

Provincial Court Practice Directives

Practice Perfect – How to Please Provincial Court Judges



Presented by:

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What are PC Practice Directives?

- Judge-made **guidelines**.
- **Purpose** is to guide counsel on matters before the court to assist both Court and counsel
- **Goal** is to ensure that matters are addressed fully and fairly by the Court
- **Enforcement:** by the spirit of co-operation among counsel and the Court.

What do they apply to?

- **Preliminary Inquiries**
- **Briefs of Law**
- **Counsel appearing by telephone**
- **Witnesses appearing by telephone or video**
- **Application for Court Appointed Counsel**

What do they apply to?

- **Withdrawal of Counsel**
- **Forfeiture orders (Exhibits)**
- **Charter Applications**
- **Change in Conditions – Probation orders**
- **Safe Handling of Exhibits**

Practice Directive I: Preliminary Inquiries

- **Purpose** is to deal with the 2004 changes to the Preliminary Inquiry process in Part XVIII of the Criminal Code:
 - 1. No Preliminary Inquiry unless requested (s. 535, S. 536(2), s. 536.2, s. 536(4), s. 536(4.3) and s. 536(4.1)(a), (b).
 - 2. Mandatory Statement of Issues and Witnesses (s. 536.3)

Preliminary Inquiries

3. Conference or Hearing prior to Preliminary Inquiry (s. 536.4)

4. Scope of Preliminary Inquiry may be limited (s. 536.3, s. 536.4, s. 536.4(2), s. 536.5)

5. Evidentiary amendments (s. 540(7), (8) and (9).

6. Conduct of Preliminary Inquiry (s. 537(1), s. 537(1.1))

Preliminary Inquiries

- 7. Absence of accused (s. 537(1)0)
- 8. Committal upon limited evidence (s. 549(1.1), s. 536.5)

Preliminary Inquiries - Process

- Accused must request PI within a time period fixed by the presiding docket court judge.
- Request for PI may be made in writing without appearance of the accused by the accused or Counsel on record filing notice with the Clerk of the Court.
- The docket court judge will set the PI date.

PI-1 Form

- Identify Issues/Witnesses

- **Party requesting PI shall file a statement of issues and witnesses, PI-1 with the trial coordinator or Court Clerk prior to fixing date for PI.**
- **Self-represented accused are not required to complete PI-1.**

Request for Pre-Hearing Conference

- Crown or Defence may apply for a "prehearing conference" to assist the parties in identifying the issues, witnesses or other matter to promote a fair and expeditious PI.
- PI Judge may order on own.
- Clerk will set a date for conference, in consultation with parties.
- Conference may be conducted by any judge. The trial coordinator or Clerk shall make every effort to schedule the conference before the PI judge.

Prehearing Conference

- The pre-hearing conference - open court on the record.
- Counsel may appear by teleconference or telephone with leave of the judge presiding
- Self-represented accused must appear in person.
- All admissions of fact or agreement shall be endorsed on PI-2 (to be signed by parties and presiding judge and filed with the court).

Practice Directive II

BRIEFS

- Crown counsel or Defence counsel may file a Brief of Law if they believe it will assist the court proceedings.
- **Brief is NOT** a Factum.
- Should set out in a concise manner, of the issues to be raised and the applicable law.

Briefs

- Counsel may file electronically, with leave of the Court.
- PDF format is preferred. Electronic Briefs may include links to the cases and authorities.
- Must also file a paper copy with Court.
- Must provide a copy of Brief to opposing counsel.

Brief - Contents

- Style of cause.
- Concise statement of issues and law.
- List of authorities.
- Copies of pertinent portions of cases should be included (do **not** file landmark decisions eg. R. v. Grant, R. v. Stinchcombe). Include head note if available.
- **Mark** passages in the authorities relied upon

Practice Directive III

Telephone Appearances

- Where impractical for counsel to appear in person, counsel may appear by telephone with **prior leave** of the Court.
- Must apply in writing to the Clerk prior to the appearance date, not later than 12:00 noon of last business day prior to appearance.
- Application shall specify what is to be done on appearance date.
- Must provide direct land line or mobile number with good sound quality.

Counsel – Appearance by Telephone

- Counsel shall forthwith notify opposing party after leave granted.
- Counsel may apply for leave to appear by telephone for any court appearance other than a Preliminary Inquiry, Trial or other matter with *viva voce* evidence.
- Court may cancel leave and direct counsel to personally attend.

PD IV: Witnesses appearing by video or telephone

- Counsel or a self-represented accused may apply pursuant (ss.714.1,714.2, 714.3, 714.4 CC) to tender a witness' evidence by means of video or telephone.
- Application must be made in writing 14 days before the proceeding in question.
- A copy of the written application shall be provided to the trial judge and to all parties to the proceeding.

Witnesses appearing by video or telephone

- Application shall include explanation of:
 - why it is necessary;
 - whether other party consents;
 - the cost of personal attendance;
 - the distance the witness must travel; and
 - the nature of the anticipated evidence;
- Court shall set date for hearing application.

Witnesses appearing by video or telephone

- Applicant party shall ensure that:
 - the witness is on a clear **land line**;
 - Witness will be free of distractions and interruptions
 - Witness location is conducive to binding their conscience and providing evidence;
 - the witness is available at the specified time for testifying.

PRACTICE DIRECTIVE V

Court Appointed Counsel

- Section 10(b) of the *Charter*: everyone arrested or charged with a criminal offence has the right to retain and instruct a lawyer.
- In Saskatchewan accused may be represented by a lawyer retained by accused, or by a Legal Aid lawyer, or a lawyer appointed by the Court.

APPLICATION PROCESS

- 1. Apply to the local Legal Aid office.
- 2. If denied by Legal Aid, keep the denial letter and appeal to the Legal Aid Commission. (Form A)
- 3. If the appeal is denied by the Legal Aid Commission, keep the denial letter and complete the application for a court appointed lawyer. (Form B)

APPLICATION PROCESS

- 4. Send application to Crown, Attorney General of Canada **and** to the Constitutional Law Branch, Saskatchewan Justice.
- 5. Complete the Financial Information sheet (Form C) and send to Crown, AG Canada and Sask. Justice. Bring to hearing before Judge.
- 6. If a lawyer involved in application, complete Waiver form (Form D).

APPLICATION PROCESS

- 7. Otherwise, complete Waiver form (Form D) and instead of lawyer's name insert "**Presiding Judge, *city name*, Provincial Court**" and deliver to that Court.
- 8. Whether you have a lawyer assisting you or not the Waiver (Form D) must be sent to:

Chief Executive Officer,
The Saskatchewan Legal Aid Commission,
502 - 21st Street East, Saskatoon, SK S7K 0B8

PRACTICE DIRECTIVE VI

Withdrawal of Counsel

- Ch. 12, Code of Professional Conduct :
The lawyer owes a duty to the client not to withdraw services except for good cause and upon notice appropriate in the circumstances.
- Court has authority to require counsel to continue to represent an accused when the reason for withdrawal is non-payment of fees,
- Authority must be exercised sparingly and only when necessary to prevent serious harm to the administration of justice.

Withdrawal of Counsel

- **Rationale** is to prevent last-minute withdrawals by counsel for non-payment of fees, or certain other reasons.
- **Goal** is to ensure counsel will be in a position to advance the date of payment of fees with their clients, and/or to reduce number of criminal trials that are adjourned, and cancel witnesses in a timely manner.

Withdrawal of Counsel

- Guiding Principles

- A client has right to terminate lawyer-client relationship at will. The lawyer does not.
- Having accepted professional engagement the lawyer may refuse to continue only if there are justifiable grounds. Requires leave of court.
- Failure of client to pay lawyer may justify withdrawal provided it is timely. Lawyer should act so as to minimize expense and avoid prejudice to the client.
- Court may refuse if it causes serious prejudice to interests of justice.

Withdrawal of Counsel - Guiding Principles

- **R. v. Cunningham, [2010] 1 S.C.R. 331**: the court's exercise of discretion to allow counsel withdrawal:
 - (a) If application is far enough in advance of scheduled proceedings that an adjournment will not be necessary, Court shall allow withdrawal.
 - (b) If timing is an issue, the court is entitled to inquire into counsel's reasons.
 - (c) The court must accept counsel's reasons at face value and not enquire further; Court must avoid trenching on solicitor-client privilege.

Withdrawal of Counsel - Guiding Principles

- **R. v. Cunningham, [2010] 1 S.C.R. 331:**
 - (d) If withdrawal is sought for an ethical reason, the court **must** grant the withdrawal;
 - (e) 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. [**Cunningham** paragraphs 47 - 50]

Obligatory Withdrawal

The lawyer will have **duty** to withdraw where:

- a) the lawyer is discharged by client
- b) the lawyer is instructed by the client to do something inconsistent with the lawyer's duty to the court or tribunal (and, following explanation, client persists);
- c) the client has engaged in dishonourable conduct in the proceedings or is taking a position solely to harass or maliciously injure another;
- d) lawyer's continuing to act will lead to a breach of Code of Conduct eg. a breach of the Rules relating to conflict of interest;
- e) Lawyer is not competent to handle matter;

Optional Withdrawal

The lawyer **may ask** to withdraw where:

- Where there has been a serious loss of confidence between lawyer and client.
- If unable to obtain instructions
- Non-Payment of Fees
- **Notice to Client** must be given
- **Governing principle:** client's interests to be protected. Lawyer should not desert client at critical stage or at a time when withdrawal would imperil or disadvantage client.

The Process (Withdrawal)

- Counsel to continue unless granted leave to withdraw in accordance with this Practice Directive.
- Application made by counsel to withdraw for any ethical reason shall be granted – Court may request reason **in writing**.
- Application to withdraw for financial reasons shall be granted by the Court where the request is confirmed to the Court, in writing, more than **45 days prior** to the scheduled trial or preliminary hearing date.

Hearing (Withdrawal)

- Hearings on application to withdraw for non-payment of fees will be required where the application to withdraw is made less than **45 days** before trial or PI.
- Determination will be made at discretion of Court.
- Notice must be sent to client.
- Counsel shall inform Crown counsel of the application, in writing.

PRACTICE DIRECTIVE VII

Forfeiture Orders

- Crown seeking forfeiture of any item in a criminal proceeding may file a draft forfeiture order in Form A. Third parties are not included in the draft Forfeiture Order.
- Form A shall be filed no later than 10 days after the direction from the Court, or 10 days after the making of the oral forfeiture order by the Court.
- Where applicable the draft order should be signed by defence counsel consenting to the form and content of the order.

PD VIII - Charter Applications

- 1. **Constitutional Questions Act** notice required for applications for remedy under **Charter** or **s. 52 of The Constitution Act**, EXCEPT exclusion of evidence or a remedy consequential on exclusion of evidence.
 - Notice served 14 days prior to hearing (see: [Notice of Charter Application Form](#)).
 - Notice shall be given to the Court, the Crown, and to counsel for Co-accused, as well as Constitutional Branch, Ministry of Justice of Saskatchewan and Department of Justice (Canada).

Charter Applications

- 2. The Court encourages the filing of a brief in support of the application, which should be consistent with Practice Directive II (Briefs).
- 3. Should a *Charter* or other constitutional issue arise during the trial, the Judge may adjourn the trial so that proper notice can be given.
- 4. Notice and written argument can be given by any common means, including fax.

Practice Directive IX – Changes to Probation Orders

- Section 732.3 CC: upon application by an offender, a probation officer or a prosecutor the Court may order changes to the optional conditions contained in a Probation Order.

Application Process

- 1. The Applicant will contact the Court Clerk to obtain a hearing date.
- 2. An application pursuant to section 732.2(3) of the *Criminal Code* shall be made in Form PO-1.

Probation Orders

- 3. Applicant shall file copy of existing Probation Order.
- 4. Applicant shall set out requested change and reasons supporting the change(s)
- 5. Application and supporting material to be filed with the Clerk of the Court
- 6. Copy provided by Applicant to the offender, the offender's Probation Officer and the Crown

Practice Directive X – Safe Handling of Exhibits

1. To promote safety and efficiency, Counsel should reach agreement on the filing of exhibits prior to trial or hearing.
2. Bulky exhibits such as large quantities of stolen property or controlled substances should be tendered by way of photos rather than actual filing.
3. Firearm exhibits should be trigger locked and/or otherwise rendered inoperable, and tendered through a witness trained in the handling of firearms.

PD X – Handling Exhibits

4. In the case of other dangerous exhibits, consideration should be given to tendering these exhibits by way of photos and/or expert reports.
5. Note: *Criminal Code provisions:*
 - Section 603(a) permits the accused, after he has been ordered to stand trial or at his trial, to inspect the evidence and the exhibits.
 - In proceedings pursuant to Sections 334, 344, 348, 354, 362 or 380 of the *Criminal Code*, Section 491.2(2) permits the use of photographs. Notice is required pursuant to section 491.2(5).

QUESTIONS??

- To download the Practice Directives, go to:

www.sasklawcourts.ca

- Click on “Provincial Court”
- Then click on “Practice Directives and Endorsements” in the left column.

Also available at: www.spmlaw.ca/SCDLA