Preserving Preliminary Inquiries

Reports of the death of preliminary inquiries have been greatly exaggerated. It appears that they will survive criminal procedure reform, albeit in a somewhat weakened state of health. Provided the prosecutor has not opted for "super" summary conviction offences proposed to be punishable by two years less a day, the accused could still obtain a preliminary inquiry under federal proposals released in September of 1998. He or she could, however, be required to identify the issues and evidence to be heard and to adhere to case management schedules. Moreover, presiding judges would be instructed under proposed s. 537(1.1) that they "shall order the immediate cessation of any part of an examination or cross-examination of a witness that is, in the opinion of the justice, abusive, too repetitive or otherwise inappropriate".

The federal proposals are an attempt at compromise between, on the one hand, the claims of the defence bar who have championed preliminary inquiries as a means of defending the accused and, on the other hand, the claims of provincial governments concerned about the expense and delay of monster preliminaries and groups concerned about the harassment of sexual assault complainants and other witnesses in the adversarial setting of the preliminary inquiry. It remains to be seen whether the proposed federal compromise will satisfy the contending forces.

The survival of preliminary inquiries is surprising. The case on paper for retention was not strong. The standard for committal is very low. It will not protect the accused so long as the prosecutor can present some evidence to establish the elements of the offence. This may protect those such as Susan Nelles, accused of complex crimes with radically insufficient evidence, but will not protect the Donald Marshalls of the world who face weak and unreliable evidence on all the elements of the crime. Thought should be given to a standard that would track present appellate concerns about unreasonable verdicts that cannot be supported by the evidence.

Principled statutory reform and preservation of the preliminary inquiry would give judges the power to discharge when the case is so weak as only to produce an unreasonable verdict. Thought should also be given to
restricting or eliminating the powers of prosecutors to do an end run around any negative decisions received at the preliminary inquiry. The power to direct an indictment after a discharge should be restricted or abolished. Finally, thought should be given to granting judges at preliminary inquires the power to award Charter remedies. None of these reforms, which might truly assist accused in their defence, are contemplated in the federal proposals.

The provincial governments’ concerns about delay and expense are addressed by giving judges at preliminary inquiries case management powers. Case management is certainly the rage in civil litigation, but it is difficult to predict its success with respect to preliminary inquiries. Monster prelims are not a problem in every jurisdiction and case management powers alone will probably not solve the complex problems that contribute to prolonged preliminaries. The Criminal Code can, at best, provide a framework for case management. Its ultimate success will depend on local legal culture and the co-operation of the local bar.

If local conditions are not favourable, attempts to impose case management could even add to the expense and delay of preliminary inquiries by adding one more step to the litigation process. The pre-inquiry conference contemplated by the federal proposals will also add another step to the process.

At present, the main value of the preliminary inquiry is to provide disclosure and discovery of the prosecutor’s case. Nevertheless, the prosecutor was not historically obliged to put forth their full case at the preliminary inquiry. In any event, the court’s decision in Stinchcombe (1991), 68 C.C.C. (3d) 1, [1991] 3 S.C.R. 326 has more directly addressed the disclosure concerns that were indirectly and imperfectly served by the preliminary inquiry.

As many defence lawyers have pointed out, however, paper disclosure is not the same as discovery of live witnesses. Bill C-46 somewhat perversely strengthened the case for retention of the preliminary inquiry by making cross-examination of complainants desirable, if not necessary, in order to establish a case for access to counselling records.

The most glaring problem with the federal proposals is the proposed instruction to judges to stop questioning that is abusive or otherwise inappropriate. These grounds are at least as vague as the ground of public interest that was found to be unconstitutionally vague in Morales (1992), 77 C.C.C. (3d) 91, [1992] 3 S.C.R. 711. If the proposal is enacted, it might well attract Charter challenge. It is difficult to predict the success of such a challenge. The cases on direct indictments suggest that, unlike in the case of reasonable bail, there is no constitutional right to a preliminary inquiry. The courts might also distinguish the full answer and defence cases on the basis that the accused cannot be convicted at the preliminary inquiry. This, however, would severely discount the effects of committal on liberty and security of the person.

The vagueness of the proposal cuts both ways. Even though judges are instructed that they “shall” stop abusive or inappropriate questioning, individual judges will have widely differing views as to what constitutes improper questioning. The new instruction raises questions about how judges exercise their own discretion to control questioning at the preliminary inquiry. It is thus not clear what the new provision will add. It will likely please no one. Its vague contours will attract criticism from the defence bar while also providing no guarantee to governments and victims that they will be protected from delay and harassment.

If it wants to protect complainants from re-victimization before trial, Parliament would be better served by simply abolishing the preliminary inquiry. If it wants to protect the accused, Parliament would be better served by a principled reform that raises the standard for committal. Parliament should decide which of these concerns is more important and act accordingly. In this case, half-measures will not do.