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March 14, 2017

Via email: mcu@justice.gc.ca

The Honourable Jody Wilson-Raybould, P.C., M.P.
Minister of Justice and Attorney General of Canada
284 Wellington Street
Ottawa, ON K1A 0H8

Dear Minister:

Re: Retaining the Preliminary Inquiry

I am writing in response to recent correspondence to you from the Attorney General of Ontario and the Attorney General of Manitoba (AGs), calling for significant limitations on, or complete elimination of preliminary inquiries for criminal matters.

The Canadian Bar Association Criminal Justice Section's (CBA Section) perspective on preliminary inquiries is based on our daily experience in courts across Canada as both prosecutors and defence counsel. Rather than being a source of court delay, preliminary inquiries save time and resources in superior courts. Before acting, we urge you to complete your careful and comprehensive review of the many challenges facing Canada's criminal justice system, taking advantage of current research and hearing from all justice system participants.

Debates about the value of preliminary inquiries are not new, but the Supreme Court of Canada decision in *R. v. Jordan*[1] has renewed pressure on governments to identify the underlying causes of court delays. Fears have been escalating about a landslide of serious charges being stayed and accused people being released with impunity. This legitimate public concern about delays in criminal court has led to a reopening of the preliminary inquiry debate.

Any connection between courts delays and the preliminary inquiry is speculative at best. In fact, a recent Canadian study concludes that:

> We do not find a clear case for re-opening the debate. The preliminary inquiry appears to have value in reducing the use of expensive court resources, either by altering the course of cases destined for Superior Court or by eliminating weak charges. Its costs in terms of court delay and valuable resources are significantly limited by its infrequent use and few court appearances. At a minimum, this article

[1] 2016 SCC 27 (CanLII).

> suggests that a more detailed empirical examination is justified (if not required) before any changes are made to the preliminary inquiry.[2]

The CBA has consistently supported retaining preliminary inquiries for the practical value they offer to the criminal justice system.[3] Five main points militate against their elimination.

1. Preliminary inquiries are not the problem

Any evidentiary link between eliminating preliminary inquiries and reducing court delays is tenuous. On the other hand, the advantages preliminary inquiries offer to justice efficiencies and fairness are well-established by evidence and bolstered by our cumulative professional experience.

Recent research indicates that:

- Only 25% of eligible cases actually opt for a preliminary inquiry
- The proportion of cases with a preliminary inquiry does not exceed 5% of the overall caseload in any part of Canada
- At most, 2% of all court appearances are used for preliminary inquiries, and
- The vast majority of preliminary inquiries take two days or less.[4]

Data collected by Manitoba's Legal Aid Plan from 2014-2016 offers further insight about the impact of preliminary inquiries on the criminal justice system. Less than 1% of criminal cases taken by Plan staff in that period resulted in an election for a preliminary inquiry (96 cases out of 12,397). Of those 96 cases, *72 did not proceed to trial after the preliminary inquiry took place*. As borne out by this recent data, few cases elect to have a preliminary inquiry, and most of those few cases resolve after the preliminary inquiry without the need for trial.[5]

The Manitoba AG and judicial representatives from that province suggest that eliminating preliminary inquiries would improve access to justice, especially for a disproportionate number of Indigenous people who spend long periods in custody. We are unaware of research to support this connection, but are aware of systemic problems responsible for the over-incarceration and discriminatory treatment of Indigenous people in Canada. In fact, preliminary inquiries offer the same advantages to Indigenous people as to others, helping to get to the truth of a matter more quickly and to resolve matters without the necessity of a full trial.

2. Unnecessary preliminary inquiries have been significantly curtailed

Ontario's AG and others have suggested that the preliminary inquiry is obsolete because of current disclosure and charge approval practices. The argument is that the preliminary inquiry no longer serves its original intended functions, including discovery and weeding out weak cases. However, this ignores the current utility of preliminary inquiries and the steps the federal government has already taken to curtail unnecessary hearings.

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2 Cheryl M. Webster and Howard H. Bebbington, "Why Re-open the Debate on the Preliminary Inquiry? Some Preliminary Empirical Observations" (2013) 55(4) Canadian Journal of Criminology and Criminal Justice 513. (http://ow.ly/znQR309KTWW)

3 See CBA Resolution 2002-06-A.

4 Other than in Quebec. See, Webster and Bebbington, *supra* note 2.

5 Data provided by Manitoba Legal Aid to the Manitoba Law Society Access to Justice Stakeholder's Committee in Nov. 2016. See also, Webster and Bebbington, *ibid*, whose study indicated that in Ontario twice as many cases were resolved in provincial courts as went on to trial.

Where it appears that a preliminary inquiry would lead to unjust delay, several tools are available to ensure that *Jordan* 'ceilings' are not exceeded:

- The Crown can elect to directly indict the matter, eliminating the preliminary inquiry altogether (s. 577).[6]
- If a preliminary inquiry would truly duplicate the disclosure process, the Crown can apply to proceed based on witness statements and other documents, without *viva voce* evidence and the associated court time to facilitate that evidence (the 'paper prelim' option – s. 540).
- Even if the preliminary inquiry proceeds with witnesses, parties can be required to focus the hearing to relevant issues (ss. 536.3-536.5).
- In addition, the preliminary inquiry judge retains discretion to curtail the conduct of the hearing generally, including the specific power to immediately end cross-examination if abusive, repetitive or otherwise inappropriate (s. 537(1.1), and s. 537 generally).

These tools already allow the Crown and courts to strictly regulate the use of preliminary hearings. In our view, there is no need to further curtail or eliminate the practice, particularly because it is frequently useful and supports justice efficiencies.

3. Preliminary inquiries mitigate court delays

Even in cases where preliminary inquiries do not result in early resolution or dismissal, they can significantly reduce the time needed in superior courts. For example, if defence counsel applies to exclude evidence based on a *Charter* violation, the preliminary inquiry is often used to cross-examine witnesses whose evidence is relevant to determining that issue. Crown and defence written arguments based on preliminary inquiry transcripts, and the transcripts themselves, are then filed in superior courts, without adding time for *viva voce* evidence or other related delays.

The preliminary inquiry also acts as an important 'practice run' for both Crown and defence counsel. A mistake at a preliminary inquiry can be fixed, eliminating delay later on. Without the preliminary inquiry, a mistake in superior court or lack of preparedness there could mean more mistrials and delays, and a significant waste of court time. The preliminary inquiry assists the prosecution in evaluating cases and knowing what defences will be presented, allowing the Crown to present a stronger case. It also ensures that all witness statements and all witnesses are known by both sides in advance, avoiding the perils of late disclosure immediately before or during trial. It assists in determining whether the charge approval standard continues to be met, in regions where charge approval is required.

In sum, prosecutors, having a chance to hear the crucial witnesses testify and be cross-examined, can eliminate cases from the system that are doomed to fail. Conversely, defence counsel, having witnessed the strength of the Crown's case at a preliminary inquiry, can encourage early and timely guilty pleas. These realities streamline the court process and encourage timeliness and efficiencies in the system.

4. Eliminating the preliminary inquiry would not reduce stays

The AGs have suggested that eliminating the preliminary inquiry would leave more time for matters to get to trial. This overlooks the important fact that the *Jordan* time limits *include the time needed to conduct a preliminary inquiry*. We can anticipate that current *Jordan* time limits would be reduced to account for eliminating a significant procedural step. This differs from the current

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6 The CBA Section believes, however, that the direct indictment power should be used sparingly.

situation where the Crown prefers a direct indictment to speed up the process, and argues that the 30-month ceiling should still apply.

If preliminary inquiries were eliminated or severely curtailed, counsel would inevitably argue that superior court trials should be conducted within a shorter timeframe (e.g. 18 months). This would imperil more serious cases currently in the system.

5. Eliminating the preliminary inquiry would ignore real efficiency problems

Any suggestion that eliminating preliminary inquiries will fix the problems highlighted in *Jordan* is misguided. The complexities of court delays and justice efficiencies elude any 'quick fix' and require the cooperation of all involved parties, including defence counsel. As the CBA Section suggested before the Senate Committee on Legal and Constitutional Affairs, many productive measures could be implemented that would help to streamline the process, without eliminating preliminary inquiries and their proven utility to the criminal justice system.[7] Examples include better disclosure management practices, more robust judicial case management procedures to ensure accurate time estimates, expanded use of charge screening protocols, the prompt filling of judicial vacancies, effective notice provisions to allow for prepared and well-argued pre-trial motions, adequate legal aid funding across Canada, eliminating protracted bail hearings, using technology to avoid unnecessary pre-trial court appearances, and developing further diversion processes to remove less serious and administration of justice offences from the docket.

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In conclusion, we stress that the issues highlighted by the Supreme Court in *Jordan* are not new and that decision has not led to a crisis across Canada. It has highlighted the need for a thorough, evidence-based approach to criminal justice law reform, rather than suggesting a need to simply 'lop off' important aspects of the criminal justice system with proven utility, like the preliminary inquiry.

We would be happy to elaborate on these suggestions. Thank you for considering our position.

Yours truly,

(original letter signed by Gaylene Schellenberg for Loreley Berra)

Loreley Berra
Chair, CBA Criminal Justice Section

Cc : The Honourable Yasir Naqvi, Ontario Attorney General and Government House Leader (attorneygeneral@ontario.ca)

The Honourable Heather Stefanson, Manitoba Minister of Justice and Attorney General (minjus@leg.gov.mb.ca)

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[7] The CBA Section appeared on two occasions during the Senate Committee's study on court delays, with written submissions offering practical suggestions. Delays in Canada's Criminal Justice System February 2016 (http://ow.ly/pjTs309RVka) and Delays in Canada's Criminal Justice System October 2016 (http://ow.ly/uZGB309RVsS).