Criminal Defence Lawyers Association of Manitoba

February 24, 2017

The Honourable Jody Wilson-Raybould
Minister of Justice and Attorney-General of Canada
284 Wellington Street
Ottawa, Ontario
Canada
K1A 0H8

Dear Minister:

RE: AN OPEN LETTER REGARDING PROPOSED CHANGES TO PRELIMINARY INQUIRIES IN MANITOBA

The Criminal Defence Lawyers Association of Manitoba (CDLAM) is a non-profit advocacy organization in Manitoba whose membership is comprised of practicing criminal defence lawyers. Our mandate is to not only advocate on behalf of the interests of criminal defence lawyers and their clients, but also to promote the proper administration of justice, and to honour and safeguard rights contained in the *Canadian Charter of Rights and Freedoms*.

We have been advised, via media inquiries, that the Chief Justices of Manitoba, in conjunction with the Minister of Justice of Manitoba, have requested an amendment to the *Criminal Code of Canada*, which would allow for the cancellation of preliminary inquiries in Manitoba on all matters, without the consent of defence counsel.

908 – 363 Broadway Winnipeg, MB R3C 3N9
Ph: (204) 982-4418 Fax: (204) 943-2573 E-mail: jostapiw@scvlaw.ca
President: Jody Ostapiw **Vice Presidents:** Kevin Sneesby and Tony Kavanagh
Secretary: Wendy Martin-White **Treasurer:** Tony Cellitti
Communications Director: Scott Newman
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We are exceptionally concerned about any such proposal, which we heard about for the first time yesterday through media requests for comments. It is shocking to us that we learned of the proposal via media inquiries. Any substantive changes to the administration of justice in Manitoba, especially one as sprawling and wide-ranging as the one proposed, should be done in the light of day, with input from all parties who would be affected by such changes.

Preliminary inquiries have been pointed to by some critics as the cause of delay in criminal proceedings in Canada, despite the complete lack of evidence to support this assertion. Decisions in court proceedings are based on evidence, and we are disheartened when we see judges and justices making proposals to fundamentally change the justice system without the same rigorous requirement of proof that would be required in a court of law. The position of the CDLAM, and many legal commentators in Canada, are that preliminary inquiries serve a vital purpose to streamlining cases in Canada. They serve to point out areas where insufficient investigation or disclosure has been provided by the Crown or the investigating agency; they allow defence counsel to narrow or restrict defences at trial, and eliminate the needless calling of witnesses; they eliminate confusion at the trial stage and minimize adjournments in front of a judge and/or jury; they lay a foundation for pre-trial or *Charter* motions at the superior court stage; and in many cases they allow cases to be disposed of or dropped well in advance of the trial stage.

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We would suggest that anyone who seeks to fundamentally overhaul the Canadian justice system, as is proposed here, should provide evidence to support that the change will have the desired result. Under the former Federal Government, changes were implemented to reduce the pre-sentence credit received by those convicted of crime. The proponents of the changes submitted at the time that such a change would encourage those guilty of crime to resolve their cases in a quicker fashion, would reduce delay, and would reduce the number of inmates in Manitoba who were at remand status. This suggestion was made without any evidence to suggest that pre-sentence credit was the cause of court delay or remand clogging. Despite this change, the number of remand inmates in Manitoba continues to lead the country, and has resulted in no substantive change to inmate numbers or delay. The hastily-implemented law was also later found to be unconstitutional.

Likewise, the proposed change to preliminary inquiries will not reduce the backlog in the system. We believe that any time savings realized by the elimination of preliminary inquiries will simply shift delays into the Provincial and Superior Court trial calendar. There will be a corresponding increase in mid-trial adjournments or, in the case of Jury trials, more mistrials. There will also be an increase in the number of trials proceeding, as there will be a lesser likelihood of resolution before trial, as neither the Crown nor the defence will be able to do any preliminary testing of the evidence.

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We believe, contrary to the assertions of the proposal of the Chief Judges, that the backlogs in Manitoba are a result of insufficient judicial resources in both the Provincial and Superior Courts, given the increases in the number of persons arrested and charged. In particular, in 2014 the Canadian Civil Liberties Association released a report called "Set Up to Fail: Bail and the Revolving Door of Pre-Trial Detention". The report disclosed that in Manitoba, the number of Administration of Justice offences (including bail and probation breaches, and fail to attend court charges) skyrocketed from under 300 charges per 100,000 residents in 1998, to 1,400 charges per 100,000 residents in 2012. In a Province of 1.2 million people, we believe it is the 13,000-plus new charges annually that are clogging the lower levels of the Court system. Part of the reason for this increase is that the former provincial government directed probation officers to lay administration of justice charges in a "zero tolerance" fashion, rather than the previous system which left the discretion as to whether or not to charge with both probation officers and screening Crown Attorneys.

As well, under the previous Federal Government, the number of mandatory minimum sentences have been increased, and the availability of conditional sentences has been severely curtailed. These penal increases have severely restricted the ability of crown and defence lawyers to negotiate resolutions to cases, and has added to the backlog of hearings.

We would be remiss not to note that Manitoba is a province where lengthy preliminary inquiries are unusual. In most cases, including homicides, preliminary inquiries are conducted in two weeks or less. In many cases, defence counsel work collegially with the Crown's office to have homicide preliminary inquiries heard in one week, in order to streamline proceedings to those situations where the evidence is central to the determinations to be made at trial. We do not have a culture of defence obstruction or the use of delaying tactics.

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It should not be lost in this discussion that Manitoba is a province with a lengthy history of wrongful convictions. Names such as Kyle Unger, James Driskell, and Thomas Sophonow are well known in Canada. Removing procedural safeguards to protect accused persons in the name of expediency is the wrong message to send. In 2007, only ten years ago, the Honourable Patrick LeSage, Q.C., wrote the following in the Driskell Inquiry Report at pp. 115-116:

> The preliminary inquiry has a long history in Canadian criminal law. It can be and often is of immeasurable assistance to the Crown and more often to the accused. Overriding the right to a preliminary inquiry when that right is available in the Criminal Code is an extraordinary step only to be used in the rarest of cases. I believe that had a preliminary inquiry been conducted in this case, the likelihood of this miscarriage of justice having occurred would have been diminished.

In our view, preliminary inquiries continue to serve a vital role in the administration of justice in Manitoba, and in Canada. This has been said time and again by legal commentators, experts, and courts in Canada. We can do no better than to echo the comments of the Honourable Madam Justice McKelvey in the recent Manitoba judgment of *R. v. Catellier*, 2016 MBQB 190, enclosed for your review. In particular, we commend your attention to paras. 69 and 70:

> [69] The ancillary role of the preliminary inquiry continues to serve as an opportunity to explore the Crown's case, particularly by way of cross-examination. This has allowed the defence to secure a record of sworn evidence that can later be used at trial to challenge the credibility of a witness. The ancillary exploratory role remains as an operative and relevant element in accordance with much of the referenced case law, as well as a procedural protection for an accused.

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Importantly, it also facilitates the evidentiary foundation for ***Charter***-based trial motions, amongst other attributes. It should not be lost that Crown counsel has much to discover during the course of examination and cross-examination of witnesses at a preliminary inquiry. Importantly, the testing of the Crown's case may also lead to resolution discussions between the parties.

[70] The kind of discovery that takes place during cross-examination at a preliminary inquiry retains its usefulness to those accused of crime. This is so even after ***Stinchcombe*** because such discovery goes well beyond constitutionally required disclosure standards. Cross-examination can turn lines of documentary disclosure into significant discovery, enabling defence counsel to explore information not found in what can be the selective, even skeletal statements obtained by the police. It permits the defence to correct innocent non-disclosure that was not foreseen by prosecutors or police officers who did not grasp the possible relevance of information that an accused may uncover during cross-examination. Further, it permits both Crown and defence counsel the opportunity to observe the demeanour and quality of witnesses. These are factors important in the tactical decisions that all counsel will make at trial. In practice, preliminary inquiry transcripts are frequently used to determine whether a witness has sufficient memory to recount events consistently, or sufficient acquaintance with the truth to keep to the same account in the retelling of a version of events.

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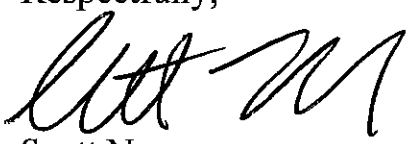
We hope that you will dismiss the judicial request out of hand, and direct the Chief Justices, and the Justice Minister of Manitoba, to consult with the defence bar and other stakeholders on proposals that may serve to streamline matters. The CDLAM has provided input in the past to many judicial committees dealing with many aspects of the justice system, including those relevant to delay. We recently advocated for half-day trials to be available on simple matters, and a trial project on that matter is set to be implemented in Provincial Court. We continue to be prepared to work with all stakeholder on proposals that will minimize delay in all matters.

Respectfully,



Scott Newman
Communications Director
Criminal Defence Lawyers Association of Manitoba
Signed on behalf of the Executive of the CDLAM

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