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Criminal

Senators amend Bill C-75 to expand availability of prelims but leave other contentious criminal law reforms intact

By **Cristin Schmitz**

(May 29, 2019, 8:58 AM EDT) -- The Senate's influential Legal and Constitutional Affairs Committee has amended the government's proposed package of criminal procedure and sentencing reforms to expand the number of offences eligible for preliminary inquiries by 393 — more than five times the number proposed by the Liberal government.

The red chamber's recent move — which would ensure that all offences currently eligible for a preliminary inquiry would continue to be eligible, but only with judicial permission (and with automatic access still reserved only to those offences with potential life sentences) — testifies to the concerted and effective lobbying campaign on various aspects of Bill C-75 that are opposed by lawyers and the organized bar. At the same time, senators on the committee have approved some other contentious provisions opposed by many bar groups, including eliminating peremptory challenges in jury selection.

With legislative time running out in the 42nd Parliament, on May 29 the Senate's legal committee hopes to finish approving or amending the Liberal government's 407-clause bill (there are more than 100 clauses still left to approve).

The wide-ranging bill, which aims at reducing court delays and has also won plaudits from the bar for a number of its proposed measures, would, among other things: divert thousands of administration of justice offences from trial; streamline the bail system; convert more than 130 indictable offences into hybrid crimes; and eliminate the use of preliminary inquiries for all cases other than those for which life imprisonment is the maximum penalty.

The Senate committee's package of amendments — which must then be approved by the full Senate — will subsequently have to go back for approval to the House of Commons (which is scheduled to adjourn for the summer by June 21.)

The Canadian Bar Association (CBA), the Criminal Lawyers' Association (CLA) and other bar groups had already scored some wins with respect to Bill C-75 in the House of Commons, where they persuaded MPs and the government, for example, to drop proposed amendments that would have permitted "routine police evidence" to be admitted into evidence by way of affidavit.

However, MPs declined to change other aspects of the bill that lawyers had identified as deeply problematic, including the proposed near-elimination of preliminary inquiries.

Sen. Pierre Dalphond

The bar's vigorous arguments got more traction in the Senate's legal and constitutional affairs committee on May 16, when senators approved, over the objections of the Department of Justice (DOJ), amendments proposed by Independent Sen. Pierre Dalphond.

Dalphond, a retired judge of the Quebec Court of Appeal, emphasized to his fellow committee members that his proposal still restricts access to preliminary inquiries — but it doesn't effectively end them — as the government's proposed legislation effectively would have, except for the 70 offences in the *Criminal Code* that are punishable by up to life in prison.

Department of Justice counsel Paulette Corriveau told senators, before they went on to vote in favour of Dalphond's amendments, that his proposal would permit judges to order preliminary inquiries for all indictable offences punishable from two years to life. This would increase the potential availability of preliminary inquiries by a further 393 offences, she said.

Corriveau warned that this could in turn produce more delays in the justice system, contrary to the bill's objective, and "balanced

approach" — which was arrived at after "a great deal" of consultation over several years.

However, some senators saw the government's proposed near-abolition of preliminary inquiries as going too far, including Sen. Andre Pratte who described it, in French, as "a bit radical."

Dalphond noted that preliminary inquiries are held in only about three per cent of cases across Canada and that their use has been diminishing. Of that three per cent of cases where preliminary inquiries were held, only 13 per cent were for crimes prosecuted on indictment that could expose the accused to life imprisonment. For the other 87 per cent of cases, "many lawyers, bar associations and other groups that have appeared before us have stressed the need not to remove completely the ability to have a preliminary inquiry," Dalphond urged.

He noted that the amendments adopted by the Senate's legal and constitutional affairs committee do not affect the government's proposal to preserve preliminary inquiries for offences punishable by up to life in prison.

However, the amendments do stipulate in addition that justices would be required to order a preliminary inquiry in cases where the Crown and accused agree, and the judge is satisfied that "appropriate measures have been taken to mitigate the impacts on any witness likely to provide evidence at the inquiry, including the complainant."

Sen. Denise Batters

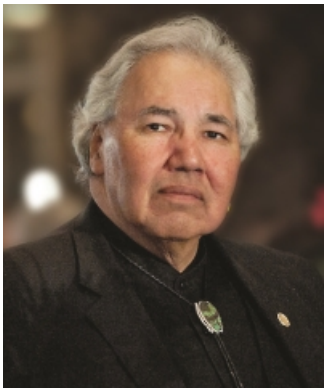
"That is to make sure that the Crown attorney will have to speak about measures to mitigate [negative impacts] and the judge will have to check that it has been done," explained Dalphond, who pointed out, for example, that there are ways to enable a complainant to testify from another room.

He noted Bill C-75 also provides judges with more power to manage cases and, for example, to limit the time for cross-examination and to focus the issues "to ensure that complainant will be treated in a more proper fashion than under the current system."

Under the Senate committee's amendments, if there is no agreement between the Crown and defence on holding a preliminary, either one could ask the judge to grant permission, but it would be granted only if the justice is satisfied that it is in the best interests of the administration of justice to hold one, and that appropriate measures have been taken to mitigate the impacts on any witness likely to provide evidence at the inquiry, "including the complainant," Dalphond said.

The committee later voted down amendments proposed by Conservative Sen. Denise Batters that would have dropped from Bill C-75 its proposed abolition of peremptory challenges to potential jurors.

The proposed abolition is controversial within the bar, with some groups, such as the CBA and CLA opposing it, while others, such as Aboriginal Legal Services, expressing support because of the way such challenges have been used to keep Indigenous and racialized communities off juries.



Sen. Murray Sinclair

"I have heard significant concerns about this major change to the jury selection process contained in Bill C-75 and I have heard those concerns from judges, defence counsel and Crown prosecutors,' said Batters, who practises law in Saskatchewan. She echoed the CBA's call for the government to study the issue more before making major legislative changes to the jury process.

However, the bill's sponsor, Independent Sen. Murray Sinclair, a former judge who is one of the country's top Indigenous jurists and who chaired the Truth and Reconciliation Commission, spoke strongly in favour the abolition of peremptory challenges. "The important thing to keep in mind is that peremptory challenges have been used, and are being used, in a discriminatory fashion," he said. "That's what the research has shown."

"We've documented a number of instances, and Justice [Frank] Iacobucci, in his report [on First Nations representation on Ontario juries] also documented instances, where individuals were being selectively removed from the jury panel," he continued. "I have been an advocate for removing peremptory challenges. I think it results in injustice to continue to allow lawyers to discriminate by removing Indigenous people. I know of no situation where the use of peremptory challenges has resulted in a balanced jury. … What is going on out there is that lawyers are using the peremptory challenges to discriminate against Indigenous people."

Senators passed Bill C-75's clause eliminating peremptory juror challenges by a vote of 8-4.
