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Does the Stinert Decision Signal the End of the Preliminary Inquiry?

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For years the efficacy of the preliminary inquiry has been questioned, studied and pronounced upon by lawyers, government officials, and the courts. Despite debate and amendments, the inquiry still exists as the legislative "shield" between the accused and the Crown, protecting, as Justice Estey explains in the 1984 majority decision of *Skogman v The Queen*, [1984] 2 SCR 93 (at page 105), "the accused from a needless, and indeed, improper, exposure to public trial where the enforcement agency is not in possession of evidence to warrant the continuation of the process." However, the preliminary inquiry is at risk. Both levels of government see no value in the procedure, only costs. The courts, since *Skogman*, have followed suit finding the preliminary inquiry irrelevant and contrary to the efficient and effective administration of justice. Certainly, the recent Alberta Provincial Court decision in *Regina v Stinert*, 2015 ABPC 4 reflects this view and, as argued in this post, may signal the end of the preliminary inquiry.

The preliminary inquiry discussion started benignly with the call for the abolition of the grand jury system; an English common law procedure requiring a panel of 24 jurors to evaluate the charges to determine if the case should proceed to an Indictment. The grand jury was ultimately codified in the 1892 *Criminal Code* but not before a vigorous debate on the issue. Prior to presenting the final version of the *Criminal Code*, the government requested input on the grand jury from justice officials including eminent judges. This correspondence, as well as the subsequent vote, is documented in the Sessional Papers No. 66 from the *Sessional Papers of the Parliament of the Dominion of Canada, Volume 17, 1891*.

The vote on the issue was too close to command any change, with 48 judges and attorneys general in favour of abolishing the practice, 41 against abolition and 12 undecided on the issue. Instead, the grand jury system was abolished by attrition as individual provinces simply stopped using the practice. Even so, the ability to convene a grand jury remained in the *Code* until finally repealed in the 1985 *Criminal Code* amendments. To this day, s. 576(2) still specifically precludes the preferment of a bill of Indictment before a grand jury. Ironically, the principle argument advanced in favour of eliminating the grand jury inquiry, which Supreme Court of Canada Justice Gwynne called in the 1891 debate "more ludicrous than real," was the existence of the preliminary inquiry as the true procedural safeguard against the power of the state.

The main purpose of the preliminary inquiry is the committal function. To determine this, a preliminary inquiry justice considers whether or not there is sufficient evidence to commit the

accused to trial pursuant to s. 548 of the *Criminal Code*. If the evidence is insufficient for committal, the accused will be discharged. In those circumstances, the Crown still has the authority to prefer an Indictment under s. 577 of the *Code* with the written consent of the Attorney General or Deputy Attorney General.

Although the test requires a fairly low evidential threshold, there are cogent illustrations of the impact of this discharge power. An example is found in the case of Susan Nelles, who was the pediatric nurse on duty when a number of babies died in the cardiac ward of the Hospital for Sick Kids in the early 1980s. She was ultimately charged with first-degree murder of four children by allegedly injecting them with lethal doses of the drug digoxin. The subsequent preliminary inquiry revealed a complete lack of evidence for the charge, resulting not only in her discharge but also in an inquiry into the deaths. In this way, a preliminary inquiry protects an accused from the awesome power of the state and can also provide a forum safe from the vagaries of public opinion.

Nevertheless, according to Mr. Justice Estey in *Skogman*, the preliminary inquiry serves an additional purpose, derived through usage, of "a forum where the accused is afforded an opportunity to discover and to appreciate the case to be made against him at trial where the requisite evidence is found to be present" (at page 105). It is this ancillary purpose, grounded in the right of an accused to make full answer and defence, which garners the most criticism and provides support for abolition. This argument suggests that with the advent of the *Charter* and the stringent disclosure requirements of *Stinchcombe*, [1991] 3 SCR 326, the preliminary inquiry is no longer a necessary discovery tool.

In the 1985 *Arviv* decision, 19 CCC (3d) 395, 1985 CarswellOnt 97, the highly regarded criminal law jurist Mr. Justice Martin, writing for the Ontario Court of Appeal, made explicit the connection between the inquiry discovery function and the disclosure obligation when he commented on "the failure to institutionalize procedures for the disclosure of the Crown's case has contributed to the development of this function of the preliminary hearing. A preliminary hearing is not, of course, the only way of providing disclosure or discovery of the Crown's case" (at para 31). This added *caveat* is clear: there are other less costly and time efficient ways to fulfill disclosure requirements. Thus in *Arviv*, the court found that a direct Indictment depriving the accused of a preliminary inquiry, and the subsequent loss of the ability to cross examinee the main Crown witness prior to trial, was not contrary to s. 7 of the *Charter* provided there was adequate disclosure.

Coincidentally, it was Mr. Justice Martin who earlier chaired and wrote the majority opinion of the 1982 Ontario Bench and Bar Council *Report of the Special Committee on Preliminary Hearings.* Unsurprisingly, the majority report called for an end to the preliminary inquiry to be replaced by a robust disclosure procedure. Notably, there was a minority report submitted by two prominent defence counsel, Earl Levy, Q.C. and the now retired Ontario Superior Court Justice Ron Thomas, which cautioned against the removal of the inquiry process. Despite the controversy, the preliminary inquiry seemed, for a time, to be safe from legislative abrogation.

About a decade later, in the *O'Connor* case, [1995] 4 SCR 411 the Supreme Court of Canada, in an all too familiar fractured mid-nineties type of decision, had an opportunity to weigh in on the matter in the context of the production of third-party records. Madam Justice L'Heureux-Dubé, writing in *obiter* on this issue, reiterated the stance articulated in *Arviv* and, in a strongly worded rebuke directed toward defence counsel, she commented (at para 170) that:

> Although preliminary inquiry judges are not permitted to determine the credibility of witnesses, one might hazard to say that the ancillary purpose of "discovery" has lately begun to eclipse the primary purpose of sparing the accused the gross indignity of being placed on trial in circumstances where there is simply insufficient evidence to justify holding the trial at all. One provincial court judge, in the course of a thoughtful discussion on the evolving role of the preliminary inquiry, recently expressed great frustration with this apparent turn of events:
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> > ...the preliminary hearing or preliminary inquiry has been turned into a nightmarish experience for any provincial court judge. Rules with respect to relevancy have been widened beyond recognition. Cross-examination at a preliminary inquiry now seems to have no limits. Attempts by provincial court judges to limit cross-examination have been perceived by some superior courts as a breach of the accused's right to fundamental justice, a breach of his or her ability to be able to make full answer and defence…The present state of the preliminary inquiry is akin to a rudderless ship on choppy waters. The preliminary hearing has been turned into a free-for-all, a living hell for victims of crime and witnesses who are called to take part in this archaic ritual. (*R. v. Darby*, [1994] B.C.J. No. 814 (Prov. Ct.), at paras. 9 and 10.)

Justice L'Heureux-Dubé considered the *Stinchcombe* requirements as an appropriate substitute for the ancillary purpose of the preliminary inquiry and concluded by suggesting that "consequently, in light of *Stinchcombe* and other decisions of this Court that have elaborated on those disclosure guidelines…, it may be necessary to reassess the extent to which the "discovery" rationale remains appropriate as a consideration in the conduct of the modern-day preliminary inquiry" (at para 171).

This reassessment did indeed happen and not too long after the *O'Connor* case. In October of 2001, the then Liberal government proposed, as part of a miscellany of criminal law amendments, significant changes to the preliminary inquiry process in the omnibus Bill C-15. The then Justice Minister Anne McLellan, in her presentation to the House upon second reading of the Bill, described the revisions as criminal procedure reform, spearheaded by the provinces, in an effort to:

> simplify trial procedure, modernize the criminal justice system and enhance its efficiency through the increased use of technology, better protect victims and witnesses in criminal trials, and provide speedy trials in accordance with charter requirements. We are trying to bring criminal procedure into the 21st century. This phase reflects our efforts to modernize our procedure without in any way reducing the measure of justice provided by the system.

Madame Justice Deschamps considered these amendments in *Regina v S.J.L.*, [2009] 1 SCR 426. In her majority decision, the Court confirmed there was no constitutional right to a preliminary inquiry. According to Justice Deschamps (at para 23), the ancillary function of the preliminary as a discovery tool "has lost much of its relevance" due to enhanced disclosure requirements, which did not include requiring the Crown to produce a witness for cross examination at the preliminary inquiry. Justice Deschamps pointed to the new procedures as clearly illustrating the trend "toward the adoption of mechanisms that are better adapted to the needs of the parties, not the imposition of more inflexible procedures" (at para 24).

It is this last phrase - "better adapted to the needs of the parties, not the imposition of more inflexible procedures" – that requires further attention. A quick survey of the new procedures suggests the opposite: the rules have in fact created a more inflexible process, whereby the needs of the accused may not be met as they were under the less regulated system.

The primary modification made by the 2002 amendments appears to be insignificant but, in fact, serves to animate the previous criticisms of the preliminary hearing. The new *Code* section alters the default position for an accused facing an indictable offence, who elects to be tried by a superior court judge, from requiring a preliminary inquiry unless waived, and note the word "waive" implies a legal right, to an optional course of action initiated by the accused (or prosecutor) upon "request." Not only must the accused or the prosecutor request a preliminary inquiry under s. 536 but the party must also comply with the various *Criminal Code* rules respecting the holding of a preliminary as well as any Rules of Court enacted in relation to the procedure.

One such rule, Section 536.3, requires the requesting party to provide a "statement that identifies the issues on which the requesting party wants evidence to be given at the inquiry and the witnesses that the requesting party wants to hear at the inquiry" within the time period specified by the Rules of Court or in the absence of Rules, by the justice conducting the preliminary inquiry. In Alberta, this requirement is fulfilled by submitting a written statement pursuant to procedural forms found on the provincial court website. Form A is counsel's written "wish list" identifying the issues and the witnesses counsel "wishes" to hear from at the preliminary. A "wish" is of course not a command and the prosecutor can, pursuant to s. 540(7), file a witness statement instead of calling the witness to testify. It must be remembered that this ability was available to the prosecutor under the original format, but subject to the preliminary hearing justice, under s. 540(9), considering it "appropriate" to require the witness's attendance to give *viva voce* evidence.

What is new is the advent of, what is colloquially known as, a "focus hearing" under s. 536.4. This hearing assists to further delineate the issues and to identify the required witnesses. Such a hearing may be brought upon application by the prosecutor or accused or by the preliminary hearing justice on his or her own motion. Although, at first blush, this hearing seems to merely "assist" counsel to fulfill the s. 536.3 requirements, it does much more than direct counsels' attention to those issues. Under s. 536.4(1)(b), the focus hearing not only helps the parties to identify the witnesses required but does so in the context of the "witnesses' needs and circumstances." Thus, the "wish" to hear particular witnesses under s. 536.3 may be subject to an application by the other party opposing the attendance of the witness on a "needs and circumstances" basis. For example, the prosecutor may argue that a child witness, in a sexual assault case, may be compromised emotionally by testifying at the preliminary hearing and should not be required. This new "necessity" requirement seems to be a more robust test than found under s. 540(9).

Furthermore, the focus hearing under s. 536.4(1)(c) permits the court to "encourage" the defence and prosecution to "consider any other matters" to "promote a fair and expeditious inquiry." In other words, this focus hearing acts as a pre preliminary hearing conference in an effort to streamline the process. Used correctly, this pre hearing may have the effect of encouraging resolution as evidenced by Form C, entitled *Agreement And Admissions At Hearing Held Under Section 536.4 Criminal Code*. On whichever basis the focus hearing is used, clearly the aperture of the focus is much wider than what is envisioned under s. 536.3.

It is, however, the inflexible application of these rules by the courts that may finally signal the end of the preliminary inquiry. In the *Stinert* case the Honourable Judge Rosborough, in referring to the comparable British committal hearing, suggested calls for reform were as a result of the procedure's "lack of utility and its effect of bloating the criminal process" (at para 8). The issue in *Stinert* involved the quality of the Form A statement submitted by the defence. The filed statement requested the prosecution to lead "any and all evidence that the Crown intends to rely on to prove the case against the accused including but not limited to evidence of a direct or circumstantial nature, viva voce evidence of Crown witnesses and any relevant documents, electronic recordings, photographs, videos or expert reports" and listed two police officers as the desired witnesses. Judge Rosborough, in deciding that the statement did not satisfy the requirements under the section, found counsel's statement "little more than a differently worded request for disclosure" and unacceptably consistent with the general practice in Red Deer to describe the issues in a "vague and overbroad" statement (at para 28). Such a practice, Judge Rosborough held, necessitated the court to "intervene" and take a proactive approach to the preliminary inquiry process by regulating the "form, content and practice" of the s. 536.3 statements (at para 38).

This enhanced gatekeeper role, as envisioned by Judge Rosborough, required the filing of a "proper" 536.3 statement as an aspect of the "request" to have a preliminary inquiry. If the statement was deficient, then the accused's request was at risk. In support of this interpretation, Judge Rosborough relied upon the Ontario Court of Justice decision in *Regina v Callender*, 2007 ONCJ 86. In that case, Justice Bruce Duncan deemed the accused abandoned or withdrew his request to have a preliminary inquiry by virtue of his failure to appear for the hearing. Justice Duncan, exasperated by two earlier aborted attempts to hold the preliminary, denied the defence application to hold the hearing in the absence of the accused as provided for under s. 544 of the *Code*. Instead, Justice Duncan committed the accused for trial on the basis that the preliminary inquiry is by request only and could therefore be withdrawn. The accused, by failing to appear, effectively withdrew his request and thus left committal for trial as the only option.

In Justice Duncan's opinion, a request was much like the accused bringing an application or launching an appeal, it is an optional hearing at the behest of the applying party and therefore no rights can flow in absence of this request. Once abandoned, the request is extinguished and the default position, committal for trial, survives. In the *Callender* case, committal was not an issue, the hearing was purely requested for the ancillary discovery function, which could be replaced by full Crown disclosure. Further, the prejudice to the administration of justice, by improper use of court and witness time, was significant. To permit the hearing to proceed in the accused's absence, Justice Duncan found, would leave the "impression that the accused is a tail that is permitted to wag the dog of the criminal justice system." (at para 12)

In the context of the specific facts in the *Callender* case and in light of the default committal position, Justice Duncan's decision makes sense. However, Judge Rosborough's reliance on this case (at para 31) as authority for finding that an "obviously deficient" s. 536.3 statement could result in an order for committal as the preliminary inquiry would be deemed withdrawn or abandoned, is reading in a far greater gatekeeper role than is suggested on even a strict reading of the circumscribed rules surrounding preliminary inquiries. Although a "request" implies the accused has the burden of bringing the matter to court, it does not follow that upon that request, if an accused does not comply with the rules to the specifications of the court, the accused is deprived of both the committal and discovery function of the preliminary hearing. Even with the requirement under s. 536.3 that the reasons for the request be articulated, the defence is not required, and should not be required, to disclose the strategy or tactical focus of the defence. To

do so would be tantamount to requiring disclosure of the defence far beyond the reasonable requirement to disclose experts and alibis. To be sure, counsel has an obligation to the client to consider the case and provide a meaningful s. 536.3 statement but any deficiencies should not deprive the accused of interacting with the case he or she must meet.

Further, considering the ability of the court to hold a focus hearing under s. 536.4, there is no reason for a denial of a preliminary hearing. Even an abandoned appeal, depending on the circumstances, may be restored pursuant to Rule 14.65 of the Alberta Rules of Court and conversely an abandoned application can be reinvigorated. It should be noted that Judge Rosborough did not limit his ruling to a situation where the accused is not opposing committal. Although the ruling appears to be driven by the lack of utility of a preliminary hearing, it must be remembered that the preliminary inquiry is still a vital part of our criminal justice system as a true expression of the court's gatekeeper function.

The *Stinert* decision can be viewed as both continuing judicial antipathy toward the ancillary function of the preliminary and as the flexing of the judicial gatekeeper "muscle," which, as a result of recent Supreme Court of Canada decisions in *Regina v Hart,* [2014] 2 SCR 544, *Regina v Mack,* [2014] 3 SCR 3 and *Regina v Grant*, 2015 SCC 9, is now expected of trial judges making threshold rulings. In fact, it is this enhanced gatekeeper role which should be the reason to retain the preliminary hearing not only for committal issues but for evidential reasons as well. These recent Supreme Court of Canada cases imbue threshold decisions with more weight than before, placing a burden on the accused to show the evidence has an "air of reality." The preliminary inquiry, therefore, can be an indispensable tool to establish the required evidential foundation for these threshold issues, be they issues of admissibility, providing the basis for a legal defence or setting the stage for a *Charter* application. Thus the notion that the preliminary inquiry lacks utility and interferes with the administration of justice fails to recognize the access to justice issues resulting from the inquiry's demise. In order for the counsel to "appreciate the case made against" the accused, counsel has to have an opportunity to see it (see earlier quote by Mr. Justice Estey in *Skogman* at page 105).

The other critic of the inquiry, the government, has been unable to look past the efficiency and cost argument. Alberta, for example, has taken a strong stand for abolition of preliminary inquiries as part of the government's response to a review of a s. 11(b) *Charter* stay entered in a sexual assault case. As part of the *Injecting a Sense of Urgency: A New Approach to Delivering Justice in Serious and Violent Criminal Cases* Reports, Alberta Justice recently issued a paper on "Eliminating Preliminary Inquiries" which justifies the government's position for "historical" reasons. In this view, the preliminary inquiry, as a committal and disclosure forum, can be adequately substituted for by appropriate prosecutorial discretion and full disclosure.

Although superficially this argument has merit, upon closer consideration such a prospect fails to provide an important element of the preliminary, which is the oversight of a fair and impartial member of the judiciary. Such judicial oversight has become a cornerstone of our justice system as provided for in the search warrant requirements. Moreover, in the most recent decision from the Supreme Court of Canada, *Regina v Nur*, 2015 SCC 15, Chief Justice McLachlin cautions against substituting prosecutorial discretion for judicial decision making, particularly in the adversarial context. Without this judicial review of committal, there is no ability to challenge the decision in court through a quash committal or *certiorari* application. This would, in the words of the Chief Justice in *Nur*, "create a situation where the exercise of the prosecutor's discretion is

effectively immune from meaningful review" (at para 94). Finally, although *Stinchcombe* has set high disclosure expectations, disclosure is not a static concept but continues throughout the case. Disclosure requests are often informed by the preliminary inquiry process, which can actually result in trial efficiencies.

In fact, statistically, the preliminary inquiry works. In a timely 2013 article entitled *Why Re-open the Debate on the Preliminary Inquiry? Some Preliminary Empirical Observations*, University of Ottawa criminologist Cheryl Webster, who has done extensive research on court reform for the federal government, and retired Department of Justice counsel Howard Bebbington, found value in the preliminary inquiry process as, based on an empirical study, it did positively impact court resources. The authors recommend a more detailed review be done before changes to an old, but useful, process be made.

Clearly, the debate on the efficacy of the preliminary hearing must be re-opened before the federal government abandons the hearing without further input. The government needs to take heed to their own implementation promise that changes will not "in any way" reduce "the measure of justice" provided under the original system (see earlier quote by then Justice Minister McLellan when presenting Bill C-15 in the House of Commons). Although any such debate must recognize both sides of the issue, a more meaningful debate would include a real assessment of the advantages and disadvantages of the inquiry process. We must be open to looking at other ways to retain the safeguards presently built into the preliminary inquiry process. For instance, where committal is not in issue, we may find a useful court alternative in the civil discovery procedures, which permits a less formal and less costly forum for the questioning of parties after full disclosure of documents. With an informed and thoughtful discourse on the issue, a more flexible approach could, and should, be found to save the preliminary inquiry from a premature legislative demise.