Why Alberta Justice and Solicitor General advocated limiting preliminary inquiries to the most serious offences under the *Criminal Code* in the *Injecting a Sense of Urgency* report

In *Injecting a Sense of Urgency: A new approach to delivering justice in serious and violent cases* (the "Airdrie Report"), Assistant Deputy Minister Greg Lepp advocates why preliminary inquiries should largely be eliminated by the Federal Government through *Criminal Code* amendments. ADM Lepp suggests the historical reasons for the existence of preliminary inquiries are largely being met in other ways, and they should be abolished, except in the most serious of cases. ADM Lepp determined that had there not been a preliminary inquiry in the sexual assault case he was reviewing, "it is likely that the case would not have been stayed" for taking too long to get to trial. The current preliminary inquiry structure is no longer a wise use of taxpayer funds, especially when the infrastructure concerns identified in the Airdrie Report are considered.

A. How the historical functions of preliminary inquiries are being met in other ways.

Historically, preliminary inquiries exist for two reasons. The first is to ensure sufficient evidence exists for the accused to stand trial ("the screening function"), and the second function is to provide some disclosure to the accused.

The test for a court to commit an accused to stand trial after a preliminary inquiry is "whether or not there is any evidence upon which a reasonable jury properly instructed could return a verdict of guilty"[i]. Alberta Justice and Solicitor General uses the more onerous standard of "reasonable likelihood of conviction" for a prosecution to occur or continue. As long as the Crown prosecutor is doing his or her job properly, cases that should not be going to trial will be screened out prior to a preliminary inquiry occurring. The Airdrie Report's suggestion of greater pre-charge consultation is a logical step to keep meritless cases from ever appearing in court.

The 1991 landmark decision of the Supreme Court of Canada in *R. v. Stinchcombe*[ii] changed the legal landscape in Canada regarding disclosure. The Crown is now obligated to provide "evidence of every material fact known to the prosecution whether favourable to the accused or otherwise". The Court instructed Crown counsel to err on the side of inclusion. In determining what the Crown had an obligation to disclose, the Supreme Court looked at how the law had properly evolved from a state in which "production and discovery were foreign to the adversary process"[iii] to the point at which the element of surprise had been largely eliminated from criminal proceedings, with accused individuals being provided with complete knowledge of the case they have to meet. One of the Court's policy reasons requiring the Crown to provide disclosure was:

> "There is also compelling evidence that much time would be saved and therefore delays reduced by reason of the increase in guilty pleas, withdrawal of charges and shortening or waiver of preliminary hearings".[iv]

This demonstrates that the Supreme Court considered the disclosure obligations it established in *Stinchcombe* to be a replacement for the disclosure provided at a preliminary inquiry. It is also important to note that in 2001, the Supreme Court referred to the discovery mechanism at a preliminary inquiry as an "ancillary role" and "incidental" to the screening function of a preliminary inquiry[v].

Additionally, the use of technology by police services has provided accused persons and the Crown with better disclosure of what witnesses will say in court. This is because police now routinely use audio or video to record statements of important witnesses in major cases. These statements are much more detailed than written witness statements. While not a complete substitute for the examination under oath that a preliminary inquiry provides, this practice provides more complete information than witness statements used to.

Given greater Crown screening and advances in the provision of disclosure, the historical safeguards of a preliminary inquiry are being met by other ways.

B. What are the costs to the taxpayer for a preliminary inquiry to occur?

It is revealing to consider the steps that must be taken for a preliminary inquiry to occur:

a. A Crown prosecutor has to review and complete any agreements limiting the scope of the preliminary inquiry and set out the witnesses that the Crown wishes to call at a preliminary inquiry[vi];
b. If necessary, the Crown prosecutor has to participate in a hearing designed to assist the parties to identify the issues at the preliminary inquiry and encourage the parties to make the preliminary inquiry "fair and expeditious"[vii]
c. A subpoena must be generated by the Crown's office, signed by a court official and served (usually personally) by a Peace Officer on each witness called by the Crown to testify;
d. The Peace Officer has to swear an affidavit of service for each subpoena he/she has served and return it to the Crown.
e. Depending on the seriousness of the case, a pre-preliminary inquiry interview with important witnesses might take place. Usually a police officer is present in case the witness changes their evidence or makes an allegation the Crown prosecutor acted inappropriately;
f. The Crown prosecutor has to attend court at the preliminary inquiry. His or her office may have had to prepare statements of admissions, copies of exhibits, transcripts of video or audio exhibits, prepare arguments on committal and do other steps required to present a case properly in a judicial proceeding.
g. Arrangements have to be made for out of town witnesses, including accommodations, meals and travel;
h. Police officers have to attend as witnesses;

i. A judge, clerk and courtroom are needed for the preliminary inquiry;
j. A transcript must be prepared of the preliminary inquiry;
k. If the accused is in custody or the case is a contentious one, security is needed in the courtroom;
l. Legal Aid, which receives significant taxpayer funding, may be paying for defence counsel to act for the accused at the preliminary inquiry.

These steps will not be duplicated in a case that proceeds directly to trial

The Airdrie Report points out that in many areas of Alberta, rapid population growth has put strain on court facilities and infrastructure designed for populations that were exceeded some time ago[viii]. ADM Lepp's conclusion that "time to trial could be accelerated enormously"[ix] by eliminating these steps is well founded.

In view of the steps needed to be taken by the Crown and Court for a preliminary inquiry to occur, and the limited current value of preliminary inquiries, it is challenging to justify their continued existence.

C. Public Confidence in the Justice System

The steps set out above do not include what is required of civilian witnesses who are required to testify at preliminary inquiry and then at trial. In Alberta, civilian witnesses are not paid for their time nor are they compensated for loss of wages or income while testifying. They often have spent some time in the police station or at a crime scene giving a statement to the police. Most do not want to come to court to testify and are even less happy when they hear that they have to testify twice and that a transcript of what they say at preliminary inquiry can be used to impeach their credibility. Eliminating preliminary inquiries will lessen the burden on these civilians. As there is a societal interest in people reporting crimes and coming forward as witnesses, the system should not require civilian witnesses to testify unless it is absolutely necessary for them to do so.

This is especially true for victims of crime or victims' families. They are often asked to relive a traumatic event in their life in a public and intimidating environment. This concern also applies to witnesses who are afraid of the accused and/or live close to the accused. Reducing an unnecessary and costly step will cut down on the perception that the justice system mainly benefits the accused.

As noted earlier, eliminating preliminary inquiries should lessen the time it takes to get to trial as a series of steps will be eliminated. This will provide for better quality evidence as events will be fresher in witnesses' memories and it is less likely witnesses will move or disappear. It is also less likely that exhibits will be lost or otherwise disappear. Accused who are detained in custody will benefit as they will get to trial sooner and spend less time in remand. Finally, but very importantly, victims will get closure sooner as there will be an earlier adjudication on the merits of the case.

Conclusion

Modern policing and prosecution practices have largely eliminated the need for preliminary inquiries to exist. When one considers their monetary cost and the inconvenience to civilian witnesses, the current preliminary inquiry regime in Canada is no longer justified.

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[i] *USA v. Sheppard* [1977]2 S.C.R. 1067 see also *R. v. Arcuri* [2001] 2 S.C.R. 828
[ii] [1991] 3 S.C.R. 326
[iii] *R. v. Stinchcombe (supra)* para. 10
[iv] *R. v. Stinchcombe (supra)* para. 13
[v] *R. v. Hynes (supra)paraa.31*
[vi] S. 536.3 *Criminal Code*
[vii] S. 536.4 *Criminal Code*
[viii] *Injecting a Sense of Urgency; A new approach to delivering justice in serious and violent criminal cases*, at p.14
[ix] Supra, at p.29