THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN
The Voice of the Legal Profession
La voix de la profession juridique

October 27, 2006

Donald K. Piragoff
Senior General Counsel
Justice Canada
284 Wellington Street
EMB 5195
Ottawa, Ontario K1A 0H8

Dear Mr. Piragoff,

RE: Criminal Procedure Reform: Hybridization

I am writing on behalf of the Canadian Bar Association's National Criminal Justice Section (CBA Section), with respect to the Justice Department's Consultation paper, "Criminal Procedure Reform: Hybridization" (Consultation paper). The CBA is a national association of 36,000 lawyers, notaries, students and law teachers, with a mandate to seek improvements in the law and the administration of justice. The CBA Section represents both prosecutors and defence counsel from every province and territory in Canada, as well as legal academics specializing in criminal law.

The CBA Section appreciates this opportunity to respond to the Consultation paper. We provide general comments, and then respond to the five specific questions posed.

The CBA Section recognizes potential benefits from hybridizing offences. Hybridization allows prosecutors to elect to proceed summarily for less serious cases, or where an accused has no criminal record. That can mean that a person convicted of a less serious offence will be subject to a shorter sentence, and less emotional and financial cost. It can also reduce demands on an over burdened criminal justice system, as summary offences generally proceed more expeditiously, and without preliminary inquiries.

However, hybridization is not without potential problems. A careful determination must be made as to which offences are appropriate for hybridization. Shifting more cases to provincial courts has significant resource implications. The impact as a result of related statutes, such as the

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Identification of Criminals Act or the *Immigration and Refugee Protection Act*,[1] must be considered, as well as the effect on various *Criminal Code* provisions, for example, the power of arrest. Additional prosecutorial discretion to achieve justice in each individual case brings additional concerns about the proper exercise of that discretion, and consistency in the exercise of discretion across the country. Opportunities for discussion and debate about the principles and factors properly considered in exercising prosecutorial discretion, such as witness availability, should be provided.

In sum, hybridization of offences is not a complete answer to perceived deficiencies in the current operation of the system. Efficiency considerations do not justify compromising fairness in the criminal justice system. Finally, the CBA recognizes the ongoing value and benefit of preliminary inquiries, and nothing in this submission should be interpreted as in any way modifying or detracting from that position.[2]

In answer to the five specific questions raised:

1. The CBA Section recognizes the potential benefits of hybridizing offences, and the Consultation paper summarizes many of these benefits fairly. However, these benefits must be balanced against certain fundamental principles of criminal justice, and efficiency arguments must never override the right of an accused to a fair trial or access to a fair trial process.

2. We agree with the list of offences set out in Annex A,B,C,D, and the maximum penalties suggested.

3. The CBA Section sees no benefit to legislative amendments that convert the summary offences listed in Annex E to hybrid offences. Matters that are generally prosecuted in a simple and cost efficient fashion should not be unnecessarily complicated. For each of the other suggested areas of hybridization, there are potential benefits for both the prosecution and the accused. This proposal would lack that balance. If the rationale for hybridizing such offences is to provide lengthier sentences for more serious examples of the offence (as set out on p.7 of the Consultation paper), then a better solution would be to increase the maximum sentence available to eighteen months, but leave the offences classified as summary conviction offences.

4. The amendment that would convert absolute jurisdiction offences to hybrid offences, as set out in Appendix F, seems to meet the desired objectives. However, there is no apparent reason for the change from absolute jurisdiction offences, or from the current six month maximum for a summary proceeding.

5. The CBA Section is opposed to increasing the limitation period for initiating charges after an offence has occurred in summary conviction matters from six to eighteen months. Generally, summary matters do not require complex investigations. If an investigation has taken more than six months to complete, and the Crown then determines that it

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1 *Identification of Criminals Act*, R.S., 1985, c.1-1; *Immigration and Refugee Protection Act*, S.C. 2001, c.27.

2 CBA Resolution 2002-06-A.

should proceed summarily, the accused has an obvious incentive to consent. An 18 month limitation period could operate unfairly against an individual charged with an offence, if, for example, required to obtain evidence of an event several months earlier. In our view, any decision to extend the limitation period should only pertain to hybrid offences, but not strictly summary conviction offences. The public interest in dealing with minor criminal matters as expeditiously as possible from occurrence through to trial supports not extending the limitation period, even for the proposed newly hybridized matters.

As previously mentioned, the implications of hybridization on other related Acts must be carefully considered before proceeding. For example, hybridizing offences that are currently straight summary offences would have the effect of compelling many more people to provide fingerprints and photographs through the *Identification of Criminals Act*. The fair operation of that Act must reflect a balance between privacy rights and the interests of law enforcement. Efficiency considerations would not justify taking fingerprints and photographs from an entire class of persons not presently subject to those requirements. If continued hybridization is planned, careful study and an open debate should take place regarding the impact on other statutes.

Thank you for the opportunity of adding the CBA Section's views to your deliberations concerning the Consultation paper.

Yours truly,

Original signed by Gaylene Schellenberg for Gregory DelBigio

Greg DelBigio
Chair, National Criminal Justice Section

Preliminary Inquiry

WHEREAS the National Criminal Justice Section has stressed that the preliminary inquiry is essential and should not be reduced in either access or scope, without first establishing through concrete evidence that preliminary inquiries unnecessarily consume time or resources unattributable to other factors and without first enacting legislation expanding the scope of disclosure;

WHEREAS over the past several years, governments have continually proposed limiting the use of preliminary inquiries, citing anticipated cost savings and to avoid having vulnerable witnesses testify twice;

WHEREAS apparent financial savings often overlook the advantages of preliminary inquiries, including increased resolution of cases prior to trial, fewer appeals and fewer wrongful convictions;

L'enquête préliminaire

ATTENDU QUE la Section nationale de droit pénal a fait valoir le caractère essentiel de l'enquête préliminaire et préconisé de ne pas restreindre sa portée ni son accès, à condition d'avoir clairement établi, à l'aide de preuves convaincantes, que cette procédure consume inutilement le temps ou les ressources de l'État, sans que l'on puisse attribuer ce fait à d'autres facteurs, et à condition d'avoir adopté au préalable une législation au sujet de la communication de preuve;

ATTENDU QUE depuis ces dernières années, les gouvernements continuent de proposer de restreindre l'enquête préliminaire dans le but de réaliser des économies et d'éviter à des personnes vulnérables de témoigner à deux reprises;

ATTENDU QUE la perspective de réaliser des économies fait souvent occulter les avantages inhérents à l'enquête préliminaire, y compris le règlement de causes avant la tenue du procès et un nombre plus restreint d'appels et de condamnations injustifiées;

Resolution 02-06-A **Résolution 02-06-A**

WHEREAS financial considerations cannot justify the erosion of procedural safeguards when important liberty interests are at stake;

ATTENDU QUE des considérations financières ne sauraient justifier l'abolition de garanties procédurales lorsque des droits fondamentaux à la liberté sont en jeu;

WHEREAS the Canadian Bar Association and other groups committed to individual liberties and constitutional protections have expressed significant concern about the hybridization of many criminal offences, resulting in fewer jury trials and preliminary inquiries;

ATTENDU QUE L'Association du Barreau canadien et d'autres groupes engagés à défendre les libertés individuelles et les garanties constitutionnelles ont exprimé de vives craintes devant la transformation croissante d'infractions criminelles en infractions mixtes, ce qui diminue d'autant les procès par jury et les enquêtes préliminaires;

BE IT RESOLVED THAT the Canadian Bar Association express a strong continued commitment to preserving the preliminary inquiry as an essential component of our criminal justice system.

QU'IL SOIT RÉSOLU QUE L'Association du Barreau canadien continue de promouvoir l'importance capitale de préserver l'enquête préliminaire à titre de composante essentielle de notre système de justice pénale.

Certified true copy of a resolution carried by the Council of the Canadian Bar Association at the Annual Meeting held in London ON, August 10-11, 2002.

Copie certifiée conforme d'une résolution adoptée par le Conseil de l'Association du Barreau canadien, lors de l'Assemblée annuelle, à London ON du 10 au 11 août 2002.

John D.V. Hoyles
Executive Director/Directeur exécutif