

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.