

## PRELIMINARY INQUIRIES

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### **General Provisions relating to Preliminary Inquiries**

The Preliminary Inquiry (PI) is governed by Part XVIII (sections 535-551) of the Criminal Code. It is available to all accused persons charged with offences that proceed by way of indictment for which the maximum punishment is more than five years (subject only to the Crown's right to prefer a direct indictment). Absolute jurisdiction offences do not have PIs.

Recent amendments to the Criminal Code have increased the number of serious offences in which the maximum punishment is less than five years, thereby reducing the number of offences for which a PI is conducted

### **Purposes of the Preliminary Inquiry**

In law, the purpose of the PI is to determine whether there is sufficient evidence for a trial. The standard is set by the Supreme Court of Canada's decision in **United States of America v. Sheppard**, [1977] 2 S.C.R. 1067, 30 C.C.C. (2d) 424 per Ritchie, J., (at p. 427 CCC):

"I agree that the duty imposed upon a "Justice" under section 475(1)[*currently section 548(1)*] is the same as that which governs a trial judge sitting with the jury in deciding whether the evidence is "sufficient" to justify him in withdrawing case from the jury, and this is to be determined according to whether or not there is any evidence upon which a reasonable jury properly instructed could return a verdict of guilty. The "Justice" in accordance with this principle, is, in my opinion, 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."

... I cannot accept the proposition that a trial judge is ever entitled to take a case from the jury and direct an acquittal on the ground that in his opinion the evidence is manifestly "unreliable". If this were the law, it would deprive the members of the jury of their function to act as the sole judges of the truth or falsity of the evidence and would thus, in my opinion, be contrary to the accepted role of the jury in our legal system. "

The test in **U.S. v. Sheppard** was re-confirmed recently by the Supreme Court of Canada in **R. v. Arcuri**, [2001] 2 S.C.R. 828.

In order to obtain a committal, the Crown must lead evidence with respect to each element of the offence.<sup>1</sup> If the only evidence on a certain element is declared inadmissible at the PI, the accused must be discharged (see below re: admissibility of evidence).

Generally speaking, the threshold for committal is so low that it is rare where the accused is discharged at the PI.

In practice, the PI serves a very important function: it allows both the defence and crown to take a long, hard look at the evidence. It can be a very important proceeding for both the prosecution and the defence. If it is carefully conducted, it will have more of an effect on the outcome of the trial than any other pre-trial procedure including disclosure.

The PI provides the accused with a chance to test the crown's case and explore defences. Defence counsel has an opportunity to freely cross-examine the crown witnesses, to pin down testimony for purposes of trial and to establish the factual underpinnings for future Charter applications. For the Crown, the PI gives the prosecutor an opportunity to assess the strength of the case and see how the prosecution witnesses respond in examination and cross-examination.

After a PI, both sides are better equipped to predict the result of a trial. For this reason, in many cases, the charges are withdrawn or reduced and/or guilty pleas are entered following the PI.

### **The PI and the Charter**

In **Mills v. The Queen**, [1986] 1 S.C.R. 863, 26 C.C.C. (3d) 481, the Supreme Court of Canada held that the preliminary inquiry court (provincial court) is not a "court of competent jurisdiction" within the meaning of section 24 of the Charter for the purpose of granting a stay of proceedings.

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<sup>1</sup> In **Re Skogman and the Queen**, [1984] 2 S.C.R. 93, 13 C.C.C.(3d) 161 the Supreme Court of Canada held that where there is no evidence on an essential element of an offence, a committal will be set aside on judicial review.

In **R. v. Seaboyer; R. v. Gayme**, [1991] 2 S.C.R. 577, (1991) 66 C.C.C. (3d) 321 the Supreme Court of Canada held that a PI judge does not have jurisdiction to decide the constitutionality of legislation relating to evidence (in that case, the ‘rape-shield’ provisions of the Criminal Code).

In **R. v. Hynes**, [2001] S.C.J. No. 80 , 2001 SCC 82, 159 C.C.C. (3d) 359, the Court in a 5:4 decision held that the preliminary inquiry court is not a “court of competent jurisdiction” for the purpose of excluding evidence under s. 24(2) of the Charter.

As a result of these decisions, it is now clear that the defence cannot make Charter applications at the PI to exclude evidence or obtain other relief for Charter violations.

Although the PI is not the proper forum for raising Charter issues, the defence can use the opportunity to illicit evidence that may be useful for the purpose of Charter applications before the trial judge. The accused him/herself may not be able to establish entitlement to Charter relief without support in the Crown’s case.<sup>2</sup> Defence counsel should be aware of all potential Charter applications before he/she embarks on the PI.

Charter applications can be complex and time consuming. Most will require notice to the Crown prior to trial. Without a sound factual basis for the application based on evidence from the PI, it may not be practical or possible to obtain Charter relief.

### **Admissibility of Evidence (non-Charter)**

The PI judge may decide issues of admissibility at common law. Issues of relevance, hearsay, exceptions to hearsay and voluntariness will be decided by the judge conducting the preliminary inquiry.

Where a statement of the accused is tendered, section 542 of the Code applies:

542. (1) Nothing in this Act prevents a prosecutor giving in evidence at a preliminary inquiry any admission, confession or statement made at any time by the accused that by law is admissible against him.

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<sup>2</sup> Counsel should keep in mind that on an application under s. 24 of the Charter, the accused has the burden of proving entitlement to relief on a balance of probabilities.

The crown must establish to the satisfaction of the PI judge on a voir-dire that the statement of the accused was voluntary. Voluntariness must be proven beyond a reasonable doubt at the PI: **R. v. Pickett (1975)**, 28 C.C.C. (2d) 297 (Ont. C.A.).

Similarly, the Crown may wish to introduce a statement from a witness under the rule in **R. v. Khan**, [1990] 2 S.C.R. 531, 59 C.C.C. (3d) 92, **R. v. K.G.B.**, [1993] 1 S.C.R. 740, 79 C.C.C. (3d) 257. Where the crown seeks to admit such a statement, the PI judge must determine hold a voir-dire to determine whether the tests for admissibility (necessity and reliability) are met: see **R. v. Seper** (1997), 207 A.R. 296 (Prov. Ct.).

A voir dire may be waived at the PI. Defence counsel may not object to a statement being admitted at the PI despite concerns about its admissibility. There may be good reasons for waiving the voir-dire, particularly where the issues of voluntariness, (or necessity and reliability in the case of a statement from a non-accused), can only be decided by placing the accused on the witness stand. If the statement is not essential to proving an element of the offence, there may be little to be gained and much to be lost by subjecting the accused to cross-examination at this stage.

### **Perpetuated Evidence**

Defence counsel should be aware of the risk in failing to cross-examine a witness at the PI. If the witness is not available at trial the evidence from the PI may be admitted. Section 715 of the Criminal Code provides:

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 the evidence was taken in the presence of the accused, it may be admitted as evidence in the proceedings without further proof, unless the accused proves that the accused did not have full opportunity to cross-examine the witness.

The word ‘may’ implies that admission of PI evidence under this section is discretionary. On an application to admit evidence under s. 715 the fact that counsel had full opportunity to cross-examination is sufficient. Whether the right was exercised is immaterial. Where, however, the opportunity to cross-examine was hampered by inadequate disclosure, the accused may successfully argue that he/she did not have a full opportunity to cross-examine the witness: **R. v. Barembruch (1997)**, 119 C.C.C. (3d) 185 (B.C.C.A.).

### **Publication Ban - s. 539(1)**

Particularly where the accused has elected or may re-elect to be tried by a jury, defence counsel should ask for a ban on the publication of evidence under section 539. This must be done before the hearing of evidence begins. This ban is mandatory if requested by the defence.

### **A General Approach to the PI for Defence Counsel**

Defence counsel should review disclosure with the client to determine possible defences and Charter applications relating to the case. A review of all the essential elements of the case and the evidence relating to each element is important.

An analysis of the potential weakness in the Crown’s case should be undertaken and consideration should be given to the potential for the Crown to fix up any weaknesses exposed by cross-examination.

Counsel should use the PI to make an informed exploration of possible defences and Charter applications. Although a broad “dance like a butterfly” exploratory approach can be useful at the PI (not at trial), counsel at the PI should avoid exposing weaknesses that can be easily rectified by the Crown at trial.

Where a weakness is exposed, counsel should “sting like a bee”. The witness should be pinned down with a succinct admission that can be used at trial in the event that the witness changes his/her testimony. At trial, particularly a jury trial, it is not very effective to read in several pages of evidence when attempting to contradict a witness.

Counsel should anticipate the issues on any voir-dire and consider what evidence, if any, should be called on behalf of the defence in the voir-dire. Where testimony from the accused is needed in order to raise doubt about admissibility of a statement, and where a statement is not the only piece of evidence on an essential element, careful consideration should be given waiving the voir-dire at the PI.

Careful consideration should also be given to the evidence that is needed by the defence in order to establish Charter defences at trial.

In general, defence counsel at the PI should ‘dance like a butterfly, sting like a bee’. Dancing like a butterfly at trial generally gives the impression that you do not know what your case is about. At the PI stage, it is understood that you do not.

### **Calling Defence evidence at the PI**

It will be very rare where the accused will have anything to gain by calling evidence at the PI. The test for committal does not allow the PI judge to weigh the evidence at all. The accused, may insist on testifying at the PI, despite strong admonitions by counsel. It is the accused’s right to testify.

If the accused wishes to be heard at the PI, he may make an unsworn statement under section 541. This statement is not subject to cross-examination. The utility of such a statement is dubious since it cannot be used in favour of the accused. If the accused is insisting on saying something, this is the less dangerous way to do it.

The defence is entitled to call witnesses at the PI, although there is limited value in doing so and it is rarely done. One reason it may be considered, however, is where there exists a promising but unco-operative witness who will not speak to defence counsel. Provided counsel is satisfied that the witness will not damage the defence, it may be useful to subpoena the witness for purposes of discovering what the witness will say.

**A partial Defence check-list - questions to ask yourself in preparation for a PI:**

- Has full Crown disclosure been provided?
- Have you thoroughly reviewed disclosure with client?
- What are the essential elements of each offence ?
- What evidence does the Crown have on each element?
- What evidence might the Crown be able to lead at trial if you demonstrate weaknesses in the Crown's case at the PI?
- What are your potential defences (non-Charter)?
- Will there be a voir dire?
- What are your potential bases for excluding evidence (non-Charter)?
- What evidence do you require from Crown witnesses to support exclusion of evidence (non-Charter)?
- What are your potential Charter applications/defences, including exclusion of evidence?
- What evidence do you require from Crown witnesses to support Charter applications?
- What are the potential dangers in illiciting evidence from the Crown witnesses on cross-examination?
- Ask for ban on publication: s. 539(1) - mandatory when requested by defence
- Pin down admissions into concise, useable form for use at trial.
- "dance like a butterfly, sting like a bee"