Alberta Crown Attorneys' Association

BRIEF TO THE HOUSE OF COMMONS STANDING COMMITTEE ON JUSTICE AND HUMAN RIGHTS RE: BILL C-75 (*AN ACT TO AMEND THE CRIMINAL CODE, THE YOUTH CRIMINAL JUSTICE ACT AND OTHER ACTS AND TO MAKE CONSEQUENTIAL AMENDMENTS TO OTHER ACTS*)

JAMES PICKARD, PRESIDENT

September 2018

1) INTRODUCTION AND SUMMARY

The members of the Alberta Crown Attorneys' Association ("ACAA") are Crown Prosecutors employed by the Province of Alberta.

The ACAA provides comments below on a few aspects of Bill C-75's amendments to the *Criminal Code* below. We have not commented on all of the changes made by the Bill. The absence of a comment does not necessarily express agreement that the change would achieve the Minister's stated goals. Our comments are those of our Association and may not reflect the views of the Government of Alberta or the Attorney General of Alberta.

According to the *Charter Statement*[1] filed by the Minister of Justice, a goal of Bill C-75 is to amend the *Criminal Code* and related statutes to reduce delays in the criminal justice system and to make that system more modern and efficient. As set out below, the ACAA submits that some of the proposed amendments to the *Criminal Code* in Bill C-75 might not support that stated goal.

2) HYBRIDIZATION

Bill C-75 converts most indictable offences which are punishable by a maximum penalty of 10 years or less into hybrid offences (where the Crown has an election to proceed through the summary conviction process or by indictment) and increases the default

[1] Charter Statement - Bill C-75: An Act to Amend the Criminal Code, Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts, Tabled in the House of Commons, March 29, 2018 (http://www.justice.gc.ca/eng/csj-sjc/pl/charter-charte/c75.html; accessed September 4, 2018).

maximum jail sentence to two years less a day for summary conviction offences (from the current default of six months). As well, the limitation period for summary conviction offences is extended from six months to twelve months.

While the ACAA submits that the provisions about hybridization of offences in Bill C-75 generally would generally be of benefit to the administration of justice (by allowing the Crown to elect to proceed by summary procedure in a wider range of cases), there is an issue with respect to agents appearing in court with accused people that is not addressed in the Bill.

Section 802.1 of the *Criminal Code* only allows agents to appear on behalf of a defendant charged with summary conviction offences if those offences carry a penalty of six months jail or less. The exceptions to this limitation are for corporations or where an agent is authorized to appear in court under a program approved by the lieutenant governor in council of the province. Bill C-75 increases the maximum penalty for summary conviction offences to imprisonment of two years less a day or a fine of not more than $5,000.00. This means that agents will be unable to appear with accused people unless a province has an approved program. Currently, very few provinces have approved programs for agents to appear. Alberta is one of the very few that has programs approved to allow law students to appear with accused persons charged with summary conviction offences. As well, there is an approved program in Alberta to allow Native Counselling Services of

The plight of the unrepresented accused in court is well documented in Canada. It is a problem that courts have been grappling with more and more. Law student organizations that assist self-represented people and other similar organizations are an important part of ensuring that those charged with offences have adequate representation before the court, and fill the gap between unrepresented litigants and underfunded Legal Aid programs. The problem becomes even more acute in remote areas of Canada where counsel are not present on a full-time basis and court workers assist duty counsel or counsel in representing accused people before the court.

The ACAA recommends that Parliament revisit the *Criminal Code,* section 802.1 and incorporate, at minimum, exceptions into that provision for students attending law school in Canada. As well, it is recommended that the Government of Canada work with the provinces and territories to ensure that they have programs in place for agencies who regularly appear with accused people before the courts.

[2] See http://www.ncsa.ca/programs/help-with-court/criminal-courtworkers/

3) PRELIMINARY HEARINGS

Bill C-75's amendments restrict the availability of preliminary inquiries to those accused of an offence punishable by life imprisonment. The ACAA submits that this change might not result in the intended goal of speedier trials if resourcing issues are not addressed first. Further, it ignores the potential benefits of preliminary inquiries for offences with lesser punishments.

Forty-five federally appointed vacancies remain across the country.[3] This is so, despite an announcement by the Federal Government in 2017 of new federally-appointed judicial positions in response to the Supreme Court of Canada's decision in *R v Jordan*. Resourcing continues to be a significant problem. The Alberta Court of Queen's Bench in particular is under considerable strain.[4] The number of cases before that Court at risk of successful applications for dismissal for delay has increased markedly over the past year. While filling vacant positions may help alleviate the backlog (once they are finally filled), it does not address the need for new positions to address Canada's growing population. Fast-tracking indictable offences to significantly under-resourced Superior Courts will only result in further delays in those courts.

There are many benefits to appropriate preliminary inquiries (which are typically much shorter than the trial): They can narrow the issues resulting in shorter trials; they can result in guilty pleas when an accused is faced with the strength of the Crown's evidence; and, they can result in resolutions where the Crown's evidence does not hold up on the stand. From a Crown perspective, preliminary inquiries also allow the Crown to test the strength of its case and, oftentimes, mend unforeseen holes or difficulties in the evidence – resulting in a stronger prosecution at trial.

The Alberta Crown Attorneys' Association recommends that Parliament reconsider limiting preliminary inquiries to offences punishable by imprisonment for life – particularly if the only reason for doing so is to fast-track indictable offences. Given the above-mentioned potential benefits of appropriately held preliminary inquiries, the Alberta Crown Attorneys Association questions whether this amendment will, in fact, result in speedier trials. It should be remembered that the Crown already has the ability to fast-track prosecutions in appropriate circumstances by preferring a direct indictment.

We also note that, according to Statistics Canada, in 2014/2015 preliminary hearings were held in only 3% of all criminal trials.

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[3] "Ottawa announces 19 new judicial appointments, as provinces deal with clogged courts", CBC News, August 31, 2018 (https://www.cbc.ca/news/politics/judicial-appointments-wilson-raybould-1.4806631; accessed August 31, 2018).

[4] *R v Wilson*, 2017 ABQB 68; *R v Regan*, 2018 ABCA 55.

If this amendment is passed as tabled, resourcing issues must be addressed first – if not, delay in Superior Courts will continue to grow and result in more and more judicial stays of viable prosecutions.

The ACAA supports the proposed amendment to the *Criminal Code,* s. 537 (1.01) – which strengthens the powers available to a provincial court judge to "limit the scope of the preliminary inquiry to specific issues and limit the witnesses to be heard on these issues." This change would clarify and strengthen the existing powers of provincial courts to streamline preliminary inquiries and force both the Crown and defence counsel to narrow the triable issues, while maintaining the benefits of preliminary inquiries outlined above.

3) Admissibility of Routine Police Evidence

The ACAA submits that the addition of subsection 551.3(vii) to the *Criminal Code*, as it applies to trials and preliminary inquiries, would not streamline criminal cases. There is already a tool that can be used to put non-contentious evidence before courts: agreed statements of facts (provided for in the *Criminal Code*, s. 655). If the evidence of a police officer is so routine that it does not raise a triable issue (such as, in most instances, continuity of a crime scene or an exhibit), counsel can agree to include it in an agreed statement of facts.

The proposed amendment could contribute to further delay. Rather than simply calling the routine police evidence (presumably, if the evidence is routine, the officer's evidence would not take long), this amendment requires the following: the officer swearing an affidavit; notice of intention to produce evidence; notice of intention to object or cross-examine; and a hearing to determine whether the officer should, in fact, be produced for cross-examination.

Practically speaking, it is difficult to imagine a scenario where, if defence counsel wished to cross-examine a police officer, the presiding judge would oppose the application. Further, if an application were opposed, the likelihood of an appeal is good.

On its face, this amendment—as it applies to trials and preliminary inquiries—is also at odds with a cornerstone of the adversarial trial process: cross-examination. Evidence from a police officer which cannot be reduced to an agreed statement of facts should be subject to cross-examination. At trial or preliminary inquiry, cross-examination on routine police evidence may reveal additional evidence that was not contained in the police report and/or police notes. Cross-examination may also reveal weaknesses in the evidence, biases, inaccuracies, and/or a mistaken belief. The factors listed in the proposed amendment—for a judge to consider whether to require the attendance of a

police officer for cross-examination—do not account for these possibilities arising through cross-examination.

The ACAA recommends that Parliament revisit the proposed subsection 551.3(vii) and exclude trials and preliminary inquiries from its ambit. Agreed statements of facts are commonly used in prosecutions. If the provision is enacted, it will likely be seldom used by Crown Prosecutors, as it will be simpler for Crown Prosecutors to call the police evidence, rather than go through the lengthy procedure set out in the amendment. Further, Crown Prosecutors might have concerns about the risk of a successful appeal if a court were to refuse a defence application to cross-examine a police officer.

ABOUT THE ALBERTA CROWN ATTORNEYS' ASSOCIATION

The ACAA is a voluntary association whose members are Crown Prosecutors employed by the Government of Alberta. It was formed in 1971, is incorporated under the *Societies Act* (Alberta) and is currently seeking certification as bargaining agent for Alberta's Crown Prosecutors.

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