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<p>CHAPTER IV – CHAPITRE IV : Pre-trial, Trial, and Appeal Matter Questions avant le procès, pendant le procès et en appels</p>	<p>Readers are referred to the list of Related Documents at the end of this Policy for additional information. Les lecteurs peuvent se référer à la liste des documents connexes notés à la fin de cette politique pour information supplémentaire.</p>	

APPEALS

1. Introduction

The right of the Crown to appeal is limited by law. A Crown appeal may be launched only where the legal criteria for an appeal are met and a thorough review of the circumstances of the case, the state of the law, and considerations of the public interest has been conducted. Not every unfavorable ruling, judgment, or sentence can or should be appealed. In deciding whether to launch a Crown appeal the governing principle is restraint and the overriding consideration is the public interest.

2. Scope of the Policy

This Policy sets out the procedure for requesting Crown appeals, the guidelines for approval of Crown appeal requests, and the manner in which indictable appeals where the Attorney General is the respondent are assigned.

3. Jurisdiction, Governing Legislation, and Rules of Procedure

3.1 Summary Conviction Appeals and Provincial Offence Appeals

Ordinarily summary conviction appeals and provincial offence appeals are heard by the Court of Queen's Bench pursuant to Part XXVII of the *Criminal Code* and section 116 of the *Provincial Offences Procedure Act*, respectively. Subsection 675(1.1) of the *Criminal Code* permits an appeal from a summary conviction matter to be heard by the Court of Appeal, with leave, where the matter was tried with an indictable offence that is also the subject of an appeal. Subsection 116(3) of the *Provincial Offences Procedure Act* also allows a party, with leave, to appeal a question of law alone directly to the Court of Appeal. Rule 64 of the Rules of Court applies to summary conviction appeals and provincial offence appeals to the Court of Queen's Bench.

3.2 Indictable Appeals

Indictable appeals are heard by the Court of Appeal pursuant to Part XXI of the *Criminal Code*. Rule 63 of the Rules of Court applies to all appeals to the Court of Appeal.

3.3 Appeals to the Supreme Court of Canada

Appeals may be brought to the Supreme Court of Canada pursuant to section 693 of the *Criminal Code* and section 40 of the *Supreme Court Act*. The Rules of the Supreme Court of Canada apply to appeals to the Supreme Court of Canada.

4. Grounds of Appeal and Public Interest Factors

Before making a request for an appeal, the requesting Crown Prosecutor and the Regional Director or the Director of Specialized Prosecutions, as the case may be, shall consider the following grounds respecting appeals and public interest factors. In assessing any request for an appeal, the Appeals and Education Counsel shall likewise consider these grounds respecting appeals and public interest factors.

4.1 Grounds of Appeal

4.1.1 Summary Conviction Appeals and Provincial Offence Appeals

For summary conviction appeals and provincial offence appeals, there is no limit on the Crown's right of appeal. An appeal can be on a question of fact, law, or mixed fact and law under section 813 of the *Criminal Code*¹ and pursuant to the *Provincial Offences Procedure Act*, respectively.

An appeal from an acquittal or an equivalent order in a summary conviction matter or of a provincial offence shall not be commenced unless

- (a) the proposed appeal involves an error of law, fact, or mixed fact and law;
- (b) the verdict would not necessarily have been the same had the error not be made; and
- (c) it is in the public interest to rectify the error upon which the acquittal or equivalent order is based.

4.1.1.1 Grounds to Appeal Sentence

An appeal against sentence in a summary conviction matter or a provincial offence shall not be commenced unless

- (a) the sentence imposed by the trial court is unfit; or
- (b) the sentence imposed by the trial court is illegal; and
- (c) the public interest requires that the sentence be appealed.

4.1.2 Appeals from Decisions of Summary Conviction Appeal Courts

The right to appeal to the Court of Appeal from a decision of a summary conviction appeal court is restricted to questions of law alone, with leave, under subsection 839(1) of the *Criminal Code* and pursuant to the *Provincial Offences Procedure Act*, respectively.

Such an appeal shall not be commenced unless

- (a) the summary conviction appeal court has erred on a question of law alone;
- (b) there is a reasonable likelihood that a further appeal will be allowed on the grounds raised; and
- (c) the issue sought to be litigated on further appeal must be the subject of competing or contradictory rulings in the summary conviction appeal court, is one of importance to the administration of justice in New Brunswick, or, if not addressed, will result in a miscarriage of justice.

¹ In addition to the broad grounds afforded for summary conviction appeals under section 813 of the *Criminal Code*, there is further provision for appeals in summary conviction matters under section 830 of the *Criminal Code*. The grounds under section 830 of the *Criminal Code*, however, are far narrower, being confined to a point of law, acting in excess of jurisdiction, or failing to exercise jurisdiction.

4.1.3 Indictable Appeals

4.1.3.1 Appeal on Question of Fact, Law, or Mixed Fact and Law

For indictable appeals to the Court of Appeal against an acquittal or a verdict of not criminally responsible, the Crown's right to appeal is confined to questions of law alone under paragraph 676(1)(a) of the *Criminal Code*, with no such limitation existing in the following situations:

- (a) an appeal from an order of a superior court quashing an indictment under paragraph 676(1)(b) of the *Criminal Code*;
- (b) an appeal from an order of a trial court that stays the proceedings or quashes an indictment under paragraph 676(1)(c) of the *Criminal Code*;
- (c) an appeal from a decision not to make an order under subsection 676(5) or section 743.6 of the *Criminal Code*;
- (d) an appeal against a sentence under paragraph 676(1)(d) or subsection 676(4) of the *Criminal Code*;
- (e) an appeal from an order for costs under section 676.1 of the *Criminal Code*; and
- (f) an appeal in relation to extraordinary remedies under subsection 784(1) of the *Criminal Code*.

4.1.3.2 Appeal on Question of Law

An indictable appeal from an acquittal shall not be commenced unless

- (a) the proposed appeal raises a question of law alone;
- (b) the verdict would not necessarily have been the same had the error of law not been made; and
- (c) an appeal is in the public interest.

4.1.3.3 Grounds to Appeal Sentence

An indictable appeal against a sentence shall not be commenced unless

- (a) the sentence imposed by the trial court is unfit; or
- (b) the sentence imposed by the trial court is illegal; and
- (c) the public interest requires that the sentence be appealed.

4.2 **Public Interest Factors**

Before proceeding to an appeal, it is not enough to show that an error occurred at trial or in a lower court. The overriding consideration is whether, and, if so, to what extent, the public interest supports an appeal. There are several factors that inform this consideration, including the following:

- (a) the safety and security of the public, having particular regard to the seriousness of the offence and the potential danger posed by the offender;
- (b) the importance of the legal issue raised;
- (c) the current state of the law on the issue being raised;
- (d) the importance of the factual issue, if raised on a summary conviction appeal, having particular regard for the impact of the finding in the particular jurisdiction;
- (e) whether the administration of justice in the province including public confidence in the criminal justice system, would be compromised if the error committed at trial is left to stand;

- (f) the importance of deference to a verdict rendered by a jury and recognition that it will not lightly be set aside by an appellate court;
- (g) the strength of the Crown's case, and whether it may deteriorate by the time a new trial is ordered;
- (h) whether the Crown would proceed with a retrial if it was ordered²;
- (i) whether the trial record provides a suitable basis upon which to raise the issue on appeal; and
- (j) whether there is a reasonable prospect that the appeal will be successful.

5. Crown Appeals

5.1 Procedure for Recommendation or Notification of Crown Appeals and Guidelines for Approval

All recommendations for Crown appeals to the Court of Appeal and Supreme Court of Canada are to be approved by the Appeals and Education Counsel in accordance with this Policy.

An appeal or application by the Crown to the Court of Appeal in a criminal or quasi-criminal proceeding requires the authority of the Attorney General or counsel instructed by the Attorney General. The Appeals and Education Counsel, or his or her designate, is counsel instructed by the Attorney General for this purpose.

An appeal or application by the Crown to the Supreme Court of Canada in a criminal or quasi-criminal proceeding requires the written authority of the Attorney General or Deputy Attorney General. No appeal or application shall be initiated without such authority.

5.1.1 Summary Conviction Appeals and Provincial Offence Appeals

An appeal to the Court of Queen's Bench must be commenced within thirty (30) days of the date of the acquittal or order appealed from or sentence appealed against.

A recommendation for a Crown appeal in a summary conviction matter or of a provincial offence must be approved by the Regional Director, or his or her designate, in the jurisdiction where the offence was committed or where the trial took place, or, in the case of a trial conducted by Specialized Prosecutions, the request must be approved by the Director of Specialized Prosecutions, or his or her designate.

The Regional Directors and the Director of Specialized Prosecutions shall establish requirements for material that must be submitted in support of the request.

Where a summary conviction appeal or provincial offence appeal is commenced, regardless of the status of the Crown as appellant or respondent, the Regional Director or the Director of Specialized Prosecutions, as the case may be, shall forward to the Appeals and Education Counsel a copy of the Notice of Appeal as well as a completed *Appendix B-Recommendation or Notification of Appeal to Court of Queen's Bench as Summary Conviction Appeal Court*

5.1.2 Indictable Appeals and Appeals of the Decision of a Summary Conviction Appeal Court

A recommendation for an appeal by the Crown in an indictable matter or the appeal of a decision of the summary conviction appeal court must be approved by the Regional Director, or his or her designate, in

² In very exceptional circumstances, it may be in the public interest to commence an appeal in cases where the Crown may be unable or unwilling to proceed if a new trial were ordered, as, for example, in a case where an adverse ruling at trial will have a continuing adverse impact on the state of the law, or in so-called "test cases". In such exceptional circumstances, it will be necessary to advise the accused and the Court of Appeal that the Crown will not be proceeding with a new trial. Furthermore, in such cases, the Crown may be obliged to pay the accused person's legal costs relating to the appeal.

the jurisdiction where the offence was committed or where the trial took place, or, in the case of a trial conducted by Specialized Prosecutions, the request must be approved by the Director of Specialized Prosecutions, or his or her designate.

A recommendation for a Crown appeal of an indictable matter or the appeal of a decision of the summary conviction appeal court shall be made in writing to the Appeals and Education Counsel. The Appeals and Education Counsel shall decide whether the proposed appeal will be commenced. Where the Appeals and Education Counsel decides to commence the appeal, he or she shall take carriage of the appeal in accordance with this Policy.

For greater clarity, the Appeals and Education Counsel does not conduct bail reviews.

An indictable appeal and an appeal of a decision of a summary conviction appeal court from an acquittal or order must be commenced within thirty (30) days of the date of the acquittal or order under appeal.

Due to time constraints imposed by the limitation periods and the difficulty of obtaining an extension, a recommendation for Crown appeals shall be made as quickly as possible and, in any event, permitting sufficient time for the recommendation to be properly considered and for an appeal to be commenced.

The package to be submitted to the Appeals and Education Counsel in relation to a recommendation or notification of an appeal shall contain, to the extent possible, the following material:

- (a) a completed Recommendation or Notification of Appeal Form, a sample of which is included in Appendix A, which shall include the approval of the Regional Director, or his or her designate, or the Director of Specialized Prosecutions, or his or her designate, as the case may be;
- (b) a copy of the Information or Indictment;
- (c) a copy of the Prosecutor's Information Sheet or other case synopsis;
- (d) any available transcripts; and
- (e) the transcript of the reasons for judgment or charge to the jury or, where this cannot be obtained within the time constraints, trial counsel's notes of the reasons for judgment or charge to the jury.

Where the Regional Director or the Director of Specialized Prosecutions, as the case may be, and the Appeals and Education Counsel disagree about whether an appeal or application should be taken to either the Court of Appeal or the Supreme Court of Canada, the matter shall be referred for resolution to the Director of Public Prosecutions at the earliest opportunity prior to the expiration of the limitation period.

The Regional Director or the Director of Specialized Prosecutions, as the case may be, may ask the Appeals and Education Counsel to permit a particular Crown Prosecutor to conduct or participate in an appeal. The decision on such a request shall be made by the Appeals and Education Counsel. The Appeals and Education Counsel may ask the Regional Director or the Director of Specialized Prosecutions, as the case may be, to provide counsel to conduct or participate in an appeal. The decision on such a request shall be made by the Regional Director or the Director of Specialized Prosecutions, as the case may be.

Where the Regional Director or the Director of Specialized Prosecutions and the Appeals and Education Counsel disagree about who will conduct or participate in an appeal, the matter shall be referred to the Director of Public Prosecutions for resolution.

Where counsel from a regional office or Specialized Prosecutions conducts or participates in an appeal, he or she is accountable to and under the direction of the Appeals and Education Counsel.

It is the responsibility of the prosecuting Crown to advise the investigating officer and victims/Victim Services representative that an appeal has been issued and that the file is now with the Appeals and Education Unit.

6. Assignment of Appeals Where the Attorney General is the Respondent

6.1 Documents to Forward to the Appeals and Education Counsel

Where an indictable appeal is filed in which the Attorney General (as Prosecutor) is the Respondent, the Notice of Appeal and the following documents shall be forwarded to the Appeals and Education Counsel:

- (a) a completed Advisory Where Crown is Respondent Form, a sample of which is included in Appendix B;
- (b) a copy of the Information or Indictment;
- (c) a copy of the Prosecutor's Information Sheet or other case synopsis;
- (d) any available transcripts; and
- (e) the transcript of the reasons for judgment or charge to the jury or, where this cannot be obtained within the time constraints, trial counsel's notes of the reasons for judgment or charge to the jury.

6.2 Responsibility for Respondent Appeals

The Appeals and Education Counsel shall be responsible for conducting all respondent appeals subject to the following:

- (a) a request from the Regional Director or the Director of Specialized Prosecutions, as the case may be, that a particular Crown Prosecutor be permitted to conduct or participate in an appeal;
- (b) a request from the Appeals and Education Counsel to the Regional Director or the Director of Specialized Prosecutions, as the case may be, to provide counsel to conduct or participate in an appeal; and
- (c) instructions from the Director of Public Prosecutions.

Where a Crown Prosecutor from a regional office or Specialized Prosecutions conducts or participates in an appeal, he or she is accountable to and under the direction of the Appeals and Education Counsel.

7. Interventions

All information and notices concerning interventions shall be forwarded to the Appeals and Education Counsel. No intervention in any case before the Supreme Court of Canada shall occur without the authority of the Deputy Attorney General. To secure the necessary authority, a written recommendation to intervene shall be made to the Appeals and Education Counsel. If the Appeals and Education Counsel endorses the recommendation to intervene in the Supreme Court of Canada, the Appeals and Education Counsel will notify the Director of Public Prosecutions, and, where the Director of Public Prosecutions agrees, a recommendation to intervene will be made to the Deputy Attorney General.

8. Related Documents

Policy 4 Specific Delegations by the Attorney General