



# ***CHARTER APPLICATIONS IN CRIMINAL CASES*** **REPORT ON CONSULTATION MEMORANDUM 12.19**

(To be published as part of a composite report  
from the Criminal Rules Working Committee)

*February 2007*

ALRI claims copyright © in this work. ALRI encourages the availability, dissemination and exchange of public information. You may copy, distribute, display, download and otherwise freely deal with this work on the following conditions:

- (1) You must acknowledge the source of this work,
- (2) You may not modify this work, and
- (3) You must not make commercial use of this work without the prior written permission of ALRI.



## PREFACE

This final report represents a pre-cursor to what is hoped will be new criminal rules dealing with the matter of non-disclosure orders. The report represents the final policy positions of the working group, following the publication of, and consultation on, Consultation Memorandum 12.19, *Charter Applications in Criminal Cases*, one of a series which the Institute has issued as part of its Rules of Court Project.

The working group will now proceed with other subject areas, but we thought it important that the legal community be aware of the final policy positions, even though it may take some time for the them to find their way into final rules format.

We thank the working group for its work and deliberations, and look forward to their further proposals in other areas. The members of the Criminal Rules 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

The Honourable John D. Bascom, Provincial Court of Alberta

Lyndon Irwin, Q.C., Alberta Law Reform Institute

Peter J. Royal, Q.C., Royal McCrum, Duckett & Glancy

Laura K. Stevens, Q.C., Anderson Dawson Kniesley & Stevens

Donna R. Valgardson Q.C., Justice Canada

Josh Hawkes, Alberta Justice

Sandra Petersson, Alberta Law Reform Institute

Wayne N. Renke, Faculty of Law, University of Alberta



## LIST OF ISSUES

### ISSUE No. 1

Is procedural reform respecting *Charter* applications in the Queen’s Bench necessary or desirable? . . . . . 3

### ISSUE No. 2

Should procedural reform focus on *Charter* applications, as opposed to other applications in criminal matters? . . . . . 4

### 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? . . . . . 4

### 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? . . . . . 5

### ISSUE No. 5

If procedural reform is necessary, should different sets of rules be designed for different types of *Charter* applications? . . . . . 6

### 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? . . . . . 6

### ISSUE No. 7

What information should be conveyed in a *Charter* application notice? . . . . . 6

### ISSUE No. 8

Should the rules provide for the exchange of memoranda of argument or factums? . . . 10

### ISSUE No. 9

Who should receive notice of *Charter* applications? . . . . . 11

### ISSUE No. 10

What Judges should hear *Charter* applications? . . . . . 11

**ISSUE No. 11**

How Should the Service of Documents be Effected? . . . . . 11

**ISSUE No. 12**

What notice period or periods should be established for *Charter* applications? . . . . . 12

**ISSUE No. 13**

Should judicial discretion permitting non-compliant applications be preserved? . . . . . 14

**ISSUE No. 14**

Should the rules regulate the conduct of *Charter* application hearings? . . . . . 17

**ISSUE No. 15**

Should the rules apply to self-represented accuseds? . . . . . 17

## ***Charter Applications in Criminal Case***

### **Report on Consultation Memorandum 12.19**

[1] At its meeting on December 6, 2006, the Criminal Rules Working Committee considered the comments received from the bench and bar on the proposals set out Consultation Memorandum 12.19, *Charter Applications in Criminal Cases* [CM 12.19]. Following discussion of the comments and the merits of the issues, the Committee decided to maintain some proposals but revise others.

[2] For the reasons indicated in paragraph 2 of the Final Report on CM 12.15, *Non-Disclosure Order Application Procedures in Criminal Cases*, the Committee decided to defer the preparation of formal drafting instructions based on its proposals. Instead, the Committee offers this Final Report as a summary of its proposals and as a foundation for any future drafting instructions. Detailed discussions of the proposals are found in CM 12.19, and are not reproduced here.

[3] The Committee received many thoughtful comments. The Committee has not responded to all comments in this Final Report: in some cases, the issues raised go beyond the scope of the Committee's mandate and the precise subjects of CM 12.19; in other cases, the responses would merely be reiterations of points made in CM 12.19. To ensure that attention is not deflected from the essence of the proposals in CM 12.19 – the advisability of formal notice requirements for *Charter* applications in criminal litigation before the Court of Queen's Bench of Alberta – the Committee should clarify that CM 12.19 does not purport to offer any opinion on the constitutionality of any legislative provisions or regulation, but only (in two footnotes) refers to the persistence of some constitutional issues concerning the scope of federal legislative authority respecting criminal procedure and provincial legislative authority respecting the administration of justice in the province. What is clear is that establishing rules of court under the authority of s. 482 of the *Criminal Code* would not, by itself, raise any division of powers concerns.

[4] The comments received from the Canadian Bar Association, Alberta Branch were particularly useful. The CBA pointed out that its Administration of Justice Task Force

submitted a report in 1996 after receiving comments on its discussion paper (referred to in CM 12.19). The CBA Alberta Branch adopted these submissions. The Task Force submissions are generally consistent with the Committee's proposals. The main point of divergence concerns the length of the pre-trial notice of application period. One might be encouraged by the similarity between the products of two independent groups – the similarity might indicate that the recommendations have objective validity. One might be discouraged by the fact that about a decade has past since the Task Force presented its conclusions – one might hope that another decade does not pass before procedure in *Charter* applications is reformed.

[5] More recent developments should be noted. In 2005, Chief Justice Heather Smith of the Ontario Court of Justice established the Advisory Committee on Criminal Trials. Shortly before CM 12.19 was published the Advisory Committee submitted its report – *New Approaches to Criminal Trials: Report of the Chief Justice's Advisory Committee on Criminal Trials in the Superior Court of Justice [Advisory Committee Report]*.<sup>1</sup> The *Advisory Committee Report* made a number of recommendations to improve Superior Court criminal proceedings. The *Advisory Committee Report* recommendations led to amendments to the Ontario Superior Court Criminal Proceedings Rules (the "Ontario Superior Court Rules").<sup>2</sup> The amendments shall come into effect as of October 16, 2006. Comments in the *Advisory Committee Report* and amendments to the Ontario Superior Court Rules relevant to *Charter* applications in criminal cases shall be referred to in connection with the appropriate Issues below.

---

<sup>1</sup> Ontario, Advisory Committee on Criminal Trials, *New Approaches to Criminal Trials: Report of the Chief Justice's Advisory Committee on Criminal Trials in the Superior Court of Justice* (May, 2006), online: Ontario Courts, Superior Court of Justice, <[http://www.ontariocourts.on.ca/superior\\_court\\_justice/reports/CTR/CTRReport.htm](http://www.ontariocourts.on.ca/superior_court_justice/reports/CTR/CTRReport.htm)> [*Advisory Committee Report*].

<sup>2</sup> The new rules can be found online at Ontario Courts, <[http://www.ontariocourts.on.ca/superior\\_court\\_justice/rules/rules.htm](http://www.ontariocourts.on.ca/superior_court_justice/rules/rules.htm)>. These rules have not yet been Gazetted. The last Gazetted version of the *Ontario Court of Justice Criminal Proceedings Rules* is SI/92-99, online: CanLII <<http://www.canlii.org/ca/regu/si92.99/whole.html>>.

## ISSUE No. 1

### Is procedural reform respecting *Charter* applications in the Queen's Bench necessary or desirable?

[6] Committee's Proposal: Procedural reform respecting *Charter* applications in the Court of Queen's Bench is necessary and desirable [*not modified*].

[7] Most comments acknowledged the need for reform. Currently, *Charter* application procedure is governed by statute and common law. The coverage is neither complete nor adequately detailed. The administration of justice would benefit by more complete, detailed, standardized, and publicized guidance.

[8] Both the Ontario Superior Court and the (provincial) Court of Justice have rules governing constitutional challenge and s. 24(1) applications. The Superior Court, however, had lacked rules governing s. 24(2) applications. The *Advisory Committee Report* argued that the lack of rules for these *Charter* applications – along with a number of other factors<sup>3</sup> – impaired the operation of the criminal justice system in Ontario: “[t]he most significant contributor to the lengthening of trials is pre-trial applications by both the Crown and defence.”<sup>4</sup> We should not be over quick to analogize the Alberta and Ontario situations. The Ontario system appears to be in worse shape than Alberta's:

Delivering the John Sopinka lecture on Advocacy at the annual conference of the Criminal Lawyers' Association on October 21, 2005, Mr. Justice Michael Moldaver of the Court of Appeal for Ontario, a defence counsel for 17 years and judge of the Supreme Court of Ontario for 4 ½ years, stated:

The message I bring to you today is not a happy one. It concerns the length of criminal trials and the impact this is having on our criminal justice system and the public's faith and confidence in it.

I, for one, am deeply concerned. To be blunt, I don't like what I am seeing. Criminal trials are spinning out of control. Sadly, they have taken

---

<sup>3</sup> For a review, the *Advisory Committee Report*, *supra* note 1, at paras. 27 - 87; culprits include not only *Charter* applications, but (e.g.) ineffective pre-trial conferences; the conduct of judges, defence counsel, and Crown counsel; the increased use of wiretap and expert evidence; problems with disclosure; institutional stresses caused by the interaction of the judicial and correctional systems; and problems with courtroom equipment, personnel, and facilities.

<sup>4</sup> *Ibid.*, at para. 36.

on a life of their own and if they haven't already done so, they are fast becoming the masters of a system they are meant to serve.<sup>5</sup>

Pre-trial *Charter* applications, according to Justice Moldaver, have become a “growth industry in Canada.”<sup>6</sup> Despite the differences between the legal environments in Ontario and Alberta, it is worth observing that the *Advisory Committee Report* recommended moving from a case-based regulatory system to a regulatory system based on rules of court; and that rules to govern s. 24(2) applications have been added to the Superior Court Rules. These new rules seek to reverse the “culture of last-minute decisions”.<sup>7</sup>

## **ISSUE No. 2**

### **Should procedural reform focus on *Charter* applications, as opposed to other applications in criminal matters?**

[9] Committee’s Proposal: Procedural reform may focus first on the reform of *Charter* application procedures; the reform of other application procedures in criminal litigation may be deferred [*not modified*]. By way of clarification, this proposal does not entail that *Charter* application reform can proceed in isolation. The Issue 6 proposal confirms that some supplementary reform rules (e.g. respecting service) must accompany *Charter* application reform.

[10] No comments disputed this proposal.

## **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?**

[11] Committee’s Proposal: While case management and pre-hearing conferences have a supplemental role in the governance of *Charter* applications, these processes do not by

---

<sup>5</sup> *Advisory Committee Report*, *supra* note 1, para. 3. Justice Moldaver recently reaffirmed his argument in his remarks to the Justice Summit, “The State of the Criminal Justice System in 2006: An Appellate Judge’s Perspective” (Toronto: November 15, 2007), pp. 4 - 5 [Moldaver].

<sup>6</sup> *Advisory Committee Report*, *ibid.* at paras. 27, 270; Moldaver, *ibid.* note 5 at 2.

<sup>7</sup> *Advisory Committee Report*, *ibid.* at para. 21, quoting Lord Justice Auld; Moldaver, *ibid.* note 5 at 9.

themselves solve all *Charter* application difficulties; further governance is necessary [not modified].

[12] One comment did confirm that pre-trial conferences are used to address *Charter* application procedures, but went on nonetheless to support procedural reform. Otherwise, no comments dealt with this issue.

[13] The new Ontario Superior Court Rules extensively regulate pre-hearing conferences and establish case-management rules (rules 28 and 29).<sup>8</sup> Another Alberta project might consider the establishment of rules in these areas.

[14] A recent Alberta development arrived through a Notice to the Profession of January 5, 2007. Effective January 19, 2007, a Criminal Appearance Court will commence in Calgary, and will sit each Friday thereafter. The court's mandate and schedule includes "[m]otions which can be dealt with expeditiously and scheduling of longer motions; for example - scheduling of a third party records application, unsealing of warrant, etc."

#### **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?**

[15] Committee's Proposal: Reform should be through rules of court [not modified].

[16] One comment did support the use of practice notes/notices to the profession. This comment did not, however, address the concerns with this mode of regulation raised in CM 12. 19. Other comments supported the use of rules of court. In the words of the CBA Task Force submissions, rules strike a compromise between the rigidity of legislation and the fluidity of practice notes or notices to the profession. The Ontario Superior Court did opt for the medium of rules.

---

<sup>8</sup> And see *Advisory Committee Report*, at paras. 145-269.

## **ISSUE No. 5**

### **If procedural reform is necessary, should different sets of rules be designed for different types of *Charter* applications?**

[17] Committee's Proposal: *Charter* applications can be broadly broken down into three main types – constitutional validity applications, s. 24(1) applications, and s. 24(2) applications. The differences between these three types of applications should be respected in rules governing *Charter* applications [*not modified*].

[18] No comments disputed the foregoing distinction.

## **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?**

[19] Committee's Proposal: *Charter* application rules should be accompanied by supplemental rules, respecting at least service [*not modified*].

[20] No comments disputed this proposal.

## **ISSUE No. 7**

### **What information should be conveyed in a *Charter* application notice?**

- [21] Committee's Original Proposal: If *Charter* application rules should be formalized,
- (a) a notice of application form should be devised;
  - (b) the notice should set out
    - (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;
    - (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 trial judge should be entitled to dispense with or modify the rules, in the interests of justice.

[22] In light of comments received, the Committee's proposal is modified as follows (changes are underlined):

If *Charter* application rules should be formalized,

- (a) a notice of application form should be devised;
- (b) the notice should set out
  - (i) the Charter rights allegedly violated;
  - (ii) a "reasonably brief" but "adequate," "reasonable," or "sufficient" account of the grounds for the application (a statement of the facts – not evidence – supporting the application and an outline of the legal argument based on those facts) so that the Crown and the judge can know what to expect and so they may prepare accordingly;
  - (iii) a brief description of the types or sources of materials or evidence to be relied on in the application, including information respecting any expert evidence, of the type referred to in ss. 657.3(3)(a)(i) to (iii) of the *Criminal Code*;
  - (iv) an estimate of the time required to argue the motion; and
  - (v) an address for service;
- (c) the notice should be accompanied by ^ headnotes of and extracts from the cases relied on in the application.

The trial judge should be entitled to dispense with or modify the rules, in the interests of justice.

[23] The explanations for the modifications are as follows:

- (A) grounds: A number of comments expressed concern with the prospect of applicants being compelled to provide detailed descriptions of the evidence to be relied on in support of the application. A clear preference was

expressed for describing facts, rather than the evidence that would be used to support factual findings.

- (B) types or sources of materials or evidence: The intention is to mimic civil motions practice, so that an applicant must disclose the type or source of evidence that will be relied on in an application – e.g., the testimony of officer X in the preliminary inquiry; pages A - C of document Y in the disclosure; the testimony of witness Z. What is not intended is that details of that evidence be disclosed (the precise questions and answers; the lines in the document; particulars of the anticipated testimony).
- (C) expert information: A comment rightly referred the Committee to s. 657.3(3) of the *Criminal Code*, which requires that notice of the use of expert evidence be provided at least 30 days before the commencement of trial (or within another period fixed by a judge). Because this is a relatively new *Criminal Code* provision, we do not have authoritative guidance on its application. Regardless of whether s. 657.3(3) does apply to *Charter* applications, providing notice of expert evidence would be prudent, and would meet the policy objectives of requiring notice of *Charter* applications. Failing to provide adequate notice of expert evidence would cause the difficulties notice is meant to correct. Hence, whether s. 657.3(3) applies or not, counsel should provide notice that expert evidence will be tendered in support of the application, with sufficient particularization to permit the other party to respond intelligently to the application.
- (D) accompanying documentation: To maintain the facts/evidence distinction and to ensure that applicants are not forced to provide more than descriptions of types or sources of evidence, the proposed requirement to attach records to the form of notice has been deleted.

[24] Support for the Committee’s approach may be drawn from the *Advisory Committee Report*. According to the *Advisory Committee Report*,

The notices and supporting material, if any, ... filed in support of applications often contain little more than boiler-plate, conclusory statements. These statements do not inform the opposing counsel or the trial judge as to what

issue is being litigated. Of greater significance for the trial judge, these statements provide little insight into whether the application has a reasonable prospect of succeeding. On occasion, defence counsel seek to exclude evidence, even though the application has no realistic chance of success, and Crown Counsel seek to have ruled admissible evidence with limited, if any, probative value, or which has no reasonable prospect of being ruled admissible. In the result, judges are conducting too many unnecessary pre-trial applications.<sup>9</sup>

The Advisory Committee writes that

In trials in the Superior Court of Justice there is no compelling reason why counsel should not be required to provide in writing a concise, case-specific Notice of Application, setting out the legal basis upon which exclusion or admission is sought, as well as a summary of the evidentiary basis upon which the application is based with reasonable particularity. The notices should not be generic or of the "boiler-plate" variety.<sup>10</sup>

[25] The new Ontario Superior Court Rules provide as follows:<sup>11</sup>

31.03 (1) Applications to exclude evidence under this Rule shall be commenced by a notice of application in Form 1.

(2) The notice of application in Form 1 shall state:

- (a) the place and date of hearing as determined in accordance with these Rules;
- (b) a detailed description of the presumptively admissible evidence the applicant seeks to exclude in the proceedings;
- (c) a precise, case-specific statement of the basis and grounds upon which the evidence is said to be inadmissible;
- (d) a detailed summary of the evidence or other material upon which the party seeking exclusion relies and a statement of the manner in which the applicant proposes to introduce the evidence;
- (e) an estimate of the time required to introduce the evidence and other material to be relied upon in support of the application; and

---

<sup>9</sup> *Ibid.*, at para. 39, footnote omitted.

<sup>10</sup> *Ibid.*, at para. 274.

<sup>11</sup> These rules have a more expansive scope than the rules contemplated in CM 12.19. Rule 31 applies where a party seeks to exclude evidence that is presumptively admissible at common law for all issues that it is reasonably foreseeable another party will seek to introduce in the proceedings, including but not only:

- (a) evidence of prior criminal convictions of an accused;
- (b) evidence of after-the-fact or post-offence conduct; and
- (c) evidence alleged to have been obtained by constitutional infringement exclusion of which is sought under Section 24(2) of the Charter.

(f) whether any order is required abridging or extending any times established by the pre-trial conference or case management judge or required for service and filing by this Rule.

Under subrule 31.05(1), the Ontario rules also require the filing of an Application Record, which may include

(c) legible copies of any reproducible materials relied upon in support of the application where it is proposed to argue the case for exclusion in whole or in part on a basis other than the testimony of witnesses;

(d) where it is proposed to argue the case for exclusion in whole or in part on the basis of testimony of witnesses, legible copies of prior statements or statements of anticipated evidence in sufficient detail to show the essential features of the evidence proposed for admission;

(e) any other materials that may reasonably assist the judge in identifying and determining the admissibility issues raised.

Under subrules 31.05(3) to (5), books of authorities must be filed and served, although factums are not required unless ordered by a judge.

[26] While the Ontario approach is generally consistent with the Committee's proposal, it is fair to observe that the Ontario approach is more demanding than the Committee's proposal.

## **ISSUE No. 8**

### **Should the rules provide for the exchange of memoranda of argument or factums?**

[27] Committee's Proposal: There should be no general, standardized requirement to file written arguments in addition to the notice of application [*not modified*].

[28] Some comments argued that the Crown should be required to provide a notice in reply to a *Charter* application. In the Committee's view, whether or not a written reply is necessary may be determined by the trial judge. Moreover, a requirement for a written reply entails further direction concerning the time within which the reply is to be served. Again, in the Committee's view, the appropriate procedure may be determined by the trial judge.

## **ISSUE No. 9**

### **Who should receive notice of *Charter* applications?**

[29] Committee's Proposal: Both the Crown and the court should receive notice. In the case of constitutional challenges, the *Judicature Act* requirement of service on both the federal and provincial Attorneys General must be observed [*not modified*].

[30] No comments disputed this proposal.

## **ISSUE No. 10**

### **What Judges should hear *Charter* applications?**

[31] Committee's Proposal: *Charter* applications should be heard by the trial judge, even if that means early assignment. The Committee does not propose interlocutory proceedings before "motions judges" [*not modified*].

[32] No comments disputed this proposal.

[33] Generally, under the new Ontario rules, applications shall be heard by the trial judge – see subrule 31.02(1). Under subrule 31.02(2), however, the parties may expressly agree that the application may be heard by another judge and that the rulings will be incorporated in the trial record. Furthermore, the pre-trial or case-management judge may make an order giving effect to the parties' agreement.

## **ISSUE No. 11**

### **How Should the Service of Documents be Effected?**

[34] Committee's Proposal: Filing suffices to give the court notice. The Crown should be served at the Crown office having carriage of the prosecution. Service may be effected by

- (i) leaving a copy of the application materials at the office,
- (ii) faxing a copy of the application materials to the office, or
- (iii) if a prosecutor with the Crown office having carriage of the prosecution agrees, in another manner, such as by e-mail.

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. [*not modified, except for the substitution of “or” for “and”*]

[35] The Committee did receive the comment that nowadays e-mail should be as acceptable a mode of service as service by fax, and so e-mail service should not require the Crown’s agreement. Because, however, of the vagaries of e-mail, and because of practical issues such as the means of proof of service, the determination and use of appropriate e-mail addresses, and the legibility of texts (especially attachments), the Committee remains inclined to retain the condition precedent of agreement by the party to be served before service by e-mail is authorized.

[36] The Committee notes that the proposal contemplates only e-service on lawyers and not e-filing with the courts.

## **ISSUE No. 12**

### **What notice period or periods should be established for *Charter* applications?**

[37] Background to the Committee’s Proposal: The Committee distinguished four "stages" on the time-line of *Charter* applications:

- (a) the number of days before trial by which notice of an application must be given;
- (b) the number of days notice that must be given before an application is 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.

[38] Committee's Proposal:

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.

One express addendum should be made to the Proposal:

The trial judge may extend or abridge any notice period set by the rules, when necessary in the interests of justice.

[39] The original proposal was controversial. While some comments approved of the 60 days before trial notice period, many comments did not. Some comments were that the notice period was too long, and favoured 14 or 15 day notice periods. Other comments were that the notice period was too short, at least respecting constitutional challenges or s. 11(b) applications, and favoured 90 or 120 day notice periods for these applications. The CBA took strong exception to the 60 day notice period, and took the view that 30 days before trial was a reasonable compromise notice period.

[40] The Ontario Superior Court has settled on 30 days as the presumptive notice period for applications made under Rule 31, unless a judge otherwise orders: subrule 31.04(1). Formerly, the Superior Court Rules operated under a general 15 day notice period for other constitutional applications; this notice period has been raised to 30 days: subrule 27.04(1). The *Advisory Committee report* commented that “[o]n occasion, 15 days' notice has proven insufficient for opposing counsel to respond, resulting in adjournments or delays in the trial starting. If the notice and supporting material are not filed until 15 days before trial, and if either side wished a further pre-trial conference to address the issues raised, it could be difficult to arrange one, given the short time.” The Advisory Committee therefore recommended the change to 30 days notice, “subject to the discretion of the pre-trial conference judge to order either a longer period in cases where additional time will be required for the responding party to properly prepare, or a shorter period if he or she determines neither party would be prejudiced.”<sup>12</sup>

[41] Certainly reasonable arguments can be made to lower or even raise the notice period from where it has been set by the Committee. The Committee, however, has

---

<sup>12</sup> *Advisory Committee Report, supra* note 1, at para. 288.

decided to retain the 60 notice period for three reasons: First, it is a compromise notice period that should, in many cases, facilitate the timely disposition of *Charter* applications. Second, if 60 days is too short or too long a period, counsel may apply to extend or abridge the period. The Committee’s proposal under Issue 13 preserves the discretion referred to by the Advisory Committee. Third, the Committee does not wish to create a system of multiple notice periods (e.g. 90 days for constitutional challenges, 30 days for s. 24(2) applications). Multiple notice periods may cause confusion and may frustrate the smooth processing of *Charter* applications. Practicality dictates that constitutional applications have a single standard notice period.

### **ISSUE No. 13**

#### **Should judicial discretion permitting non-compliant applications be preserved?**

[42] Committee’s Original Proposal: Judicial discretion to relax procedural requirements should be preserved, so that procedural rules do not trump *Charter* rights. 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.” This proposal should be modified by adding the following: “The Court is entitled to make any order or issue any direction necessary in the interests of justice.”

[43] A judge should be entitled to abridge notice periods and formalities of applications in those instances in which the grounds for an application are not reasonably apparent (whether because of late disclosure, the evolution of trial proceedings, the development of evidence at trial, or other reasons) in sufficient time to permit compliance with notice requirements. A rules-based discretion, however, would not permit the variation of a statutorily-set notice period, as in s. 24 the *Judicature Act*. If, however, insistence on a statutorily-set notice period would work an injustice in a particular case, to avoid a violation of constitutional rights, a judge doubtless has the authority under the *Charter* to abridge a notice period.

[44] Some comments recommended that judges have the authority to punish the non-compliant - e.g. by imposing costs. Some comments recommended that non-compliance should presumptively support an adjournment and recommended that formal notice be

required within the adjournment period. With respect to the costs comment, the Committee's philosophy is that the proposals should not be supported by a punitive power. Counsel should abide by the rules because following a rational public procedure works to everyone's benefit, not because they or their clients will be punished if they do not comply. With respect to the adjournment and automatic formal notice comment, the Committee is not prepared to fetter the trial judge's discretion with various presumptions. The trial judge may work out the appropriate process in the circumstances – and that process may or may not entail the need for a formal notice. If, for example, an issue arises in trial, the Crown will receive actual notice of the application. The evidential context in which the issue arises will assist in specifying the nature of the application. Oral elaboration may provide sufficient particulars and authorities. In such a case, a formal notice would not be necessary. However, to confirm the judge's authority to manage the proceedings, the addition concerning authority to grant orders and issue directions has been added.

[45] The new Ontario Rule 34.03 is, at least on its face, more strict than the Committee's proposal:

Where an applicant has failed to comply with the Rules governing an application, the application shall not be heard unless the presiding judge grants leave, after taking into account all the circumstances of the case, including but not limited to:

- (a) the nature of the applicant's non-compliance with these Rules;
- (b) the right of the applicant to raise issues, including issues relating to the admissibility of evidence and to have those issues determined on their merits;
- (c) the right of other parties to have a reasonable opportunity to respond to any issues raised by an applicant;
- (d) the need for an expeditious determination of pre-trial applications and the orderly conduct of trial proceedings;
- (e) the history of the pre-trial applications and the proceedings;
- (f) any notice given to other parties about the issues raised in the pre-trial applications;
- (g) the apparent merits of the application as reflected in any materials filed and any submissions made in the proceeding;
- (h) any prejudice to any other party in the proceeding;
- (i) the nature of the issues raised and the extent of their impact on the course of the trial or other proceeding;
- (j) any explanation advanced for failure to comply with these rules; and

(k) any other factors the judge considers relevant to his or her determination.

The *Advisory Committee Report* took the view that

The trial judge has an inherent discretion to decline to hear pre-trial applications where the applicant has not complied with the rules of court or where, on the basis of the material filed, the trial judge concludes that the application could not succeed. These aspects of the case management rules are not innovations created by the committee. That the discretion already exists is well established.<sup>13</sup>

The Committee would not deny the existence of the discretion to decline to hear an application. Indeed, its existence was confirmed in *Dwernychuk*.<sup>14</sup> Nonetheless, in the Committee's view, it is a discretion that should only rarely and reluctantly be exercised: constitutional rights should not be sacrificed on the altar of procedure. Hence, the Committee has not adopted the strict approach of the new Ontario rules.

[46] The Committee has not introduced an express proposal to allow for dismissal for failure to disclose a reasonable argument. In contrast, the new Ontario rules provide in Rule 34.02 that

The presiding judge may conduct a preliminary assessment of the merits of any pre-trial or other application on the basis of the materials filed, and, if satisfied that there is no reasonable prospect that the application could succeed, may dismiss the application without further hearing or inquiry.

The *Advisory Committee Report* commented that

While concerns were raised by the bar that this aspect of the rules would lead to increased litigation over whether the notice and material in support met the requirements of the rules and the threshold, the committee feels that, where the material filed is deficient, there will be little need for any argument regarding the content. If the material filed is so deficient that the trial judge cannot determine whether there is a reasonable prospect that the application could succeed, there is no need for lengthy submissions in court. The application should simply be dismissed by the trial judge under the new rules. All counsel will have adequate notice that if the written material filed fails to disclose the requisite bases upon which the relief sought could be granted, the application will not proceed.<sup>15</sup>

---

<sup>13</sup> *Ibid.*, at para. 311, footnote omitted.

<sup>14</sup> *R. v. Dwernychuk* (1992), 135 A.R. 31 (C.A.), McClung and Bracco J.J.A., McDonald J., leave to appeal to S.C.C. refused, [1993] 2 S.C.R. vii.

<sup>15</sup> *Advisory Committee Report*, *supra* note 1, at para. 276. The Ontario approach may reflect Justice Moldaver's position that the way to address the complexity and prolixity that bedevils criminal litigation is to wrest control of proceedings from litigants and return it to the judges: Moldaver, *supra* note 5, at 5-6, 8, 10.

The Committee had considered this type of provision, and did not consider it advisable. The Committee was swayed by arguments that failed to move the Advisory Committee: Such a provision could entail a focus on formalities, when substance should be considered; and could encourage procedural wrangling rather than argument on the merits. Under the Committee's proposals, the judge has full authority to address allegations that a notice is defective and to direct appropriate procedures in the circumstances.

#### **ISSUE No. 14**

##### **Should the rules regulate the conduct of *Charter* application hearings?**

[47] Committee Proposal: The "order of hearing" should not be governed by rules of court [*not modified*].

[48] No comments disputed this proposal. The new Ontario Rule 34.01 is in line with the Committee's proposal: "The presiding judge shall determine the order in which pre-trial and other applications shall be heard and the manner in which the evidence in support of any application shall be presented."

#### **ISSUE No. 15**

##### **Should the rules apply to self-represented accuseds?**

[49] Committee Proposal: The rules should apply to self-represented litigants [*not modified*].

[50] One comment suggested that self-represented litigants would not be aware of rules and would likely not abide by them. Rules, however, are more accessible than the decisions which currently partially govern *Charter* applications. Moreover, rules provide a public road map to which self-represented litigants may refer, and to which judges may refer self-represented litigants. The presence of rules may even assist judges in guiding self-represented litigants. In any event, judges have the authority to dispense with compliance with rules, if justice so requires.

## ISSUES ON WHICH THE COMMITTEE HAS OFFERED NO PROPOSALS

[51] Comments were received respecting the following issues:

- (i) Once the Crown receives a *Charter* notice, the Crown may disclose it to police or civilian witnesses. There is a danger that these witnesses will "tailor" their evidence based on the disclosure.
- (ii) Furthermore, disclosure of the notice will permit witnesses to have an opportunity to discuss their evidence before trial, undercutting the utility of witness exclusion orders at trial.
- (iii) *Charter* notices may contain information that is privileged – in particular, information that falls under "solicitor work product privilege". Restrictions may therefore be imposed on the Crown respecting disclosure of the notice: *R. v. Evenson (No. 2)*, 2006 ABPC 224, H.A. Lamoureux PCJ.
- (iv) If testimony at trial is different than the anticipated evidence set out in the notice, the judge's assessment of credibility may be affected; an adverse inference could be drawn.

[52] The Committee declines to comment on these issues. Section 482 of the *Criminal Code* contemplates rules respecting procedure only. The Committee is not mandated to embark on explorations of substantive law. Issues of privilege and restrictions on the disclosure of court records are outside the purview of procedural rules and the Committee's project. Moreover, in the Committee's estimation, rules could not be crafted with sufficient precision to deal with the wide variety of circumstances in which these issues could arise. The law respecting these issues should develop, as it has in the past, through judicial determinations based on particular facts.

[53] In any event, if a notice is succinct, and pleads facts and not evidence, most of the indicated practical problems should not arise.

[54] Finally, disclosure required for the tactical purpose of bringing an application is not constitutionally objectionable: *R. v. Underwood*, [1998] 1 S.C.R. 77, Lamer CJC, at para. 10; *R. v. Darrach*, [2000] 2 S.C.R. 443, Gonthier J., at para. 55.



Significant support and financial contributions  
to the Rules of Court Project were received from

**Alberta Justice**  
**Alberta Law Foundation**  
**Law Society of Alberta**



**Alberta Law Reform Institute**

402 Law Centre  
University of Alberta  
Edmonton, Alberta T6G 2H5  
reform@alri.ualberta.ca  
www.law.ualberta.ca/alri/  
t: (780) 492-5291  
f: (780) 492-1790