does not vitiate the jury selection process.[251]

[236] Under current law, one set of triers does not hear all challenges. Instead, a sequential procedure has been developed: two triers are sworn in (their names being drawn at random from those of the prospective jurors); when a juror is sworn, that juror replaces one trier; the next sworn juror replaces the second; thereafter, each newly sworn juror replaces the longest-sitting trier until all jurors are selected.[252] This sequential approach

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[250] *Moore-McFarlane*, note 249, at paras. 86-88; *R.* v. *Brown* (2002), 166 C.C.C. (3d) 570 at para. 11 (Ont. C.A.), Goudge J.A. [*Brown*].

[251] Royal, note 195, at 18; *English*, note 249, at 532-533; Tanovich, note 197, at 163 (7.2(a)); see *Brown*, note 250, at para. 16.

[252] Canadian Judicial Council, note 247, at 16; Jury Officer Memorandum, appendix to Royal, note 195, at xvii; see Rutherford J., "Introductory Remarks to Panel," appendix to Royal, note 195, xx at xxiv; Tanovich, note 197, at 163-164 (7.2(b)); Ferguson, note 213, 1.00-7; *Brown*, note 250, at paras. 17 - 19; *English*, note 249 [however: use of first two triers to hear all challenges was not reversible error]; "One consequence of this unique procedure ... is that to a considerable degree the members

(continued...)

appears to be consistent with the language of s. 640(2), which refers to the challenge being heard by "the two jurors who were last sworn." The identity of the last sworn jurors will change as jurors are sworn.

[237] Section 640(2.2) of the *Code* establishes a different procedure:

> If an order is made under subsection (2.1), two unsworn jurors, who are then exempt from the order, or two persons present who are appointed by the court for that purpose, shall be sworn to determine whether the ground of challenge is true. Those persons so appointed shall exercise their duties until twelve jurors and any alternate jurors are sworn.

Thus, if a juror exclusion order is granted, a set of two triers is established. The identity of the triers does not change and the two triers hear all the challenges until the requisite number of jurors is sworn.[253] However, the two triers cannot be sworn. Hence, the issue of whether the two triers are partial will not arise.

[238] While ordinarily the only witness in the challenge process is the challenged prospective juror, other witnesses may be called.[254] The opposing party may be permitted to question the prospective juror and to call evidence.[255] Ordinarily, counsel do not address the triers or make submissions to them.[256]

[239] The triers observe the challenge and decide on a balance of probabilities whether the prospective juror is impartial.[257] The burden of proof lies on the party challenging the prospective juror.[258] The triers decide whether the prospective juror does have the partiality in question, and whether he or she is capable of setting that partiality aside. Thus, in the case of challenge for cause on the basis of racial prejudice, the triers

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[252] (...continued)
of the jury are responsible for its make-up. I do not propose to explore the implications of this self-selection process for group cohesion.... Another consequence is that through taking part in, as well as observing, the challenge process, the jurors are further educated about the importance of being impartial": Neil Vidmar, "The Canadian Criminal Jury Trial: Searching for a Middle Ground" (1999), 62 *Law & Contemp. Probs.* 141 at 145.

[253] Canadian Judicial Council, note 247, at 16, n.10.

[254] Granger, note 197, at 188; Tanovich, note 197, at 168 (8.3), (8.4).

[255] Granger, note 197, at 188; *Hubbert*, note 243, at 295; Tanovich, note 197, at 169 (8.5).

[256] Granger, note 197, at 188; *Moore-McFarlane*, note 249, at para. 89.

[257] Watt, note 249, at 17.

[258] Granger, note 197, at 188.

must determine "(1) whether a particular juror is racially prejudiced in a way that could affect his or her partiality; and (2) if so, whether the juror is capable of setting aside that prejudice."[259] Under s. 640(3) of the *Code*:

> Where the finding ... is that the ground of challenge is not true, the juror shall be sworn, but if the finding is that the ground of challenge is true, the juror shall not be sworn.

[240] The triers should be told that they may retire to a jury room to consider their decision if they wish to do so. Otherwise, they may choose to discuss matters where they are.[260]

[241] The triers' decision must be unanimous.[261] They do not need to provide reasons for their decision.[262] If they cannot agree, they should so advise the judge.[263] In these circumstances, the judge may discharge them and direct two other triers to decide the issue.[264] Under s. 640(4) of the *Code*:

> Where, after what the court considers to be a reasonable time, the two persons who are sworn to determine whether the ground of challenge is true are unable to agree, the court may discharge them from giving a verdict and may direct two other persons to be sworn to determine whether the ground of challenge is true.

The triers' decision cannot be appealed.[265]

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[259] *Williams*, note 200, at para. 23. "The triers may conclude that the connection between a prospective juror's prejudices and the trial are so small that they cannot realistically translate into partiality. Conversely, the triers might conclude that a prospective juror's beliefs that people of the accused's race are more likely than others to commit the type of crime alleged are highly indicative of partiality": *Williams,* note 200, at para. 31.

[260] Royal, note 195; *McLean*, note 239, at para. 8; *R. v. Cardinal,* 2005 ABCA 303, 380 A.R. 174 at paras. 15-17; Watt, note 249, at 18; *Moore-McFarlane*, note 249, at para. 88; *Brown*, note 250, at para. 13.

[261] *R. v. Cardinal,* 2005 ABCA 303, 380 A.R. 174, at para. 17; *McLean*, note 239, at paras. 6, 9; *Moore-McFarlane*, note 249, at para. 88.

[262] Granger, note 197, at 188.

[263] Royal, note 195, at 18.

[264] Granger, note 197, at 187.

[265] Tanovich, note 197, at 170 (8.7(c)).

4. GENERAL CHALLENGE FOR CAUSE PRACTICE IN ALBERTA

[242] Shortly after *Criminal Jury Trials: Challenge for Cause Procedures*, Consultation Memorandum No. 12.20 [CM12.20] was published,[266] the Court of Queen's Bench of Alberta issued Criminal Practice Note 5 - Challenge for Cause, which provides as follows:[267]

> Where the prosecutor or the accused wishes to challenge jurors pursuant to section 638(1)(b) of the *Criminal Code*, for example a challenge based on the personal characteristics of the accused or the accused's witnesses, prejudice about the nature of the crime, or prejudice arising from pre-trial publicity, the following procedure will be followed:
>
> 1. Notification of such a challenge will be given to the prosecutor or the accused and to the Trial Coordinator in the Judicial District where the trial is scheduled to take place at least 60 days prior to the scheduled jury selection or, such shorter interval that the trial judge may allow in the interests of justice;
>
> 2. Notification must be in writing setting out the basis for the proposed challenge (See s.639 and Form 41 of the *Criminal Code*);
>
> 3. Upon receipt of the written notification, the Trial Coordinator in the Judicial District where the trial is scheduled will schedule a pre-trial conference with the trial judge, the prosecutor and the accused to resolve issues raised by the application.

[243] Some additional practices have developed to facilitate challenge for cause procedures. These include the following:

(a) the Jury Officer's attendance at the pre-trial conference if a jury trial is contemplated, to ensure that he or she is aware of how the trial judge wishes to proceed;[268]

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[266] Alberta Law Reform Institute, *Criminal Jury Trials: Challenge for Cause Procedures*, Consultation Memorandum No. 12.20 (2007) [CM 12.20].

[267] Court of Queen's Bench of Alberta, "Q.B. Criminal Practice Note '5' - Challenge for Cause" (28 June 2007), online: Alberta Courts - Practice Notes <http://www.albertacourts.ab.ca/qb/practicenotes/criminalPN5.pdf> [CPN5].

[268] Jury Officer Memorandum, appendix to Royal, note 195, at xvi.

(b) the development of a standard address by the trial judge to the array, prior to the selection of particular members of the jury, dealing with, among other things, challenge for cause issues;[269]

(c) the development of a standard set of instructions for delivery by the trial judge to the triers, before they hear a challenge for cause;[270]

(d) the development of guidelines for the challenge for cause hearing, respecting, for example, whether a prospective juror is sworn, and who is entitled to question the prospective juror;[271] and

(e) the development of a standard set of instructions for delivery by the trial judge to the triers after the evidence is heard in the challenge for cause and before the triers make their decision.[272]

5. GENERAL CHALLENGE FOR CAUSE IN OTHER JURISDICTIONS

[244] The only Canadian jurisdiction to have created a set of rules of court specifically concerning general challenges for cause in criminal jury trials is the Northwest Territories. Other jurisdictions have general criminal rules which apply to challenges for cause, some with specific challenge application deadlines, or practice directions. Further, the jury legislation of the provinces and territories do not make any special provision for challenges for cause in criminal jury trials.

a. Northwest Territories

[245] Part 15 of the *Criminal Procedure Rules of the Supreme Court of the Northwest Territories* provides as follows:[273]

> *Challenge for general lack of indifference*
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> 91 Where the accused or the prosecutor seeks, pursuant to paragraph 638(1)(b) of the Code, to challenge for cause every member of a jury panel on the basis of a general lack of indifference, the applicant shall file and serve a notice of

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[269] Canadian Judicial Council, note 247, at 15.

[270] Canadian Judicial Council, note 247, at 17.

[271] Royal, note 195, at 34.

[272] Royal, note 195; Canadian Judicial Council, note 247, at 18.

[273] *NWT Criminal Rules*, note 10, rr. 91-93.

> motion in Form 1 of the schedule not less than seven days before the date fixed for selection of a jury for the trial.
>
> *Application*
>
> 92(1) The application must be supported by an affidavit of or on behalf of the applicant setting out with particularity the grounds for the challenge and the proposed questions to be put to each prospective juror.
>
> (2) The application shall be heard by the trial judge in the absence of the jury panel.
>
> *Questions to members of jury panel*
>
> 93(1) If the application is granted, the judge shall specify the form of each question to be put to each prospective juror and who shall ask the questions.
>
> (2) Each member of the jury panel shall be questioned in the presence of the accused and the triers but in the absence of the remainder of the members of the jury panel, who shall be kept in a separate room.
>
> (3) The trial judge may, in his or her discretion, permit counsel to make submissions to the triers.

b. Notice requirements in other jurisdictions

[246] British Columbia has a general notice requirement concerning pre-trial applications, with a specific deadline for challenges for cause. In particular, the rules state that:[274]

> RULE 2 NOTICE OF APPLICATION
>
> (1) All pre-trial applications in criminal proceedings shall be commenced by a notice of application in Form 1.
>
> (7) A notice of application for leave to challenge potential jurors for cause on the ground of prejudice shall be filed and delivered to any opposing party at least 30 days before the date set for jury selection.

[247] Some jurisdictions have a set of rules governing all or a variety of motions in criminal matters. For example, Part 5 of the *Manitoba Court of Queen's Bench Rules (Criminal)* establishes a single form for criminal motions, and requires that the notice of motion set out, among other things, the relief sought, the grounds upon which relief is sought, and the

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[274] *BC Criminal Rules*, note 50, r. 2(1),(7).

material on which the moving party relies, including statutory provisions.[275] An application to challenge for cause in a criminal jury trial in Manitoba should, it would appear, follow the requirements of Part 5.

[248] Similarly, the *Ontario Superior Court Criminal Rules* provide that:[276]

> 6.01(1) Where the *Criminal Code* or other federal enactment to which the procedural provisions of the *Criminal Code* apply, authorizes, permits or requires that an application or motion be made to or an order or determination made by a judge of or presiding in the superior court of criminal jurisdiction, or a judge as defined in s.552 of the *Criminal Code*, other than a judge presiding at trial upon an indictment, the application shall be commenced by a notice of application in Form 1.
>
> 6.03 Every notice of application in Form 1 shall state
>
> (a) the place and date of hearing in accordance with Rule 6.02 and any other applicable rule;
>
> (b) the precise relief sought;
>
> (c) the grounds to be argued, including a reference to any statutory provision or rule to be relied upon;
>
> (d) the documentary, affidavit and other evidence to be used at the hearing of the application; and
>
> (e) whether any order is required abridging or extending the time for service or filing of the notice of application or supporting materials required under these rules.

On the theory that a trial does not begin until the accused is put in charge of the jury, these rules apply at the stage of jury selection.[277] Hence, an application to challenge for cause in a criminal jury trial in Ontario should follow these rules.

[249] The Supreme Court of Newfoundland and Labrador gives direction concerning challenge for cause proceedings in a practice note and states that a formal application to use the challenge for cause procedure will not

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[275] *Manitoba Criminal Rules,* note 58, rr. 5.01, 5.03-5.04.

[276] *Ontario Superior Court Criminal Rules,* note 13, rr. 6.01, 6.03.

[277] *R.* v. *Basarabas*, [1982] 2 S.C.R. 730, Dickson J; *R.* v. *Emkeit* (1971), 3 C.C.C. (2d) 309 (Alta. S.C. Appellate Div.), Smith C.J.A.; aff'd., without reference to this point, [1974] S.C.R. 133.

be entertained, except in unusual circumstances, if made less than 4 weeks before the trial is scheduled to begin.[278]

[250] The Northwest Territories, British Columbia, Manitoba, Ontario, and Newfoundland and Labrador all require service of a formal notice setting out essentially the same types of information. This report makes recommendations in the second part of this chapter which are similar.

B. General Challenge for Cause Issues and Recommendations

[251] The comments received from the bench and bar on the general challenge for cause proposals set out in CM 12.20 were reviewed. The insights provided and suggestions made in these comments improved the practical understanding of many of the issues associated with general challenges for cause and helped refine the final recommendations.

1. REFORM OF GENERAL CHALLENGE FOR CAUSE PROCEDURES

[252] In Alberta, jury trials tend to be reserved for very serious offences. Because of the individual and social interests at stake in such trials, procedures should be as transparent, certain and as consistent as possible. Although not many accused persons elect to be tried by jury, there are still a substantial number of jury trials conducted in Alberta each year. Both the absolute number and percentage of criminal jury trials has increased since 2000,[279] with the number of criminal jury trials in the Court of Queen's Bench exceeding 80 per year and the percentage holding fairly steady at approximately 25% of the total over the three years prior to the issuance of CM 12.20.[280]

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[278] The Law Courts of Newfoundland and Labrador, "Jury Trials (Criminal): Challenge for Cause Procedure" (10 October 2002), online: Supreme Court - General Division - Practice Notes <http://www.court.nl.ca/supreme/general/pracnotes/10_10_02-2.pdf>.

[279] Queen's Bench statistics for 2000 - 2001 indicate that in 2000 there were 67 criminal jury trials and 409 non-jury criminal trials (14% jury trials) and in 2001, there were 57 jury trials and 397 non-jury trials (12.5 % jury trials). These statistics were provided by the Court of Queen's Bench and are on file with the Alberta Law Reform Institute.

[280] In 2003/2004, there were 90 criminal jury trials and 348 criminal trials in total (26% jury trials). In 2004/2005, there were 93 jury trials and 393 criminal trials in total (24% jury trials). In 2005/2006, there were 82 jury trials and 338 criminal trials in total (24% jury trials). These statistics were provided by Alberta Justice, Court Services and manually collected. No inference should be drawn that Alberta Justice supports, endorses, or approves of the analysis or recommendations associated with these statistics.

[253] Procedural reform respecting general challenges for cause in criminal jury trials is necessary and desirable. The original difficulty identified in CM 12.20 was that the process was under regulated and lacked standards. This created the possibility of inconsistent processes in different cases and made the general challenge process too dependent on individual counsel and judges.

[254] To a degree, the practice note, CPN5, attenuates the need for reform. However, it contains only the minimum requirements for applying for court permission to make a general challenge (that is, notice and a written form) and does not describe the process for challenging every prospective juror. In this regard, rules which reflect the recommendations in this report could supplement or replace the practice note provisions.

[255] Those who commented on CM 12.20 supported the proposal that standardized procedures for challenges for cause be developed. In particular, the Law Society of Alberta, Criminal Practice Advisory Committee [Criminal Practice Advisory Committee] observed that although the *Code* outlines procedures once a challenge for cause is underway, there is a need to identify steps to be taken prior to starting the challenge for cause process.[281]

[256] One commentator noted that the challenge process is complex, time consuming and may result in excellent candidates being rejected by the triers for no apparent reason and identified an additional complication that was not discussed in CM 12.20. In particular, even after the triers approve a prospective juror, counsel can peremptorily challenge that prospective juror.[282]

[257] This commentator suggested that the challenge process could be streamlined without jeopardizing fairness or impartiality of the jury by modifying the proposals in two ways. First, it should be the trial judge rather than two other triers who decides whether a prospective juror is

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[281] See the Law Society of Alberta Criminal Practice Advisory Committee: Sub-committee Report upon Law Reform Institute Report and Recommendations Concerning Jury Challenge for Cause Procedures dated June 29, 2007 [unpublished] [CPAC Letter].

[282] See letter from The Honourable Mr. Justice Frans F. Slatter to Peter J.M. Lown, Q.C., Director, Alberta Law Reform Institute, (4 September 2007) [unpublished].

impartial.[283] Second, there should be a requirement that if counsel chooses to exercise the peremptory right to challenge a particular juror, he or she must do so before embarking on the general challenge for cause process.[284]

[258] However, as this commentator acknowledged, it is provisions of the *Code* which preclude development of a rule authorizing the judge to decide the question of juror impartiality in the general challenge for cause proceeding.[285] A reform of this nature would require amendment of the federal statute and is beyond the mandate of the project.

2. PROCEDURAL MECHANISMS USED TO ADDRESS CHALLENGE FOR CAUSE ISSUES

[259] It has been suggested that difficulties around challenges for cause could be worked out through case management processes or pre-trial conferences. In this regard, the *Code* provides as follows:[286]

> 625.1(2) In any case to be tried with a jury, a judge of the court before which the accused is to be tried shall, before the trial, order that a conference between the prosecutor and the accused or counsel for the accused, to be presided over by a judge of that court, be held in accordance with the rules of court made under sections 482 and 482.1 to consider any matters that would promote a fair and expeditious trial.

[260] In the *Sleigh* case, a series of pre-trial conferences were held with Clackson, J., the trial judge. Challenge for cause was discussed and defence counsel provided a draft of proposed questions.[287]

[261] Case management and pre-trial conferences should play a supplemental, as opposed to leading, role in the governance of general challenges for cause. Section 625.1(2) itself refers to "the rules of court made under sections 482 and 482.1" but the Court of Queen's Bench does not have rules relating to general challenges for cause.

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[283] Justice Slatter observes that challenge for cause proceedings would benefit by relying on the experience of trial judges at this stage as judges regularly decide questions of bias in other areas of the law.

[284] In Justice Slatter's opinion, reversing the order of the challenges would not undermine trial fairness. He finds support for his view that the two types of challenges are distinct and that the peremptory challenge should go first in *Find*, note 203; *R. v. Sherratt*, [1991] 1 S.C.R. 509 at 538-39; and *Hubbert,* note 243.

[285] *Code*, ss. 640(2), (2.2), (3) and (4).

[286] *Code*, s. 625.1.

[287] Royal, note 195, at 24.

[262] CPN5 contains a notice requirement and provides that a pre-trial conference will be scheduled to address the general challenge issues. However, individual pre-trial conferences, although well suited to solving case specific procedural problems, will likely not resolve the general challenge for cause difficulties in a consistent manner. It is the "one of a kind" approach of case management and pre-trial conferences which makes the regulation of general challenges by these measures too dependent on individual counsel and judges and gives rise to the inconsistency issue.

[263] Based on the responses to CM 12.20, it is concluded that procedural reform respecting general challenges for cause in criminal jury trials is necessary and desirable. In particular, standardized rules should govern the conduct of general challenge for cause proceedings.

3. NOTICE IN WRITING

[264] Section 639(1) of the *Code* provides that "[w]here a challenge is made on a ground mentioned in section 638, the court may, in its discretion, require the party that challenges to put the challenge in writing." The *NWT Criminal Rules* take a stricter approach. In particular, under r. 91:

> Where the accused or the prosecutor seeks, pursuant to paragraph 638(1)(b) of the Code, to challenge for cause every member of a jury panel on the basis of a general lack of indifference, the applicant shall file and serve a notice of motion in Form 1 of the schedule not less than seven days before the date fixed for selection of a jury for the trial.

That is, the applicant is required to file and serve a form, subject to the court's general dispensing power.

[265] In contrast, the Ontario Court of Appeal held in *Hubbert* that a challenge for cause need not be in writing: "Counsel should put it in writing if the nature of the challenge may bring opprobrium to the juror (such as having been sentenced to 15 months' imprisonment, 10 years ago). The trial judge can always require that the challenge be put in

writing...."[288] The Court of Appeal also held that particulars of the challenge need not be provided:[289]

> The *Code* does not require that a challenge, oral or written, be particularized. A challenge in the bald words of Form 37 and one or more of paras. (b) to (e) of s. 567(1) is sufficient. But counsel must *have* a reason, even a generalized one; otherwise he is not acting responsibly.
>
> Furthermore, the trial Judge has to know what the reason is, in more than general words; otherwise he cannot properly direct and control the trial of the truth of the challenge. Counsel must be prepared to state the reason for his challenge, and if he refuses to do so, the trial Judge may refuse to permit the trial of its truth, because that trial cannot properly be had without some definition of the issue.

[266] Two issues arise: Can rules *require* the filing and service of a form? If so, *should* the rules require the filing and service of a form?

[267] First, rules may require the filing and service of a form. This is not inconsistent with the discretion recognized under s. 639(1) of the *Code*. The requirement would not apply to all forms of challenge under s. 638(1), but only to general challenges in which a party challenges every member of a jury panel pursuant to s. 638(1)(b).

[268] In keeping with the recommendation made earlier in this final report, it is important to note and stress that a judge may exercise discretion respecting all aspects of a general challenge for cause process and, in particular, the requirement to provide written notice. In some cases, the grounds for general or "generic" challenges, such as those based on pre-trial publicity or race based challenges, will be known well before trial.[290] In others, the grounds supporting a finding of partiality may develop or may only become apparent as the trial approaches. Further, counsel may not be appointed until shortly before trial. While the written notice requirement should work well for ordinary cases, rules must have sufficient flexibility to deal with the extraordinary cases.[291]

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[288] *Hubbert*, note 243, at 293; See also Stephen R. Stackhouse, "Procedure on Challenge for Cause: *Regina v. Hubbert*" (1978), 16 Alta. L. Rev. 120; *Atkinson*, note 238, at paras. 27-30.

[289] *Hubbert*, note 243, at 293.

[290] Tanovich, note 197, at 151 (6.1).

[291] Tanovich, note 197, at 151 (6.1).

[269] Second, rules should require the filing and service of a form. While *Hubbert* was decided by a strong court and received Laskin C.J.C.'s endorsement, the case was decided in 1975. Since then, challenges for cause have become exceedingly technical. A challenge may turn on expert evidence, the availability of judicial notice, or the admissibility of learned papers or governmental reports, as well as on the interpretation of relevant authorities. The other party and the judge need an opportunity to assess the basis for the challenge and to develop responses.

[270] Furthermore, any challenge for cause will require that some questions be put to prospective jurors. These questions should be thought out in advance. The other party and the judge need an opportunity to decide whether all or any of the questions are appropriate; and even if it were conceded that some questions are appropriate, the questions may have to be re-worded to be effective.

[271] Failing to provide adequate notice of proposed evidence, authorities, and proposed questions is likely to result in delay. If the judge and all counsel have not had enough time to think matters through, the jury selection process may be damaged. If the process is seriously damaged, the result may be a new trial – causing delays, expense, and extra work for all involved. Tanovich, Paciocco, and Skurka write as follows:[292]

> To avoid delays or adjournments while opposing counsel or the judge research the matter, it is, at the very least, prudent and courteous to provide notice. There are also practical advantages to doing so. Often the opposing party will agree that it is an appropriate case for a challenge for cause, and when this occurs the need for extensive legal argument can be avoided. It may also be possible to work out the questions in advance, if notice is provided. For these reasons the usual practice is for parties seeking to bring general or generic challenges to provide notice and supporting materials in advance of the application.

Tanovich, Paciocco, and Skurka also make the interesting point that if the party challenging for cause relies on *Charter* grounds, the rules of procedure governing *Charter* applications should apply.[293]

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[292] Tanovich, note 197, at 151 (6.1). See also *R. v. Hoang* (1999), 140 C.C.C. (3d) 226 at para. 45 (B.C.C.A.), Ryan J.A.

[293] Tanovich, note 197, at 152. The recommendation in Chapter 2 - *Charter* Applications is that notice should be in writing.

[272] There was no disagreement with the view that notice of challenge for cause should be provided in a standardized, written form and the Criminal Practice Advisory Committee specifically agreed with the principle that early written notice should be required. Written notice is also required by CPN5 which states:[294]

> 2. Notification must be in writing setting out the basis for the proposed challenge (See s.639 and Form 41 of the *Criminal Code*).

RECOMMENDATION 39

The rules should require the filing and service of a form to give notice of an application to challenge for cause every member of a jury panel for general lack of indifference pursuant to s. 638(1)(b) of the *Code*.

4. FORM AND CONTENT OF NOTICE

[273] Section 639(2) of the *Code* provides that "[a] challenge may be in Form 41." Form 41 is minimalist. It requires only that the ground under s. 638(1) be set out. One might interpret Form 41 to require only the repetition of the words of the relevant paragraph.

[274] The *NWT Criminal Rules* go farther. In particular, rule 92(1) states that:

> The application must be supported by an affidavit of or on behalf of the applicant setting out with particularity the grounds for the challenge and the proposed questions to be put to each prospective juror.

[275] It might be argued that counsel are always entitled to use Form 41, regardless of what the rules might say, since the *Code* allows the challenge to be made using that form.

[276] To address the "Form 41 always suffices" argument, two more questions must be answered: Does s. 639(2) permit a requirement to provide more information than required by Form 41? If so, should rules require the provision of more information than required by Form 41? Both questions should be answered in the affirmative. Section 639(2) is permissive. Furthermore, s. 639(1) provides that the judge "may... require

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[294] CPN5, note 267.

the party that challenges to put the challenge in writing." The judge, then, would have the authority to require particulars beyond those of Form 41. The judge could look to rules for guidance in the exercise of his or her discretion. Hence, it appears that creating rules that go beyond the informational requirements of Form 41 is permissable. Given the purposes of providing notice mentioned earlier in this chapter, rules should require that more information be provided than is conveyed by Form 41.

[277] A third question must also be answered: What information should a notice to challenge for cause contain? A form of notice of intention to challenge for cause under s. 638(1)(b) should set out the following:

(a) particulars of the lack of impartiality: a "reasonably brief" but "adequate," "reasonable," or "sufficient" account of the grounds for the application (a statement of the facts, not evidence, supporting the application and an outline of the legal argument based on those facts), including any facts sought to be established by judicial notice, so that the other party and the judge can know what to expect and so they may prepare accordingly;

(b) a brief description of the types or sources of materials or evidence to be relied on in the application, which may include:

  (i) affidavit evidence of lay witnesses;

  (ii) citations for learned publications or governmental reports to be relied on and the authorities supporting the admissibility of those documents in the proceedings;

  (iii) cases supporting further legal arguments arising in connection with the proposed challenge for cause; and

  (iv) an address for service.

[278] In addition, if expert evidence will be relied on, the requirements of s. 657.3(3) should be satisfied. The notice should set out the name of the expert, a statement of the expert's qualifications, and a summary of the opinion expected to be given. Under s. 657.3(1), calling an expert could be avoided through the filing of an expert report and sworn qualifications, if the requirements of paragraphs (a) and (b) are satisfied (i.e., the court must recognize the person as an expert, and the party intending to produce the report has, before the proceeding, given the other party a

copy of the sworn qualifications and the report, and reasonable notice of the intention to produce it in evidence).

[279] The notice should be accompanied by a list of relevant authorities that are to be relied on in the application.

[280] The foregoing type of package is a modest elaboration of the British Columbia Supreme Court form, and matches the package recommended by Tanovich, Paciocco, and Skurka:[295]

> It is also prudent for the party seeking to bring the challenge to prepare the challenge by assembling, serving, and filing copies of the cases relied on, and the supporting material. Indeed, the prospects of succeeding will be enhanced if the application is accompanied by a brief, clear factum outlining the facts relied on, as well as the relevant principles of law.

[281] If the "learned publications or governmental reports" to be relied on are bulky, reference should be made to the relevant pages along with a full citation. If a document is available electronically, the URL for the document should be provided.

[282] A general, standardized requirement to file written arguments in addition to the notice of intention to challenge for cause was not proposed on the theory that if counsel drafts the notice properly, the notice will provide the necessary outline of argument. Regardless, in some cases, counsel may wish to file written argument or the court may require the filing of written argument. Any practical uncertainties could be resolved by an application for advice and directions, through the pre-trial conference, or through the interventions of the trial judge.

[283] The Criminal Practice Advisory Committee responded to the proposals concerning form and content of a notice for challenge for cause by stating that a notice of motion in the usual form and with the usual content, as contemplated by the existing rules of court, should be employed to convey the information generally identified in CM 12.20. However, the Criminal Practice Advisory Committee expressly disagreed with the proposals concerning case information, since notice of authorities would be provided later and separately in written briefs.

[284] There is no disagreement with the idea that notice forms should be simple and standardized. In addition, it is acknowledged that authorities

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[295] Tanovich, note 197, at 152 (6.1).

will be provided later and separately in written briefs. However, one of the reasons for requiring notice is to give notice of pending legal arguments. Since counsel has determined that the challenge for cause is warranted in the particular evidential and legal circumstances, counsel will have reviewed the applicable authorities. Including cases references in the notice would not be an undue burden and notice of the legal issues will ensure that opposing counsel and the judge can deal with all issues in an expeditious and effective way. The case reference requirement recommended for challenge for cause notices tracks the recommendation made earlier in this report for *Charter* applications. For efficiency and consistency reasons, the case reference requirement should be maintained.

[285] Although CPN5 refers to a notice "in writing setting out the basis for the proposed challenge (See s. 639 and Form 41 of the *Code*)" and does not limit notice contents to the minimal Form 41 content, it is recommended that more detail be provided in a notice concerning a general challenge for cause.

RECOMMENDATION 40

A form of notice of an application to challenge every potential juror for cause under s. 683(1)(b) of the *Code* should be developed.

RECOMMENDATION 41

The notice of an application to challenge every prospective juror for cause should contain the following information:

(a) particulars of the lack of impartiality; and

(b) a brief description of the types or sources of materials or evidence to be relied on in the application, which may include:

  (i) affidavit evidence,

  (ii) citations of any learned publications or governmental reports to be relied on, and

  (iii) a list of the relevant authorities.

RECOMMENDATION 42

The notice of general challenge for cause should include a draft copy of the questions that are proposed to be put to every prospective juror in the general challenge for cause proceeding.

RECOMMENDATION 43

If expert evidence will be relied on to support the application to make a general challenge for cause, the requirements of s. 657.3(3) of the *Code* should also be satisfied.

5. NOTICE PERIOD

[286] Under *NWT Criminal Rules*, r. 91, the notice is to be filed not less than 7 days before the date set for jury selection. In CM 12.20, it was suggested that 7 days before jury selection is not sufficient, particularly if the challenging party is raising novel points. Further, having the application to challenge for cause heard too close to the date of jury selection may prevent the sheriff from summonsing a sufficient number of potential jurors.[296]

[287] Consistent with the proposals that had been made respecting the time requirements for *Charter* applications, it was suggested that the notice of intention to challenge for cause be filed and served at least 60 days before the date set for jury selection. In addition, a 60 day notice period would ensure compliance in spirit with s. 657.3(3) respecting notices of intention to call expert witnesses at trial.

[288] The Criminal Practice Advisory Committee did not agree with the proposal and commented that 60 days is not long enough, particularly if there are any issues involving expert evidence. Under s. 657.3(3), the *Code* imposes its own 30 day minimum notice period on parties intending to call experts. The Criminal Practice Advisory Committee states:

> Assuming this provision would apply in the case of an expert being called during the challenge for cause application, it would appear unlikely that the various time limits and deadlines would be satisfied and met if notice of the

[296] *R. v. Hoang* (1999), 140 C.C.C. (3d) 226, at para. 25 (B.C.C.A.), Ryan J.A.; *R. v. McKenzie* (2001), 49 C.R. (5th) 123 (Ont. S.C.J.).

> challenge for cause application itself is not given until 60 days before the date set for jury selection.[297]

[289] Notice periods that are longer and shorter than 60 days were considered in preparing CM 12.20. Competing interests must be balanced. On the one hand, enough notice must be provided so that all those involved have enough time to address the issues accordingly; on the other hand, given workloads and the need to balance commitments, counsel cannot be expected to have fully worked out their positions too far in advance of jury selection. Sixty days is considered to be a good compromise and has the virtue of being consistent with the 60 day notice requirement recommended for notice of a *Charter* application.

[290] There is no doubt that determining the right notice period is difficult. However, a specific notice period must be established and so long as the trial judge has discretion to expand or contract the notice period as circumstances and justice require, any difficulties with the usual length of a notice period can be avoided.

[291] The Criminal Practice Advisory Committee also pointed out that the date of the pre-trial conference should not be used as a reference point for the giving of the challenge for cause notice, since the practice respecting the timing of the conferences varies between Edmonton (two to three months before trial) and Calgary (six to eight weeks before trial).

[292] It was not intended or proposed that a pre-trial conference serve as the reference point for the purpose of establishing when a notice concerning a challenge for cause should be provided. CM 12.20 contemplated only that the challenge for cause issue would be on the agenda for a pre-trial conference. The time for filing and service of notice concerning an intent to challenge for cause should be set independently.

[293] The proposal in CM 12.20 is consistent with CPN5: "Notification of such a challenge will be given to the prosecutor or the accused and to the Trial Coordinator ... at least 60 days prior to the scheduled jury selection or, such shorter interval that the trial judge may allow in the interests of justice."

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[297] CPAC Letter, note 281.

RECOMMENDATION 44

Notice of an application to challenge every prospective juror for cause should be filed and served at least 2 months before the date set for jury selection.

6. NOTICE OF OPPOSITION TO GENERAL CHALLENGE

[294] The general challenge for cause may be opposed by the other party. However, the other party should not be allowed to sit silently after receiving the notice until the trial date as opposition by ambush is likely to delay the trial. If fairness and expediency dictate that the party who seeks to challenge every prospective juror for cause should provide notice along with some particularization of the arguments and authorities supporting the application, then these principles also dictate that a party opposing the general challenge for cause should provide notice of opposition and an indication of his or her arguments and authorities.

[295] The proposal in CM 12.20 was that if a party opposes an application for a general challenge for cause, the party should provide a notice of opposition. The initial notice of opposition may be very brief but, to prevent misunderstanding or misinterpretation, it should be in writing. It was also suggested that initial notice of opposition could be provided quickly. Details concerning the bases for the opposition (which may require legal or social-scientific research, or consultation with experts and need additional time to prepare) could be provided somewhat later.

[296] The proposal was that the notice of objection be provided within 10 days after the date of service of the notice of application to challenge for cause. The further particularization of the objection should be provided at least 30 days before trial, that is, within 20 days following provision of the notice of objection.

[297] The Criminal Practice Advisory Committee agreed with the proposals that a party opposing an application concerning challenge for cause should provide notice of opposition within 10 days and that the notice of objection does not need to include legal research, precedents or citations, which would presumably be provided at a later date. Since the legal issues will have been raised in the notice to challenge and since the respondent is operating under a short time-line, freeing the respondent from an obligation to provide case information in the initial notice of opposition is reasonable.

[298] The Criminal Practice Advisory Committee observed that the proposal to have the respondent's "particularization" deadline set as at least 30 days before trial could result in insufficient notice being provided to the applicant and the judge. A better reference for the 30 day minimum notice period for particularization is, as the Criminal Practice Advisory Committee suggested, at least 30 days before the date of the argument on the application to challenge for cause.

[299] CPN5 does not deal with the issue of response to a notice of general challenge for cause.

RECOMMENDATION 45

The notice of opposition to an application for a general challenge for cause should be in writing and briefly indicate the arguments and authority which supports the opponent's position.

RECOMMENDATION 46

A party opposing an application for a general challenge for cause should provide notice of opposition within 10 days after the date of service of the notice of application.

RECOMMENDATION 47

The detailed bases for the opposition should be provided at least one month before the date of the hearing of the application for a general challenge for cause.

7. GENERAL CHALLENGE FOR CAUSE HEARING

[300] Under the *NWT Criminal Rules*:[298]

> 92(2) The application shall be heard by the trial judge in the absence of the jury panel.
>
> 93(1) If the application is granted, the judge shall specify the form of each question to be put to each prospective juror and who shall ask the questions…
>
> 93(3) The trial judge may, in his or her discretion, permit counsel to make submissions to the triers.

[298] *NWT Criminal Rules*, note 10, rr. 92(2), 93(1), 93(3).

[301] The general challenge application hearing does not require much regulation and should not be vastly different than for any other application before a judge. The direction found in rule 92(2) likely goes without saying, but it does not hurt to say it and a rule concerning the conduct of a general challenge application hearing is recommended.[299]

[302] Similarly, the directions in rules 93(1) and 93(3) likely go without saying. One of the crucial purposes of a challenge for cause application is to establish the appropriate questions. Another important issue to be determined is whether the judge or counsel should ask the questions. As discussed earlier in this chapter, sometimes it is appropriate for the judge to ask the questions and sometimes the task should fall to counsel. The judge may also allow counsel to make submissions, aside from asking questions. The directions found in rules 93(1) and 93(3) are recommended. Of note, as indicated earlier in this report, the judge also has discretion to make any other ruling he or she considers appropriate in a general challenge for cause process.

[303] There was no opposition to the proposals concerning conduct of the general challenge for cause hearing. The Criminal Practice Advisory Committee commented that it is impossible to fashion a single question rule that would be the best tool for all circumstances and that the determination of the identity of the questioner is best left to the judge's discretion. CPN5 does not speak to the conduct of the hearing.

RECOMMENDATION 48

The hearing of an application for a general challenge for cause should follow the approach described in rules 92(2), 93(1) and 93(3) of the Northwest Territories.

RECOMMENDATION 49

The general challenge for cause application should be heard by the trial judge or another judge of the Court of Queen's Bench in the absence of the jury panel.

[299] Granger, note 197, at 162.

RECOMMENDATION 50

If the application is granted, the judge specifies a) the form of each question to be put to each prospective juror, and b) the questioner.

8. SPECIAL JURY PANEL IN THE EVENT OF A CHALLENGE FOR CAUSE

[304] Royal writes as follows: "Given that the challenge for cause process will always be time-consuming ... a special panel should be summonsed as the selection obviously cannot take place at the regular Thursday morning jury array."[300] It was proposed in CM 12.20 that a special panel be summonsed for a general challenge for cause proceeding and no commentators opposed the proposal. CPN5 does not deal with this issue.

[305] As a practical matter, implementing the recommendation that a special panel be summonsed in selections involving a general challenge for cause will help ensure that regular jury selections proceed in a timely fashion with as little inconvenience to public members of the jury pool as possible.

RECOMMENDATION 51

A special panel should be summonsed if the court authorizes a general challenge for cause.

9. FORM AND CONTENT OF NOTICE GIVEN AT PRE-TRIAL CONFERENCE

[306] The purpose of a pre-trial conference is to facilitate subsequent trial proceedings. The judge and the parties need sufficient information so that the job of the pre-trial conference can be done. Hence, some notice of an intention to challenge every prospective juror for cause should be provided at the pre-trial conference stage. The *Sleigh* case, including the work done in the associated pre-trial conferences, supports this conclusion.

[307] Whether the notice given at a pre-trial conference needs to be in the form and have the recommended content described earlier in this chapter depends on the timing of the pre-trial conference. Recall that the notice of intent to make a general challenge for cause is to be provided 60 days

[300] Royal, note 195, at 27.

before the jury selection date. If a pre-trial conference occurs more than 60 days in advance of the jury selection date, then the notice should be in written form, contain the recommended elements and be filed and served prior to the pre-trial conference. If the conference takes place less than 60 days before trial, then oral notice of a general challenge for cause may be provided.

[308] Further, it would enhance the efficiency of the pre-trial conference process if counsel giving notice were to also provide a draft copy of the questions that are to be put to prospective jurors in the general challenge for cause proceeding when the notice is given.

[309] The Criminal Practice Advisory Committee did not take issue with the notion of providing a form of notice or discussing planned challenges for cause processes at the pre-trial conference stage.

[310] In addition, CPN5 provides that:[301]

> 3. Upon receipt of the written notification [of challenge for cause], the Trial Coordinator in the Judicial District where the trial is scheduled will schedule a pre-trial conference with the trial judge, the prosecutor and the accused to resolve issues raised by the application.

This provision clearly states that a notice of intent to challenge will initiate a pre-trial conference if such conference is not already scheduled.

[311] The nature and content of the notice provided at the pre-trial conference stage should be consistent with the circumstances. In other words, if written, general notice of intent to challenge every prospective juror for cause has been filed and served prior to the pre-trial conference, or if the conference occurs more than 60 days in advance of the jury selection date, then notice materials provided to the court and other side at the conference should be specific and include more than a simple "heads up" as to the intent to challenge. If the intent to challenge every prospective juror for cause arises during the pre-trial conference, the notice and associated materials will obviously be less detailed.

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[301] CPN5, note 267.

RECOMMENDATION 52

Notice of an application to challenge every member of a jury panel for cause and a draft copy of the questions that are to be put to prospective jurors should be provided to the court and other party prior to, or during, the pre-trial conference.

10. PROCEDURE IN CHALLENGES FOR CAUSE BEFORE THE TRIERS

[312] Three procedural matters might be dealt with in the rules; the separation of the triers and prospective jurors undergoing the challenge procedure from the remainder of the jury panel, the 'serial rotation' of triers, and the entitlement of triers to leave the courtroom to deliberate.

[313] Rule 93(2) of the *NWT Criminal Rules* deals with the first issue: "[e]ach member of the jury panel shall be questioned in the presence of the accused and the triers but in the absence of the remainder of the members of the jury panel, who shall be kept in a separate room."

[314] Rule 93(2) may be unduly restrictive. As noted above, the quotation from the Canadian Judicial Council concerning the presence of prospective jurors indicates that sometimes it is appropriate for prospective jurors to observe the challenge process, and sometimes it is not.[302] In this regard, it is generally preferred that there be a rule confirming the trial judge's discretion concerning presence or absence of potential jurors during a challenge process.

[315] Further, the rules could go on to deal with the practical implications of a decision that the challenge process should not take place before the panel. Royal relates the following from the *Sleigh* case:[303]

> Justice Clackson initially indicated that he did not think that two courtrooms ought to be used, however, His Lordship was persuaded that both Courtroom 317, the ceremonial courtroom which is used for jury selection proceedings in Edmonton, and the much smaller adjoining Courtroom 311, ought to be employed and this process proceeded very smoothly. In Courtroom 317, after the jury panel were polled, they were left there and we then moved to Courtroom 311 with the accused and the first two triers who were selected from the jury panel. 20 names were then called forward from

[302] Canadian Judicial Council, note 247.

[303] Royal, note 195, at 33.

> those waiting in Courtroom 317 and the challenge for cause then proceeded in Courtroom 311.

It was therefore proposed in CM 12.20 that two adjoining courtrooms be booked for challenge for cause procedures.

[316] The 'serial rotation' of triers is described earlier in this chapter.[304] Under s. 640 (2.1) of the *Code*, the judge may order the exclusion of prospective jurors and if the judge so orders, serial rotation of triers cannot occur. The same two triers would be required to hear all challenges until all jurors plus alternates are sworn. Rules should nonetheless be designed to cover cases in which the judge does not order the exclusion of prospective jurors.

[317] The rules could also deal with the issue of whether the first two triers need to be tried themselves. Under ss. 640(2), (2.2) of the *Code*, "two persons present who are appointed by the court" may serve as triers. These subsections do not preclude some form of pre-qualification of the triers by the judge. However, since the scheme of s. 640 contemplates that triers, not the judge, determine whether proposed jurors are impartial, the judge's pre-qualification ruling could only be provisional and would likely be subject to ratification by two other triers.

[318] A rule should confirm that triers are entitled to leave the courtroom to deliberate in a separate room and that the judge should remind the triers of this option.

[319] There was no opposition to the proposals concerning process before the triers in a challenge for cause proceeding and CPN5 does not speak to this issue.

[320] Recall that the *Code*, s. 640(2.1), confirms the judge's discretion to exclude sworn and unsworn jurors from a challenge for cause proceeding and that s. 640(2.2) entails that the two appointed triers are to hear all of the challenges for cause in the event an order is made pursuant to s. 640(2.1). The triers will either already have been through the challenge for cause procedure themselves or not. If the triers have not undergone the procedure, it appears that their role in the trial will be complete once the jurors and any alternates have been selected. Hence, there will be no need for these triers to be approved as potential jurors.

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[304] Appendix to Royal, note 195, at xvii; Canadian Judicial Council, note 247, at 16, n. 10.

[321] The following recommendations may usefully supplement provisions of the *Code* and help clarify the challenge for cause process.

RECOMMENDATION 53

If an order is not made under s. 640(2.1) of the *Code*, the judge should retain discretion respecting the manner of appointment of the triers.

RECOMMENDATION 54

The rules should state whether the first two triers need be tried themselves.

RECOMMENDATION 55

The judge may permit counsel to make submissions to the triers.

RECOMMENDATION 56

The rules should provide that jurors may be challenged in a location that is separate from the panel of prospective jurors, should the judge so decide. In addition, triers are entitled to leave the courtroom to deliberate in a separate room and the rules should contemplate that a judge would remind triers of this option.

11. STANDARD FORM OF JUDICIAL INSTRUCTIONS

[322] The Canadian Judicial Council has prepared authoritative standard form instructions.[305] Hence, this work is already done and the CM 12.20 suggested that there was no need for further procedural guidance in this regard. No commentators opposed this view and CPN5 does not speak to the matter of judicial instructions.

[323] In light of the work that has been done by the Canadian Judicial Council and others, there is no need to develop additional standard form instructions concerning challenge for cause proceedings.

[305] Canadian Judicial Council, note 247; see also Watt, note 249 and Ferguson & Bouck, note 213.

CHAPTER 5

Rule Making

A. Authority and Limitations

[324] The Federal Parliament has authority to legislate respecting procedure in criminal matters.[306] The authority to make rules for criminal proceedings is partially delegated to the courts under the *Code* and, in the absence of a comprehensive, national procedural regime, rules of court can be developed which reflect the specific circumstances and practices of different jurisdictions.[307]

[325] The authority to make rules for criminal proceedings is described as follows:[308]

> 482(1) Every superior court of criminal jurisdiction and every court of appeal may make rules of court not inconsistent with this or any other Act of Parliament, and any rules so made apply to any prosecution, proceeding, action or appeal, as the case may be, within the jurisdiction of that court, instituted in relation to any matter of a criminal nature or arising from or incidental to any such prosecution, proceeding, action or appeal.
> ...
> (3) Rules under subsection (1) ... may be made
>
> (a) generally to regulate the duties of the officers of the court and any other matter considered expedient to attain the ends of justice and carry into effect the provisions of the law;
>
> (b) to regulate the sittings of the court or any division thereof, or of any judge of the court sitting in chambers, except in so far as they are regulated by law;
>
> (c) to regulate the pleading, practice and procedure in criminal matters, including pre-hearing conferences

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306 *Constitution Act, 1867*, (U.K.), 30 & 31 Vict., c. 3, s. 91(27); *Charter* applications within criminal cases arguably should be characterized as procedure in criminal matters, see *R. v. Derose*, 2002 ABPC 53, 313 A.R. 47 at paras. 32-33, Allen P.C.J.

307 *Code*, ss. 482, 482.1. To date, no national rules of criminal procedure have been established under s. 482(5)

308 *Code*, ss. 482, 482.1. The federal *Interpretation Act* applies to duly-constituted rules made under s. 482, since these rules fall under the definition of "enactment" (as a form of "regulation") under this Act: R.S.C. 1985, c. I-21, ss. 2, 3.

held under section 625.1, proceedings with respect to judicial interim release and preliminary inquiries and, in the case of rules under subsection (1), proceedings with respect to mandamus, certiorari, habeas corpus, prohibition and procedendo and proceedings on an appeal under section 830; and

(d) to carry out the provisions of this Act relating to appeals from conviction, acquittal or sentence and, without restricting the generality of this paragraph,

(i) for furnishing necessary forms and instructions in relation to notices of appeal or applications for leave to appeal to officials or other persons requiring or demanding them,

(ii) for ensuring the accuracy of notes taken at a trial and the verification of any copy or transcript,

(iii) for keeping writings, exhibits or other things connected with the proceedings on the trial,

(iv) for securing the safe custody of property during the period in which the operation of an order with respect to that property is suspended under subsection 689(1), and

(v) for providing that the Attorney General and counsel who acted for the Attorney General at the trial be supplied with certified copies of writings, exhibits and things connected with the proceedings that are required for the purposes of their duties.

(4) Rules of court that are made under the authority of this section shall be published in the Canada Gazette.

(5) Notwithstanding anything in this section, the Governor in Council may make such provision as he considers proper to secure uniformity in the rules of court in criminal matters, and all uniform rules made under the authority of this subsection prevail and have effect as if enacted by this Act.

...

482.1(1) A court referred to in subsection 482(1) or (2) may make rules for case management, including rules

(a) for the determination of any matter that would assist the court in effective and efficient case management;

> (b) permitting personnel of the court to deal with administrative matters relating to proceedings out of court if the accused is represented by counsel; and
>
> (c) establishing case management schedules.
>
> (2) The parties to a case shall comply with any direction made in accordance with a rule made under subsection (1).
>
> (3) If rules are made under subsection (1), a court, justice or judge may issue a summons or warrant to compel the presence of the accused at case management proceedings.
>
> (4) Section 512 and subsection 524(1) apply, with any modifications that the circumstances require, to the issuance of a summons or a warrant under subsection (3).
> ...
> (6) Subsections 482(4) and (5) apply, with any modifications that the circumstances require, to rules made under subsection (1).

Under s. 482(1) the courts are entitled to make criminal rules without the approval of the Governor in Council but are required by s. 482(4) to publish rules in the *Canada Gazette*.

[326] Rules made pursuant to s. 482 must follow the law established outside of the rules and "generally involve matters of pleading, practice and procedure in relation to proceedings in the court and are expressly meant to facilitate and regulate the carrying into effect of the provisions of the law."[309] The power to make procedural rules is limited to matters already within the jurisdiction of the court.[310] Further, s. 482 cannot be used to make rules that grant substantive rights supplemental to those in the *Code*.[311] In short, procedural rules cannot change the substantive law.

[327] The requirement of *Canada Gazette* publication involves a level of approval beyond the courts. In this respect, rules of court constitute a "regulation" and the Court of Queen's Bench is a "regulation-making

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[309] *R. v. H. (E.)* (1997), 33 O.R. (3d) 202 at 211 (Ont. C.A.), leave to appeal to S.C.C. refused, [1997] S.C.C.A. No. 256, 274.

[310] *R. v. H. (E.)* (1997), 33 O.R. (3d) 202 at 211-12 (Ont. C.A.), leave to appeal to S.C.C. refused, [1997] S.C.C.A. No. 256, 274.

[311] *R. v. B.C. Tel* (2002), 214 D.L.R. (4th) 729 at para. 55 (B.C.C.A.).

authority" as defined in the *Statutory Instruments Act*.[312] Therefore, rules of court may be implemented as follows:[313]

> 3(1) … where a regulation-making authority proposes to make a regulation, it shall cause to be forwarded to the Clerk of the Privy Council three copies of the proposed regulation in both official languages.
>
> (2) On receipt by the Clerk of the Privy Council of copies of a proposed regulation pursuant to subsection (1), the Clerk of the Privy Council, in consultation with the Deputy Minister of Justice, shall examine the proposed regulation to ensure that
>
> (a) it is authorized by the statute pursuant to which it is to be made;
>
> (b) it does not constitute an unusual or unexpected use of the authority pursuant to which it is to be made;
>
> (c) it does not trespass unduly on existing rights and freedoms and is not, in any case, inconsistent with the purposes and provisions of the Canadian Charter of Rights and Freedoms and the Canadian Bill of Rights; and
>
> (d) the form and draftsmanship of the proposed regulation are in accordance with established standards.
>
> (3) When a proposed regulation has been examined as required by subsection (2), the Clerk of the Privy Council shall advise the regulation-making authority that the proposed regulation has been so examined and shall indicate any matter referred to in paragraphs (2)(a), (b), (c), or (d) to which, in the opinion of the Deputy Minister of Justice, based on that examination, the attention of the regulation-making authority should be drawn.

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[312] *Statutory Instruments Act,* R.S.C. 1985, c. S-22, s. 2(1) states:

> 2(1) In this Act,
>
> "regulation" … includes a rule, order or regulation governing the practice or procedure in any proceedings before a judicial or quasi-judicial body established by or under an Act of Parliament, and any instrument described as a regulation in any other Act of Parliament;
>
> "regulation-making authority" means any authority authorized to make regulations and, with reference to any particular regulation or proposed regulation, meant the authority that proposed to make the regulation.

Rules of court are not exempted from the requirements of the *Statutory Instruments Act*, see *Statutory Instruments Regulations*, C.R.C., c. 1509, s. 7. In addition, rules of court are "regulations" and "enactments" under *Interpretation Act*, R.S.C. 1985, c. I-21, s. 2(1) and general requirements for enactments may apply.

[313] *Statutory Instruments Act*, s. 3.

B. Process

[328] The first step in implementing rules of court for criminal proceedings is to suggest procedures and requirements which are consistent with the *Code*, the constitution, substantive law and court practices. In this regard, this report concludes ALRI's analysis, consultation and recommendations concerning procedures for *Charter* applications, non-disclosure orders and general challenges for cause in jury selections. This report may provide the basis for moving forward with the next steps of the rule making process.

[329] The next step is for the court, as the regulation-making authority, to draft rules which meet the court's needs and satisfy the requirements of the *Statutory Instruments Act*.[314]

[330] Once draft rules of criminal procedure are in nearly final form, it is usual to have them reviewed at the federal level by the Department of Justice, Deputy Minister and Clerk of the Privy Council.

[331] Following federal review, the rules are prepared in final form as a regulation. The regulation-making authority transmits copies of the regulation in both official languages to the Clerk of the Privy Council for registration.[315] The Clerk of the Privy Council may refuse to register a regulation if it does not satisfy statutory requirements.[316] A regulation that is approved is published in the *Canada Gazette* within 23 days after the registration.[317] Rules of court come into effect on the date of registration. According to the Privy Council:[318]

> Registration is a crucial step in the case of regulations because it determines when they take effect. Regulations that must be registered come into force on the day they are registered, unless the enabling statute or regulations themselves specify another commencement date (see subsection 6(2) of the Interpretation Act) ... The SI Act and SI

[314] *Statutory Instruments Act,* ss. 3(2) (a)-(c).

[315] *Statutory Instruments Act,* s. 5(1).

[316] *Statutory Instruments Act,* s. 7(1).

[317] *Statutory Instruments Act,* s. 11(1).

[318] Government of Canada, Privy Council Office, Guide to Making Federal Acts and Regulations, 2nd Edition at 187, online: http://www.pco-bcp.gc.ca/docs/information/publications/legislation/pdf-eng.pdf

> Regulations provide for the publication of regulations in Part II of the Canada Gazette within 23 days after their registration.

[332] In order to satisfy general publication requirements, rules of court are to be published in both official languages.[319]

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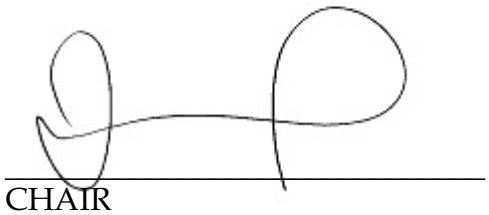
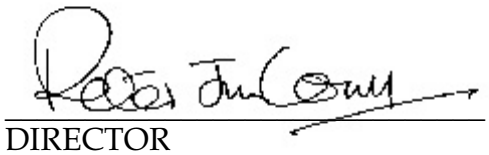
JS PEACOCK QC (Chair)	R KHULLAR
ND BANKES	AL KIRKER QC
PL BRYDEN	PJM LOWN QC (Director)
AS de VILLARS QC	HON AD MACLEOD
JT EAMON QC	ND STEED QC
HON CD GARDNER	DR STOLLERY QC
WH HURLBURT QC	



CHAIR



DIRECTOR

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[319] *Official Languages Act*, R.S.C. 1985, c. 31 (4th Supp.), s. 7(1):

> 7(1) Any instrument made in the execution of a legislative power conferred by or under an Act of Parliament that
>
> (a) is made by, or with the approval of, the Governor General in Council or one or more ministers of the Crown,
>
> (b) is required by or pursuant to an Act of Parliament to be published in the Canada Gazette, or
>
> (c) is of a public and general nature shall be made in both official languages and, if printed and published, shall be printed and published in both official languages.