NOVA SCOTIA PROVINCIAL COURT RULES

(Implementation Date: January 1, 2013)

Rule 1 – General

1.1 Fundamental Objective

1.1 (1) The fundamental objective of these Rules is to ensure that cases in the Provincial Court of Nova Scotia are dealt with fairly, reasonably and efficiently.

Duty of Counsel, Agents and Self-Represented Persons

1.1 (2) In every case, each counsel, agent and self-represented person shall comply with these Rules and with applicable Practice Directions and other orders made by the Court.

Duty of Court

1.1 (3) The Court shall take the fundamental objective into account when,

(a) exercising any power under these Rules; or

(b) applying or interpreting any Rule or Practice Direction.

1.2 Scope of Rules

1. 2 These Rules apply to all cases before the Court.

1.3 Definitions

1.3 In these Rules,

"Charter" means the Charter of Rights and Freedoms;

"Court" means the Provincial Court of Nova Scotia.

Rule 2 – Applications

2.1 Notice of Application

2.1 (1) An application shall be commenced by,

(a) completing a Notice of Application in Form 1;

(b) serving (giving or sending) Form 1 to the opposing parties; and

(c) filing a copy of Form 1 with the Court.

Contents of Notice

2.1 (2) The Notice of Application shall include,

(a) a statement of what is being requested;

(b) the reasons for the request; and

(c) the facts supporting the request.

Commentary

The party who is making an application to the Court under these Rules must use Form 1. It is important that Form 1 is filled out completely.

Transcripts or Audio Recordings

2.1 (3) A party who wishes to rely upon something that happened in a previous court proceeding shall attach the transcript or audio recording of the relevant part of the other proceeding to Form 1.

Commentary

Transcripts of court proceedings may be very important to the Court in deciding an application. Transcripts are important where a party seeks a stay of proceedings due to unreasonable delay under s. 11(b) of the Charter. Where a party requires a transcript or audio recording, it is important that the procedures for ordering recordings of court proceedings are followed, so that there is enough time for the transcript or audio recording to be prepared, to be attached to Form 1 and to be served and filed.

2.2 Response

2.2 (1) A party who wishes to respond to a Notice of Application may prepare, send or give a Response in Form 2 to the opposing parties and file a copy of it with the Court before the first appearance on the application.

Contents of Response

2.2 (2) If a party chooses to respond, the Response shall include,

(a) the reasons for opposing the application; and

(b) the facts supporting those reasons.

Commentary

If a party chooses to respond it is important that Form 2 is filled out completely.

2.3 Additional Material

Parties making applications and opposing parties, may serve and file any additional documents that they consider appropriate and helpful to assist the Court, including,

(a) a brief statement of the legal argument to be made;

(b) one or more affidavits;

(c) case law to be relied upon; and

(d) an agreed statement of facts.

Commentary

Additional materials may be filed that will assist the Court to decide the application. These might include an agreed statement of facts, affidavits and written argument and case law, where appropriate. It may also be necessary to have witnesses attend court (e.g., on an application for an adjournment of trial, a person who has firsthand knowledge of the reasons for the unavailability of the witness on the trial date). Where cases or statutes, bills or laws are filed, the relevant passage(s) should be indicated.

There is no need to reproduce well known material, such as a section of the Criminal Code. All materials shall be filed as soon as possible subject to any direction of the Court.

2.4 Time for Pre-Trial Applications

2.4 (1) Except with the permission of the Court, a pre-trial application shall be heard at least 60 days before trial.

2.4 (2) For the purposes of sub-rule (1), pre-trial applications include,

(a) procedural applications such as applications for adjournments or withdrawal of counsel of record;

(b) preparatory applications for matters that are necessary before proceeding to trial, such as disclosure, access to private records, release of exhibits for testing or commission evidence;

(c) applications for severance and for particulars;

(d) applications for the appointment or removal of counsel; and

(e) applications for a stay of proceedings for unreasonable delay under clause 11(b) of the Charter.

2.4 (3) An application for a stay of proceedings for unreasonable delay under clause 11(b) of the Charter shall be brought before the assigned trial judge.

2.5 Time for Trial Applications

2.5 (1) A trial application shall be heard at the start of the trial or during the trial, subject to the direction of a judge at a pre-trial or of the trial judge.

2.5 (2) Trial applications include,

(a) applications such as those under the Charter that,

(i) challenge the constitutionality of legislation,
(ii) seek a stay of proceedings, except for unreasonable delay under clause 11(b) of the Charter,
(iii) seek the exclusion of evidence; and

(b) complex evidentiary applications such as applications for the admission of,

(i) similar fact evidence,
(ii) evidence of a complainant's prior sexual activity, or
(iii) hearsay evidence.

Commentary

Trial applications can take many forms. Rule 2.5 is designed to balance the benefits of certainty, as to how a complex issue should be addressed, and flexibility, to ensure that the fundamental objective is properly respected.

2.6 Time for Third Party Applications

2.6 (1) Applications by witnesses or by the media shall be heard at least 30 days before the trial.

2.7 Applications by Consent

2.7 (1) Subject to sub-rule (2), an application may be dealt with by consent, without a hearing, if a party files a Consent in Form 3.

2.7 (2) If the Court is of the opinion that the application requires a hearing, a hearing date shall be ordered.

2.7 (3) An application in which a party is not represented by counsel may be dealt with by consent if,

(a) the self-represented person appears before the Court; and

(b) the Court is satisfied that the self-represented person understands the nature of the consent and the consequences of giving it.

Commentary

Parties are encouraged to consent to applications in a timely way in appropriate cases.

Rule 3 – Serving Documents

3.1 Times for Serving Notices and Responses

3.1 (1) A Notice of Application shall be served, and filed with proof of service, at least 7 days before the date of the first appearance on the application.

3.1 (2) A Response shall be served and filed with proof of service at least 3 days before the date of the hearing of the application.

Exceptions

3.1 (3) Despite sub-rules (1) and (2), the time periods set out in those sub-rules may be shortened or lengthened,

(a) by a local Practice Direction;

(b) by an order of the Court;

(c) with the consent of the parties, except for applications for adjournments and applications by counsel to be removed from the record.

Commentary

Timely notice of applications that are being brought under these Rules is essential to the efficient management of trial proceedings. The general rule is that applications must be served and filed no less than 7 days before the date set for hearing the application. Rule 3.1 provides exceptions to this, such as an order of the Court authorizing a different time period.

3.2 Application for Adjournment or for Counsel to Withdraw

3.2 (1) On applications for adjournment and applications by counsel to be removed from the record, shortening the time periods set out in sub-rules 3.1 (1) and (2) requires the approval of the Court.

3.2 (2) The Court shall consider all of the circumstances surrounding the application and the consent of the parties if any.

Commentary

It is recognized that there are occasions where unexpected developments take place, such as the illness of a witness shortly before the trial date or a breakdown in the lawyer-client relationship, and it is not possible to give as much notice as the Rules require. In such cases, the parties should not wait until the trial date to bring the application, but instead bring the application as soon as the matter comes to their attention, and request that the Court permit the matter to be heard on short notice, with the consent of the other party.

3.3 Methods of Service

3.3 (1) Service under these Rules may be made in person, by fax or by email, and hard copies of the documents served shall be filed with the Court.

Electronic Filing Technology

3.3 (2) If electronic filing technology is available and its use is authorized the documents may be served, filed or both by means of the technology. When a document has been filed electronically, it is not necessary to file a hard copy.

Rule 4 – Case Management

4.1 Hearing and Trial Management

When conducting a hearing or trial, the Court has power to make any order or direction in relation to the conduct of the case that would assist in ensuring that it is conducted fairly, reasonably and efficiently.

Commentary

Trial judges possess trial management powers in order to ensure that the proceedings are conducted reasonably, fairly and efficiently. A trial judge is not a mere observer who must sit by passively allowing counsel to conduct the proceedings in any manner they choose. For our justice system to operate effectively trial judges must have the ability to control the course of proceedings before them.

4.2 Judicial Pre-Trial

4.2 (1) Every case that is proceeding to preliminary inquiry or to trial, that is set down for one full day or longer, may have a judicial pre-trial.

4.2 (2) Before attending the judicial pre-trial, the parties shall,

(a) review the file; and

(b) communicate in order to attempt to resolve issues.

4.2 (3) At the judicial pre-trial the parties are expected to be authorized to make decisions on,

(a) disclosure;

(b) applications, including Charter applications, that the parties will bring at trial;

(c) the number of witnesses each party intends to call at the preliminary inquiry or at trial;

(d) any admissions the parties are willing to make;

(e) any legal issues that the parties anticipate may arise in the case;

(f) an estimate of the time needed to complete the case; and

(g) resolution of the matter, if appropriate.

Commentary

Pre-trials can result in speedier trials, focused on the matters in issue. For the convenience of the parties, a pre-trial may be conducted by telephone with the consent of the pre-trial judge. A pre-trial on the record is particularly helpful for parties not represented by counsel. The court procedures can be explained, the position of the Crown on the issues can be related and the issues set out in sub-rule (3) above can be canvassed.

Judicial Directions

4.2 (4) After hearing from the parties during the judicial pre-trial, the pre-trial judge may take one or more of the following steps:

1. Confirm or amend the estimates of the time required to hear the case.

2. Set timelines for the exchange of materials on applications to be heard, or for the completion of disclosure on matters to be set for trial or preliminary hearing.

3. Set times for the hearing of applications.

4. Set a date for a further judicial pre-trial, if required.

Record of Pre-Trial Agreements and Admissions

4.2 (5) At the completion of the judicial pre-trial any agreements or admissions shall be recorded, transcribed and attached to the Information for the assistance of the trial judge.

4.3 Focus Hearing

4.3 (1) A case that is proceeding to a preliminary inquiry may have a judicial pre-trial as set out above, and shall have a focus hearing as set out in the Criminal Code if the parties request one or a judge so directs.

4.3 (2) A focus hearing shall be attended by counsel who will be conducting the inquiry or by the self-represented person.

Commentary

The purpose of a focus hearing pursuant to the Criminal Code is to:

(a) assist the parties to identify issues on which evidence will be given at the inquiry;

(b) assist the parties to identify the witnesses to be called at the inquiry taking into account the needs and circumstances of each witness; and

(c) encourage the parties to consider any other matters that would promote a fair and expeditious inquiry.

Materials

4.3 (3) The party who requests the preliminary inquiry shall serve the following materials on the opposing parties and file them with proof of service, at least 3 days before the focus hearing:

1. A list of witnesses whom the parties seek to have testify at the preliminary inquiry;

2. A brief statement as to whether committal for trial is in issue, and on what basis; and

3. A statement of admissions, if any.

Absence of Agreement

4.3 (4) At the conclusion of the focus hearing, if the parties do not agree as to the witnesses to be called at the preliminary inquiry, either party may schedule a hearing.

Commentary

The purpose of a focus hearing is to ensure that the process is streamlined and witnesses with non-contentious evidence are not inconvenienced or that non- contentious evidence is not called unnecessarily. If the parties cannot agree on the witnesses to be called or the manner of receiving their testimony, then a hearing can be scheduled under the Criminal Code provisions before the preliminary inquiry judge on the record and may result in the judge making binding orders for the conduct of the inquiry.

Rule 5 – Practice Directions, Forms, Non-Compliance, and Commencement

5.1 Power to Issue Practice Directions

5.1 (1) The Chief Judge or his or her delegate may issue Practice Directions that are consistent with these Rules.

5.1 (2) A Practice Direction may apply to the whole of Nova Scotia, to one or more regions or to a local court within a region.

5.1 (3) A Practice Direction does not come into effect before it is posted on the Nova Scotia Courts website (www.courts.ns.ca).

Commentary

Practice Directions can address the issues and court culture of our regions and local courts. In creating Practice Directions the judiciary, in their discretion, will consult with members of the justice community.

5.2 Forms

5.2 (1) The following forms, which are available on the Nova Scotia Courts website at www.courts.ns.ca/provincial/pc_forms.htm shall be used where applicable and with such variations as the circumstances require:

Form 1 (Notice of Application)
Form 2 (Response)
Form 3 (Consent)

5.2 (2) The Chief Judge may issue Forms Notices establishing additional forms and requiring their use. This power shall not be delegated.

5.2 (3) A Forms Notice does not come into effect before,

(a) it is posted on the Nova Scotia Courts website (www.courts.ns.ca); and

(b) the form or forms it establishes are available on the website at www.courts.ns.ca/provincial/pc_forms.htm.

5.3 Power of Court to Excuse Non-Compliance

The Court may excuse non-compliance with any Rule at any time to the extent necessary to ensure that the fundamental objective set out in Rule 1.1 is met.

Commentary

It is expected that the parties will be familiar with these Rules of Court and will comply with them. It is a professional obligation to do so. However, on rare occasions, there may be circumstances that prevent compliance. The Court, in its discretion, may excuse compliance with the Rules to the extent required to ensure a fair hearing. Consequences may result from non-compliance, including dismissal of the application without a hearing on the merits.

Commencement

These Rules come into force on January 1, 2013.

PRACTICE DIRECTION – CHARTER APPLICATIONS (PC Rule 2)

Applicable Provincial Court Rule

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

Guiding Principles

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

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

Sufficient notice means:

1) The nature of the alleged *Charter* violation must be described and the sections of the *Charter* alleged to have been breached must be listed;

2) The evidentiary basis for the alleged *Charter* violation must be provided. The Defence must provide an outline of the facts grounding the application in sufficient detail to disclose a breach, allow a response to the allegations, and allow the Court to determine if it should hear evidence on the application. As *Kutynec* points out, if the Defence fails to advance a sufficient basis for the *Charter* application, the application may be dismissed without hearing evidence. (*Kutynec, paragraphs 21 and 22*)

3) The remedy being sought, including a list of any evidence which the Defence seeks to exclude.

4) A list of any cases to be relied on by Defence in support of the application. Counsel should expect that once Notice is filed, the Court will hold a pre-trial conference to set dates for written submissions and discuss admissions, evidentiary burdens, form of evidence (affidavits, *viva voce* testimony), etc.

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

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

a) whether to hear the application forthwith or to adjourn the trial to hear it;

b) and on what terms the judge will hear the application; or

c) whether, without hearing the application, to dismiss it summarily.

Section 52 Charter Applications

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

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

PRACTICE DIRECTION - PRE-HEARING CONFERENCES and FOCUS HEARINGS (PC Rule 4)

FOCUS HEARINGS (Code, s. 536.4)

Attendance at Focus Hearing

Prior to attending at the focus hearing, the requesting party must have filed Form (identifying witnesses and issues) in Court at the time the preliminary inquiry was set, or as the Court directed.

The Crown counsel and counsel for the accused, who are each to be fully briefed in respect of the issues to be discussed at the focus hearing, shall be present at the focus hearing, unless otherwise ordered by a judge, and in the case of an accused who is not represented by counsel, the accused shall be present.

Unless otherwise directed by the judge, counsel will be permitted to attend the focus hearing by telephone or videolink.

In exceptional circumstances, alternate and not assigned counsel may attend the focus hearing, provided s/he is briefed on the file and able to make representations and decisions on behalf of the Crown or the accused as applicable.

Completion in Draft of Pre-Focus Hearing Report

Prior to attending the focus hearing, Crown counsel and counsel for the accused should each prepare in draft a pre-hearing conference report in Form 4.1A to be presented to the focus hearing judge.

General Nature of a Focus Hearing

Unless otherwise ordered by the hearing judge, a focus hearing shall be on the record.

Specific Inquiries to be Made

A Judge conducting a focus hearing pursuant to s. 536.4 of the *Code* may inquire as to:

a) the identification and simplification of such issues as remain to be contested at the preliminary inquiry;

b) the identification of witnesses to be heard at the inquiry;

c) the identification of any special needs and circumstances of witnesses;

d) the possibility of obtaining admissions and agreements so as to facilitate an expeditious, fair and just determination of the proceedings;

e) the estimated duration of the preliminary inquiry proceedings;

f) the advisability of fixing the hearing date, in the event that a hearing date has not been set for any reason;

g) any application to be made at the preliminary inquiry pursuant to s. 540(7) of the *Code;*

h) any other matter that may assist in promoting a fair, just and expeditious hearing; and

i) the possibility of resolving the matter before trial.

Any admissions of fact or agreements reached at a focus hearing shall be recorded in Form 4.1B by the Judge conducting the hearing, unless Form 4.1A suffices.

An application to be made at the preliminary inquiry pursuant to s. 540(7) of the *Code* shall be identified at the focus hearing, and if contested, shall be filed on Form 1 and heard on the record within the time period directed by the judge presiding at the focus hearing.

Focus Hearing Orders

At the conclusion of a focus hearing, the focus hearing judge may:

a) adjourn and continue the focus hearing to such further dates, times and places as the judge may direct;

b) give counsel directions regarding further steps to be taken or information to be obtained and set dates for such directions to be met;

c) if he or she deems it necessary, cancel, abridge or add to scheduled preliminary inquiry dates to ensure that the time set aside is appropriate and to facilitate compliance with the Practice Directions;

d) order that certain preliminary motions be heard in advance of the preliminary inquiry date, and fix dates for the motion to be heard; and

e) once all focus hearings are completed, prepare a focus hearing report, a copy of which shall be provided to the Crown counsel and counsel for the accused, or the accused if he or she is not represented by counsel.

PRE-TRIAL CONFERENCES [Code, s. 625.1]

For all matters set for a trial of one day or more, a pre-trial conference shall be held at such time and date, and in such place and manner, as a judge of the Court may direct.

For all other trials, any counsel may request a judge of the Court to direct that a pre-trial conference be held.

Attendance at Conference

The Crown counsel and counsel for the accused, who are each to be fully briefed in respect of the issues to be discussed at the pre-trial conference, shall be present at the pre-trial conference, unless ordered by a judge, and in the case of an accused who is not represented by counsel, the accused shall be present.

Unless otherwise directed by the judge, counsel will be permitted to attend the pre- trial conference by telephone or videolink.

In exceptional circumstances, alternate and not assigned counsel may attend the pre-trial conference, provided s/he is briefed on the file and able to make representations and decisions on behalf of the Crown or the accused as applicable..

Completion in Draft of Pre-Trial Report

Prior to attending the pre-trial conference, Crown counsel and counsel for the accused should each prepare in draft a pre-trial conference report in Form 4.2 to be presented to the pre-trial conference judge.

General Nature of Pre-Trial Conference

Unless otherwise ordered by the pre-trial conference judge, a pre-trial conference shall be on the record.

Specific Inquiries to be Made

A pre-trial conference judge may inquire as to:

a) the extent of disclosure made by the Crown counsel and any or further requests for disclosure by an accused or counsel for an accused;

b) the nature and particulars of any applications to be made before or at the onset of the trial including an:

i. application to quash an Information

ii. application to change the venue or adjourn the hearing of the trial;

iii. application to challenge the sufficiency of the Information, to order particulars or to amend the Information or any count therein;

iv. application to sever the trial of any count(s) or accused from the trial(s) of another or others of them; and

v. application to determine the fitness of an accused to stand trial;

c) the identification and simplification of such issues as remain to be contested at the trial;

d) the identification of witnesses to be heard at the trial;

e) the identification of any special needs and circumstances of witnesses;

f) the possibility of obtaining admissions and agreements so as to facilitate an expeditious, fair and just determination of the proceedings;

g) the estimated duration of the trial;

h) any other matter that may assist in promoting a fair, just and expeditious hearing; and

i) the possibility of resolving the matter before trial.

Pre-Trial Conference Orders

At the conclusion of a pre-trial meeting, the pre-trial conference judge may:

a) adjourn and order a continuation of the pre-trial conference and fix the date, time and place for the conference to be continued;

b) give counsel directions regarding further steps to be taken or information to be obtained and set dates for such directions to be met;

c) if he or she deems it necessary, cancel, abridge or add to scheduled trial dates to ensure that the time set aside is appropriate and to facilitate compliance with the Practice Directions;

d) order that certain preliminary motions be heard in advance of the trial date, and fix dates for the motion to be heard in advance of the trial;

e) if the matter concerns an application for *Charter* relief other than application to exclude evidence fix motion dates and trial dates; and

f) once all pre-trial conference meetings are completed, prepare a pre-trial conference report, a copy of which shall be provided to the Crown counsel and counsel for the accused, or the accused if he or she is not represented by counsel.

PRACTICE DIRECTION – APPLICATIONS FOR DISCRETIONARY PUBLICATION BANS (PC Rule 2)

Applicable Provincial Court Rule

Applications are governed by Rule 2 of the Provincial Court Rules. This Rule, and Rule 3 – Service of Documents, must be followed in preparing an application for a discretionary ban on publication.

Guiding Principles

The leading authority on discretionary publication bans are the Supreme Court of Canada decisions in *R. v. Dagenais,* [1994] S.C.J. No. 104 *and R. v. Mentuck,* [2001] S.C.J. No. 73.

Section 2 of the *Canadian Charter of Rights and Freedoms* guarantees freedom of communication and expression. The administration of justice operates on the open courts principle. The *Degenais/Mentuck* test applies to "all discretionary orders that limit freedom of expression and freedom of the press in relation to legal proceedings." *(Toronto Star Newspapers Ltd. v. Ontario,* [2005] S.C.J. No. 41)

Where the rights to be balanced are fair trial rights and freedom of expression, the *Degenais* test applies:

A publication ban should only be ordered when:

(a) Such a ban is necessary in order to prevent a real and substantial risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; and

The salutary effects of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban. (*Degenais, paragraph 73*)

Where there are broader interests in issue, the test formulated in *Mentuck* is applicable:

A publication ban should only be ordered when:

(a) Such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonable alternative measures will not prevent the risk; and

(b) The salutary effects of the publication ban outweigh the deleterious effects on the rights and interest of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial and the efficacy of the administration of justice. (*Mentuck, paragraphs 32 and 33*)

The party seeking the publication ban bears the onus of justifying the order being sought. A sufficient

evidentiary basis must be established.

In *Degenais* the Supreme Court of Canada held that "motions for publication bans made in the context of criminal proceedings are criminal in nature" and therefore governed by the applicable provincial court rules and relevant case law.

Degenais and *Mentuck* contemplate notice being given to the media when an application is made for a discretionary publication ban.

Practice Direction

1. A party who makes an application for a discretionary publication ban on the evidence to be given or that has been given must give reasonable notice to representatives of the media, unless the judge before whom the application has been made orders otherwise.

2. Unless otherwise ordered, notice to the media representatives shall be given by filling in and submitting the electronic notice of an application for a publication ban on the Nova Scotia Courts' website: http://www.courts.ns.ca (click on the Media Information tab on the left under Resources and then scroll down to Publication Bans and click on Notice to the Bar and then click on Notify Media of Publication Ban Application and then, How To – Publication Ban Notification Service)

3. The Provincial Court will not have jurisdiction over applications for bans on publication brought in relation to the fair trial rights of accused persons who are not before the Provincial Court. For example, where the targeted evidence is being heard in a trial in the Provincial Court and the applicant for the publication ban has been committed to trial in the Supreme Court, the application to ban publication of the Provincial Court trial evidence must be brought in the Supreme Court. *(see, for example: R. v. B.T.*, [2012] N.S.J. No. 363 (P.C.)) As explained in *Degenais*:

16 …To seek a ban under a judge's common law or legislated discretionary authority, the Crown and/or the accused should ask for a ban pursuant to that authority. This request should be made to the trial judge (if one has been appointed) or to a judge in the court at the level the case will be heard (if the level of court can be established definitively by reference to statutory provisions such as ss. 468, 469, 553, 555, 798 of the *Criminal Code*, R.S.C., 1985, c. C-46, and s. 5 of the *Young Offenders Act*, R.S.C., 1985, c. Y-1). If the level of court has not been established and cannot be established definitively by reference to statutory provisions, then the request should be made to a superior court judge (i.e., it should be made to the highest court that could hear the case, in order to avoid later having a superior court judge bound by an order made by a provincial court judge)…

PROVINCIAL COURT OF NOVA SCOTIA

PRACTICE DIRECTION – Application for *Rowbotham* Counsel

An application for court-appointed counsel is available under sections 7 and 11(d) of the *Canadian Charter of Rights and Freedoms*. These sections guarantee an accused person the right to a fair trial. In certain situations, a fair trial requires court-appointed counsel.

In Nova Scotia, an accused person may be represented by a lawyer whom the accused has hired, by a Nova Scotia Legal Aid lawyer, or by a lawyer appointed by the Court.

APPLICATION PROCESS

1. Apply to the local Legal Aid Office.

2. If denied Legal Aid, keep the denial letter and file an appeal to Nova Scotia Legal Aid Appeal Committee. Appeals must be in writing and may be directed to: Appeal Committee, Nova Scotia Legal Aid Commission, 1701 Hollis Street, Suite 920, Halifax, NS, B3J 3M8.

3. If the appeal is denied by Nova Scotia Legal Aid, keep the denial letter and complete the notice of application for a court-appointed lawyer. (Form 1.A)

4. Submit the original application to the court, with a copy of the application sent to the Attorney General of Canada and the Attorney General of Nova Scotia.

5. If a lawyer is helping you with your application for a court-appointed lawyer, complete the Waiver (Form B) and give it to the lawyer.

6. If a lawyer is not helping you with your application for a court-appointed lawyer, complete the Waiver (Form B) and rather than using a lawyer's name put in "Presiding Judge, (Name of City/Town), Provincial Court" and deliver it to the Provincial Court where your case will be heard.

7. Whether you have a lawyer assisting you or not the Waiver (Form B) must be sent to the Executive Director, Nova Scotia Legal Aid, 1701 Hollis Street, Suite 920, Halifax, NS, B3J 3M8.

8. Prepare an affidavit (Form 2.A). This contains all the evidence and financial information for

your application. You will submit the original affidavit to the Provincial Court. A copy of the affidavit is to be sent to the Attorney General of Canada and the Attorney General of Nova Scotia.

PRACTICE DIRECTION – WITHDRAWAL OF COUNSEL (PC Rule 3)

Applicable Provincial Court Rules

The relevant Provincial Court Rules are 3.1(1) and 3.1(2) and 3.2(1) and 3.2(2).

A Notice of Application shall be served, and filed with proof of service, at least 7 days before the date of the first appearance on the application. A Response shall be served and filed with proof of service at least 3 days before the date of the hearing of the application.

These time periods can be shortened, with approval of the Court, for applications by counsel to be removed from the record. Rule 3.2(2) provides: "The Court shall consider all of the circumstances surrounding the application and the consent of the parties if any".

Nova Scotia Barristers' Society Code of Professional Conduct

3.7 Withdrawal from Representation

3.7-1 A lawyer must not withdraw from representation of a client except for good cause and on reasonable notice to the client.

The Nova Scotia Barristers' Society Code of Professional Conduct notes in 3.7-1 [3] (Commentary) that: “Every effort should be made to ensure that withdrawal occurs at an appropriate time in the proceedings in keeping with the lawyer’s obligations…

Application to Withdraw as Counsel of Record

A Court has the authority to require counsel to continue to represent an accused when the reason for withdrawal is non-payment of fees, but the authority must be exercised sparingly and only when necessary to prevent serious harm to the administration of justice.

Rationale

To prevent last minute withdrawals by counsel for non-payment of fees, or other reasons, such that the Court is unable to re-book, or use the Court time for other matters. Timely and appropriate withdrawal applications will assist in ensuring that counsel advance the payment dates for retainer fees with their clients, reduce the number of criminal trials that must be adjourned, and permit the cancellation of witnesses so as to minimize their inconvenience.

Guiding Principles

Although the client has the right to terminate the lawyer-client relationship at will, a lawyer does not

have the same freedom. Having undertaken the representation of a client, the lawyer should complete the task as ably as possible unless there is justifiable cause for terminating the relationship.

Where withdrawal is required or permitted by this Rule *the lawyer must comply with all applicable Rules of Court as well as local rules and practice.* (Emphasis added)

In *R. v. Cunningham*, [2010] 1 S.C.R. 331, The Supreme Court of Canada stated that the Court's exercise of discretion to allow counsel's application for withdrawal shall be guided by the following principles:

(a) If counsel seeks to withdraw far enough in advance of any scheduled proceedings and an adjournment will not be necessary, the Court shall allow the withdrawal.

(b) If timing is an issue, the Court is entitled to inquire into counsel's reasons. In either the case of ethical reasons or non-payment of fees, the Court must accept counsel's answer at face value and not enquire further so as to avoid trenching on potential issues of solicitor-client privilege. If withdrawal is sought for an ethical reason, the Court must grant the withdrawal: if it is sought because of non-payment of legal fees, the Court may exercise its discretion to refuse counsel's request if it determines, after weighing all the relevant factors, that allowing withdrawal would cause serious harm to the administration of justice.

As these factors are all independent of the solicitor-client relationship, there is no risk of violating solicitor-client privilege when engaging in this analysis. On the basis of these factors, the Court must determine whether allowing withdrawal would cause serious harm to the administration of justice. If the answer is yes, withdrawal may be refused. [*Cunningham*, paragraphs 47-50]

Non-Payment of Fees

In determining whether withdrawal should be permitted because of non-payment of fees, the Court should consider the following non-exhaustive list of factors:

- Whether it is feasible for the accused to represent himself or herself;
- Other means of obtaining representation;
- Impact on the accused from delay in proceedings, particularly if the accused is in custody;
- Conduct of counsel, e.g. if counsel sought leave of the Court to withdraw at the earliest possible time;
- Impact on the Crown and any co-accused;
- Impact on complainants, witnesses and jurors;
- Fairness to defence counsel, including consideration of the expected length and complexity of the proceeding and the history of proceedings, e.g. if the accused has changed lawyers repeatedly. [*R. v. Cunningham*, paragraph 50]

Practice Direction

1. Counsel who appear with or on behalf of a party to a proceeding or file a designation of counsel with the Court, will thereafter continue as counsel of record for that party unless counsel (1) indicate s/he is appearing on a limited retainer for that Court appearance only; or (2) is removed by order of the

Court; or (3) is granted leave to withdraw in accordance with the Practice Direction.

2. This Practice Direction does not apply to counsel appearing as either counsel for the Crown or Legal Aid duty counsel, and who have identified themselves as such to the Court.

3. This Practice Direction applies to applications made by counsel of record for an accused who are seeking to withdraw as counsel of record and to applications to remove counsel of record.

4. Counsel applying to withdraw as counsel of record shall inform Crown counsel of the application, in writing, concurrent with notification to the Court of the application in Form 1.

5. Timely notice shall be given of any application to withdraw.

6. In the event that the Court requires an Affidavit in support of counsel's application to withdraw, the Affidavit should include the following:

a) particulars of the proceedings in respect of which the application is made, including a statement of the date upon which any trial is scheduled to commence and its length;

b) particulars of any prior applications, whether on behalf of the accused or the prosecutor, including, where available, transcripts of proceedings in regard of such applications;

c) where the application is made by counsel acting on behalf of an accused, a full statement of all facts material to a determination of the application, including - without disclosing any solicitor-client communication in respect of which privilege has not been waived - a statement of the reasons why the order sought should be given;

d) where the application is made by or on behalf of Crown counsel, a full statement of all facts material to a determination of the application, including a statement of the reasons why the order sought should be given;

e) a statement whether an adjournment of the trial is likely or will be required in order to enable the accused to retain and instruct new counsel and, if so, when it is proposed that the trial will commence;

f) where applicable, a statement as to the identity of new counsel; and

g) an indication of whether the accused is in custody, and if so, the place of detention.

PRACTICE DIRECTION – APPLICATIONS FOR APPEARANCE OF WITNESS VIA VIDEO CONFERENCING (PC Rule 2)

Revised Dec. 5, 2017

Applicable Provincial Court Rule

Applications are governed by Rule 2 of the Provincial Court Rules. This Rule, and Rule 3 – Service of Documents, must be followed in preparing an application for a witness to testify via video conferencing.

Witness Video Evidence s. 714.1, 714.2, 714.3 or 714.4 of the Code

Counsel or a self-represented accused may apply pursuant to sections 714.1, 714.2,

714.3 or 714.4 of the Criminal Code to tender a witness' evidence by means of video technology that permits the witness to testify in the virtual presence of the parties and the Court. A court may grant such an order if it is of the opinion that it would be appropriate in all the circumstances including but not limited to:

(a) the location and personal circumstances of the witness;

(b) the costs that would be incurred if the witness had to be physically present; and

(c) the nature of the witness' anticipated evidence.

Practice Direction

1. The application shall include an explanation of:

- whether the witness' credibility is in issue;
- why it is believed to be appropriate to receive a witness' evidence in this fashion;
- whether it is a consent or contested application;
- the cost of personally attending the court proceeding;
- the general location of and distance the witness must travel and their personal circumstances relevant to the application including how the requirement to travel for court will personally affect the witness;
- If the witness is under the age of 18 or a person with a disability, whether an application

is being made under s. 486.2(1) of the *Criminal Code* to testify outside the courtroom;

- the nature of the anticipated evidence including but not limited to:
    - Use of photos, diagrams, reports
    - Replaying audio/video recordings
- the quality of the video connection;

2. A completed copy of The Court Video Appearance Request Form (Appearance of Witness) shall be attached to the application.

3. The Court shall set a date for oral submissions on the application.

4. If the application is granted the party who requested to tender evidence by means of video link shall:

- be responsible for the securing and setting up of the video link;
- complete, electronically or manually, the 'Witness Video Appearance' form located on the Courts website at www.courts.ns.ca under Provincial Court Rules and Forms;
- ensure that the witness is available at the specified time for testifying;
- ensure that the witness' location is conducive to providing evidence including being quiet and free from distraction; and
- ensure that the oath or affirmation can be taken in a manner that is legally binding on the witness (see Canada Evidence Act s. 40 and Nova Scotia Evidence Act s. 66(1);
- where feasible, ensure the witness testifies from a local courtroom.

Revised Dec. 5, 2017

PRACTICE DIRECTION - COMPLEX CASES – HOW TO IDENTIFY AND MANAGE THEM (PC RULE 4 – Case Management)

Applicable Provincial Court Rule

4.1 When conducting a hearing or trial, the Court has power to make any order or direction in relation to the conduct of the case that would assist in ensuring that it is conducted fairly, reasonably and efficiently.

Practice Direction:

Upon Crown and Defence identifying a case as complex at any stage of the proceeding, the presiding judge will schedule a pre-trial conference and direct that the Complex Case Pre-trial Report (Appendix "B") or Focus Hearing Form 4.1A be completed.

Guiding Principles and Practice Directions

What May Identify a Case as Complex?

[1] A complex case is likely to have several of the features identified in **Appendix "A"** – "Identifying a Complex Case". Creating a definition of a complex case is not a profitable approach.[1]

[2] A determination that a case is "complex" for purposes of this Practice Direction is not an acknowledgement that the case is of sufficient complexity to qualify as exceptional for the purpose of adjudicating a s. 11(b) application under *Jordan*.[2]

Managing a Complex Case – First Principles

[3] The British Columbia Supreme Court has observed in the context of its pre- trial conference project how much our judicial system has changed as a reflection of the fact that "we live in a much more complicated and sophisticated society than existed 50 or even 30 years ago. The trial process reflects that increase in complexity and sophistication."[3]

[4] The expeditious conduct of the trial and maintaining a focus on the real issues must be of interest to both Crown and Defence[4]. Aspirations toward more efficient and timely criminal justice processes must adhere faithfully to the fundamental principles of the criminal justice system: the presumption of innocence and the requirement that the Crown prove its case beyond a reasonable doubt in a fair and public trial before an independent and impartial decision maker.[5]

Meeting the Challenges – Making Better Use of Existing Tools

[5] The objective of making the management of complex cases in the criminal justice system more

efficient and effective is well-served by judges, Crown prosecutors and Defence lawyers making better use of available mechanisms that have been designed for precisely this purpose. Dealing effectively with complex cases is a shared responsibility. Case management pre-trials, focus hearings, and, if agreed to by the judge, and where judicial resources allow, resolution conferences [SEE PARAGRAPHS 20 to 22 BELOW] are tools that can be employed to manage the challenges presented by the complex case. Some complex cases may be candidates for the appointment of a case management judge under section 555.1.[6]

[6] Rigorous and contextualized case management of complex cases is essential to avoid proceedings becoming unwieldy and protracted. The effectiveness of existing procedures can be enhanced and new approaches undertaken.

Complex Case Pre-trial conferences

[7] The purpose of pre-trial conferences, as described in section 625.1 of the *Criminal Code*, is to "promote a fair and expeditious hearing..." A pre-trial conference is: "…an important procedural step – it cannot be perfunctory – all participants must be prepared, organized and committed to the objectives of such a hearing."[7]

[8] Pre-trial conferences ensure the court, crown counsel, defence counsel and accused focus on the case and its issues. PTC's can also be useful for focusing a client's attention on the issues.

[9] Complex Case pre-trial conferences should be on the record or a record created of the positions taken by parties. In some cases, all agreements will be noted on the Complex Case Pre-trial Report (Appendix "B") which has been filed by counsel. In most cases, further issues are raised and/or resolved at the pre-trial conference. Where the pre-trial is not conducted on the record, it is important that notes be kept and that a summary be circulated to the parties to confirm accuracy.

[10] A pre-trial conference provides an opportunity for the judge:

- to discuss with counsel the order of any applications to be made.
- to explore whether any application or applications the Defence is intending to bring will be determinative. If so, the court can explore whether trial dates should only be set once the application/applications are heard and decided.
- set deadlines for the proposed application/applications to be made and not made by the deadline(s) the focus will be on trial readiness.
- to explore the merits of Crown counsel drafting trial admissions for the Defence to review. ("The Crown, the party with the burden of proof and production in commencing a criminal trial, should…regularly advance matters for the defence to consider admitting…")[8]

[11] Lesage and Code noted that counsel for both the Crown and Defence are "under an ethical duty to make reasonable admissions of facts that are not legitimately in dispute." They said the court

…should encourage…efforts to frame reasonable admissions. When the Defence fully admits facts alleged by the Crown, the court has the power to require the Crown to accept a properly framed admission and to exclude evidence on that issue.[9]

[12] In relation to a complex case pre-trial conference it is expected that:

- Crown and defence counsel should have had discussions on substantive issues prior to the PTC.
- Assigned Crown and defence counsel shall be present at the pre-trial conference, except in unusual circumstances.
- Counsel attending a complex case pre-trial conference (whether assigned counsel or an alternate) must be informed and instructed about matters in issue in the case, must be able to identify and discuss those issues and any matters relevant to the orderly conduct of the trial or hearing, and must be able to make representations and decisions on behalf of the Crown or the accused as applicable.
- Unless otherwise directed by the judge, counsel will be permitted to attend the pre-trial conference by telephone or video link.
- The accused should be present at a complex case pre-trial conference and shall be present if self-represented.

Focus Hearings for Complex Cases

[13] Section 536.3 of the *Criminal Code* obliges Crown and Defence[10] to provide the court (and each other) with a statement of issues and witnesses. "Focus hearings" are governed by section 536.4 and seek to "assist the parties" to identify the issues and witnesses for a preliminary inquiry. The judge is to "encourage the parties to consider any other matters that would promote a fair and expeditious inquiry."

[14] Focus hearings can provide the opportunity to arrive at a reasonably accurate estimate of the time required for the preliminary inquiry by setting "reasonable targets for the completion of each witnesses' evidence…" with the objective of completing the preliminary inquiry "at one continuous sitting without adjournments."[11]

[15] A Complex Case focus hearing shall be on the record.

[16] A focus hearing provides the opportunity for the judge:

- To explore with counsel well ahead of the preliminary inquiry what issues are to be focused on and what witnesses are being sought.
- To explore if the Crown is examining in direct the witnesses being called.
- To explore if the Crown is intending to conduct the preliminary inquiry by using section 540(7) of the *Criminal Code* - what is often referred to as a "paper" inquiry[12] - and to deal with any issues arising out of the Crown seeking to proceed on this basis.
- To determine if committal will be in issue.

[17] Focus hearings for complex cases will be most effective if Crown and Defence have had substantive discussions prior to the focus hearing.

[18] In relation to a complex case focus hearing it is expected that:

- Assigned Crown and defence counsel shall be present at the focus hearing except in unusual circumstances.
- Counsel attending a complex case focus hearing (whether assigned counsel or an alternate) must be briefed on the file, informed and instructed about matters to be discussed at the focus hearing and able to make representations and decisions on behalf of the Crown or the accused as applicable.
- An accused who is not represented by counsel shall be present for the focus hearing.
- Unless otherwise directed by the judge, counsel will be permitted to attend the pre-trial conference by telephone or video link.
- Prior to attending the focus hearing, the requesting party must have filed Form 4.1 (identifying witnesses and issues) in Court at the time the preliminary inquiry was set, or as the Court directed.
- Any admissions of fact or agreements reached at a focus hearing shall be recorded in Form 4.1B by the Judge conducting the hearing, unless Form 4.1A suffices.

[19] A Judge conducting a COMPLEX CASE focus hearing pursuant to s. 536.4 of the *Code* may inquire as to:

a) the identification and simplification of such issues as remain to be contested at the preliminary inquiry;

b) the identification of witnesses to be heard at the inquiry;

c) the identification of any special needs and circumstances of witnesses;

d) the possibility of obtaining admissions and agreements so as to facilitate an expeditious, fair and just determination of the proceedings;

e) the estimated duration of the preliminary inquiry proceedings;

f) the advisability of fixing the hearing date, in the event that a hearing date has not been set for any reason;

g) any application to be made at the preliminary inquiry pursuant to s. 540(7) of the *Code* and any issues arising out of the Crown decision to proceed on this basis including but not limited to*:*

- procedure;
- a determination of what is “credible and trustworthy” evidence;
- leave to cross-examine;

- filing dates

h) any other matter that may assist in promoting a fair, just and expeditious hearing; and

i) the possibility of resolving the matter before trial.

Resolution Conference

[20] Resolution conferences may be available upon request by Crown and defence.

[21] Resolution conferences must be conducted by a judge other than the assigned trial judge. In single-judge locations, another judge will have to be brought in to conduct the resolution conference which creates logistical challenges.

[22] If resolution conferences are undertaken by any members of the Court at the request of Crown and Defence, Nova Scotia Supreme Court Practice Memorandum No. 7 "Resolution Conferences – Criminal Trials" should be used as a guideline for their conduct in Provincial Court.

Trial Management - Procedure

[23] Trial management should be, in the succinct words of Justice Casey Hill, "Realistically, and practically…a shared responsibility between the court and counsel."[13]

[24] Justice Hill has identified other trial processes that may be subject to the exercise of judicial trial management: "scheduling, enforcing compliance with rules of court and procedure, setting time limits for oral argument, intervention to clarify evidence, to focus submissions, to prevent prejudicial or irrelevant evidence, to eliminate unnecessary evidence, to avoid repetitive or confusing questions by counsel or abuse of witnesses, and maintenance of civility."[14]

[25] Active case management in complex cases may identify applications[15] that are conducive to rulings in advance of the trial proper.[16] Applications that may be best suited to early disposition include:

- disclosure;
- third party records;
- s. 11(b) *Charter* delay;
- wiretap admissibility;
- statements and confessions;
- search and seizure;
- similar fact;
- severance.

[26] Evidentiary issues will not always be appropriate for early pre-trial rulings because the relevant evidence may need to be led at trial, to contextualize the issues on the application.

[27] Applications will proceed most efficiently if "each party…clearly knows in advance of the application what is at issue, what evidence will be led, what arguments will be made and what case law will be presented."[17] Where written briefs have been filed on an application, the parties should not expect "the judge to allow the oral hearing to be anything more than an occasion to highlight concisely their arguments and answer any questions the court may have of them…" Applications should not be allowed to drag on.[18]

[28] Give the principle that court proceedings are presumptively open, in high profile cases, the Court and counsel should consider, proactively, issues relating to media such as access to exhibits through a media access protocol and/or order of the court.[19] The "open court" principle, privacy, and fair trial rights will have to be addressed.

Trial Management – the Trial Judge

[29] Statutory courts "have implicit powers that derive from the court's authority to control its own process."[20] In the context of the criminal trial as an adversarial process with the trial judge, Crown and Defence all occupying specific well-defined roles, it is the court that

> …bears responsibility for control of the trial process, achievement of a just result, and maintenance of respect for the administration of criminal justice. Avoidance of delay, efficient management of limited court time and resources…compliance with rules of court and judicial directions designed to promote trial fairness, minimizing inconvenience, establishing a professional and civil forum for trying a case without distraction or personal disputes, and encouragement of public respect for the process, all legitimize a trial judge's authority to effectively manage a criminal trial.[21]

[30] Justice Hill has elaborated on what "judicial management of litigation" means in the 21st century:

> Originally cast in terms of inherent authority to control the processes of the court and prevention of abuse of the process, it is today recognized that a trial judge has a duty to *manage* the trial process balancing fairness to the parties as well as efficient and orderly discharge of court process. Judicial management of litigation recognizes that "there is more at stake than just the interests of the accused". Management involves control, direction and administration in the conduct of a trial. This power, settled within a broad discretion, relates to the entirety of the trial proceeding extending beyond the scope of pre-trial case management rules designed for "effective and efficient case management.[22]

[31] A trial judge is no "mere arbiter allowing parties to conduct their case as they see fit."[23] The judge in a complex case will be actively engaged in the shared objective of ensuring an orderly and fair trial. This may mean using trial management powers to:

…place reasonable limits on oral submissions, to direct that submissions be made in writing, to require an offer of proof before embarking on a lengthy *voir dire*, to defer rulings, to direct the manner in which a *voir dire* is conducted, especially whether to do so on the basis of testimony or in some other form, and

exceptionally to direct the order in which evidence is called…[24]

[32] The judge should conduct periodic case management sessions during the trial as a stock-taking exercise on the progress of the trial, relevance of proposed witnesses, procedure to be followed, etc.[25]

Unrepresented Accused

[33] Cases may be made complex where the accused is unrepresented either from the start of the trial or as a result of events that occur once the trial is underway. Lesage and Code recommended that:

> Trial Judges should exercise their common law power to appoint *amicus curiae* in any long complex trial where the accused in unrepresented or chooses to be self-represented and where such appointment is likely to assist in ensuring the fairness of the trial. Wherever possible, the appointment should be made at an early stage, to prevent delays of the trial. The *amicus* should generally be allowed to play an expanded role, including the examination and cross-examination of witnesses, whenever feasible.[26]

[34] With or without an appointment of an *amicus*, the trial judge has a duty to provide "a measure of assistance" to an unrepresented accused "to the extent that this is possible and consistent with the judge's role as an impartial decision- maker."[27] An accused who is unrepresented does not have

> …any special status before the Court. While the judge is bound to provide appropriate assistance, the scope of that assistance is limited to what is reasonable and does not extend to the kind of advice counsel would be expected to provide.[28]

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[1] This was the view expressed in the Lesage/Code Report of November 2008 where the authors noted that various definitions exist but did not attempt to develop a definition for the complex criminal case: Report of the Review of Large and Complex Criminal Case Procedures, page 5

2 *R. v. Jordan, 2016 SCC 27*

[3] Supreme Court of British Columbia Criminal Pre-Trial Conference Project Information Sheet, page 3

[4] "It cannot be in the interests of any defendant for his good points to become lost in the welter of uncontroversial or irrelevant evidence." Control and management of heavy fraud and other complex criminal cases – A protocol issues by the Lord Chief Justice of England and Wales – 22 March 2005.

[5] Supreme Court of British Columbia Criminal Pre-Trial Conference Project Information Sheet, page 4

[6] A case management judge may be appointed by the Chief Judge on application by the Crown, the accused or on the Chief Judge's own motion. (section 551.1, *Criminal Code*)

[7] *Judicial Pre-Trial Conferences Scheduled for Tuesday, October 11, 2016 (Re), 2016 ONSC 6398, para. 12*

[8] *Judicial Pre-Trial Conferences Scheduled for Tuesday, October 11, 2016 (Re), supra, para. 24*

[9] Lesage and Code, Report of the Review of Large and Complex Criminal Case Procedures, Recommendation 18

[10] The obligations under section 536.3 of the *Criminal Code* do not apply to unrepresented accused.

[11] Lesage and Code, Report of the Review of Large and Complex Criminal Case Procedures, Recommendation 16

[12] As of March 2017, the Working Group that provided input into this document, which included representation from the Public Prosecution Service of Canada, was advised that the PPSC has moved, presumptively, to using section 540(7) of the *Criminal Code* for preliminary inquiries.

[13] Justice Casey Hill, "The Duty to Manage a Criminal Trial", April 2012, National Judicial Institute

[14] Justice Casey Hill, *supra*, endnote 14

[15] In the Provincial Court of Nova Scotia, *Charter* Applications are subject to a Practice Direction under Provincial Court Rule 2.

[16] Lesage and Code, Report of the Review of Large and Complex Criminal Case Procedures, Recommendation 11

[17] *R. v. Sipes, 2008 BCSC 1257, para. 31*

[18] Control and Management of heavy fraud and other complex criminal cases – Criminal Procedure Rules – A protocol issues by Lord Chief Justice of England and Wales – 22 March 2005

[19] *R. v. Sipes, 2011 BCSC 918; R. v. Huth, 2013 BCSC 2123*

[20] *R. v. Anderson, 2014 SCC 41, para. 58; R. v. Cunningham, [2010] S.C.J. No. 10, para. 19*

[21] Justice Casey Hill, *supra*, endnote 14

[22] Justice Casey Hill, *supra*, endnote 14

[23] *R. v. Auclair, 2013 QCCA 671, para. 55*

[24] *R. v. Felderhoff, [2003] O.J. No. 4819, paragraph 57 (C.A.)* The Ontario Court of Appeal observed that directing the order in which evidence is called is a power to "be exercised sparingly because the trial judge does not know counsel's brief." See also: *R. v. Anderson, para. 59*

[25] See, for example: *R. v. Colpitts, 2017 NSSC 22; 2017 NSSC 24;* and *2017 NSSC 40*

[26] Lesage and Code, Report of the Review of Large and Complex Criminal Case Procedures, Recommendation 40

[27] *R. v. Schneider, 2004 NSCA 99, para. 57.*

[28] *R. v. Schneider, supra, para. 70*

APPENDIX "A"

Identifying A Complex Case

The Information

Multiple accuseds and/or multiple charges

Charges covering a long period of time

Nature of the Charges

Historical allegations (ex. sexual assault);

Prosecutions including complex conspiracy, tax evasion activities or commercial fraud

Organized crime and criminal organization offences National security matters

Terrorism

Determination of aboriginal and Metis rights Major IRPA offences

Dangerous offender/long term offender applications Fatality or homicide cases

Hate crimes

Disclosure

Voluminous disclosure

Disclosure applications

Whether information gathered in other investigations is relevant to an issue in the case

Special Needs Complainants and/or Witnesses

Vulnerable witnesses, such as very young complainants

Complainants/witnesses requiring accommodations for disability, e.g. hearing, cognitive impairment

Pre-trial Applications

Multiple or complex voir dire issues such as:

Admissibility of evidence (non-Charter) such as statement voluntariness, sexual history, private records, similar act evidence

Severance of accused or counts

Stays of proceedings for unreasonable delay or abuse of process Charter applications

Part VI wiretap applications Media applications

Requirement for *in camera* proceedings

Trial

The quantity of evidence gathered in the course of the investigation Novel or complicated legal and/or evidentiary issues

A large number of significant issues in dispute Challenges to established laws or procedures

Novel and substantive challenges to legislation involving constitutional questions or interpretations of legislation

A large number of witnesses

Significant requirements for expert evidence

Presentation of Evidence

Non-simple technical presentation of evidence

Witnesses by video-link, CCTV, wiretap

Language interpretation requirements

Other

Issues of legal aid or retainer issues that need to be resolved

Unrepresented/self-represented accused

Unrepresented/self-represented accused with special issues/needs, such as mental health issues/needs;

Litigation involving Freemen on the Land.

High profile matters subject to media scrutiny