Editorial ? Grand juries: Long gone, good riddance

Few Canadians realize that our criminal justice system once included grand juries. Yet visitors to Toronto's old city hall can still find courtrooms with two jury boxes, enough to house the 24 members of a grand jury.

Today, the United States is virtually the only common law jurisdiction in the world that continues to use the grand jury to screen criminal indictments. Under the system, a grand jury may issue an indictment for a crime, also known as a ?true bill,? only if it finds, based upon the evidence that has been presented to it, that there is ?probable cause? to believe that a crime has been committed.

According to Wikipedia, while all 50 U.S. states have provisions for grand juries, only half actually employ them, with 22 requiring their use to varying extents.

Unfortunately, two states mandating grand juries are Missouri and New York, the scene of somewhat similar incidents in which unarmed black men were killed by white police officers, only to have charges against them dismissed by a majority of the jurors.

In both cases, there is little doubt that if the incidents had occurred in Canada the police officers would have been charged and face a preliminary hearing at which a judge would determine whether there was sufficient evidence which, if accepted by a properly instructed jury of their peers, could lead to a conviction.

Both systems involve elements of secrecy. In the case of grand juries, everything is supposed to be kept secret and the media cannot attend the hearings. Under Canada's Criminal Code, the proceedings are subject to a temporary ban on publication unless both Crown and defence agree to have the ban lifted, and the bans expire if the judge refuses to commit the accused to trial or after the criminal proceedings conclude.

We may never know why the two U.S. grand juries decided that there was no ?probable cause,? although it will always be suspected that the case of the Missouri jurywas tilted in the officer's favour by the fact nine of the 12 jurors (enough for a verdict) were white.

There are many similarities between the two systems. In both, the prosecutor decides what evidence he or she will adduce, and all witnesses are subject to cross-examination by lawyers for the suspect.

Perhaps the most important difference is that at a preliminary hearing, a judge, properly trained in the law, ultimately makes the decision. He or she has several options; the accused can be committed to trial on some or all of the original charges, or the judge may conclude that the evidence supports committal on a different charge (usually, but not always, a less serious one).

Although both systems usually lead to the suspect facing trial, there have been celebrated exceptions. Perhaps the most famous example of a Canadian suspect who faced murder charges being freed after a preliminary hearing is that of Susan Nelles.

A nurse at Toronto's Hospital for Sick Children, Nelles faced four counts of murder following a police investigation of multiple alleged poisonings of babies at the hospital between June 1980 and April 1981.

She was exonerated when defence lawyer Austin Cooper was able to establish that she had not been on duty at the time of the four deaths, having swapped shifts with other nurses in the intensive care unit.

Perhaps the biggest difference between the grand jury system and our criminal justice system is that Canadian prosecutors can opt to proceed by direct indictment, in which case they remain compelled, thanks to the Charter of Rights and Freedoms, to disclose all relevant evidence (both incriminating and exculpatory) to the defence.

Although we don't know what triggered the decision to abolish our grand juries, history has shown it to be a good idea.