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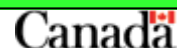
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The Federal Prosecution Service DESKBOOK

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Part V PROCEEDINGS AT TRIAL AND ON APPEAL Chapter 17

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17 DIRECT INDICTMENTS

17.1 Introduction

Section 577 of the *Criminal Code* permits the Attorney General or the Deputy Attorney General to send a case directly to trial without a preliminary inquiry or after an accused has been discharged at a preliminary inquiry. The object of the section has been described by Southin J.A. of the British Columbia Court of Appeal in the following terms:

In my opinion, Parliament intended, by this section, to confer upon the Attorney General or his Deputy the power to override the preliminary inquiry process. It is a special power not to be exercised by Crown counsel generally but only on the personal consideration of the chief law officer of the Crown and his or her deputy.

Such a power is a recognition of the ultimate constitutional responsibility of Attorneys General to ensure that those who ought to be brought to trial are brought to trial. There are many

reasons why an Attorney General or a Deputy Attorney General might consider a direct indictment in the interests of the proper administration of criminal justice. Witnesses may have been threatened or may be in precarious health; there may have been some delay in carrying a prosecution forward and, thus, a risk of running afoul of s. 11(b) of the *Canadian Charter of Rights and Freedoms*; a preliminary inquiry, in, for instance, cases essentially founded on wire-tap evidence, may be considered by the Attorney General to be expensive and time consuming for no purpose. These are simply illustrations. It is neither wise nor possible to circumscribe the power of the Attorney General under this section.¹

This chapter outlines the criteria that will be applied by the Attorney General of Canada when determining whether to consent to the preferment of an indictment pursuant to this provision. It will also describe the procedure for Crown counsel and agents to follow when making a recommendation for a "direct indictment".

17.2 Statement of Policy

The discretion vested in the Attorney General under section 577 of the *Criminal Code* will be exercised only in circumstances involving serious violations of the law. The controlling factor in all instances is whether the public interest requires a departure from the usual procedure of indictment following an order to stand trial made at a preliminary inquiry. The public interest may require a direct indictment in circumstances which include (but are not restricted to) the following:

- a. where the accused is discharged at a preliminary inquiry because of an error of law, jurisdictional error, or palpable error on the facts of the case²;
- b. where the accused is discharged at a preliminary inquiry and new evidence is later discovered which, if it had been tendered at the preliminary inquiry, would likely have resulted in an order to stand trial;
- c. where the accused is ordered to stand trial on the offence charged and new evidence is later obtained that justifies trying the accused on a different or more serious offence for which no preliminary inquiry has been held;
- d. where significant delay in bringing the matter to trial resulting, for instance, from persistent collateral attacks on the pre-trial proceedings, has led to the conclusion that the right to trial within a reasonable time guaranteed by section 11(b) of the Charter of Rights and Freedoms may not be met unless the case is brought to trial forthwith;
- e. where there is a reasonable basis to believe that the lives, safety or security of witnesses or their families may be in peril, and the potential for interference with them can be reduced significantly by bringing the case directly to trial without preliminary inquiry³;
- f. where proceedings against the accused ought to be expedited to ensure public confidence in the administration of justice – for example, where the determination of the accused's innocence or guilt is of particular public importance;
- g. where a direct indictment is necessary to avoid multiple proceedings -- for example, where one accused has been ordered to stand trial following a preliminary inquiry, and a second accused charged with the same offence has just been arrested or extradited to Canada on the offence⁴;

- h. where the age, health or other circumstances relating to witnesses⁵ requires their evidence to be presented before the trial court as soon as possible; and
- i. where the holding of a preliminary inquiry would unreasonably tax the resources of the prosecution, the investigative agency or the court.

The circumstances in a case for which a direct indictment is recommended must meet the charge approval standard in Part V, Chapter 15, "The Decision to Prosecute" - namely, that there is a reasonable prospect of conviction at trial, and the public interest requires a prosecution to be pursued.

17.3 Procedure

17.3.1 Regional Office

The Regional Director must ensure preparation of the following:

- a. a concise statement of facts sufficient to conclude that there is a reasonable prospect of conviction at trial and that the public interest requires a prosecution to be pursued. The statement must include the names of the accused, the charges and the evidence, the reasons for requesting a direct indictment and the date for which the indictment is required. Where the indictment charges several accused, the statement must be sufficient to demonstrate that there is sufficient evidence to implicate each accused individually;
- b. a statement of the extent of disclosure already given to the defence or that will be given before trial;
- c. two original indictments containing all charges for which the indictment is requested. Both should be signed in the usual way by the person normally signing indictments in the Regional Office. Below that, the following should appear:

I hereby consent to the preferment of this indictment pursuant to section 577 of the *Criminal Code*. Dated at Ottawa, Ontario, this _____ day of _____, _____.

Deputy Attorney General of Canada (or Attorney General of Canada, as the case may be)

The Regional Director shall review each recommendation and, if satisfied that the case is appropriate for a direct indictment, send it to the Senior General Counsel (Criminal Law) or, in drug or proceeds of crime cases, the Senior General Counsel (Strategy Prosecution Policy Section).

17.3.2 Headquarters

Senior General Counsel reviews the request and prepares a recommendation for the Assistant Deputy Attorney General (Criminal Law). If it is recommended that a direct indictment be preferred and the Assistant Deputy Attorney General agrees, the recommendation will be forwarded to the Deputy Attorney General for consent⁶. If the Assistant Deputy Attorney General concludes that a direct indictment is not appropriate in the circumstances, the Regional Director will be advised that no recommendation will be made to the Deputy Attorney General. In unusual circumstances involving a significant public interest, the Assistant Deputy Attorney General may recommend that the Attorney General consent to the preferment of the indictment personally.

If the Deputy Attorney General accepts the recommendation, one of the original indictments, signed by the Deputy Attorney General, is sent to the Regional Office. The second signed original is filed in the appropriate Senior General Counsel's office.

Once the trial has been completed, the Regional Director must report the outcome to the appropriate Senior General Counsel.

17.4 Procedural Considerations After Preferment of a Direct Indictment

Where an indictment has been preferred pursuant to a consent under section 577, Crown counsel assuming responsibility for the trial should ensure that two important procedural issues are considered. First, where the case is being sent directly to trial without a preliminary inquiry, there is a heightened need for early and full disclosure in accordance with Part V, Chapter 18, "Disclosure". Second, where, after a full review of the evidence, Crown counsel concludes that the charges (or any of them) ought to be withdrawn, stayed or reduced, the appropriate Senior General Counsel in the Federal Prosecution Service or the Assistant Deputy Attorney General should first be consulted wherever time reasonably permits.

17.5 Re-elections

Where an indictment has been preferred pursuant to a consent under section 577, the accused is deemed under subsection 565(2) to have elected to be tried by a court composed of a judge and jury. Under that same subsection, however, the accused may re-elect for trial by a judge without a jury, with the written consent of Crown counsel. The procedures necessary to give effect to this right of re-election are described in subsections 565(3) and (4), and subsections 561(6) and (7). Crown counsel should consider the criteria described in Part V, Chapter 19, "Elections and Re-Elections", when assessing whether consent should be provided to a proposed re-election.

As noted earlier in this chapter, a direct indictment should be endorsed to read that consent has been given "pursuant to section 577 of the *Criminal Code*". This is intended to avoid the erroneous conclusion that the preferment of the indictment by the Attorney General or the Deputy Attorney General was intended to *require* a jury trial under section 568. A requirement of that nature, given its extraordinary character, will, as outlined in Part V, Chapter 19, "Elections and Re-elections", be expressly endorsed on the indictment.

17.6 Laying a New Information

Where an accused has been discharged at the conclusion of a preliminary inquiry, a new information may be laid with the personal consent in writing of the Attorney General or the Deputy Attorney General (paragraphs 577(b) and (c) of the *Criminal Code*).

Where the evidence meets the charge approval standard outlined in Part V, Chapter 15, "The Decision to Prosecute", but the case fails to meet the test for a direct indictment described above ("exceptional circumstances involving serious violations of the law"), it may nonetheless be appropriate to consider laying a new information. A new information may be laid where:

- a. the accused was discharged at the preliminary inquiry because of an error of law, jurisdictional error, or palpable error on the facts of the case;¹ or
- b. new evidence has been discovered after the accused was discharged which, if it had been tendered at the preliminary inquiry, would likely have resulted in an order to stand trial.

Since the laying of a new information is an alternative to the seeking of a direct indictment, the merits of both options should be canvassed in a single memorandum when the Attorney General's consent is sought.

¹ 1 *R. v. Charlie* (1998), 126 C.C.C.(3d) 513 at 521-522 (B.C.C.A.)

² For a discussion of "palpable error" as a basis for controverting findings of

fact made in earlier proceedings, see: *MacNeill and Shanahan v. Briau* [1977], 2 S.C.R. 205; *Hoyt v. Grand Lake Devl. Corp.*, [1977] 2 S.C.R. 907 at 911-12, adopted in *R. v. Purves*, (1979) 50 C.C.C. (2d) 211 at 222-24 (Man. C.A.); *R. v. Van Der Peet*, [1996] 2 S.C.R. 507 at 565-566.

3 Wherever reasonably practicable, Crown counsel should first ask the investigators to prepare a confidential threat assessment where a direct indictment is being considered on this basis.

4 See e.g. *R. v. Cross* (1996), 112 C.C.C.(3d) 410 (Que.C.A.)

5 It would be appropriate to consider, for example, the particular circumstances relating to complainants in sexual offences, especially youthful ones. This may include, for example, consideration of whether requiring the witness to testify about the same matters a number of times will cause harm to that person, or whether the circumstances will inhibit the presentation of candid and truthful evidence.

6 In *R. v. Trang*, 2002 ABQB 744 at para.419 (August 15, 2002), it was held that the recommendation is subject to solicitor-client privilege.

7 See note 2.

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