

PRACTICE DIRECTION – CHARTER APPLICATIONS (PC Rule 2)

Applicable Provincial Court Rule

Applications are governed by Rule 2 of the Provincial Court Rules. This Rule, and Rule 3 – Service of Documents, must be followed in preparing an application for *Charter* relief.

Guiding Principles

The leading authority on applications for *Charter* relief is *R. v. Kutynec, [1992] O.J. No. 347 (C.A.)*

Prior to hearing any application for *Charter* relief pursuant to sections 24(1) or 24(2), there must be sufficient written notice to the Crown and the Court hearing the application. Any co-accused must also be provided with notice.

Sufficient notice means:

- 1) The nature of the alleged *Charter* violation must be described and the sections of the *Charter* alleged to have been breached must be listed;
- 2) The evidentiary basis for the alleged *Charter* violation must be provided. The Defence must provide an outline of the facts grounding the application in sufficient detail to disclose a breach, allow a response to the allegations, and allow the Court to determine if it should hear evidence on the application. As *Kutynec* points out, if the Defence fails to advance a sufficient basis for the *Charter* application, the application may be dismissed without hearing evidence. (*Kutynec, paragraphs 21 and 22*)
- 3) The remedy being sought, including a list of any evidence which the Defence seeks to exclude.
- 4) A list of any cases to be relied on by Defence in support of the application.

Counsel should expect that once Notice is filed, the Court will hold a pre-trial conference to set dates for written submissions and discuss admissions, evidentiary burdens, form of evidence (affidavits, *viva voce* testimony), etc.

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At the pre-trial conference it will be determined whether the *Charter voir dire* will be heard as part of the trial or as a pre-trial matter.

Nothing in this Practice Direction shall be interpreted as derogating from the right of an accused to make an application at any point in the trial, but the failure to give timely notice for such an application may be taken into account by the trial judge in determining

- a) whether to hear the application forthwith or to adjourn the trial to hear it;
- b) and on what terms the judge will hear the application; or
- c) whether, without hearing the application, to dismiss it summarily.

Section 52 Charter Applications

Section 52 Charter applications require Notice under the relevant *Constitutional Questions Act* but otherwise will proceed as contemplated above for applications seeking section 24 *Charter* relief.

At the pre-trial to address a section 52 *Charter* application, the Court may determine that it will hear the constitutional challenge before proceeding to hear and determine the section 1, reasonable limits, aspect of the application.