Best practices in Charter motions
Mr. Justice Cullen

BC Civil Liberties Association Seminar, December 11, 2010

These notes are based on a paper entitled the "Role of the Trial Judge in Managing Criminal Trials" prepared by Jill Leacock, Law Officer, and Gavin Cameron, law clerk in May 2010

I have been asked to speak to you today about best practices from the judicial perspective, in bringing Charter applications. Before I talk about Charter applications specifically, I want to begin by making some preliminary observations to set the larger context.

1. Criminal trials have become lengthier and more complex

In the last 20 years, criminal trials have gradually become lengthier and more complex than trials of the past. This is something that both bench and bar must be concerned about and come to grips with because of the implications it has for public confidence in the criminal justice system.

Mr. Justice Moldaver of the Ontario Court of Appeal has observed on a number of occasions that the criminal justice system is at a crossroads where urgent measures are required to address the increasing length and complexity of criminal trials. In a speech he gave in 2005, he said this:

> "Criminal trials are spinning out of control. More and more, they seem to go on endlessly, often for months and sometimes years at a time. ...Long criminal trials are a cancer on our criminal justice system and they pose a threat to its very existence. ... if the criminal justice system does not enjoy the support and respect of those who it is meant to serve; if criminal trials are seen by the public as little more than interminable games; if the public comes to view the system with disdain and contempt, then the system will have lost its reason for being."[1]

2. Pre-trial applications are a significant contributor to lengthening of trials

Five years ago, the problems associated with long, complex criminal trials in the Ontario Superior Court became so acute that an Advisory Committee co-chaired by Justices David Watt and Bruce Durno was formed and given a mandate to make

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[1] The Hon. J. Michael J. Moldaver, "Long Criminal Trials: Masters of a System They are Meant to Serve", (2005) 32 C.R. (6th) 316.

recommendations for shortening and focusing trials. Based on the conclusions and recommendations of the Ontario Report, new criminal case management rules were adopted in that court in October, 2006.

The Ontario Report concluded that pre-trial Charter applications are the most significant contributor to the lengthening of trials and are the greatest reason why trials last longer than anticipated.[2] Likely the same conclusion could be made about pre-trial applications in our Court.

3. Judges have both the power and the duty to manage criminal trials

The third general observation I would make is that judges have not only the power but the duty to control the course of proceedings before them. Judges must take an active role in managing criminal trials. As Rothstein J. put it in *R. v. Cunningham*, judges have authority to "ensure the machinery of the court functions in an orderly and effective manner." [3]

Against these general observations as to context, let me turn to Charter applications specifically.

BEST PRACTICES ON CHARTER APPLICATIONS

I have been asked to comment on best practices when it comes to Charter applications: what are the legal requirements of Charter applications and what does it take to ensure they proceed efficiently?

1. Notice requirements on Charter applications

The *Criminal Rules* do not include any specific notice requirements for Charter applications. Therefore, as Romilly J. observed in *R. v. Russell*,[4] the sufficiency of

[2] "New Approaches to Criminal Trials: The Report of the Chief Justice's Advisory Committee on Criminal Trials in the Superior Court of Justice", May 2006, [the "*Ontario Report*"].¶307.
[3] *R. v. Cunningham*, 2010 SCC 10.
[4] *R. v. Russell*, [1999] B.C.J. No. 2245, 44 W.C.B. (2d) 87 (S.C.)

notice for pre-trial Charter applications in this jurisdiction must be determined by the common law.

a) Sufficiency of Notice

In *R. v. Dwernychuk*,[5] the Alberta Court of Appeal held that where the defence intends to raise a *Charter* issue and seek the exclusion of evidence, it must provide reasonable notice of this intention to the Crown and the judge. Advance notice enables Crown counsel to marshal the relevant evidence and put it before the court in an orderly way. Advance notice to the court:

> ... enables the judge... 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 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 question of witnesses...Fair and reasonable notice to the Crown and to the court will better enable the judge to carry out his constitutional duty, mandated by s. 24(2), to have regard to "all the circumstances" when he or she decides whether the admission of the evidence would bring the administration of justice into disrepute.[6]

In *R. v. Francey*, Duncan J. of the Ontario Court of Justice stated that "boiler-plate" notice is unacceptable as it must be "real and meaningful", and sufficiently detailed to alert the responding party and the court to the issues involved.[7] Duncan J. stated:

> A generic and unsupported *Charter* application causes prejudice to the administration of justice, the Court and the parties. From the standpoint of the administration of justice, the Notice and related requirements are intended to facilitate case administration and resolution, time allotment and scheduling. Generic material not only fails to serve these ends but hinders their achievement. The Crown is prejudiced by not knowing what to respond to and by wasted time and effort in responded to allegations that have no substance. Similarly, the Court wastes time reading meaningless material and is deprived of the advantages to decision making that proper Notice might provide.[8]

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[5] *R. v. Dwernychuk* (1992), 135 A.R. 31, 77 C.C.C. (3d) 385 (C.A.), leave to appeal ref'd [1993] 2 S.C.R. vii
[6] *Ibid.* at 392-93.
[7] *R. v. Francey* (2002), 30 M.V.R. (4th) 95 ¶7, 6 C.R. (6th) 386 (Ont. C.J.)
[8] *Ibid.*

b) Consequences when notice is inadequate

When inadequate notice of an application is given, the trial judge has to decide whether or not to hear the application.

In *R. v. Tash*, Mr. Justice Hill of the Ontario Superior Court of Justice summarized the principles which guide the Court in determining whether a Charter application ought to be entertained notwithstanding non-compliance with notice requirements.[9]

i. Trial judge must consider prejudice to opposing party

The trial judge will consider whether the opposite party is unfairly prejudiced by late notice of an application. In *R. v. Blom,* Sharpe J.A. stated:

> Where a party complains of inadequate notice, it is crucial for the trial judge to consider the issue of prejudice: does the failure to provide adequate notice put the opposite party at some unfair disadvantage in meeting the case that is being presented? If there is no real prejudice, inadequate notice should not prevent consideration of the *Charter* application. If the inadequate notice does put the opposing party at a disadvantage, the court must consider whether something less drastic than refusing to consider the *Charter* argument, but still consistent with the goal of achieving "fairness in administration and the elimination of unjustifiable expense and delay", can be done to alleviate that prejudice. If so, that course should be followed in preference to an order refusing to entertain the *Charter* application.[10]

ii. Trial judge will balance competing interests

When faced with an application in respect of which no notice or insufficient notice has been given, the trial judge must balance the rights of the accused with fairness to the Crown. In *R. v. Loveman*, Finlayson JA observed:

> In deciding how to proceed when faced with the Crown's objection, the trial judge had to balance various interests. He had to bear in mind an accused's right to raise constitutional objections to the admissibility of evidence and the Crown's right to have an adequate opportunity to meet *Charter* arguments made on behalf of an accused. In addition, the trial judge had to be

[9] *R. v. Tash* (2008), 166 C.L.R. (2d) 358 ¶15, 77 W.C.B. (2d) 113. Rosenberg J.A. noted that Mr. Justice Hill's reasons contain "an excellent review of the factors to be considered" on this point: *R. v. Gundy*, 2008 ONCA 284 ¶24, 231 C.C.C. (3d) 26 [*Gundy*].
[10] *R. v. Blom* (2002), 61 O.R. (3d) 51 ¶23, 167 C.C.C. (3d) 332 (C.A.)

> concerned with the effective use of court resources and the expeditious determination of criminal matters.[11]

iii. Trial judge will canvass alternatives to accommodate *Charter* rights

The trial judge will also canvass whether there are other remedies, short of declining to entertain the application in its entirety. In *Loveman*, Finlayson JA observed:

> In my opinion, the trial judge did not properly balance the various interests. His ruling sacrificed entirely the appellant's right to advance a *Charter* –based argument. The other interests engaged did not require the order made by the trial judge. As Crown counsel suggested, there were other alternatives. The trial judge could have heard the entire case except the Crown's legal argument in reply to the *Charter* argument, and then, if necessary (and it may well not have been necessary), allowed Crown counsel a brief adjournment to prepare his response to the legal issues flowing from the *Charter* argument. This procedure would have better served the interests of the effective administration of justice by allowing the appellant to make his *Charter* argument while at the same time allowing the Crown to make an effective response to that argument.[12]

iv. Trial judge may decline to hear pre-trial application

In some cases where inadequate or no notice of a pre-trial application has been given, the trial judge may properly decline to hear the application. For example, in *R. v. Gundy*, the Ontario Court of Appeal held that the trial judge should not have allowed a Charter application challenging the admissibility of breath samples so late in the day. Rosenberg J.A. stated:

> In my view, the trial judge erred in permitting the defence to challenge the admissibility of the certificate and the results of the Intoxilizer test at the completion of the trial. Allowing the argument at that stage did not serve the interests of justice. I do not agree that the Crown was not prejudiced by the manner in which the challenge to the evidence unfolded. Had timely objection been taken, Crown counsel would have had the option of calling additional evidence. A month later, the case was closed and presumably the witnesses were gone. As it turned out, the trial judge dismissed the objection, but the Crown could have been unfairly prejudiced because of the defence's failure to make a timely objection. These observations do not relate solely to the *Charter* issue but apply to all of the other objections to the admissibility of the Intoxilizer results that were taken by counsel for the first time at the end of the case.[13]

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[11] *Ibid.* ¶16.
[12] *Loveman, supra* note 23 ¶19.
[13] *R. v. Gundy*, 2008 ONCA 284 ¶24, 231 C.C.C. (3d) 26, ¶23.

2. Applications must meet merits threshold

Applications must meet a merits threshold. A number of provincial appellate courts, including our own Court of Appeal in *R. v. Vukelich*,[14] have lamented that too much judicial time is lost dealing with unmeritorious pre-trial applications.

In *Lising*, the Supreme Court of Canada affirmed a judge's power to decline to hear pre-trial applications that fall short of a merits threshold:

> The concern over the constructive use of judicial resources is as equally, if not more, applicable today as it was 15 years ago when *Garofoli* was decided. For our justice system to operate, trial judges must have some ability to control the course of proceedings before them. One such mechanism is the power to decline to embark upon an evidentiary hearing at the request of one counsel when that party is unable to show a reasonable likelihood that the hearing can assist in determining the issues before the court.[15]

In *R. v. Sandham*, Heeney J. declined to entertain a *Charter* application where an insufficient basis for the violation of the accused's rights had been established. The Court noted that pre-trial applications should not be "fishing expeditions", with counsel seeking to find a *Charter* violation. Neither should they become "try-out camps" or "examinations for discovery" for witnesses' evidence at trial."[16]

3. Materials in support of pre-trial applications

A number of cases have considered the procedure to be followed by trial judges in deciding whether or not to embark on a *voir dire.*

a) <u>*Determining need for voir dire on statements of counsel*</u>

In *Vukelich*, Chief Justice McEachern stated that, where possible, the question of whether or not to hold a *voir dire* should be decided on the basis of statements of counsel, possibly supported by an affidavit.

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[14] *R. v. Vukelich* (1996), 108 C.C.C. (3d) 193, 37 C.R.R. (2d) 237 (B.C.C.A.), leave to appeal ref'd [1996] S.C.C.A. No. 461

[15] *R. v. Lising*, 2005 SCC 66 ¶35.

[16] *R. v. Sandham*, [2009] O.J. No. 4557 ¶26 (S.C.J.).

In some cases, it will be apparent from counsel's statements that an evidentiary hearing is unnecessary. In *R. v. Hamill*, Esson J.A. stated:

> In those cases where the accused does apply to exclude the evidence, it will be for the trial judge to decide what procedure should be followed but, at the least, counsel for the accused should be required to state with reasonable particularity the ground upon which the application for exclusion is made. That much is essential for an orderly trial of the issue. If follows that, if the statement of grounds does not disclose a basis upon which the court could make an order excluding the evidence, the application may be dismissed without hearing evidence.[17]

Vukelich is an example of a case where the trial judge determined, and the Court of Appeal agreed, that a *voir dire* was unnecessary. The accused sought to challenge the validity of a search warrant by alleging that certain portions of the supporting affidavit contained false or misleading information. The court held that even if the defence's allegations were true and the offending portions of the affidavit were expunged, there remained sufficient information in the affidavit to support the warrant. In other words, a *voir dire* was unnecessary since no *Charter* remedy could result even if the defence's case was taken at its highest.

The principles stated in *Vukelich* were recently reaffirmed by the Court of Appeal in *R. v. Bains*. The Court upheld the trial judge's decision refusing to hold a *voir dire* regarding an alleged abuse of process, noting that the onus is on the accused to establish a *voir dire* is necessary, and that a trial judge's discretion in this regard will be accorded substantial deference on appeal:

> There is no absolute right to a *voir dire* merely because an accused chooses to allege a *Charter* violation. An applicant must show that a *voir dire* is necessary and would assist the "proper trial of the real issues". This threshold test was summarized by Chief Justice McEachern in *Vukelich*:
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> Based on these authorities, it does not follow that an accused is always entitled as of right to a *voir dire* in the course of a criminal trial in order to challenge the constitutionality of a search. The trial judge must control the course of the proceedings, and he or she need not embark upon an enquiry that will not assist the proper trial of the real issues.
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> ...

[17] *R. v. Hamill* (1984), 14 C.C.C. (3d) 338 ¶87, 41 C.R. (3d) 123 (B.C.C.A.) (QL), aff'd [1987] 1 S.C.R. 301

> As was noted in *Vukelich*, it is the responsibility of the trial judge to control the course of the proceedings. This involves the exercise of discretion for which this Court must show deference, absent an error in principle. I am not persuaded that the trial judge erred in principle in his application of the threshold test in *Vukelich*. I would not accede to this ground of appeal.[18]

b) *<u>If counsel's statements are not sufficient, a more formal approach is required</u>*

In *Vukelich*, Chief Justice McEachern stated that where the statements of counsel are not sufficient to persuade a judge to order a *voir dire*, the defence will need to go further by providing affidavits or perhaps an undertaking to adduce evidence, including calling the deponent as a witness. The Chief Justice emphasized that the flexible approach recommended by the Ontario Court of Appeal in *R. v. Kutynec*[19] was to be preferred over a fixed process.

In *Kutynec*, Finlayson J.A. in considering the proper procedure stated:

> In some cases, when the defence indicates, prior to the calling of evidence, that it intends to advance a *Charter* application to exclude evidence, the trial judge may call upon the defence to summarize the evidence that it anticipates it would elicit on the application. This kind of procedure is well-known to the criminal process: see *R. v. Sproule* (1975), 26 C.C.C. (2d) 92 at pp. 97-8, 30 C.R.N.S. 56 (Ont. C.A.); *R. v. Dietrich* (1970), 1 C.C.C. (2d) 49 at p. 62, [1970] 3 O.R. 725; leave to appeal refused [1970] S.C.R. xi. If the defence is able to summarize the anticipated evidentiary basis for its claim, and if that evidence reveals no basis upon which the evidence could be excluded, then the trial judge need not enter into an evidentiary inquiry. In other words, if the facts as alleged by the defence in its summary provide no basis for a finding of a *Charter* infringement, or a finding that the evidence in question was obtained in a manner which infringed the *Charter*, or a finding that the test for exclusion set out in s. 24(2) was met, then the trial judge should dismiss the motion without hearing evidence.
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> ....
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> In many cases, the accused's entitlement to an evidentiary hearing with respect to an alleged *Charter* violation will be readily established on the basis of information provided through disclosure, cross-examination at prior proceedings, or by an indication by counsel for the accused that he or she intends to call evidence which will substantiate the *Charter* violation. I see no difficulty in a trial judge asking counsel what evidence will be called on the application to exclude evidence and what witnesses will be called. Direct

[18] *R. v. Bains*, 2010 BCCA 178 ¶69, 76.
[19] *R. v. Kutynec* (1992), 7 O.R. (3d) 277, 70 C.C.C. (3d) 289 (C.A.)

> answers to these simple questions will often quickly determine the need for an evidentiary inquiry and will assist in deciding the format and timing of that inquiry.[20]

Hamill, *Vukelich*, and *Kutynec* all concerned applications to exclude evidence based upon an alleged *Charter* breach, which would lead to evidence being excluded pursuant to s. 24(2). The same principles have been applied to applications for remedies under s. 24(1).[21]

4. The evidentiary basis for pre-trial applications

If the trial judge determines that it is necessary to hold a *voir dire*, he or she may direct how the evidence will be presented.[22]

On some applications, the trial judge's ruling will require findings of credibility and *vive voce* evidence is necessary. In other instances, the trial judge could direct that the evidence or portions thereof be presented by way of an agreed statement of facts, transcripts, or "will say" statements.

In *R. v. Snow*, the Court held that the defence is not entitled to insist on witnesses being called on an application. In that case, the Crown sought to tender similar fact evidence, and relied on transcripts of the accused's earlier guilty pleas and on evidence led at the preliminary inquiry. The Court of Appeal upheld the trial judge's decision to proceed without oral testimony as follows:

> The appellant submitted before this court that the procedure adopted by the trial judge constitutes an error of law. We did not call upon the respondent on this ground of appeal as, in our view, it is without merit. The procedure adopted by the trial judge was appropriate in the circumstances of this case. This was not evidence (for example, a statement by the accused) where the Crown was required to prove certain facts (voluntariness) as a prerequisite for admissibility. In the circumstances of this case, admissibility of the similar fact evidence did not require the testing of circumstances surrounding the evidence, nor was there uncertainty about what the witnesses might say. The

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[20] *Ibid.* at 301.
[21] See for example *R. v. Derose*, 313 A.R. 47 ¶38, 2002 ABPC 53; *U.S.A. v. Quintin* (2000), 4 Imm. L.R. (3d) 255 ¶45, 73 C.R.R. (2d) 237 (Ont. S.C.J.) *R. v. Wilder*, 2004 BCSC 304 ¶33.
[22] *R. v. Snow* (2004), 73 O.R. (3d) 40, 190 C.C.C. (3d) 317 (C.A.)

> trial judge was entitled to adopt a more expeditious procedure that was entirely adequate to test the admissibility of the similar fact evidence: *R. v. D. (G.N.)*, (1993), 81 C.C.C. (3d) 65 (Ont. C.A.); *R. v. Carpenter (No. 2)* (1982), 1 C.C.C. (3d) 149 (Ont. C.A.); *R. v. Dietrich*, (1970), 1 C.C.C. (2d) 49 (C.A.) at 623.[23]

5. Conduct of the *Voir Dire*

In *R. v. Bacon*, Lytwyn Prov. Ct. J. discussed the appropriate procedure to employ where the accused asserts there have been a series of Charter violations. The Crown sought two separate *voir dires*, pointing to the fact that differing evidentiary burdens were involved depending on the alleged Charter violation, while the accused sought an omnibus blended *voir dire* to "explore the conduct of the RCMP in its entirety". Noting that the Charter itself provided no procedural rules or guidance on how applications to exclude evidence should be handled, Lytwyn Prov. Ct. J. held that trial judges enjoy a wide discretion to determine how a Charter *voir dire* should be conducted, subject to the principle that trial economy should not be permitted to supersede the importance of procedural justice and fairness for an accused person. In the result, the Court ordered the applications be heard as one blended *voir dire*, but with procedural allowances to address the Crown's concerns.[24]

In *R. v. Nguyen*, the court emphasized that to avoid difficulties that arise out of a combined *voir dire* for Charter issues and voluntariness, separate *voir dires* should be held:

> The onus and standards of proof on the issues are different; the accused has the onus to prove infringements of *Charter* rights on the balance of probabilities, while the Crown must prove the voluntariness of statements beyond a reasonable doubt. The sensible approach would be to determine the admissibility of statements first, followed by the examination of the *Charter* issues.[25]

6. Rulings on pre-trial applications

The trial judge's decision whether to rule on the application or reserve until the end of the case after the evidence has been heard is discretionary and must be

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[23] Snow ¶61
[24] *R. v. Bacon*, 2009 BCPC 329.
[25] *R. v. Nguyen*, 230 B.C.A.C. 116 ¶12, 2006 BCCA 397

exercised having regard to two policy considerations. The first is that criminal proceedings should not be fragmented by interlocutory proceedings which take on a life of their own. The second, which relates to constitutional challenges, discourages adjudication of constitutional issues without a factual foundation.

The BC Court of Appeal has held that in some situations it is preferable to reserve on an application until the end of the case, particularly where the remedy sought is a stay of proceedings, as a full evidentiary record may be required to determine whether any prejudice has been incurred by the accused.[26]

[26] *R. v. Hooites-Meursing*, 2008 BCCA 264, 175 C.R.R. (2d) 230, leave to appeal ref'd [2008] S.C.C.A. No. 379. See also *R. v. Buric* (1996), 28 O.R. (3d) 737 ¶26 (C.A.), aff'd [1997] 1 S.C.R. 535.

SUMMARY - BEST PRACTICES CHECKLIST

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1. A pre-trial application is not a fishing expedition. Do not waste the court's time in bringing applications that are unmeritorious.

2. Give 'real and meaningful' notice of your application.

3. Ensure that the materials in support of your application are adequate to inform opposing counsel and the judge of the issues at stake. The materials filed should establish both the legal and factual foundation for the application.

4. Where notice is inadequate, the judge will consider prejudice to the opposing party. If there is real prejudice, the judge may decline to hear your application unless some less drastic measure will alleviate the prejudice.

5. There is no absolute right to a *voir dire* on a Charter application. The judge will not embark on a *voir dire* unless satisfied that is will assist the "proper trial of the real issues."

6. If the judge determines a *voir dire* is necessary, he or she may direct how the evidence will be presented. *Vive voce* evidence will be necessary where finding of credibility are required; in other instances agreed facts, transcripts or 'will say' statements may suffice.

7. Ensure that your oral submission on the application is focussed and efficient.

8. Remember that it is the duty of the judge to control the proceedings to ensure that the machinery of the court functions in an orderly and effective way. Expect that the judge will take an active management role when it comes to all phases of the trial, including pre-trial applications.