HYBRID/INDICTABLE OFFENCE PROCEDURES

Election by Crown

There are two levels of charges in Canada. The minor charge and approach is called "*summarily.*" More serious offences, and the major process, is called "*indictment.*" These are old English terms and do not have any individual meaning in themselves.

If a charge is "*hybrid*", this means that the Crown can proceed either by treating it as a more minor offence or a major offence. If it is treated as a major offence, the time that a person can be sent to jail is increased. However, if it is treated as a major offence (indictable) the accused has the right to choose the trial at any one of the three levels set out below:

a. Provincial Court - Judge alone (lowest level);

b. Superior Court - Judge alone (high court); or

c. Superior Court - Judge and jury.

Indictable Offences/Elections by the Accused

If the Crown is proceeding with an indictable offence, there is a time at the Provincial Court that you will be told that you have an election pursuant to section 536(2) of the Criminal Code. The Court Clerk will read out to you the following statement:

> "*You have the option to elect to be tried by a Provincial Court Judge without a jury and without having had a preliminary inquiry; or you may elect to have a preliminary inquiry and to be tried by a judge without a jury; or you may elect to have a preliminary inquiry and to be tried by a court composed of a judge and jury. If you do not elect now, you shall be deemed to have elected to have a preliminary inquiry and to be tried by a court composed of a judge and jury. How do you elect to be tried*?"

Preliminary Inquiry

This is a proceeding to determine whether there is sufficient evidence for the case to be taken to the higher level court. The only test is whether there is "*some evidence upon which a jury could convict*."

The Crown calls witnesses and the defence counsel cross-examines them. It is very rare when the defence calls a witness and almost never is an accused called at a preliminary inquiry.

At the end of the Crown's case, and prior to the judge making a ruling as to whether there is sufficient evidence, the Court Clerk will read out the content of section 541 of the Criminal Code to you. It reads as follows:

> "*Having heard the evidence, do you wish to say anything in answer to the charge or any other indictable offence, in respect of the same transaction, founded on the facts that are disclosed by the evidence? You are not bound to say anything, but whatever you do say will be taken down in writing and may be given in evidence against you at trial. You must clearly understand that you have nothing to hope from any promise of favour and nothing to fear from any threat which may have been held out to you to induce you to make any admission or confession of guilt, but whatever you now say may be given in evidence against you at your trial notwithstanding the promise of threat*."

It is extremely rare that the accused makes any statement whatsoever.

Bail After Committal for Trial

Your bail could be varied following a preliminary inquiry. However, this is only if there has been a significant change would the court be encouraged to increase the conditions imposed on an accused. However, it is possible that a judge could be convinced, in some circumstances, to diminish or reduce the conditions under which the accused is being kept out of custody.

Assignment Court

Once the matter moves from Provincial Court, it is set up for an assignment court date in the Superior Court. This is to keep the case on track and to scheduled a judicial pretrial.

Judicial Pretrial

This is a meeting involving the Crown Attorney, your defence lawyer and you are at court on that date. Various topics will be discussed, including the amount of trial time required and whether there will be any Charter arguments or expert witnesses at trial.

Trial at the Superior Court

When you attend at the Superior Court, a number of events will occur.

Seating of the Accused

You will be placed in "*the prisoners' box*" which is usually behind the defence lawyer. However, it may be possible for the defence lawyer to obtain a ruling from the judge that you may be seated at counsel table.

Ready for Trial

The clerk of the court will ask if you are the person that is the accused named in the indictment. The clerk will ask whether you are ready for your trial. The defence lawyer will answer yes.

Arraignment

The clerk of the court will read the indictment (the written form of your charges) aloud to you and you will be told exactly what charges you are facing.

Your Plea

Usually an accused will be pleading "*not guilty.*" However, if there has been arrangement for you to be sentenced the plea that would be entered would be "*guilty.*" There are some other complicated pleas that may be entered but these would be discussed with you and put in by the defence lawyer.

Assembling the Jury

The jury is composed of twelve people. It is the jury that will decide whether the accused is "*guilty*" or "*not guilty*."

To choose the jury, a number of people will have arrived at court having been brought there by the local sheriff. The name of each of these potential jurors will have been placed on a card with a number. This will be placed into a box or drum and the clerk of the court will draw from the box or drum, one card at a time. Each time a name is called, the potential juror will step from the body of the court and come forward.

There is a process whereby both the defence lawyer, and the Crown, get to decide whether each juror is someone whom they would want to be a member of the jury. There are certain words that are used to decide whether the juror is acceptable.

The process involves the juror coming forward and the clerk of the court saying the following:

"*Prisoner look at the juror, juror look at the prisoner.*"

At this point, the defence lawyer must indicate one of three options which are set out below:

1. "*Content*" Means the juror called is satisfactory to the defence; or

2. "*Challenge*" Means the juror called is not satisfactory to the defence; or

3. "*Challenge for cause*" Means that there is a legal reason that the proposed juror is not satisfactory. There is a section, 638, of the Criminal Code, which specifically sets out the reasons why a juror may not be satisfactory, which includes the following:

a. The juror's name is not properly on the panel;

b. A juror is prejudice or has some other bias which would rule him out;

c. A juror has been convicted of an offence or series of offences for which he received 12 months in jail;

d. A juror is an alien (non Canadian); or

e. A juror is physically unable to perform properly the duties of a juror.

The judge will have already suggested to the jury who you are and who some of the people are involved in the case. If these jurors know you personally, or know the Crown Attorney or other people they would have to bring this to the attention of the judge. The may be disqualified for that reason.

Crown's Option to Dismiss Jury

Once the accused has made his election and indicated his decision being "*content*", the Crown may dismiss the juror by indicating "*challenge*", or a "*challenge for cause.*" If the Crown is content, the Crown may indicate so by saying "*content*." With respect to the number of challenges, this is set out in the Criminal Code based on the seriousness of the charge. If the charge is high treason or first degree murder, there are twenty peremptory challenges. If the accused is charged with an offence for which the accused may be sentenced to imprisonment for a term exceeding five years, there are twelve peremptory challenges, and if the indictable offence has a potential jail term of less than five years, four peremptory challenges.

If two or more charges are being tried together, the accused is entitled only to the number of peremptory challenges in respect of the count for which the greatest number of challenges is available.

Where two or more accused are tried together, each accused is entitled to the number of peremptory challenges to which he would be entitled if tried alone. However, the prosecutor is entitled to the total number of peremptory challenges available to all of the accused.

The order of the challenges is that first the accused shall be called on and thereafter the prosecutor and the accused shall be called on alternatively in respect of each of the remaining jurors.

The above is a process that has continued until twelve jurors have been chosen and each juror in turn has been sworn an oath to do their job properly.

It is possible for counsel to obtain a list of the proposed jurors fourteen days before the trial. These lists contain only the name, area of residence and occupation of each juror.

In some cases, there may be a specific challenge to the jurors, such as if there is an indication that the juror may potentially be biassed against an identified minority to which an accused belongs.

The process of choosing the jury is not one in which the accused makes the decisions in court. There may be some discussions about how the jury will chosen prior to the process. For example some lawyers may be of the view that people of certain occupation are less likely to be sympathetic to an individual or the application of the rules to an individual. An example might be the banking industry, where the people engaged in this occupation may tend to be seem as people who are very rule oriented. It should be kept in mind that a jury has the right to bring in a finding of not guilty for the reason that it concludes is appropriate. Even if there is a lot of evidence which would show that the accused committed the offence the jury could still find the accused "*not guilty*."

The Trial

After the jury has been selected, the judge will tell the jury to harken to your plea and you will plead to the charges.

Preliminary Motions

There may be some motions made before the court about exclusion of witnesses or restraints on the press reporting the trial. However, this may have been worked out with the judge in chambers, which is a meeting in the judge's office among the judge, the Crown Attorney and your defence counsel.

Opening Address

The trial judge will make an opening address to the jury, explaining the charges, the procedures of the trial and how they should exercise their duties. The judge will tell them that ultimately they will be electing a "*fore person*" who is to act as the person controlling the discussions and the one who will report to the trial judge any problems in the jury room and ultimately to give to the judge the verdict.

The Crown Attorney will be invited to speak to the jury about the case. This is called "*an opening address*." The Crown will explain the nature of the charges, what he hopes to prove through various witnesses and how the case will unfold. The defence does not get to have an opening address at this time, unless there has been special permission given by the judge. Only if the trial was going to be very long, or if there is some other special feature to the trial, would defence counsel be allowed to make an opening address at this point.

Calling Witnesses

The Crown will call a witness and will examine the witness "*in chief*." At this point, the questions asked are not to be a ones where the answer is suggested. The witness is to give the details of the evidence.

The defence lawyer will have an opportunity to question each witness. This is called "*cross-examination*." At this point, suggestions or "*leading questions*" may be put to the witness to see if their version of events can be challenged or altered.

The Crown Attorney has a final opportunity to question each of its witnesses. This is called "*re-examination*." The Crown's questions are to be limited to those areas of evidence which were not fully explored by the Crown, but were brought up in cross-examination by defence counsel.

The Defence

At the conclusion of the Crown's case, the defence has an opportunity to decide whether or not to call evidence. It is for the Crown to prove the case and it may be that the Crown has not put in enough evidence to make a case. Defence counsel may suggest to the judge that the case should be taken away from the jury as there is insufficient evidence for them to even consider. This would be called a "*non-suit*."

Neither the Crown, nor the judge, can require the accused to testify at the trial. Neither can comment to the jury about the fact that the accused chose not to testify.

Defence counsel often makes the decision as to whether or not to call evidence only after the Crown has completed its case. There may be a general plan as to what will be occurring but much depends on the nature and extent of the evidence as presented through the Crown's case.

If the defence elect to call evidence, defence counsel is entitled to make an opening address to the jury. This would be an explanation as to the evidence that the jury may hear and a statement of how the jury should be open minded about the case until all of the defence evidence is called. Thereafter, the defence calls its first witness. The defence lawyer examines each witness "*in chief.*" The Crown has an opportunity to "*cross-examine*." The defence has an opportunity to "*re-examine*." This is a reversal of the procedure when the Crown called evidence.

Reply Evidence by the Crown

After all of the defence witnesses have testified, the Crown may choose to call reply witnesses. These would be witnesses giving evidence about topics not brought out in the Crown's original case, but on topics discussed or raised when defence witnesses testified. Once the Crown examines its witness "*in chief*", defence counsel gets to "*cross-examine*" and the Crown gets to "*re-examine*."

Questions of Law During the Trial

From time to time, during the trial, it may become necessary to determine the admissibility of certain evidence or questions. On these occasions, the trial judge may have the jury retire from the courtroom. The accused does not leave the courtroom at any time during the trial.

Concluding Addresses

If the defence has called evidence, counsel for the defence **must** address the jury first. The prosecution would get to address the jury last. If the defence has not called evidence, the Crown must address the jury first and the defence gets to address the jury last. There is a general opinion that it is a preferred position to be addressing the jury last.

Charge to the Jury by the Judge

After both sides have given their addresses to the jury, the judge will instruct the jury as to how they are to go about their tasks. The trial judge will talk about the law. The judge will put the theory of both the Crown and the defence to the jury in the instructions. The judge may express opinions about the evidence. However, in the end the judge must tell the jury that they are the sole judges of the facts of the case. They are entitled to disregard the judges opinion as to the facts, and to disregard the addresses given by the Crown and defence as to their respective views as to how the jury should consider the facts.

Deliberations

At the conclusions of the trial judge's charge to the jury, a sheriff's officer will take the jury to the jury room. With them will go the exhibits from the trial. The jury will be asked to consider their verdict.

Comments on Charge to the Jury

As soon as the jury retires, the trial judge will invite the Crown and defence counsel for any comments or objections with respect to the charge which the judge has given to the jury. If there are valid or substantial objections (as determined by the trial judge), the trial judge will recall the jury and instruct them on the point that requires clarification or change.

Length of Jury Deliberations

The jury may be out of the court for as long as an hour or two, or they could be many hours or even days. The judge will decide how the jury will deal with their meals. The jury may be sequestered, such that they have to stay overnight at a hotel or otherwise until there verdict is reached. The judge will give specific instructions to the sheriff as to how to deal with the jury until it comes to a conclusion.

The jury may return to the courtroom from time to time and say that they have a problem or wish to rehear some of the evidence or ask other questions of the judge. When this occurs, the judge will ask the Crown and defence (in the absence of the jury) what the Crown and defence thinks ought to be done with respect to the question raised by the jury. Ultimately, the judge will decide how to deal with any questions asked.

The Verdict

There are three possible verdicts. However, they fall into the two major categories of "*guilty as charged*" or "*not guilty*." For either of these verdicts to be rendered, all twelve jurors must agree.

If the jury cannot totally agree on the verdict then no ruling is made and this is called "*hung jury*." The judge may ask the jury to keep trying to come to a verdict and if this is impossible ultimately the judge would dismiss the jury and the proceedings would be called "*a mistrial*." The Crown would have to decide whether to prosecute again and the trial would start from the beginning at a later date.

Delivering the Verdict to the Judge

When the jury returns with a verdict, the fore person delivers the written verdict to the clerk of the court. The clerk hands it to the judge. The verdict is then given orally. The jury can sometimes be "*poled*" which means that each juror is asked if they agree with the verdict as rendered.

Consequences of Verdict

The following would be the consequences:

Not Guilty:

The accused is discharged and may leave the court free from any bail conditions.

Guilty:

Unless the defence moves for sentencing right away, the case would probably be adjourned to allow defence to call character witnesses or prepare submissions regarding sentence. During the time, the accused may have to go into custody if they are not already in custody.

Hung jury:

The accused is released, probably on the same bail conditions as during the trial. The case is adjourned for a new trial before another judge and jury at a later date.

Dismissing the Jury

The judge would thank the jury for their work and dismiss them.

The judge alone decides what sentence is appropriate.

Appeals

An appeal of a verdict by a jury usually only occurs if the following errors are alleged to have occurred during the trial:

a. The trial judge admitted into evidence before the jury material which should have been ruled inadmissible; or

b. The Crown Attorney used inappropriate comments or statements or questioning during the trial to such a degree that it made for an unfair trial; or

c. The judge was not accurate when instructing the jury about the law; or

d. The judge did fairly and properly put both the theory of the Crown and the defence to the jury for consideration.

A decision whether to appeal the verdict can only be given once the trial is complete and assessed.

It is possible to appeal the sentenced imposed by the trial judge. This is a separate issue and there the question is whether the sentencing procedure was properly followed or whether the amount of jail time that was imposed was too long or too short.

Either the Crown, or the accused, may appeal a verdict or the sentence imposed. However, there must be reasons ("*grounds*") for the appeal. There is a short time period of a few days following the conclusion of the proceeding in which the Notice of Appeal must be filed with Court of Appeal for Ontario. This is the highest court in our province.

Some cases are appealed beyond the highest provincial court and are heard by the Supreme Court of Canada, which has as a total 9 judges who may sit and hear a case and render their individual verdicts. An appeal court makes its ruling based on the number of judges who decide one way or the other on issues that are before it.

General Comments

This memo gives general information only. There may be exceptions in any specific trial.