1 Threshold Matters

Box 1.1 The Constitution Act, 1982, Sections 24 and 52(1)

24(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute. ...

52(1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

I. Introduction

The *Canadian Charter of Rights and Freedoms*[1] offers two distinct types of remedies. Section 24 provides for remedies against government actions that violate Charter rights, and section 52(1) provides for remedies against legislation that operates in violation of Charter rights.[2] This book is about how those remedies can be obtained in criminal courts.

There are a number of threshold requirements that a claimant must be able to satisfy before a criminal court will consider granting a remedy. These requirements can be understood under three headings: jurisdictional, procedural, and evidentiary.

II. Key Concepts in This Chapter

- The Charter only applies to legislation and conduct of Canadian governmental authorities. It does not usually apply to the conduct of private actors, nor to conduct outside of Canada. However, there are some exceptions, which are discussed in Section III.A.
- Not all courts can grant Charter remedies at all times. In criminal litigation, most Charter applications are made to the trial judge or the appointed case management judge. There are special considerations for Charter applications

1 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [the Charter].

2 *R v 974649 Ontario Inc*, 2001 SCC 81 at para 14 [*Dunedin Construction*].

made to a jurist other than the trial judge or case management judge, discussed in Section III.B.

- A special form of notice, called a Notice of Constitutional Question or an NCQ, must be served on the attorney(s) general before a court can consider striking down legislation. In some provinces an NCQ is also required before a court can consider other Charter remedies, except exclusion of evidence. Failure to serve the required NCQ is a critical error by the applicant that can deprive the court of jurisdiction to grant a remedy. See Section III.C.
- Judges are empowered to conduct a threshold screening of Charter applications and to summarily dismiss those that lack a reasonable possibility of contributing to the resolution of the issues to be decided at trial. It is crucial that the written application particularizes the claim to be made and the desired remedy, identifies the evidence that will support the claim, and links the desired remedy to a material issue at trial. See Section IV.B.
- Beyond the relevant rules of court, procedure on a Charter application is controlled by the presiding judge. Counsel should obtain direction from the judge on procedural choices like blended evidentiary hearings and bifurcated hearings. See Sections IV.C through IV.F.

III. Jurisdiction to Grant a Remedy

Box 1.2 The Constitution Act, 1982, Section 32(1)

32(1) This Charter applies

(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

A. Conduct by a Government in Canada Must Be in Issue

The Charter does not regulate all aspects of life in Canada. It does not regulate conduct between private persons. The Charter only protects individuals against the actions of Canadian governments.[3] This follows from section 32(1) of the Charter

3 This includes the federal and provincial governments (specifically enumerated in s 32(1)) plus all subordinate governments enabled by federal or provincial legislation, including the federal territories and all regional and local levels of government that are creations of provincial statute.

(see Box 1.2). Therefore, only a claim about conduct by a Canadian governmental body or agent is capable of obtaining a remedy under the Charter.

1. Private Actors Not Governed by the Charter Unless Shown to Be Acting as State Agents

The conduct of private actors, provided they are not carrying out governmental functions[4] or acting as state agents, is not governed by the Charter. Courts have held that actions of banks,[5] public utility companies,[6] private security guards,[7] off-duty auxiliary police constables,[8] and private prosecutors[9] are not subject to the Charter.

However, it is possible for a private actor's conduct to be attributed to the government when a court can find that they were acting as an agent of the state. State agency arises when a private person acts at the request or direction of a state authority. The question a court will ask is this: *Would the private person have acted as they did but for the intervention of the state authority?*[10]

Proof of "but for" causation is required to establish that a private person acted as an agent of the state. It may not be sufficient to simply show a temporal connection between a request by a state authority and a private person's conduct to prove that the request caused the action.[11] Even conscious cooperation between a private actor and a state authority does not necessarily make the private actor into a state agent.[12]

Whether state agency is proved on a given set of facts is a case-specific assessment; the court's conclusion will depend on the evidence in the particular case, not on whether a certain label or category can be applied to the situation.[13]

Examples where state agency has been found include an emergency room doctor who took a sample of a driver's blood at the request of police and without legal authority to do so;[14] a foster parent who searched a child's room while under a government contract that required him to report any contraband to the police;[15] an electric company worker who entered a home to check for a by-pass at the request of

4 *Eldridge v British Columbia (AG)*, [1997] 3 SCR 624, 1997 CanLII 327 at paras 43-44.
5 *Royal Bank of Canada v Welton*, 2009 ONCA 48 at paras 16-23.
6 *R v Gomboc*, 2010 SCC 55 at para 42; *R v Ward*, 2012 ONCA 660 at para 96.
7 *R v Buhay*, 2003 SCC 30 at paras 25-31; *R v Nguyen*, 2016 BCCA 32 at paras 56-58.
8 *R v McElroy*, 2009 SKCA 77 at para 15.
9 *Podolsky v Cadillac Fairview Corp Ltd*, 2012 ONCJ 545 at paras 21-25.
10 *R v Buhay*, *supra* note 7 at para 29.
11 *R v Saciragic*, 2017 ONCA 91 at paras 25-38; *R v Webster*, 2015 BCCA 286 at paras 68-70.
12 *R v M (MR)*, [1998] 3 SCR 393, 1998 CanLII 770 at para 28.
13 *R v Buhay*, *supra* note 7 at para 31.
14 *R v Pohoretsky*, [1987] 1 SCR 945, 1987 CanLII 62; *R v Dersch*, [1993] 3 SCR 768, 1993 CanLII 32 at 777. Contrast *R v Culotta*, 2018 ONCA 665 at para 54, aff'd 2018 SCC 57.
15 *R v IDK*, 2002 BCPC 536 at para 14.

police;[16] and firefighters who re-entered a house after a fire had been extinguished in order to assist police in searching the house.[17]

Private citizens who gather and provide evidence to police, unprompted by police request, will generally not be found to have acted as police agents.[18]

Note that being a governmental actor or agent does not always mean the person's actions will be held to the same standards as police conduct would be. If the person exercises a government regulatory power for a regulatory purpose, then the lawfulness of their conduct will be scrutinized on the standard relevant to that regulatory power—*not* on the standard that would apply if a police officer had done it for a criminal law purpose.[19] School officials, child protection workers, and electric company inspectors, for example, can conduct warrantless searches that police officers cannot lawfully conduct in the same circumstances; if they subsequently provide the fruits of the search to a police officer, it does not necessarily mean that they acted on behalf of the police.[20] But, as already discussed, if they do so at the request or direction of police, then that conduct will be scrutinized as though it were police conduct.[21] The law of agency ensures that police officers cannot exploit the powers of government regulatory authorities and hope to avoid Charter scrutiny.

2. The Charter Applies Only to Canadian Governments

As indicated by the text of section 32(1), the Charter applies only to Canadian governments, *not* foreign ones. This is so even where Canadian police cooperate abroad with a foreign government.[22]

But while the Charter does not apply to actions of foreign governments, foreign-gathered evidence is susceptible to exclusion in a Canadian criminal trial if its admission would render the accused's trial unfair or otherwise violate the principles of

16 *R v Liang, Yeung, Zhu, Zhai, Wen, Zhou, Jiang, Cheung and Xu*, 2007 YKTC 18 at paras 236-41.

17 *R v Newton and Molody*, 2015 ONSC 1348.

18 *R v Buhay*, *supra* note 7 at para 30; see also *R v Dell*, 2005 ABCA 246 at para 7; *R v Drakes*, 2009 ONCA 560 at para 15; *R v Orlandis-Habsburgo*, 2017 ONCA 649 at para 34; *R v Phagura*, 2019 BCSC 1638 at paras 57-62; *R v Molyneaux*, 2020 PECA 2 at para 35; *R v Mawick*, 2021 ONCA 177 at para 54; *R v JJ R-M*, 2021 ONCA 454 at para 9.

19 *R v M (MR)*, *supra* note 12 at paras 30, 48; *R v Bourque*, 2001 BCSC 621 at para 87; *R v RMJT*, 2014 MBCA 36 at paras 80-130.

20 *R v M (MR)*, *supra* note 12 at paras 28-29; *R v Benham*, 2003 BCCA 341; *R v Cole*, 2012 SCC 53 at paras 60-73; *R v RMJT*, *supra* note 19 at paras 72-79.

21 See also *R v Gomboc*, *supra* note 6 at para 148, McLachlin CJ and Fish J dissenting but not on this point; *R v Orlandis-Habsburgo*, *supra* note 18 at paras 34-35.

22 *R v Terry*, [1996] 2 SCR 207 at para 19, 1996 CanLII 199; *R v Tan*, 2014 BCCA 9 at paras 33-50; *United States v Viscomi*, 2015 ONCA 484 at para 47.

fundamental justice.[23] That is, the Charter violation (if any) is attributable to the Canadian prosecution, not to the foreign government.[24]

3. The Charter Applies Only Inside Canada (with Exceptions)

Similarly, the Charter's enforcement provisions apply only within Canada, *not* extraterritorially.[25] This means that when Canadian police officers venture abroad to conduct an investigation, their actions abroad are not governed by the Charter; instead, they are governed by the local law of the foreign jurisdiction.[26]

While the general rule is that the Charter does not follow Canadian police when they go abroad, there is an exception to this when the relevant foreign authority *consents* to Canadian law being applied within the foreign state (an event the Supreme Court of Canada acknowledges would be rare).[27] There is a second exception where Canadian state actors abroad participate in a violation of Canada's international human rights obligations (for example, the investigative interview of a Canadian citizen detained in violation of the *Geneva Conventions* by a foreign state).[28]

Despite the territorial limits of the Charter's reach, foreign-gathered evidence is, as noted in the preceding section, potentially susceptible to exclusion in a Canadian criminal trial if its admission would be unfair to the accused or would violate the principles of fundamental justice that are afforded to an accused person in Canada.[29] But this is *not* the same as saying that conduct abroad that would have violated the Charter if done by the state within Canada will necessarily provide the basis for a Charter remedy.[30] Rather, the Supreme Court's jurisprudence has repeatedly allowed that foreign-gathered evidence can be admitted in a Canadian trial even though its gathering would not have complied with Charter standards if it were done in Canada. (Of course, evidence gathered within Canada in violation of the Charter may also be admitted at trial: see the discussion of s 24(2) in Chapter 2.)

B. Court of Competent Jurisdiction

1. Section 24 Remedies

Section 24 provides that anyone whose Charter rights have been infringed or denied may apply to a "court of competent jurisdiction" for a remedy. This reflects a basic

23 *R v Harrer*, [1995] 3 SCR 562, 1995 CanLII 70; *R v Terry*, *supra* note 22; *Schreiber v Canada (AG)*, [1998] 1 SCR 841, 1998 CanLII 828.

24 *R v Hape*, 2007 SCC 26 at para 91.

25 *Ibid* at paras 69, 94.

26 *Ibid* at paras 99, 101.

27 *Ibid* at paras 69, 106; *R v Tan*, *supra* note 22 at paras 54-79.

28 *R v Hape*, *supra* note 24 at paras 101, 105-6; *Canada (Justice) v Khadr*, 2008 SCC 28 at paras 15-27; *Canada (Prime Minister) v Khadr*, 2010 SCC 3 at paras 14-18.

29 *R v Hape*, *supra* note 24 at paras 100, 107-8.

30 *R v Harrer*, *supra* note 23, at paras 14-15; *R v Hape*, *supra* note 24 at para 108.

decision of the framers of the Charter: it does not confer additional remedial powers that the court or tribunal does not already have.[31] Therefore, the remedy sought must be one that is already within the powers of the court to grant.[32]

A court of competent jurisdiction is one that has (1) jurisdiction over the person, (2) jurisdiction over the subject matter, and (3) jurisdiction to grant the remedy.[33] In criminal and quasi-criminal contexts, this generally means that a section 24 Charter application must be made to either the trial judge or to a judge of a superior court (who need not be the trial judge). This also means that a provincial court judge presiding *other than* as the trial judge is *not* a "court of competent jurisdiction" and consequently has no power to grant section 24 remedies.

a. Superior Courts Are Almost Always Courts of Competent Jurisdiction

The provincial superior courts have "constant, complete and concurrent"[34] jurisdiction to entertain applications for section 24 Charter relief.[35] They are *almost* always courts of competent jurisdiction. However, two caveats must be noted.

The first caveat is a significant one. Any section 24 application in a criminal matter that is made to a judge of the superior court *not* sitting as the trial judge will ordinarily be deferred to the trial judge. Trial courts are the preferred forum for the hearing of section 24 applications, and especially so when the remedy sought relates to the conduct of the trial.[36] The Supreme Court has repeatedly and emphatically stated that the bifurcation of criminal proceedings, through the hearing of applications in the superior court outside of the trial process, is undesirable and should be avoided.[37] The superior court's jurisdiction to hear a free-standing Charter application is discretionary and should not be exercised routinely.[38] Rather, a superior court judge should entertain a section 24 Charter application relating to a criminal matter outside of trial only if persuaded that the superior court is substantially better suited to deal with the

31 *Dunedin Construction*, *supra* note 2 at paras 22-23, 40, 26.

32 *Mills v R*, [1986] 1 SCR 863, 1986 CanLII 17 at 953; *Dunedin Construction*, *supra* note 2 at paras 26-27, 42-47; *R v Conway*, 2010 SCC 22 at paras 81-82.

33 *Dunedin Construction*, *supra* note 2 at para 15, citing *Mills v R*, *supra* note 32.

34 *Mills v R*, *supra* note 32 at 892, Lamer J.

35 *Ibid* at 956, McIntyre J; *Dunedin Construction*, *supra* note 2 at para 79; *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62 at paras 45, 49.

36 *R v Zevallos* (1987), 37 CCC (3d) 79 at 86-87 (Ont CA); *R v Johnson* (*sub nom R v Duvivier*) (1991), 3 OR (3d) 49 at 23g-25a, 64 CCC (3d) 20 (CA); *Canada (AG) v King*, 1997 CanLII 9531, 187 NBR (2d) 185 (CA); *Dunedin Construction*, *supra* note 2 at para 79; *R v Menard*, 2008 BCCA 521 at para 42.

37 *R v Garofoli*, [1990] 2 SCR 1421, 1990 CanLII 52; *Kourtessis v MNR*, [1993] 2 SCR 53 at 89-90, La Forest J and at 115-16, Sopinka J; *Dunedin Construction*, *supra* note 2 at para 96; *R v Conway*, *supra* note 32 at para 79; see also *Reza v Canada*, [1994] 2 SCR 394, 1994 CanLII 91.

38 *R v Zevallos*, *supra* note 36 at 86-87; *R v Johnson*, *supra* note 36; *Kourtessis v MNR*, *supra* note 37 at 89-90, La Forest J and 115-16, Sopinka J.

matter or if satisfied there is urgency to the claim such that the interests of justice require a determination without delay but a forum in the trial court will not be available reasonably soon.[39]

Another procedural vehicle by which to obtain a binding ruling prior to the appointment of a trial judge was introduced by the enactment of part XVIII.1 of the *Criminal Code*[40] in 2011. These provisions allow for the appointment of a "case management judge" on the application of either party (or on the court's own initiative), and give that judge broad authority to make rulings—including Charter rulings—that would otherwise be reserved to the trial judge.[41]

Even apart from case management under part XVIII.1, there are circumstances where Charter section 24(1) applications have been heard on the merits in a free-standing application in the superior court, rather than being deferred to the trial (or case management) judge. These tend to be cases where the return of seized things, and not just exclusion of evidence, is sought[42] or where criminal proceedings have not commenced or have already been concluded.[43] On the other hand, in *Kourtessis v MNR*, the Supreme Court confirmed that a Charter section 24(1) application was correctly deferred to the trial judge, even though the relief sought included return of seized things and not just an evidentiary ruling pertaining to the conduct of the trial.[44] Seeking an order that is more than procedural or evidentiary (such as return of property) will not necessarily guarantee a hearing on a free-standing application made in the superior court.

The second caveat is a minor one for criminal practitioners. It is sometimes possible for Parliament or a provincial legislature to withdraw a legal subject matter from the jurisdiction of the provincial superior courts by conferring exclusive jurisdiction on another court. However, in criminal practice this consideration is almost negligible. National security privilege under section 38 of the *Canada Evidence Act*[45] seems to be the only example that might be encountered in criminal litigation. Issues of section 38 national security privilege are reserved exclusively for the Federal Court,[46] and consequently so too are any section 24 Charter applications made in that context.

39 *R v Zevallos*, *supra* note 36 at 86-87; *R v Johnson*, *supra* note 36; *Kourtessis v MNR*, *supra* note 37 at 89-90, La Forest J and at 115-16, Sopinka J; *Dunedin Construction*, *supra* note 2 at para 79; *R v Menard*, *supra* note 36 at paras 43-50; *R v Codina*, 2017 ONCA 527 at paras 17-20.

40 RSC 1985, c C-46 [the Code].

41 The part XVIII.1 case management provisions were enacted in response to Patrick LeSage and Michael Code's report for the Ontario government, *Report of the Review of Large and Complex Criminal Case Procedures* (Toronto: Queen's Printer, 2008).

42 *Vijaya v HMQ*, 2014 ONSC 1653; *R v Seguin*, 2015 ONSC 1908.

43 *R v Robinson*, 2011 ONSC 1388; *Vijaya v HMQ*, *supra* note 42; *Kelly v Ontario*, 2014 ONSC 3824.

44 *Kourtessis v MNR*, *supra* note 37. Similarly, see also *Pèse Pêche Inc v R*, 2013 NBCA 37; *Bureau des enquêtes indépendantes v Boulanger*, 2020 QCCS 4252 at paras 90ff.

45 RSC 1985, c C-5.

46 *Abou-Elmaati v Canada (AG)*, 2011 ONCA 95; *R v Ahmad*, 2011 SCC 6.

b. Inferior Courts Are Sometimes Courts of Competent Jurisdiction

When sitting as the trial court in proceedings under the Code, a provincial court is a court of competent jurisdiction and can grant section 24 remedies provided they are within its express or implied statutory powers as the trial court.[47] The same is true of a provincial court sitting as a trial court under provincial quasi-criminal legislation.[48] In both contexts, the trial court's jurisdiction ends if the charge is stayed or withdrawn by the prosecution (unless the stay or withdrawal itself is abusive).[49]

On the other hand, when they are *not* sitting as the trial court, provincial inferior courts exercising criminal or quasi-criminal law functions are generally *not* courts of competent jurisdiction. Preliminary inquiry judges cannot grant section 24 Charter remedies.[50] Nor can provincial court judges or justices presiding over bail hearings[51] or hearings under section 490 of the Code respecting continued detention of seized things.[52]

Interestingly, a judge hearing an application for forfeiture (as opposed to continued detention) of seized things may be a court of competent jurisdiction to order return of the property as a remedy under Charter section 24(1)[53] and to exclude evidence at the forfeiture hearing under section 24(2).[54] This question has been left open by the Supreme Court.[55]

Provincial review boards under part XX.1 of the Code (which review the custody of persons found not criminally responsible on account of mental disorder) are courts of competent jurisdiction to grant section 24 remedies that are consistent with their statutory mandate and powers.[56]

The Parole Board of Canada is a court of competent jurisdiction to grant some Charter remedies,[57] although it seems that exclusion of evidence through section 24(2) is not among the remedies available to the Board.[58]

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47 *Mills v R*, *supra* note 32 at 955; *R v Garofoli*, *supra* note 37 at 1449.

48 *Dunedin Construction*, *supra* note 2.

49 *R v Fach*, 2004 CanLII 36167, 191 CCC (3d) 225 (Ont CA); *R v Marsden*, 2007 ONCA 765; *R v Martin*, 2016 ONCA 840.

50 *Mills v R*, *supra* note 32 at 954; *R v Hynes*, 2001 SCC 82.

51 *R v Menard*, *supra* note 36.

52 *R v Raponi*, 2004 SCC 50 at paras 21-31.

53 *R v West*, 2005 CanLII 30052, 77 OR (3d) 185 at paras 46-52 (CA).

54 *R v Daley*, 2001 ABCA 155 at para 25, adopting *R v Clymore*, 1992 CanLII 1112, 74 CCC (3d) 217 at 240-43 (BCSC). It should be noted that neither of these decisions considered the "court of competent jurisdiction" test as set out by the Supreme Court in *Mills v R*, *supra* note 32.

55 *R v Raponi*, *supra* note 52 at para 30.

56 *R v Conway*, *supra* note 32 at paras 84-103; *Re Chaudry*, 2015 ONCA 317 at paras 85-107; *Re Starz*, 2015 ONCA 318 at paras 88-111; *Re Ohenhen*, 2017 ONCA 960; *Re Shortt*, 2020 ONCA 651.

57 *R v Bird*, 2019 SCC 7 at paras 52-54.

58 *Ibid*, casting doubt on *Mooring v Canada (National Parole Board)*, [1996] 1 SCR 75 at para 32, 1996 CanLII 254, which had held that the Parole Board cannot grant section 24(2) remedies. But see *Fraser v Canada (Public Safety and Emergency Preparedness)*, 2021 FC 821 at para 88, observing that *Bird* merely distinguished but did not overrule *Mooring*.

2. Section 52(1) Remedies

Unlike section 24, the text of section 52(1) does not include any statement about the remedial competence required of the court in which an application is brought. Nevertheless, the jurisprudence is clear. A judge of a provincial superior court can declare that a law is of no force or effect because of its inconsistency with the Charter. In contrast, a judge in a provincial inferior court cannot grant a general declaration *but*, when sitting as a trial judge, can decide that a law is invalid due to its inconsistency with the Charter and therefore inapplicable in the case before the court.[59] A preliminary inquiry judge cannot decide that legislation is invalid.[60]

C. Notice of Constitutional Question

In every province there is legislation requiring that formal notice of a constitutional challenge must be given to the province's attorney general before any claim for a section 52(1) remedy can be heard. Most provinces require that notice also be given to the Attorney General of Canada. Additionally, some provinces require that formal notice of a constitutional question be given before a claim for a section 24(1) remedy can be heard, although most of those do not require formal notice when exclusion of evidence is the only remedy sought under section 24(1). Ontario uniquely requires a notice of constitutional question for *any* section 24(1) remedy. No provinces require a notice of constitutional question for exclusion sought under section 24(2). The form and manner of service required is described in each province's applicable legislation (see Table 1.1).

The Supreme Court has emphasized the importance of complying with these notice requirements: "The absence of notice and the absence of a record developed in the courts and tribunals below are far from technical defects";[61] rather, "[n]otice requirements serve a vital purpose in ensuring that courts have a full evidentiary record before invalidating legislation and that governments are given the fullest opportunity to support the validity of legislation."[62] In short, complying with the notice requirements is mandatory because it is essential to the proper adjudication of constitutional claims.

The notice requirement is no less mandatory where a section 24(1) remedy is sought (in provinces where such notice is required), nor where the government action impugned is that of a municipality rather than a provincial or federal government.[63]

59 *R v Lloyd*, 2016 SCC 13 at paras 15-19. For further discussion, see Chapter 7.
60 *R v Seaboyer; R v Gayme*, [1991] 2 SCR 577, 1991 CanLII 76 at 637-39.
61 *Eaton v Brant County Board of Education*, [1997] 1 SCR 241, 1997 CanLII 366 at para 55.
62 *Guindon v Canada*, 2015 SCC 41 at para 19.
63 *R v Vellone*, 2011 ONCA 785.

TABLE 1.1 Notice of Constitutional Question Requirements by Jurisdiction

Jurisdiction	Statute	Charter remedies requiring notice	Who must receive notice
British Columbia	*Constitutional Question Act*, RSBC 1996, c 68, s 8	ss 24(1) and 52(1)	*both* provincial and federal AGs
Alberta	*Judicature Act*, RSA 2000, c J-2, s 24	s 52(1)	*both* provincial and federal AGs
Saskatchewan	*The Constitutional Questions Act, 2012*, SS 2012, c C-29.01, ss 12-15	ss 24(1) and 52(1)	*both* provincial and federal AGs
Manitoba	*The Constitutional Questions Act*, CCSM c C180, s 7	ss 24(1) and 52(1)	*both* provincial and federal AGs
Ontario	*Courts of Justice Act*, RSO 1990, c C.43, s 109	ss 24(1) and 52(1)	*both* provincial and federal AGs
Quebec	*Code of Civil Procedure*, CQLR c C-25.01, arts 76-78	s 52(1)	provincial AG *and* DCPP *and* federal AG
New Brunswick	*Judicature Act*, RSNB 1973, c J-2, s 22(3)	s 52(1)	*both* provincial and federal AGs
Nova Scotia	*Constitutional Questions Act*, RSNS 1989, c 89, s 10	ss 24(1) and 52(1)	provincial AG *only*
Prince Edward Island	*Judicature Act*, RSPEI 1988, c J-2.1, s 49	s 52(1)	*both* provincial and federal AGs
Newfoundland and Labrador	*Judicature Act*, RSNL 1990, c J-4, s 57	s 52(1)	*both* provincial and federal AGs
Yukon	*Constitutional Questions Act*, RSY 2002, c 39, s 2	s 52(1)	*both* territorial Minister and federal AG

(Continued on next page)

TABLE 1.1 Notice of Constitutional Question Requirements by Jurisdiction (Concluded)

Jurisdiction	Statute	Charter remedies requiring notice	Who must receive notice
Northwest Territories	*Judicature Act*, RSNWT 1988, c J-1, s 59	s 52(1)	*both* territorial Commissioner and federal AG
Nunavut	*Judicature Act*, SNWT (Nu) 1998, c 34, s 1, as amended, s 58	s 52(1)	*both* territorial and federal AGs
Federal Court	*Federal Courts Act*, RSC 1985, c F-7, s 57	s 52(1)	*all* provincial and federal AGs
Tax Court	*Tax Court of Canada Act*, RSC 1985, c T-2, s 19.2	s 52(1)	*all* provincial and federal AGs
Court Martial Appeal Court	*Court Martial Appeal Court Rules*, SOR/86-959, r 11.1	s 52(1)	*all* provincial and federal AGs

There is an esoteric question about whether a court's decision on a Charter claim adjudicated without the required notice is void or instead is merely voidable upon a showing of prejudice by the affected attorney general. While leaving this question open, a unanimous Supreme Court indicated a strong preference for the former view: failure to give the required notice means that a court's decision is a nullity.[64] And despite the Supreme Court's reluctance to firmly decide the point, in some provinces the law is clear that lack of notice means the court lacks jurisdiction to adjudicate the Charter claim.[65]

Lack of notice in the court of first instance *might* be curable by giving notice on appeal, but the appellate court's exercise of discretion as to whether to consider the Charter claim on appeal will be informed by whether the trial record provides sufficient basis to fairly adjudicate the claim and whether the lateness of the notice

64 *Eaton v Brant County Board of Education*, *supra* note 61 at paras 49-54.

65 See e.g. *New Brunswick (Minister of Health and Community Services) v DN*, 1992 CanLII 2805, 127 NBR (2d) 383 at 388 (CA); *Paluska, Jr v Cava*, 2002 CanLII 41746, 59 OR (3d) 469 at para 24 (CA).

prejudices the attorney general's ability to respond.[66] An appellate court's discretion to hear a constitutional claim where proper notice is given for the first time on appeal "should only be exercised exceptionally and never unless the challenger shows that doing so causes no prejudice to the parties."[67] In deciding how to exercise that discretion, an appellate court must consider all the circumstances—including fairness to all parties; whether the record includes evidence sufficient to adjudicate the new issue; the importance of deciding the issue in the case before the court; and the significance of the issue to administration of justice more broadly.[68]

Where a superior court in the same province has already granted a section 52(1) remedy declaring a statutory provision to be unconstitutional in another proceeding, but neither the provincial court of appeal nor the Supreme Court of Canada has ruled on the question, it is unclear whether an accused who wishes to rely on the prior declaration is required to serve a notice of constitutional question in their case. This issue intersects with the legal presumption of judicial comity, which dictates that in the absence of higher authority which binds the court through vertical *stare decisis*, judges must follow precedents of the same court that decide questions of law, unless a judge is satisfied the prior decision should not be followed by application of a legal test now called the "*Spruce Mills* criteria."[69] So, in a case where the accused wants the benefit of a prior declaration of invalidity that the Crown did not appeal, is it the accused's obligation to file an application for a section 52(1) remedy and serve a notice of constitutional question, or can the accused rely on the effect of the prior declaration without making an application? And is the Crown, having not appealed the prior declaration, barred from arguing the prior decision is wrong?

The latter question was answered by the Supreme Court in *R v Sullivan*. The impugned section of the Code had been struck down in an earlier prosecution, and the Crown had not appealed that result. The accused argued that the Crown could not now defend the constitutionality of the section given the prior un-appealed declaration of invalidity. The Supreme Court disagreed and held that the Crown could defend the constitutionality in the latter case even though the Crown had not appealed the earlier

66 *Guindon v Canada*, *supra* note 62 at paras 19-33.

67 *Ibid* at para 23. See also *Canada (Public Safety and Emergency Preparedness) v Chhina*, 2019 SCC 29 at para 16, n 1, where the Court refused to hear a Charter argument raised on appeal without the claimant having served the requisite notice of constitutional question.

68 *Guindon v Canada*, *supra* note 62 at para 20; *R v JF*, 2022 SCC 17 at para 41.

69 *R v Sullivan*, 2022 SCC 19 at paras 73-79, refining the classic statement of judicial comity from *Re Hansard Spruce Mills Ltd*, 1954 CanLII 253, [1954] 4 DLR 590 (BCSC). The *Spruce Mills* criteria, according to the Supreme Court's restatement in *Sullivan*, only allow a trial judge to depart from a non-distinguishable prior decision on a point of law by a judge of a coordinate court in the same province in three narrow circumstances: (1) the earlier decision has been undermined by a subsequent appellate decision; (2) the earlier decision was reached without consideration of a relevant statute or binding authority that would have affected the result; or (3) the earlier decision was made in haste and not fully considered.

declaration of invalidity. A declaration of constitutional invalidity made under section 52(1) is a ruling on a point of law, and its authority in future cases is governed by the normal rules of vertical and horizontal *stare decisis* and judicial comity.[70]

However the Supreme Court in *Sullivan* did not clearly decide whether an accused who seeks to rely on a prior declaration of invalidity by a superior court in the same province must always apply for a section 52(1) remedy and serve a formal notice of constitutional question. The Ontario Court of Appeal's decision in the *Sullivan* case, before it reached the Supreme Court, seemed to say that in such a situation it would be the Crown's obligation to first put the accused on notice that correctness of the prior declaration will be disputed on the *Spruce Mills* criteria, failing which the prior declaration will govern the proceedings.[71] While this makes sense, unfortunately this approach raises further questions concerning the timing of when and how the Crown must put the correctness of the prior declaration in issue and what triggers the need for the defence to make a formal application for a section 52(1) remedy. There are divergent decisions on these points,[72] and the Supreme Court in *Sullivan* did not provide clarity. Until these procedural questions are resolved, a prudent prosecutor would put the defence on notice as early as possible to avoid unnecessary litigation delays, and a prudent defence counsel would make the formal application and serve notice of constitutional question even if arguably not required, to ensure the court has jurisdiction to grant a section 52(1) remedy if needed.

Clearly, if the prior authority holds that the challenged provision *is* constitutional, then the accused must serve the required notice of constitutional question in order to give the court jurisdiction to grant a section 52(1) remedy if it is persuaded to reach a different conclusion.

D. Evidence "Obtained in a Manner"

When exclusion of evidence is sought under section 24(2), there is an additional threshold requirement. The evidence sought to be excluded must have been "obtained in a manner that infringed or denied any rights or freedoms" guaranteed by the Charter. As interpreted by appellate courts, that means that the evidence must be meaningfully connected to the Charter violation. However, it is not necessary to show that the Charter violation caused the state to obtain the evidence. The court will look for a temporal, contextual, or causal connection. The "obtained in a manner" requirement is discussed in more depth in Chapter 2.

70 *R v Sullivan*, *supra* note 69.

71 *R v Sullivan*, 2020 ONCA 333 at para 38.

72 *R v Sarmales*, 2017 ONSC 1869 at paras 15-23 (holding that the defence was not required to serve a notice of constitutional question and that the Crown could not contest the prior declaration); *R v MJ*, 2021 ONCJ 74 at paras 3-4 (requiring the defence to serve notice of constitutional question, absent which the legislation was treated as valid despite a prior declaration in another case).

IV. Procedural Requirements

The Charter says nothing about the required procedure for seeking a remedy. Subject to specific rules of court, procedure is left to the discretion of the application judge to decide, although any procedure adopted must ensure that the process is fair to the parties and that the evidence adduced complies with normal standards of proof.[73]

A. Rules of Court

The criminal courts in each province are authorized to impose rules that govern the manner of applying for Charter remedies in a criminal proceeding. The rules of each court vary, but they can include matters such as the required form and content of a Notice of Application (beyond whatever notice of constitutional question may be required by legislation); the timing of the written notice and any written response; requirements for documentary evidence to be filed; and specifications for written argument, if any. The criminal practitioner must become familiar with the applicable rules of each court in which they practice. Failure to provide adequate notice may result in denial of a hearing of the application.[74]

B. Justifying a Hearing

The accused is not entitled to a hearing of any Charter claim as of right. Rather, courts can insist that the applicant justify a hearing before the court embarks on a Charter *voir dire* if the application materials do not make clear that the relief sought is a realistic possibility.

The entitlement of a court to require that the applicant make an "offer of proof" predates the Charter and is now firmly entrenched in the Charter jurisprudence.[75] The Supreme Court has confirmed that a trial judge may "decline to embark upon an evidentiary hearing at the request of one of the parties when that party is unable to show a reasonable likelihood that the hearing can assist in determining the issues before the court."[76] Further, even after an application has been allowed to commence, the Supreme Court has said that a trial judge can and should dismiss it summarily if ever it becomes apparent that the application is frivolous.[77] A trial judge's exercise of discretion to refuse a *voir dire* attracts deference on appeal, provided the discretion is

73 *R v L (WK)*, [1991] 1 SCR 1091 at 1103, 1991 CanLII 54; *R v Kematch (SD)*, 2010 MBCA 18 at para 43; *R v Sadikov*, 2014 ONCA 72 at para 32.

74 *R v Greer*, 2020 ONCA 795 at paras 103-5; *R v Megill*, 2021 ONCA 253 at paras 142-47.

75 *R v Kutynec*, 1992 CanLII 7751, 70 CCC (3d) 289 at 301-3 (Ont CA); *R v Vukelich*, 1996 CanLII 1005, 108 CCC (3d) 193 at paras 23, 26 (BCCA); *R v Pires; R v Lising*, 2005 SCC 66 at para 34; *R v Nixon*, 2011 SCC 34 at para 61.

76 *R v Pires; R v Lising*, *supra* note 75 at para 35.

77 *R v Jordan*, 2016 SCC 27 at para 63; *R v Cody*, 2017 SCC 31 at para 38.

exercised judicially.[78] Before dismissing an application without a *voir dire*, the judge must give the applicant a fair opportunity to make submissions about what evidence they would adduce and what arguments they would make.[79]

The foregoing approach to justifying a Charter hearing was developed in the context of section 24 applications. A similar idea about judicial restraint and efficiency also developed in the section 52(1) cases, although it is focused somewhat differently. Where the validity of legislation is at stake, Charter analysis of the enactment should not be undertaken unless a decision would affect the case before the court.[80] This means that while a Charter challenge seeking a section 52(1) remedy can be *heard* at any time in the proceedings that the trial judge thinks appropriate, a *decision* on the constitutional issue should be deferred until a time when it is clear that a decision will be material to the presentation of the case or its outcome. If a decision on the constitutionality of the provision would not be material to the case, then no decision should be given.[81]

This restrained approach is sometimes relaxed where a mandatory minimum sentence is challenged on the basis that it constitutes cruel and unusual punishment contrary to section 12 of the Charter. In *R v Nur*, for example, the trial judge held that even if the impugned mandatory minimum were to be struck down, the offender deserved more than the minimum sentence. The Court of Appeal and the Supreme Court both endorsed that ultimate conclusion and affirmed a sentence that exceeded the legislated minimum. And yet both appeal courts held that the mandatory minimum sentence was unconstitutional in respect of other reasonable hypothetical offenders and was therefore required to be struck down pursuant to section 52(1).[82] This anomaly seems to be the result of the "reasonable hypothetical" analytic approach that the Supreme Court has adopted for section 12 of the Charter. That is, adjudicating a section 12 claim sometimes requires a court to consider factual circumstances other than the claimant's, and a section 12 violation can be found

78 *R v Pires; R v Lising*, *supra* note 75 at paras 46-47; *R v Montgomery*, 2016 BCCA 379 at paras 255-58; *R v MB*, 2016 BCCA 476 at paras 45-48.

79 *R v Abdulkadir*, 2020 ABCA 214 at paras 21, 81-94.

80 *Moysa v Alberta (Labour Relations Board)*, [1989] 1 SCR 1572 at 1580, 1991 CanLII 54; *R v DeSousa*, [1992] 2 SCR 944 at 954-55, 1991 CanLII 54; *Phillips v Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 SCR 97 at paras 5-13, 1995 CanLII 86; *R v Mills*, [1999] 3 SCR 668 at paras 36-42, 1999 CanLII 637; *R v Banks*, 2007 ONCA 19 at paras 24-25; *Abou-Elmaati v Canada (AG)*, *supra* note 46 at paras 38-39.

81 As stated in *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 at para 46, 1985 CanLII 69, it must be remembered that "[n]o one may be convicted of an offence under an invalid statute." This principle means that a claimant "who otherwise has standing can generally seek a declaration of invalidity under s. 52 on the grounds that a law has unconstitutional effects either in his own case or on third parties": *R v Ferguson*, 2008 SCC 6 at para 59. However, this does not derogate from the general rule against unnecessary adjudication of constitutional issues because the prospect of conviction under an invalid statute is justification enough for the court to resolve the issue.

82 *R v Nur*, 2015 SCC 15.

on hypothetical facts that are not connected to the offender's own circumstances. Consequently, an applicant has standing to bring a section 12 claim that might not benefit the applicant personally.

That said, although an applicant has standing to *bring* the section 12 Charter claim on hypothetical facts, courts are not required to *decide* a claim that clearly will not benefit the applicant. In *R v Lloyd*, decided a year after *Nur*, McLachlin CJ commented that "it does not follow that a provincial court judge is obligated to consider the constitutionality of a mandatory minimum provision where it can have no impact on the sentence in the case at issue" and explained that judicial economy weighs against deciding legal issues that will not affect the outcome.[83] Those comments in *Lloyd* were linked to the idea that an inferior court's decision not to apply a provision for constitutional reasons is not a formal declaration of invalidity that has effect in other cases,[84] and it is not clear from *Lloyd* itself that the same analysis applies to a superior court.[85] But intermediate appellate courts—whose decisions *do* have binding effect on lower courts—have repeatedly declined to decide section 12 claims on the basis that they could not affect the sentence for the applicant then before the court.[86] Thus, it is open to lower courts to hold that while a section 12 application *can* be decided where it will not affect the outcome in the case at bar (as in *Nur*), it is not *necessary* to do so when it is clear that success in the section 12 claim will have no material impact on the applicant's sentence. In most cases, it will make sense for the sentencing court to determine first what would be a fit sentence without regard to a mandatory minimum, and if it becomes clear that even success in the section 12 claim would not practically assist the applicant, the court can decide not to go further in adjudicating the constitutional claim.[87]

C. Judicial Control of the Process

To ensure that scarce judicial resources are not wasted on pointless or needlessly prolonged litigation, appellate courts have urged trial judges to maintain a firm hand when

83 *R v Lloyd*, *supra* note 59 at para 18.

84 *Ibid* at para 19.

85 This uncertainty about the meaning of McLachlin CJ's comments in *Lloyd* is demonstrated in *R v Robertson*, 2018 BCSC 521 at para 21.

86 *R v Curry*, 2013 ONCA 420 at paras 21-22; *R v Stephenson*, 2019 ABCA 453 at paras 15-19; *Montour v R*, 2020 QCCA 1648 at paras 103-8; *R v Dodman*, 2021 ONCA 543 at para 27; *Chahinian v R*, 2022 QCCA 499 at para 105.

87 Indeed, there can be circumstances where adjudicating a s 12 issue that does not affect the outcome of the case is not only unnecessary but also contrary to the interests of the accused. In *R v Kinnear*, 2005 CanLII 21092, 198 CCC (3d) 232 at para 59 (Ont CA), Doherty JA criticized the trial judge for adjudicating a s 12 issue raised on the trial judge's own motion. The unnecessary litigation had the effect of lengthening the applicant's time in jail since the applicant ultimately received a "time served" sentence and would have done so a month sooner but for the time taken by the trial judge's consideration of the irrelevant constitutional issue.

controlling the process in Charter applications.[88] Appeal courts have largely declined to impose rigid rules of procedure.[89] Rather, the guiding principle is judicial discretion, with the focus always on fair and efficient determination of the material issues.[90]

D. Blended Evidentiary Hearings

The default procedure is for the evidence relevant to a Charter claim to be received within a *voir dire*, procedurally separated from the evidence admitted on the trial proper. However, in trials without a jury, it can sometimes be more efficient for the trial judge to hear the evidence for a section 24 Charter application commingled with the trial evidence. This is called a "blended" hearing. On this approach, witnesses testify on both the trial proper and the Charter issues without entering into a formal *voir dire* to keep the issues separate.

This approach can offer efficiencies where the witnesses needed for the Charter issues will also be testifying on the trial anyway. For example, blended hearings are common in impaired driving cases where the Charter claims relate to whether officers had grounds to invoke their powers to detain a driver and demand a bodily sample for analysis.

Blended hearings present some challenges. Depending on the precise procedure followed, the defence may gain the advantage of cross-examining a police witness to adduce evidence in support of the Charter application, even though the burden of calling evidence to prove the Charter claim is on the defence and, absent the blended hearing, the defence would be obligated to call the officer and the Crown would be entitled to cross-examine. Consequently, the Crown may resist a blended hearing. This can often be resolved through an agreement that the Crown will be allowed more liberty to lead police witnesses on Charter issues or more liberty to re-examine on those issues. Whatever the arrangement, this should be discussed in advance with the trial judge so that the ground rules are clear to the parties and the court.[91] The need for a clear discussion in advance takes on heightened importance where the accused is self-represented and might not understand the implications of testifying on a *voir dire* when it is blended into the trial proper.[92] The trial judge has discretion

88 *R v Felderhof*, 2003 CanLII 37346, 68 OR (3d) 481 at paras 40-43, 57 (CA); *R v Pires; R v Lising*, *supra* note 75 at paras 31, 34-35; *R v Omar*, 2007 ONCA 117 at paras 31-32; *R v Jordan*, *supra* note 77 at paras 63-65.

89 *R v Kutynec*, *supra* note 75 at 300; *R v Vukelich*, *supra* note 75 at para 23. A notable exception is the strict leave requirement before cross-examination of a search warrant or wiretap affiant may be permitted on a s 8 Charter application: *R v Pires; R v Lising*, *supra* note 75.

90 *R v Felderhof*, *supra* note 88 at para 57; *R v Pires; R v Lising*, *supra* note 75 at paras 3, 31, 35; *R v Omar*, *supra* note 88 at para 32; *R v Wilson*, 2011 BCCA 252 at paras 61-69; *R v Cody*, *supra* note 77 at paras 37-39.

91 In *R v Brodersen*, 2012 ABPC 231 at paras 28-82, the Court provided a detailed and helpful discussion on the issues that counsel and the court must be alert to when conducting a blended *voir dire*.

92 *R v Cochrane*, 2018 ABCA 80.

over the procedure to be adopted, as long as the accused is afforded a reasonable opportunity to challenge the credibility of the state actor(s) whose conduct is alleged to have infringed the Charter.[93]

Another challenge posed by blended hearings is that the parties and the trial judge must carefully remain focused on which party bears the burden on which issues. A single piece of evidence may require different burdens and standards of proof to be applied in respect of different issues—for instance, where voluntariness and section 10(b) concerns are raised in respect of an accused's statement.[94] And, of course, the burden on an accused to establish a Charter breach on a balance of probabilities must at all times be distinguished from the burden on the prosecution to prove guilt beyond a reasonable doubt. Trial judges have occasionally erred by conflating the different burdens of proof when the Charter application is blended with the trial proper, leading to appellate intervention and a new trial.[95]

Sometimes a blended hearing clearly does not make sense. For example, in a case about possession of contraband, a crucial issue may be the legality of the search and seizure. In such a case, it usually makes more sense to hear the section 8/24(2) application first and obtain a ruling from the trial judge before commencing the trial proper.

Indeed, a good alternative to the blended hearing in a judge-alone trial may be to receive the evidence on the Charter application within a *voir dire*, but agree in advance (and obtain the assent of the trial judge) that the evidence relevant to trial issues will be imported into the trial proper. From the defence perspective, this is preferable if the accused is to testify on the Charter application but perhaps not on the trial of the charges. This procedural arrangement requires careful attention to what evidence will be applied to the trial. Any such agreement, including any concession that the evidence, if admitted, would establish guilt, needs to be made explicitly on the record to ensure the accused's right to a fair trial, which includes the right to make the Crown prove its case on admissible evidence, is protected.[96] Likewise the accused's right to choose whether to testify at trial must not be waived by incorporating the accused's *voir dire* testimony into the trial proper without informed agreement from the accused.[97] Absent agreement of the parties to apply *voir dire* evidence

93 *R v Besharah*, 2010 SKCA 2 at para 37.

94 The Crown always bears the onus of proving that an accused's statement to a person in authority was made voluntarily: *R v Hodgson*, [1998] 2 SCR 449 at para 37, 1998 CanLII 798. In accordance with the normal allocation of the burden of proof on a Charter application, however, the accused would bear the onus of establishing that the same statement was obtained in violation of their right to counsel.

95 See e.g. *R v Boston*, 2013 ONCA 498 at paras 20-29.

96 *R v Longo*, 2008 BCCA 274 at paras 23-24.

97 See *R v Trought*, 2021 ONCA 379 at paras 72-73, where the defence counsel wrongly agreed to blend the *voir dire* evidence into the trial after the accused had testified in the *voir dire*, but without receiving the accused's instructions to agree to this.

to the trial, it is an error for the trial judge to do so.[98] Furthermore, care must be taken to ensure that only evidence properly admissible at trial is imported from the *voir dire* into the trial.[99]

E. Bifurcated Hearings

Litigants and trial judges should give serious consideration to bifurcating the Charter application where this could help focus the proceedings and make more efficient use of court time.

In section 24 applications, it can make sense for the trial judge to rule first on whether a breach has been proved and make findings about the nature and extent of the breach before the parties litigate what remedy might be appropriate. This approach makes the most sense where a variety of breaches is alleged (thus, knowing which breaches were proved will assist the parties to make more relevant submissions on remedy) or where a portion of the anticipated evidence would be relevant only to remedy (thus, it need not be adduced at all unless a breach is proved). On the other hand, in simpler situations there may be no efficiency to be gained in bifurcating the hearing. As discussed in the preceding section, after hearing from the parties about their plans and preferences, the procedure to be followed is in the trial judge's discretion to control.

Similarly, in section 52(1) applications, it may be more efficient for the court to first decide whether the legislation is inconsistent with the Charter before hearing any section 1 evidence seeking to justify the alleged infringement. In this way, the calling of section 1 evidence can be focused on the actual infringement or avoided altogether if there is no infringement to justify.

F. Timing of the Hearing and the Ruling

As in other aspects of Charter procedure, the trial judge has considerable discretion as to when to hear and decide a section 24 Charter application[100] so long as the parties are not prejudiced by the timing.[101] In some circumstances, such as where the accused claims that a fair trial cannot be had because of a Charter violation, it will be most preferable to decide the claim after a finding of guilt is made but before a conviction is entered.[102] This is the standard procedure, for example, when a claim of entrapment is made[103] or where the accused alleges an abuse of process on the basis of lost or

98 *R v Sadikov*, *supra* note 73 at paras 30-31, 101; see also *R v Cochrane*, *supra* note 92 at paras 17-28.

99 *R v Jir*, 2010 BCCA 497 at para 10; *R v Ahmed-Kadir*, 2015 BCCA 346 at paras 118-20.

100 *R v Byron*, 2001 MBCA 81 at para 24; *R v Salisbury*, 2012 SKCA 32 at paras 12-14; *R v Wilson*, 2013 SKCA 128 at paras 15-22.

101 *R v Dunkers*, 2017 BCCA 120 at para 28.

102 *R v Bérubé*, 2012 BCCA 345 at paras 41-42, 62-65.

103 *R v Mack*, [1988] 2 SCR 903, 1988 CanLII 24.

destroyed evidence.[104] In other circumstances, such as where non-disclosure or the admissibility of evidence is challenged, it will obviously be necessary to rule before or during the trial.

Many courts now have specific rules or practice directions concerning the timing of some Charter applications, especially for section 11(b) claims for a stay of proceedings. These rules should of course be consulted and followed.

Section 52(1) applications can also be heard whenever the judge directs but in general should not be decided until it is clear that a decision will be material to the case.[105] For example, if an accused would be acquitted on the law as currently in force, there would be no need to consider the constitutionality of the impugned provision. Appellate courts also prefer the factual record to be complete, which tends to militate against deciding a section 52(1) application at the outset of a trial rather than at the end.[106]

V. Burden and Standard of Proof

The burden of proving that a Charter remedy should be granted is always on the applicant, on a balance of probabilities.[107] (This is so even in part XX.1 review board hearings where the burden of proof is ordinarily on the board itself, not on any of the parties.)[108] A party who seeks a Charter remedy must both prove the violation and justify the remedy sought.

There are a few situations when the government may, at its option, undertake a counter-proof, the burden of which is on the government. The first situation is warrantless searches, which are presumptively unreasonable but can sometimes be proved reasonable. If the prosecution seeks to prove that a warrantless search was reasonable, then the prosecution has the burden of proof on that issue. But it must be remembered that this burden comes into play only after the applicant proves that the search was warrantless.[109] And even if the search is held to be unreasonable and therefore in violation of section 8—and even if the breach is serious—the applicant still carries the ultimate burden of proving that a remedy should be granted.[110]

104 *R v La*, [1997] 2 SCR 680 at para 27, 1997 CanLII 309.

105 See *Moysa v Alberta (Labour Relations Board)*; *R v DeSousa*; *Phillips v Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*; *R v Mills*; and *R v Banks*, *supra* note 80; *Abou-Elmaati v Canada (AG)*, *supra* note 46.

106 See *R v PH*, 2000 CanLII 5063, 143 CCC (3d) 223 at paras 18-20 (Ont CA); contrast *R v DeSousa*, *supra* note 80 at 954-55.

107 *R v Collins*, [1987] 1 SCR 265 at 277, 1987 CanLII 84 at para 21; *R v Orr*, 2021 BCCA 42 at para 44.

108 *Re Starz*, *supra* note 56 at paras 118-22.

109 *R v Collins*, *supra* note 107 at 277-78 (SCR), para 22 (CanLII).

110 *R v Bartle*, [1994] 3 SCR 173, 1994 CanLII 64; *R v Sandhu*, 2011 ONCA 124 at paras 41-46.

Another situation involves certain claims of excessive use of force by police. Peace officers are allowed by section 25 of the Code to use reasonable force in carrying out steps that they are authorized or required by law to do. Excessive use of force against the accused may be a violation of section 7 of the Charter. Normally, a section 7 claim puts the burden on the claimant to prove the violation and the appropriate remedy. But if the claimant establishes that the force "[was] intended or [was] likely to cause death or grievous bodily harm," sections 25(3) and 25(4) of the Code then move the burden to the government to prove that the statutory preconditions for the use of deadly force were met. The effect is that once the claimant shows that deadly force was used, the government must justify its use. As with warrantless searches, the overall burden of justifying a Charter remedy remains with the claimant.[111]

A third situation in which the government may elect to take on a burden of proof is when invoking section 1 to attempt to justify legislation that is otherwise inconsistent with the Charter and would therefore attract a section 52(1) remedy. If the government is relying on section 1, then the government bears the burden of proof on a balance of probabilities. Section 1 is discussed in more detail in Chapter 7, Declarations of Invalidity: Section 52(1).

VI. Checklists

A. Section 24(1): Threshold Requirements

Before a court considers granting a remedy under section 24(1), the court should be satisfied of the following threshold requirements:

- Does the claim relate to the conduct of a Canadian government official or (if a private actor) to someone acting as an agent of a Canadian government official?
- Does the claim relate to conduct within Canada?
  - Or, if outside Canada,
    - does the claim relate to conduct by a Canadian government or agent in foreign territory where the foreign state consented to the Charter applying, or
    - does the claim relate to conduct by a Canadian government or agent in violation of Canada's international human rights obligations?
- Is the claim being made in a court of competent jurisdiction?
  - If made in a superior court that is *not* sitting as the trial court, should the claim be deferred to the trial judge?
- In provinces where an NCQ is required for section 24(1) applications, has an NCQ been served on the requisite attorney(s) general?

111 *R v Davis*, 2013 ABCA 15 at paras 43-45 (majority), and 77-81 (Fraser CJA, dissenting); dissent aff'd 2014 SCC 4.

- Has the applicant complied with the relevant rules of court respecting notice and supporting materials for the application?
- Has the applicant established a reasonable likelihood that a hearing of the Charter application would assist the court to decide the material issues at trial?

B. Section 24(2): Threshold Requirements

Before a court considers excluding evidence under section 24(2), the court should be satisfied of the following threshold requirements:

- Does the claim relate to the conduct of a Canadian government official or (if a private actor) to someone acting as an agent of a Canadian government official?
- Does the claim relate to conduct within Canada?
  - Or, if outside Canada,
    - does the claim relate to conduct by a Canadian government or agent in foreign territory where the foreign state consented to the Charter applying, or
    - does the claim relate to conduct by a Canadian government or agent in violation of Canada's international human rights obligations?
- Is the claim being made in a court of competent jurisdiction?
  - If made in a superior court that is *not* sitting as the trial court, should the claim be deferred to the trial judge?
- Does the claimant seek to exclude evidence that was "obtained in a manner" that violated the Charter?
- Has the applicant complied with the relevant rules of court respecting notice and supporting materials for the application?
- Has the applicant established a reasonable likelihood that a hearing of the Charter application would assist the court to decide the material issues at trial?

C. Section 52(1): Threshold Requirements

Before a court considers granting a remedy under section 52(1), the court should be satisfied of the following threshold requirements:

- Does the claim relate to legislation of the Parliament of Canada or to legislation of a province? (This includes subordinate legislation enacted pursuant to the delegated authority of Parliament or of a provincial legislature.)
- Is the claim being made to either a superior court judge or a provincial court judge sitting as the trial judge?
- Has an NCQ been served on the requisite attorney(s) general?
- Has the applicant complied with the relevant rules of court respecting notice and supporting materials for the application?
- Is a decision on the validity of the enactment necessary to the resolution of an issue before the court?

VII. Example Notice of Application

This is an annotated Notice of Application for exclusion of evidence under section 24(2) of the Charter based on an alleged violation of the accused's right to be free from unreasonable search and seizure. This example and the annotations follow the *Criminal Proceedings Rules for the Superior Court of Justice (Ontario)*.[112]

Court file CR-00001

Ontario
Superior Court of Justice
Toronto Region

BETWEEN:

HER MAJESTY THE QUEEN

respondent

– and –

ALEXANDER DEFENDANT

applicant

NOTICE OF APPLICATION

to exclude evidence at trial pursuant to sections 8 and 24(2) of the Charter

TAKE NOTICE that an application will be brought on Monday the 28th day of November, 2022[113] at the Superior Court of Justice located at 361 University Avenue, Toronto, Ontario for an order pursuant to section 24(2) of the *Canadian Charter of Rights and Freedoms*, excluding from evidence all of the things seized by police on July 30, 2021 from the applicant's motor vehicle.

112 SI/2012-7 [the Rules].

113 The Notice of Application and all supporting materials must be served at least 30 days before the return date of the application: rr 6.04(2) and 31.04(1) of the Rules. Ordinarily, the application should be made returnable on the date scheduled for the commencement of trial unless an earlier date for pre-trial motions has been set, whether before the trial judge or another judge (see r 31.02(2) of the Rules), or unless a specific rule provides otherwise. Notably, applications for stay of proceedings based on unreasonable delay must be heard at least 60 days before the scheduled commencement of trial (including any other pre-trial applications): see para 24 of the Ontario Superior Court's Provincial Practice Direction Regarding Criminal Proceedings, effective August 12, 2020 [the Practice Direction].

THE GROUNDS FOR THIS APPLICATION ARE THAT:

1. On July 28, 2020 the applicant presented himself at the local police station at the request of Detective Constable Smith. The applicant had been contacted by Det. Cst. Smith and was advised that police intended to charge the applicant with assault with a weapon and threatening death, based on an allegation that the applicant had threatened his neighbour by brandishing what the neighbour described as a shotgun.
2. Upon arriving at the police station, the applicant was advised by Det. Cst. Smith that the applicant would be arrested and that before being arrested the applicant might wish to leave any personal valuables in his vehicle. The applicant placed his Apple iPhone, among other items, into the glove box of his vehicle, while Det. Cst. Smith watched. The applicant then accompanied the police officer into the police station where he was arrested and held for bail. The applicant spent two days in custody before being released on bail in the afternoon of July 30.
3. On July 30, Justice of the Peace O. Henry granted a warrant to search the applicant's vehicle that remained parked in the visitor parking area at the police station. Officers were authorized to search for a shotgun or replica resembling a shotgun.
4. At 11:45 a.m. on July 30, Det. Cst. Smith executed the search warrant by entering the applicant's vehicle. Although he was authorized to search for only a shotgun or replica shotgun, he exceeded the authority of the warrant by opening and searching inside areas of the vehicle that could not have contained an object the size and shape of a shotgun.
5. In particular, the officer:
   a. opened the glove box and seized the applicant's iPhone;
   b. opened the lid of the centre console and seized a set of keys that included keys to a storage locker and to a gun safe;
   c. opened the trunk, opened a briefcase found in the trunk, and seized a laptop computer found inside the briefcase.

   All these things were seized by the officer as evidence, purporting to rely on the seizure power in section 489 of the *Criminal Code*. The officer also found, in a gun case in the trunk of the vehicle, an inoperable antique rifle.[114]
6. Det. Cst. Smith deliberately exceeded the authority of the search warrant and engaged in a warrantless search of receptacles and containers in which the only thing authorized to be searched for—an object resembling a shotgun—could not have been found.

(Continued on next page)

114 The things to be excluded must be described in detail: r 31.03(2)(b) of the Rules.

7. Det. Cst. Smith applied for the search warrant knowing that the applicant had placed his iPhone in the glove box. He knew that the warrant only authorized a search for an object resembling a shotgun. Yet, he searched where he knew he had no authority to search, knowing that he would find the iPhone.
8. The entire conduct of the search was unreasonable, and the applicant's right to be free from unreasonable search and seizure, protected by section 8 of the Charter, was violated.
9. To admit into evidence any of the fruits of this illegal search would bring the administration of justice into disrepute. Consequently, all the things seized, including the antique rifle, should be ordered excluded pursuant to section 24(2) of the Charter.
10. Such further and other grounds as counsel may advise and this Honourable Court may permit.[115]

IN SUPPORT OF THIS APPLICATION, THE APPLICANT RELIES UPON:[116]

1. The Information to Obtain a Search Warrant that was before Henry JP;
2. The Search Warrant granted by Henry JP for the search of the applicant's vehicle;
3. Transcript of the preliminary inquiry evidence of Det. Cst. Smith;
4. The affidavit of Alexander Defendant;[117]

115 There may be a temptation to withhold the applicant's best arguments from the Notice of Application and save them for the oral hearing. Apart from being professionally discourteous to opposing counsel and the court, this approach is also tactically unwise. Rules 6.11 and 34.02 of the Rules allow for summary dismissal of applications that appear frivolous or vexatious, without ever reaching an oral hearing. This is consistent with the principle that a court can demand an "offer of proof" before embarking on a *voir dire*, discussed in Section IV.B of this chapter. Furthermore, "notice by implication" is not notice: *R v Greer*, *supra* note 74 at paras 103-4.

116 In addition to filing the Notice of Application, the applicant is required to file an Application Record containing a copy of the Notice, a copy of the Indictment, and copies of all documentary materials relied upon: r 31.05 of the Rules. The Application Record must be filed at least 30 days before the hearing of the application: r 31.04(3) of the Rules. In practice, the Notice of Application, the Application Record, and the Factum and Book of Authorities will usually be filed together on the same day.

117 It is often not necessary for the accused to personally give evidence on the Charter application. But it can be if the defence does not have access to another witness who can establish facts required to support the Charter claim. If the accused is to give evidence on the Charter application, ordinarily the defence will prefer that the application proceed in a separate *voir dire*—not as a blended hearing—so that the accused's evidence in the *voir dire* will not be part of the trial proper. Evidence on an application can be presented by way of affidavit (r 6.07 of the Rules) or, with leave of the presiding judge, *viva voce* (rr 6.08 and 34.01 of the Rules).

5. The applicant's factum[118] and the oral submissions of counsel.[119]

THE TIME REQUIRED for the hearing of evidence on this application is three hours.[120]

THE APPLICANT MAY BE SERVED WITH DOCUMENTS PERTINENT TO THIS APPLICATION by service in accordance with Rule 5, through counsel at [*address and email address of counsel's law practice*].

DATED AT Toronto, this 18th day of October, 2022.

[*name and signature of counsel for the applicant*]

118 In the Ontario Superior Court, a Factum and Book of Authorities are required for all applications to exclude evidence: r 31.05(4) of the Rules, and para 9 of the Practice Direction. Factums must be filed at least 30 days before the hearing of the application: r 33.01(12) of the Rules. The requirement to file a factum is notably different from proceedings in the Ontario Court of Justice (the provincial court), where factums are optional.

119 The presiding judge can impose time limits on oral submission: r 34.04 of the Rules.

120 A time estimate, required by r 31.03(2)(e) of the Rules, is to be included in the Notice of Application.