The Federal Prosecution Service DESKBOOK

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Part V
PROCEEDINGS AT TRIAL AND ON APPEAL
Chapter 19

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19 ELECTIONS AND RE-ELECTIONS

19.1 Introduction

This chapter sets out policies on the following:

- determining whether to proceed summarily or by indictment in "dual procedure" ("hybrid") offences;
- electing to proceed by indictment in tax evasion and certain other types of cases;
- consenting to re-election by an accused; and
- the decision of the Attorney General to require a trial by a judge and jury under section 568 of the *Criminal Code*.[1]

19.2 Crown Elections in Dual Procedure Offences

In dual procedure offences, Crown counsel has the discretion to proceed by summary conviction or indictment[2]. This discretion allows Crown counsel the flexibility of taking the specific circumstances of a case into account to ensure that in each case the interests of justice, including the public's interest in the effective enforcement of the criminal law, are best served.

19.2.1 Statement of Policy

When deciding whether to proceed summarily or by indictment[3], Crown counsel shall examine the circumstances surrounding the offence and the background of the accused. The following factors are of particular importance:

- whether the facts alleged make the offence a serious one;

- whether the accused has a lengthy criminal record or a record of criminal convictions for similar types of offences;
- the sentence that will be recommended by Crown counsel in the event of a conviction;
- the effect that having to testify at both a preliminary inquiry and a trial may have on victims or witnesses (if procedure by indictment is chosen, this may lead to the preferral of a direct indictment[4]); and
- whether it would not be in the public interest to have a trial by jury.

If the accused is charged with a number of offences arising out of the same transaction, Crown counsel should consider entering elections that avoid a multiplicity of litigation. Such a course may benefit the accused, by reducing his or her court appearances, as well as serving the interests of the administration of justice. This approach will be beneficial not only at the trial level, but also in the event of an appeal.

Where, based on the above criteria, Crown counsel would normally elect to proceed summarily but the limitation period for a summary proceeding has expired, Crown counsel should not elect to proceed by indictment unless:

- the accused contributed significantly to the delay;
- the investigative agency acted with due diligence but the investigation continued beyond the limitation period because of the complexity of the case;
- the particular circumstances of the offence did not come to light until shortly before or at some time after the limitation period expired, and the offence is serious;
- the accused has refused to give consent, pursuant to s. 786(2) of the *Criminal Code*, to have the matter proceed by summary conviction; or
- the public interest otherwise warrants prosecuting[5].

19.3 Election of the Attorney General to Proceed by Indictment in Tax Evasion Cases

Subsection 239(2) of the *Income Tax Act* states:

> Every person who is charged with an offence described by subsection (1) may, at the election of the Attorney General of Canada, be prosecuted upon indictment and, if convicted, is, in addition to any penalty otherwise provided, liable to:
>
> a. a fine of not less than 100% and not more than 200% of the amount of tax that was sought to be evaded, and
>
> b. imprisonment for a term not exceeding 5 years.

19.3.1 Statement of Policy

Procedure by indictment is reserved for more serious cases. While it is important to consider all of the relevant circumstances in each case before making an election, it would normally be appropriate to proceed by indictment in the following situations:

a. (a) where the accused has previously been convicted of tax evasion or conspiracy to evade tax, contrary to the *Income Tax Act* or other comparable criminal behaviour, such as fraud;

   or

b. where the tax evaded exceeds $250,000[6] and at least one of the following circumstances is present:

   i. if a conviction is entered, Crown counsel intends to seek more than two years imprisonment and a fine of at least 100% of the tax evaded;

   ii. the evasion scheme was sophisticated and demonstrated considerable planning;

   iii. the accused counselled others to evade taxes;

   iv. the accused acted as an advisor or consultant to others, who then innocently acted on the advice and unknowingly became involved in tax evasion;

v. an innocent third party suffered significant losses because of the actions of the accused;

vi. the accused, or someone on the accused's behalf, attempted to tamper with important evidence or witnesses;

vii. the accused used intimidation designed to induce others to assist in or acquiesce in the offence; or

viii. the accused placed assets beyond the reach of the authorities to prevent collection of taxes payable.

The personal circumstances of the accused, particularly age and health, should also be considered.

The consent to proceed by indictment need not be given personally by the Attorney General or the Deputy Attorney General[7]. It may be given by the Regional Director and, for cases in Ottawa, by the Senior General Counsel (Criminal Law).

19.4 Election of the Attorney General to Proceed by Indictment in Other Types of Cases

Some federal enactments, other than the *Criminal Code*, require an election by the Attorney General of Canada to proceed by indictment. Offences under subsection 20(1) of the *Atomic Energy Control Act* and subsection 327(2) of the *Excise Tax Act* are examples. As with cases of tax evasion, the election need not be made personally by the Attorney General. It can be entered or authorized on behalf of the Attorney General by the Regional Director or, in cases arising in the Ottawa area, by the Senior General Counsel (Criminal Law).

19.5 Consenting to Re-elections by an Accused

The relevant *Criminal Code* provisions[8] on re-elections state:

> 561(1) An accused who elects or is deemed to have elected a mode of trial other than trial by a provincial court judge may re-elect
>
> a. at any time before or after the completion of the preliminary inquiry, with the written consent of the prosecutor, to be tried by a provincial court judge;
>
> b. on or after the fifteenth day following the completion of the preliminary inquiry, any mode of trial with the written consent of the prosecutor.
>
> 561(2) An accused who elects to be tried by a provincial court judge or who does not request a preliminary inquiry under subsection 536(4) may, not later than 14 days before the day first appointed for the trial, re-elect as of right another mode of trial, and may do so after that time with the written consent of the prosecutor.
>
> 565(2) If an accused is to be tried after an indictment has been preferred against the accused pursuant to a consent or order given under section 577, the accused is, for the purposes of the provisions of this Part relating to election and re-election, deemed both to have elected to be tried by a court composed of a judge and jury and not to have requested a preliminary inquiry under subsection 536(4) or 536.1(3) and may, with the written consent of the prosecutor, re-elect to be tried by a judge without a jury without a preliminary inquiry.

19.5.1 Statement of Policy

Crown counsel should generally consent to a timely request for re-election made by an accused or counsel for the accused. The following factors are, however, important in deciding whether to consent. In some instances one of them may be decisive:

- the length of notice given;
- whether the proposed re-election will result in delay that could lead to a violation of section 11(b) of the *Charter of Rights and Freedoms*;
- whether the accused has previously re-elected in the case;
- whether the court, including prospective jurors, will be inconvenienced by a re-election;
- whether it would *not* be in the public interest to have a trial by jury (for instance, where the issues in dispute are primarily legal rather than factual); and

- whether it *would* be in the public interest to have a trial by jury (see the criteria set out in the section, "Decision of the Attorney General to Require Trial by Judge and Jury", immediately below).

19.6 Decision by Attorney General to Require Trial by Judge and Jury

19.6.1 Introduction

Under section 568 of the *Criminal Code*[9], the Attorney General may require an accused to be tried by a court composed of a judge and jury, even if the accused has elected or re-elected otherwise. The alleged offence must be punishable by more than five years imprisonment.

19.6.2 Statement of Policy

A requirement to be tried by judge and jury under section 568 will only be directed when the Attorney General thinks it clearly in the public interest to do so. For example, it may be appropriate to direct this requirement where someone who is normally involved in the administration of justice, such as a police officer, lawyer, or judge, is charged with a serious offence. It is important in those cases to ensure that the public has, and continues to have, confidence in the criminal justice system. It may also be appropriate to direct a jury trial where community standards are in issue, or where the accused's guilt or innocence is of particular public importance. In addition, this provision may be used where jointly charged accused select different modes of trial, and the provincial court judge chooses not to exercise the power in section 567 to decline to record the non-jury elections.

In all instances the decision to proceed under section 568 shall be made personally by the Attorney General of Canada, on the advice of the Assistant Deputy Attorney General (Criminal Law).

19.6.3 Procedure

The Regional Director must ensure preparation of the following:

a. a concise statement of the facts of the case;

b. a list and an assessment of the factors to be considered in the decision to require trial by judge and jury, and the recommendation of the Regional Director;

c. two original indictments containing all charges on which the requirement is sought to be directed. 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 require the above-named accused to be tried by a court composed of a judge and jury pursuant to section 568 of the *Criminal Code*. Dated at Ottawa, Ontario, this ____day of ___, ____.

_____

Attorney General of Canada

The documents should be forwarded to the Assistant Deputy Attorney General. If the Assistant Deputy Attorney General concludes that the circumstances do not justify directing a requirement under section 568, the Regional Director will be advised. If the Assistant Deputy Attorney General concludes that the circumstances do justify directing a requirement under section 568, then advice on the case will be prepared for the Attorney General. If the Attorney General accepts the recommendation, one of the original indictments, signed by the Attorney General, will be sent to the Regional Office. The second signed original will be filed at Headquarters.

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1 Counsel should note that the wording of section s.577 was substantially amended by S.C. 2002, c.13 (“Bill C-15A”).

2 See generally: *R.* v. *Smythe* (1971), 3 C.C.C. (2d) 366 (S.C.C.), which held that the discretion given by law to the Attorney General to prosecute by way of summary conviction or on indictment is not discriminatory or contrary to the principles of equality; *R* v. *Century 21 Ramos Realty* (1987), 32 C.C.C. (3d) 353 (Ont. C.A.), holding that the authority of Crown counsel to elect the mode of procedure in hybrid offences is not contrary to the *Charter*; and *R.* v. *V.T.* (1992), 71 C.C.C. (3d) 32 (S.C.C.) which confirmed *R.* v. *Smythe*.

3 Before the Crown elects, a hybrid offence is treated as an indictable offence, pursuant to par. 34(1)(a) of the *Interpretation Act*. Where the Crown fails to elect the mode of procedure for a hybrid offence and the case proceeds in summary conviction court, the Crown is deemed to have elected to proceed on a summary conviction basis: see E. Ewaschuk, *Criminal Pleadings and Practice in Canada*, 2d ed. Aurora, Ont.: Canada Law Book, 1998, s. 7:2070.

4 See Part V, Chapter 17, "Direct Indictments", and Part VI, Chapter 29, “Victims of Crime”.

5 In some circumstances, the Crown's election may be impugned as an abuse of process if it appears that it was made solely to circumvent a limitation period. There are a number of decisions in the area, with each turning on its particular facts: see e.g.: *R.* v. *Quinn* (1989), 54 C.C.C.(3d) 157 (Que.C.A.); *R.* v. *Boutilier* (1995), 104 C.C.C.(3d) 327 (N.S.C.A.); *R.* v. *Belair* (1988), 41 C.C.C.(3d) 329 (Ont.C.A.); *R.* v. *Jans* (1990), 59 C.C.C.(3d) 398 (Alta.C.A.).

6 In cases of Goods and Services Tax evasion under s. 327 of the *Excise Tax Act*, the amount is the same.

7 In accordance with Part V, Chapter 16, "Decisions Made by, and on Behalf of, the Attorney General".

8 With respect to re-elections in prosecutions taking place in Nunavut, see s.565.1.

9 In *Re Hanneson* v. *The Queen* (1987), 31 C.C.C. (3d) 560 (Ont. H.C.), it was held that this section is not contrary to the *Charter*.

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