Existing Standard	Proposed Standard	Rationale
N/A	**# - *Charter* Applications** **STANDARD** 1. A lawyer who is retained must review the disclosure as soon as possible to determine whether there are grounds for making an application for a *Charter* remedy, pursuant to the *Canadian Charter of Rights and Freedoms* ("*Charter*")[1]. 2. If grounds exist for making a *Charter* application, the lawyer must make reasonable efforts to obtain instructions (preferably in writing) from the client regarding whether to make an Application. **COMMENTARY** Jurisdiction The primary remedy for a *Charter* violation is for the accused to make an Application to the trial court, pursuant to s. 24. Under s. 24, "Anyone whose [*Charter*] rights and freedoms…have been infringed or denied" may apply for a remedy to a court of "competent jurisdiction.[1]" A trial court, as a "court of competent jurisdiction," may give an "appropriate and just" remedy (s. 24(1)), or exclude evidence obtained in violation of the *Charter* if admission would bring the administration of justice into disrepute (s. 24(2)).[2] All criminal trial courts, including trials before Provincial Court judges, are "courts of competent jurisdiction," as defined by s. 2 of the *Criminal Code* for the purposes of granting s. 24 *Charter* remedies[3]. Section 24 does not	The Professional Standards (Criminal) Committee is of the opinion that a standard is required so that criminal practitioners (1) have a clear understanding of the importance to make a timely *Charter* application in appropriate cases, (2) review the Crown disclosure as soon as possible in order to decided whether to bring an application for *Charter* relief, and (3) understanding the importance of obtaining the necessary instructions from the client as early in the process as possible.

	confer on the courts new jurisdiction; those courts already had "jurisdiction conferred by a statute over the offences and persons, and power to make the orders sought."[4] On the other hand, the Supreme Court in *Mills* unanimously ruled that a justice at a preliminary inquiry was not a court of competent jurisdiction for the purpose of granting *Charter* remedies under s. 24. Their jurisdiction under what is now Part XVIII of the *Criminal Code* was limited to considering whether there is sufficient evidence to put the accused on trial. Notwithstanding that the rules for the admissibility of evidence apply at preliminary inquiries, there is no jurisdiction for a justice at a preliminary inquiry to consider whether evidence should be excluded under s. 24(2) as having been obtained in violation of the *Charter*.[5] Courts have held that judges at extradition hearings are "courts of competent jurisdiction" for the purposes of s. 24[6]; however, parole boards are not[7]. Justices at bail hearings do not have *Charter* jurisdiction[8]. A divided Supreme Court in *R. v. Hape*[9] held that the *Charter* does not apply to Canadian police acting outside Canada unless the foreign jurisdiction consents to their enforcement jurisdiction. However, in *Khadr v. Canada (Minister of Justice)* the Court created an exception where action violate Canada's international obligations.[10] Lawyers should be careful to consider the availability of potential *Charter* applications that are specific to racialized clients, including:	

a. Racial Profiling, (see *R. Dudhi*, 2019 ONCA 665);

b. Police authority to question[11] individuals, (see *R. v. Le*, 2019 SCC 34).

<u>Failure to Bring a *Charter* Application may Have Unintended Consequences</u>

The purpose of this standard may seem self-evident. After all, the failure to make a *Charter* Application, where there is evidence of a *Charter* breach, may prejudice the defence. This is particularly true in cases of "impaired over .08."

To address the challenges posed by a large number of impaired driving offences, Parliament has, over the years, taken steps to simplify and streamline the trial process. One of those steps involved the introduction of evidentiary shortcuts into the *Criminal Code*. These shortcuts are now found in <u>ss. 320.31(1)</u> of the *Criminal Code* (formerly 258(1)(c) and 258(1)(g) of the *Code*). They permit the Crown to establish an accused's blood-alcohol concentration at the time of the alleged offence by filing a certificate recording the accused's breath readings.
To ensure that those evidentiary shortcuts yield reliable evidence, Parliament built a number of preconditions into the scheme—the most notable being that the breath samples have to be taken within a prescribed period of time following the alleged offence.[12]

If there are issues related to the proof of the evidentiary preconditions, the demand for breath (or blood) samples may be unlawful. For example, a demand made to provide a breath sample into the approved screening device without the required reasonable suspicion under section 254(2) is

a warrantless and unreasonable search, pursuant to s. 8 of the *Charter.* However, if the lawyer chooses not to bring a *Charter* Application at trial, the Crown does not have to prove that the demand was a "lawful demand" before it can take advantage of the evidentiary shortcuts: *Rilling v. The Queen*[13]. *Rilling* has been applied in Nova Scotia, and remains good law[14].

Justice Moldaver places the practical importance of the *Charter* Application in context at paragraph 11 of *R. v. Alex*:

> *When ss. 258(1)(c) and 258(1)(g) are analyzed in accordance with the modern principles of statutory interpretation, I am satisfied that the Crown need not prove that the demand was lawful in order to take advantage of the shortcuts. If the taking of the samples is subjected to Charter scrutiny, and the evidence of the breath test results is found to be inadmissible by virtue of ss. 8 and 24(2) of the Charter, that will end the matter. Resort to the evidentiary shortcuts will be a non-issue. On the other hand, if the taking of the samples is subjected to s. 8 Charter scrutiny, and the breath test results are found to be admissible in evidence—either because no. s. 8 breach occurred or because the evidence survived s. 24(2) Charter scrutiny—the shortcuts should remain available to the Crown.* [15]

FOOTNOTES

[1] NSBS, *Code of Professional Conduct*, Halifax: Nova Scotia Barristers' Society, 2012, rule 3.1-2.

[2] *Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982*, being Schedule B to the *Canada Act*, *1982* (U.K.), 1982, c. 11, s. 24(1).

[3] *Ibid.*, s. 24(2).

[4] *R. v. Mills* (1986), 52 C.R. (3d) 1 (S.C.C.).

[5] *Ibid.*, at p. 19. A Provincial Court judge therefore has no *Charter* jurisdiction respecting an indictable offence before election. See *R. v. Wilson* (1997), 121 C.C.C. (3d) 92 (N.S.C.A.).

[6] *R. v. Mills*, supra note 4; *R. v. Hynes* (2001), 47 C.R. (5th) 278 (S.C.C.).

[7] *Unites States v. Kwok*, [2001] 1 S.C.R. 532. Arbour J. for the Court confirmed jurisdiction under the new *Extradition Act* over matters relevant to extradition hearings. These include s. 7 rights, but not s. 6 mobility rights which arise under the Minister's surrender jurisdiction.

[8] *Mooring v. National Parole Board* (1996), 45 C.R. (4th) 265 (S.C.C.).

[9] *R. v. Menard* (2008), 63 C.R. (6th) 211 (B.C.C.A.).

[10] *R. v. Hape* (2007), 47 C.R. (6th) 96 (S.C.C.).

[11] *Khadr v. Canada (Minister of Justice)* (2008), 56 C.R. (6th) 255 (S.C.C.). See too *Canada v. Khadr*, [2010] 1 S.C.R. 44 (S.C.C.).

[12] The Court stated the police have no legal authority to question people who are doing nothing wrong, nor demand their IDs. Both the majority and dissent recognized that a person may experience a police interaction differently due to their race and existing relations between the police and various racial groups. The majority also accepted a position advanced by us stating even a short interaction with the police can have a significant impact on an individual and can be considered a form of detention.

[13] Other preconditions include that the samples have to be provides in an approved container or instrument, and the instrument has to be operated by a properly qualified technician, and the demand has been made upon "reasonable grounds."

[14] *Rilling v. The Queen*, [1976] 2 S.C.R. 183 (S.C.C.); *R. v. Alex*, 2017 SCC 37; *R. v. Bernshaw*, [1995] 1 S.C.R. 254 (S.C.C.), at para. 42; and *R. v. Charette*, 2009 ONCA 310.

[15] *R. v. MacLennan*, [1995] N.S.J. No. 77 (N.S.C.A.), at para. 58.

STANDARD

2. A lawyer must provide reasonable notice of a *Charter* Application to the Crown and to the Court.[16]

COMMENTARY

Reasonable Notice

Where a *Charter* challenge involves an attack on the constitutional validity or applicability of a law, the applicant must comply with statutory notices to be given to the Attorneys General of Canada, or the Province, or both.[17] In Nova Scotia, the notice period is 14 days.[18]

If the lawyer files his or her *Charter* Application in Provincial Court, or if the Application is to exclude evidence pursuant to section 24(2) of the *Charter*, the applicant must file a Notice of Application with the Court, and serve it on the respondent, at least 7 days prior to the date of the first appearance for the application[19]. Pre-trial applications are to be heard 60 days prior to the beginning of the trial, unless the Court orders otherwise.[20]

The purpose of notice of a *Charter* Application has been summarized in *R. v. Floate*, 2001 ABPC 250, at paragraph 7:

"The purpose of notice of a Charter Application is to ensure a fair trial and an expeditious trial. It is to allow the Crown an opportunity to marshal its evidence and ask questions of its witnesses to deal with the

	Charter issue. It is to allow them an opportunity to call evidence relating to the Charter they would normally have called. It is also to give the Court notice of the issue so it can view the evidence as it is presented knowing the issue and to be prepared by reading cases beforehand that deal with the issue and which counsel will rely upon and in that way expedite the trial process rather than delay by adjournments to review evidence and cases[21].” Justice Jamie Campbell commented on the purpose of the notice period set out in the Provincial Court Rules in *R. v. Doncaster.*[22] Their purpose is to prevent “litigation by ambush,” by permitting both parties with an opportunity to respond to the application, file the appropriate materials, and avoid unnecessary adjournments.[23] The Alberta Court of Appeal in *R. v. Dwernychuk* described at paragraph 12 the benefit notice has on the Court hearing the Application: *“It enables the judge, with the help of both counsel, 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 has 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 questions of witnesses. If such notice is given, the judge is better able to reach a rational decision which is based on a calm reading and serene appreciation of the law, rather than having to reach a decision, perhaps without due consideration, because of the inexorable pressure of his or her docket.”*[24] It should be kept in mind that *Charter* issues may sometimes arise mid-trial. In those circumstances, notice to the other party will not be possible.	

	Both parties may benefit from requesting that the trial judge hear closing arguments in writing. That way, the parties will have the best opportunity to address the *Charter* issues. <u>Sufficiency of Notice</u> Sufficient notice means: (1) It is provided in writing to the Crown and to the Court; (2) It lists the sections of the *Charter* alleged to have been breached; (3) It describes the nature of the *Charter* violation; (4) It provides for an evidentiary basis for the Charter violation, including an outline of the facts grounding the application. It must be in sufficient detail to disclose a breach, allow a response to the allegations, and allow the Court to determine if it should hear evidence on the application.[25] (5) It should outline the remedy being sought, including a list of evidence the Applicant seeks to exclude, if applicable; and (6) A list of cases to be relied on by Applicant in support of the Application.[26] <u>Consequences of Insufficient Notice</u> If an Applicant fails to file sufficient notice of an Application, several alternatives can reasonably be anticipated:	

(1) The application could proceed, with minimal notice to the Crown and to the Court, or in the absence of the supporting materials required by the Rules of Court and the common law. That would give the Applicant the “tactical advantage of surprise, which is one of the very things that the rules are intended to prevent.”[27]

(2) The Crown could be granted an adjournment. Courts have a discretion to grant or deny requests for an adjournment. While a court is arguably without jurisdiction to hear and determine a *Charter* Application unless the notice has been properly provided, it has the discretion to adjourn the proceedings in order to facilitate belated compliance with that requirement. That is another thing the rules are intended to prevent.

In deciding whether to grant an adjournment, Court must bear in mind the potential importance of *Charter* Applications. A litigant’s right to make such an application in a trial forum will not[28] be denied lightly[29]. However, the legal environment has changed considerably since the decision in the early Charter notice cases, like *Kutynec*. Both the common law,regulatory provisions, and Rules of Court governing *Charter* Applications unambiguously dictate that proper notice be given. Moreover, the harmful effects of delay are manifesting themselves in increases to lead times and length of proceedings.

(3) The Application could be dismissed because of untimely or inadequate notice.[30]

FOOTNOTES

[16] *R. v. Alex*, *supra* note 13, at para. 11.

[17] *R. v. Charette*, *supra* note 13, at para. 45; *R. v. Gundy* (2008), 231 C.C.C. (3d) 26 (Ont. C.A.), at paras. 19-24 and 50 ; *R. v. Dwernychuk, infra,* note 21, at paras. 12-14.

[18] *Constitutional Questions Act*, R.S.N.S 1989, c. 89, ss. 10(2).

[19] *Ibid*., at s. 10(4). Provincial statutory notice requirements have been held to be constitutionally within the provincial power over the administration of justice under section 92(14) of the *Constitution Act* of 1867: *McGillivary v. Manitoba* (1989), 51 C.C.C. (3d) 60 (Man. Q.B.).

[20] *Provincial Court Rules*, s. 3.1(1).

[21] *Ibid*., s. 2.4(1). See also the Provincial Court Practice Directive No. 2.

[22] *R. v. Floate*, 2001 ABPC 250, at para. 7. See also: *R. v. Mosseau*, 2002 ABQB 150, at para. 8; *R. v. Dwernychuk* (1992), 77 C.C.C. (3d) 385 (Alta. C.A.)., *R. v. McNab*, 1999 ABPC 85, at paras 11 and 12; *R. v. Doncaster*, 2013 NSPC 13, at para. 9; *R. v. Blom* (2002), 6 C.R. (6th) 181 (Ont. C.A.); *R. v. Kutynec* (1992), 70 C.C.C. (3d) 289 (Ont. C.A.), at para. 9.

[23] *R. v. Doncaster*, *supra* note 21.

[24] *Ibid*., at para. 9.

[25] *R. v. Dwernychuk*, *supra* note 9, at para. 12.

[26] If the Applicant fails to advance a sufficient basis for the *Charter* Application, the application may be dismissed without hearing evidence: *R. v. Kutynec*, *supra* note 9, at paras. 21 and 22.

[27] See Provincial Court Rules Practice Direction— "*Charter* Applications," (PC Rule 2). See also: *R. v. Dwernychuk*, *supra* note 21, at paras. 25-28; *R. v. Kutynec*, *supra* note 21, at para. 36;

[28] *R. v. Doncaster*, *supra* note 9, at para. 14.

[29] *R. v. Loveman* (1992), 71 C.C.C. (3d) 123 (Ont. C.A.).

[30] *R. v. Loveman* (1992), 71 C.C.C. (3d) 123 (Ont. C.A.).

[31] *R. v. Kutynec*, *supra* note 21, at paras. 21 and 22.

MEMORANDUM TO COUNCIL

From: Professional Standards (Criminal Law) Committee
Date: January 12, 2021
Subject: Professional Standards (Criminal) Committee Standard # - *Charter* Applications

DATE January 22, 2021	Council	Introduction
	Council	Approval

Recommendation/Motion:

This is the introduction to Council of a new standard No. # - *Charter* Applications – by the Professional Standards (Criminal) Committee. Following introduction, the standard will be circulated to the membership for review and consultation. The Committee will review any comments received and then present the final form, amended if necessary, to Council for approval.

Executive Summary:

The Professional Standards (Criminal) Committee is of the opinion that a standard is required so that criminal practitioners (1) have a clear understanding of the importance to make a timely *Charter* application in appropriate cases, (2) review the Crown disclosure as soon as possible in order to decided whether to bring an application for *Charter* relief, and (3) understanding the importance of obtaining the necessary instructions from the client as early in the process as possible.

This standard was sent to the GEC and REC for review and their recommendations have been included in this current Standard.

Exhibit: Standard No. #: *Charter* Applications with rationale.