Court of Queen's Bench of Alberta

Citation: R v Conway-McDowall, 2019 ABQB 11

Date: 20190107
Docket: 170205793Q1
Registry: Edmonton

Between:

Her Majesty the Queen

Crown

- and -

Joshua Ian Conway-McDowall

Accused

Restriction on Publication

Identification Ban – See the *Criminal Code*, section 486.4.
By Court Order, information that may identify any of the complainants in this matter must not be published, broadcast, or transmitted in any way.
NOTE: This judgment is intended to comply with the restriction so that it may be published.

Reasons for Decision
of the
Honourable Mr. Justice John T. Henderson

I. OVERVIEW

[1] The Deputy Attorney General of Alberta preferred a direct indictment against the Accused in accordance with s. 577 of the *Criminal Code of Canada*. Because the Crown proceeded by direct indictment, the Accused is deemed to have elected to be tried by a Court composed of a Judge and a jury: s. 565(1).

[2] On December 7, 2018, the Accused served a Notice of Re-election by which he re-elected to be tried by Judge without a jury. The Notice of Re-election was served in the manner required by s. 565(3). On this motion, the Crown objects to the re-election because the Accused did not obtain the consent of the Crown. The Crown does not consent to a Judge alone trial and insists that the Accused be tried by Judge and jury.

[3] The single issue on this motion is whether an accused person, against whom proceedings have been commenced by direct indictment, may re-elect to be tried by Judge alone without first seeking the consent of the Crown.

[4] The position of the Accused is refreshingly concise. He argues that s. 565(2) applies specifically to direct indictments and that the express wording of the sub-section gives him the right to "re-elect to be tried by a judge without a jury". This sub-section does not require him to obtain the consent of the Crown. The Accused argues that he properly served the notice required by s. 565(3) and that the Crown may not interfere with his re-election.

[5] The Crown contends that the Accused can only re-elect with Crown consent.

[6] For the reasons that follow, I conclude that where the Attorney General prefers a direct indictment in accordance with s. 577, the accused person may re-elect to trial by Judge alone at any time without seeking the consent of the Crown.

II. PROCEDURAL HISTORY

[7] On an Information sworn November 13, 2016, the Accused was charged with sexual assault and sexual interference in relation to a single complainant. The Accused was taken into custody and sought bail in Provincial Court which was denied. A second Information was sworn on February 13, 2017. The second Information charged nine counts of sex related offences involving three separate complainants. Process with respect to the first Information was transferred to the second Information on March 1, 2017 at which time the first Information was withdrawn.

[8] On April 21, 2017, the Accused appeared in Provincial Court in person by CCTV with counsel present and elected to be tried by Queen's Bench Judge alone. At the same time, he requested a preliminary inquiry which was then scheduled to be heard on December 11, 2017.

[9] Less than 1 month after the election by the Accused, the Deputy Attorney General preferred the direct indictment, which was filed with the Clerk of the Court on May 17, 2017. Because of the direct indictment, the Information was stayed in Provincial Court.

[10] The Accused, along with counsel, first appeared in Queen's Bench Appearance Court (QBAC) on June 2, 2017. At that time the matter was set for a 10 day trial scheduled to commence on October 15, 2018. Jury selection was scheduled to take place on October 11, 2018 and a pre-trial conference was scheduled for February 12, 2018. The pre-trial conference proceeded as scheduled.

[11] On October 1, 2018 (14 days before the day first appointed for trial), the Accused gave notice that matter would be brought forward by the Accused for the purpose of re-election from trial by Judge and Jury to a Judge alone trial. This application was adjourned to be heard October 5, 2018 in QBAC.

[12] On October 5, 2018, the Accused appeared in QBAC. However, instead of dealing with the issue of re-election, the Accused discharged his counsel and the Court granted counsel leave to withdraw. At the request of the Accused, the trial dates were cancelled and the matter was put over until October 26, 2018 in QBAC to give the Accused an opportunity to obtain new counsel.

[13] After two further adjournments in QBAC, the Accused along with his new counsel, appeared on November 23, 2018, at which time the Court granted a further adjournment to December 7, 2018. The November 23, 2018 endorsements indicate "Judge and Jury election", despite the fact that no election was put to the Accused on that date and despite the fact that he had no right of election.

[14] On December 7, 2018, in QBAC, new trial dates were scheduled for 10 days commencing March 18, 2019. Jury selection was scheduled for March 14, 2019.

[15] Also on December 7, 2018, the Accused served a Notice of Re-election by which he re-elected to be tried by Judge without a jury. The Notice of Re-election was served as required by s. 656(3).

[16] On December 17, 2018, the parties appeared before me to make their arguments on this motion.

III. POSITION OF CROWN – S. 561(2) APPLIES TO DIRECT INDICTMENTS

[17] The foundation of the Crown's position is that the re-election requirements of s. 561(2) must be satisfied even where the Crown has proceeded by direct indictment, and the accused person has re-elected pursuant to s. 565(2) and served notice of the re-election as required by s. 565(3). In support of this position, the Crown points to the express wording of s. 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,
>
> (emphasis added)

[18] The Crown argues that s. 561(2) is applicable in one of two circumstances, first where the election is trial by Provincial Court Judge, and second where the accused person "does not request a preliminary inquiry". The Crown points out that s. 565(2) expressly provides that when a direct indictment is preferred pursuant to s. 577, the accused person is deemed "not to have requested a preliminary inquiry under subsection 536(4)". The Crown therefore argues that because the accused person is deemed to have not requested a preliminary inquiry, any re-election following a direct indictment must meet the requirements of s. 651(2).

[19] The Crown argues that, pursuant to s. 651(2) the accused person may, as of right, re-elect to Judge alone 14 days or more before the "day first appointed for the trial". Thereafter, any re-election can only be made with the consent of the Crown.

[20] In this case, the Crown argues that the trial was first scheduled to begin on October 15, 2018, but was adjourned because the Accused discharged his counsel. Nevertheless, the "first day appointed for trial" was October 15, 2018. Thus, the Crown argues, the Notice of Re-election filed on December 7, 2018 could only have been proper with the consent of the Crown.

[21] The Crown was unable to provide me with any direct authority in support of its position that s. 561(2) is applicable to direct indictments. However, the Crown did refer me to a number of cases which, while not directly on point, generally discuss the interpretation of the relevant statutory provisions. The cases cited by the Crown are the following: ***R v E(L)*** (1994), 94 CCC (3d) 228 (ONCA); ***R v Madsen***, 2018 ABPC 281; ***R v Brahaney,*** 2016 ONCJ 395; ***R v Lavoie*** 2016 ABQB 497; ***R v Meister*** 2014 ABQB 91; ***R v Moore***, 2014 BCPC 135; ***R v Ng***, 2003 ABCA 1; ***R v Shilmar*** 2017 ABPC 213; ***R v Wright***, 2011 ABQB 145 and ***R v Park***, 2009 ABQB 374.

[22] I have read each of the cases cited by the Crown but do not propose to deal with them individually. The cases do describe many of the principles relating to re-election by an accused person, but primarily deal with the issue of the exercise of Crown discretion to refuse to consent to re-election pursuant to s. 561(2). Some of the cases also address the issue of what is meant by the phrase "day first appointed for the trial" in s. 565(2).

[23] The cases cited by the Crown do not address the fundamental issue of the applicability of s. 561(2) to a re-election made pursuant to s. 565(2).

[24] I observe that some legal commentators have expressed views directly contrary to the submissions made by the Crown. For example in Eugene Ewaschuk, *Criminal Pleadings & Practice in Canada*, 2nd ed Toronto: Thomson/Reuters, loose-leaf – 2018, at para 8:0074 provides the following summary:

> 8:0074 – Election or re-election on direct indictment
>
> Where an accused is to be tried on a "direct indictment", the accused is, for the purpose of "election or re-election" as to mode of trial, deemed to both have elected to be tried by a court composed of a "judge and jury" and not to have requested a preliminary inquiry
>
> *Code*, s. 565(1)
>
> The "consent of the Crown" is not required for the accused to re-elect to be tried by a "judge without a jury without a preliminary inquiry"
>
> *Code*, s. 565(2)
> (emphasis added)

[25] A similar statement is made at para 8:2100:

> 8:2100 – Election on direct indictment
>
> An accused may re-elect to be tried by a "judge without a jury without a preliminary inquiry" following the preferment of a "direct indictment" even in the absence of consent by the Crown**.**
>
> *Code*, s. 565(2)
> (emphasis added)

[26] However, the author does not make any reference to s. 561(2) when stating that the consent of the Crown is not required for the re-election. Furthermore, the author does not explain why he came to this conclusion.

IV. MODE OF TRIAL – ELECTION AND RE-ELECTION

a. Principles of Statutory Interpretation

[27] In ***Rizzo & Rizzo Shoes Ltd (Re)***, [1998] 1 SCR 27, the Supreme Court endorsed the modern approach to statutory interpretation. The words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. The task is to determine the intent of Parliament, insofar as this can be done, by looking at the words and the scheme and object of the provision. Every part of a provision or set of provisions should be given meaning if possible: ***R v Barton*** 2017 ABCA 216 at para 101; ***R v Hutchinson***, 2014 SCC 19 at para 16, [2014] 1 SCR 346.

[28] The modern approach to statutory interpretation has been consistently applied since ***Rizzo*** and was recently emphasized by the Alberta Court of Appeal in ***Alberta v ENMAX Energy Corporation,*** 2018 ABCA 147. In ***ENMAX*** the Court explained at para 70:

> ... A court must consider not only the textual wording of the statutory provision in dispute but also the purpose of that provision and all relevant context. That includes the legislative scheme of which the provision forms a part....
>
> (emphasis added)

[29] As a result, in determining whether a re-election following a direct indictment must have the Crown's consent, it is necessary to consider the words of the statutory provisions in the context of legislation and the purpose and scheme of the election and re-election provisions in the ***Criminal Code***.

b. Elections and Re-elections – Framework in *Criminal Code*

[30] The ***Criminal Code*** contains a complex series of provisions which determine the mode of trial for indictable offences. In some situations the accused person has a right to elect and then re-elect the mode of trial. In other situations, the accused person has no right of election and is deemed to have made an election as the mode of trial. Where there is a deemed election, in some situations there is no right to re-elect and in other situations there is only a limited right of re-election. The consent of the Crown is required in some, but not all, situations where the accused person seeks to re-elect.

[31] A general framework for the determining the mode of trial for indictable offences, which is subject to numerous exceptions, is set out in the ***Criminal Code*** and can be summarized as follows:

i. Most Serious Indictable Offences (s. 469 – Exclusive Jurisdiction of Superior Court)

- Election – the accused person has no election in relation to these offences. The election is deemed to be trial by Judge and jury: s. 471, s. 473.
- Re-election - the accused person has no right of re-election, but if the accused person and the Attorney General both consent, the trial may proceed by Judge alone: s. 473(1)

ii. Least Serious Indictable Offences (s. 553 – Absolute jurisdiction of Provincial Court)

- The accused person has no election as to mode of trial and no right to re-elect. The trial proceeds before a Provincial Court Judge.

iii. Indictable Offences - Other Than s. 469 and s. 553 offences

- Election – the accused person has an election pursuant to s. 536(2) to be tried by a Provincial Court Judge or by a Judge without a Jury, or by Judge and Jury.
- Re-election – the accused generally has right to re-elect. The right is in some cases limited by time and in some cases the consent of the Crown is required. Generally:
    - If a preliminary hearing is requested, the accused may re-elect, at any time, to trial in Provincial Court, but only with the consent of the Crown – s. 561(1)(a);
    - If a preliminary hearing is requested, the accused may re-elect to trial by either Judge alone or Judge and Jury provided the election is made within 15 days of completion of the preliminary hearing. The consent of the Crown is not required – s. 561(1)(b)
    - The accused, with the consent of the Crown, may re-elect to any mode of trial on or after 15 days following the completion of the preliminary hearing – s. 561(1)(b).
    - If a preliminary hearing is not requested, or is deemed not to have been requested, then the accused may re-elect to any other mode of trial. If the re-election is made more than 14 days before the "day first appointed for the trial" then the re-election may be made without the consent of the Crown. If the re-election is made less than 14 days before trial the consent of the Crown is required – s. 565(2).

[32] There are however a number of exceptions to the general framework, some of which are as follows:

- Where multiple accused persons are jointly charged on a single indictment, unless all of them elect or re-elect the same mode of trial, the Court may decline to record the elections: s. 567. The deemed election at that point for all accused persons is Judge and jury: s. 565(1)(b).
- Where an accused person fails, without reasonable excuse, to attend at trial, he or she is deemed to have waived the right to trial by Judge and jury, even in relation to s. 469 offences: s. 598.
- Notwithstanding that an accused person has elected to be tried by a Provincial Court Judge, the trial judge may, in some circumstances, decline to adjudicate and instead convert the proceedings to a preliminary inquiry: s. 555(1). The deemed election at that point is judge and jury: s. 565(1)(a).
- In very limited situations a Provincial Court Judge may, after the commencement of trial on s. 553 offences (Absolute Jurisdiction of the Provincial Court), be required to put the accused to an election as to mode of trial - see for example s. 555(2).

- An accused person has only a limited right of re-election in relation to new trials which are ordered by a Court of Appeal: s. 686(5). However, if the Court of Appeal orders that a new trial be held before a Judge and jury, the accused person may re-elect with the consent of the Crown: 686(1.1).
- The Attorney General may override an accused person's election or re-election and insist on a jury trial: s. 568. This is a rarely used provision which requires the direct involvement of the Attorney General. The use of this section of the ***Criminal Code*** is reviewable by the Court on a less deferential standard: ***R. v. JRS*** 2012 ONCA 568, leave to appeal refused, 447 NR 389 (SCC).

[33] The scheme of the election and re-election provisions of the ***Criminal Code*** suggest that Parliament intended to attempt to balance the rights of the accused person and the rights of the Crown in relation to mode of trial. The scheme protects the accused person's constitutional right to a jury trial for the most serious offences: s. 11(f) of the ***Charter***. This constitutional right can be waived by the accused person in some, but not all, situations. Thus, an accused person does not have a constitutional right to trial by Judge alone: ***R v Turpin***, [1989] 1 SCR 1296, 48 CCC(3d) 8 at 28.

[34] The legislative scheme in the ***Criminal Code*** gives the Crown some ability to control the mode of trial. The scheme makes the accused person's re-election conditional on the Crown's consent in some, but not all, situations.

[35] A proper interpretation of the re-election provisions contained in s. 561(2) and s. 565(2) must take into consideration the balancing of the rights of the accused and the Crown.

c. Legislative History – s. 565(2) – Re-election After Direct Indictment

[36] Prior to the 2008 amendments to the ***Criminal Code***, an accused person, by the express wording of 565(2), could not re-elect to Judge alone on a direct indictment without the consent of the Crown. The wording of the subsection as it existed prior to the 2008 amendments read:

> (2) If an accused is to be tired 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.
>
> (emphasis added)

[37] The 2008 amendment eliminated the words "with the written consent of the prosecutor" in relation to the re-election provisions.

[38] During second reading of Bill C-23, An Act to amend the Criminal Code (criminal procedure, language of the accused, sentencing and other amendments), the Parliamentary Secretary to the Minister of Justice and Attorney General of Canada explained the proposed amendments. In relation specifically to the amendment to 565(2) which is at issue before me, the Parliamentary Secretary said the following:

> Another criminal procedure amendment is proposed with respect to the right of an accused to be tried before a judge, sitting without a jury, where an indictment has

> been preferred; that is, where the Crown files the indictment directly before the Superior Court. Currently, when this is the case, the accused may not, without the written consent of the Crown prosecutor, choose to be tried before a court sitting without a jury. The amendment would allow the accused to elect to be tried before a Superior Court judge, sitting without a jury, subject to certain conditions. This amendment would introduce more flexibility and would assist in avoiding unnecessary jury trials where the accused would prefer to be tried by a judge alone.
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> *House of Commons Debates*, 39th Parliament, First Session, October 16, 2006, p 1200

[39] The 2008 amendments to the Criminal Code also made a corresponding change to the notice provisions contained in s. 565(3). Prior to the 2008 amendments an accused person who wished to re-elect to Judge alone after a direct indictment was required to give notice of the re-election to the Judge or the clerk of the court "together with the written consent of the prosecutor". As a result of the 2008 amendment to s. 565(3), these words were eliminated and thus, after 2008, an accused person wishing to re-elect to Judge alone was only required to provide his or her own notice to the Judge or the clerk of the court. After 2008 there was no longer any need to provide the Judge or the clerk of the court with any type of Crown consent.

[40] The 2008 amendments which specifically eliminated the requirement for Crown consent for a re-election following a direct indictment strongly suggest that the intention of Parliament was that an accused person could re-elect to Judge alone without the need to obtain any Crown consent.

d. Re-Election Under s. 565(2) - Related Subsections

Even after the 2008 amendments, the re-election provisions contained in s. 565(2) and s. 565(3) continued to be subject to some, but not all, of the requirements contained in s. 561. In this regard, s. 565(4) provides:

> (4) Subsections 561(6) and (7), or subsections 561.1(8) and (9), as the case may be, apply to a re-election made under subsection (3).

[41] Subsections 561(6) and (7) deal with the procedure which the Court must follow when a Notice of Re-election is received. Arrangements must be made for the accused person to appear before the Court so that a formal re-election can be entered on the record. These subsections do not require any consent by the Crown.

[42] Subsections 561.1(8) and (9) deal with re-election in Nunavut and are not relevant to proceedings in Alberta.

[43] The essence of the Crown's position is that a re-election under s. 565(2) must also be subject to the requirements of s. 561(2). If, as the Crown argues, this was the intention of Parliament, then s. 561(2) could easily have been incorporated by reference into s. 565(4) along with s. 561(6) and (7). But s. 561(2) was not included in s. 565(4). This strongly suggests that Parliament did not intend s. 561(2) to apply to re-elections under s. 565(2): See ***R v CBC***, 2018 ABCA 391 at para 16.

V. CONCLUSION

[44] On a strict literal reading of s. 561(2), it may be possible to support an interpretation which requires the Crown's consent to re-election following a direct indictment in some situations.

[45] However, I am required to read 565(2) and 561(2) in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the ***Criminal Code***, the object of the ***Criminal Code***, and the intention of Parliament.

[46] Parliament has used very clear language in 565(2), 565(3) and 565(4). These provisions constitute the re-election procedure in relation to direct indictments. These subsections outline very specifically what an accused person must do when re-electing in proceedings commenced by direct indictment. The subsections incorporate some of the re-election procedures contained in 561(6) and 561(7), but do not incorporate the Crown consent requirements of 561(2).The 2008 amendments to 565 eliminated the need for Crown consent on a re-election to Judge alone in proceedings commenced by direct indictment. The statements made in Parliament by the Parliamentary Secretary to the Minister of Justice provide the rational for the amendment. The amendments were intended to respect the right of an accused person as to mode of trial and also to make the judicial system more efficient by eliminating unnecessary jury trials where an accused person prefers to be tried by Judge alone.

[47] When I apply the modern approach to statutory interpretation, I conclude that s. 561(2) has no application to an accused person's re-election following a direct indictment. As a result, I conclude that an accused person who re-elects to Judge alone pursuant to s. 565(2) may do so without seeking the consent of the Crown.

[48] The Accused served notice of his intention to re-elect on December 7, 2018, more than 3 months prior to the currently scheduled trial dates. His notice was completely consistent with his prior elections made throughout this litigation, including his election on April 21, 2017 and his notice of intention to re-elect on October 1, 2018.

[49] In re-electing to Judge alone pursuant to s. 565(2) and serving his Re-election notice pursuant to s. 565(3), the Accused was under no obligation to seek the consent of the Crown. The Crown has no statutory basis to object to the re-election.

[50] I direct that counsel bring the matter forward before me at the earliest opportunity so that a formal re-election can be put to the Accused pursuant to s. 561(7).

Heard on the 17th day of December, 2018.
Dated at Edmonton, Alberta this 7th day of January, 2019.

John T. Henderson
J.C.Q.B.A.

Appearances:

Jennifer Danker
Crown Prosecutor
for the Crown

Cameron Mitchell
Moreau & Company
for the Accused