ALBERTA LAW REFORM INSTITUTE

EDMONTON, ALBERTA

ALBERTA RULES OF COURT PROJECT

Charter Applications in Criminal Cases

- Background
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- Issues

Consultation Memorandum No. 12.19

June 2006

Deadline for Comments: August 25, 2006

ALBERTA RULES OF COURT PROJECT

The Alberta Rules of Court Project is a 3-year project which has undertaken a major review of the *Alberta Rules of Court* [The Rules] with a view to producing recommendations for a new set of rules by 2004. The Project is funded by the Alberta Law Reform Institute (ALRI), the Alberta Department of Justice, the Law Society of Alberta and the Alberta Law Foundation, and is managed by ALRI.

This Consultation Memorandum is issued as part of the Project. It has been prepared with the assistance of the members of the Rules Project Criminal Rules Committee, who were generous in the donation of their time and expert knowledge to this project. The members of the committee are:

The Honourable Justice Ronald L. Berger, Court of Appeal of Alberta
The Honourable Justice Elizabeth A. Hughes, Court of Queen's Bench of Alberta
The Honourable Judge Michael G. Allen, Provincial Court of Alberta
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A reader who wishes to have more information about the Alberta Rules of Court Project may consult the background material included in each of the Consultation Memoranda 12.1 to 12.9. More complete information, including reports about the

Project and particulars of previous Consultation Memoranda, may also be found at, and downloaded from, the ALRI website: *http://www.law.ualberta.ca/alri*.

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THE RULES PROJECT CONSULTATION MEMORANDA

No.	Title	Date of Issue	Date for Comments
12.1	Commencement of Proceedings in Queen's Bench	October 2002	January 31, 2003
12.2	Document Discovery and Examination for Discovery	October 2002	January 31, 2003
12.3	Expert Evidence and "Independent" Medical Examinations	February 2003	May 16, 2003
12.4	Parties	February 2003	June 2, 2003
12.5	Management of Litigation	March 2003	June 30, 2003
12.6	Promoting Early Resolution of Disputes by Settlement	July 2003	November 14, 2003
12.7	Discovery and Evidence Issues: Commission Evidence, Admissions, Pierrringer Agreements and Innovative Procedures	July 2003	November 14, 2003
12.8	Pleadings	October 2003	January 31, 2004
12.9	Joining Claims and Parties, Including Third Party Claims, Counterclaims and Representative Actions	February 2004	April 30, 2004
12.10	Motions and Orders	July 2004	September 30, 2004
12.11	Enforcement of Judgements and Orders	August 2004	October 31, 2004
12.12	Summary Disposition of Actions	August 2004	October 31, 2004
12.13	Judicial Review	August 2004	October 31, 2004
12.14	Miscellaneous Issues	October 2004	November 30, 2004
12.15	Non-Disclosure Order Application Procedures in Criminal Cases	November 2004	January 15, 2004
12.16	Trial and Evidence Rules – Parts 25 and 26	November 2004	January 12, 2005

12.17	Costs and Sanctions	February 2005	March 25, 2005
12.18	Self-Represented Litigants	March 2005	April 22, 2005
12.19	*Charter* Applications in Criminal Cases	May 2006	August 25, 2006

Available to view or download at the ALRI website: *http://www.law.ualberta.ca/alri/*

ALBERTA LAW REFORM INSTITUTE

The Alberta Law Reform Institute was established on January 1, 1968, by the Government of Alberta, the University of Alberta and the Law Society of Alberta for the purposes, among others, of conducting legal research and recommending reforms in the law. Funding of the Institute's operations is provided by the Government of Alberta, the University of Alberta, and the Alberta Law Foundation.

The members of the Institute's Board are C.G. Amrhein; A. de Villars, Q.C.; The Hon. Judge N.A. Flatters; W.H. Hurlburt, Q.C.; H.J.L. Irwin, Q.C.; P.J.M. Lown, Q.C. (Director); The Hon. Mr. Justice A.D. Macleod; J.S. Peacock, Q.C.; The Hon. Madam Justice B.L. Rawlins; W.N. Renke; N.D. Steed, Q.C.; D.R. Stollery, Q.C.; The Hon. Mr. Justice N.C. Wittmann (Chairman) and K.D. Yamauchi.

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PREFACE AND INVITATION TO COMMENT

Comments on the issues raised in this Memorandum should reach the Institute by August 25, 2006 .

This consultation memorandum addresses procedures for *Charter* applications in criminal cases tried in the Court of Queen's Bench of Alberta.

Having considered case law, comments from the Bar and the Bench, and comparisons with the rules of other jurisdictions, the Criminal Rules Committee has identified a number of issues respecting *Charter*-application procedures and has made preliminary proposals. These proposals are not final recommendations, but are put to the legal community for further comment. These proposals will be reviewed once comments on the issues raised in the consultation memorandum are received, and may be revised accordingly. While this consultation memorandum attempts to include a comprehensive list of issues in the areas covered, there may be other issues which have not been, but should be, addressed. Please feel free to provide comments regarding other issues which should be addressed.

We encourage your comments on the issues and proposals. You may respond to one or more of the issues addressed. You can reach us with your comments or with questions about this consultation memorandum or the Rules Project on our website, by fax, mail or e-mail to:

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The process of law reform is essentially public. Even so, you may provide anonymous written comments, if you prefer. Or you may identify yourself, but request that your comments be treated confidentially (i.e., your name will not be publicly linked to your comments). Unless you choose anonymity, or request confidentiality by indicating this in your response, ALRI assumes that all ***written comments are not confidential***, in which case ALRI may quote from or refer to your comments in whole or in part and may attribute them to you, although usually we will discuss comments generally and without specific attributions.

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EXECUTIVE SUMMARY

This summary highlights only some of the issues that the Committee discussed and proposals which it reached. The complete discussion of all issues and Committee proposals is contained in the consultation memorandum.

Chapter 1 addresses some background issues bearing on the development of rules of court for *Charter* application procedures, including the need for rules to follow established legal principles, to provide for "fair notice" of applications, and to preserve judicial discretion.

Chapter 2 reviews the regulation of *Charter* applications outside of the Court of Queen's Bench of Alberta. This Chapter reviews *Charter* application rules in the Provincial Court of Alberta, the British Columbia Supreme Court, the Supreme Court of the Northwest Territories, the Nunavut Court of Justice, the Manitoba Court of Queen's Bench, and the Ontario Court of Justice.

Chapter 3 reviews the current state of *Charter* application regulation in the Court of Queen's Bench of Alberta. This Chapter reviews the provisions of the *Judicature Act* governing constitutional applications and the guidelines established in the Court of Appeal's *Dwernychuk* and *Holt* cases.

Chapter 4 sets out the Committee's proposals respecting *Charter* application rules. Generally, the Committee proposes a standardized form for providing notice of *Charter* applications and proposes a standardized process for the scheduling and administration of applications. The Committee's proposals include the following:

(a) reform in this area is necessary and rules of court are the appropriate vehicle for reform;
(b) *Charter* application rules may be addressed separately from rules for other criminal litigation applications;
(c) different sets of rules should be designed for applications for judicial review of legislation, applications under s. 24(1) of the *Charter*, and applications under s. 24(2) of the *Charter*;

(d) rules should specify a form of notice and accompanying documents for applications;
(e) rules for service should be designed;
(f) rules should specify the period before trial by which applications should be heard;
(g) rules should apply to self-represented litigants; and
(i) rules should preserve judicial discretion to waive the application of rules, in the interests of justice.

In the Committee's view, rules should not address the order of proceedings within *Charter* application hearings themselves.

LIST OF ISSUES

CHAPTER 1. BACKGROUND

A. Introduction

[1] 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 *Criminal Code*[1] establishes detailed rules governing defence applications to adduce evidence of the sexual history of a complainant in certain sexual offence prosecutions.[2] The *Criminal Code* establishes similar rules governing defence applications for the production of records relating to a complainant or witness held by third-parties, again in certain sexual offence prosecutions.[3] Prior to the enactment of these production rules, the Supreme Court established third-party records application rules in the *O'Connor* case, which continue to apply in cases not regulated by the *Criminal Code*.[4]

[2] In contrast, applications by accuseds based on alleged violations of rights or freedoms protected by the *Canadian Charter of Rights and Freedoms*[5] are not the subject of standardized national regulation. Both the means by which these applications are regulated and the scope of regulation vary from province to province, territory to territory, and court to court. Regulation may be imposed by provincial statute, provincial regulation, rules of court, appellate decisions, or some combination of these mechanisms. *Charter* applications may be regulated as part of a comprehensive scheme for the regulation of criminal procedure; they may be the subject of special rules; various components of applications may be regulated (e.g. the contents of memoranda or factums to be filed in support of applications and the timing for their exchange); or only a notice mechanism may be addressed.

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[1] R.S.C. 1985, c. C-46.

[2] *Ibid.*, ss. 276.1-276.5; see *R. v. Darrach*, [2000] 2 S.C.R. 443, 2000 SCC 46, Gonthier J. [*Darrach* cited to S.C.R.].

[3] *Criminal Code*, *ibid.*, ss. 278.1-278.91; see *R. v. Mills*, [1999] 3 S.C.R. 668 [*Mills*].

[4] *R. v. O'Connor*, [1995] 4 S.C.R. 411 [*O'Connor*].

[5] Being Part I of the *Constitution Act, 1982*, enacted by the *Canada Act 1982* (U.K.), c. 11 [*Charter*].

[3] One might fairly observe that *Charter* applications in the Court of Queen's Bench of Alberta are not comprehensively regulated. We do have the Court of Appeal's *Dwernychuk*[6] and *Holt*[7] cases and some rules for some applications are set by the *Judicature Act*.[8] The Court of Queen's Bench – unlike some other courts – has not, however, developed rules of court or practice notes to govern *Charter* applications.

[4] Determining whether or not this relative dearth of regulation is appropriate, and, if it is not, how the deficiency might be addressed, is the burden of this Consultation Memorandum. The Memorandum will proceed through four stages. The remainder of this Chapter will review some basic observations and principles relating to *Charter* applications. Chapter 2 will consider the regulation of *Charter* applications in courts other than the Court of Queen's Bench of Alberta. Chapter 3 will set out the statutory and judicial guidance for *Charter* applications in the Court of Queen's Bench. Chapter 4 will identify issues and proposals for the reform of *Charter* application proceedings in criminal cases tried in the Court of Queen's Bench of Alberta.

B. Observations and Principles

1. An open federal field

[5] To begin with the obvious, neither the *Criminal Code* nor the *Charter* itself establish procedures for *Charter* applications. Certainly it would be open to Parliament to legislate procedures under s. 91(27) of *The Constitution Act*, *1867*, which allocates authority to Parliament to legislate in relation to "Procedure in Criminal Matters."[9] The absence of procedural rules in the *Charter* or in federal legislation allows for the development of rules of court under the authority of s. 482 of

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[6] *R. v. Dwernychuk* (1992), 135 A.R. 31 (C.A.), McClung and Bracco JJ.A., McDonald J., leave to appeal to S.C.C. refused, [1993] 2 S.C.R. vii [*Dwernychuk*].

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

[8] R.S.A. 2000, c. J-2.

[9] *Charter* application procedures in criminal cases could and probably should be characterized as "procedure in criminal matters." See *R. v. Derose* (2002), 313 A.R. 47 at paras. 32-33, 2000 ABPC 53, Allen P.C.J. [*Derose* cited to A.R.].

the *Criminal Code*.[10] One might speculate this absence is in fact an invitation for the development of rules of court, sensitive to the circumstances of different jurisdictions.

2. Tracking the law

[6] Another obvious point is that any procedural rules should be consistent with the *Charter* jurisprudence. Procedural rules should not change the law. For example, procedural rules should be consistent with the allocation of the burden of proof in *Charter* applications. An accused who seeks *Charter* relief bears the burden of establishing

(a) the violation of the relevant *Charter*-protected right; and

(b) entitlement to the remedy sought.[11]

A procedural requirement on an accused to give some sort of notice of the *Charter* issues to be advanced would be consistent with this burden of proof rule. Procedure should also accommodate circumstances in which the burden of proof is allocated to the Crown in a *Charter* application, as when the Crown asserts the waiver of a *Charter*-protected right, when it disputes whether evidence gathered through a *Charter* violation is "conscriptive" or "conscriptive derivative,"[12] or when it claims that a warrantless search was "reasonable" and so not violative of s. 8 of the *Charter*.[13] Failing to recognize the Crown's burden of proof procedurally – i.e., maintaining procedure premised on the accused's burden throughout an application, regardless of the shifting of the burden – would be an error.[14]

[7] Procedural rules of the sort found in rules of court should follow the law established outside of the rules – whether in legislation or judicial decisions. They are

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[10] For a discussion of the rule-making authority under the *Criminal Code*, *supra* note 1 at s. 482, see Alberta Law Reform Institute, *Non-Disclosure Order Application Procedures in Criminal Cases* (Consultation Memorandum No. 12.15) (Edmonton: Alberta Law Reform Institute, 2004).

[11] *R. v. Collins*, [1987] 1 S.C.R. 265 at 277, Lamer J. [*Collins*]; *R. v. Brosseau (F.D.)* (2001), 305 A.R. 1 at para. 30, 2001 ABPC 220, Allen P.C.J [*Brosseau* cited to A.R.]. The accused's burden is tactical, in the sense that he or she chooses whether or not to raise a *Charter* issue: *Darrach*, *supra* note 2 at paras. 46-52.

[12] *R. v. Burlingham*, [1995] 2 S.C.R. 206 at paras. 30-32, Iacobucci J.; *R. v. Stillman*, [1997] 1 S.C.R. 607 at para. 107, Cory J.; *R. v. Feeney*, [1997] 2 S.C.R. 13 at para. 62, Sopinka J.

[13] *Collins*, *supra* note 11 at 277-278.

[14] *R. v. Russell*, [2003] O.J. No. 5266 (S.C.J.), Sedgwick J.

"to facilitate and regulate the carrying into effect of the provisions of the law."[15] They provide details, fill in blanks, and deal with practical steps omitted in broader statements of the law. But procedural rules presuppose that the governing and directing principles have already been established. If those principles have not already been established – either because the issues have not been dealt with as a matter of legislation, common law, or constitutional decision, or because the judicial authorities are conflicting – rules of court would not be appropriate.[16] Furthermore, rules of court are to facilitate, not fetter. If there are procedural issues that the cases have shown require the case-by-case exercise of judicial discretion to manage properly, rules should not impinge on that discretion and purport to impose uniformity where uniformity cannot exist. These abstract reflections on the appropriateness of rules of court shall be revisited in connection with Issue 17 below (regulating the conduct of *Charter* application hearings).

3. Three different types of *Charter* applications

[8] All *Charter* applications cannot be subsumed under a single procedural template. Different *Charter* applications may arise in even a single trial, aimed at legislative or common law rules, executive actions, or the administration of procedures. For example, applications may be made respecting

(a) whether a statutory provision limits a *Charter*-protected right or freedom and whether that limitation is justifiable under s. 1 of the *Charter*;

(b) whether a violation of the right to fundamental justice under s. 7 warrants a stay of proceedings under s. 24(1) of the *Charter*;

(c) whether the State has failed to try the accused within a reasonable time, in violation of the accused's rights under s. 11(b), warranting a stay of proceedings under s. 24(1) of the *Charter*; or

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[15] *R. v. H. (E.)* (1997), 33 O.R. (3d) 202 at para. 25 (C.A.), leave to appeal to S.C.C. refused, 1997 S.C.C.A. 274.

[16] This issue is of lesser concern for The Rules, since The Rules have been "validated notwithstanding that any provision the Rules may affect substantive rights:" *Judicature Act*, *supra* note 8, s. 63(2). In addition, under the *Court of Queen's Bench Act*, R.S.A. 2000, c. C-31, ss. 20(1.1) and (1.2), The Rules may "alter or conform to [or supplement] the substantive law," so long as they do not "conflict with an Act of the Legislature or of the Parliament of Canada, or regulations made under those Acts." While these provisions assist The Rules, which fall under provincial jurisdiction, they could not assist criminal rules, which are made under the *Criminal Code*, s. 482, *supra* note 1, and reside in federal jurisdiction.

(d) whether evidence (whether oral, physical, or recorded) should be excluded from trial, because

(i) the evidence was obtained in a manner that infringed or denied an accused's *Charter*-protected rights, and admitting the evidence at trial would "bring the administration of justice into disrepute," under s. 24(2) of the *Charter*;

(ii) the use of the evidence at trial would violate the accused's *Charter*-protected rights (such as the right against self-incrimination), warranting a remedy under s. 24(1) of the *Charter*; or

(iii) the use of the evidence at trial would violate the accused's right under s. 11(d) of the *Charter* to a "fair hearing".[17]

These different applications entail different requirements concerning the timing of notices of application, the contents of notices of application, and the types of evidence necessary to support the applications.

[9] Despite their differences, *Charter* applications fall into three main groups –

(a) applications to strike down or for the "reading down" of legislation, regulation, or common law;

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

(c) applications under s. 24(2) of the *Charter* and other applications for the exclusion of evidence (e.g. under ss. 24(1) or 11(d)).

What differentiates these groups of applications is not merely the different sorts of legal interests at play, but (of critical importance procedurally) the different times at which the factual foundations for the applications may become apparent. For example, the factual foundation for a legislative challenge may have little to do with the precise circumstances of a particular accused, but may relate to general nature or effects of the legislation. Defence counsel need not await the disclosure of information through court processes to ascertain the factual foundation for argument. On the other hand, the appropriateness of an application to exclude evidence may not be apparent until testimony at trial is heard. Defence counsel may not have the factual foundation for

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[17] Other types of constitutional applications are possible, such as applications for a declaration that a legislative provision is *ultra vires* under *The Constitution Act, 1867*, 30 & 31 Victoria, c. 3 (U.K.); or an application for a determination that an individual is immune from criminal liability under aboriginal or treaty rights protected under the *Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (U.K.) 1982, c. 11, s. 35.

argument before trial.[18] 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 pre-dating trial; some s. 24(1) applications, such as those concerning entrapment, may be based on evidence that emerges during trial, and may only be heard, in any event, following conviction. Other s. 24(1) applications may be based on events that could not have been anticipated before trial.[19] These sorts of practical differences necessitate different treatment in terms of (e.g.) the formalities of notice and the timing of stages of an application.

4. Fair notice

[10] If the Alberta legal community were to support more formalized procedures in *Charter* applications, the likely basis for this support would be a concern with the issue of "fair notice" of *Charter* applications. Crowns, judges, the defence bar, and the public have distinct perspectives on "fair notice."

[11] 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 tactics, and ensure that witnesses are available – generally, it permits proper preparation for the application. Adequate notice forestalls requests for adjournments.

[12] Judges require adequate notice of applications so that they are not taken by surprise. Adequate notice gives judges the opportunity to do their own research and to review legal authorities and arguments, and thereby supports properly informed analysis and decisions. It preserves judges from being asked to make important decisions in haste, on the basis of what may be incomplete legal argument and evidence. Judges have a particular responsibility – a "constitutional duty"[20] – to get

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[18] The grounds for some s. 24(2) applications may be obvious long before trial. This observation only supports the proposition that within each procedural group, there should be some accommodation for the particular and peculiar circumstances that beset criminal litigation.

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

[20] *Brosseau*, *supra* note 11 at para. 30; *R. v. Mide* (1998), 233 A.R. 84, 1998 ABPC 126 [*Mide* cited to

(continued...)

Charter decisions right. To discharge this responsibility, they need adequate notice of the arguments in play, the evidence or prospective evidence in support, and the authorities relied upon.[21]

[13] Defence counsel require notice of application rules to be fair, so that 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 forced to disclose any more information than is strictly necessary for the purposes of the application.[22] Defence counsel will wish to ensure that the accused's right to remain silent and the Crown's burden to make out a case to meet are respected by notice of application rules.

[14] The public also has a strong interest in the development of procedures promoting fair notice of *Charter* applications.[23] Generally, the public has an interest in orderly and expeditious trials. Moreover, criminal procedures should encourage the best *Charter* decisions practically attainable. It is true that any legal decision by the courts (e.g. amending hearsay doctrine) may have far-reaching effects. Common law developments, though, should be incremental.[24] *Charter* decisions – especially since we are still, relatively speaking, in the early days of *Charter* development – can have massive impacts outside of particular cases, affecting many other cases (recall the fallout of *Askov*), police practices, Parliament's and the legislatures' law-making policies, and government policy. *Charter* decisions, moreover, have no "incremental" constraint. Importantly, *Charter* decisions are not correctable or reversible by ordinary statute.

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[20] (...continued)
A.R.], Fraser P.C.J.; *R. v. Kutynec* (1992), 7 O.R. (3d) 277 (C.A.), Finlayson J.A. [*Kutynec*].

[21] *Mide*, *supra* note 20; *R. v. Mousseau* (2002), 324 A.R. 42 at para. 11 (Q.B.), Moen J [*Mousseau*].

[22] *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.

[23] *Mide*, *supra* note 20; *R. v. Domstad* (2001), 285 A.R. 105 at para. 31, 2001 ABQB 179, Watson J. [*Domstad* cited to A.R.]; *R. v. Baker*, 2004 ABPC 218 at para. 12, Allen P.C.J. [*Baker*].

[24] *R. v. Salituro*, [1991] 3 S.C.R. 654 at paras. 668-699, Iacobucci J.

5. Preserving judicial discretion

[15] *Charter* application rules should preserve judicial discretion, the inherent authority of judges to manage proceedings before them.[25] This authority may be an independent constitutional principle, as an aspect of judicial independence. In any event, this authority is based on the primacy of the Constitution. Under s. 52 of the *Constitution Act, 1982*, "[t]he 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 or effect." While *Charter* application rules would be drafted with an eye to their constitutionality and would seek to be consistent with accuseds' constitutional rights, procedural rules are general. Rules may work acceptably in many cases. But the circumstances of applications are particular. It may be that enforcement of standard rules in particular circumstances would work an injustice – i.e., would violate the Constitution. The judge, then, should have the authority to ensure that rules do not overtake constitutional rights, and that rights are respected, in spite of standardized rules.[26]

[16] Furthermore, preserving judicial discretion ensures that counsel will retain scope for creative approaches to constitutional issues. In particular circumstances, counsel may devise procedures that are not standard, but will maximize the chances of achieving just results. If a judge can be convinced that a creative approach is the best approach, the judge should have the authority to relax the standard rules.

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[25] *Kutynec*, *supra* note 20 at 287; *R. v. Felderhof* (2003), 68 O.R. (3d) 481 at paras. 40, 57 (C.A.) [*Felderhof*]; *R. v. Loveman* (1992), 8 O.R. (3d) 51 at para. 7 (C.A.) [*Loveman*].

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

CHAPTER 2. THE REGULATION OF *CHARTER* APPLICATIONS OUTSIDE OF THE COURT OF QUEEN'S BENCH OF ALBERTA

A. The Provincial Court of Alberta

[17] *Charter* application procedures in the Provincial Court of Alberta are governed by the *Judicature Act*, respecting challenges to the constitutionality of legislation (the relevant provisions shall be reviewed below), and by the "Constitutional Notice Regulation," which provides as follows:

> **Notice of constitutional remedy**
>
> **1(1)** Unless a notice has been given under section 24 of the *Judicature Act*, if in a proceeding in the Provincial Court relating to the prosecution of an offence under an Act of the Legislature or an Act of the Parliament of Canada, an application is to be made to seek
>
> (a) a remedy under section 24(1) or (2) of the *Canadian Charter of Rights and Freedoms* or under section 52(1) of the *Constitution Act, 1982*, or
>
> (b) a determination of any aboriginal or treaty rights under section 35 of the *Constitution Act, 1982*,
>
> a written notice of the application must be given.
>
> **(2)** A notice must be given not less than 14 days before the date on which the proceeding is scheduled to commence unless the prosecutor agrees to a shorter period of time.
>
> **(3)** The notice must be given
>
> (a) to the clerk of the Provincial Court, and
>
> (b) to the office of the prosecutor having carriage of the proceeding.
>
> **(4)** The notice must state
>
> (a) the law in question, the right or freedom alleged to be infringed or denied or the aboriginal or treaty right to be determined, as the case may be,
>
> (b) the day and place on which the application is to be argued,
>
> (c) the relief sought, and
>
> (d) the grounds to be argued, including a concise statement of the constitutional principles to be argued and a reference to any statutory provision or rule on which reliance will be placed.
>
> **(5)** If a notice under section 24 of the *Judicature Act* or a notice under this section is given, the proceeding is to be heard by a judge of the Provincial Court.

> **(6)** Where a notice under section 24 of the *Judicature Act* has not been given in accordance with that Act or a notice under this section has not been given within the time provided under subsection (2) but the notice is given after the proceeding has commenced, if the proceeding is presided over by a sitting justice, the sitting justice
>
> (a) may continue to conduct the proceeding or may transfer the proceeding to a judge of the Provincial Court, and
>
> (b) notwithstanding clause (a), must transfer the proceeding to a judge of the Provincial Court if requested by the prosecutor or the accused.
>
> **Coming into force**
>
> **2** This Regulation comes into force on September 1, 1999.[27]

[18] Note that

(a) the procedure applies to all types of constitutional applications, other than those covered by the *Judicature Act* – including both ss. 24(1) and 24(2) applications;[28]

(b) written notice is required;

(c) notice must be given not less than 14 days before the proceedings in which the application is to be heard;

(d) the prosecutor – and not the judge – is stated to have the discretion to waive the time requirements;[29] and

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[27] Alta. Reg. 102/99.

[28] Insofar as the Regulation purports to apply to the prosecution of offences established under federal legislation, it may be *ultra vires* the Province: see *e.g.*, *R. v. MacLeod* (2001), 283 A.R. 218 at para. 74, 2001 ABPC 7, Allen P.C.J.; *Baker*, *supra* note 23 at para. 9. While Alberta is entitled to regulate procedure respecting provincial offences under *The Constitution Act, 1867*, *supra* note 17, s. 91(27), criminal procedure is a subject matter within Parliamentary legislative competence. The Regulation could be argued to be "legislation" in relation to criminal procedure since it does purport to regulate procedure. Moreover, it might be argued that the Regulation is a colourable attempt to avoid the strictures the *Criminal Code*, *supra* note 1. The province has opted for a Regulation, instead of the rules of court which Parliament has required. The provincial government, though, has taken the position that the regulation is valid "legislation" in relation to the "administration of justice" in the province, which falls within provincial legislative authority under *The Constitution Act, 1867*, s. 92(14): Letter from the Minister of Justice to Charles B. Davison, President of the Criminal Trial Lawyers Association (7 July 1999).

[29] If the effect of this provision is to negate the inherent jurisdiction of the judge to regulate proceedings – particularly respecting s. 24(2) applications, which may not emerge as live matters until the trial has commenced – the Regulation would be subject to constitutional attack as being contrary to accuseds' rights and the independence of the judiciary. However, the Regulation may preserve judicial discretion

(continued...)

(e) the notice must set out

(i) (*inter alia*) 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 reference to any statutory provision or rule relied upon.

B. Other Provinces and Territories

[19] Other provinces and territories have adopted a "blended" approach to *Charter* applications, combining provincial statute with rules of court or appellate decisions.

1. Statutory rules

[20] British Columbia, Saskatchewan, and Ontario, for example, have provincial "constitutional questions" legislation with provisions similar to s. 24 of the *Judicature Act*.[30] The constitutional questions legislation of all three jurisdictions

(a) applies to applications to challenge the constitutional validity of legislation (*Charter* or *Constitution Act, 1867* grounds), applications respecting the constitutional applicability of legislation (i.e. constitutional exemption arguments), and applications for remedies under s. 24(1) of the *Charter* other than for the exclusion of evidence;

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

(c) establishes notice periods (14 days before the day of argument, BC and Saskatchewan; 15 days, Ontario), unless the court abridges time.

Under the BC and Saskatchewan legislation, the notice must set out (*inter alia*),

(a) the law in question or the right or freedom alleged to have been infringed or denied, and

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[29] (...continued)
implicitly. Subsection 1(6) contemplates notice not being given within the time specified by s. 1(2); s. 1(6) directs only that the matter must then be heard by a Provincial Court judge, as opposed to a sitting justice. Subsection 1(6) does not direct that the application cannot be heard. This issue requires judicial clarification.

[30] *Constitutional Question Act*, R.S.B.C. 1996, c. 68; *The Constitutional Questions Act*, R.S.S., 1978, c. C-29; *Courts of Justice Act*, R.S.O. 1990, c. C-43.

(b) particulars necessary to show the point to be argued.

Under the Ontario legislation, the form of notice is established by rules of court. The notice must set out (*inter alia*),

(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;

(c) the documentary, affidavit and other evidence to be used at the hearing of the application.

The Ontario rules provide for the exchange of factums.

2. Rules of court jurisdictions

[21] No other jurisdictions currently govern *Charter* applications through regulations, practice notes, or notices to the profession. Some jurisdictions have adopted rules of court for *Charter* applications.

a. Supreme Court of British Columbia

[22] The *Criminal Rules of the Supreme Court of British Columbia*[31] establish a form for "[a]ll pre-trial applications in criminal proceedings."[32] No distinction is made between *Charter* and non-*Charter* or different types of *Charter* applications.

[23] The form requires reference to the evidence (e.g. affidavits, 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 is to "set forth fully the grounds upon which it is brought."[33]

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[31] *Criminal Rules of the Supreme Court of British Columbia*, SI/97-140, online: CanLII <http://www.canlii.org/ca/regu/si97-140/whole.html>.

[32] *Ibid.,* r. 2(1).

[33] *Ibid.*, r. 2(2).

[24] The notice shall be served at least five days before the hearing date, unless (e.g.) a judge otherwise directs.[34]

b. Supreme Court of the Northwest Territories

[25] The *Criminal Procedure Rules of the Supreme Court of the Northwest Territories*[35] set out rules governing applications generally (Part 3), applications respecting constitutional issues (Part 12), and applications to exclude evidence (Part 13). The NWT Supreme Court Rules

(i) establish forms for the notices of application, which, in each case, require the following to be set out (*inter alia*):
   (A) the relief sought,
   (B) the grounds to be argued, including reference to any statutory provision or rule relied upon; and
   (C) the documentary, affidavit and other evidence to be used.[36]

(ii) establish rules for the exchange of memoranda of argument[37] or pre-hearing briefs[38] in Part 3 applications or Part 12 applications; no factum or brief requirements are established for Part 13 applications.

(iii) expressly provide, in relation to Part 13 applications, that the judge may waive the requirement of written notice,[39] 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 ... whether to hear the application forthwith or to adjourn the trial to hear it; and ... on what terms the judge will hear the application."[40]

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[34] *Ibid.*, r. 2(3).

[35] *Criminal Procedure Rules of the Supreme Court of the Northwest Territories*, SI/98-78, online: CanLII <http://www.canlii.org/ca/regu/si98-78/whole.html> [NWT Criminal Rules].

[36] *Ibid.*, rr. 19, 67, 74.

[37] *Ibid.*, r. 25.

[38] *Ibid.*, r. 70.

[39] *Ibid.*, r. 73(3).

[40] *Ibid.*, r. 76.

(iv) establish a general "dispensing" rule: "The Court may, where it considers it necessary in the interests of justice, dispense with compliance with any rule at any time."[41]

c. Nunavut Court of Justice

[26] The Nunavut Court of Justice *Criminal Procedure Rules*[42] establish rules governing applications generally (Rule 2), applications to declare enactments or regulations of no force or effect or for constitutional exemptions (Rule 5), and applications for *Charter* relief and remedies (Rule 6). These rules

(i) establish a single form for notices of application;

(ii) require that a notice state the grounds upon which it is brought and the law on which it is based; in particular, Rule 5 and Rule 6 applications require that the notice set out a concise statement of the issue to be raised, a statement of the constitutional principles to be argued, and reference to any constitutional, statutory, or regulatory provision relied upon;

(iii) establish notice periods – 5 days before the hearing for Rule 2 and 6 applications and 30 days before the hearing for Rule 5 applications;

(iv) in relation to Rule 6 applications, expressly provide that the Court may waive the requirement of written notice "where it is in the interests of justice to do so;" and that, if written notice is waived, the Court may adjourn proceedings and take steps necessary to ensure that the information that would be contained in a notice of application is entered in the record and delivered to the respondent, who shall have a reasonable opportunity to respond.

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[41] *Ibid.*, r. 134.

[42] Nunavut, *Criminal Procedure Rules*, online: Nunavut Court Justice <http://www.nucj.ca/rules/SI2002-XX_NCJ_Criminal_Procedure_Rules_e.pdf>. Pursuant to Nunavut Court of Justice Practice Directive No. 7 (31 October 2002), these rules replaced the NWT Criminal Rules, *supra* note 35. These rules have not yet been formally published in the Canada Gazette.

d. Manitoba Court of Queen's Bench

[27] The *Manitoba Court of Queen's Bench Rules (Criminal)*[43]

(i) establish a single form for criminal motions;[44]

(ii) require that the notice of motion set out (*inter alia*)

(A) the relief sought,

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

(C) the material on which the moving party relies, including statutory provisions;[45]

(iii) provide that if a motion raises a point of law,

(A) 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;

(B) 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);[46] and

(iv) expressly provide that, "in a situation of urgency", the judge may dispense with the notice and filing requirements.[47]

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[43] *Manitoba Court of Queen's Bench Rules (Criminal)*, SI/92-35, online: CanLII <http://www.canlii.org/ca/regu/si92-35/whole.html>.

[44] *Ibid.*, r. 5.01.

[45] *Ibid.*, rr. 5.03 and 5.04.

[46] *Ibid.*, r. 5.08.

[47] *Ibid.*, r. 5.09.

e. Ontario Courts

[28] The Ontario courts are guided by extensive and elaborate procedural rules governing applications, falling into three main sets – general rules for applications; rules governing constitutional issue applications, other than for the exclusion of evidence; and (in the rules applicable to the Provincial Court) rules governing applications for the exclusion of evidence.[48] These last rules:

(i) establish a form for the notice of application;[49]

(ii) require that the notice set out (*inter alia*)

(A) the anticipated evidence sought to be excluded,

(B) 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;

(C) the documentary, affidavit or other evidence to be used at the hearing of the application;

(D) the relief sought;[50]

(iii) require that service of the notice and supporting materials be made not less than 15 days before the hearing date;[51]

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[48] The Ontario Provincial Court rules are the *Rules of the Ontario Court in Criminal Proceedings*, SI/97-133, online: CanLII <http://www.canlii.org/ca/regu/si97-133/whole.html> [Ontario Provincial Court Rules]. The Ontario Superior Court Rules are *the Ontario Court of Justice Criminal Proceedings Rules*, SI/92-99, online: CanLII <http://www.canlii.org/ca/regu/si92-99/whole.html>. Effective October 16, 2006, these rules were amended: online, Ontario Court, <http://www.ontariocourts.on.ca/superior_court_justice/rules/rules.html>. At the time of the publication of this Consultation Memorandum, The Superior Court did not have a rule equivalent to Rule 30 of the Ontario Provincial Court Rules. The new Ontario Superior Court rules are discussed in the Report on this Consultation Memorandum (February 2007), online: Alberta Law Reform Institute <http:www.law.ualberta.ca/alri>. Criminal procedure rules have also been established for the Provincial Court of Newfoundland and Labrador: *Rules of the Provincial Court of Newfoundland and Labrador in Criminal Proceedings*, SI/2004-134, online: CanLII <http://www.canlii.org/ca/regu/si2004-134/whole.html>. These rules shall not be reviewed in this memorandum.

[49] Ontario Provincial Court Rules, *supra* note 48, r. 30.03.

[50] *Ibid*.

[51] *Ibid.*, r. 30.04.

(iv) require that additional materials be filed and served, including transcripts and an applicant's affidavit if necessary to complete the record;[52] and

(v) provide that the judge may require that factums be filed.[53]

[29] Under Rule 1.04(1), "[t]hese 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."

[30] Under Rule 2.01, "[a] failure to comply with these rules is an irregularity and does not render a proceeding or a step, document or order in a proceeding a nullity, and the court

(a) may grant all necessary amendments or other relief in accordance with rule 2.02, on such terms as are just, to secure the just determination of the real matters in dispute ..."

[31] Under Rule 2.02, "[t]he court may, only where and as necessary in the interests of justice, dispense with compliance with any rule at any time."

3. Some rules of court conclusions

[32] A few conclusions can be drawn from this brief review of rules of court in other jurisdictions.

[33] First, the courts have established rules of court – not practice notes or notices to the profession. The rules have been made under the authority of s. 482 of the *Criminal Code*.

[34] Second, the rules do not concern *Charter* applications alone. The rules apply to applications generally (whether by the Crown or the accused; whether concerning *Charter* matters or matters contemplated by the *Criminal Code*), and include rules respecting service.

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[52] *Ibid.*, r. 30.05.

[53] *Ibid.*, r. 30.05(4).

[35] Third, while the Manitoba and British Columbia Rules establish general procedures for all applications, the Northwest Territories, Nunavut, and Ontario Rules establish separate sets of rules for *Charter* applications and for non-*Charter* applications.

[36] Fourth, while the Nunavut Rules establish a single set of rules for all s. 24 applications, the Northwest Territories and Ontario Rules establish separate rules for s. 24(1) and s. 24(2) applications. The s. 24(2) rules are the least rigid sets of rules.

[37] Fifth, the rules require, generally, that applications be in writing, and specify forms. The notices of application must set out the grounds for the application and the law relied on. The Manitoba, Northwest Territories, and especially Ontario Rules require extensive materials to be filed and served in connection with applications, including briefs of law.

[38] Sixth, the rules typically have a "dispensing clause" that allows a judge to waive formal strictures when justice requires it.

4. Appellate decision jurisdictions

[39] Jurisdictions that have not established rules of court have generally followed the *Kutynec* approach to notification. This includes the superior courts in Saskatchewan,[54] Alberta, and Ontario. The British Columbia superior courts (their rules providing only meagre regulation) endorse a *Kutynec* approach as well.[55] The Alberta version of the *Kutynec* approach shall be explored in the next Chapter.

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[54] *R. v. Pelletier* (1995), 38 C.R. (4th) 242 (Sask. C.A.).

[55] *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*].

CHAPTER 3. THE REGULATION OF *CHARTER* APPLICATIONS IN THE COURT OF QUEEN'S BENCH OF ALBERTA

[40] Currently, The Rules do not contain provisions regulating *Charter* applications in criminal proceedings. Neither do any practice notes or notices to the profession. Rules governing *Charter* applications, however, have been established in statute and common law.

A. *Judicature Act*

[41] Section 24 of the *Judicature Act* provides as follows:

> (1) If in a proceeding the constitutional validity of an enactment of the Parliament of Canada or of the Legislature of Alberta is brought into question, the enactment shall not be held to be invalid unless 14 days' written notice has been given to the Attorney General of Canada and the Minister of Justice and Attorney General of Alberta....
>
> (3) The notice shall include what enactment or part of an enactment is in question and give reasonable particulars of the proposed argument.
>
> (4) The Attorney General of Canada and the Minister of Justice and Attorney General of Alberta are entitled as of right to be heard, either in person or by counsel, notwithstanding that the Crown is not a party to the proceeding....
>
> (6) If the Minister of Justice and Attorney General of Alberta or counsel designated by the Minister of Justice and Attorney General of Alberta appears in a proceeding within Alberta in respect of a question referred to in subsection (1) ..., the Minister of Justice and Attorney General of Alberta is deemed to be a party to the proceeding for the purpose of an appeal from an adjudication in respect of that question and has the same rights with respect to an appeal as any other party to the proceeding.

These provisions have the following features pertinent to *Charter* applications:

(a) the provisions apply only to applications respecting the constitutional validity of a provincial or federal enactment – not, for example, to applications respecting the legality of executive action or for the exclusion of evidence;[56]

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[56] The *Judicature Act*, *supra* note 8 may pose the same sort of division of powers problem as the *Constitutional Notice Regulation*, *supra* note 27. Again, under *The Constitution Act, 1867*, *supra* note 17, (continued...)

(b) the provisions require written notice to be provided, to federal and provincial authorities;

(c) the notice period is 14 days before the date on which the constitutional validity of the enactment is to be determined;

(d) the notice must

  (i) identify the enactment or part of the enactment at issue; and

  (ii) set out "reasonable particulars" of the "proposed argument;"

(e) the provisions do not require any identification of evidence in support of the application for invalidity (other than as may be encompassed by "reasonable particulars" of the "proposed argument") and do not require that the notice be supported by (e.g.) affidavit evidence; and

(g) in effect, the provisions require that an applicant give a "warning" to federal and provincial authorities.

B. Common Law: s. 24(2)

[42] Part of the *Charter* application procedural field has been occupied in Alberta by the Court of Appeal's *per curiam* decision in *Dwernychuk*.[57] Very generally, this was an "over 80" case that involved an application for the exclusion of evidence – a breathalyzer technician's certificate – under s. 24(2) of the *Charter*, based on a violation of s. 8. The arresting officer allegedly did not have reasonable grounds to

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[56] (...continued)
s. 91(27), "Procedure in Criminal Matters" is a class of subject in relation to which Parliament has legislative authority. While s. 24 has unimpeachable application to proceedings falling within provincial competence – including provincial prosecutions – if s. 24 were understood to regulate procedure in criminal matters, it would appear to be criminal procedure legislation and hence *ultra vires* the province. Several commentators, however, have argued that s. 24 is sustainable under *The Constitution Act, 1867*, s. 91(14) as legislation in relation to the "administration of justice" in the province: Barry L. Strayer, *The Canadian Constitution and the Courts: The Function and Scope of Judicial Review*, 3d ed. (Toronto: Butterworths, 1988) at 74; J. Cavarzan, "Legislation: Judicature Act, R.S.O. 1980, c. 223, s. 35 – Notice of Constitutional Issue" (1984) 62 Can. B. Rev. 75 at 83, 84; P. Bendin, "Governmental Interventions in Constitutional Litigation: An Analysis of Section 25 of the Judicature Act" (1991) 29 Alta. L. Rev 450. Some support for this position may even be drawn from an Alberta Court of Appeal decision: *R. v. Stanger* (1983), 46 A.R. 241 (C.A.). In *Kourtessis v. Minister of National Revenue*, [1993] 2 S.C.R. 53 at 114, Sopinka J. indicated that since a declaration is a "civil remedy", provincial legislation supporting an application for a declaration remains a civil matter, even when the statute in relation to which the declaration is sought falls within Parliament's constitutional competence. On this narrow ground, s. 24 might be sustained. In any event, as seen in Chapter 2, legislation like the *Judicature Act*, *supra* note 8 is common.

[57] *Supra* note 6.

demand a breath sample. Since this remains our leading authority, it is worth reviewing *Dwernychuk's* procedural lessons at length. The Court made the following general comments:

(a) Section 24 of the *Charter* does not establish procedure.[58]

(b) The decision concerns only s. 24(2) applications: "we say nothing here that is intended to apply to applications under s. 24(1)."[59]

(c) "[T]here may be occasions when the way in which defence counsel attempts to obtain a s. 24(2) ruling is inconsistent with the purpose of s. 24(2) and with the orderly flow of a criminal trial."[60]

(d) "When account is taken of the obvious public interest in expeditious trials, as well as due process, this court will not resile from laying down procedures that should be observed when *Charter* objections are taken to the admission of relevant evidence that would otherwise be admissible."[61]

(e) "In deciding the procedure which should be followed, 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."[62]

(f) An application "by ambush" might lead a reasonable person to conclude that the exclusion of evidence had brought the administration of justice into disrepute.[63]

(f) "[A] reasonable person would expect that where the defence intends to raise a *Charter* issue and seek the exclusion of evidence, the procedure

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[58] *Ibid.* at para. 9.

[59] *Ibid.* at para. 19.

[60] *Ibid.* at para. 9.

[61] *Ibid.*

[62] *Ibid.* at para. 11.

[63] *Ibid.* at para. 13.

followed would be such as to give the Crown and the judge reasonable notice of the intention to do so."[64]

(g) "The reasonable person would expect that defence counsel would make known to the prosecution, either before or at the commencement of the trial, that he or she intends to allege that there has been an infringement of a specific *Charter* right and to apply for the exclusion of evidence. Such advance notice would enable Crown counsel and the court to plan and decide how and when best to call witnesses; whether witnesses should be called whose evidence would be relevant to the issue raised and who otherwise would not be called; the order in which witnesses should be called; what questions should be asked; and whether and when witnesses, once they have testified, may be released. It enables Crown counsel to prepare legal submissions in advance rather than hastily and on the spur of the moment. It enables the judge, with the help of both counsel, to begin to read relevant cases and to put his or her thoughts in order, rather than becoming aware of the existence and nature of a *Charter* issue only after he or she has heard the evidence without realizing what he or she should be listening for and without being able to exercise his or her limited right to ask questions of witnesses."[65]

(h) 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, away of doing things which our practice does not ordinarily permit the Crown to do voluntarily."[66]

(i) "The practice to be followed in regard to these matters should be as uniform as possible in all the provinces and territories. It will not always be possible to have identical practices in all jurisdictions. Nevertheless, if the appellate court of a jurisdiction other than Alberta articulates sound

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[64] *Ibid.* at para. 12.

[65] *Ibid*.

[66] *Ibid.* at para. 17.

guidelines for the courts of that jurisdiction, this court will not hesitate to endorse them as being applicable in Alberta."[67]

[43] After reviewing the *Kutynec* and *Loveman* Ontario Court of Appeal decisions,[68] the court made the following "points" – which "are not intended to be treated as inflexible rules:"[69]

(1) "The defence should, generally, be expected to apply for the exclusion of evidence under s. 24(2) before the evidence is admitted, not after it has been accepted."[70] The *Kutynec* commentary, quoted with approval, is that this procedure applies in both jury trials and trials by judge alone.

(2) "Once the evidence has been admitted, the trial judge may entertain an application to exclude the evidence only when, after the admission of the evidence, some event occurs which will entitle, perhaps even require, the judge to entertain a s. 24(2) application, in the interests of justice. ...what we have in mind, without intending to be exhaustive of the possibilities, is some development in the case which occurred after the close of the Crown's case – perhaps the acquisition of new information ... or a fresh appreciation of the implications of known prosecution evidence after the close of the Crown's case."[71]

(3)[a] The accused should "[invoke] s. 24(2) and [allege] infringement of a specific *Charter* right."[72]

(3)[b] "[T]he accused should raise the issue at the earliest possible time in the trial.... Of course, as to what is 'the earliest possible time', the court may, in an appropriate case, extend latitude to the defence if defence counsel asserts that the point is being raised late in the trial because (for example) his client had no memory of what had occurred or the implications of the

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[67] *Ibid.* at para. 18.

[68] *Kutynec*, *supra* note 20; *Loveman*, *supra* note 25.

[69] *Dwernychuk*, *supra* note 6 at para. 29.

[70] *Ibid.* at para. 22.

[71] *Ibid.* at para. 23.

[72] *Ibid.* at para. 24.

known facts did not become apparent until after the evidence had initially been admitted."[73]

(4)[a] "[I]t is preferrable that defence counsel indicate before or, at the latest, at the commencement of the trial, whether he or she will be alleging the infringement of a *Charter* right and will be seeking the exclusion of evidence under s. 24(2). No universal rule of practice is meant by this."[74]

(4)[b] "If defence counsel fails to give such an indication, then, if the point arises later, it is open to the judge to take that failure into account, together with all other circumstances, in deciding whether to entertain the application to assert a *Charter* remedy."[75]

(5) Thus, "[w]ritten notice, given before trial, of the alleged infringement of the *Charter* right, and ... of the intention of the accused to seek to have the evidence excluded under s. 24(2), will be expected, *at least in the Court of Queen's Bench*."[76]

The Court offers a qualification: "[I]n the 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."[77]

(6)[a] When the defence indicates its intention to make an application to exclude evidence, "the trial judge may ask defence counsel to summarize the evidence that it would rely upon."[78]

(6)[b] "Of course, the defence is not limited to reliance upon evidence which it would elicit on the application. It is entitled to ask the trial judge to

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[73] *Ibid*.

[74] *Ibid.* at para. 25.

[75] *Ibid*.

[76] *Ibid.* at para. 26 [emphasis added].

[77] *Ibid.* at para. 27

[78] *Ibid.* at para. 28.

consider 'all the circumstances of the case,' which includes any evidence elicited by the Crown."[79]

(6)[c] "There is no absolute entitlement to a *voir dire*."[80] That is, for a judge to embark on a *voir dire*, defence counsel must offer evidence and legal argument that justifies this process.

[44] With respect to *Charter* applications other than those for the exclusion of evidence, the Court noted that "Finlayson J.A. concluded his judgment in *Kutynec* by expressing ... 'reluctance to propound a detailed judge-made rule to cover all *Charter* motions'"[81], and the Court quoted with approval Finlayson J.A.'s comments in *Loveman*:

> 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 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.[82]

[45] The *Dwernychuk* "points" may be summarized as follows:

(a) An application to exclude evidence should be made at the commencement of a trial, before evidence is called, although the trial judge may permit a later application [one might observe that the *Dwernychuk* case is more concerned with the timing of applications than their content].[83]

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[79] *Ibid.*

[80] *Ibid.*

[81] *Kutynec*, *supra* note 20 at 290.

[82] *Dwernychuk*, *supra* note 6 at para. 29; the quotation is from *Loveman*, *supra* note 25 at 53-54.

[83] See *e.g.,*s. 24(2) case arising during trial, through the failure of a Crown (police) witness to attend and testify, see *Domstad*, *supra* note 23.

(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)).
(c) Counsel should be prepared to summarize the evidence that supports the application.
(d) The foregoing points do not bind the Provincial Court.
(e) The foregoing points apply only to *Charter*-based applications for the exclusion of evidence, not to other *Charter* applications.

[46] The *Dwernychuk* points have received some elaboration in subsequent cases. For example, some cases require that a list of authorities be provided. As Moen J. has commented, this seems like a "consistent, fair and reasonable requirement."[84]

C. Common Law: ss. 11(b) and 24(1)

[47] The Court of Appeal has provided some additional procedural guidance in the *Holt* case,[85] which concerns applications for relief under s. 24(1) of the *Charter* based on violations of s. 11(b) – "[a]ny person charged with an offence has the right ... to be tried within a reasonable time." The key passage in *Holt* is as follows:

> [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 Section 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 thirty days before the date set for trial. This will make some allowance for the possibility of a reserved judgment on the issue. It is to be remembered that a careful balancing of interests is required in these cases; and that the relief, if granted, is usually final. It should also be borne in mind that termination for delay of criminal prosecutions that are otherwise valid is relief that is new to the traditions of our law. It is an outcome that is easily resented, or at least misunderstood by many members of the public, and should neither be summarily sought nor granted. It has been said that if the public is led to understand that the judges can stop valid prosecutions for a host of different reasons the belief will soon grow that those prosecutions which do proceed are going ahead with the judges' permission. Thirdly, the history of the case should be presented to the Court documented by transcripts (where

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[84] *Mousseau*, *supra* note 21 at para. 12.

[85] *Holt*, *supra* note 7.

> 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. That is clear from **R. v. Bennett**, supra. The evidence may take many forms because it may come from many sources. But that comparison could rarely, if ever, be established by the simple repetition of the regional statistics weighed in Cory, J.'s judgment in **R. v. Askov**.[86]

[48] Thus, a ss. 11(b) - 24(1) application

(a) should be on notice to the Crown (unless the court raises the delay issue itself);

(b) should be returnable at least 30 days before trial;

(c) must be supported by evidence respecting the particular delays for the case at bar, and respecting the comparison of the delay of this case with delay in comparable jurisdictions.

[49] Paragraph 11(b) applications are likely to turn on evidence available well before trial that has little or nothing to do with the issues at trial. Disposing of s. 11(b) applications significantly in advance of trial makes sense.

[50] Gwilym Davies has noted a procedural omission in *Holt*. While the application should be heard at least 30 days before the trial, *Holt* does not specify the number of days notice required for the application. An accused might – consistently with *Holt* – bring a ss. 11(b) - 24(1) application on two days notice. That notice period would probably not permit the Crown or the court to prepare adequately for the application.[87]

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[86] *Ibid.* at para. 11.

[87] 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].

CHAPTER 4. ISSUES

ISSUE No. 1
Is procedural reform respecting *Charter* applications in the Queen's Bench necessary or desirable?

[51] Canvassing during the initial stages of the Rules Project did not disclose that the criminal bar was unhappy with the current state of *Charter* applications procedures. The Alberta defence bar has not taken up the reform of *Charter* application procedures as a cause.

[52] The Alberta situation appears to be dissimilar to the Ontario situation described by Assistant Chief Judge Brian W. Lennox:

> 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 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.[88]

[53] Nonetheless, in 1997, the Uniform Law Conference unanimously passed a resolution calling for the creation of a working group or committee "to develop a body of procedural law to govern the conduct of *Charter* applications." The result was *Regulating Charter Applications*.[89] In 1996, the Administration of Justice Taskforce of the Alberta Branch of the Canadian Bar Association issued a discussion paper entitled "Charter Applications - Procedural Guidelines." Gwilym Davies submitted a

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[88] Uniform Law Conference, *Regulating Charter Applications* (Final Report and Recommendations of the Working Group) (Victoria, British Columbia: Uniform Law Conference, 2000), online: <http://www.ulcc.ca/en/criminal/index.cfm?sec=38&sub=3a>.

[89] *Ibid.*

response to this discussion paper to the Criminal Trial Lawyers Association.[90] Some attention was paid to *Charter* procedures in the journals in the 1990s,[91] although a resounding call for reform has not been made in the legal literature (perhaps due to despair over progress on long-awaited substantive criminal law reform). Some members of the Alberta judiciary have indicated a preference for more definite regulation of *Charter* applications.

[54] An argument against procedural reform is that the *Dwernychuk* points give adequate guidance to counsel: "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."[92] Applications to exclude under s. 24(2) may turn on very different circumstances – ranging from applications to exclude certificates in drunk driving cases to gang trial cases involving multiple accuseds, thousands of constitutionally-impugned records, direct indictments, and problematic disclosure. Procedural reform could impose an inappropriate uniformity on fact-specific and law-specific applications.

[55] The establishment of rules could also lead to the overformalization of criminal procedure, and the rejection of *Charter* applications on the basis of formal defects.

CRIMINAL RULES WORKING COMMITTEE PROPOSAL

[56] In the Committee's view, procedural reform respecting *Charter* applications in the Court of Queen's Bench is necessary and desirable.

[57] Other jurisdictions' rule-making is a testament to the need for better regulation, although the Committee recognizes that there are hold-out jurisdictions, such as the superior courts in Saskatchewan and Ontario.

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[90] *Supra* note 87.

[91] See *e.g.*, J. Sandy Tse, "Charter Remedies: Procedural Issues" (1989) 69 C.R. (3d) 129; M. 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.

[92] *R. v. Mah* (2001), 294 A.R. 96 at para. 6 (point 5), 2001 ABQB 394, Sulyma J.

[58] Even if *Dwernychuk* provides adequate coverage for s. 24(2) applications and *Holt* provides adequate coverage for ss. 11(b) - 24(1) applications, they do not provide procedural guidance for all s. 24(1) applications. An additional "problem" with *Dwernychuk* and *Holt* is that they are judicial decisions. While decisions are necessary to interpret procedural rules, procedural rules are best not left in judicial decisions:

(a) the bar may not be aware or fully aware of the decisions;

(b) different interpretations of decisions may result in different procedures in similar cases;

(c) judicial decisions are not written by legislative drafters (one might suggest that decisions might be better understood as setting out drafting instructions rather than actual drafting);

(d) decisions are responses to particular cases, which means that procedures are likely to be skewed towards the facts before the court, rather than being properly general; and

(e) *Dwernychuk* and *Holt* have not provided sufficient practical guidance to forestall the discomfort which has led, *inter alia*, to the production of this Memorandum.

ISSUE No. 2
Should procedural reform focus on *Charter* applications, as opposed to other applications in criminal matters?

[59] As seen above, jurisdictions that have introduced rules of court in criminal matters have regulated applications generally, with *Charter* applications being only one of the types of applications regulated. This suggests that *Charter* applications should not be regulated on their own, but should await regulation within the context of broader procedural regulation.

CRIMINAL RULES WORKING COMMITTEE PROPOSAL

[60] As was also seen above, *Charter* applications have features that distinguish them in importance from other types of applications. If there is any urgency in reforming the regulation of *Charter* applications, then it makes sense to proceed first with the development of workable rules for these applications. The regulation of other applications, which may be less controversial, may be attended to later. Moreover, jurisdictions that have created criminal rules of court have tended to develop distinct

rules for *Charter* applications. This suggests that considering *Charter* applications by themselves is appropriate.

[61] In any event, nothing prevents proposed reforms respecting *Charter* applications from being integrated with other proposed reforms for criminal procedure generally. In the Final Report respecting Consultation Memorandum 12.15, it was indicated that the criminal procedure recommendations will not be moving immediately to a drafting phase. Once a drafting phase is initiated, integration may occur.

ISSUE No. 3
May any current difficulties relating to *Charter* applications be resolved without procedural reform, through (in particular) pre-trial conferences or otherwise through the management of criminal litigation?

[62] Difficulties around the timing and specification of *Charter* applications could be worked out through case management processes or through pre-hearing conferences.[93] Through court-supervised "mediation" processes, defence counsel could be encouraged to advise the Crown of whether applications will be brought at trial to particularize applications.

CRIMINAL RULES WORKING COMMITTEE PROPOSAL

[63] In the Committee's view, case management and pre-hearing conferences have a supplemental role in the governance of *Charter* applications, at least in cases that involve these processes. These processes, though, would not by themselves solve all *Charter* application difficulties:

(a) not all Court of Queen's Bench criminal trials will be preceded by pre-hearing conferences;

(b) on the civil side, where pre-trial conferences and other judicial case management techniques are employed, the "notice of motion" system has not been replaced;

(c) the grounds for s. 24(2) or other applications may not become evident until trial or after any pre-hearing conference, despite full pre-trial disclosure by the Crown;

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[93] See *Criminal Code*, *supra* note 1, s. 625.1.

(d) case management and pre-hearing conference tactics would likely be more successful if judges had the particularized information available about applications that a notice system provides.

ISSUE No. 4
If procedural reform respecting *Charter* applications in the Court of Queen's Bench is necessary or desirable, should the reforms be made through the medium of statute, rules of court, or practice notes/notices to the profession?

[64] In Consultation Memorandum 12.15, we proposed that rules of court are the superior mode of procedural regulation.

[65] A reasonable argument may be made, however, that rules of court are not the best means for regulating *Charter* applications. Rules are likely to be too general and too rigid to be useful. If reform is desired, practice notes, which can multiply and can be amended easily, are a preferable mechanism for reform. Even aside from practice notes, guidance from the bench suffices – as has been provided, for example, through *Dwernychuk* and *Holt*.

[66] On the other hand,

(a) the jurisdictions considered above (save for the hold-outs) all went the rules route, rather than the practice notes route, and Ontario's provincial court expressly repudiated the practice note approach;

(b) rules can be drafted at a level of generality that permits them to be useful, without being overly constraining – that is, rules can be designed to deal with "ordinary" or "typical" cases while preserving judges' authority to vary procedures to deal with extraordinary situations (for example, as arise in "gang trials");

(c) rules should not impose excessive uniformity – all that might be required would be, for example, the requirement of providing notice, in prescribed form, within a prescribed time; the identification of grounds for an application; and a reference to materials to be relied on; furthermore, rules should distinguish the different main types of *Charter* applications (see Issue 5).

Properly constructed rules, then, may be useful and may avoid the inefficiencies of practice notes.

CRIMINAL RULES WORKING COMMITTEE PROPOSAL

[67] In the Committee's view, in light of the foregoing, if procedural reform is necessary or desirable, it should be accomplished through the medium of rules of court.

ISSUE No. 5
If procedural reform is necessary, should different sets of rules be designed for different types of *Charter* applications?

[68] At least three main types of *Charter* applications occur in criminal proceedings:

(a) applications to strike down or for the "reading down" of legislation, regulation, or common law;
(b) applications under s. 24(1) of the *Charter*; and
(c) applications under s. 24(2) of the *Charter* and other applications for the exclusion of evidence.

One might argue that these types could be broken down more finely – for example, s. 24(2) applications could be categorized into applications for the exclusion of "wiretap" records, for the exclusion of evidence gathered through search warrants, for the exclusion of conscriptive/conscriptive derivative evidence obtained through *Charter* violations, and "other cases."

CRIMINAL RULES WORKING COMMITTEE PROPOSAL

[69] In the Committee's view, at least these three large divisions should be recognized, if rules are warranted. These divisions are recognized, implicitly, in our current Alberta law – with the *Judicature Act* partially regulating the first; *Holt* partially regulating at least some of the second, and *Dwernychuk* regulating the third. As indicated above, some other jurisdictions with criminal procedure rules respect this division, and separate s. 24(2) applications from s. 24(1) applications.

[70] While all three types of applications should be governed by similar rules concerning application documentation and service, the practical differences between

the different types of applications should be accommodated through establishing different pre-application notice periods.

[71] A complexity that must be recognized concerning s. 24(1) applications is that in certain cases – particularly s. 11(b), "trial within a reasonable time" cases – the grounds for the application will be known substantially in advance of trial. The grounds supporting other applications for relief under s. 24(1) may not arise until shortly before trial or even in trial. Rules should not treat all s. 24(1) applications alike.

ISSUE No. 6
If procedural reform is necessary, should *Charter* application rules be developed in isolation, or should they be developed in the context of "supplemental" procedural rules?

[72] In other jurisdictions, *Charter* application rules do not occur on their own. Instead, the rules are supported by general procedural rules, concerning (e.g.) requirements for filed documents, affidavits, and service.

CRIMINAL RULES WORKING COMMITTEE PROPOSAL

[73] In the Committee's view, if procedural reform respecting *Charter* applications is necessary, the *Charter* application rules should not be developed in isolation, but should be developed in the context of supplemental rules, respecting at least service.

ISSUE No. 7
What information should be conveyed in a *Charter* application notice?

CRIMINAL RULES WORKING COMMITTEE PROPOSAL

[74] If *Charter* application rules should be formalized,[94]

(a) a notice of application form should be devised;

(b) the notice should set out[95]

(i) the *Charter* rights allegedly violated;

(ii) 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 so they may prepare accordingly;

(iii) a description of the materials or evidence to be relied on in the application;[96]

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

(v) an address for service;

(c) the notice should be accompanied by

(i) copies of any records containing the information referred to in (b)(iii), and

(ii) headnotes of and extracts from the cases relied on in the application.

The following is by way of comment.

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[94] The notice of motion provisions in The Rules might be considered as an analogy. See r. 384:

> (1) An application in an action or proceeding shall be made by motion and, unless the court otherwise orders, notice of the motion shall be given to all parties affected.
>
> (2) A Notice of Motion must
>
> (a) state the relief sought,
>
> (b) state briefly the grounds and material or evidence intended to be relied on, including any reference to any statutory provision or Rule sought to be invoked, and
>
> (c) specify any irregularities complained of or objection relied on.
>
> (3) The respondent to a Notice of Motion shall give reasonable notice to the applicant of any material that the respondent intends to rely on, including any material that has already been filed.
>
> (4) Notice under subrule (3) must be given at least 24 hours before the day for hearing.

[95] On applying the *Dwernychuk* points, *supra* note 6, to s. 24(1) applications, see *Derose*, *supra* note 9 at para. 41.

[96] *Baker*, *supra* note 23 at paras. 7, 8, 173.

[75] The point of the notice is, on the one hand, to permit the Crown and the judge hearing the application to know what to expect in the application so that they may prepare accordingly; and, on the other hand, to ensure that the accused is making a viable, non-frivolous application. The "sufficiency" of the description of the application should be judged in this light. The Committee's further proposals respecting "sufficiency" are set out at Issue 14 below.

[76] To ensure "reasonably brief" descriptions of arguments, a page limit (e.g. 3 pages) could be specified.

[77] The materials supporting the application should be filed and served with the notice. These might include extracts from disclosure or transcripts. Statements indicating anticipated testimony from the accused's or the Crown's witnesses might be included.[97] There may be instances in which an affidavit is required. The rules should have a provision for advice and directions to deal with difficult cases.

[78] The rules should provide that extracts from cases and their headnotes be filed and served with the notice. The rules should provide that this requirement may be dispensed with by the court. In the major centres, for example, where there is ready access to electronic case databases, a list of cases with pinpoint citations may suffice.[98]

[79] With respect to the address for service, see Issue 11 below.

[80] The form of notice and accompanying materials should be used for any *Charter* application. The rules should take into account, however, that the grounds for a *Charter* application may only arise in the course of trial. In these cases, the trial judge should have the authority to dispense with formal notice requirements. The trial judge should be entitled to dispense with or modify the rules, in the interests of justice.

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[97] The statements of counsel may provide sufficient information to support an application: *Vukelich*, *supra* note 55 at para. 17; *Brosseau*, *supra* note 11 at para. 31. An undertaking to adduce evidence may also be employed: *ibid.*; *R. v. M.L.K.*, 2004 ABQB 734 at para. 59, Watson J.

[98] *Mousseau*, *supra* note 21 at para. 13; *Mide*, *supra* note 20.

ISSUE No. 8
Should the rules provide for the exchange of memoranda of argument or factums?

CRIMINAL RULES WORKING COMMITTEE PROPOSAL

[81] The Committee does not favour a general, standardized requirement to file written arguments in addition to the notice of application. If counsel has drafted the notice properly, the notice will provide the necessary outline of argument.

[82] Regardless, in some cases, counsel may wish to file written argument or the court may require the filing of written argument. Any practical uncertainties respecting the exchange of documents between defence and the Crown could be resolved by an application for advice and directions, or through the interventions of the trial judge, at or after the "initial return date" discussed below.

ISSUE No. 9
Who should receive notice of *Charter* applications?

CRIMINAL RULES WORKING COMMITTEE PROPOSAL

[83] Both the Crown and the court should receive notice. With respect to the court, any notice and additional material should be filed with the clerk of the court, so that it can be transmitted, as soon as is practicable, to the appropriate judge. In the case of constitutional challenges, the *Judicature Act* requirement of service on both the federal and provincial Attorneys General must be observed.

ISSUE No. 10
What Judges should hear *Charter* applications?

CRIMINAL RULES WORKING COMMITTEE PROPOSAL

[84] *Charter* applications should be heard by the trial judge.[99] The Committee does not contemplate establishing interlocutory proceedings before "motions judges." A difficulty is that a hearing may be required substantially in advance of trial. The

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[99] *Mills*, *supra* note 3 at para. 145; *O'Connor*, *supra* note 4 at para 20, 179; *R. v. Litchfield*, [1993] 4 S.C.R 333 at 353; *R. v. Mills*, [1986] 1 S.C.R. 863 at para. 69, Lamer J. (dissenting, but not on this point); *R. v. DeSousa*, [1992] 2 S.C.R. 944 at para. 17, Sopinka J [*DeSousa*].

Committee is of the view that the assignment of judges to trials to deal with *Charter* applications may be worked out administratively, or through an application to the Chief Justice or Associate Chief Justice.

ISSUE No. 11
How Should the Service of Documents be Effected?

CRIMINAL RULES WORKING COMMITTEE PROPOSAL

[85] Filing suffices to give the court notice. The Crown should be served at the Crown office having carriage of the prosecution. Service may be by way of

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

(iii) faxing a copy of the application materials to the office.

[86] 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 e-mail.[100]

[87] If the Crown wishes to serve any documents on defence counsel, service may be effected at the address for service indicated on the notice of application.

ISSUE No. 12
What notice period or periods should be established for *Charter* applications?

CRIMINAL RULES WORKING COMMITTEE PROPOSAL

[88] The following "stages" on the time-line of applications should be distinguished:

(a) the number of days before trial by which date notice of an application must be given, by means of the prescribed form of notice of application with supporting documentation;[101]

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[100] If the *Proceedings Against the Crown Act*, R.S.A. 2000, c. P - 25, s. 13, applies (which it may not, because a *Charter* application may not fall within the ambit of "proceedings against the Crown"), a more generous notice target would be available: "A document to be served on the Crown shall be served by leaving a copy with the Minister of Justice and Attorney General or the Deputy Minister of Justice and Deputy Attorney General or any barrister or solicitor employed in the Department of Justice."

[101] The intention is to parallel the structure of the *Constitutional Notice Regulation*, *supra* note 27 and s. 24(1) of the *Judicature Act*, *supra* note 8, which require written notice of an application to be made a

(continued...)

(b) the number of days notice that must be given, before an application is (initially) brought before a judge;

(c) the number of days that an applicant or respondent has to provide further documentation to the other party; and

(d) the number of days notice that must be given, before an application is heard.

The differences between *Charter* applications require that they be "staged" differently.

[89] With this qualification in mind, the Committee's proposals are as follows:

re (a): written notice should be provided 60 days before trial;

re (b): the application should be returnable before the trial judge in 7 days (this concerns only the initial hearing before the judge, to establish the time-lines and requirements for the application process);

re (c): the time-lines and documentary requirements for the application are to be established by the trial judge; and

re (d): the date for the hearing of the application is to be established by the trial judge.

The Committee's comments on the different types of *Charter* applications are as follows.

(1) Constitutional Challenges

[90] Written notice of constitutional challenges – governed by the *Judicature Act* – should be provided at least 60 days before trial (stage (a)). The Committee has proposed that notice be provided substantially in advance of trial for the following reasons:

(i) notice 14 days before trial is likely to put the trial date in jeopardy; 14 days before trial may not be long enough for the Crown and the court to deal with serious issues;[102]

(ii) counsel will likely have had the benefit of gathering information through a preliminary inquiry, in addition to disclosure; and

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[101] (...continued)
specified number of days before a proceeding.

[102] *Mousseau*, *supra* note 21 at para. 11.

(iii) in most cases, counsel are likely to be aware of the available *Charter* applications substantially before trial.

This early notice date does not contradict the *Judicature Act*. The *Judicature Act* provides that "14 days' written notice" must be given; this notice, it appears, must be before "the proceeding" in which "the constitutional validity of an enactment" is "brought into question." That is, whatever may be the date of the "proceeding" – the hearing date – this date must be preceded by 14 days' notice. In other words, the *Judicature Act* is dealing with "stage (d)" not "stage (a)." In any event, the "14 days" could be considered a minimum, not a prudent maximum.

[91] Once commenced, the application may be brought expeditiously before the judge. The initial return date could be 7 days from the date of service. This initial court date (stage (b)) is not the date on which the application is to be heard. The applicant and the Crown are brought together before the judge. The judge, with input from counsel, can determine whether the Crown or the applicant need file any further documentation and any time lines for the filing of further documentation (stage (c)). The judge can determine the date on which the application will be heard (stage (d)).

[92] To comply with the *Judicature Act*, the hearing date must be at least 14 days after the notice of application was served.

[93] The hearing date may be the first day of trial, if no earlier date is appropriate. The judge is entitled to reserve his or her decision until the end of the trial, if the ruling is dependent on facts elicited during the trial.[103]

(2) Holt *Cases – Violations of s. 11(b)*

[94] Of the s. 24(1) claims for relief, applications based on s. 11(b) are the most procedurally straightforward. Counsel will generally know long in advance of trial (because it has taken a long time to get to trial) that they will advance a s. 11(b) argument. Hence, as in the case of constitutional challenges, notice of the application should be provided at least 60 days before trial (stage (a)).

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[103] *DeSousa*, *supra* note 99 at para. 17.

[95] Again, the initial return date may be 7 days from the date of service (stage (b)). The trial judge may deal with issues of documentation and may set the hearing date (stage (d)).

[96] To be consistent with *Holt*, the hearing date should be at least 30 days before the trial date.

(3) Claims for Relief under ss. 24(1) or 24(2) - Grounds Known in Advance of Trial

[97] The Committee proposes that even s. 24(1) and s. 24(2) applications require the provision of notice at least 60 days before trial, for the following reasons:

(a) this maintains a consistent initial notice date for all applications;
(b) counsel will have had the benefit of disclosure and a preliminary inquiry;
(c) the trial date should be sufficiently distant from the preliminary inquiry to permit adequate reflection and preparation for the application; and
(d) an exemption from the normal notice period shall be available if the grounds for an application are not evident in advance of trial.

[98] The initial return date should be 7 days from the 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.[104] The judge may make any order required to deal with the exchange of further documentation. The hearing date may be set as the first day of trial or, in the case of s. 24(1) applications based on (e.g.) entrapment, after the conclusion of the trial.[105]

(4) Applications for the Exclusion of Evidence: Grounds not Known Before Trial

[99] If the grounds for an application to exclude evidence (or for any other *Charter* application) are not known before trial, or the full basis for the application is not established until evidence emerges at trial, then neither the notice of application and supporting material rules nor the timing rules should apply to the application. The trial judge should manage the application process.

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[104] By way of an illustration, see *Mousseau*, *supra* note 21.

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

ISSUE No. 13
Should judicial discretion permitting non-compliant applications be preserved?

CRIMINAL RULES WORKING COMMITTEE PROPOSAL

[100] Judicial discretion to relax procedural requirements should be preserved, so that procedural rules do not trump *Charter* rights.[106] A useful approach is found in Rule 134 of the Northwest Territories Rules: "The Court may, where it considers it necessary in the interests of justice, dispense with compliance with any rule at any time."[107]

[101] Punitive consequences for a failure to follow the rules should not be established.

[102] A variety of factors may be considered by the judge in determining the appropriate response to a failure to follow rules:

(a) whether the Crown has been prejudiced or put at an unfair disadvantage;
(b) whether the *Charter* argument is novel;
(c) whether the *Charter* argument is common in the type of proceedings;
(d) whether the Crown will need to call additional evidence or recall any witnesses;
(e) counsel's diligence; and
(f) whether there was any discernable attempt to engage in "ambush" tactics.[108]

[103] In theory – as contemplated by *Dwernychuk* – a case may arise in which the court will not permit a *Charter* argument to proceed. That would have to be the very rare case in which that result is the just result.[109]

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[106] *Loewen*, *supra* note 26; *Blom*, *supra* note 26 at paras. 21, 22.

[107] On the need for flexibility, see *Domstad*, *supra* note 23 at para. 27; *R. v. Lamont* (2004), 364 A.R. 51 at para. 15, 2004 ABPC 97, Lamoureux P.C.J.; *Brosseau*, *supra* note 11 at para. 30.

[108] *Blom, supra* note 26 at paras. 22, 23, 27.

[109] *R. v. Phillips* (2003), 239 Sask. R. 161, 2003 SKQB 330, Wilson J.

[104] One might object that if form-of-notice and commencement-date requirements are set, but there are no punitive consequences for a failure to follow the rules (e.g., if the rules are not followed, the application will not be heard), then the rules will be more honoured in the breach than the observance. Counsel will have no motivation to follow the rules.

[105] Part of the response is, again, that *Charter* rights cannot be defeated by procedural rules. Even if a "punitive response" were created, it could not effectively bar *Charter* applications.

[106] Another part of the response is this: The Committee has offered its proposals in the belief that they would work to the advantage of all parties – judges, Crowns, defence counsel. The proposals would support the rational management of litigation time and resources. A benefit of following the rules will be that *Charter* isues, regardless of their complexity, can be dealt with in a timely and effective manner. Delays and uncertainty will be avoided. The hope is that the rules (or some version of them) would be followed because following them is the right thing to do, not because of the penalties that would be imposed if the rules are not followed.

[107] In the short term, it may be predicted that the rules would not be followed consistently. In the longer term, giving full advance notice will be confirmed as an aspect of the culture of litigation, and the rules will be followed as a matter of course.

ISSUE No. 14
Should the rules regulate the conduct of *Charter* application hearings?

[108] The "order of *Charter* application hearings" (to use a phrase parallel to the "order of trial") poses some particular difficulties: who must call witnesses first? may 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? (e.g. whether s. 10(b) rights were properly implemented, or whether both common law voluntariness and s. 10(b) rights are at

issue). Different approaches are possible and have been advanced in the cases.[110] For example, the Crown might be obliged to call police witnesses and be restricted to examining them in chief, with the accused entitled to cross-examine; the accused might be obliged to call police witnesses, but be permitted to cross-examine, and the Crown might be restricted to direct examination; if the accused is relying on defence-friendly witnesses, the accused might be obliged to call the witnesses and examine them in chief, and the Crown would cross-examine.

[109] Should rules of court specify the "order of hearing"?

CRIMINAL RULES WORKING COMMITTEE PROPOSAL

[110] The Committee begins with the observation that the appropriate "order of hearing" is a controversial and difficult matter. That, by itself, might not preclude establishing rules, so that the controversies might be settled. However, the reflections in paragraph 7 above are relevant. In this instance, rule-making does not have firm guidance from legislation or judicial decisions (in particular, we lack firm direction from any Supreme Court *Charter* jurisprudence). The principles by which rules should proceed are not manifest. While we do have the analogy of the "order of trial," *voir dires* generally and *Charter voir dires* in particular need not follow trial procedures. Moreover, establishing "order of hearing" rules runs the risk of fettering the discretion of the trial judge to direct the procedure most appropriate in the particular circumstances of the hearing.[111] The Committee notes that none of the jurisdictions with criminal rules of court regulate the "order of hearing." The proposal of the Committee, therefore, is that *Charter* application hearing procedures not be the subject of rules of court.

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[110] *R. v. Coles* (2005), 28 C.R. (6th) 167, 2005 ABPC 20, Fradsham P.C.J.; *R. v. Sapara*, [2002] A.J. No. 483 at paras. 27-28 (Q.B.), Watson J.; *Brosseau*, *supra* note 11 at paras. 39, 41.

[111] *Felderhof*, *supra* note 25 at para. 57.

ISSUE No. 15
Should the rules apply to self-represented accuseds?

[111] An accused may choose not to be represented by counsel.[112] The self-represented accused may wish to bring a *Charter* application.

CRIMINAL RULES WORKING COMMITTEE PROPOSAL

[112] Self-represented accuseds should be subject to the same procedural rules as counsel-represented litigants. The principles, interests, and practicalities that motivate and shape *Charter* application rules do not vary with whether or not an accused is represented by counsel. Representation or lack of representation by counsel does not, in itself, have any bearing on the design of *Charter* application rules. Self-represented litigants would actually benefit from standardized public rules – the rules would provide a roadmap for a lay litigant to follow, reducing the need for guidance by counsel. In any event, should justice so require, a trial judge would retain the authority to relax the rules in the case of a self-represented accused – as the judge would in the case of a counsel-represented litigant.

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[112] See, respecting the civil context, Alberta Law Reform Institute, *Self-Represented Litigants* (Consultation Memorandum No. 12.18) (Edmonton: Alberta Law Reform Institute, 2005).