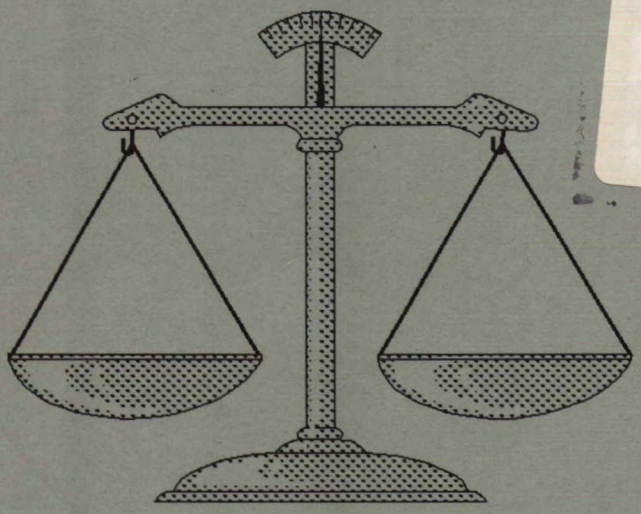
Department of Justice Canada
Ministère de la Justice Canada

Do we still need preliminary inquiries?



Options for changes to the *Criminal Code* -
A Consultation Paper

Canada

Do we still need preliminary inquiries?

Options for changes to the *Criminal Code* -

A Consultation Paper

Recommendations for reforming the preliminary inquiry have been made by many individuals and groups in recent years.

The Department of Justice Canada is now undertaking a wide consultation to seek your views and the views of others as to options for reform of the preliminary inquiry. We will then be in a position to advise the Minister of Justice on the best ways to improve the criminal law and its procedures in this area.

The Department does not work in isolation. We consult with our colleagues in the provincial and territorial departments of justice. We consult with lawyers, judges and court administrators. And we consult with organizations that have an interest in criminal justice issues and with members of the general public.

For our work on the preliminary inquiry process, we also have had the benefit of a research paper — *A Survey of the Preliminary Inquiry in Canada*[1] — prepared for the Department's Research Section.

Now we need to hear from you. What do you think about the possible changes to the law identified in this paper?

Please send us your opinions on these options for changes to the preliminary inquiry process. Write to

Preliminary Inquiry Consultation
Criminal and Social Policy Sector
Department of Justice Canada
Ottawa, Ontario
K1A 0H8

Your comments are always welcome, but you should write to us before April 15, 1994, if you want your ideas to be included in this stage of the law reform process.

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[1] David Pomerant and Glenn Gilmour, *A Survey of the Preliminary Inquiry in Canada*, Draft Technical Report, Department of Justice Canada, 1993.

Table of Contents

Part A - Background

1.	Principles of our criminal justice system	1
2.	The purpose of a preliminary inquiry	1
3.	The power of a justice at a preliminary inquiry	2
4.	The option to have a preliminary inquiry	3
5.	The use of a preliminary inquiry	4
6.	Recent court decisions	5
7.	Criticisms of the preliminary inquiry process	6
8.	In defence of the preliminary inquiry	9
9.	Calls for changes to the preliminary inquiry process	11
10.	The framework for law reform	12

Part B - Options for change

Option 1	Keep the preliminary inquiry process the same.	13
Option 2	Keep the preliminary inquiry only for charge screening purposes.	13
Option 3	Keep the preliminary inquiry and give the justice more power to judge the evidence.	14
Option 4	Make the preliminary inquiry available in only a few situations.	15
Option 5	Abolish the preliminary inquiry process and replace it with other mechanisms.	15
Option 6	Abolish the preliminary inquiry.	20
Other issues to consider		21
Summary		22

PART A - BACKGROUND

1. Principles of our criminal justice system

Our criminal justice system operates on the basis of certain fundamental principles.

- A person who is charged with a criminal offence will be treated as innocent until he or she is convicted of the offence.
- A person who is charged with a criminal offence has the right to a fair trial at which that person has the right to make a full answer and defence to the charge.
- A person who is charged with a criminal offence can remain silent, and this silence cannot be used as evidence of guilt.
- A person must be found guilty of the offence beyond a reasonable doubt.

Any reform of the criminal law must respect these principles. They protect everyone by preventing the state from arbitrarily punishing people for crimes.

2. The purpose of a preliminary inquiry

When Canada's first *Criminal Code* came into force on July 1, 1893, it included sections establishing a preliminary inquiry procedure. These sections have stayed almost exactly the same for over 100 years.

A preliminary inquiry is one step in the criminal justice process. When it occurs, it takes place after a person is charged and before the trial.

The preliminary inquiry serves as a screening process and protects the accused from an unnecessary trial. In the words of the Supreme Court of Canada,

> The purpose of a preliminary inquiry is clearly defined by the *Criminal Code* - to determine whether there is sufficient evidence to put the accused on trial.[2]

At the preliminary inquiry, the prosecution has to show that each element in the offence has occurred and that there is evidence to suggest the accused is guilty. The justice hearing the evidence does not decide the accused's guilt or innocence. The justice must only consider whether a judge or jury would convict the accused if they believed this evidence without hearing anything to contradict it.

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[2] *Patterson* v. *The Queen* (1970), 2 C.C.C. (2d) 227, at p. 230.

According to the Supreme Court of Canada, the justice is

> required to commit an accused person for trial in any case in which there is admissible evidence which could, if it were believed, result in a conviction.[3]

The justice at a preliminary inquiry does not consider the credibility of the witnesses. This is the job of the judge or jury at the trial.

> *Criminal Code*, Subsection 548(1)
> When all the evidence has been taken by the justice, he shall
> (a) if in his opinion there is sufficient evidence to put the accused on trial for the offence charged or any other indictable offence in respect of the same transaction, order the accused to stand trial; or
>
> (b) discharge the accused, if in his opinion on the whole of the evidence no sufficient case is made out to put the accused on trial for the offence charged or any other indictable offence in respect of the same transaction.

3. The power of a justice at a preliminary inquiry

The powers of a justice at a preliminary inquiry are limited. For example, the Supreme Court of Canada has held that a justice at a preliminary inquiry cannot make a decision about how the *Canadian Charter of Rights and Freedoms* might apply to any aspect of the case:

> [The justice at a preliminary inquiry] has no jurisdiction to acquit or convict, or to impose a penalty, or to give a remedy. He is given no jurisdiction which would permit him to hear and determine the question of whether or not a *Charter* right has been infringed or denied.[4]

The law only gives a justice the narrow role of deciding if a trial should take place.

There is no direct appeal procedure from the decision of a justice at a preliminary inquiry. If the defence objects, they can ask a superior court to review the decision

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[3] *United States of America* v. *Sheppard* (1976), 30 C.C.C. (2d) 424, at 427.

[4] *Mills* v. *R.*, 52 C.R. (3d) 1, at 19.

by using a special administrative procedure, but there are very limited situations in which this can take place.[5]

4. The option to have a preliminary inquiry

The *Criminal Code* says that a preliminary inquiry must take place if the accused is charged with an offence under Section 469 (including murder and treason) that will be tried in a superior court.

The accused has the choice of having a preliminary inquiry if he or she is charged with an indictable offence[6] that can be, but does not have to be, tried in a superior court. In this case, a preliminary inquiry will be held if the accused chooses to be tried in a superior court, either by a judge alone or by a judge and jury. If the accused chooses to be tried by a justice (usually a provincial court judge), a preliminary inquiry will not take place.

If the accused is charged with a summary conviction offence[7] or an offence which the *Criminal Code* says must be tried by a provincial court judge, or is tried in youth court, the law does not give the accused the choice of having a preliminary inquiry.

There are some exceptions to these general rules, but they do not occur very often.

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[5] See for example *Forsythe* v. *The Queen* (1980), 53 C.C.C. (2nd) 225 and *Re Skogman and the Queen* (1984), 13 C.C.C. (3rd) 161.

[6] The maximum punishment for the most serious indictable offences is life in prison. The maximum punishment for the least serious indictable offence is two years in prison.

[7] Summary conviction offences are minor offences for which the maximum punishment is 6 months in jail and a fine of up to $ 2000.

Criminal Code, Subsection 536(2)
Where an accused is before a justice charged with an offence, other than an offence listed in section 469, and the offence is not one over which a provincial court judge has absolute jurisdiction under section 553, the justice shall, after the information has been read to the accused, put the accused to his election in the following words:

> You have the option to elect to be tried by a provincial court judge without a jury and without having had a preliminary inquiry; or you may elect to have a preliminary inquiry and to be tried by a judge without a jury; or you may elect to have a preliminary inquiry and to be tried by a court composed of a judge and jury. If you do not elect now, you shall be deemed to have elected to have a preliminary inquiry and to be tried by a court composed of a judge and jury. How do you elect to be tried?

5. The use of the preliminary inquiry

Although the purpose of the preliminary inquiry is to determine whether there is enough evidence to justify a trial, other uses have developed over time.

Pre-trial disclosure of the prosecution's case protects the accused's right to make a full answer and defence at the trial. At the inquiry, an accused has the chance to hear the evidence the prosecution has collected to prove his or her guilt. This helps an accused prepare for trial and prevents surprises.

Preliminary inquiries are a chance for both the prosecution and defence to hear prosecution witnesses testify. The defence questions witnesses to learn more about their evidence and to test for weaknesses in their story. Later, at the trial, the defence may use transcripts of a witness's testimony at the preliminary inquiry to point out any inconsistencies, which may suggest that the witness is not sure about something or is lying.

The prosecution may use the preliminary inquiry to set out its case so that a complete record of the evidence is available later to assist the trial prosecutors. The transcripts may also be used to help prepare witnesses for the trial, by giving them a chance to review the testimony they gave several months before at the preliminary inquiry.

On the other hand, the prosecution may choose not to set out all of its case, but may present the minimum amount of evidence required to move the case to trial.

If the prosecution presents most or all of its evidence, the preliminary inquiry becomes a kind of "dress rehearsal" for the trial, with the defence having the

opportunity to find out the exact nature of the evidence against the accused and to test the composure and credibility of prosecution witnesses.

The record of a witness's testimony at a preliminary inquiry can be used at a trial, in some circumstances, if the witness is unable to testify. In this way, the preliminary inquiry preserves evidence that might otherwise be lost because of the delay between the offence and the trial.

Finally, the preliminary inquiry focuses the attention of the prosecution and the defence on the charges and provides them with an opportunity to meet and review the evidence in the case.

After the preliminary inquiry an accused may decide to plead guilty, having had a chance to assess the evidence and the ability of witnesses to communicate it effectively. The prosecution may decide to reduce the charges or to accept a guilty plea to a less serious offence.

Criminal Code, Subsection 715(1)
Where, at the trial of an accused, a person whose evidence was given at a previous trial on the same charge, or whose evidence was taken in the investigation of the charge against the accused or on the preliminary inquiry into the charge, refuses to be sworn or to give evidence, or if facts are proved on oath from which it can be inferred reasonably that the person

(*a*) is dead,
(*b*) has since become and is insane,
(*c*) is so ill that he is unable to travel or testify, or
(*d*) is absent from Canada,

and where it is proved that his evidence was taken in the presence of the accused, it may be read as evidence in the proceedings without further proof, if the evidence purports to be signed by the judge or justice before whom it purports to have been taken, unless the accused proves that it was not in fact signed by that judge or justice or that he did not have full opportunity to cross-examine the witness.

6. Recent court decisions

Since the coming into force of the *Canadian Charter of Rights and Freedoms* in 1982, there have been several court decisions that have clarified the scope of a preliminary inquiry and the accused's rights.

In 1985, the Ontario Court of Appeal held that the Charter does not guarantee an accused the right to a preliminary inquiry, nor does it guarantee the accused a right

to cross-examine witnesses prior to the trial. However, if the prosecution has not disclosed its evidence to the defence before the trial, then the lack of a preliminary inquiry or an opportunity to cross-examine key witnesses may contravene an accused's rights under the Charter.[8]

The Supreme Court of Canada reinforced the defence right to full disclosure of the prosecution's evidence in a 1991 decision.[9] The Court said that an accused has a right, under the Charter, to all relevant information, even information that the prosecution may not be planning to use at the trial. The disclosure of the prosecution's evidence is supposed to take place before the accused has to decide whether or not to have a preliminary inquiry and before the accused has to decide on a plea.

In general, the courts have not used the Charter to expand the role of the preliminary inquiry.

> *Canadian Charter of Rights and Freedoms*
> Section 7
> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

7. Criticisms of the preliminary inquiry process

Critics of the preliminary inquiry process identify several weaknesses in the current system. Here is a brief summary of the problems people have pointed out.

♦ **When deciding whether or not to proceed with a case, prosecutors now apply a tougher test than a justice must use at a preliminary inquiry.** The purpose of the preliminary inquiry, under Section 548 of the *Criminal Code*, is to determine whether there is sufficient evidence implicating the accused to justify a trial. In theory, the preliminary inquiry screens cases and prevents an accused from having to go to trial if the prosecution does not have enough evidence. In practice, however, prosecution policies in many provinces in Canada require prosecutors to screen cases before proceeding with a charge. These prosecution screening policies set a higher standard than the "sufficient case" test in Section 548.

For example, the federal Department of Justice has guidelines for prosecutors that advise them to go ahead only when there is "a reasonable prospect of conviction" and recommend that a prosecutor's evaluation should include an assessment of

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[8] *Re R. and Arviv* (1985), 19 C.C.C. (3d) 395. A request to appeal this decision was refused by the Supreme Court of Canada.

[9] *R.* v. *Stinchcombe* (1991), 68 C.C.C. (3d) 1.

"how strong the case is likely to be when presented at trial,"[10] a factor that a justice at the preliminary inquiry has no authority to consider.

Some provinces suggest that prosecutors use a "substantial likelihood of conviction" test.

These prosecution screening policies call into question the need for a preliminary inquiry, since they require stronger evidence of guilt than a preliminary inquiry justice must find before ordering the accused to go to trial.

◆ **The Supreme Court of Canada's decisions on an accused's rights under the Charter require the prosecution to disclose its evidence to the defence before a preliminary inquiry, making the preliminary inquiry superfluous with respect to the disclosure of evidence.** The prosecution must disclose its evidence in order to allow an accused to make a full answer and defence to the charge. During the last few years, the extent of the disclosure and its timing have been sketched out by the courts. At this point, there are disclosure policies across the country which require the prosecution to disclose "all relevant information" to the defence before a preliminary inquiry takes place. This means that, in principle, the defence gets information about the evidence early in the process.

At the preliminary inquiry, the prosecution can present the minimum amount of evidence required to move the case on to a trial. The inquiry's role as a forum for the disclosure of the evidence has become unnecessary.

◆ **Victims of crime and witnesses may have to give evidence at both the preliminary inquiry and the trial, which is an unfair burden on them.** The court experience is usually a time-consuming and emotionally draining experience for victims of crime and witnesses. They have to disrupt their lives to come to court, often having to return several times before they are called to testify. Testifying can be trying and difficult, especially for victims of assault and sexual assault crimes. In a courtroom, in front of strangers, they must relive their experience and describe what happened to them in detail. They can be cross-examined by the defence and may have to withstand attacks on their credibility.

While the defence has a right to challenge witnesses and show the judge (and jury) reasons why a witness should not be believed, it is difficult to justify requiring a witness to testify on two separate occasions, months apart.

◆ **The preliminary inquiry has no judicial purpose and is now being used by the prosecution and defence only to assist with trial preparation.** Since charge screening and disclosure now take place before a preliminary inquiry occurs, the preliminary inquiry has lost its judicial purpose. However, a preliminary inquiry often lasts for hours, if not days, taking up valuable court time. It is being used by

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[10] *Crown Policy Manual*, Part II, Chapter 7, "The Decision to Prosecute", Department of Justice Canada, July 1993.

the prosecution to test its case and prepare for the trial and by the defence to hear witnesses testify so that it can get a sense of their composure and the credibility their evidence is likely to have in court. Considering that the courts have said that the accused has no fundamental right to have a preliminary inquiry or to cross-examine witnesses, the need for a preliminary inquiry is no longer apparent.

◆ **A preliminary inquiry creates another layer in the criminal justice process, delaying the resolution of a case and increasing the difficulties for victims of crime and witnesses.** The preliminary inquiry adds a step between the laying of the charge and the trial. Although there is no conclusive evidence on exactly how much time the preliminary inquiry adds to the process, any delay in the resolution of a case puts extra stress on victims of crime and witnesses. They must be available to testify and may worry about the prospect of having to give evidence in court.

Victims of crime report that they cannot put the crime events behind them and recover from the experience while waiting for the trial to take place. Delays put added pressure on crime victims.

From the perspective of victims of crime and some witnesses, the preliminary inquiry adds a long and painful step to the criminal justice process.

◆ **A preliminary inquiry is an additional and unnecessary expense.** There are a number of costs involved in a preliminary inquiry, including the costs of using a courtroom and having court personnel — a justice, a clerk, a court reporter — present. Time is also spent by the prosecution, the police and, if the accused is in custody, jail personnel who must arrange the accused's transportation and presence in court.

If the accused is eligible for legal aid, legal aid pays defence counsel. If the accused is not eligible for legal aid, the accused must pay a lawyer to appear at the preliminary inquiry, or can appear without legal counsel.

Governments are now operating under very tight fiscal restraints. Given its restricted role, the preliminary inquiry is an expensive part of the criminal justice process.

◆ **The preliminary inquiry is a weak link in the justice process, with some inconsistent and anomalous elements.** A preliminary inquiry is only available to an accused charged with certain offences. Even when it is an option, the prosecution can deny the accused the choice and go directly to trial by using a special process called a direct indictment. There is no right to a preliminary inquiry.

A preliminary inquiry is not a trial, and a justice hearing the preliminary inquiry has a very limited role. This results in some oddities. For example, a justice must allow evidence which may be in violation of the Charter, even though it is likely to be excluded at the trial, because the justice has no right to decide Charter issues.

There is only a restricted opportunity to appeal a decision made by a justice at a preliminary inquiry, which reflects its narrow role.

These inconsistencies suggest that there are inherent flaws in the preliminary inquiry process.

Summary People who are in favour of changing the preliminary inquiry process say that the inquiry no longer serves a useful function and is a waste of time and money.

8. In defence of the preliminary inquiry

Some people believe that the preliminary inquiry is an important part of the criminal justice process. Here is a brief summary of the benefits that people have pointed out.

◆ **The preliminary inquiry is the best way for the defence to properly prepare for the trial.** Without a preliminary inquiry, the defence would not know everything it needs to know about a witness's testimony. For example, a witness's statements to the police may be incomplete on some point that is important to the defence. Defence counsel might find out this new information through cross-examination at the preliminary inquiry and this could change the defence strategy at the trial. If no preliminary inquiry is held, the defence is at a real disadvantage at the trial.

The preliminary inquiry is therefore essential to protect an accused's right to make a full answer and defence to the charge.

◆ **The "dress rehearsal" role of a preliminary inquiry helps all parties to prepare for the trial, to everyone's benefit.** For the defence, the preliminary inquiry provides an opportunity to test the composure and credibility of witnesses and to understand the nature of the prosecution's case against the accused. This gives the defence the best chance to prepare for the trial and to protect the accused's rights.

For the prosecution, the preliminary inquiry is also a chance to see how witnesses will react to giving their evidence in court. In addition, the prosecution can use the preliminary inquiry to map out its trial strategy. The transcripts from the preliminary inquiry can simplify preparing for the trial and can be especially helpful when different prosecutors handle the preliminary inquiry and the trial.

For witnesses, the preliminary inquiry is an opportunity to become familiar with the courtroom, trial procedures and cross-examination techniques. Although their testimony is being recorded and they can be challenged on it later at the trial, there is less at stake at a preliminary inquiry. This may help witnesses to prepare for giving testimony at the trial, possibly in front of a jury. As well, before the trial, witnesses can review the transcripts of their preliminary inquiry testimony to refresh their memories. This can be helpful when the trial takes place several months after the incident that led to the charges.

The preliminary inquiry is the only mechanism that provides these opportunities and benefits to all parties.

◆ **Once an accused has had a chance to hear the evidence proving his or her guilt at the preliminary inquiry, he or she is more likely to plead guilty before the trial.** Although the disclosure of evidence by the prosecution helps the defence to prepare for the trial, the preliminary inquiry can provide a good opportunity to appreciate the extent of the prosecution's case and the strength of the evidence. After hearing witnesses testify, the accused has a much better idea of what to expect at the trial.

The accused may be more likely to plead guilty after a preliminary inquiry, saving the costs involved in holding a trial. The preliminary inquiry is therefore an efficient and effective step in the criminal justice process.

◆ **The preliminary inquiry provides an excellent forum for the defence and the prosecution to discuss guilty pleas, reduced charges and appropriate punishment.** Prosecution and defence counsel are very busy, work on a number of files, and are in and out of court most days. The preliminary inquiry process ensures that they will meet long before the trial and have a chance to talk about the charges against the accused.

Plea negotiations may result in a guilty plea on a reduced charge or a joint prosecution-defence submission to the court on the appropriate sentence. Successful plea negotiations guarantee that the accused will be punished for the crime and mean savings in time and costs for the criminal justice system.

◆ **After the preliminary inquiry, the defence can decide to accept some of the evidence and limit the issues that it will argue at the trial.** Preliminary inquiries can help the defence and prosecution narrow the issues that will be in dispute at the trial. This can reduce the number of witnesses that need to be heard and the length of the trial. In this way, the preliminary inquiry makes the criminal justice system more efficient.

◆ **Preliminary inquiries do not delay trials and may, in fact, contribute to earlier trial dates.** Preliminary inquiries are held in provincial courts before provincially appointed judges whose courts handle a wide range and large volume of cases. The trials take place in superior courts before federally appointed judges who handle a narrower range and smaller volume of criminal cases. The preliminary inquiry (and resulting guilty pleas) results in fewer cases going to trial. This reduces the backlog of cases waiting for superior court trial dates and shortens delays and contributes to the efficiency of the criminal justice system.

Summary People who support the preliminary inquiry process say that it is the only way to protect the rights of the accused to a full answer and defence and that it is an efficient and beneficial step in the criminal justice system.

9. Calls for changes to the preliminary inquiry process

During the last few years, a number of commissions and public inquiries have recommended changes to the preliminary inquiry process.

The Commissioners to the Aboriginal Justice Inquiry of Manitoba examined the role of the preliminary inquiry and concluded that "the inquiry adds greatly to the delay present in the criminal justice system." They recommended abolishing it. In its place, they suggested a system of pre-trial conferences and the complete disclosure of prosecution evidence.[11]

At the National Symposium on Women, Law and the Administration of Justice, held in Vancouver in 1991, participants recommended that "The *Criminal Code* be amended to abolish preliminary hearings provided there is mandatory full disclosure by the Crown and police with sanctions for lack of disclosure."[12]

The Canadian Panel on Violence Against Women reports that "[t]he issue of delays in court proceedings and trials is particularly difficult for women survivors. Too much time between the actual crime and the trial date gives an offender more opportunity to intimidate the victim further... The stress of the courtroom experience is doubled by the existence of preliminary hearings. The requirement of recalling the details of the crime twice results in normal variations in repeated stories which become issues of credibility." The Panel concluded that preliminary hearings should be replaced, wherever possible, with paper disclosure of the prosecution's evidence.[13]

In statements made outside the courtroom, some judges have also recently questioned the necessity and use of the preliminary inquiry.[14]

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[11] Summary Report of the Aboriginal Justice Inquiry of Manitoba, Volume 1, *The Justice System and Aboriginal People*, Manitoba Queen's Printer, Winnipeg, 1991, pp. 17 and 22. The Inquiry Commissioners were Associate Chief Justice A.C. Hamilton and Associate Chief Judge C.M. Sinclair.

[12] National Symposium on Women, Law and the Administration of Justice, Volume II, *Recommendations*, Department of Justice Canada, 1992, p. 28.

[13] *Final Report of the Canadian Panel on Violence Against Women*, Ministry of Supply and Services Canada, 1993, p. 220 and 221 and Recommendation L. 39.

[14] See, for example, comments made by the Rt. Hon. Chief Justice Antonio Lamer, Chief Justice of Canada, to the Canadian Association of Provincial Court Judges, Regina, Saskatchewan, September 19, 1992. The Report of the Provincial Criminal Court Judges Special Committee on Criminal Justice in Ontario, January 2, 1987. Report of the Ontario Courts Inquiry, The Hon. T.G. Zuber, (Toronto, Queen's Printer for Ontario, 1987), p. 232.

Many countries with criminal justice systems similar to ours have recently considered and made changes to their preliminary inquiry process.[15]

The need to examine the use and purpose of the preliminary inquiry and consider changes to the law is clear.

10. The framework for law reform

Any law reform work must be grounded in the rights and protection provided in the *Canadian Charter of Rights and Freedoms*. The principles of fundamental justice that must be respected include

- the right of the accused to make a full answer and defence to the charges (Section 7)
- the right to have a trial within a reasonable time (Section 11(b))
- everyone's right to equality before and under the law (Section 15).

In addition to these principles, any changes to the law should work to improve our system of justice by

- making the system more efficient
- making the best use of limited resources
- encouraging victims of crime to report the crime to the police
- respecting the needs of victims of crime so that they will follow up their complaints and give evidence in court
- stopping the justice system from contributing to the difficulties victims of crime suffer
- ensuring that the justice system is fair to everyone — the accused, victims and witnesses.

With these principles and goals in mind, please think about these options for changes to the preliminary inquiry process.

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[15] England, Scotland, New Zealand and states in Australia and the United States of America have all worked on reforms to the preliminary inquiry process. You can find more information about this in *A Survey of the Preliminary Inquiry in Canada*, David Pomerant and Glenn Gilmour, Draft Technical Report, Department of Justice Canada, 1993, pp. 97 - 125.

PART B - OPTIONS FOR CHANGE

We are presenting these options to promote discussion about the preliminary inquiry process. There are many different possibilities for change and you may agree with elements of some of the options and not with others. We have listed the options this way to clarify the issues. We welcome your ideas and suggestions.

Option 1 - Keep the preliminary inquiry process the same.

No changes would be made to the current process.

Disadvantages

- Does not solve any of the problems identified with the current system.

Advantages

- None of the costs, time expenditures and transitional confusion associated with making changes would occur.

Option 2 - Keep the preliminary inquiry only to screen charges.

The preliminary inquiry would remain to be used only as a way of ensuring that there is sufficient evidence against the accused to justify a trial. There are three ways this could be done.

(i) The prosecution would present just enough evidence to prove the elements of the offence and the need for a trial.
(ii) The justice would rely on the documents the prosecution disclosed to the defence to decide if there is enough evidence to justify a trial (a paper review process).
(iii) The justice would rely on the disclosure documents but the accused could request a hearing in certain circumstances.

Disadvantages

- Under methods (i) and (iii), the defence would have only a limited opportunity to hear the evidence and cross-examine witnesses. Under (ii), the defence would not be able to hear the witnesses before the trial.

Advantages

- Under methods (i) and (iii), fewer witnesses might be called to testify at the preliminary inquiry. Under (ii), witnesses would not have to testify twice.

- Methods (i) and (iii) would not improve the situation for victims of crime and witnesses.
- More cases might go to trial because the defence will not have heard the evidence and will plead 'not guilty'.
- Charge-screening policies set a higher standard of proof than the one used at a preliminary inquiry, so this process is unnecessary.
- Mechanisms would have to be put in place to ensure that the disclosure materials are complete and that information favourable to the defence has not been left out.
- Under method (i), time in the courtroom would be reduced because the prosecution would only present basic evidence.
- Under method (ii), the inquiry process would not require any courtroom time.

Option 3 - Keep the preliminary inquiry and give the justice more power to judge the evidence.

More power would be given to the justice at the preliminary inquiry to weigh the evidence, decide on the credibility of witnesses, and consider Charter arguments. Only cases in which there is a reasonable likelihood of conviction at trial would pass the preliminary inquiry stage and be sent to trial.

Disadvantages

- More would be at stake at the preliminary inquiry. It would become more like a trial, take longer and result in more appeals.
- The inquiry would take longer and use court resources.
- Witnesses might be required to give more extensive testimony

Advantages

- Accused who were unlikely to be convicted at trial would be spared the burden of a trial.
- More cases might be screened out at an early stage, relieving pressure on trial courts.
- The prosecution and defence would have a good opportunity

and to answer more questions in cross-examination. They would still have to testify twice in most cases.

to prepare their cases for trial and to assess the evidence.

Option 4 - Make the preliminary inquiry available in only a few situations.

The preliminary inquiry process would be available in only some cases. These could be

(i) for offences under section 469 (murder, treason, etc.), or
(ii) for offences now covered, excluding cases involving a great deal of documentary evidence which require significant court time or cases which deserve only a minor penalty.

Disadvantages

- Depending on which crimes were covered, victims of crimes might still have to testify twice.
- Inconsistencies in the process would remain.
- More accused might opt for jury trials in order to have a preliminary inquiry. (The Charter says that jury trials must be an option for any offence for which the potential punishment is five years in prison or more.)

Advantages

- The defence would have a chance to cross-examine witnesses in cases involving the most serious offences.
- The prosecution and the defence could use the preliminary inquiry to prepare for trials involving the most serious offences.
- Fewer cases would go through the preliminary inquiry process, resulting in a possible saving of time and money.

Option 5 - Abolish the preliminary inquiry process and replace it with other mechanisms.

Instead of preliminary inquiries, mechanisms would be put in place to protect the rights of the accused and to ensure fairness in the system. For example,

(i) Prosecution policies would guarantee the consistent screening of charges before proceeding to trial.

(ii) Prosecution and police policies would guarantee that complete information is included in the disclosure materials given to the defence as soon as possible after charges are laid.

(iii) The defence could ask the court for more information from the prosecution if the disclosure materials are unsatisfactory.

(iv) The defence could ask the court to dismiss charges before trial if there is not enough evidence in the disclosure materials to justify a trial.

(v) The prosecution and the defence could both use a procedure to record the evidence of witnesses who might not be available for the trial.

(vi) The defence could show the court why they need permission to question witnesses before trial in certain cases. The questioning

(a) would take place with a court reporter but without a judge;
(b) would take place in court in front of a judge; or
(c) would be in writing. The defence would submit a list of questions to the prosecution or judge and the witness would provide answers within a specified time.

Disadvantages	*Advantages*
◆ Many new procedures would need to be developed, leading to confusion and uncertainty for a few years.	◆ This change is consistent with recent developments, including new prosecution procedures for charge screening and disclosure. Court cases are already defining the timing and requirements for prosecution disclosure.
◆ The different mechanisms would use more court time, as the defence would have to start procedures to get more information or to hear witnesses.	◆ The flaws and inconsistencies in the preliminary inquiry process would be eliminated and a more logical and effective system would replace it.

(i) Prosecution policies would guarantee the consistent screening of charges before proceeding to trial.

Disadvantages	*Advantages*
◆ The prosecution's role is to present all the evidence in a case before the courts. However, the public perceives the prosecution's role as taking a position against the accused	◆ The prosecution is already screening charges and this would only clarify existing practices.

and trying to prove guilt. The public may not feel that the prosecution can or should act objectively in a charge-screening role. In some situations, the public may not accept the prosecution's decision to drop a charge.

(ii) Prosecution and police policies would guarantee that complete information is included in the disclosure materials given to the defence as soon as possible after charges are laid.

Disadvantages

- The disclosure of evidence would depend on the integrity of individuals and cooperation between the police and the prosecution. Both parties must respect the commitment to give the defence full disclosure of all the information that has been gathered.

Advantages

- The prosecution is already following disclosure policies and this would only clarify existing practices.

(iii) The defence could ask the court for more information from the prosecution if the disclosure materials are unsatisfactory.

Disadvantages

- This creates another step in the process that could slow down a case and tie matters up in court for some time.

Advantages

- This reflects the system that is already in place.
- It encourages the prosecution to prepare complete disclosure materials to avoid having to go to court to defend the disclosure package.

(iv) The defence could ask the court to dismiss charges before trial if there is not enough evidence in the disclosure materials to justify a trial.

Disadvantages	*Advantages*
♦ This would create another step in the process that could slow down a case and tie matters up in court for some time.	♦ This would ensure that the prosecution would apply charge-screening policies stringently and only proceed with charges that can be justified.

(v) The prosecution and the defence could both use a procedure to record the evidence of witnesses who might not be available for the trial.

Disadvantages	*Advantages*
♦ This would be a new procedure and it might take some time to establish its parameters.	♦ The preliminary inquiry is a way of preserving the evidence of witnesses who are old or ill with a life-threatening disease or who may be about to leave the country.
♦ The procedure would apply to all criminal cases, adding pressure to the system.	♦ A new procedure would protect evidence with respect to all crimes in the same way.

(vi) The defence could show the court why they need permission to question witnesses before trial. The questioning

(a) would take place with a court reporter but without a judge;
(b) would take place in court in front of a judge; or
(c) would be in writing. The defence would submit a list of questions to the prosecution or judge and the witness would provide answers within a specified time.

Disadvantages	*Advantages*
♦ Under (a) and (b), victims of crime and witnesses might be required to testify twice.	♦ Under (a) and (b), some victims of crime and witnesses would be relieved of the burden of having to testify twice.

- Under (c), defence would not have an opportunity to see and cross-examine the witness before the trial.

- The more informal procedure, (a), could be more intimidating and unsettling for victims of crime and witnesses who might be questioned in a small room in the presence of the accused. As well, depending on the rules concerning this type of questioning, a witness might be asked to return to clear up some questions. In that case, the witness might end up testifying on three separate occasions. Without a judge present, the witness has less protection from inappropriate questions.

- The more formal procedure, (b), would be the same as a preliminary inquiry and therefore not address the problems witnesses and victims of crime have with the preliminary inquiry process.

- The witnesses who are most likely to be questioned are the witnesses for whom giving testimony tends to be the most unpleasant — victims of sexual assault and wife assault.

- Under (c), a witness would not have to go to court and testify twice and the defence would still be able to get additional information.

- The more informal procedure, (a), could save courtroom time but would still give the defence a full opportunity to hear the evidence a witness has to give. It would result in a transcript of a witness's evidence that would help the defence, the prosecution and the witness prepare for trial. It would preserve the evidence in case the witness was not available for the trial.

- Although the more formal procedure, (b), would require the witness to appear in court, it would reduce the overall time required in court by limiting the number of witnesses that could be called to testify before the trial.

Option 6 - Abolish the preliminary inquiry.

Preliminary inquiries would be eliminated and an accused would go directly to trial. Disclosure of the prosecution's evidence would be made to the defence before the trial, according to the disclosure structures already in place. Charges would be screened by the prosecution.

Disadvantages

- Some charges that should have been dropped might go to trial.
- There might be fewer guilty pleas and more trials.
- The defence would not have an opportunity to hear and test a witness's testimony in person before trial and would be limited to reviewing written statements.
- More trials might take place as defence and prosecution would have no structured opportunity to talk about the charge and plea.
- It would put the burden on the prosecution to act appropriately and would restrict the accused's options.
- Both the prosecution and the defence would have to develop other ways of preparing for a trial.

Advantages

- It would eliminate a step in the criminal justice process.
- It would save victims and witnesses from having to testify on two separate occasions.
- It would reduce the need for courtroom time and reduces the demands on resources.
- It would simplify the criminal justice process by eliminating the preliminary inquiry option, making the process for all offences the same.

Other issues to consider

Changing the preliminary inquiry process in any of the ways described above would require a number of other changes too. We must take into account the cost and impact of these changes when deciding on the best options. Here are some of the other issues to consider.

- Offences in the *Criminal Code* are divided into different categories which dictate what kind of process will be followed. If the preliminary inquiry were abolished, what new classification of offences would be appropriate?

- The *Criminal Code* now gives an accused who is charged with certain offences the option to choose the court in which the trial will be held. Sometimes the defence chooses a superior court trial only because they want a preliminary inquiry. If the preliminary inquiry is abolished, is any election process necessary?

- Some offences leave the prosecution the choice of proceeding with the charge as a summary conviction offence or an indictable offence. Sometimes the prosecution will proceed on the summary conviction charge to eliminate the need for a preliminary inquiry. If the preliminary inquiry is abolished, one purpose for these "hybrid" offences disappears. Is the distinction still useful?

- Provincial court judges or justices of the peace hear preliminary inquiries. How will their workload change if the preliminary inquiry is abolished?

- Superior court cases are heard by federally appointed judges. If the preliminary inquiry is abolished, will they be asked to hear more cases because there may be fewer guilty pleas?

- Which court would hear applications for charges to be dismissed, for more information, to preserve the evidence or to hear witnesses' testimony if Option 5(iii), (iv), (v) or (vi) were selected? What are the implications for court times and delays?

- How will the elimination of the preliminary inquiry affect the way legal aid lawyers are paid for their work in representing an accused before the trial?

- Is there a need for a procedure to ensure that the prosecution and the defence meet before the trial to discuss the evidence and possible negotiations on the plea? In some jurisdictions, a pre-trial conference with a judge is required before a trial can take place.

- If abolishing the preliminary inquiry and instituting new mechanisms has the effect of delaying the trial, will victims of crimes and witnesses end up in a worse situation than they are in now?

- Any change to the criminal justice system creates a certain amount of confusion and uncertainty while the new measures are put into place, and courts are inevitably asked to interpret their exact meaning. If any changes to the preliminary inquiry process are made, how can the transition be made as smooth as possible?

Summary

This paper provides an overview of some of the issues involved in changing the preliminary inquiry process in Canada. We would like to hear from you. Please write to us with your comments and suggestions. We would like advice on what you think would be the best course of action.

We look forward to hearing from you.

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