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DIRECT INDICTMENTS

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NOTE:

THIS POLICY DOCUMENT IS TO BE READ IN THE CONTEXT PROVIDED BY THE **PREFACE** TO THIS PART OF THE MANUAL.

CERTAIN WORDS AND PHRASES HAVE THE MEANINGS ESTABLISHED IN THE "**WORDS & PHRASES**" SECTION OF THIS PART OF THE MANUAL.

DIRECT INDICTMENTS

Introduction

Under Section 577 of the Criminal Code, the Attorney General has the authority to prefer an indictment sending a matter directly to trial, despite the discharge of an accused person at a Preliminary Inquiry, or without the convening of a Preliminary Inquiry.

Section 577 states:

577. Despite section 574, an indictment may be preferred even if the accused has not been given the opportunity to request a preliminary inquiry, a preliminary inquiry has been commenced but not concluded or a preliminary inquiry has been held and the accused has been discharged, if

(a) in the case of a prosecution conducted by the Attorney General or one in which the Attorney General intervenes, the personal consent in writing of the Attorney General or Deputy Attorney General is filed in court; or

(b) in any other case, a judge of the court so orders.

The following excerpts, drawn from the decision of the Supreme Court of Canadian *R. v. S.J.L.*, 2009 SCC 14, describe the authority for, the legal effect, and the utility of the Direct Indictment, both in the context of proceedings against an adult and young persons:

[9] ... By preferring a direct indictment, the prosecution can terminate or skip the preliminary inquiry stage. It can also put the accused on trial even if he or she was discharged following a preliminary inquiry. Where a direct indictment is preferred, the accused is deemed both to have elected to be tried by a judge and jury, and not to have requested a preliminary inquiry. He or she may nevertheless elect to be tried by a judge without a jury (s.565(2) Cr. C.-Part XIX).

[11]... In fact, the Crown's power to proceed by direct indictment existed even before the *Cr. C.* came into force in 1892; at the time of the codification of the rules, this power was limited, but the validity of proceeding by indictment without a preliminary inquiry was recognized: see *McKibbon v. The Queen*, 1984 CanLII 67 (SCC), [1984] 1 S.C.R. 131, at pp.137-40, and *In re Criminal Code (1910)* 1910 CanLII 30 (SCC), 43 SCR 434. Over the years, other restrictions were introduced, but the Attorney General's power to proceed by direct indictment

survived: see *McKibbon*, at pp. 140-52 and 155.

[21] It is well established that the preliminary inquiry is a screening mechanism for the purpose of determining whether the Crown has sufficient evidence to commit the accused to trial: *R. v. Hynes*, [2001] SCC 82 (CanLII), [2001] 3 SCR 623, at para. 30, and *R. v. Sazant*, 2004 SCC 77 (CanLII), [2004] 3 SCR 635, at paras. 14-16. However, there is no constitutional right to a preliminary inquiry or to the outcome of such an inquiry: *R. v. Ertel* (1987), 1987 CanLII 183 (ON CA), 35 C.C.C. (3d) 398 (Ont. C.A.), leave to appeal refused, [1987] 2 SCR vii; *R. v. Moore* (1986), 26 C.C.C. (3d) 474 (Man. C.A.).

[22] Similarly, although the preliminary inquiry may also allow an accused to test the credibility of witnesses and better appreciate the Crown's evidence (*Skogman v. The Queen*, 1984 CanLII 22 (SCC), [1984] 2 SCR 93, at p.105), such incidental benefits do not give rise to a constitutional right to this proceeding: *Re Regina and Arviv* (1985), 1985 CanLII 161 (ON CA), 51 O.R. (2d) 551 (C.A.), leave to appeal refused, [1985] 1 SCR v; *Ertel* and *R. v. Sterling* (1993), 1993 CanLII 6775 (SK CA), 113 Sask. R. 81 (C.A.).

[24] ... Whether a direct indictment should be preferred is at the Attorney General's discretion, and the courts will intervene in such a case only if there is an abuse of process.

In Nova Scotia, the Attorney General, the Director of Public Prosecutions (DPP) and the Deputy Director of Public Prosecutions have the exclusive authority to consent to the preferring of a direct indictment in public prosecutions. In keeping with the provisions of the *Public Prosecutions Act*, the responsibility for determining whether written consent will be granted to the preferring of the indictment will be that of the DPP.

This policy statement outlines the procedure which a Crown Attorney should follow in seeking the DPP's consent for a direct indictment, and the criteria to be considered in determining such a request.

Criteria for Consenting to a Direct Indictment

A consent will be granted when the Director of Public Prosecutions determines that the public interest is best served by a direct indictment and that the circumstances warrant a departure from the usual procedure of preferring an indictment following an order to stand trial made at a preliminary inquiry.

There are a number of particular circumstances now recognized in the policy statements of various prosecution services in Canada which warrant consideration being given to preferring an indictment.

These include (but are not limited to) the following:

- 1) 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;
- 2) 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;
- 3) 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;
- 4) where delay (actual or anticipated) in bringing the matter to trial, has led to the conclusion that the right to trial within a reasonable time guaranteed by s.11(b) of the Canadian Charter of Rights and Freedoms may not be met unless the case is brought to trial forthwith;
- 5) where there is a reasonable basis to believe that the lives, safety or security of witnesses or their families, informers, or justice system participants 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;
- 6) where proceedings against the accused ought to be expedited to ensure public confidence in the administration of justice;
- 7) 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;
- 8) where the age, health or other circumstances relating to witnesses requires their evidence to be presented before the trial court as soon as possible, or presents difficulties in having witnesses testify more than once;
- 9) where the holding of a preliminary inquiry would unreasonably tax the resources of the prosecution, the investigative agency or the court; and

- 10) where a direct indictment is necessary to protect ongoing police investigations, operations and security where the requirement for such protection is of importance and can be significantly demonstrated.

The circumstances for each charge for which a direct indictment is recommended must meet the charge approval standard in the DPP's Directive "The Decision to Prosecute", namely, that there is a realistic prospect of conviction at trial, and that the public interest requires a prosecution to be pursued.

Procedure

A Crown Attorney who wishes to proceed by direct indictment should prepare a written request addressed to her/his Chief Crown Attorney.

Following the Chief Crown Attorney's review and approval of the request, the documentation should be forwarded to the Deputy Director of Public Prosecutions for her/his consideration and that of the DPP.

The request to proceed by direct indictment should include the following:

- 1) The name/s of the accused person;
- 2) A copy of the information;
- 3) The crown sheet which should include a concise summary of the evidence on each count;
- 4) A memorandum summarizing the history of the proceeding, its current status, and the factor/s being relied upon in support of a direct indictment;
- 5) The date by which the indictment is required;
- 6) Where a direct indictment is being requested to send a matter to trial without a preliminary inquiry, a statement of the extent of disclosure already provided to the defence or that will be provided prior to trial;
- 7) Two copies of the draft indictment containing all charges for which the indictment is requested, and to include the following consent wording:

I hereby consent to the preferring of this indictment pursuant to section 577 of the Criminal Code.

Dated at Halifax, Nova Scotia, this ____ day of _____, _____.

Director of Public Prosecutions and
lawful deputy of the Attorney General
of Nova Scotia in respect of prosecutions