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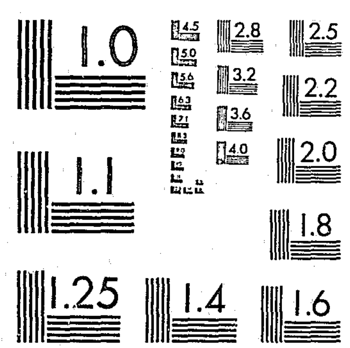

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Ministère de la Justice et
procureur général du Canada

Minister of Justice and
Attorney General of Canada

Notes for an Address

by

The Honourable Mark MacGuigan,
Minister of Justice
and Attorney General of Canada

to the

Defence Counsel Association of Ottawa

Hull, Quebec
June 7, 1983

FOR RELEASE: 8:00 p.m., June 7, 1983

CHECK AGAINST DELIVERY

Most of us believe that the time for criminal law review is ripe, if not overdue. Our Criminal Code dates back to 1982 and has never undergone an in-depth, systematic and thorough revision. It bears the imprint of conditions and social values at the turn of the century.

It can be said that society is never far from the values it seeks to preserve in its penal laws. For what is or is not the subject of criminal law has a decisive influence on society's make-up, on our way of thinking, and ultimately, on the quality of life we enjoy.

That is why, in a massive undertaking, the Law Reform Commission of Canada, the provincial governments, the Solicitor-General of Canada, and the Department of Justice have united their efforts under the Department of Justice in launching the criminal law review. This review, which covers the entire spectrum of our criminal justice system, is one of the most ambitious and fundamental projects in our legal history.

The dynamics of the reform are based on a three-phase approach involving research, consultation and implementation of recommendations.

Justice Department officials are evaluating several reports submitted by the Law Reform Commission of Canada as

part of Phase II of the accelerated review. I expect to receive recommendations from my department in the next few weeks concerning theft and fraud (including computer fraud), contempt of court, and reform of the jury.

As part of this review, we are also considering the Commission's report on mental disorder. This report deals with three areas: the defence of insanity, fitness to stand trial, and the Lieutenant Governor's warrant system. A group of experts is working in this area, and I expect a report in the near future.

We are also working with the Commission on a review of pre-trial procedures. In cooperation with the provincial departments, we have completed a national survey on the operation of the preliminary inquiry. Our research endeavours will lead to the publication of a working paper by the Commission, with recommendations by the department thereafter.

The review is a long-term look at many substantive and procedural areas of criminal law. But we will be addressing some of the more pressing problems sooner. Depending on the legislative time-table, we will soon be tabling a Criminal Law Amendment Bill.

This Bill, which incorporates the Criminal Law Amendment Bills of 1978, will, among other things, improve procedures to reduce delays and backlogs in the courts; it will limit the powers of Crown counsel; and it will further protect the privacy of the accused.

The present slow and inefficient system has resulted -- as the president of the Canadian Bar Association said recently at the People's Law Conference -- in "indecent delays" in the criminal court system. The proposed amendments would require that trials begin within six months of the accused's first court appearance in either a summary conviction or indictable matter tried by a Provincial Court Judge.

The preliminary inquiry would be subject to the same limitations. Where the accused has been committed to stand trial after the holding of a preliminary inquiry, that trial would have to commence within six months of the date of committal. Where, however, there has been no preliminary inquiry, or where there has been a preliminary inquiry but the accused was discharged - and the Crown opts to proceed by preferring a direct indictment, the trial must take place within six months of the date the direct indictment is filed. Where these time limits are not met, the charge

would be dismissed for want of prosecution, unless the court is satisfied an extension is warranted.

We are also looking at procedural delays both before and during trial. To avoid procedural delays before trial, judges will be authorized to call a pre-trial conference. This measure would provide a statutory base for the actual practice in many jurisdictions. As in civil courts, issues, possible defences and admitted facts could be specified in a pre-trial report. By holding a conference presided over by the court, with counsel for the Crown and the accused present, some parts of the case could be resolved before trial.

Another measure would authorize judges and counsel to dispose of preliminary matters in a jury trial before the jury is chosen, in a kind of pre-trial motions court. This would eliminate prolonged delays that often take place at the start of a jury trial.

A common complaint has been that many levels of court are overloaded and need expanding. This situation will hopefully be resolved by a measure that I introduced in the House of Commons two weeks ago to increase the number of federally appointed judges. Nine judges will be added to

the Quebec Superior Court alone, to deal with the tremendous backlog in that province. Six more judges will be appointed to the Federal Court to handle that Court's responsibilities.

The exercise of certain discretionary powers by Crown prosecutors has caused considerable controversy in the legal community. In some instances, judges have expressed concern that prosecutorial discretion might result in abuse of the judicial process.

In response to these concerns, the Bill proposes amendments whereby the Crown will no longer be able to withdraw a case, but must ask for a stay of proceedings. And once a proceeding has been stayed, it could not be recommended without the written personal consent of the Attorney General or Deputy Attorney General. This will result in a process of equitable review, and the development of consistent practices within a province.

Furthermore, unless proceedings are recommended within three months of the entry of the original stay, they would be dismissed for want of prosecution.

These measures would mean that a Crown attorney would no longer be able to withdraw a case because his witnesses have not appeared and his motion for adjournment has been refused. Under these proposals, he would have to obtain the personal consent of the A-G before he could recommence the same proceedings.

We have also proposed amendments to protect solicitor-client privilege and to ensure immunity of certain government documents to public disclosure.

With regard to solicitor-client privilege, a police officer who seizes documents in a lawyer's office would be required to place the documents in a sealed packet if the privilege is claimed. The packet would be turned over to a court of superior jurisdiction which would determine whether it is subject to the privilege.

In the case of public interest immunity, documents in question would be delivered to the Chief Justice of the Federal Court. The Chief Justice would then determine whether public disclosure of the information in the document would pose a threat to international relations, national defence or national security. If such were the case, the documents would fall under the privilege and would not be subject to seizure.

We have included measures in the Bill to protect the privacy of accused persons. An amendment to Section 467 of the Criminal Code would give the Crown the right to request non-publication orders for information obtained during preliminary inquiries. Such orders would be granted at the discretion of the Court if requested by the Crown. The purpose of the amendment is to protect the Crown's right to hold a trial in the venue in which the offence occurred, and to prevent unnecessary publicity which could prejudice that right.

Another amendment would prohibit the media from publishing the identity of a person whose premises have been searched, unless charges result and the accused appears in court.

Although the Criminal Law Amendment Bill has been in the works for some time, its enactment is being hastened to ensure that it is in keeping with the Charter implementation project at the Department of Justice. This project is a co-ordinated review of all federal legislation, regulations, directives and guidelines, and will help me introduce legislation to bring all federal statutes into conformity with the Charter.

As you can imagine, the task of reviewing hundreds of federal statutes is an enormous one. First, we have to assess conflicts or perceived conflicts in the light of Charter decisions which are daily being handed down. A lengthy list of possible difficulties has been prepared.

Secondly, we have to determine the balance between society's need to regulate an activity and to verify compliance with the regulations, and the right of an individual freely to carry out that activity without interference from the government.

Among the more obvious problems are the various rights of entry, search and seizure, which appear in more that 60 federal statutes. The scope of these powers varies from that of a peace officer holding a writ of assistance under the Narcotic Control Act to that of an inspector under the Agricultural Products Standards Act. In each case, society has a legitimate objective -- the control of dangerous drugs and control over the safety of agricultural products. The question is how vigourous our safeguards need to be.

There are other areas where implementation of the Charter poses some practical questions.

Certain federal statutes could be construed as unreasonably infringing the mobility rights section of the Charter. For example, the Public Service Employment Act gives preference in job placement to Canadian citizens. However, the Charter grants mobility rights to permanent residents whether or not they are Canadian citizens. Furthermore, the Act requires the Public Service Commission to recruit from the "area" when filling certain "local" positions. These legislative provisions and employment practices must now be re-examined.

There have been several cases defining the right to freedom of expression in Section 2 of the Charter. In the Southam case, the Ontario Court of Appeal held that there cannot be an absolute exclusion of the public from proceedings under the Juvenile Delinquents Act. There are other proceedings authorized by federal statutes which provide for exclusion of the public in certain circumstances -- an inquiry under the Immigration Act, for example. In our review of these powers, we must determine the reasons for such exclusions, and ensure, where they are believed necessary, that we clearly spell out the power to exclude.

Another complex area is freedom of expression for public servants. The Fraser case has focussed attention on

the extent to which public servants may express themselves on matters of public concern. I think that there is a very important public interest in ensuring that public servants are not only impartial, but are seen to be impartial. At present, there is a prohibition on political activity in Section 32 of the Public Service Employment Act. We may have to set out the ground rules for public servants more clearly, to bring this Act into conformity with the Charter.

For those regulations, acts, and guidelines which do not meet the test, policy recommendations are being prepared to seek authority from Cabinet for the necessary amendments to the legislation or regulations. Some changes may come in the next session of Parliament, although we expect the whole process to take some time and to require at least two or three Bills.

Other legislation is ready to be introduced in the next session of Parliament.

The first is reform of the Divorce Act, most particularly with regard to the grounds for divorce. When the Divorce Act was passed in 1968, we said that it would be reviewed in a few years to ensure that the legislation would keep pace with changing social realities. In 1976, the

Minister of Justice tabled, in the House of Commons, the report of the Law Reform Commission on Family Law. It recommended, among other things, the establishment of Unified Family Courts and a new divorce process on the basis of marriage breakdown regardless of fault.

A major obstacle was the need for the provinces to enact fair and equitable matrimonial property-sharing legislation. Otherwise, the right to obtain a divorce upon marriage breakdown would have resulted in disastrous financial consequences for low-income spouses or spouses without jobs.

Most of the provinces have now adopted equitable matrimonial property-sharing laws. Therefore, I believe the time is ripe for reform. The legislation is ready, but I may have to await the Speech from the Throne in the fall to announce its contents.

A closely related and important area is the enforcement of custody and maintenance orders. This subject is under review by federal and provincial officials who are examining better ways of improving and facilitating enforcement of these orders.

We will also have a package of sentencing reform legislation ready for presentation this fall. The law provides no guidelines to assure fairness and predictability in sentencing, which has resulted in unwarranted disparity in sentences. We also need means of evaluating the effectiveness of sentencing practices.

One of our proposals will be that imprisonment be used only when lesser sanctions, such as compensation and restitution, would help address the immediate needs of the victims of crime, by restoring their property or by providing some measure of compensation for their injuries. We are seeking to have these options recognized as legitimate and effective sanctions in their own right.

I am meeting in early July with my provincial counterparts to consider the report of the Federal-Provincial Task Force which was created to make recommendations for both levels of government to assist victims of crime. One of the things the Task Force is considering is how to give the victim more recognition in the criminal justice system.

One of the proposals calls for the introduction of a "victim impact statement" as part of the pre-sentence report

to be presented to the sentencing judge. This statement would be one of the many factors considered by the judge in imposing sentence on the convicted offender.

It would give the victim a chance to tell the judge the extent of the injury, damage or loss that he has suffered by the acts of the accused. This would give the victim an active role in the process which, up to now, has virtually ignored him.

Finally, within the next month, I intend to propose legislation and other initiatives to respond to the increasing amount of pornographic, violent and degrading material on the market. With the co-operation of the opposition parties, new obscenity legislation could even be in place before the summer recess of Parliament.

From the reform initiatives I have mentioned this evening, you can see that our plate is full, if not overflowing. No law reform of this magnitude can be successful or can truly achieve its full potential without the full and active participation of the community. This can happen only if we ensure that the public has a closer relationship with the law.

A significant move in that direction occurred when the first national People's Law Conference met in Ottawa. The conference marked the beginning of an on-going consultation between the public and the Department of Justice on the process of law reform.

One of the prevailing themes that emerged from the conference was that many people feel alienated from the law. They believe that knowledge of the law will lead to better exercise of their rights, and greater justice. And they believe, perhaps rightly, that it is the role of the legal profession and the Department of Justice to demystify the law. This is particularly important since the legal profession has been criticized for its failure to keep pace with the social and political environment, and for being a "world unto itself", where only lawyers and judges may tread.

We have already started to counter this perception. A working group is being set up within the Department of Justice which will develop concrete policies to ensure that the suggestions and concerns of the People's Law Conference will be considered. A primary concern of the group will be to develop in-house expertise and programs on public legal education.

These programs will be directed toward specific members of the public who will be affected by our law reform initiatives. Programs will be set up to advise other departments and levels of government which will be affected by federal laws, for example, our proposed legislation on assistance to victims. We will also be developing our own educational initiatives, as well as an in-house service to assist groups, including local bar associations, to organize community education programs.

In closing, I want to reiterate that if the law persistently fails to take into account legitimate public needs and interests, it risks becoming irrelevant, and even antagonistic to people's real concerns. Therefore, in our efforts to make our society a better place to live, <u>all</u> members of the profession have a responsibility to diligently seek to improve our laws.

To respond adequately to the changing needs and wishes of people in our society is our duty and our hope. To do that, we are developing new and more effective means for people to interact with those who must design the law. With the help of the legal profession, among others, we will be able to remove the barriers between the people and the law, and we will have laws which truly reflect the legitimate interests and expectations of the Canadian people.

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