

## DIRECT INDICTMENTS

*“To see a man fearless in dangers, untainted with lusts, happy in adversity, composed in a tumult, and laughing at all those things which are generally either coveted or feared, all men must acknowledge that this can be from nothing else but a beam of divinity that influences a mortal body.”*

- Seneca (5 BC - 65 AD)

### Introduction

The *Criminal Code* s. 577, 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.<sup>1</sup>

This chapter outlines the criteria that will be applied by the Attorney General of Newfoundland and Labrador when determining whether to consent to the preferment of an indictment pursuant to this provision. It will also describe

the procedure for Crown Attorneys to follow when making a recommendation for a "direct indictment".

### **Statement of Policy**

The discretion vested in the Attorney General of Newfoundland and Labrador 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 case<sup>2</sup>;
- 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 inquiry<sup>3</sup>;

- 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 offence<sup>4</sup>;
- h. where the age, health or other circumstances relating to witnesses<sup>5</sup> 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 the section of these materials on "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.

## **Procedure**

The Senior Crown Attorney 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;

The Director of Public Prosecutions (Assistant Deputy Minister - Criminal Division) will consider the request. In unusual circumstances involving a significant public interest, the DPP may recommend that the Attorney General consent to the preferment of the indictment personally.

If the Deputy Attorney General accepts the recommendation the indictment may then be prepared for his or her signature.

### **Procedural Considerations after Direct Indictment**

Where an indictment has been preferred pursuant to a consent under section 577, the Crown Attorney 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 the section in this Guide Book titled, "Disclosure". Second, where, after a full review of the evidence, the Crown Attorney concludes that the charges (or any of them) ought to be terminated or reduced, the Senior Crown Attorney must be consulted.

### **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 Attorneys should consider the criteria described in this Guide Book on "Elections and Re-Elections", when assessing whether consent should be provided to a proposed re-election.

As noted earlier, 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 by the 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 this Guide Book on "Elections and Re-elections", be expressly endorsed on the indictment.

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

<sup>2</sup> 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.

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

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

<sup>5</sup> 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.