Regulating Charter Applications 2000

Final Report and Recommendations of the Working Group Victoria, August 13- 17 2000

Background

In August of 1997, the Uniform Law Conference unanimously passed the following resolution:

"That a working group or committee be created to develop a proposal respecting a body of procedural law to govern the conduct of Charter applications."

A Discussion Paper was prepared and disseminated for comment at the Uniform Law Conference held in Halifax the following year. After a full discussion, the conference passed a second resolution in the following terms:

"That the issue of regulation of Charter applications be referred to a Working Group of the Criminal Law Section of the Uniform Law Conference to create rules governing such applications and to make any other recommendations it deems appropriate in consultation with the bar and judiciary."

A Working Group was appointed, consisting of the following individuals:

1. Bart Rosborough Q.C. (Alberta Justice) - Chair
2. Marvin Bloos (Alberta - Defence)
3. Susan Ficek (Ontario Ministry of the Attorney General)
4. Isabel Schurman (Quebec - Defence)
5. Gregory Fitch (B.C. Attorney General)
6. Lucie Joncas (Quebec - Defence)
7. Patricia Dunberry (Justice Canada)

The Working Group has met by conference call on several occasions and now presents this report and recommendations for consideration by the conference.

Jurisdictional Considerations

Section 482 of the Criminal Code permits courts[1] to create rules "not inconsistent with this Act or any other Act of Parliament" for the purposes described in subsection 482(3). Many jurisdictions have used this power to create Rules of Court but few have attempted to create a comprehensive regulatory framework designed to govern procedure in 'Charter' applications[2].

In addition to the court's own power to make Rules of Court, s.482(5) C.C. provides that:

"482 (5) Notwithstanding anything in this section, the Governor in Council may make such provision as he considers proper to secure uniformity in the rules of court in criminal matters, and all uniform rules made under the authority of this subsection prevail and have effect as if enacted by this Act."

The Uniform Law Conference's work in this area is timely. Very few courts have used their rule-making power to regulate procedure in 'Charter' applications. Because of this, a uniform body of rules would not have to supplant existing regulatory schemes which have been implemented and with which local jurisdictions have become

accustomed. The opportunity exists to achieve a level of uniformity in this aspect of criminal procedure.

The Need for Regulation

When the Canadian Charter of Rights and Freedoms became the supreme law of Canada on April 17th, 1982, it arrived in criminal courts unescorted by any procedural code designed to ensure the orderly litigation of issues it was certain to spawn. The judiciary was left to fashion procedural guidelines and rules of evidence to fit the constitutional context. This was no mean task and has resulted in considerable litigation over the first two decades of the Charter's existence. The fact that something as elemental as 'burden of proof' on an exclusion application took more than half a decade for definitive resolution exemplifies this dynamic.[3] There is little to suggest that litigation of procedural issues in the context of Charter applications is diminishing.

Apart from the prevalence of such litigation, the manner of its development in the context of criminal proceedings has been viewed as problematic. This, especially in areas where 'Charter' litigation is prevalent. First, procedure varies from province to province, notwithstanding the fact that the statute to which these procedural rules pertain is federal. The only time that national standards of procedure may be dictated is when a case ultimately wends its way to the Supreme Court of Canada. Second, since 'procedural law' in this area is largely jurisprudential, it is much more difficult to learn and keep abreast of. Those without legal training cannot be expected to know or observe rules of procedure to be found only in the judgments of a province's courts. Even the legal profession may experience difficulty keeping abreast of a mushrooming jurisprudence on procedure in Charter applications. Finally, the lack of guidance in the regulation of Charter applications has occasionally led to unfairness in the manner in which Charter applications have been litigated.[4] The importance of Charter litigation underscores the need to ensure that it is dealt with in an orderly,
well-understood and fair manner.

The inevitable product of this concern is confusion, frustration and delay. Courts are properly reluctant to summarily dismiss applications for declarations, exclusion or other remedies on the basis of technical or procedural irregularities. When they do not, however, it results in delays in the proceedings and inconvenience to witnesses, counsel and the court. It is the view of the Working Group that, in those jurisdictions where Rules of Court are enacted to govern 'Charter' applications, a standardized, publicized and procedurally efficacious method of dealing with Charter applications of all types can only enure to the benefit of the parties to a proceeding and the repute of the criminal justice system.

The Working Group took into account the view that regulation for the sake of regulation is undesirable. Nevertheless, the potential for error, inefficiency and frustration of the administration of criminal justice by the absence of formal guidance inclined the Working Group to accept that some form or regulation of procedure in Charter applications is required.

Calls For Reform

The need for a coherent body of rules governing Charter applications has not gone unnoticed by the judiciary. Many courts have voiced their concern over the lack of procedural guidance in this area. An early example of this is the comment of the late Mr. Justice John Sopinka who, almost a decade ago, stated:

"It would, therefore, be useful if the under-utilized power conferred by s.482 of the Criminal Code which empowers superior courts and courts of criminal jurisdiction to enact rules were employed to provide further details with respect to the procedural aspects of disclosure." [5]

This conference, too, has addressed the need for some level of uniformity in the regulation of Charter procedure.

Precedent

Ontario has led the way in providing regulatory guidance in this troubled area. Rules of Court governing 'Charter' applications have recently been enacted and are in force in that province's trial courts.[6] Assistant Chief Judge

Brian W. Lennox commented on the efficacy of these rules in the following terms:

"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. The authority to issue Practice Directions is now limited under the Rules to the Chief Judge or to a Regional Senior Judge.

The purpose of the enactment of Rules is found in Rule 1.04(1) and is stated as follows:

1.04(1)
These rules are intended to provide for the just determination of every criminal proceeding, and shall be liberally construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay."[7]

The Working Group has drawn heavily upon these rules in attempting to structure its own model rules. We are indebted to Ontario for its pioneering efforts in this area.

Rules or Legislation?

Regulation being desirable in this area, a variety of mechanisms are available for use in standardizing procedure in constitutional litigation. They range from the informal giving of advice to the passage of legislation. Flexibility in the application of those mechanisms generally decreases as one progresses from the former to the latter. Compliance is also a desirable feature of any form of regulatory scheme. It generally increases as one proceeds from the former to the latter.

Legislation has the advantage of actual and deemed knowledge by all those affected. It is characteristically mandatory in operation. Its disadvantages include delays attendant upon the legislative process and by the notion of policy being dictated by bodies or agencies unfamiliar or unaffected by the legislation itself. Once enacted, it is also difficult to change.

Rules of Court have the advantages of being well-known by members of the legal community, of being generated by those with the largest stake in their application and of being susceptible to change much more readily than legislated rules. The Working Group considers that Rules of Court are the most appropriate mechanism for governing procedure in Charter applications.

Rules for Which Courts?

In its initial discussions, the Working Group considered that separate rules ought to be developed for each level of court and for hearings before, during and after the trial or appeal.[8] However, it soon became apparent that the basic concepts underlying the Charter motion were virtually identical for each level of court. Both trial and appeal courts have 'motion days' during which they hear interlocutory applications of some form or another. It is in this context that the Charter application will be brought.
Accordingly, we have structured a single set of Rules designed to regulate Charter applications in 'motion courts' or in motions before trial courts.

Having done so, we recognize that there will be some differences in procedure which may require that the rules be modified. The 'model rules' to follow can be supplemented by additional rules designed to accommodate the needs of particular courts or proceedings.

Application of Rules

"Application of Rules

1. These Rules apply to applications in criminal or quasi-criminal proceedings

a. to declare unconstitutional or of no force or effect, in whole or in part, any enactment or regulation of the Parliament of Canada or of the legislature of any Province;

b. to suspend or declare inapplicable any part of any such enactment or regulation for any purpose or in relation to any person(s) as a result of a conflict with the constitution of Canada;

c. to declare unconstitutional and of no force or effect, in whole or in part, any rule or principle of law applicable to criminal or quasi-criminal proceedings, whether on account of the Criminal Code, ss.8(2) or (3) or otherwise;

d. to suspend or declare inapplicable any rule or principle of law applicable to criminal or quasi-criminal proceedings for any purpose or in relation to any person(s) as a result of a conflict with the constitution of Canada;

e. for any relief or remedy pursuant to the constitution of Canada, including, but not limited to any relief or remedy pursuant to the Canadian Charter of Rights and Freedoms, s.24."

The Rules commence with a direction as to their applicability. They are designed to regulate two basic types of constitutional applications: (1) applications to declare legislative instruments or principles of common law unconstitutional; (2) applications for remedies, including exclusion of evidence. Reference to laws of a provincial legislature is included as these can be (and have been) struck down during the course of criminal litigation.

Specific reference is made in this section to the notion of 'constitutional exemption'. Where an individual or group seeks exemption from a law or laws by operation of a constitutional provision, the model Rules must be followed. Exemption from the law is an important declaration. Procedural regularity in the process of so doing is appropriate.

The Rules are extended to 'quasi-criminal' proceedings as these may often overlap with criminal proceedings. The limitation of these Rules is that they apply to 'prosecutions'. The distinction between quasi-criminal and criminal in light of this is somewhat artificial.

Jurisdiction

"Jurisdiction
2. Any application made pursuant to these Rules shall be brought before a Court of competent jurisdiction. That Court must have jurisdiction both to hear the application and to grant the relief sought."

The Working Group gave consideration to delineating which Court was competent to grant a particular remedy. This component of the Rules could also specify how an individual could achieve standing before the Court to make or otherwise appear on an application. However, it was our view that the requirement of notice[9], both to the Court and to other interested parties would achieve this end without complicating the Rules with considerable additional detail. Application before a Court which was not competent could be struck upon application of a notified party or, indeed, by the Registrar her/himself.

Notice

"Notice

3. Any application made pursuant to these Rules shall be initiated by the filing and service of a Notice of Application. That notice shall state:

a. the source of the Court's jurisdiction to hear the application and to grant the relief sought;

b. the date, time and place of the application;

c. the grounds to be relied upon in support of the application. This must include a concise statement of the application(s) to be raised, a statement of the constitutional principles to be argued and, where applicable, reference to any constitutional, statutory or regulatory provision to be relied upon;

d. the relief or remedies sought;

e. the amount of time required by the applicant to make the application; and

f. whether an order is required abridging or extending the time for service or filing of the Notice of Application or supporting materials."

Requirements of notice in constitutional litigation have become commonplace. In the context of challenges to the constitutionality of legislation, most jurisdictions have actually legislated a requirement of notice.[10] Some jurisdictions have expanded that requirement to include, "... reasonable particulars of the proposed argument."[11] These provisions have been styled 'jurisdictional conditions precedent' to the bringing of Charter applications in this context.[12]

Until comparatively recently, however, there had been no associated provisions governing 'remedy' or 'exclusion' applications. Early cases called into question the propriety of 'surprise' or 'impromptu' Charter arguments.[13] This led to pronouncements in several provincial Courts of Appeal supporting the general proposition that exclusion and remedy applications should be preceded by timely and proper notice to the Court and prosecution.[14] This precise issue has yet to be definitively resolved by the Supreme Court of Canada and the precise contours of any notice are unclear. Nevertheless, notice has now become common in constitutional litigation.[15]

Jurisprudence on notice appears to support the following propositions:

1. Where possible, the applicant should give 'pre-trial' notice of an intention to attack the validity of legislation, apply for a remedy, or seek the exclusion of evidence. A requirement of 'reasonable' notice appears to be the threshold. Precise notice periods have not been set, however.[16] At least one court has directed that, in superior court, notice must be in writing.[17]

2. The applicant should provide particulars of the grounds upon which(s)he is relying to make the application.[18]

3. The evidence sought to be relied upon in making the application should be summarized.[19]

4. And, implicit in the foregoing, is the common sense requirement that there be some indication of the nature of the remedy sought.

The Working Group was of the view that a standardized form for Charter motions was a desirable feature whenever written notice was given. The general rule is that the motion should be in writing and contain sufficient information to permit the Court and counsel the opportunity to effectively prepare for or respond to that motion. To assist with format, the Rules could provide a standard form which can be completed to suit the circumstances of specific applications.

The Working Group considered that this general rule must yield to three important exceptions. First, where the applicant is not represented by counsel, the requirement of writing could be waived. Second, the Court must always retain a residual discretion to waive the requirement of written notice where it is in the interests of justice to do so. And finally, special accomodation must be made for what is likely the most common Charter remedy, exclusion of evidence. While it could be argued that the Court could accommodate these circumstances without express regulatory sanction, the Working Group was of the view that explicit reference should be made to them. The exceptions are accommodated within the Rules as follows:

4. "Notwithstanding any other Rule, an application for relief or a remedy pursuant to the Canadian Charter of Rights and Freedoms, s.24(1) may be brought without filing and service of a Notice of Application in any case where the applicant is not represented by counsel or it is otherwise in the interests of justice for the Court to waive those requirements.

5. Notwithstanding any other Rule, an application for the exclusion of evidence pursuant to the Canadian Charter of Rights and Freedoms, s.24(2) may be brought without the filing and service of a Notice of Application. Where the applicant is represented by counsel, (s)he shall take reasonable steps to notify the respondent of the information otherwise contained in a Notice of Application. The Court may, at any stage in the proceedings, waive the requirement of any form of notice of an application to exclude evidence where it is in the interests of justice to do so."

Having accommodated the peculiar needs of the unrepresented accused and the 'exclusion' application, it is important to ensure that the interests protected by a 'notice' provision are otherwise respected. It is vital that both the Court and the respondent(s) or intervener(s) have adequate opportunity to meet the allegations of constitutional wrongdoing made by the applicant. The Rules address this as follows:

"6. Where the Court waives the requirement of filing and service of a Notice of Application or the giving of reasonable notice of an application to exclude evidence, it shall adjourn the proceedings and take such steps as are necessary to ensure that the information otherwise contained in a Notice of Application is entered in the record of proceedings and delivered to the respondent(s). The Court shall thereafter afford the respondent a reasonable opportunity to respond to the application.

7. The Court need not adjourn the proceedings where it elects to dismiss the application without hearing from the respondent. The respondent(s) may waive the necessity of any adjournment referred to in Rule 6."

It should be stressed that the efficacy of proper notice continues beyond the trial or motion forum at first instance. Appeal Courts require this same information in order to properly review the rulings made at first instance. Accordingly, it is important to ensure that the record is perfected.

Notice Period

"Filing and Service of Notice of Application

8. A Notice of Application in Form A shall be filed with the Court and served in accordance with Rules 9 to 12 inclusive not less than 30 days before the date fixed for hearing or, where the application is to be brought at a proceeding expected to last more than one day, not less than 30 days before the date fixed for the commencement of the proceeding.

9. A Notice of Application seeking the relief referred to in Rule 1(a) to (d) shall be served in accordance with Rule 8 on the Attorney General of [the Province], the Attorney General of Canada and such other person(s) or bodies and upon such terms as the Court may direct.

10. A Notice of Application seeking the relief referred to in Rule 1(e) shall be served in accordance with Rule 8 on the office of the prosecutor having carriage of the proceedings and such other person(s) or bodies and upon such terms as the Court may direct.

11. Where there is uncertainty whether anyone should be served with the Notice of Application, the applicant may make a motion for directions, without notice, to a judge of the Court hearing the application.

Applications for relief based upon accusations of constitutional wrongdoing are serious matters. Not only is any finding in this regard of significance but the remedies themselves may be important. In some cases, there can be an extensive evidentiary component.[20] As a result, it is important to plan for each step in the application. At the same time, these matters, being motions, should be heard expeditiously.

The Working Group attempted to balance these interests when setting a notice period. Statutory and judicial pronouncements on point were reviewed. These vary from 30 day periods to 14 day periods to 'reasonable notice'. The Working Group considered 30 days notice to be a presumptively appropriate period of time within which to notify the Court, parties and interveners of an impending Charter application. This is long enough to ensure that intermediate steps (such as notification of other parties, gathering evidence, etc.) is accomplished but will not unduly delay the hearing. A single notice period was specified for the sake of simplicity and consistency. And finally, in order to avoid any hardship which may be brought about by the length of the notice period, Rule 36 was added to permit the Court to abridge the length of time. Rule 3(f) contemplates requests for such an order.

Memorandum of Argument

"Materials in Support of Application
12. A Memorandum of Applicant in Form B shall be filed with the Court and served on any person or body served with a Notice of Application not less than 21 days before the date fixed for hearing or, where the application is to be brought at a proceeding expected to last more than one day, not less than 21 days before the date fixed for the commencement of the proceeding.

13. A Memorandum of Applicant filed in accordance with Rule 13 shall contain:

a. a copy of the information or indictment (if any) to which the application relates;

b. a transcript of any earlier proceedings which are material to a determination of the application;

c. where necessary to complete the record, an affidavit by or on behalf of the applicant deposing to the matters referred to in Rule 3;

d. a copy of any other material in the Court file that is necessary for the hearing and determination of the application;

e. the documentary, affidavit or other evidence to be adduced at the hearing of the application;

f. the intended argument of the applicant;

g. copies of any authorities to be relied upon by the applicant.

14. The affidavit by or on behalf of the applicant referred to in Rule 13 shall include:

a. a description of the affiant's status and the basis of his or her knowledge of the matters deposed;

b. a statement of the facts material to a just determination of the application which are not disclosed in any other materials filed in support of the application."

Most of the materials referred to in Rules 13 and 14 typically escort a properly constituted Charter application brought at the present time. Some of those materials will be unnecessary (e.g. a transcript, where there have been no previous proceedings). Nevertheless, this Rule may serve as a checklist of materials which, if they are to be

relied upon, will be required to be included in the Memorandum of Applicant.

There is no requirement of affidavit evidence from the applicant. In R. v. Kutynec, op cit, the Ontario Court of Appeal felt it inappropriate to mandate the filing of an affidavit in every case. Nevertheless, where the applicant seeks to rely upon facts not in evidence before the Court or not admitted by the respondent, it is essential to ensure that the evidence is submitted in an appropriate form. The Memorandum of Applicant must be filed 21 days before the hearing. This should provide ample opportunity for cross-examination upon any affidavit evidence.

As with the exceptions recognized for Notices of Application, the requirement of a Memorandum of Applicant can be waived for the unrepresented applicant or where it is otherwise in the interests of justice to do so. Analogous provision is made in Rule 15 to ensure that what would otherwise be required in a Memorandum of Applicant ultimately forms part of the Court record.

15. "Notwithstanding Rule 13, an application for a remedy pursuant to the Canadian Charter of Rights and Freedoms, s.24(1) may be brought without filing and service of a Memorandum of Applicant in any case where the applicant is not represented by counsel or it is otherwise in the interests of justice for the Court to waive those requirements.

16. Where the Court waives the requirement of filing and service of a Memorandum of Applicant, it shall adjourn the proceedings and take such steps as are necessary to ensure that the information otherwise contained in a Memorandum of Applicant is entered in the record of proceedings and delivered to the respondent(s). The Court shall thereafter afford the respondent a reasonable opportunity to respond to the application.

17. The Court need not adjourn the proceedings where it elects to dismiss the application without hearing from the respondent. The respondent(s) may waive the necessity of any adjournment referred to in Rule 16"

Response to the Application

"Response to Application
18. A Memorandum of Respondent in Form C shall be filed with the Court and served on the applicant not less than 14 days before the date fixed for hearing or, where the application is to be brought at a proceeding expected to last more than one day, not less than 14 days before the date fixed for the commencement of the proceeding.

19. A Memorandum of Respondent filed in accordance with Rule 18, Form C shall contain:

a. any material to be relied upon by the respondent in support of a submission that the Canadian Charter of Rights and Freedoms, s.1, applies to the application or an issue arising in the application;

b. any material or evidence, including any affidavit(s) or other materials not included in the Notice of Application or Memorandum of Applicant which the respondent intends to rely upon in response to the application;

c. the argument of the respondent;

d. copies of any authorities to be relied upon by the respondent.

20. Notwithstanding any other Rule, where a respondent elects to consent to the granting of any relief or remedy, (s)he shall notify the applicant and Court in writing of the basis upon which the concession is made, the precise relief or remedy consented to."

Once the respondent is notified of the 'case to meet', an obligation arises for her/him to make out a full response. Where application is made to have legislation declared inoperative, the respondent may elect to marshall 'Section 1' evidence in support of the constitutionality of the impugned provision. These rules would require the

respondent to notify the applicant of those provisions and provide copies.

The Court, too, is in a much more advantageous position once both parties to the litigation have joined issue, submitted their evidence and made argument on the constitutional issue. Focussed attention can be given to the precise issue with full knowledge of the factual substratum and the legal argument on point. One cannot underestimate the administrative and adjudicative advantages of having issues of this import perfected in an orderly and complete fashion.

The Working Group considered the possibility that the requirement of a Memorandum of Argument may unduly tax the resources of Crown Counsel. However, there is nothing requiring the Memorandum of Argument to be unduly lengthy or complex. Indeed, in the case of a conceded argument, this may be done by a simple notice in writing (e.g. a letter).

Interveners

Interveners

21. Any person or body interested in an application authorized by these rules may apply to intervene in that application.

22. An Application to Intervene in Form D shall be filed with the Court and served on the applicant and respondent(s) not less than 21 days before the date fixed for hearing or, where the application is to be brought at a proceeding expected to last more than one day, not less than 21 days before the date fixed for the commencement of the proceeding.

23. An Application to Intervene filed in accordance with Rule 19 shall include:

a. a brief statement identifying the intervener and who (s)he represents;

b. a statement of the intervener's interest in the application(s) to be heard and determined on the application;

c. the unique position or perspective the intervener proposes bringing to the argument of the application;

d. the position of the intervener (if any) on the remedies sought;

e. copies of any supporting evidence, document, material or authorities to be relied upon by the intervener on the hearing of the application;

f. the amount of time required by the intervener to address its submissions at the hearing of the application.

24. The applicant and respondent(s) may file submissions in support of or in opposition to any application to Intervene.

25. A Response to the Application to Intervene in Form E may be filed with the Court and served on the intervener not less than 14 days before the date fixed for hearing or, where the application is to be brought at a proceeding expected to last more than one day, not less than 14 days before the date fixed for the commencement of the proceeding.

26. The Court shall determine whether to permit a person or body to intervene on the hearing of an application not less than 7 days before the date fixed for hearing or, where the application is to be brought at a proceeding expected to last more than one day, not less than 7 days before the date fixed for the commencement of the proceeding. The applicant, respondent(s) and intervener shall be notified of that determination and any terms imposed by the Court according to which the intervener shall proceed at the hearing of the application."

In the vast majority of cases, there will be no desire or need to permit intervention. Nevertheless, trial courts are competent to make declarations of invalidity and their adjudication upon the worth of a legislative provision may be guided by input from other relevant organizations or bodies. In the event that intervention is sought, these Rules provide a principled basis upon which that intervention can be accommodated.

The Working Group considered the tight timelines associated with intervention. Nevertheless, it must be observed that the litigation in question is a 'motion' and there is an obvious need for that motion to be heard and determined expeditiously. Moreover, those bodies with the most direct and immediate interest in the litigation (prosecution and accused) must have an adequate opportunity to respond to any arguments raised by an intervener in this forum. Finally, Rule 31 permits time extensions where it is in the interests of justice to permit them.

Argument

The rules regarding the content of the 'argument' portion of Charter applications is delineated in Rules 27 and 28. They replicate provisions which apply to factums filed in Courts of Appeal or the Supreme Court of Canada. Strict limits are imposed on the length of an argument, recognizing the summary nature of most applications. Rule 32 permits adjustment of that length where it is in the interests of justice to do so.

"Argument
27. The argument portion of any written submission shall contain:

a. In Part 1, a concise summary of the facts material to the application;

b. In Part 2, a description of the issues raised by the application;

c. In Part 3, the intended argument to be raised in support of or in opposition to the application; and

d. In Part 4, the remedy or relief sought.

28. The argument of the applicant and respondent shall not exceed 10 pages in length. The argument of an intervener shall not exceed 5 pages in length."

Abandonment of Application

"Hearing / Termination of Proceedings
29. A Notice of Abandonment in Form F may be filed at any time before the hearing of an application. The application shall be deemed to have been dismissed where a Notice of Abandonment has been filed.

30. A Court may reinstate an application dismissed for want of prosecution on such terms as are appropriate in the circumstances."

For any one of a number of reasons, it may be deemed advisable by the Applicant to abandon a Charter application. This provides a mechanism for so doing. Recognizing the potential for the application of the doctrine of res judicata in these circumstances, an abandoned application is deemed to have been dismissed in these circumstances.[21]

Abridgment of Rules

"Abridgment of Rules
31. The Court may at any time extend or abridge the times specified by these Rules for taking any step specified herein where it is in the interests of justice to do so.

32. The Court may at any time permit extensions to the length of the 'argument' portion of a Memorandum otherwise prepared in accordance with these Rules where it is in the interests of justice to do so."

33. The Court or a judge hearing an application governed by these Rules may give all directions respecting the conduct of the application that the Court or Judge considers necessary in the interests of justice."

Any Rules developed to promote the orderly litigation of Charter applications must balance the need for regularity with the overarching need for fairness. As has already been noted, these Rules make special provision for the unrepresented accused and provide the Court with jurisdiction to make accommodation where the interests of justice so require. Rules 32 and 33 merely reinforce the notion that the Rules seek to promote procedural regularity but not at the expense of fairness.

Forms

While the Working Group believes that Forms should be provided for use in making Charter applications, model forms are not incorporated into these rules. They can be easily fashioned by each jurisdiction in a manner consistent with forms already being utilized for analogous motions.

Recommendations

The Working Group has been requested to, " ... make any other recommendations it deems appropriate in consultation with the bar and judiciary." These Rules have been fashioned by the Working Group after consultation with selected representatives from several provinces. They do not represent the consensus following a broad-ranging consultation process. As a result, we do not recommend that the Rules be 'imposed' upon any jurisdiction in Canada pursuant to the power vested in the Governor in Council under s.482(5) C.C. Nevertheless, we put forward these Rules as a model for all jurisdictions to follow for the orderly litigation of constitutional matters. In accordance with that sentiment, the Working Group makes the following recommendations:

1. The Working Group recommends that the Uniform Law Conference ratify and endorse the Rules of Court Governing the Conduct of Applications in Constitutional Matters as a model set of rules.

2. The Working Group recommends that a copy of this Report be forwarded to the Chief Judges and Chief Justices of each criminal court in Canada and to Federal and Provincial Judicial Councils for their consideration as a means of promoting the orderly litigation of Charter applications.

3. The Working Group recommends that a copy of this Report be forwarded to the Minister of Justice and Attorney General of each province and territory and the Attorney General of Canada for their consideration on the question of whether a wide-ranging consultation with interested groups, including members of the bar, should be conducted with a view to enacting national Rules of Court Governing the Conduct of Applications in Constitutional Matters.

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Bart Rosborough Q.C. Chair Isabel J. Schurman

Patricia Dunberry | Susan Ficek

Gregory Fitch | Lucie Joncas

FOOTNOTES

[1] Provincially-constituted courts, provincial superior courts and provincial courts of appeal all enjoy this rule-making power subject to the general limitation mandating consistency with existing statutory provisions.

[2] A notable exception is the province of Ontario which has detailed Rules of Court for both its provincial superior court and the Ontario Court of Justice (Provincial Division).

[3] Collins v. The Queen (1987), 33 C.C.C. (3d) 1 (S.C.C.). While Collins set the cornerstone for procedure in the exclusion application, the subject of 'burden of proof' is far from settled. Reversals of that burden have been, and continue to be established in the jurisprudence. See, for eg. Hunter v. Southam, et al (1984), 14 C.C.C.(3d) 97 (S.C.C.); R. v. Clarkson (1986), 25 C.C.C. (3d) 207 (S.C.C.); R. v. Oakes (1986), 24 C.C.C. (3d) 321 (S.C.C.); R. v. Baig (1987), 37 C.C.C. (3d) 181 (S.C.C.); R. v. Prosper (1994), 92 C.C.C. (3d) 353 (S.C.C.), R. v. Bartle (1994), 92 C.C.C. (3d) 289 (S.C.C.); R. v. S.(R.J.) (1995), 96 C.C.C. (3d) 1 (S.C.C.); R. v. Burlingham (1995), 97 C.C.C. (3d) 385 (S.C.C.) and, generally, Sopinka, Lederman and Bryant The Law of Evidence in Canada, Butterworths Canada Ltd. 1992, at p.211.

[4] See, for e.g.: R. v. Lee (1987), 37 C.C.C. (3d) 407 (B.C.S.C.), per Southin J. (as she then was) at p.415

[5] R. v. Stinchcombe (1991), 68 C.C.C. (3d) 1 (S.C.C.), at p.6.

[6] Rules of the Ontario Court of Justice in Criminal Proceedings, O.C. 2020/97 (SI97/133).

[7] These comments appear in the Foreword to the Annotated Rules of the Ontario Court of Justice in Criminal Proceedings 1999, Rick Libman, Carswell, 1999.

[8] See: Interim Report of the Working Group on Regulating Charter Applications, August 1999.

[9] And, in particular, Rule 3(a).

[10] See, for example, the Judicature Act, R.S.A.1980, c.J-1, s.25(1)

[11] Ibid, s.25(2.1).

[12] M.(R.E.D.) v. The Director of Child Welfare, [1988] 6 W.W.R. 661 (Alta.C.A.).

[13] R. v. Lee, op cit, fn.4.

[14] R. v. O'Connor (1995), 103 C.C.C. (3d) 1 (S.C.C.); R. v. Kutynec, op cit, fn.31; R. v. Loveman (1992), 71 C.C.C. (3d) 123 (Ont.C.A.); R. v. Franklin (1991), 66 C.C.C. (3d) 114 (Ont.C.A.); R. v. Chamberlain (1994), 30 C.R. (4th) 275 (Ont.C.A.); R. v. Dwernychuk, (1992) 77 C.C.C. (3d) 385 (Alta.C.A.), leave denied (1993) 46 W.A.C. 317 (S.C.C.); R. v. Holt (1991), 117 A.R. 218 (C.A.); R. v. Yorke (1992), 77 C.C.C. (3d) 529 (N.S.C.A.), aff'd. (1993), 84 C.C.C. (3d) 286n (S.C.C.); R. v. Firth (1991), 70 C.C.C. (3d) 376 (N.S.C.A.); R. v. Howell (1995), 103 C.C.C. (3d) 302 (N.S.C.A.); R. v. Daigle (1994), 80 W.A.C. 257 (B.C.C.A.); R. v. Feldman (1994), 91 C.C.C. (3d) 256 (B.C.C.A.), aff'd in the result (1994), 93 C.C.C. (3D) 576n (S.C.C.); R. v. Pelletier (1995), 97 C.C.C. (3d) 139 (Sask.C.A.).

[15] In Alberta, the Constitutional Notice Regulation, Alta.O/C 182/99, filed April 28, 1999, requires written notice of applications pursuant to the Charter, s.24. It came into force September 1, 1999.

[16] R. v. Holt, op cit, fn.15.

[17] R.v. Dwernychuk, op cit, fn.15.

[18] R. v. Feldman, op cit, fn.15.

[19] Ibid.; R. v. Kutynec (1992), 70 C.C.C. (3d) 289 (Ont.C.A.)

[20] See, for e.g. R. v. Mills [1999}, 139 C.C.C. (3d) 321; 44 W.C.B. (2d) 124 (S.C.C.) where there was extensive evidence adduced in support of the constitutionality of ss.278.1 to 278.91 C.C.

[21] See: R. v. Robinson, [2000] A.W.L.D. 72 (C.A.) (December 22, 1999); overruling [1999] A.W.L.D. 365 (Alta.Q.B.) (August 18, 1997) in this regard. "