Criminal Law

Doing away with prelims is invitation to abuse: Stilman

By Jacob Stilman

If you are in charge of the control room at a nuclear power plant and suddenly half the console lights up with flashing red lights, is the appropriate response to unscrew the bulbs and keep on running the reactors?

If a school has a seriously high failure rate amongst its students, is the answer to the problem to do away with meaningful grading standards?

If a company complains that the safety standards for the production of a certain product are too costly, do you re-write them, knowing that the public will be put at risk?

These are all examples of irresponsible decisions which might address an immediate problem in a quick and inexpensive way, but at the invitation of a much greater risk to the public. Sort of like, you know, when the courts are too clogged let's do away with those pesky and time-consuming procedural safeguards which have benefited the public by ensuring a just and reliable criminal justice system.

Remember that?

Fairness. The opportunity to test the case against you. Ferret out lying witnesses. To make sure that weak cases don't proceed to trial, thereby reducing the burden on the system. I am, of course, referring to what may soon be placed on the endangered species list of criminal justice procedure in Ontario: the preliminary inquiry.

According to news reports, a recently-surfaced memo from the deputy Attorney General is directing Crown prosecutors to request the preferring of direct indictments on serious matters, in order to circumvent the strict time limits set by the Supreme Court, whereby trials must be heard within 30 months.

Like the nuclear control room with flashing red lights, the failing school, or the toxic product, it is always easier to paper over a problem or change the standard, than it is to produce a solution which is safe, effective, and truly serves the public interest.

Similarly, it is much easier to do away with the burdensome, but very important, safeguard of the preliminary inquiry than it is to fix the problem of unconstitutional delay.

The preliminary inquiry, which has existed as an integral first step in trials for most indictable offences, has been under siege now for the better part of the last two decades.

Many charges, which formerly could only proceed by indictment, thus guaranteeing an accused the right to a trial in high court and a preliminary inquiry at the provincial court, have been converted into hybrid offences, giving the Crown the sole discretion as to whether the accused will have access to the two-step process. The result has been a dramatic decrease in the number of trials ever reaching the Superior Court, as most trials are heard at the lower court level.

Despite the disappearance of the preliminary inquiry, prosecutors have long complained, viewing it as an unnecessary and time-consuming burden, a utility that has been diminished through more complete and formalized disclosure obligations.

Since the defence has full disclosure, goes the argument, the "discovery" purpose of the preliminary inquiry is obviated.

This is a facile and disingenuous argument.

The ability to gauge a witness, test his or her evidence, uncover the subtle nuances in testimony, and even sometimes simply stumble upon a fatal flaw in the Crown's case, is greatly enhanced by the preliminary inquiry, where witnesses are subjected to actual cross-examination.

Written materials in the disclosure package are never a substitute for actual testimony in a courtroom. Tactical decisions taken at trial, which may have a fateful impact on the outcome of the case, often have their origins at the preliminary inquiry.

By inviting Crown attorneys to seek direct indictments and do away with preliminary inquiries, which up to now are still a fairly rare occurrence, the Attorney General is thumbing its nose at the rights of its own citizenry.

Trial fairness will be compromised, and with it the increased risk of wrongful or questionable convictions. Procedural safeguards are in place for a reason, and some are time honoured and well tested.

Doing away with the preliminary inquiry is to invite abuses, enhance the ability of untruthful witnesses to get away with perjurous testimony, and strike a blow for expeditious, but flawed, justice.

It would be far more effective, just, and protective of our system of justice for the province to expend real resources on improving access to justice, rather than doing it on the cheap – and knowing full well that this approach will simply delay the coming meltdown.