Brief for a Presentation to the Standing Senate Committee on Legal and Constitutional Affairs on March 9, 2017

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Speaking Notes for a Presentation to the Standing Senate Committee on Legal and Constitutional Affairs on March 9, 2017

Thank you for inviting me. I welcome the opportunity to express some thoughts and provide recommendations to this Standing Senate Committee on the issue of lengthy court delays in Canada.

In my experience, lengthy court delays have always been an issue of concern to the public. That concern has become magnified as it becomes increasingly apparent that criminal charges have been placed in peril – and will in the future continue to be placed in peril – as a result of the constitutional requirements defined by the Supreme Court of Canada in *The Queen v. Jordan*, delivered last July.[1]

At the outset, let me be clear on one thing: the decision in *Jordan* is a game-changer. It was intended to cause change in the way that criminal cases are being handled. At the same time, it was intended to effect a change in culture on the part of justice system participants – from one of apparent complacency to one of sharp attention to the temporal requirements of the *Charter of Rights and Freedoms.*

Maintaining the status quo and forging ahead with a "business as usual" attitude is simply not an option. The clear direction from the Supreme Court requires changes in the law, the way we process cases, and the culture that has developed amongst the various justice system participants – particularly within prosecutions services, the defence bar and members of the judiciary.

I might add – somewhat gratuitously – that if media coverage on the subject is accurate, not all of the players in the criminal justice system have bought into the notion that change is required. I suspect that this Standing Committee and other law makers will encounter considerable push-back and resistance to the sorts of significant change mandated by *Jordan.* With respect, there is a need to keep a sharp focus on the constitutional requirements defined in *Jordan* – despite the vocal position taken by some lobby groups that have an interest in the outcome.

I turn now to changes that are necessary. I agree with many of the recommendations set out in the Interim Report of this Standing Committee – especially the need to fill judicial vacancies, manage mega-trials, develop further technological changes to modernize criminal procedure, and reduce unnecessary appearances and adjournments.

[1] *R. v. Jordan*, [2016] 1 S.C.R. 631, available online at: http://www.canlii.org/en/ca/scc/doc/2016/2016scc27/2016scc27.html?autocompleteStr=jordan&autocompletePos=1

But, with the greatest of respect, I don't believe that these adjustments, either individually or collectively, will be responsive to the game-changing mandate provided in *Jordan.* What is required are *fundamental* changes to both our procedure and the culture that has developed – which are, at the same time, procedurally fair and constitutionally secure.

I come before this Standing Committee with four specific recommendations. The first involves a major change to our procedure. The remaining three involve more modest but nonetheless significant changes that are responsive to *Jordan.*

First, I recommend that the procedure for handling cases described in the *Criminal Code* be reconsidered and re-designed to meet the needs of a modern criminal justice system. That implicates, in particular, Parts XVI to XX of the *Criminal Code*, and may draw in some other Parts as well. I recognize that this is a major task, and that the Interim Report was wary of undertaking a broad reform.[2] I nonetheless wish to advance an impassioned plea for this review, noting two things: we now have the benefit of the direction provided in *Jordan*; and my recommendation is to re-consider only the procedural parts of the Statute – not the entire *Criminal Code.*

The following are three more narrow recommendations. They can be considered and implemented at the same time that the bigger project that I just described earlier is being pursued.

Second, eliminate or reduce the role of the preliminary inquiry. Historically, the preliminary inquiry had a two-fold purpose: to act as a screening mechanism to determine whether the Crown has sufficient evidence to commit the accused to trial; and to provide a discovery mechanism for the benefit of the accused.[3] However, the Supreme Court has been clear that "[…] there is no constitutional right to a preliminary inquiry or to the outcome of such an inquiry".[4] Concerning both of these objectives, the Supreme Court has said this: "Dispensing with the screening process therefore does not result in a deprivation of fundamental justice…;" and because of the Supreme Court's decisions requiring full disclosure to the accused, "[…] the incidental function of the preliminary inquiry as a discovery mechanism has lost much of its relevance".[5]

In the modern era, the preliminary inquiry has outlived its usefulness. Discharges at the conclusion of an inquiry are rare: the test for committal is low, and in weak cases the Crown is more likely to stay proceedings or withdraw the charge. The disclosure function has been completely overtaken by modern disclosure rules. There are, in my view, two viable options for reform:

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[2] In recent times, major reform has been attempted on two occasions: in the early 1950's, resulting in a modest rearrangement and consolidation: The Senate of Canada, *Official Report of Debates*, 1952, "Report of Royal Commission on Revision of Criminal Code" (available online at: http://www.lareau-law.ca/Report1955.pdf . In the 1980's a new Code was sought under the direction of Senator Jacques Flynn as Minister of Justice, but never came to fruition: see the account described by Vincent Del Buono, "Toward a New *Criminal Code* for Canada", (1986), 28 *C.L.Q*. 370 (available online through WestlawNext Canada).

[3] *R. v. S.J.L.,* [2009] 1 S.C.R. 426, at paras. 21-23 [available online at: http://www.canlii.org/en/ca/scc/doc/2009/2009scc14/2009scc14.html?autocompleteStr=sjl&autocompletePos=1] [4] *R. v. S.J.L.*, above at para. 21 (majority decision), and at para. 89 (minority decision)

[5] R. v. S.J.L., above at paras 21 and 23.

a) Eliminate the preliminary inquiry completely, or;
b) Confine it's use to the most serious offences such as murder and terrorism, perhaps with a five year sunset provision to allow the effect of the change to be assessed.

Third, add a new section in the Code setting out principles intended to overcome the culture of complacency. Deeply-rooted cultures in any system take a long time to overcome, often measured in years or decades. Parliament needs to send the three main players in the criminal justice system a clear message that past practices need to change in favor of a culture that emphasizes the importance of proceeding fairly, but with dispatch.

To achieve this change in culture, I recommend that a new part be added to the *Code* headed "Expediting Proceedings to Ensure Compliance with Constitutional Requirements". Below that heading should be a series of principles directed specifically at prosecution services, the defence bar and the judiciary. They could read something along the following lines:

a) *Prosecutors are expected to*: provide disclosure in a timely way; ensure that their case is focused in terms of the number of persons charged, the number of counts, and the evidence to be led at trial; and be prepared to proceed to trial within the timeframe contemplated by s. 11(b) of the *Charter*;
b) *Counsel for an accused are expected*, upon receiving full disclosure from the Crown, to be able proceed to trial within the timeframe contemplated by s. 11(b) of the *Charter;*
c) *Trial judges are expected* to manage pre-trial processes in such a manner that the case can proceed to trial within the timeframe contemplated by s. 11(b) of the *Charter*.

Two final points on this recommendation. It is intended to cast roughly equal obligations on all three of the main players in the criminal justice system, focusing sharply on the s. 11(b) constitutional requirement.[6] Second, while the concept of "principles" is not common in penal legislation, they have previously been used by Parliament to set the tone in relation to the sentencing of offenders. Those provisions have made a significant difference in practice.[7]

Fourth, tighten up individual cases with time and word restrictions. I recommend that the practice in international criminal courts be examined and considered in terms of its potential application to Canada. The court with which I am most familiar is the International Criminal Tribunal for the Former Yugoslavia ("ICTY"), where, over a period of five years (2008 – 2012) I was appointed as an *amicus curiae* to both investigate and prosecute cases. Established by the Security Council of the United Nations in 1993, the ICTY was the first international criminal court since the Nuremberg trials. It has since served as a model for subsequent international criminal tribunals,

[6] A case can also be made to add a fourth principle, directed to the police.
[7] Sections 718 – 718.21 *Criminal Code*. Concerning these sentencing principles, see MacFarlane, Frater and Michaelson, *Drug Offences in Canada*, 4th edition (Toronto: Thomson Reuters), loose-leaf updated to December 2016, chapter 34, "General Sentencing Principles", at section 34:40, "The *Criminal Code* Sentencing Principles".

and has been recognized by the Supreme Court of Canada for the expertise it has developed in international law.[8]

The judges in the ICTY are drawn from around the world, and bring to their judicial function the best practices from their home countries.[9] The judges have collectively assumed a legislative role, and have prepared a detailed procedural code entitled the *Rules of Procedure and Evidence*.[10] The objective of these Rules was to ensure a pre-trial and trial process that was fair but expeditious.

In the cases that I handled, I was struck by several things. Many of the trial issues were dealt with pre-trial and out of court (but under the direct supervision of the judges). Before trial, the issues were narrowed. Counsel were constrained by the trial chamber in terms of the length of their case and the length of submissions. Portions of either party's case could be tendered pre-trial and in writing, with a resulting detailed decision in writing before the trial. Administrative issues were dealt with by experienced Legal Officers, acting under the supervision of the judges. Trial time in my cases collapsed down to days, not weeks. Here are some of the specific procedures that are available:

a) The accused is expected to plead on the first appearance. After that, no appearances are required. Counsel are advised by written court order when the trial will commence[11];
b) Pre-trial motions (for example, abuse of process) are dealt with through written motions, with a resulting written order of the court[12];
c) There are periodic "status conferences" in open court, where the accused has the ability to raise any issue of concern[13];
d) Written motions are subject to a word limit enforced strictly by the Trial and Appeals Chambers. A party wishing to exceed that limit must first obtain an order of the court[14];

[8] *Mugesera v. Canada*, [2005] 2 S.C.R. 100 at para. 126; repeated in *Ezokola v. Canada*, [2013] 2 S.C.R. 678 at para. 51.
[9] Since first being established, judges have been appointed from Canada, the U.S., the U.K., Netherlands, Bahamas, Australia, France, Belgium, Nigeria, South Korea, South Africa, China, Italy, Germany, Malta, Egypt and Jamaica (amongst others).
[10] Available online at: http://www.icty.org/en/sid/136
[11] For example, see *In the Case against Florence Hartmann*, a decision of the Trial Chamber in the ICTY, available online at: http://www.icty.org/x/cases/contempt_hartmann/tord/en/081128.pdf
[12] For example, see *In the Case against Florence Hartmann*, above, available online at: http://www.icty.org/x/cases/contempt_hartmann/tdec/en/090203b.pdf
[13] For example, see *Prosecutor v. Seselj*, available online at: http://www.icty.org/x/cases/contempt_seselj2/tord/en/100825.pdf; and *In the Case Against Florence Hartmann,* above, available online at: http://www.icty.org/x/cases/contempt_hartmann/tord/en/090122.pdf
[14] For example, see *In the Case Against Florence Hartmann*, above, available online at: http://www.icty.org/x/cases/contempt_hartmann/tord/en/090113.pdf . On appeal, see the example provided in *Prosecutor v. Seselj*, above, available online at: http://www.icty.org/x/cases/contempt_seselj2/acdec/en/120423.pdf

e) Portions of the case for either party can be tendered pre-trial in a "Bar Table Motion". The court will then issue a written ruling, invariably reducing trial time[15];
f) The length of the case for both the prosecution and the defence is controlled by the court, in consultation with counsel[16];
g) A written post-trial brief is required of both parties. The Chamber imposes a word limit on them. A tight timeframe for the filing of these briefs is directed by the court. Final oral submissions at trial likewise carry a time limit – usually the same for both parties.[17]
h) Some – though not all – appeals are considered solely on the basis of written submissions and the record at trial; in these circumstances, an oral appeal hearing is considered exceptional, and must be justified by motion to the appeal chamber, in writing.[18]

All of which is respectfully submitted to this Standing Committee,

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[15] For example, see *In the Case Against Florence Hartmann*, above, available online at: http://www.icty.org/x/cases/contempt_hartmann/tdec/en/090519c.pdf

[16] By way of example, in the case of *Prosecutor v. Seselj*, the prosecution was allowed three to five hours to present its case at trial: http://www.icty.org/x/cases/contempt_seselj2/trans/en/110222ED.htm [p. 72, line 15 to p. 73, line 11]; and by subsequent written order the accused was "granted" five hours to present his case: http://www.icty.org/x/cases/contempt_seselj2/tord/en/110510.pdf

[17] For example, see *In the Case Against Florence Hartmann*, available online at: http://www.icty.org/x/cases/contempt_hartmann/tord/en/090624.pdf

[18] Rule 116 *bis (at p. 112)* of the *Rules of Procedure and Evidence* of the ICTY, available online at: http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032Rev50_en.pdf