



NOVASCOTIA
PUBLIC PROSECUTION SERVICE

DOCUMENT TITLE:

**CONSENT BY THE PROSECUTOR TO RE-ELECTING MODE
OF TRIAL (SECTION 561 OF THE CRIMINAL CODE)**

NATURE OF DOCUMENT:	DPP DIRECTIVE
FIRST ISSUED:	April 19, 2007
LAST SUBSTANTIVE REVISION:	April 19, 2007
EDITED / DISTRIBUTED:	April 19, 2007

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.

CONSENT BY THE PROSECUTOR TO RE-ELECTING MODE OF TRIAL (SECTION 561 OF THE CRIMINAL CODE)

Section 561 of the *Criminal Code* prescribes a number of time limitations to be met by an accused seeking to re-elect mode of trial. For example, s.561(1)(b) allows an accused (who has elected or been deemed to have elected to be tried by other than a provincial court judge) an absolute right to re-elect judge alone, but only if this is done before the 15th day following the completion of the preliminary inquiry. This has been interpreted to permit the accused to re-elect within 15 days of learning of a substantial change in the Crown's case, even though this takes the date beyond the time referred to in s.561(1)(b): *R. v. Ruston* (1991), 63 C.C.C. (3d) 419 (Man. C.A.). Thereafter, however, the re-election may only be made with the prosecutor's written consent: s.561(1)(c). Similarly, s.561(2) permits an accused who has elected to be tried by a provincial court judge to re-elect another mode of trial, but only where this is done not later than 14 days before the date set for trial. Again, any later re-election requires the written consent of the prosecutor.

The decision to consent or to refuse to consent to a re-election by the accused, like any other exercise of discretion by the Crown, must be made in accordance with the Crown Attorney's duty to be fair. Such decisions must not be, and must not appear to be, an attempt by the prosecutor to achieve an unfair advantage based upon a prediction of the likelihood of a conviction by either a jury or a judge alone. Further, these decisions must not be, and must not appear to be, an attempt by the prosecutor to steer the case to a particular judge [please see the commentary on **judge shopping** which accompanies this directive].

The following principles and considerations are to guide this exercise of discretion by prosecutors:

1. The decision to consent or to refuse consent to a re-election is to be made on a **case by case basis**.

There is no presumption in favour of a trial by jury or in favour of a trial by judge alone. Prosecutors, however, in exercising their discretion must bear in mind that the community has a role to play in the administration of justice by having its members serve as jurors in criminal cases. In *R. v. Sherratt*, L'Heureux-Dubé, J. commented as follows:

The jury, through its collective decision making, is an excellent fact-finder; due to its representative character, it acts as the conscience of the community; the jury can act as the final bulwark against oppressive laws or their enforcement; it provides a means whereby the public increases its knowledge of the criminal justice system and it increases, through the involvement of the public, societal trust in the system as a whole. (1991), 63 C.C.C. (3d) 193, at p.203.

In exercising their discretion, Crown Attorneys should not lightly disregard these comments.

2. Although this is not an exhaustive list, **the following matters pertaining to a particular case are relevant to the decision to consent or to refuse consent to a re-election by the accused:**

- The **timing** of the request for re-election.

How soon after the time limit was the request made? Was the request made before a particular trial judge was assigned ?

- The **procedural history** of the case.

Have there been previous re-elections? Will a re-election cause a delay which will inconvenience witnesses or adversely affect the case in some other way?

- The **nature of the charge**, the anticipated **issues**, the **length of the trial**, and the **nature of the evidence** to be presented.

A jury trial will tend to be preferable in these cases:

- the accused is a police officer, lawyer, judge, or someone normally involved in the administration of justice;
- judgment is required on issues involving community values or assessments of behaviour, e.g. reasonableness, provocation, dishonesty, and indecency;
- the evidence is wholly circumstantial or the facts depend substantially on findings of credibility.

A trial by judge alone will tend to be preferable in these cases:

- the trial will be so long that it will impose a hardship on jurors;
 - the public interest or the sentencing process requires that there be detailed reasons for judgement available at the end of the trial (this may arise, for instance, when the evidence provides alternative routes to conviction with differing degrees of culpability, or where there are multiple accused with differing levels of involvement);
 - the crucial evidence will be primarily of a technical nature or will involve complex expert opinions;
 - the key issues are legal, and the facts are not seriously in dispute;
 - the charge is relatively technical or trivial i.e. in the view of the prosecutor, the charge does not require the direct involvement of representatives of the community.
3. The matters outlined above should be considered **collectively**, but in a particular case it is possible for any one of these matters to outweigh all of the others.
4. Crown Attorneys are not required by law to provide **reasons for their decision** to consent or to not consent to the re-election by the accused. A recommended practice, however, is to note in the prosecution file the particular factor or factors (as outlined in this policy document) which influenced the decision which was made.

JUDGE SHOPPING

Any discussion of re-election of the mode of trial inevitably leads to a reference to judge shopping or the possibility that there may be the appearance of judge shopping. In *R. v. Ng*, [2003] A.J. No. 489, the Honourable Catherine Fraser, Chief Justice of Alberta, provided an insightful and helpful commentary on judge shopping. The following excerpts from that judgement are of interest (paragraph numbers from the judgement are included):

As a practical matter, today in Canada, judge shopping is a growth industry. To deny this is to dismiss reality [123].

Judge shopping, in the context of an accused's choice of mode of trial, has been accurately described in these terms in The Victorian Parliament Law Reform Committee, *Jury Service in Victoria*, Issues Paper No. 2 (Melbourne, Victoria, Australia: Law Reform Committee, 1995), ...at paragraph 2.38:

'Judge shopping' is where an election to be tried by a judge without a jury depends on the accused knowing the identity of the trial judge, combined with the accused's perception of what the judge's likely reaction to the defence case will be"[106].

To be clear, judge shopping includes more than selecting a particular judge; it also extends to compiling a shopping list of preferred judges or, alternatively, a list of judges to be avoided. In other words, judge avoidance is subsumed in judge shopping. Judge avoidance may not be as broad in scope as some other forms of judge shopping but the point of the exercise and the results sought are essentially the same [107].

Why does the justice system tolerate, or even accommodate, this degree of judge shopping? The answers given commonly include practicality, expediency and cost. Certainly, jury trials take longer; cost more; ordinarily place more demands on counsel, Crown and defence alike, not to mention the trial judge; and not infrequently, contribute to overall delay in the criminal justice system. Further, there is a legitimate interest in avoiding inconvenience to the public, and all the attendant costs that this involves, arising from cancelling jurors after they have been selected to serve on a jury. This occurs when the defence re-elects judge alone on learning the identity of the trial judge, and the Crown consents to that re-election [124].

What must be understood, however, is that the common denominator in those instances in which judge shopping is presently accommodated in the criminal justice system is the joint agreement of the Crown and the defence to proceed in this fashion. This being so, neither side can complain about the other gaining an unfair strategic advantage when the process followed, and the judge(s) in question, are agreeable to both [125]....The critical point is that where judge shopping is being tolerated, accommodated, and even encouraged in the criminal justice system, it is with the joint concurrence and agreement of both Crown and defence [126].

What the defence cannot do however is complain if the Crown declines to provide the opportunity for judge shopping. The Crown is not required to cede to the accused every possible strategic advantage. Or vice versa. The criminal trial process in Canada remains an adversarial one, not one in which the Crown must surrender on each issue which the accused thinks might benefit him or her. A fair balance must be struck between the interests of the accused and those of society: *R. v. Cook, supra*; *R. v. Swain*, [1991] 1 S.C.R. 933 (S.C.C.); *R. v. Levogiannis*, [1993] 4 S.C.R. 475 (S.C.C.). Accordingly, the Crown, as litigant in an adversarial system, has a valid state interest in seeing that a case is tried in a manner it believes is most likely to produce a fair result [140].

Within the constraints of the fair trial process, the defence is entitled to press its case, as is the Crown. However, when the defence re-election to judge alone is firmly tethered to knowing the identity of the trial judge, this belies the assertion that it is the mode of trial which is of primary concern. In these circumstances, it clearly is not. Instead, the choice of mode of trial is being used as a means to manoeuvre the criminal justice system. If the accused considers the particular assigned judge a better option than the jury, then, and only then, does the preferred mode of trial become judge alone. But a right to select mode of trial, where one exists, is not tied to knowing the name of the trial judge. Indeed, the statutory framework under the *Code* is designed to ensure that the final choice of mode of trial is made before the name of the trial judge is disclosed, failing which Crown consent is required [142].

...But in the interests of a fair trial for both the accused and the state, and in the interests of preserving public confidence in the impartiality of the criminal justice system, neither party has a right to engage in unilateral judge shopping or judge selection without the consent of the other. Nor does one party have the right to compel the other to agree to judge shopping. As the Supreme Court of Canada noted in *R. v. Regan*,... judge shopping discredits the reputation of the justice system: see also *R. v. Scott*, [1990] 3 S.C.R. 979 (S.C.C.), per McLachlin J. (as she then was), dissenting on another point. Although the Supreme Court's condemnation of this practice was expressed in general terms, it is clear that these comments were made in the context of judge shopping by one side alone to the exclusion of the other. Thus, the Supreme Court's comments should be understood in this light [143].

...The Crown is under no obligation to give reasons for not consenting to a trial by judge alone in the absence of any evidence that it exercised its discretion for an oblique or improper motive. I also agree that the absence of reasons cannot, by itself, support an adverse inference that the Crown improperly exercised its discretion. Nor can the fact that the Crown often or ordinarily consents to trial by judge alone lead to an adverse inference that it must have an improper motive when it declines to consent to trial by judge alone in a given case [145].