Law Reform Commission of Canada

Study Report

discovery

in

CRIMINAL CASES

1974

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NOTICE

This book contains two sections. The first consists of a research paper prepared by the Criminal Procedure project. It contains the analysis of the existing law and practices in a number of jurisdictions. It also contains the project's proposals.

The second part consists of a Working Paper of the Law Reform Commission of Canada. This includes the philosophy of the Commission and recommendations for changes in the law. The proposals in this section represent the views of the Commission.

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FOREWORD

In Canada, the civil procedure systems of the provinces have long provided for broad pre-trial discovery of an opponent's case. Indeed this is true of all Anglo-American civil litigation systems. Compulsory discovery of documents, interrogatories, oral examinations for discovery, and medical examinations in personal injury claims are some of the civil discovery procedures to which reference might be made. Yet in Canadian criminal procedure it would seem that very little discovery is available, notwithstanding the more serious consequences attending criminal proceedings, and that the arguments for discovery in criminal law, in Canada at least, have only recently been advanced. In fact Professor Hooper's extensive analysis on "Discovery In Criminal Cases" published in the 1972 Canadian Bar Review[1] is the first substantial treatment of this important subject in Canadian legal literature.

The purpose of this study is threefold. First, it is to examine the extent to which either the accused or the prosecution is now either entitled or enabled to obtain discovery of any information, objects, theories, or of anything that might be relevant to the conduct of a criminal prosecution. The distinction between "entitled" and "enabled" is important, as this study will reveal, as it signifies the difference between obtaining discovery as of right and as a result of the exercise of discretion—usually the discretion of a prosecutor. The second purpose is to examine the arguments both for and against discovery in criminal cases including the very special considerations that are raised in regard to possible discovery of the accused. This also includes an examination of the question of whether a discovery system, assuming there should be discovery in criminal cases, should be based on the exercise of discretion, or on the construction of a formal system providing, in the main, discovery to the accused as of right. The third purpose of the study is to examine the criminal discovery systems of other jurisdictions, and tentatively to propose possible changes that might be made to the present Canadian discovery system.

The Organization of the Discovery Study

This study is divided into seven major parts. As well, it is a truly bilingual study since, while the full paper has been translated for purposes of publication, some parts of it were originally written in French and some parts in English. This approach encouraged thoroughness in research of the application in all parts of Canada of the laws and practices of criminal procedure.[2]

1. *Existing Discovery in Canadian Criminal Procedure*

In some respects this part of the discovery study has been the most exacting. While it would have saved considerable time to be able to rely on the doctrinal and empirical research of others, in fact the doctrinal research that exists is incomplete[3] and the empirical research almost non-existent.[4] Therefore the first objective of this study was to conduct a full examination of both the law and the practice in Canada in order to determine the nature and extent of the existing discovery "system", or if in fact there were no "system", of existing discovery practices. Without such a thorough study the value of suggestions for improvements to the existing system would be questionable.

Thus this first part is divided into two segments: (a) an examination of the *Criminal Code* and the case law, and (b) an examination, through a questionnaire survey of Canadian prosecutors and defence counsel, of discovery practice.

The first segment is entitled: "The State of Canadian Law Relating to Discovery in Criminal Cases" and proceeds from an examination of various sections in the *Criminal Code* which may directly or indirectly bear on discovery to the accused, to an examination of some common law doctrines that may also be applied in providing discovery to the accused. In turn, this segment examines various procedures, both in the *Criminal Code* and elsewhere, that may be considered as allowing for a degree of discovery to the prosecution. The conclusion of this major segment of the study is that in fact there is no discovery "system" as such, and further that there is very little discovery available to the accused as of right.

These conclusions support the decision taken at the beginning of the study to attempt to examine actual discovery practices. Since there is little discovery available to the accused as of right, it is necessary to determine whether or not prosecutors nevertheless provide discovery in practice and, if so, to what extent and in what form. These questions are examined in the survey of the legal profession. Detailed questionnaires were drawn for distribution to prosecutors and defence counsel. The questionnaires went through a number of drafts, were checked with experienced lawyers, and were finally drawn in a form to permit computer coding. All of this work culminated in 666 questionnaires being sent to prosecutors, both full and part-time, and 5,579 to defence counsel whose names were obtained, in the main, from provincial criminal legal aid lists. The mailing of the questionnaires was completed by the first week of May 1972[5] and about 1,000 completed questionnaires were returned. A full retrieval and analysis of the information from this survey is nearing completion and will be separately published. Therefore this paper is essentially a doctrinal examination of the many issues bearing on discovery in criminal cases. However, to the extent that the opinions and positions expressed herein may be affected by the survey information they are clearly tentative and will be subject to re-examination.

2. *The Theory of Discovery*

Part 2 of the study examines discovery in relation to the aim of the criminal process and the adversary nature of that process, both pre-trial and at trial. Against this background, this part of the study reviews the main arguments that have been advanced against discovery in favour of the accused. These arguments concern the so-called balance of advantage in the criminal process, the difficulty of making discovery mutual or reciprocal, the promotion of perjury and witness intimidation, and the possible inefficiency of the process that discovery may cause.

3. *Policy Questions*

In Part 3, two important policy questions are examined. The first question, based upon the assumption that the arguments in favour of discovery in criminal cases are accepted is: should discovery be provided on a discretionary basis, either in the discretion of the Crown or the Court, or should discovery be provided through formal legal rules? While to some extent, the answer to this question may be affected by the survey information—particularly if it should be revealed that, in the exercise of discretion, Canadian prosecutors provide "full" discovery—value concepts are also involved and require examination. The second question is: if it were to be concluded that discovery should be provided in a formal procedure, what would be the relationship between the discovery procedure and the preliminary inquiry? Can the preliminary inquiry be reasonably employed to provide discovery or are the needs of committal and discovery so different that separate procedures should be devised for each? These are the policy questions that are examined in this part.

4. *Sanctions to Enforce Discovery*

This part briefly examines the various sanctions that might be used in the enforcement of a formal discovery system, and points out that, while one sanction might be useful for one situation, a quite different sanction may be required for another. For example, the sanction of inadmissibility of evidence not disclosed by the prosecution may be soundly employed as to incriminating evidence, but for possible exculpatory evidence that the accused might adduce once disclosed some other procedural sanction would be necessary.

5. *Prosecutorial Discovery*

Very special issues are raised by the question of whether the prosecution should have the right to discovery of the accused and therefore this subject receives a detailed examination in this part. Involved here are the arguments in favour of and against prosecutorial discovery of the accused, the kinds of information that might be the subject of prosecutorial discovery, the relationship of this subject to police questioning of accused persons, and the relationship of discovery of the accused to the various rights of the

accused: (a) to remain silent and not assist in his own prosecution, (b) to advance, as a primary defence, the weakness of the prosecution case, and (c) to advance a full answer and defence.

6. *Models For Discovery*

Of major importance to this study, Part 6 examines a number of discovery models which are either systems now in effect in other common law countries, or models that have been proposed. They range from the discovery system in England to that in the American States of Vermont, Texas and California, to those proposed in other states and in the American Bar Association Standards, and to the system in effect in Israel. Through the examination of these models it may be possible to suggest which features of them, if any, are feasible for adoption in Canada. However, before this stage is reached it will be necessary to acquire a more intimate knowledge of how the various discovery systems are actually applied.

7. *Proposal for Reform*

As noted earlier, there is still work in progress. The information from the questionnaire survey is being analyzed and the operation in practice of some of the discovery models is being more closely examined. However, we think it would give focus to every aspect of the study, as well as to comments that readers of this study paper may wish to make, to propose a specific discovery system that would, at this point in our research, seem most workable in the Canadian criminal process. Thus Part 7 set out in some detail the various features of a suggested discovery system.

NOTES

1. Hooper, "Discovery in Criminal Cases" (1972), 50 Can. Bar Rev. 445.
2. We were immeasurably assisted by Lagarde, *Droit Pénal Canadien* (1962) and Supplements, a superior annotated Criminal Code that is unfortunately little known outside of Quebec.
3. Professor Hooper's study, see *supra* footnote 1, is the only substantial Canadian article on discovery in criminal cases and even it does not cover all aspects of the subject. In particular it does not consider the subjects of prosecutorial discovery either at present or in theory, or sanctions to enforce discovery, or the relationship between committal proceedings and discovery. As well the article does not contain any information on comparative discovery models.
4. The only empirical evidence on discovery is found in Professor Grosman's *The Prosecutor* (1969), at pp. 74-77.
5. See Questionnaires on Discovery in Criminal Cases published by the Procedure Project, 1973.

PART I

THE STATE OF CANADIAN LAW RELATING TO DISCOVERY IN CRIMINAL CASES

INTRODUCTION

The first part of this study deals exclusively with the present state of discovery in Canadian criminal law. In fact, however, there is no formal discovery procedure in criminal law, in contrast to civil law which provides for comprehensive procedures governing the exchange of information between litigants, including procedures for discovery of documents and for oral examinations of parties for discovery. Despite this absence of formal criminal discovery procedures the *Criminal Code* does contain many provisions which are capable of being used by litigants for discovery purposes.

These various provisions were not conceived as a unified or comprehensive system and they are not set out together in the *Criminal Code*. Thus grouping them for purposes of analysis, while appearing artificial, serves to emphasize the absence of a formal discovery system. The law will be examined and dealt with first, in order to identify the extent to which it enables the defence to have access before trial to material or information in the possession of the prosecution, and second, in order to identify the extent to which it enables the prosecution to have access before trial to material or information in the possession of the defence not only for the purpose of completing the investigation and preparation of its own case, but also for the purpose of being informed before trial of the evidence and defences that may be advanced at trial.

DISCOVERY OF THE PROSECUTION BY THE DEFENCE

1. *Discovery Provisions in the Criminal Code and Other Statutes*

The *Criminal Code* contains a number of provisions which can directly or sometimes incidentally, either permit or compel pre-trial disclosure by the prosecution of certain elements of its case. In some cases the provisions deal with discovery in general terms; in others they precisely identify material or information to be disclosed. This analysis will examine all of the relevant sections in the *Criminal Code* in terms of their utility as discovery instruments.

(a) The Preliminary Inquiry

The preliminary inquiry is most commonly considered as a method by which the defence may obtain information as to the nature and details of the prosecution case. While many legal practitioners see this procedure as the best means to find out the nature and quality of the evidence they will have to meet at trial,[1] it is not really an effective discovery instrument. In fact it is available in only a small number of cases[2] and sometimes even in these cases it provides incomplete discovery.[3]

The Canadian preliminary inquiry stems from an inquisitorial system of criminal investigation and prosecution in England, in which justices of the peace originally performed all of the investigative functions now performed by the police.[4] The role of the justice of the peace gradually changed and eventually began to take on judicial characteristics. At the same time the inquiry over which the justice of the peace presided also changed, becoming mainly a judicial examination of the justification and need for pretrial detention of the accused as well as an examination of the need for a trial itself. In this proceeding the prosecution was required to present its case, or at least to present sufficient evidence to establish a *prima facie* case. In England over the years this obligation on the part of the prosecution to reveal its evidence was developed and has now taken on considerable importance in itself. The defence uses the preliminary inquiry to become informed of prosecution evidence and generally does not contest committal for trial, often preferring an acquittal at trial to a discharge at the preliminary inquiry. The defence practice is mainly to use the preliminary inquiry, and the right to cross-examine the prosecution witnesses called at this stage, to obtain discovery and not to disclose elements of its own case for the purpose of contesting committals for trial.[5]

To some degree English law has recognized this evolution of the preliminary inquiry towards a discovery procedure. In England the prosecution cannot call a witness whose identity has not been disclosed at the preliminary inquiry without first notifying the defence.[6] English authors take the position that the preliminary inquiry serves as much to verify the existence of *prima facie* evidence as to prevent the defence from being taken by surprise at the trial.[7] However, these two objectives are confused in English practice. The extent to which this confusion prevents the English preliminary inquiry from being a fully satisfactory discovery proceeding will be discussed at a later stage.[8]

In Canada, authors have long debated whether there is a right to use the preliminary inquiry for purposes of discovery.[9] This issue has also been argued before the courts[10] and recently the Supreme Court of Canada defined the exact limit of the preliminary inquiry. Mr. Justice Judson, writing the majority opinion, declared in *Patterson v. R.*[11] that:

> The purpose of the preliminary inquiry is clearly defined by the Criminal Code—to determine whether there is sufficient evidence to put

the accused on trial. It is not a trial and should not be allowed to become a trial.[12]

Thus, he added, while a magistrate at a preliminary inquiry has the discretionary authority to order the prosecution to disclose a witness' statement to the defence, a decision not to force the Crown to disclose it does not affect the jurisdiction of the magistrate to commit the accused for trial and is consequently not reviewable by *certiorari*.

Despite the characterization by Mr. Justice Judson of the issue in the *Patterson* case as being a very narrow one, the decision seems to substantially diminish the value of the preliminary inquiry as a discovery vehicle.

Therefore, contrary to the rule which is said to apply in England, there is no rule in Canada which requires the Crown to present all of its evidence at the preliminary inquiry;[13] the defence cannot require the Crown to go beyond the establishment of a *prima facie* case.[14] In this respect, the decisions, previous to the *Patterson* case, which authorized the defence to conduct its cross-examination to avoid being taken by surprise at trial,[15] may not be followed. Of course discovery can be obtained at the preliminary inquiry when it is incidental to a right formally conferred on the defence by a statute,[16] such as the right to call witnesses. In this way the defence may obtain evidence from people who will probably be Crown witnesses at the trial, but in calling them the defence loses the right of cross-examination at the preliminary inquiry.

It may be noted however that some magistrates at preliminary inquiries are not going along with the views expressed by the Supreme Court of Canada. There are two interesting examples of this resistance using two different lines of reasoning. In *R. v. Littlejohn,*[17] the magistrate reached a conclusion contrary to *Patterson* by accepting an argument which had not been raised before the Supreme Court. This argument was based on section 2(*e*) of the *Canadian Bill of Rights,* which provides that no law of Canada shall be applied in such a way as "to deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations". The magistrate concluded, on facts similar to those in the *Patterson* case, that if a restrictive interpretation of the right to cross-examination and the word "trial" in section 10 of the *Canada Evidence Act,* which provides a right, at "any trial" to cross-examine a witness as to his previous written statement, were to prevent the accused from having a just and equitable preliminary inquiry, then section 2(*e*) of the *Canadian Bill of Rights* would require that section 10 be more liberally interpreted in order to correct this inequitable situation.

In *R. v. Harbison*[18] the reasoning is perhaps less convincing. There the magistrate did not accept the argument put forth in the *Littlejohn* case, but was content to accept that the Supreme Court of Canada in *Patterson* simply decided that section 10 of the *Canada Evidence Act* did not enable a magistrate to order that written statements be produced during a preliminary inquiry

solely for cross-examination and that, while this power did not exist by virtue of section 10, a discretionary power nevertheless existed when the interests of justice required it. Whether convincing or not, this case is perhaps the best example of the resistance of magistrates to the spirit of the *Patterson* decision.

It should still be understood, in spite of these efforts to resist *Patterson,* that the right to cross-examination is necessarily limited by the nature of the procedure in which it is used. As long as a preliminary inquiry remains a procedure having only the function of verifying whether there is sufficient evidence to warrant a trial, the right to cross-examination at the inquiry cannot become a perfect instrument for discovery of prosecution evidence. And even if the dual functions of the preliminary inquiry were fully recognized the result would still be unsatisfactory because in essence these functions are incompatible. It is impossible for the defence in one proceeding to effectively contest the committal for trial and at the same time attempt to obtain full discovery.[19]

The Canadian trend in this matter is thus paradoxical and seems to lead to an impasse. While the Supreme Court of Canada has recently declared that the preliminary inquiry only serves one function, i.e. that of evaluating the evidence justifying committal for trial, there are those who continue to claim that the defence should not really attempt to strongly resist the committal for trial, but should instead concentrate on cross-examination for discovery of Crown evidence.[20] It seems that this procedure should be completely re-examined if it no longer serves its original function, and is used instead to compensate for the absence of direct procedures designed for an essential need, the pre-trial discovery of the prosecution case.[21]

(b) Section 531 of the Criminal Code

The second important provision in the *Criminal Code* which seems to come within the field of discovery is section 531. This section entitles the accused, "after he has been committed for trial or at his trial", to inspect without charge "his own statement, the evidence and the exhibits", and to receive copies of them. But the true scope of this section has really not been determined. At one time it was believed that the term "statement" applied to any judicial or extra-judicial confession made by the accused,[22] and that the word "evidence" applied to all evidence, even statements or exhibits that might eventually be used as evidence. But in *R. v. Lantos*[23] the British Columbia Court of Appeal rejected this line of reasoning. This court decided that the word "statement" referred only to any statement made by the accused at the preliminary inquiry and that the word "evidence" was to be understood as meaning evidence given at a judicial proceeding. While this strict interpretation appears justified by the legislative history of the section and by its wording,[24] the restriction that these documents be available only after the committal for trial could hardly be justified if this section was intended to be a real discovery procedure with reference to all Crown evidence and to confessions of accused persons in all cases. It thus

seems fair to conclude that this section is quite technical in scope, and only allows the defence to receive, before trial, the evidence presented at the preliminary inquiry.[25] Furthermore, section 531 does not apply in cases where there is no preliminary inquiry and in these cases the accused is not entitled, according to any section in the *Criminal Code,* to obtain, "his own statement, the evidence and the exhibits", before the trial.

(c) Section 524 of the Criminal Code

This section, which appears under the heading entitled "Proceedings Before Grand Jury" provides that "the name of every witness who is examined or whom it is intended to examine shall be endorsed on the bill of indictment . . . ". The only Provinces which have retained the Grand Jury process are: Newfoundland, Prince Edward Island, Nova Scotia and Ontario—but now Ontario is moving towards its abolition. An attempt was made in one case to widen the scope of section 524 to cover all indictments, even those not emanating from the Grand Jury; but this attempt was rejected.[26] Therefore in the Provinces where the Grand Jury has been abolished, under this section the defence is not entitled to obtain a list of witnesses the Crown intends to call at trial. However, in the case just referred to, it was added that the defence was usually sufficiently informed by the preliminary inquiry, and that the prosecution should disclose the names of all witnesses it intends to call at trial but who have not been called at the preliminary inquiry. The ruling in the case was also stated to be made in the context that trial judges could be relied upon to be vigilant in ensuring that accused persons would not be prejudiced in preparing their defences.

Like the preliminary inquiry, which is not always held, section 524 thus creates an inequality in discovery since it does not apply in certain Provinces. Even in those Provinces where it does apply, it applies only in those cases where the Grand Jury hands down the indictment.

It might be further noted that sometimes simply being informed of the names and addresses of witnesses without being provided with their statements or a controlled forum for interviewing may not be too helpful. Sometimes it is risky to interview a witness, and since the Crown does not have to call all witnesses whose names are endorsed on the indictment,[27] or may call witnesses who are not listed on the indictment there may be little difference in practice between prosecutions flowing from Grand Jury indictments and other prosecutions.

In Canada, in regard to calling witnesses whose names are on the indictment, the courts have followed the English case of *Seneviratne v. R.*[28]. There it was established that while the prosecution was not expected to fulfil the function of both the prosecution and the defence, it must call all witnesses essential to the unfolding of the narrative on which the prosecution is based, whether or not in the result the account of evidence of such witnesses is favourable to the prosecution's case. As well, in deciding whether the prosecution was obliged to call all the witnesses likely to assist

in establishing its own case, Canadian courts have followed *Adel Muhammed El Dabbah v. A.G. of Palestine*,[29] in which it was stated that:

> ". . . The prosecutor has a discretion as to what witnesses should be called by the prosecution, and the courts will not interfere with the exercise of that discretion, unless, perhaps, it can be shown that the prosecutor has been influenced by some oblique motive."[30]

In this case the defence was appealing on the ground that the Crown did not call as witnesses all of the persons whose names were endorsed on the indictment. In *Lemay v. R.*[31] the Supreme Court of Canada followed this statement of Lord Thankerton, reiterating that the Crown has complete discretion in its choice of the witnesses to be called.

Thus, even in the cases where the defence obtains the names of Crown witnesses, either because they are endorsed on the indictment or by other means, the defence may itself have to call these witnesses at trial. In such cases the defence loses not only the advantage of being able to ask leading questions in cross-examination, but may also be put in the position of examining a witness without having the opportunity of interviewing the witness beforehand. This problem was raised in *R. v. Gibbons*,[32] when the defence tried to get the Crown to call certain witnesses whose names were endorsed on the indictment. The judge, recognizing the prosecution's discretion in the matter, refused to compel the Crown to do so and emphasized that the defence was free to call these witnesses itself. The Court of Appeal report includes the debate that took place at the trial:

> "Mr. Gilligan (defence counsel):
>
> 'The only point to the matter, My Lord, is that we have been unable to approach these witnesses.'
>
> His Lordship:
>
> 'That may be. You will be under that handicap. I do not know of any rule that a defence counsel cannot interview a witness that may be called for the Crown . . .'."[33]

There is of course no Crown property right in a witness, but one can also understand that an examination of some witnesses out of court is often difficult. It has even been described as a dangerous practice, particularly if the witness is emotionally involved in the case.[34] To do so may sometimes risk appearing to influence a witness or to make him change his account before his first appearance in court.

In conclusion, while section 524 allows the defence to obtain the names of the prosecution witnesses, in terms of tactics and actual opportunities to interview witnesses, this section may not make it easier for the defence to obtain discovery of the Crown's evidence before trial.

The second problem unresolved by this section concerns the question of whether the prosecution may call new witnesses to be heard at the trial if their names are not on the Grand Jury indictment.

First, it has been decided that the Crown may call witnesses not presented at the Grand Jury hearing. However, the judge in such a case may comment on the Crown's failure to disclose the existence of these new witnesses, and the defence can obtain an adjournment to meet this unforeseen circumstance.[35] It has also been decided that the prosecution must provide the defence with the "substance" of the evidence to be adduced by such witnesses.[36] If, incidentally, this information is not supplied and the defence raises this problem only on appeal, it must show that it has suffered a prejudice and did not have a fair trial.[37]

Speaking generally there is the view that where there is no Grand Jury and no preliminary inquiry, the Crown should disclose the names of all its witnesses and the nature of their evidence on a request by the defence; failing this, the defence may request an adjournment of the trial.[38] But in any case, the Appeal Court will not intervene unless the defence establishes that it has been prejudiced by such non-discovery. However this concept of suffering a prejudice is still vague and intangible because there is no case in which such a prejudice has been recognized by a Court of Appeal.

This area of common law has, incidentally, an interesting characteristic. In those cases where discovery has in fact been refused, very liberal principles of discovery have been formulated. This is well illustrated in the cases of *R. v. McClain, Richard v. R., R. v. Cunningham,* and *Childs v. R.*[39]. On the other hand where the courts have ruled that a certain item of evidence should be disclosed to the defence they have been careful not to express general principles. In *R. v. Bohozuk*,[40] for example, the court ordered the Crown to disclose to the defence the substance of any additional evidence that it intended to introduce, but, so far as any general principle was concerned, the court declared that:

> ". . . The interest of the accused is not a matter with which the Court should be concerned; the interest of justice, and that alone, is and should remain the motivating factor in such applications. . . ."[41]

and then concluded that the defence was not necessarily entitled to know the names of Crown witnesses before trial, but that it should have access to the "substance" of the prosecution's evidence.

This brief overview of section 524 of the *Criminal Code* may lead one to the conclusion that, while a list of prosecution witnesses may be endorsed on the indictment, the defence nevertheless has no guarantee of access, before the trial, to the substance of the evidence that these witnesses will give. And if certain names are omitted, the defence has no right to have them disclosed before the trial, but is only entitled to be informed of the substance of their evidence! This summary, while possibly oversimplified, illustrates well the strange situation caused by a failure to develop a body of general principles on the subject of discovery.

(d) Section 532 of the Criminal Code

This section, which applies only in certain forms of treason, is interesting in that it is a unique discovery provision in Canadian law. It entitles the accused to receive, at least ten days before his arraignment,[42] a copy of the indictment, a list of prosecution witnesses, and a copy of the panel of jurors. The section adds that the accused must be given not only the names of the witnesses and jurors, but also their addresses and their occupations.

This provision, which is the most specific and liberal discovery provision in Canada, first appeared in England immediately after the preliminary inquiry was converted into an accusatorial judicial procedure in 1688. The principle remained part of English law and was reproduced in Canada's first *Criminal Code* where it has remained unaltered. The only explanation for this section comes from Stephen,[43] who referred to the political situation which obtained at the time it was first adopted. He said that before 1688, the accused was kept in complete ignorance of evidence held by the prosecution in support of the accusations against him; very often he did not even know the nature of these accusations. The legislators thus thought they were doing a great favour to accused persons by adopting this legislation obliging the Crown to inform the accused of the exact nature of the accusation and of the identity of witnesses and jurors. But they decided to reserve this provision for those crimes for which they and their friends were the most likely to be prosecuted, i.e. crimes of a political nature. Stephen thus sees in this section the expression of the personal interest of the members of the English Parliament to see that political trials were not unjust. With this he contrasts their indifference to extending the principles of discovery to common law offences such as sheep-stealing, burglary, or murder in which other people were more likely to be involved.[44]

It should also be noted that the only sanction applied for a refusal or failure by a prosecutor to disclose this information to the accused was, and still is, the right to adjourn the case to enable the accused to obtain the information.[45]

As treason cases are relatively rare, this section is seldom invoked, and the courts have not been called on to comment on it. It is nonetheless surprising that this provision did not either disappear with the political instability which justified its adoption, or lead to more general provisions for discovery. Its existence is surely symptomatic of the inconsistency, and above all, the indifference, still shown in Canadian law towards the subject of discovery.

(e) Section 533 of the Criminal Code

This section is the last of a series of three sections in the *Criminal Code* under the title "Inspection and Copies of Documents". Earlier we commented on sections 531 and 532 of the *Code*. It would seem that section 533 was

conceived in the same spirit as section 531 and thus makes the exceptional nature of section 532 all the more evident. Section 533 reads as follows:

> "**533.** (1) A Judge of a Superior Court of criminal Jurisdiction or a court of criminal jurisdiction may, on summary application on behalf of the accused or the prosecutor, after three days notice to the accused or prosecutor, as the case may be, order the release of any exhibit for the purpose of a scientific or other test or examination, subject to such terms as appear to be necessary or desirable to ensure the safeguarding of the exhibit and its preservation for use at the trial.
>
> (2) Every one who fails to comply with the terms of an order that is made under the subsection (1) is guilty of contempt of court and may be dealt with summarily by the judge or magistrate who made the order or before whom the trial of the accused takes place."

As with section 531, section 533 has a very limited application. It only applies in those cases where there is a preliminary inquiry, and then, only after a committal for trial.[46] To be considered an "exhibit", an object to be examined must have been produced during a judicial procedure and the only one available before trial is the preliminary inquiry. Incidentally, section 533 would be difficult to apply at trial since it is necessary to give three days notice to the opposing party before the application to release the exhibit may be presented to the court.

(f) Section 10 of the Canada Evidence Act

From time to time defence counsel have sought to employ section 10 of the *Canada Evidence Act* as a means of obtaining, either before or at trial, copies of witness statements. This section, concerning the right to cross-examine on previous statements in writing of witnesses, provides that the "judge at any time during the trial, may require the production of the writing for his inspection, and thereupon make such use of it for the purposes of the trial as he thinks fit".

However it has now been established that this section only applies during the trial, not before, and not even during a preliminary inquiry.[47] Examining this section closely, it does not seem to have been enacted for the purpose of conferring discovery on the defence—even during the trial.[48] The spirit of this section is to enable the trial judge—not defence counsel—to be informed of the written statement and to order it to be produced so that he can control the cross-examination of the witness and see that there is no abuse when the witness is contradicted on his written statement. Thus the courts have interpreted section 10 as conferring a discretionary power on the trial judge authorizing him to use the written statement as he sees fit.[49] In turn it has been held that the defence does not have the right to have such written statement produced to the defence—at least not under this section.[50] Therefore one can conclude that section 10 of the *Canada Evidence Act* is not a procedure providing discovery to the defence.

(*g*) *Section 516 of the Criminal Code*

Because of the way it is worded, an application for particulars as provided for in section 516 of the *Criminal Code* could be mistaken for a discovery procedure. Section 516 provides that the court may, if it feels it necessary to assure a fair trial, order the prosecutor to furnish particulars. But the particulars may only relate to allegations the Crown intends to prove against the accused, and not to the evidence to prove these allegations. Section 516 provides that the court may order the prosecutor to furnish details:

> "(*f*) further describing the means by which an offence is alleged to have been committed; or
>
> (*g*) further describing a person, place or thing referred to in an indictment."

But the courts have decided that this provision cannot require the Crown to reveal a part of its evidence. For example, an accused, charged with keeping a common betting house, tried to obtain certain particulars including the names of persons alleged to have made bets at that house. His application was rejected, and the court declared:

> "What persons, if any, made bets, this is a matter of evidence. The Crown is not obliged, I do not believe, to furnish the names of the witnesses, nor is it obliged to set out by way of particulars the evidence that it expects to adduce at the trial."[51]

(*h*) *Notice*[52]

In certain cases the *Criminal Code* and the *Canada Evidence Act* require the Crown to give notice to the defence before the trial of its intention to use certain methods of adducing evidence. This requirement appears most frequently in cases where the evidence to be introduced departs from the best evidence rule.[53] For example, when the Crown is authorized to use a certificate, it usually must give notice to the defence of its intention to do so.[54] As well, in cases of applications for preventive detention with regard to habitual criminals or dangerous sexual offenders,[55] notice must be given to the accused. The Crown is also required to give notice of its intention to use certain presumptions such as in sections 317 and 318 of the *Criminal Code*, applicable in cases of possession of stolen goods. As a final example, section 592 of the *Criminal Code* is interesting because it requires the Crown to give notice of its intention to seek a heavier punishment for a previous conviction before the accused enters a plea.

These numerous sections relating to the obligation to give notice are interesting in that, in all cases, the sanction for noncompliance is the inadmissibility of the evidence not disclosed. In the case of evidence by certificate, such severity is understandable, since the sanction may not be prejudicial to the party subject to it. Indeed, the inadmissibility of this secondary evidence only obliges the prosecution to return to the best evidence; it is thus not really the inadmissibility of evidence which is at stake, but the inadmissibility of a

method of adducing the evidence. The same is true of the inadmissibility sanction found in sections 317 and 318 of the *Code*. By failing to comply with the sections, the Crown loses the benefit of a presumption, but is still able to use other ways to prove that the accused knew the goods in his possession were stolen.

But inadmissibility in regard to section 592 is more serious because the failure to give notice definitely prevents the Crown from proving previous convictions in order to require that a stronger penalty be applied. In actual practice, however, the differences in the final result may be lessened by the fact that the court may take previous convictions into account in sentencing.[56]

This completes the examination of the various sections of the *Criminal Code* and of the *Canada Evidence Act* which bear on discovery to the accused in criminal cases.

2. *Common Law Rules*

There are also a number of cases at common law that bear on the subject of discovery to the accused. The Canadian cases appear to draw heavily on the principles and directives developed in the common law of England. However, when examined closely, the actual application of the common law of England in this area of criminal law in providing discovery is really quite limited. Canadian courts have instead referred most often to the *Criminal Code* and have interpreted it in a very restrictive manner, concluding that:

> "The *Criminal Code* is the governing authority and, in so far as its provisions conflict with the Common Law in substance or in procedure, it must govern."[57]

But the unfortunate consequences of this position is that even when the *Code* is silent, as it so often is in the matter of discovery, because it is the governing authority, that silence prevails.[58] As a result, Canadian law, already limited as to discovery in the *Code*, has failed to follow English common law in its gradual formulation of discovery rules. But at the same time, in certain areas, notably in the development of principles relating to the discretion of the prosecution in the presentation of its case, our courts have largely relied upon English precedent.

(*a*) *Prosecutorial Discretion in the Presentation of Evidence*

The rules establishing prosecutorial discretion in the presentation of a case were developed in England in two Privy Council decisions, already mentioned.[59] In the first case in 1936, the Privy Council decided that:

> "Witnesses essential to the unfolding of the narrative on which the prosecution is based, must, of course, be called by the prosecution, whether in the result the effect of their testimony is for or against the case for the prosecution."[60]

This general direction to the prosecution as to the conduct of its case seems to be firmly entrenched and well followed in English law.[61] How-

ever, a few years after this 1936 case, the Privy Council added that the prosecution had complete discretion as to the choice of witnesses to be called at trial and that this discretion would not be reconsidered unless the prosecution was influenced by an "oblique motive".[62]

In *Lemay v. The King*[63] the Supreme Court of Canada followed this latter view. This was a case of trafficking in narcotics, in which at trial the Crown failed to call as a witness an R.C.M.P. informant who was present when the offence was being committed. Mr. Justice Kerwin, recognizing that the Crown had no obligation to call this witness, stated:

> "Of course the Crown must not hold back evidence because it would assist an accused but there is no suggestion that this was done in the present case or, to use the words of Lord Thankerton 'that the prosecutor has been influenced by some oblique motive'."[64]

After examining the Supreme Court decision in *Lemay,* the Court of Appeal of British Columbia in *R. v. McFayden and Taylor*[65] expressed what is clearly the most basic limitation upon the discretion of the prosecution in the field of discovery. This court said that while the prosecution has a discretion in its choice of witnesses, it also has a duty to call all of the witnesses necessary to establish proof against the accused beyond a reasonable doubt, and if, in the exercise of its discretion, it fails to fulfil this obligation, the accused must be acquitted.[66]

These general principles relating to the conduct of the Crown at trial raise the question as to its conduct before trial. Thus the English courts, reconciling the duty of the prosecution to present all pertinent evidence at trial with its discretion as to the choice of witnesses to be called, formulated the following rule: if the Crown knows of a witness whose evidence would be relevant but does not intend to call the witness at trial, it must reveal the existence of this witness to the defence. This rule was decided in *R. v. Bryant and Dickson,*[67] but the court added that the prosecution is not obliged to also furnish the defence with a copy of any statement that the witness may have made to the police. Then in *Dallison v. Caffery,*[68] the English Court of Appeal went further and decided that the Crown was required to furnish the defence with a copy of a statement made by a witness whom the Crown does not intend to call at trial either because the substance of the evidence is favourable to the defence or because, in the opinion of the prosecution, the witness is not trustworthy. However, while some Canadian courts have stated that the Crown has a duty to disclose the existence of pertinent witnesses they do not intend to call at trial,[69] they have generally rejected any further duty on the Crown to provide the defence with copies of witness statements.

(*b*) *The Use of Previous Statements of Persons Who Will Be Called as Witnesses*

The problem becomes more complicated when one considers whether the Crown has a duty to disclose, either before or during a trial, state-

ments made to the police by persons who will be Crown witnesses at the trial. Here again, English law has evolved towards a rather clear position that has not been fully followed in Canada. In 1936 the Privy Council in *Mahadeo v. R.*[70] established the principle that the defence should be given an opportunity to compare evidence given by a Crown witness at trial with a previous statement or statements given to the police. The production of such statements was thus allowed at the trial,[71] as well as before trial.[72] But in Canada, even before the Supreme Court adopted the restrictive attitude expressed in *Patterson,* the courts had shown an unwillingness to accept this rule.[73]

The Discretionary Rule

It appears that Canadian courts at first thought it advisable to differentiate between the production of such statements at trial and their disclosure to the defence at any stage before trial. In a number of cases it was decided, with respect to the production of such statements at trial, that the accused could not claim to be formally entitled to them since there was no formal expression of such a right in the *Criminal Code.* The cases held that the judge had a discretion as to the production of witness statements at trial and therefore such production could be ordered only to permit cross-examination as to the credibility of a witness.

Then, with regard to discovery of such statements before trial, the courts decided that the defence has no right to pre-trial discovery of statements made by witnesses in the course of police investigation, even for the sole purpose of preparing for cross-examination at trial. The decision to disclose such statements to the defence rests entirely within the discretion of the prosecution, which is not in any way obliged to disclose them.[74] The result is that the defence is denied such right, both on applications before trial and also at the time of cross-examination at a preliminary inquiry.[75] The only dissenting voice to this trend in the cases appeared in a British Columbia case[76] where a magistrate applied the principles expressed by the Privy Council in *Mahadeo v. R.*,[77] and ordered that all previous statements of a Crown witness be produced to the defence before trial. But this decision has not been followed since.[78] It now seems established that disclosure to the defence of statements made by witnesses during a police investigation depends entirely upon the exercise of either the discretion of the Crown at the pre-trial stage or the discretion of the judge at the trial. At no time may the defence claim to have a right to discovery of these statements.

The Rule for "Refreshing Memory"

On a related point, the common law has established a rule requiring disclosure, but its result is no less confusing. On the question of a witness producing his notes or résumés made for his own use, or police notes and reports, a rule has been established that allows a witness to refresh his memory

at trial with the help of these notes if they were prepared shortly after the event about which evidence is being given. The rule permits the defence to have these notes produced in order to allow a full cross-examination as to the witness's credibility.[79] However, it has been held that if the witness does not use the notes at trial the cross-examining party has no power to have them produced since such documents are not "previous written statements" of the witness within the meaning of section 10 of the *Canada Evidence Act*.[80] Thus, apart from this section, in cases where a witness does not use his notes at trial to refresh his memory, but admits, for example, to having referred to them five minutes before, or the evening before, or the week before,[81] their disclosure to the defence is in the discretion of the trial judge.

3. *Conclusion*

In regard to discovery in favour of the accused, if a comparison is made between the confused situation in Canadian law and the statements of principle in English law,[82] it seems that the need of the defence in a criminal case to have unlimited access to the facts likely to support its case or to reduce the impact of the prosecution's case has been neither recognized as valid in its own right nor expressed through adequate procedures. In the few cases in which the defence has been given access to certain information in the prosecution's case, disclosure has been confined to information that is admissible evidence at trial and not extended to information that might be useful in preparing for trial. Thus it may be concluded that the value of discovery to the accused, being the disclosure of any information which may either directly or indirectly enable the defence to advance its own case or damage that of the prosecution, which is the basis for discovery in civil cases, has yet to be recognized in Canadian criminal cases.

This conclusion will be re-examined after examining the state of the law in relation to prosecutorial discovery of the defence. This analysis will allow the question of discovery for both sides to be considered and will make it possible to identify both deficiencies and possibilities for reform in the discovery field as a whole.

PROSECUTORIAL DISCOVERY OF THE DEFENCE

In our criminal process, the Crown is clearly not invited to look to the defence for the facts and evidence likely to support its case. The fact that the accused is not required to incriminate himself either before or at trial illustrates the extent to which the Canadian criminal process is opposed to the concept of compulsory disclosure by the accused. Instead the prosecution conducts its own independent research of the facts in most cases through the use of the powers of investigation possessed by police forces, including the powers of search and seizure.

These powers conferred on the police are normally exercised before a suspect is formally charged. While it is not intended in this study to examine

the whole process of criminal investigation and detection as discovery procedures, one should be aware that the Crown's effective power to obtain evidence against a suspect rests in this broad field. However, this study will be confined to the specific powers available as exceptions to the above general position, powers which allow the prosecution to go more or less directly to the defence in order to complete its gathering of evidence and to anticipate possible defence positions at trial.

1. *Discovery of Incriminating Information*

The legal powers of the prosecution to, in effect, force the defence to disclose certain information are exceptional, and are generally of limited application. However the *Criminal Code* does contain a few such provisions, which, while not intended as such, do bear on the subject of discovery. Our examination will focus on how they are applied and on their rationales.

(a) Section 183(1) of the Criminal Code

Section 183(1) of the *Criminal Code* provides:

> **183.** (1) A justice before whom a person is taken pursuant to a warrant issued under section 181 or 182 may require that person to be examined on oath and to give evidence with respect to:
>
> (a) the purpose for which the place referred to in the warrant is and has been used, kept or occupied, and
>
> (b) any matter relating to the execution of the warrant.

The warrants referred to in this section are search warrants which enable a peace officer to place persons found in a disorderly house in custody. These persons, who are then examined, may also themselves be suspected of having committed an offence and may be subsequently formally charged. It is interesting to first note the wording of section 183(1). This section does not require that the magistrate himself examine the persons brought before him. Instead, it states that the magistrate "may require that person to be examined under oath and to give evidence". This seems to imply that the magistrate can either examine the person himself or require him to be examined by another person, perhaps by a representative of the police or the prosecution. We will return to this question when we compare this section with section 455.4.

Of course, section 183 of the *Criminal Code* has limited application and does not confer a broad discovery power on the Crown. However, two questions may be asked concerning the justification for this power. First, does the need for the repression of offences relating to disorderly houses justify the existence of a power to force witnesses to give evidence under oath even before anyone has been formally charged? If it does, the second question one might ask is whether there is a serious danger that this power may be exercised for purposes other than that designated in the section.

Opinions appear divided with regard to the first question. When this legislation was adopted,[83] it seemed that this type of illegal activity

was well established and organized. Thus this power of examination was intended to fill a gap caused by the absence of other means to obtain incriminating evidence against persons who ran disorderly houses. If this argument was, and remains, valid it should be examined along with the abuses that the legislation could encourage. As well it should be reconsidered within the framework of the concept of prosecutorial discovery of the defence.

Concerning the problem of abuse in the application of this section, we may examine one specific case: In *Re Sommervill*[84] the prosecution, using section 174 (now 183), had a warrant issued for the specific purpose of examining under oath persons arrested in a disorderly house. The Court of Appeal noted that the examination had in fact been a true "fishing expedition" conducted solely to obtain information relating to a person accused of conspiracy to corrupt a police officer. However, the court did not rule on the admissibility of the statements gathered against the accused by means of this examination, deciding simply that the case against the accused should be heard before a magistrate other than the one who sat during the examination. From this case it would appear that a major problem with this proceeding is the absence of controls to confine the interrogation to the purposes stated in section 183. If the interrogation does get off the rails the accused is deprived of any means of complaining about it so long as illegally obtained evidence remains admissible in Canadian courts.

Upon examining the *Sommervill* case, it is curious that the Crown did not apply to question witnesses under a different section—section 455.4 of the *Code*. This would have allowed for a much wider investigation.

(b) Section 455.4 of the Criminal Code

Section 455.4 states:

"(1) A Justice who receives an information laid before him, under section 455.1 shall:

(a) hear and consider, *ex parte*,
  (i) the allegations of the informant, and
  (ii) the evidence of witnesses, where he considers it desirable or necessary to do so."

It is to be noted that the evidence must be taken under oath and recorded. See sections 455.4(2)(*a*) and (*b*) and 468.

Section 455.4 is a much wider means available to the prosecution for obtaining information than section 183. The aim of this section, both in its original form and as amended to date,[85] is to prevent the summons or even the arrest of a person where an accusation is manifestly weak or unfounded. In practice, however, it has been possible in certain cases, to make use of this section as "an 'ex parte' preliminary inquiry in favour of the Crown".[86] The requirement that a magistrate "hear and examine 'ex parte' " the allegations of the informant and of the witnesses appears to mean that the magistrate, and *only the magistrate,* has the power to conduct the

inquiry provided for in this section. It will be remembered, by way of comparison, that the wording of section 183 of the *Code* seems to allow a person other than the arraigning magistrate to conduct the examination of the witnesses. The wording of section 455.4 does not, however, seem to allow for such an interpretation. Nevertheless, it has been decided that this "ex parte" examination can be conducted by a Crown prosecutor. In *R. v. Ingwer et al.*[87] it was decided that a prosecutor was authorized to ask leading questions of the witnesses at this hearing, while the accused had no right to be present or even to be represented by counsel. This case also decided that during such an inquiry there is nothing reprehensible in the prosecutor "encouraging" the witness to tell the truth by pointing out to him that if he did not, he could be prosecuted for perjury.[88] But forcing persons to give evidence under oath in the absence of the accused and without any possibility of cross-examination, and warning them against the risk of subsequently changing anything in their version of the facts, is certainly a far-reaching discovery power.

The argument advanced to justify this "proceeding" being "ex parte" is that it avoids requiring the magistrate to hold a "trial before the trial" with both parties present.[89] But if the exercise of this power may seem excessive there are two possible changes that could be made. First, the accused could be present, represented by counsel, and be entitled only to cross-examine the witnesses without being able to present a defence as such. Or, second, if there is a real desire to avoid premature controversy, it could be required that the magistrate who is authorized to issue a summons or a warrant for arrest be entitled to examine witnesses as to whether the accusation is well-founded, but that this proceeding take place privately, even in the absence of both parties, with the text of these statements being made available to the parties.

In any case, perhaps the nature and scope of the hearing permitted by section 455.4 of the *Code* should be re-examined in context of the kind of discovery procedures that should be available for the prosecution.

(c) The Preliminary Inquiry and the Grand Jury

Conceivably the prosecution may on occasion regard the procedures of the preliminary inquiry and the grand jury (in those provinces where it exists) as means for obtaining discovery. However, this refers to a special kind of discovery. It is not discovery of the accused, since defence evidence and defences are seldom revealed at these proceedings, but rather discovery of the strength or weakness of the prosecution's own case and of the evidence and of the reliability of prosecution witnesses. But not only is this value of these procedures removed from our examination of procedures that result in the disclosure of information from one side to the other, it is more closely related to their accepted value or purpose in ensuring that only meritorious charges proceed to trial. And, as will be suggested in Part 3, this purpose can be achieved by a simple motion pro-

cedure after the prosecution has provided discovery to the defence. In so far as prosecutors may use these procedures as aids in preparation for trial, more informal means such as interviews, and questioning in a prosecutor's office could be employed to achieve the same purpose.

(d) Administrative Tribunals, Coroners Inquests and Statements Required by Statute

Many administrative bodies, both at the Federal and Provincial level, are invested with powers of inquiry. Reference to the *Ouimet* and *McRuer* Reports gives an overall idea of the wide range of these investigative powers. These administrative bodies have characteristics that resemble both police investigations and judicial proceedings, and these inquiries often lead to the initiation of formal criminal proceedings. This is true of the coroners inquiry for example, which allows for information that may later lead to a criminal prosecution, to be divulged. These inquiries are thus of interest as they are an important means by which the Crown can obtain discovery of evidence against a person suspected of committing a crime.[90]

While some of these administrative bodies, such as the coroner's inquiry, are not directly concerned to detect the commission of a criminal offence, they can be used for that purpose and thus they are within the scope of our study of procedures that may provide the prosecution with discovery of accused persons.

(e) Breathalyzer Legislation

The recent breathalyzer legislation introduced in the *Criminal Code* is perhaps the most specific discovery provision in favour of the prosecution. The breathalyzer legislation enables the Crown to force a suspected impaired driver to provide the prosecution with direct evidence of his state of impairment. This provision has inevitably come into conflict with the right said to be fundamental in English law: the right against self-incrimination. This right, generally speaking, sets the limit of police interrogation. Lord Devlin, dealing with the powers of interrogation of the prosecution in the English system, wrote:

> "There are (at any rate in the legal sense of the term) other forms of interrogation besides oral questioning, and I propose next to consider how far they are permissible in the English system. Is the prosecution entitled to require the accused to disclose to them all the documents in his possession which may have a bearing on the question of his innocence or guilt? This is what is known as the right to discovery. It is one of the most important rights in civil litigation. Documents are not so important in the ordinary criminal case; still there are certain types of cases, such as business frauds, in which discovery would be very useful. But the law gives the prosecution no right of discovery. Indeed that must follow from the principle that the prosecution has no right to question. An accused man cannot be compelled to incriminate himself either by his answers to oral questions or by the production of documents or indeed by any other evidence in his possession."[91]

But this right of a person not to incriminate himself, which is protected by its inclusion in the *Canadian Bill of Rights,* has been qualified by this breathalyzer legislation which the Supreme Court of Canada in *Curr v. R.*[92] has held to be valid. In interpreting section 2(*d*) of the *Canadian Bill of Rights,* the Supreme Court simply decided that only a statutory or non-statutory rule of federal law that would compel a person to incriminate himself by requiring him to testify before a court or like tribunal without concurrently protecting him against the later use of his testimony, is inoperative. This decision may enable the Crown to compel a suspect to provide it with certain elements of the evidence under other legislation. Although this may take the decision in *Curr* too far, the court's reasoning is certainly not confined to the specific legislation in question.

2. *Discovery of Actual Defences*

The final question to be examined is that of the pre-trial disclosure of actual defences and defence strategy. To what degree is the Crown authorized to have pre-trial discovery of the nature of an accused's defence as well as the evidence that will be adduced to support it? This problem has been the subject of controversy particularly in relation to the defence of alibi:

(*a*) *Disclosure of Alibi*

The question of disclosure of the defence of alibi may be examined from two directions. The first concerns the credibility of an alibi. The second concerns the need for the Crown to be informed before the trial of this defence so as to be able to rebut it. While these two approaches are different, the courts have mainly been concerned with the first approach.

The Supreme Court of Canada has recognized that there should be some compulsion on an accused to reveal his alibi at the first opportunity. In *Russell v. R.*[93] the Supreme Court considered the following instructions given by the trial judge to the jury:

> "I think perhaps in referring to the alibi, if you are considering it seriously, one aspect you must consider in an alibi defence is that it must be set up at the earliest possible moment, and ought to include a statement of where the accused was at the time of the commission of the alleged offence. It is for you to say when it was first heard."[94]

In considering the correctness of these instructions, Mr. Justice Kerwin declared:

> "What the learned trial judge was doing was indicating to the jury one way in which they might test the *credibility* of the story told by the accused at the trial; and this is permissible."[95]

Canadian courts have definitely favoured this approach; they have never said that an accused should reveal his alibi as early as possible so as to enable the Crown to rebut it at trial. This distinction is particularly important in determining the scope of the disclosure which might be made. If the only

reason that an accused should reveal his alibi at an early stage is the subsequent credibility of the accused when he gives evidence of alibi at trial, it would suffice to leave the nature and extent, if any, of this disclosure up to the accused because, in the final result, the absence or existence of such disclosure and any details that might be given to support it bear only on the credibility of evidence of alibi at trial. But no more or less so than in the case of any evidence that an accused should offer at trial that might be challenged as false. And no special rule infringing on an accused's right of silence and the presumption of innocence has been constructed for evidence other than alibi that is offered for the first time at trial.

However if the aim behind wanting an accused to reveal the defence at an early stage is to enable the Crown to be able to rebut it, then it would always be inadequate to simply allow an accused to merely reveal his intention of raising alibi; the details of this defence would have to be disclosed.

Allowing inferences unfavourable to the accused to be drawn from his failure to reveal his alibi at an early stage is perhaps defensible in that such failure is relevant to the credibility of the defence. But compelling him to make a full disclosure of this defence before the trial is perhaps less defensible; Lagarde in *Droit Pénal Canadien*, who is strongly opposed to the present state of the law on this question, has written:

> "The difficulty faced by the Crown in proving the guilt of an accused or in rebutting his defence cannot become a motive for placing a burden on the accused which otherwise ought to rest solely with the prosecution."[96]

In England, the Canadian approach has not been followed and accused persons are obliged to reveal the defence of alibi for the express purpose of allowing the Crown to prepare to meet and rebut it. It is useful, in this regard, to refer to the wording of section 11 of the *Criminal Justice Act* of 1967:[97]

> "(1) On a trial on indictment, the defendant shall not without the leave of the court adduce evidence in support of an alibi unless, before the end of the prescribed period, he gives notice of particulars of the alibi.
>
> (2) Without prejudice to the foregoing subsection on any such trial the defendant shall not without the leave of the court call any other person to give such evidence unless:
>
> (a) the notice under that subsection includes the name and address of the witness, or if the name and address is not known to the defendant at the time he gives the notice, any information in his possession which might be of material assistance in finding the witness;
>
> (b) if the name or the address is not included in that notice, the court is satisfied that the defendant, before giving the notice, took and thereafter continued to take all reasonable steps to secure that the name or address would be ascertained;
>
> (c) if the name or the address is not included in that notice, but the defendant subsequently discovers the name or address or re-

ceives other information which might be of material assistance in finding the witness, he forthwith gives notice of the name, address or other information, as the case may be; and

(d) if the defendant is notified by or on behalf of the prosecutor that the witness has not been traced by the name or at the address given, he forthwith gives notice of any such information which is then in his possession or, on subsequently receiving any such information, forthwith gives notice of it.

(3) The court shall not refuse leave under this section if it appears to the court that the defendant was not informed in accordance with rules under section 15 of the Justices of the Peace Act 1949 (rules of procedure for magistrates' courts) of the requirements of this section.

(4) Any evidence tendered to disprove an alibi may, subject to any directions by the court as to the time it is to be given, be given before or after evidence is given in support of the alibi.

(5) Any notice purporting to be given under this section on behalf of the defendant by his solicitor shall, unless the contrary is proved, be deemed to be given with the authority of the defendant.

(6) A notice under subsection (1) of this section shall either be given in court during, or at the end of, the proceedings before the examining justices, or be given in writing to the solicitor for the prosecutor, and a notice under paragraph (c) or (d) of subsection (2) of this section shall be given in writing to that solicitor.

(7) A notice required by this section to be given to the solicitor for the prosecutor may be given by delivering it to him or by leaving it at his office, or by sending it in a registered letter or by the recorded delivery service addressed to him at his office.

(8) In this section—

"evidence in support of an alibi" means evidence tending to show that by reason of the presence of the defendant at a particular place or in a particular area at a particular time he was not, or was unlikely to have been, at the place where the offence is alleged to have been committed at the time of its alleged commission.

"the prescribed period" means the period of seven days from the end of the proceedings before the examining justices.

(9) In computing the said period, Sunday, Christmas Day, Good Friday, a day which is a bank holiday under the Bank Holidays Act 1871 in England and Wales or a day appointed for public thanksgiving or mourning shall be disregarded."

The question is thus no longer, in England, solely a rule of evidence but also a rule of procedure; the purpose of the rule is not to bear on the credibility of this defence at the trial, but to provide discovery to the prosecution before trial.

A final comment on this new English procedure may be made. According to the terms of subsections (1) and (2) of section 11 of the *Criminal Justice Act,* the sanction imposed for failure to follow these rules can in-

clude the eventual inadmissibility of an alibi defence at trial. This is perhaps the most drastic sanction that may be devised to enforce discovery,[98] whether it be discovery of the prosecution or discovery of the defence, and we will return to it later in discussing the full range of sanctions that are available.

CONCLUSION TO PART I

In concluding this study of provisions in the *Criminal Code* and rulings at common law that bear on discovery in criminal cases, it is apparent that there are a number of issues which have either never been raised, or which have been treated so inconsistently as to reveal a complete lack of clearly stated principles. To some extent this absence of formal principles and rules for discovery may be explained by the existence of informal discovery practices by prosecutors and defence counsel, and by the absence of procedures for bringing discovery disputes before the courts. Thus, many cases that may involve discovery issues never reach the courts for determination, issues such as whether discovery should operate selectively depending on the type of offence involved, or whether discovery should occur in cases where the preliminary inquiry is unavailable, or the extent to which the defence should obtain information likely to be useful to it but which will not be admissible at the trial, or the extent to which discovery to the defence should operate before a plea is entered.[99]

But more distressing, even in those few cases that have reached the courts, hard and sound principles have not been laid down. More often than not cases concerning discovery have been decided without reference to underlying principles. For example, in *Duke v. R.*[100] the Supreme Court of Canada had an opportunity to articulate basic principles governing discovery to accused persons but declined to do so. In *Duke,* the appellant submitted that the police or the Crown should have given him, on application, a sample of his breath as analyzed by the breathalyzer so that he could perform his own analysis. This was essential, he said, to the exercise of his right to make a full answer and defence. Thus the issue in this case raised the general question of the right to discovery in criminal cases. The court, however, treated the question much more narrowly, holding that:

> "Section 224A, as enacted, would have required the person taking the breath sample to offer to provide a specimen of the breath to the accused, and, if requested by the accused, to provide such specimen to him, before evidence of an analysis of the sample could be used against him in a charge under s. 222 or s. 224. However, that requirement was deliberately omitted when the Act was proclaimed and the result is that the statute makes it clear that the accused is not entitled to receive a specimen of his breath from the person who takes the sample, and that the analysis of the breath sample can be used in evidence on a charge under s. 222 or s. 224."[101]

But the question could well have been approached differently. While the partial proclamation of section 224(*a*) of the *Criminal Code* has the

effect of making the certificate of analysis admissible as evidence without compelling the Crown to prove that a breath sample has been provided to the accused, this should not have excluded the question of the accused's right to such evidence according to his right to make a full answer and defence and to have a fair hearing of his case—being the very issue that the defence raised. Such an approach could have opened the door to an examination of the principles underlying the concept of discovery in criminal cases. The closest the court came to such examination is found in the following ambiguous passage. The Chief Justice ruled:

> "This is not a case in which the accused has requested information in the possession of the Crown, and been refused. Whether or not a refusal of that kind would deprive the accused of a fair hearing is not in issue in this case. This is a case in which the complaint is that the Crown failed to provide the accused with evidence for the purpose of his defence."[102]

Then the Chief Justice added, in an obiter dictum to which Mr. Justice Laskin (as he then was) reserved his opinion:

> "In my opinion, the failure of the Crown to provide evidence to an accused person does not deprive the accused of a fair trial unless, by law, it is required to do so.[103]

Along the same lines, the Ontario Court of Appeal in *R. v. Caccamo and Caccamo*[104] recently stated that:

> "It does not seem to us to be right to say that a trial becomes abortive because evidence in the possession of the Crown is not disclosed to the defence prior to the opening of the trial."[105]

The result of these two cases seems clear: unless provided by statute the accused has no right to pre-trial discovery of the prosecution's case. And while this result is consistent with the trend established in cases like *Finland, Silvester and Trapp, Lalonde, Patterson,* and others, it has occurred without any serious examination of the practice of prosecutors in providing discovery to accused persons and of the relationship of such discovery to the aims of the criminal process.

NOTES

1. G. A. Martin, "Preliminary Hearings", Special Lectures of the Law Society of Upper Canada, (1955), I; H. Shapray, "The Prosecutor as a Minister of Justice: A Critical Appraisal", (1969), 15 McGill L. J. 124 at p. 66.
2. According to the statistics, a preliminary inquiry was held in only about five percent of criminal cases during the year 1968; see *infra*, Part 3.
3. R. Salhany, "The Preliminary Inquiry: Extension of Pre-Trial Discovery" (1966-67), 9 Crim. L. Q. 394 at p. 397.
4. For the background of this procedure, see *infra*, Part 3 at pp. 61-63.
5. Glanville Williams, "Proposals to Expedite Criminal Trials", 1959 Crim. L. R. 82 at p. 85.
6. *Criminal Justice Act*, 1967 c. 80, sections 1 and 2; M. Carlisle, "Committal Proceedings in English Criminal Law" (1967-68), 10 Crim. L.Q. 147; D. Napley, *A Guide to Law and Practice under the Criminal Justice Act, 1967*, (1967); P. Devlin, *The Criminal Prosecution in England*, (1960), at pp. 93-4.
7. G. Mueller, and F. LePoole-Griffiths, *Comparative Criminal Procedure*, (1969), at p. 64.
8. See *infra*, Part 3, at pp. 64-67.
9. G.A. Martin, *supra*, footnote 1 at p. 6; C. Savage, "Preliminary Inquiries" (1958-59) 1 Crim. L.Q. 77, at p. 89; S. E. Halyk, "The Preliminary Inquiry in Canada" (1967-68), 10 Crim. L.Q. 181, at p. 186; Mueller and LePoole-Griffiths, *supra*, footnote 7, at pp. 80-87.
10. *R. v. Grigoreshenko and Stupka*, (1945), 3 W.W.R. 734 (Sask. C.A.); *R. v. Mishko et al.*, (1946), I. C.R. 7 (Ont. S.C.); *R. v. Churchman and Durham*, (1955), 20 C.R. 137 (Ont. S.C.); *R.* v. *Prince, Hewitt and Craib* (1970), 10 C.R.N.S. 260 (Man. Q.B.).
11. [1970] S.C.R. 409.
12. *Ibid.*, at p. 412.
13. *R. v. Prince, Hewitt and Craib, supra*, footnote 10.
14. *Patterson v. R., supra*, footnote 11.
15. *R. v. Grigoreshenko and Stupka, supra*, footnote 10.
16. *R. v. Mishko et al., supra*, footnote 10.
17. (1972), 3 W.W.R. 475 (Manitoba).
18. *R. v. Harbison et al.* (1972), 6 W.W.R. 501 (British Columbia).
19. For a discussion of this position, see *infra*, Part 3, at pp. 66-69.
20. Glanville Williams, *supra*, footnote 5 at p. 85; defence lawyers were asked this question in Part 4 of the questionnaire sent to them, (question No. 9, p. 12); the results will be published separately.
21. For comments on this problem, see *infra*, Part 3.
22. This interpretation has been advanced by Martin, *supra*, footnote 1, at p. 7, and others.
23. [1964] 2 C.C.C. 52.
24. For this legislative history of, and an interpretation of this section, see A. Hooper, "Discovery in Criminal Cases", (1972), 50 Can. Bar Rev. 445, at pp. 479-80.

25. This interpretation was impliedly followed by the Quebec Court of Appeal in *R. v. Meloche*, C.A. no. 10-000005-72, September, 1972 (unreported): the defence could not obtain a copy of his own confession during a "voir-dire" in a preliminary inquiry.
26. *R. v. McClain*, (1915), 7 W.W.R. 1134.
27. *R. v. Gibbons*, (1946), 86 C.C.C. 20; *R. v. Sing*, (1932), 64 C.C.C. 328; *Adel Muhammed El Dabbah v. Attorney-General of Palestine* [1944] 2 All E.R. 139.
28. [1936] 3 All E.R. 361, at p. 48.
29. *Supra*, footnote 27.
30. *Ibid.*, at p. 144.
31. [1952] 1 S.C.R. 232.
32. *Supra*, footnote 27 at pp. 27-9.
33. *Ibid.*, at p. 28.
34. "Problems in Ethics and Advocacy", Panel Discussion, Special Lectures of the Law Society of Upper Canada (1969), 279 at pp. 320-322. (Comments of Mr. Justice Hartt).
35. *R. v. Gallant*, (No. 1) (1943), 83 C.C.C. 48.
36. *R. v. Bohozuk*, (1947), 87 C.C.C. 125.
37. *R. v. Cunningham*, (1952-53), 15 C.R. 167; see also *Richard v. R.*, (1957), 126 C.C.C. 255.
38. *Childs v. R.*, (1959), 29 C.R. 75.
39. *Supra*, footnotes 26, 37 and 38.
40. *Supra*, footnote 36.
41. *Ibid.*, at p. 126.
42. Section 532 of the *Criminal Code* states that the accused is entitled to receive copies of certain documents "after the indictment has been found and at least ten days before his arraignment". The French word "interpellation" is incorrectly translated in English by the word "arraignment". It thus seems that this phrase must be taken in French to mean "at least ten days before the accused is required to plead".
43. Stephen, *A History of the Criminal Law of England*, (1883).
44. *Ibid.*, Vol. I, at pp. 225-6.
45. *R. v. Burke*, (1867), 10 Cox C.C. 519, *R. v. Frost*, (1839), 4 St. tr. (n.s.) 85.
46. See Martin, *Criminal Code* (1955), at p. 824; see also Lagarde, *Droit Pénal Canadien*, at p. 794; where it is stated:
    > "The present provision comes from section 10 of chapter 11 of the Statutes of Canada 1950 to which have been added subsections 3 and 4 to section 695 of the former *Code*. (R.S.C. 1927 c. 36). As indicated in the explanatory note of the draft bill, section 10 aims at enabling a magistrate to authorize, *between the committal for trial of the accused and the trial*, the release of an exhibit for the purpose of examination or expert evaluation."
47. *Patterson v. R., supra*, footnote 11.
48. See Hooper, *supra*, footnote 24, at p. 482.
49. *R. v. McNeil*, (1960), 33 C.R. 346.
50. *R. v. Tousignant et al.*, (1962), 38 C.R. 319.
51. *Re Ault; Ault v. Read*, (1956), 115 C.C.C. 132 at p. 133; see also, to the same effect, *R. v. Stevens*, (1904), 8 C.C.C. 387.
52. See, "Notice Requirements under the *Criminal Code* and *Canada Evidence Act*" (1970-71), 13 Crim. L.Q. 157.
53. Devlin, *supra*, footnote 6, at p. 52.
54. See, for example, the following sections of the *Criminal Code;* 238(3): Driving while disqualified; 234 and 236; Driving while ability to drive is impaired and driving with more than 80 mgs. of alcohol in blood; 594: proof of previous con-

victions; as well as sections 28 and 29 of the *Canada Evidence Act* pertaining to the production of documents. See also *R. v. Blau*, (1970), 10 C.R.N.S. 65.

55. Section 688 and 689 *Criminal Code*.

56. See, for example, *R. v. Enders*, (1962), 132 C.C.C. 383.

57. *R. v. Finland*, (1959), 125 C.C.C. 186; *R. v. Weigelt*, (1960), 128 C.C.C. 217.

58. See, for example, a statement of the Chief Justice of Supreme Court of Canada in *Duke v. R.*, [1972] S.C.R. 917, at p. 914.

59. See, *supra*, at p. 20.

60. *Seneviratne v. R., supra*, footnote 28 at p. 49.

61. *R. v. Oliva*, [1965] 3 All E.R. 116; *Dallison v. Caffery*, [1964] 2 All E.R. 610; See also Devlin, *supra*, footnote 6 at pp. 93-97.

62. *Adel Muhammed El Dabbah v. A.G. of Palestine, supra*, footnote 27 at p. 144.

63. *Supra*, footnote 31; see also *R. v. Castellani*, [1969], 1 C.C.C. 327.

64. *Ibid.*, at p. 241.

65. [1967] 3 C.C.C. 345.

66. See also *R. v. Guerin*, (1931), 23 Cr. App. R. 39.

67. (1946), 31 Cr. App. R. 146.

68. *Supra*, footnote 61.

69. *R. v. Bohozuk, supra*, footnote 36.

70. [1936] 2 All E.R. 813.

71. *R. v. Clarke*, (1930), 22 Cr. App. R. 58.

72. *R. v. Hall*, (1958), 43 Cr. App. R. 29; *R. v. Xinaris*, cited in *R. v. Hall*, (1959), 43 Cr. App. R. 30; *R. v. Fenn*, (1959), 23 J.C.L. 253.

73. *R. v. Weigelt, supra*, footnote 57, *R. v. Lantos, supra*, footnote 22; *R. v. Lalonde*, (1971), 15 C.R.N.S. I.

74. *R. v. Finland, supra*, footnote 57; *R. v. Silvester and Trapp*, (1959), 125 C.C.C. 190; *R. v. Torrens*, (1962), 39 C.R. 35.

75. R. v. Landry, (1970), R.L.N.S. 190; *Patterson v. R., supra*, footnote 11; *R. v. Lalonde, supra*, footnote 73.

76. *R. v. Sommers*, (1957), reported in (1959-60), 2 C.L.Q. 452.

77. *Supra*, footnote 70.

78. It is curious to find a 1961 decision of the Alberta Supreme Court which ignores all of this jurisprudence—which at the time was very recent: See *R. v. Imbery*, (1961), 35 W.W.R. 192.
This case is reported as follows:
> "In a preliminary hearing of a rape charge, the magistrate declined, on jurisdictional grounds, to exercise his discretion as to the production to the accused's counsel of a copy of complainant's statement to the police. *Held*, on a mandamus application, said magistrate must exercise his discretion as requested. No written reasons."

This decision thus confirms the discretionary power of the magistrate presiding at the preliminary inquiry.

79. *R. v. Lewis*, [1969] 3 C.C.C. 235; See Contra, *R. v. Lepine*, (1962), 38 C.R. 145.

80. *R. v. Kerenko, Cohen and Stewart* [1965] 3 C.C.C. 52; *R. v. Bonnycastle* [1969] 3 D.L.R. (3d) 288.

81. Compare, for example, *R. v. Lewis, supra*, footnote 79 and *R. v. Kerenko et al., supra*, footnote 80.

82. See, eg., *R. v. Clarke, supra*, footnote 71:
> "A defendant is entitled to see a written description of himself given by a police officer to a superior, with a view to cross-examining that officer on alleged discrepancies between the contents of that document and his sworn testimony."

83. See Martin, *Criminal Code* (1955), at pp. 318-19.

84. (1962), 37 C.R. 400.
85. Martin, *Criminal Code* (1955), at pp. 729-30.
86. Sedgwick, J., "Further Comments on the Criminal Code" (1961), 4 Can. Bar J. 442, at p. 446.
87. [1956] O.R. 60.
88. *Ibid.*
89. *Re Tait,* (1950), 98 C.C.C. 241.
90. See *Batary v. Attorney-General of Saskatchewan* [1965] S.C.R. 465; *R. v. Quebec Municipal Commission et al., Ex parte Longpré,* [1970], 11 D.L.R. (3d.) 491.
91. Devlin, *supra,* footnote 6 at p. 52.
92. [1972] S.C.R. 889.
93. (1936), 67 C.C.C. 28 (S.C.C.).
94. *Ibid.,* at p. 29.
95. *Ibid.,* at p. 30.
96. Lagarde, *supra* footnote 46, at pp. 1523-1524.
97. Ch. 80, S. 11.
98. See *infra* Part 4.
99. See *R. v. Haines,* (1960), 127 C.C.C. 125.
100. *Supra,* footnote 58.
101. *Ibid.,* at p. 923.
102. *Ibid.,* at p. 924.
103. *Ibid.*
104. (1973), 11 C.C.C. (2d.) 249. On May 7, 1973, the Supreme Court granted permission to appeal this question, as well as the point of law upon which a judge of the Ontario Court of Appeal had dissented.
105. *Ibid.,* at p. 252.

PART II

THE THEORY OF DISCOVERY

Having examined the Canadian law bearing on discovery in criminal cases, it may now prove useful to reflect on the aim of the criminal process and the relationship of that aim to discovery. In turn, since our criminal process has a particular form, an adversary structure, the relationship between discovery and the adversary model should be examined. Then against this background some of the arguments concerning discovery in criminal cases may be considered.

THE AIM OF THE CRIMINAL PROCESS AND DISCOVERY

It can be safely said that the primary aim of all criminal procedure systems is the same: the screening of the guilty from the innocent. Put more precisely, in terms of our own system, it is the conviction of those who have committed criminal acts with the necessary legal responsibility and the acquittal of those who have not. This primary aim of the process may be referred to as the pursuit of truth, but not truth in any general sense. Rather it is truth in the sense of the veracity of the allegations of the prosecution.

However, pursuit of the truth in this sense is not an untrammelled process. Some barriers to conviction are inserted in all procedural systems out of a concern to minimize the risk of convicting innocent persons.[1] In our own system, the most obvious example is the burden on the prosecution to prove its case against an accused beyond a reasonable doubt.[2] Coupled with this burden, an accused is always presumed to be innocent and entitled at every stage of the process, with very few exceptions, to require the prosecution to prove its case without his assistance.[3] Of course there have been intrusions on this position. Some, such as the incriminating nature of arrest and pre-trial detention procedures have existed from the very beginning, and to a degree, cannot be helped.[4] Others, such as provisions placing the burden of proof on the accused,[5] and the requirement that a suspected impaired driver submit to a breathalyzer test[6] are of more recent origin. But in general the accused is entitled to refuse to talk to the police, to refuse to give evidence at trial, and while assuming this passive role, to advance as a primary defence

the weakness of the prosecution's case. While these characteristics of the role of the accused may seem to some as no more than bothersome obstacles in the path of the prosecution, they in fact serve a much higher purpose in keeping the reach of the criminal law and the methods of those charged with its enforcement within reasonable limits. There is perhaps no better statement of the reasoning behind this purpose than that of Vice-Chancellor Knight Bruce in the venerable English case of *Pearse v. Pearse*[7] where he said: "(T)ruth, like all the good things may be loved unwisely—may be pursued too keenly—may cost too much." Thus, although the primary aim of the criminal process is a pursuit of the truth of the allegations of the prosecution, it is not an absolute truth. Rather it is a reasonable attempt at its attainment while observing the values reflected in the restraints placed upon its pursuit.[8]

The relationship between this aim of the criminal process and discovery is close. Professor Hooper describes the relationship in this way: "It is submitted that allowing the defence full discovery will increase the likelihood of obtaining 'truer' verdicts".[9] He explains that since some evidence such as eye-witness identification is so often unreliable, it is therefore important to allow it to be checked out by the defence.[10] However, although this statement and example are in the right direction because they illustrate how discovery can, in practical terms, permit the defence to be involved in the full testing of evidence and thus minimize the risk of convicting an innocent accused, they still do not fully describe that relationship. The essence of the relationship is this: while in theory the law can strive for a high quality of justice, the actual realization of that quality on any consistent basis can only be achieved through discovery. In many instances the existence of facts which might prove useful in undermining the validity of the prosecution's case or in establishing that due process requirements were not adhered to will only be known to the prosecution. Thus without disclosure of them at some point in the process they will just not be used.[11] To focus this relationship on the application of safeguards against false convictions, one writer in commenting on the American system concluded that "restraints placed on disclosure make it harder for the American defendant to rebut the prosecutor's evidence, thus indirectly decreasing prosecutorial evidentiary burdens".[12] As to this point there is sufficient similarity between the Canadian and American criminal law systems to allow the same conclusion to be drawn in Canada. In sum, it would seem that without discovery in criminal cases a serious limitation is imposed upon the achievement of the aim of the criminal process.

THE ADVERSARY MODEL OF THE CRIMINAL PROCESS AND DISCOVERY

The criminal trial systems of all common law countries are generally referred to as adversarial systems which, so it might seem, by reason of the very nature of that system of trial do not provide for much discovery. In a

thorough examination of the relationship between pre-trial discovery and the adversary system William A. Glaser commented that:

> "The adversary system assumes that the court will concentrate entirely upon the law and pertinent facts and that the parties will argue only in ways that will assist the court in judging the merits. But an adversarial situation tempts each side to impress the court—and particularly a jury of laymen unfamiliar with law and the case—by means of forensic tactics and irrelevant information. Each side is particularly eager to introduce witnesses, evidence, questions or motions that surprise and confuse the other. In a short trial the effect may be spectacular and decisive."[13]

While surprise and confusion of issues are serious problems that can result from a lack of discovery[14]—another and more serious concern is the point made earlier about the quality of justice that is achieved—the important subject at this point is not the examination of various disadvantages that may stem from a lack of discovery but the determination of the exact relationship between the adversary model and discovery. More particularly it is to determine if the general lack of discovery in criminal cases and the concomitant effects of surprise and confusion of issues are no more than natural temptations that arise in adversarial situations or whether they are somehow intrinsically connected with the operation of the adversary model.

In order to answer this question it will be of assistance to analyse what is precisely meant by the terms "adversary" and "non-adversary" and in this way to determine just which features of the adversary system are essential and which ones are not. In turn, upon this foundation the true relationship between discovery and the adversary system may be better considered.

1. *The Adversary System*

While the expressions "adversary" (or "accusatorial") and non-adversary (or "inquisitorial") are sometimes used in a variety of senses and while it is not always clear which sets of features are determinative of either system, there is an opposition that can be traced which fixes the essential characteristics of each system—more particularly for the purposes of this discussion the essential characteristics of the adversary model. To examine the adversary model first, its "fundamental matrix is based upon the view that proceedings should be structured as a dispute between two sides in a position of theoretical equality before a court which must decide on the outcome of the contest".[15] Flowing from this matrix the dispute depends upon the parties for its structuring, that is for the determination of the issues in dispute and in the presentation of information on those issues. Thus the protagonists of the model, in criminal proceedings the prosecutor and the accused, have definite, independent, and generally conflicting functions. In drawing the charge, or in reviewing a charge laid by the police, the prosecutor determines what factual propositions he will attempt to prove and then marshalls the evidence in support of them. Further he has the burden of presenting the evidence in court, should the accused dispute the charge, and the burden of persuasion

as to the proof of the factual propositions. The accused on the other side of the dispute decides what position will be taken with respect to the charge, whether one of admitting or disputing it, and, if the latter, the accused then decides upon what factual contentions he will advance and present the evidence, if any, in support of them. In the middle of the dispute the adjudicator's role is that of both an umpire and an impartial arbiter. During the parties' advancement of the evidence, he sees to it that they abide by the rules regulating the contest, and at the end he decides on the outcome.

Although at some points this description may seem an exaggeration, what emerges from it as essential characteristics are the relatively active roles of the parties in preparing and presenting the dispute and the relatively passive and impartial role of the court. By contrast however,

> "Non-adversary proceedings emerge from the following central structural idea. Rather than being conceived of as a dispute, they are considered as official and thorough inquiry, triggered by the initial probability that a crime has been committed. The procedural aim is to establish whether the imposition of criminal sanctions is justified. Of course, the matrix of an official investigation is incompatible with formal pleadings and stipulations: the court-controlled pursuit of facts cannot be limited by mutual consent of the participants. 'Parties' in the sense of independent actors are not needed, and proceedings may, for instance, be a mere 'affaire à deux'. Factfinding is 'unilateral' and detached. All reliable sources of information may in principle be used, and the defendant may be subjected to interrogation. Obviously, then, this much simpler structure of proceedings leads to fewer technicalities. The non-adversary model is, thus, 'under-lawyered'."[16]

Here again, while some parts of this description may seem exaggerated, what emerges as the essential characteristic of the non-adversary system is the reliance on the active role of the judge, and the relatively inactive role of the parties.

2. *The Adversary Trial System and Discovery*

Having described the essential features of the adversary system and determined that they centre around the relatively active role of the parties and the relatively passive role of the adjudicator, it then becomes clear that many features of criminal procedures in common law countries, such as trial by jury, emphasis on oral testimony, and, to focus on the subject of our study, a relative lack of discovery, are not indispensable to the adversary model. For historical and ideological reasons[17] they may have developed in relation to the adversary model as a matter of natural choice, but they are clearly not essential. In fact, confining our discussion to discovery it is arguable that the very opposite is the case, and that discovery is essential to the "rational" working of the adversary model. As already articulated, the purpose of the criminal process is the attainment of a certain quality of truth in the determination of the allegations of the prosecution. But because of the way in which the adversary system is structured, to allow

for full discovery of an opponent's case, where there is no other reasonable means of acquiring knowledge about it, may be essential in order to achieve that purpose. In the words of Traynor, former Chief Justice of the California Supreme Court:

> "The plea for the adversary system is that it elicits a reasonable approximation of the truth. The reasoning is that with each side on its mettle to present its own case and to challenge its opponent's, the relevant unprivileged evidence in the main emerges in the ensuing clash. Such reasoning is hardly realistic unless the evidence is accessible in advance to the adversaries so that each can prepare accordingly in the light of such evidence".[18]

If Traynor is right, that the reasoning behind the adversary system is only valid if the parties have equal access to the evidence, the next question is whether the only realistic or consistent way in which evidence may be accessible, in particular to the accused, is through discovery. The best answer to this question is found in the words of Edmund Morgan:

> "If [the adversary system] were to operate perfectly, both parties would have the same opportunities and capacities for investigation, including the resources to finance them, equal facilities for producing all the discoverable materials, equal good or bad fortune with respect to the availability of witnesses and preservation of evidence, and equal persuasive skill in the presentation of evidence and argument. The case is rare where there is even approximate equality in these respects, and there is no practical method of providing it. But there can be no question that the system ought to enable each litigant in advance to know the exact area of dispute and to have access to all available data so that he may be aware in just what particulars he and his adversary disagree, that he may investigate and determine the pertinency and value of any materials favourable and unfavourable to his contention, and that he may consider the reliability of the persons willing or compellable to testify. Until he knows what evidence is likely to be available for or against him he cannot prepare to meet or interpose objections. . .".[19]

Applying Morgan's view to the adversary system in criminal cases, since it is impossible to equip both the prosecution and the defence with the same investigative facilities the only reasonable way to attain advance equality in access to the evidence is through "the system",[20] that is through a discovery procedure. In fact, taking a comparative look at civil procedure systems, this is exactly the route that is followed. Discovery of documents, interrogatories, oral examinations for discovery, medical examinations, and pre-trial production of documents in the hands of any person[21] are all procedures in "the system" that provide discovery as of right and make it possible for the reasoning of the adversary model to be fulfilled.

Before leaving this question of the relationship of the adversary model to discovery, it might be contended that discovery is still not necessary in criminal cases as long as all of the evidence favourable to the accused is made

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Before leaving this question of the relationship of the adversary model to discovery, it might be contended that discovery is still not necessary in criminal cases as long as all of the evidence favourable to the accused is made

available to the court. But it should be clear that to accommodate the need for discovery in this fashion is to deny the very basis of the adversary system, i.e., that the best truth emerges when each side is "on its mettle to present its own case and to challenge its opponent's. . .". Of course some measure of relaxation of this structure can be allowed and indeed it is expected that prosecutors will bring forward evidence which exculpates the accused. But to make this moral obligation the basis for the structure of the system—in denying discovery to the accused—is, in essence, a denial of the validity of the adversary system. Moreover, reference again to discovery in civil cases reminds us that discovery is not limited to admissible evidence.[22] Thus to limit disclosure to admissible evidence favourable to the accused which the prosecution would be expected to adduce would not in fact meet the need for discovery at all.[23]

3. *Guilty Pleas and Discovery*

Before concluding this discussion of the adversary system and discovery it is desirable to say something about guilty pleas because in adversary models of the criminal process it is not every case that is adjudicated.[24] In fact, quite the reverse, most criminal charges are disposed of by guilty pleas. Studies in Canada have indicated that in about 70 percent of all criminal cases the accused plead guilty.[25] But quite apart from the development of this procedure as a natural extension of the adversary system's reliance on the parties to structure the issues in dispute—and hence to determine if there is any dispute at all—there are a number of reasons in favour of allowing guilty pleas to be entered. The first reason usually advanced is that it would be prohibitively expensive to process every case through to trial.[26] To do so would require vast increases in judges, prosecutors, and court facilities.[27] Then it is argued that the sheer volume of cases would lead to less attention being paid to the more serious cases "and to the eventual loss of any value that the criminal trial has as a 'contemporary morality play' and 'as a demonstration of certain values to the community' ".[28] A third reason, and perhaps in principle more acceptable than either of the above, is the practical good sense involved in asking anyone charged with an offence whether or not he admits his guilt; it just strikes one as an eminently sensible thing to do.

Although this analysis of the reasons underlying the guilty plea system is much too brief and the subject may require a separate study, nevertheless because of the prominence of this aspect of our system it does seem reasonable to assume that the guilty plea will remain. However, despite the reasons that support a guilty plea system, the existing system is subject to considerable criticism. Since the primary aim of the criminal process is the conviction of those who have committed criminal acts with the necessary legal responsibility and the acquittal of those who have not, the same aim is involved whether the conviction results from a trial or a guilty plea. And if in the trial version of the system it is sound to provide discovery to an accused so that "a reasonable approximation of the truth" may be achieved and various safeguards realized, then it seems equally sound to provide discovery before an

accused is even asked to plead because entry of a plea of guilty involves not just an admission of factual involvement in a transaction, but an admission of legal involvement. A plea of guilty is an admission of guilt as to the charge preferred by the prosecution in the sense that it acknowledges the ability of the prosecution to establish guilt in fact and in law.[29] That acknowledgment covers all elements involved in the charge, the inapplicability of any defence, and the ability of the Crown to show proof beyond a reasonable doubt.[30]

This being the significance of the guilty plea, the criminal process should therefore ensure that the accused is fully informed both as to the implications of the plea and the material or information comprising the prosecution's case. While one approach to achieving this goal might be for the court to conduct extensive pre-plea questioning of the accused before a guilty plea is accepted, a simpler and better approach, since it would not risk compromising the impartial role of the court, would be to ensure, as we are more and more concerned to do,[31] that all accused persons are provided with legal counsel and with a sensible system of pre-plea discovery of the Crown's case.

In conclusion, it seems clear that not only is a lack of discovery not inherent in the adversary model, but rather that discovery is in fact essential to its rational operation both at the pre-trial and pre-plea stages. Indeed, perhaps with a full discovery system, the retention of the essential features of the adversary model in the criminal process, that is, the relatively active role of the parties and the relatively passive role of the court, will be justified.[32]

ARGUMENTS CONCERNING DISCOVERY IN CRIMINAL PROCEDURE

In Part A it was argued that on a theoretical level at least, the philosophy of discovery—that pre-trial disclosure tends to reduce surprise and contributes to achieving more reasonably true results while allowing for the realization of various safeguards—is compatible with the aims of the criminal process.[33] As well, it was there also contended that the philosophy of discovery is as reconcilable with the adversary principle—indeed necessary for its rational application—in criminal as in civil litigation.[34] Finally it was also argued that some discovery to the accused before plea was necessary in order to justify the plea-taking process and the significance attached to a guilty plea.[35] However, even if this analysis should be accepted, there are a number of arguments against discovery, particularly discovery to the accused in criminal cases, that ought to be examined to see how seriously they weigh against the essential value of discovery. For example it has been contended that discovery of the criminal process would upset the balance of advantage between the state and the accused. Next it has been suggested that discovery would be "unfair" since it cannot, as against the accused, be reciprocal because of the privilege against compulsory self-incrimination. Then it is said that discovery to the accused

would be unacceptable because it would tend to create opportunities for perjury and witness intimidation. Finally a number of arguments have been advanced against discovery in criminal cases which suggest that somehow the criminal process will thereby become less efficient. These principal arguments against discovery in criminal procedure require careful analysis to see if they are sound or instead "blind striking(s) at criminal discovery as the whipping boy for other possible evils in law enforcement . . . ".[36]

1. *Prosecution and the Accused: Does Discovery Upset the Balance of Advantage?*

In *Regina v. Lalonde*[37] Mr. Justice Haines of the Ontario Supreme Court held that:

> "The accused's right to pre-trial discovery is not an absolute value existing in a vacuum. It must be balanced by the need to maintain effective channels of investigation by the police. The criminal process is a balancing of interests".[38]

While the main "interest" that Mr. Justice Haines was concerned to protect in this case was that of the administration of criminal justice in protecting against witness tampering and intimidation,[39] a matter that will be more fully considered later, it seems that the learned judge was also applying the argument first expressed in the United States that to provide discovery to the accused as of right would upset the balance of advantage between the prosecution and the accused and would tip the scales too much in the accused's favour. After examining some of the Canadian and English cases that bear on discovery to the accused,[40] Mr. Justice Haines quoted from Judge Learned Hand of the District Court of Appeals (2nd Cir.) whose name has given this argument its greatest thrust. In *United States v. Garsson*[41] Judge Hand said as justification for a "modern" approach:

> "Under our criminal procedure, the accused has every advantage. While the prosecution is held rigidly to the charge, he need not disclose the barest outline of his defence. He is immune from question or comment on his silence; he cannot be convicted where there is the least fair doubt in the minds of any one of the twelve. Why in addition he should in advance have the whole evidence against him to pick over at his leisure, and make his defence, fairly or foully, I have never been able to see. . . .
>
> Our dangers do not lie in too little tenderness to the accused. It is an unreal dream. What we need to fear is the archaic formalism and the watery sentiment that obstructs, delays and defeats the prosecution of crime".[42]

But upon examination this argument is quite unsound and likely would have been long forgotten were it not associated with such a famous jurist. The unsoundness of the argument is apparent both in practical terms and in theory. First, the validity of the argument depends "upon the assumption that the accused does have 'every advantage' in a criminal trial"[43] and this as-

sumption, at least in terms of the need for "discovery", is simply incorrect. Second, the whole construction of the balance of advantage argument is a distortion of the aims of the criminal process.

To take up the first point, at the pre-trial stage, and in particular in regard to the need for discovery, in the vast majority of cases there is a considerable disparity between the ability of the prosecution and the defence to conduct an investigation. It is the prosecution assisted by the police that is able to employ considerable physical and human resources as aids in investigation. The police have the use of scientific laboratories and experts as well as teams of investigators. They have the advantage of being able to arrive early at the scene of a crime and hence they have access to evidence when it is fresh. Moreover, the police power to interrogate, to search and to seize, and to interview witnesses when their recollection is recent and hence likely to be more accurate, are all powers that are generally not available to the defence. On the other hand, the accused, even if he is familiar with the events in question, has little or no access to scientific facilities for the analysis of evidence he may have in his possession and he has neither the legal means nor even the persuasiveness of apparent authority to oblige reluctant witnesses to speak to him. Finally, the accused has no power to search in private places and he usually lacks the financial resources to mount police scale investigations even if the procedural tools necessary to do so are made available. But the comparison can be extended even further to cover a host of other formal and informal powers exercisable by the prosecution that easily outmatch the powers given to the accused to remain silent and to require the prosecution to prove its case beyond a reasonable doubt. The fullest catalogue of these powers is found in Professor Hooper's article on "Discovery in Criminal Cases"[44] and are set out below—but without any reference numbers or footnotes:

> "While it is true that a person cannot be forced to take part in an identification parade or to submit himself to tests of blood and so on, he will usually co-operate and in any event, the results of tests done against his will are still admissible. Although his answers may be inadmissible at any subsequent trial, a person charged with an offence is a compellable witness before an administrative tribunal. Exceptionally, in the case of a coroner's court, a person charged with homicide cannot be compelled to testify, although a person about to be so charged is compellable. If a person is required by statute to make a statement to the police or other agency, that statement may be admissible at any subsequent trial. A person charged with an offence may be forced to testify at the separate trial of his accomplice or co-conspirator and a director may be forced to testify at the trial of his corporation. Less direct pressures may also force an accused to disclose his case prior to trial. If he does not disclose an alibi prior to trial, his failure to do so may be made the subject of comment. Where an accused gives an explanation for his conduct for the first time at trial, the jury are entitled to take that into account in determining what weight to give to it. Disclosure at trial can be 'forced' by the use of presumptions and reverse onus clauses,

> by the rule making exculpatory statements inadmissible (otherwise than at the option of the Crown) unless the accused testifies, by downplaying the role of the judge at the stage of a motion for a directed verdict, by allowing the Crown considerable freedom when it wishes to reopen its case, by allowing comment on the accused's silence at trial and by taking it into account on appeal. Pre-trial disclosure of the likely testimony of those defence witnesses whose names are known to the prosecutor may be obtained through police interrogations and, theoretically at least, at the preliminary hearing or during the proceedings before the grand jury".[45]

In light of this comparative analysis "it can hardly be said that the accused has every advantage".[46] In the United States an earlier response by Goldstein in his article, "The State and The Accused: Balance of Advantage in Criminal Procedure" was severely critical of Judge Learned Hand's "modern" view. Goldstein wrote:

> "If Judge Hand's view represented an accurate appraisal of the formal system of criminal procedure, it would be difficult to take issue with his conclusion; except on broad philosophical grounds. But the fact is that his view does not accurately represent the process. Both doctrinally and practically, criminal procedure, as presently constituted, does not give the accused 'every advantage' but, instead, gives overwhelming advantage to the prosecution. The real effect of the 'modern' approach has been to aggravate this condition by loosening standards of pleading and proof without introducing compensatory safeguards earlier in the process. Underlying this development has been an inarticulate, albeit clearly operative, rejection of the presumption of innocence in favour of a presumption of guilt".[47]

It is on the second level, in terms of the aims of the criminal process, that the balance of advantage argument should receive the strongest criticism. Because in fact there is not and never has been any balance of advantage in the criminal process and the attempt to construct one by toting up the alleged advantages enjoyed by each side in the criminal process and then deciding that the result somehow weighs against providing discovery to the accused is quite misleading. The powers exercised by the police and the prosecution in the conduct of an investigation and a prosecution of a charge, and the rights exercised by an accused were not constructed out of any concern for symmetry. Rather they evolved in response to the quite different roles of these parties. It is the prosecution representing the state that is charged with the duty of prosecuting crime and, in order to protect against the risk of convicting innocent persons, it is required to present proof of that guilt beyond a reasonable doubt. The role of the accused on the other hand is the very opposite. While the accused may raise positive defences if he chooses to do so, he is throughout the process presumed to be innocent as a safeguard against false convictions, and thus he is always entitled to take a passive role and to raise as a primary defence the weakness of the prosecution's case.

Thus, in comparing these two quite opposite roles it is of no assistance to think in terms of an unobtainable balance of advantage; indeed the roles are so opposite that in essence they must always be in a state of "imbalance". In sum the aim of the criminal process is not "to make sure that the advantages are even"[48] but to convict those who are guilty and to acquit those who are innocent in a process that guards against the risk of convicting the innocent and strives for a reasonable approximation of the truth. And if the attainment of this aim would be promoted by a procedural system that provides discovery to the accused without any appreciable increase in the risk of acquitting guilty persons, a matter to be examined later,[49] then it would seem that such a system should be constructed. At the very least, it is in this context and not in regard to the illusory balance of advantage that the issue of discovery should be considered.

2. *Discovery and Reciprocity: Should Discovery to the Accused be Denied Since it Cannot be Made Reciprocal Because of the Principle Against Compulsory Self-Incrimination?*

To some extent this argument appears to be a mere rephrasing of the balance of advantage argument. Like the latter, it has primary regard for maintenance of ideal conditions for an ideal contest as opposed to the aims of the contest. In addition the argument assumes that in some way the principle against self-incrimination prevents devising any procedures to provide for discovery of the accused. But in the existing system it is quite clear that this principle does not prevent pre-trial questioning of an accused.[50] Moreover, it is not at all clear just how much of an obstacle the privilege against self-incrimination would constitute against disclosure of the general nature of the defence.[51] However, the main criticism that should be levelled against this argument is its rejection of the aim of the criminal process. If in order to better achieve the aim of the criminal process it is desirable to provide discovery to the accused it is sophism to then argue that such discovery should be denied because of some difficulty in making discovery a mutual or reciprocal arrangement. The issue of whether or not it would be desirable to provide for more prosecutorial discovery of the accused is a separate issue raising quite different concerns and will be examined in Part V of this study.[52]

There is another, more practical basis upon which the mutuality concept should be examined. It concerns the basic assumption hidden in the reciprocity argument that the prosecution is seriously hampered in investigating allegations of crime and in preparing prosecutions of charges because of the privilege against self-incrimination. However this assumption requires a close examination. We have already seen in Part I that in existing practice there are a number of formal procedures that can be used to provide information or "discovery" to the Crown.[53] But in addition, there are any number of factors which in the normal investigation and prosecution of crime make an indi-

vidual's privilege against self-incrimination no barrier at all to the development and preparation of the prosecution case. For example:

(*a*) The natural reluctance of most persons to become involved in legal proceedings is generally overcome, at least for neutral witnesses, by the awe of police and public authority. Only where witnesses are relatives or friends of the suspect will there be any problem in this regard; yet even in these situations the public authority of the police may persuade witnesses to respond to questioning.

(*b*) To the extent that raw data and scientific evidence are obtained independently of the accused, the principle against self-incrimination has no application, and, as to access to this evidence, the prosecution is in a much stronger position than the accused.

(*c*) The principle against self-incrimination does not bar interrogation of the accused or witnesses. As Louisell has noted:

> "While a person at all stages of the investigative and litigative process involving him as an accused has the theoretical right not to make testimonial utterances; and while all persons have such a right at all times not to answer questions which tend to incriminate them under the law . . . the significance of these theoretical rights depends largely on the extent they are known and exercized by the affected persons".[54]

(*d*) To borrow again from Louisell:

> "Even when a confession is held inadmissible, the interrogation which produced it may still have served vital discovery functions by providing leads to other evidence. It can hardly be gainsaid that investigative interrogation, save when the person interviewed is disciplined to the process' realities by frequent contacts with the police as the professional criminal typically is, weighs heavily on the scales as in effective discovery device for the state".[55]

(*e*) The principle against self-incrimination does not bar the admission at trial of tangible evidence found as a result of an interrogation of an accused nor the confession itself or those parts of it that are confirmed to be true by the finding of the evidence.[56]

In sum, if all these factors are taken into account the conclusion of Goldstein as to the existing "discovery" powers of the prosecution, although made in the context of United States practice, would seem applicable in Canada. He concluded that:

> ". . . Fairly, clearly, pre-trial discovery by the prosecution is far-reaching and it cannot in any sense be said to be matched by what is available to the defendant or by what he can keep from the prosecution—even when his 'immunity' from self-incrimination is thrown into the scales. While the possibility that the defendant may produce hitherto undisclosed witnesses or theory of the defence is always present, the opportunity for surprise is rendered practically illusory by the government's broad investigatory powers and by the requirement in many states that the defences of alibi and insanity be specially pleaded. The sum of

the matter is that the defendant is not an effective participant in the pre-trial criminal process. It is to the trial alone that he must look for justice. Yet the imbalance of the pre-trial period may prevent him from making the most of the critical trial date, and the trial, in turn, has been refashioned so that it is increasingly unlikely that it will compensate for the imbalance before trial".[57]

3. *Perjury and Witness Intimidation: Does Discovery Create Such Opportunities for Distortion of the Criminal Process that it Should not be Allowed?*

The argument most frequently advanced against discovery to the accused is that allowing the accused to acquire knowledge of the prosecution case, including production of witness names and statements, would make it easier for the accused to fabricate defences, procure perjured testimony and to intimidate witnesses. As well, this argument is frequently combined with the contention that if potential witnesses were to know that the accused would be provided with their names and statements they would be reluctant to provide information or otherwise assist the police in the investigation of crime. Thus, so the arguments proceed, discovery to the accused would tend to increase opportunities for falsification of evidence and would make accurate fact finding less likely. Indeed, these were the very arguments advanced by Mr. Justice Haines in *R. v. Lalonde*[58] in denying the accused's request for production *at trial*[59] of witness statements and memoranda of their evidence made by the police.[60] The learned judge held that:

"The courts, when considering what extent of pre-trial discovery to force upon the Crown by means of orders and adverse comment at trial, must keep in mind that many crimes are committed within the confines of a criminal subculture and as such the only possible witnesses or sources of information are those representatives of a criminal milieu who are very vulnerable to tampering and intimidation once their names are known. This fact makes comparisons between the opportunity for discovery in the criminal trial process with that offered by the civil process of little use. In ordering production of the statements of Crown witnesses, it must be kept in mind that many people would be unwilling to talk to the police if they felt that their statements would be given to defence counsel before trial, so that they may be picked apart at leisure in preparation for their embarrassment in the witness stand or accosted by private investigators to recant".[61]

These statements are similar to those made by Chief Justice Vanderbilt in the United States case of *State v. Tune*[62] where he said:

"In criminal proceedings long experience has taught the courts that often discovery will not lead to honest fact finding, but on the contrary to perjury and the suppression of evidence. Thus the criminal who is aware of the whole case against him will often procure perjured testimony in order to set up a false defence.

> Another result of full discovery would be that the criminal defendant who is informed of the names of all of the state's witnesses may take steps to bribe or frighten them into giving perjured testimony or into absenting themselves so that they are unavailable to testify. Moreover, many witnesses, if they know that the defendant will have knowledge of their names prior to trial, will be reluctant to come forward with information during the investigation of the crime . . . All these dangers are more inherent in criminal proceedings where the defendant has much more at stake, often his own life, than in civil proceedings".[63]

However, when examined closely these arguments are, as a New York Court recently noted, "built one-sidedly of untested folklore".[64] There is no evidence to support them. At the most, all one can say is that discovery may increase the potential for the abuses of perjury and witness intimidation. Moreover, it would seem these arguments are based upon a presumption of guilt rather than one of innocence. But the arguments go further and assume a general inclination of accused persons and, by inference, defence counsel, to suborn bribery, perjury, and other illegal activities in order to secure acquittals. Needless to say, as a general statement about the defence bar, and accused persons generally, this is a thoroughly unacceptable indictment.

In the legal literature in the United States perhaps the strongest reply to the perjury and intimidation argument is found in an article by Mr. Justice William J. Brennan Jr., who wrote the dissenting opinion in *State v. Tune*.[65] Later, when a Justice of the United States Supreme Court, he wrote:

> "How can we be so positive criminal discovery will produce perjured defences when we have firmly shut the door to such discovery? That alleged experience is simply non-existent. . .
>
> . . . I must say I cannot be persuaded that the old hobgoblin perjury, invariably raised with every suggested change in procedure to make easier the discovery of the truth, supports the case against criminal discovery. I should think that its complete fallacy has been starkly exposed through the extensive an analogous experience in civil cases where liberal discovery has been allowed and perjury has not been fostered. Indeed this experience has suggested that liberal discovery, far from abetting, actually deters perjury and fabrication. . .
>
> . . . In any event, as has been said, the true safeguard against perjury is not to refuse to permit any inquiry at all, for that will eliminate the true as well as the false, but the inquiry should be so conducted as to separate and distinguish the one from the other where both are present . . . we must remember that society's interest is equally that the innocent shall not suffer and not alone that the guilty shall not escape . . .
>
> . . . Besides, isn't there a suggestion in the argument, and a rather slanderous one, that the criminal defence bar cannot be trusted? . . . Whatever justification there may be for the assumption that the desperate accused will try anything to escape his fate, the notion that his lawyer can't want to conspire with him to that end hardly comports with the foundation of trust and ethics which underlies our professional honor system".[66]

While this rejoinder to the perjury and intimidation arguments refers again to the criminal procedure systems in the United States there is every reason to believe that it is applicable in Canada.

The argument often added to the perjury and intimidation arguments, that "many witnesses, if they know that the defendant will have knowledge of their names prior to trial will be reluctant to come forward with information during the investigation",[67] deserves a similar rebuke. In part it smacks of the intimidation argument in the sense that it suggests that these witnesses would be afraid of being intimidated by the accused. But also, in part it suggests that witnesses will be afraid of coming forward and making statements if those statements might be picked over by the defence and any inconsistencies made the basis of cross-examination at trial. But in reply, first, the suggestion that witnesses would be reluctant to come forward is again "untested folklore".[68] In systems where discovery is denied "that alleged experience is simply non-existent" . . ."[69] Moreover, those States in the United States which "by rule or statute have permitted fairly broad criminal discovery have not found it necessary to eliminate or restrict it because of the difficulties foreseen by Chief Justice Vanderbilt".[70]

Second, the suggestion hidden in this argument that witnesses should be protected against having their statements reviewed by defence counsel and made the subject of cross-examination at trial, should be rooted out and exposed for what it is: a completely erroneous, nay even dangerous proposition. There is no property in a witness, particularly in a criminal case, and a citizen who makes a statement in a criminal investigation does not make it just for the prosecution; it is a statement made in the interests of justice and thus a witness has no right to expect that it will not be shown to the defence or that he will be protected from cross-examination on it should it be inconsistent with his evidence at trial. In fact his expectations should be the very opposite. At stake in every prosecution is the liberty of the accused—who must be proved guilty beyond a reasonable doubt—and the quality of criminal justice in its search for truth.[71] But if the incriminating evidence of a witness against an accused cannot be searched out and challenged because a previous statement was not disclosed to the defence, including a copy of it if it is in writing, then a dangerous constraint is placed upon this safeguard and the quality of the system is diminished. Of course, many if not most witness statements will not contain serious inconsistencies that cannot be explained away, and the practice of advocacy being what it is, if defence counsel should seek to exploit some point that is irrelevant or explainable he will likely suffer for it. But, what may not appear to the prosecutor as a serious inconsistency between a witness's statement and the evidence expected to be adduced at trial may in fact turn out to be so and for the prosecutor to decide not to produce or disclose this statement to the defence is to arrogate to himself the determination of the validity of the witness's evidence and, conceivably, the guilt of the accused. In sum, a denial of the proper tools to conduct a full cross-examination is a denial of the proper

use of that right and this in turn is a denial of the very reasoning of the adversary system.[72] To quote Chief Justice Traynor once again:

> ". . . the state has no interest in denying the accused access to all evidence that can throw light on the issues in the case, and in particular it has no interest in convicting on the testimony of witnesses who have not been as rigorously cross-examined and as thoroughly impeached as the evidence permits".[73]

Furthermore, involved in the perjury and intimidation arguments is the suggestion that the risk of these abuses is much greater in criminal than in civil cases and thus the wide discovery available in civil procedure has no analogy to criminal procedure.[74] However, apart from the examination of the perjury and intimidation arguments that has already been made, perhaps a special look should be taken at this suggestion. In answer to it Goldstein wrote:

> "It could, of course, be said that the severity of criminal sanctions is so much greater than civil ones that the accused is more likely to tamper with the process than is the party to a civil case, or that the criminal 'class' includes more persons disposed to violence than does the civil litigant class. But a moment's reflection indicates how suspect such hypotheses are. Even if we assume the accused to be more motivated or more disposed by personality to engage in such conduct, he, unlike his civil analogue, is already marked by the state as a criminal and hence is more likely to be under scrutiny. Moreover, the very real likelihood that charges of such misconduct against criminal defendants will be believed makes it all the more obvious that they must behave with the utmost circumspection.
>
> But perhaps the most significant reason of all is the fact that the range of civil and criminal substantive law is too broad to permit the generalization that one involved in civil litigation is far less likely to suborn perjury or intimidate witnesses. It is difficult to believe that the defendant to charges of income tax evasion, false advertising, mail fraud, et cetera, will regularly tamper with justice on the criminal side of the court but that he will not do so when defending against the same or comparable charges on the civil side. Or that the petty thief accused of shoplifting will lie or intimidate but that the same person suing for an injury from an automobile collision will behave properly. Far more likely, 'bad' people will do bad things on both sides of the court; the kind of people involved in litigation, and the stakes at issue, are central to the intimidation-bribery-perjury nexus, not their involvement of any one side of the court. It must be conceded, of course, that, at the margins, the pressure of a serious criminal charge may cause a given individual to engage in conduct which he would not consider if he were faced with a less serious civil charge, and that the personality types brought within certain criminal categories may present a significantly greater threat to the process. But since generalizations are necessary if systems of procedures are to be built, it seems fairly obvious that in most instances, the only approach to disclosure consonant with equality of opportunity and with the presumption of innocence is that used on the civil side of the court. It places its faith in the freest possible discovery

> as an aid to truth and as a means of searching out falsehood. But more important, it leaves to a more selective process than a blanket distinction between the civil and criminal cases the development of techniques for coping with the special problems which may arise in some criminal cases".[75]

Finally, even if despite these arguments the potential for perjury and intimidation are seen as possible deleterious features of discovery, there are clearly ways in which this potential can be countered without refusing to provide full discovery in the majority of cases. While some of these means will be explored in other parts of this paper, particularly in the review of some of the models[76] and in the tentative directions for reform,[77] perhaps at this stage it would be appropriate to suggest that, the arguments being what they are, at the very least there should be a presumption in favour of discovery unless the prosecution can show on proper grounds that it should not be granted. In sum "the reasons for discovery, the ascertainment of the facts, pervade each and every criminal case, while the reasons against it do not".[78]

4. *Discovery and Efficiency: Will Discovery to the Accused Unduly Interfere with the Efficiency of the Criminal Process?*

There are a number of arguments that have been even less convincingly put forward which can be conveniently grouped under the general question of the relationship of discovery to the efficiency of the criminal process.

An argument sometimes advanced is that a prosecutor, and before him a police officer, faced with disclosure of a case before trial and, as they may see it, thereby having the case exposed to the dangers of a fabricated defence "will protect against the evil by striving so far as possible to make (the) case non-disclosable; i.e. (they), (the police officer and the prosecutor) will commit to memory, rather than paper or record, the results of (their) investigative labours".[79] If there is anything to this threat, its effect would be to further exalt human recollection over more reliable recordings and thereby undermine the fact finding efficiency of the criminal process.

However there are obvious limits to the operation of such a threat. A police officer or a prosecutor "who refrains from taking a witness's statement in writing, in order to frustrate its potential discovery by (the) defendant, may find that it is he who most needs a writing at trial in order to impeach the witness who has disappointed his expectations".[80] Moreover, where there is any delay between the investigation and the trial, as is often the case, a police officer who ceased taking notes or making written records of his investigations would likely be the first victim of such casual preparation. In sum, this argument has the appearance of an empty threat and even to the extent that it could result, the range of information and material that could be included in a full discovery system[81] would still give substantial discovery in any event.

A second attack on the efficiency of the criminal process alleged to result from discovery to the accused is found in the argument that discovery will make defence lawyers lazy, inefficient, and will disincline them to conduct full investigations on their own. However, while it is tempting to dismiss this argument as an empty concern, perhaps the proper response is to suggest that a denial of discovery is surely not a cure for laziness of counsel. Clearly if this is a disadvantage flowing from discovery, the "diligence" argument would also seem to apply in civil cases and yet no one has proposed that civil discovery be abolished on this (or any other) basis. More precisely, if the professional tradition and pride of defence lawyers does not compel them to perform diligently in matters as important as criminal cases, it would seem that the problem is not one of discovery, but rather one of training and professional ethics.

But there is an even sharper rejoinder that has special application in criminal cases. It was captured by Louisell, who dissected nearly all of the anti-discovery arguments,[82] when he wrote:

> "Further, whatever the significance in civil litigation of the 'diligence' objection, other considerations tend to diminish its relevance in the context of the criminal discovery process. For often the defendant, in a practical sense, simply does not have the access to witnesses that the prosecution has. . . When a defendant's lawyer confronts witnesses who have been told explicitly or implicitly by police or prosecutor 'not to talk', an attempt to find out the facts on his own is an uphill fight. The more diligent the attempt the more likely his own exposure to the charge of tampering with witnesses or suborning perjury. Hence it is reasonably arguable at least in some criminal cases that the need of discovery, for obtainment of all the facts, is greater than in those civil cases which do not pose equivalent barriers to free access to witnesses."[83]

A third argument raised against discovery in criminal cases is one that was also raised, and rejected, in regard to civil discovery. It is said that a full discovery system will be time-consuming and will result in an increase in the number of collateral issues that will then have to be disposed of at trial. Of course a discovery system will involve the expenditure of some time. The actual amount will depend upon the discovery procedures that are available and employed in each case. It is also likely that discovery will permit the accused to explore, and at least to consider raising at trial, issues that might otherwise never have come to light. However, to become taken up with these concerns risks defining the "efficiency" of the criminal process in terms of speed and administrative uniformity to the exclusion of other benefits. In fact hidden in this concern for the efficiency of the system is a presumption of guilt and an expression of confidence in the reliability of administrative fact finding by the police that needs no review or interference by the defence.[84] As well, this definition of efficiency ignores the facilitation of other benefits that ought to be taken into account in any concern as to the effect of discovery on the efficiency of the criminal process.

First among these benefits of discovery is the elimination of issues that will not be contested. This result may be accomplished by revealing to the accused the weakness of any particular defence that might otherwise have been advanced. In fact this result may be so well accomplished that many more accused persons will see the futility of contesting cases and enter pleas of guilty. Indeed, jurisdictions which have instituted fairly full discovery systems have experienced higher rates of guilty pleas.[85] Second, in cases where the accused does decide to plead not guilty, by creating a setting in which frivolous or fruitless issues are not raised at trial and in which the parties may be able to agree upon certain undisputed facts, discovery contributes to an efficient presentation of evidence and makes it more likely that less time will be necessary to conduct criminal trials.

But even more important, efficiency must also be measured in terms of the accuracy and reliability of the process. To the extent that full disclosure will tend to equalize the parties' knowledge at trial, facilitate the search for other facts, and promote the full testing of the credibility of witnesses, it can only contribute to the accuracy and reliability of the process.

These arguments concerning discovery and efficiency bring us back once again to the aim of the criminal process. In fact all of the arguments against discovery cannot be adequately considered without holding them up, each in turn, and assessing them in terms of this aim. For to deny discovery to the accused on the ground that it would create an imbalance between the prosecution and the defence, or be unfair to the prosecution because reciprocity could not be achieved, would be to lose sight of the true aim of the criminal process. And to deny discovery because of the possibility of evidence fabrication and witness intimidation, or the possible encouragement to inefficiency, would be to emphasize concerns in some cases which, if they have any validity at all, are clearly secondary to achievement of the aim of the criminal process in every criminal case.

NOTES

1. See Damaska, "Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study", (1973), 121 U. of Penn. L.R. 507, 578-589, where he contends that in a comparison between common law adversarial systems and non-adversarial systems the former has greater greater safeguards against false convictions.
2. See *In Re Winship*, (1970), 90 S.Ct. 1068 at p. 1072 where the reasonable doubt standard was described as "a prime instrument for reducing the risk of convictions resting on factual error".
3. At trial the accused is not compellable as a witness. Before trial while the police may question the accused he is not obliged to answer, and even if he should provide information at some previous judicial hearing he is there entitled to claim the privilege of s. 5 of the *Canada Evidence Act*, R.S.C. 1970, c. E-10, so that his evidence cannot "be used . . . against him in any criminal trial . . . thereafter taking place . . . ." There are of course various informal pressures that arise in a criminal prosecution that may make this position of the accused difficult to adhere to. For example, both during police questioning and at trial the inference that in common sense may be drawn from silence in the face of incriminating evidence results in a very definite pressure to talk or to testify. But there is a great difference between informal pressures and the specific procedures and sanctions of the system and here the focus is on the latter.
4. This effect of the procedures of arrest and pre-trial detention are fully examined by Professor M. L. Friedland in *Detention Before Trial* (1965). However the very clear purpose of the *Bail Reform Act* R.S.C. 1970, 2nd Supp., c. 2 is to minimize unnecessary arrest and pre-trial detention and thus to reduce the deleterious pressures created by pre-trial procedure.
5. See eg. the *Criminal Code* s. 307 (being unlawfully in a dwelling-house), s. 309 (possession of house-breaking instruments), s. 310 (possession of instruments for breaking into coin-operated device).
6. See *Criminal Code* s. 235.
7. (1846) 1 De. G. & Sm. 12, at pp. 27-8.
8. Excluded from this discussion are various safeguards that are not so much concerned to enhance the quality of the truth, but are directed at preserving procedural fairness and the integrity of the judicial process. While the commitment to these safeguards is clearly strongest in the United States where a full exclusionary rule proscribes against the admission of illegally obtained evidence (see eg., *Mapp v. Ohio*, 367 U.S. 643), there are a number of points in our own system where discussions of them have at least occurred; see for example the confessions rule and *R. v. Wray*, [1971] S.C.R. 272 and Roberts, "The Legacy of *Regina v. Wray*" (1972) Can. Bar. Rev. 19. See also *R. v. Pettipiece* [1972] 7 C.C.C. (2d) 133 (B.C.C.A.); then see the abuse of process discussion and *R. v. Osborn*, [1971] S.C.R. 184, *R. v. Pratt* [1972] 5 W.W.R. 52, *R. v. Koski* [1971] 5 C.C.C. 46, *R. v. Atwood* [1972] 7 C.C.C. (2d) 116 and *R. v. Croquet* (1973) (unreported decision of B.C.C.A.). See also the *Bill of Rights* S.C. 1960, c. 44.
9. Hooper, "Discovery in Criminal Cases", (1972), 50 Can. Bar Rev. 445, at p. 450—hereinafter cited as Hooper.
10. *Ibid.*

11. Of course it can be argued that one answer to this problem would be to ensure that all evidence favourable to the accused is made available to the court. But in answer to this suggestion see *infra* at pp. 74-75.

12. See Damaska, *supra* footnote 1 at p. 534.

13. Glaser, *Pre-Trial Discovery and the Adversary System* (1968), at p. 7.

14. These problems are of course encountered whether the surprise and confusion of issues results from prosecutor or defence tactics. However it seems that the prosecutor is more favoured than the defendant by lack of full discovery, and that the "balance of advantage" on this score is tipped in the direction of the prosecution. See Goldstein, "The State and the Accused: Balance of Advantage in Criminal Procedure" (1960), 69 Yale L.J. 1149, at pp. 1180-92. For a full discussion on this issue, see *infra* at pp. 79-85.

15. See Damaska, *supra* footnote 1 at p. 563.

16. *Ibid.*, at p. 564.

17. See Damaska, *supra*, at pp. 555-560, 561-565, and 583-587 for an excellent treatment of the historical and ideological underpinnings of both adversary and non-adversary systems.

18. "Ground Lost and Found in Criminal Discovery" (1964), 39 N.Y.U.L. Rev. 228.

19. *Some Problems of Proof Under the Anglo-American System of Litigation* (1956), at pp. 35-36.

20. See use of this term by Morgan in the previously quoted statement.

21. See eg., *British Columbia Supreme Court Rules*, Order XXXI, Rule 20A

> "20A. When a document is in the possession of a person who is not a party to the action and the production of the document at a trial might be compelled, the Court or a Judge may, on the application of any party, on notice to the person and the opposite party, direct the production and inspection thereof and may give directions respecting the preparation of a copy that may be used for all purposes in lieu of the original."

22. The rule as to civil discovery of documents at English Common law was laid down by Brett L.J. in *Compagnie Financière du Pacifique v. Peruvian Guano Co.*, (1882) 11 Q.B.D. 55 at p. 63 where in interpreting the practice rule as to discovery "relating to matters in question" he said:

> "It seems to me that every document relates to matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which *may*—not *must*—either directly or indirectly enable the party requiring the affidavit (of documents) to advance his own case or to damage the case of his adversary. . . . I have put in the words 'either directly or indirectly' because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document *which may fairly lead him to a train of inquiry*, which may have either of these two consequences." (emphasis added)

Followed in Canada in *Can. Bank of Commerce v. Wilson*, [1908] 8 W.L.R. 266, and *Hutchison and Dowding v. Bank of Toronto* [1934] 1 W.W.R 446. The principle in this case has also been applied to cover the extent of oral examinations for discovery; see *St. Regis Timber Company Limited v. Lake Logging Company Limited* [1947] 1 W.W.R. 810 at pp. 812-813. See also these statements about examinations for discovery (1) "Hearsay evidence is permissible on discovery which would not be allowed at the trial". Robertson J.A. in *Haswell v. Burns & Jackson Logging Co.* [1947] 2 W.W.R. 394. (2) "(T)he words touching the matters in question and relating to (the practice rules) permit more latitude on discovery than is permitted by the rules of admissibility at trial". See Riley J. *Canadian Utilities Limited v. Mannix Limited et. al.* (1959), 27 W.W.R. 508 at p. 521. See generally, *The Canadian Abridgement* (2nd. ed.) Appendix at pp. 1361-1380; in Quebec, however, the situation is different; one reason is that the rules of evidence applicable to the trial must be strictly followed during the examination for

discovery, since the depositions taken at the examination for discovery form part of the record. See section 396 *Code of Civil Procedure*. Thus objections to the evidence must be raised during the examination, and if any dispute arises it must be submitted immediately to a judge for his decision, unless the parties agree to continue the examination and reserve the objection to be later decided by the trial judge. What is more, the field of investigation during such an examination is much more limited in Quebec than in the Common Law Provinces, particularly in those cases where the defendant examines the plaintiff *before filing a defence*. (The defendant is authorized to do this by virtue of section 397 of the *Code of Civil Procedure*.) In *Boyer v. J. C. LeRoux Ltée* [VTFG] S.C.R. 123, it was indeed decided "that the examination must deal with the facts alleged in the statement of claim, and not with those facts that would enable the defendant to prepare a defence which is not yet on the record". After the defence has been filed, the examination may only deal with "all facts relating to the issues between the parties" (section 398 of the *Code of Civil Procedure*); this holds true no matter what party initiated the inquiry. This wording excludes from discovery all facts that are not alleged in writing. See for example, an interrogatory examination on articulated facts, *Dame Thurlow v. Wedell*, (1969) B.R. 1115. It should thus be understood that the rules on relevance and admissibility of evidence at an examination for discovery in Quebec are generally the same rules as those applicable at trial.

23. In this analysis one might also refer to Hooper, see *supra* footnote 9, where he raised these points: (1) the argument depends for its validity on the assumption that prosecutors spontaneously present evidence unfavourable to their case—a highly dangerous assumption to make, (2) this assumption in (1) depends upon the even more questionable premise that the police always disclose to the prosecutor any evidence favourable to the accused, (3) the evidence called by the Crown as part of its case may be false (e.g. a lying witness) and without pre-trial discovery the defence will not be in a position to do anything about it, and moreover, since the criminal trial is not open-ended the defence does not have any time, except for the occasionally granted adjournment, to go and check on Crown evidence, (4) what may appear to a prosecutor or to a police officer as a neutral or unimportant fact and hence one not adduced may be of considerable value to the defence.

24. In general the opposite is the case in most continental systems where an inquiry proceeds even if a defendant declares that he is guilty. However, where guilt is really not disputed the emphasis of the inquiry is on the character and background of the accused and thus in many respects the inquiry in these cases resembles the sentencing stage of the criminal adversary process.

25. There are no statistics available which indicate for all of Canada the number or percentage of convictions by trial as opposed to the number of convictions by guilty pleas. However, a few studies have been conducted in various regions at various times from which an estimate or approximation can be made. See M. Friedland, *Detention Before Trial* (1965), 89; *Report of the Canadian Committee on Corrections* (1969), 134; Canadian Civil Liberties Education Trust, *Due Process Safeguards and Canadian Criminal Justice* (1971), 39; J. Hogarth, *Sentencing as a Human Process* (1971), 270.

26. See eg. Hooper, at *supra* footnote 9 p. 459. Although Professor Hooper advances this reason in favour of "plea-bargaining" it is really a justification for guilty pleas. Professor Hooper's approach assumes that plea bargaining is essential in order to maintain a high flow of guilty pleas and that may well be a completely unwarranted assumption.

27. See view of Mr. Graburn (now Judge Graburn) in "Problems in Ethics and Advocacy—Panel Discussion" Law Society of Upper Canada Special Lectures (1969), 279 at p. 302.

28. Hooper, *supra* footnote 9 at p. 459. In confining the discussion to the relationship between discovery and guilty pleas it should not go unnoticed that some analysts, notably Professor Hooper, would extend it to plea bargaining and argue that discovery will "eliminate some of the undesirable features of plea-bargaining". See

Hooper, *supra* footnote 9 at pp. 457-467 and specifically at p. 465. However this approach is basically one that accepts the system of plea bargaining, albeit an improved system, and does not subject it to a thoroughly critical examination. In our opinion this approach is unsound and thus we are leaving the subject of plea bargaining for a completely separate study.

29. In Canada this view of the significance of the guilty plea was taken in *R. v. Roop* (1924), 42 C.C.C. 344, (N.S.S.C.); in England it was recently decided that a guilty plea has two effects:

> "First of all it is a confession of fact; secondly, it is such a confession that without further evidence the court is entitled to and indeed in all proper circumstances will so act on it that it results in a conviction." [*R. v. Rimmer* [1972] 1 All E.R. 604 at p. 607.]

30. To the extent that a guilty plea is the result of plea bargaining this analysis will be inaccurate. But here we are focusing on guilty pleas freely and voluntarily given and the subject of plea bargaining will receive a separate examination in a Project study paper.

31. Reference here may be made to the various criminal legal aid programs in effect in the Provinces and the interest shown by the Federal Government in assisting in the financing of these programs: see press releases from the Office of the Minister of Justice dated March 15, 1973.

32. No attempt has been made to set forth the various arguments in favour of and against the adversary model. As to these arguments, see generally: Weiler, "Two Models of Judicial Decision-Making" (1968), 46 Can. Bar Rev. 406 at p. 412; Damaska, "Evidentiary Barriers. . . .", see *supra* footnote I; Griffiths " 'Family Model' in "Ideology in Criminal Procedure or a Third Model of the Criminal Process" (1970), 79 Yale L. J. 359. And for two interesting empirical studies, see Marshall, Marquis & Oskamp "Effects of Kind of Questions and Atmosphere of Interrogation on Accuracy and Completeness of Testimony" (1971), 84 Harv. L. Rev. 1620, and Thibaut, Walker & Loud, "Adversary Presentation and Bias in Legal Decision-Making", (1972), 86 Harv. L. Rev. 386.

33. See *supra* at pp. 65-68.

34. See *supra* at pp. 68-75.

35. See *supra* at pp. 75-78.

36. Louisell, "Criminal Discovery: Dilemma Real or Apparent" (1961), 49 Calif. L. Rev. 56 at p. 86. Louisell refers to the other possible evils as "under-staffed, inefficient, lax or corrupt police departments, ineffective prosecution or suborned defence, excessive review procedures and the like". In Canada the one "evil" that may be of concern in some areas is the under-staffing of police departments.

37. 15 C.R.N.S. 1.

38. *Ibid.*, at p. 8.

39. *Ibid.*, in actual fact, at no point in this case was any suggestion made that witness tampering or intimidation were real concerns. The relevant facts reported are to the effect that the defence asked for "production of statements given to the police by witnesses and memoranda of their evidence made by the police during the investigation". (p. 5) Thus to case denial of access to witness statements on this ground without determining its validity is in reality to confirm the prosecutor's denial of production of witness statements for whatever reason. And this is precisely the position that is followed by Canadian courts. While perpetuating the myth that the Crown must act judicially in matters of disclosure the courts are "loath to interfere with that (the prosecutor's discretion. . .". See eg. *R. v. Lalonde supra*, footnote 37 at pp. 8-13.

40. *Ibid.*, at pp. 6-12.

41. (1923), 291 F. 646.

42. *Ibid.*, at p. 649.

43. Hooper, "Discovery in Criminal Cases", *supra* footnote 9, at p. 472.

44. *Ibid.*

45. *Ibid.*, at pp. 473-474.
46. *Ibid.*
47. (1960), see *supra*, footnote 14, at p. 1152.
48. Hooper, *supra* footnote 9, at p. 474.
49. See *infra* at pp. 89-102.
50. See *supra* Part I at pp. 20-29.
51. See *infra* Part 5 at pp. 95-99.
52. See *infra* Part 5 at p. 83 et seq.
53. See *supra* Part I at p. 20 et seq.
54. Louisell, *supra* footnote 36 at p. 88.
55. *Ibid.*, at p. 89.
56. *R. v. Wray*, [1970] 4 C.C.C.I.
57. See *supra* footnote 14 at p. 1192. The question whether the accused should disclose these defences of alibi or insanity in our system will be examined in Parts 5 and 7 herein.
58. See *supra* footnote 37.
59. Emphasis added.
60. *Supra*, footnote 37 at p. 8.
61. *Ibid.*
62. (1953) 13 N.J. 203, 98 A (2d) 881.
63. *Ibid.*, at pp. 210-211.
64. See *United States v. Projansky*, (1968), 44 F.R.D. 550, (S.D.N.Y.)
65. See *supra* footnote 62.
66. "The Criminal Prosecution: Sporting Event or Quest for Truth?", (1963), Wash. U.L.Q. 279, at pp. 290-92.
67. See *supra* footnote 62, at pp. 218-19.
68. See *supra* footnote 64.
69. See *supra* footnote 66.
70. See *State v. Tune, supra* footnote 62.
71. See *supra* at pp. 65-68.
72. See *supra* at pp. 68-75.
73. *People v. Riser* (1956), 305 P. (2d) 1, at p. 13.
74. See eg., *R. v. Lalonde, supra* footnote 37, at p. 8 where Mr. Justice Haines advances this very suggestion.
75. See *supra* footnote 14 at p. 1194.
76. See *infra* Part 6 at p. 105 et seq.
77. See *infra* Part 7.
78. See (1966), 4 Harv. J. Legis. 105 at p. 111.
79. See Louisell, *supra* footnote 36 at p. 91.
80. *Ibid.*, at p. 92.
81. See *infra* Parts 6 and 7.
82. See Louisell, *supra* footnote 36, at pp. 86-103.
83. *Ibid.*, at pp. 95-96.
84. See H. Packer, *The Limits of the Criminal Sanction* (1968) at pp. 158-62.
85. See *infra* Part 6 at pp. 112-113.

PART III

POLICY QUESTIONS AS TO DISCOVERY IN CRIMINAL PROCEDURE

If pre-trial discovery is necessary in order to achieve the reasoning of the adversary system, the question becomes one of determining how the machinery of the system should be applied to achieve it. While it is too early in this study to undertake a detailed and technical analysis of the various processes by which discovery could operate, it is nonetheless important to deal with certain important policy questions essential to the setting up of such a process. Thus, in this third part, two fundamental questions will be discussed. First, should discovery operate on a discretionary basis, or should it be regulated by a formal proceeding? Second, if a formal proceeding is required, how should it fit in with the procedures that presently govern the pre-trial phase of the criminal process? Hopefully, through this discussion of these two problems it will be possible to lay the basis for developing a Canadian discovery model. It should be noted here that the discussion, at this point, relates solely to the question of discovery to the accused. The question as to whether there should be discovery of the accused in favour of the prosecution raises special problems, and will be fully dealt with later on in this study.[1]

SHOULD DISCOVERY BE DISCRETIONARY OR FORMAL?

If it is accepted that the accused should receive discovery of the prosecution case before his trial, it must still be decided in what form such discovery should occur. Should the prosecutor, or perhaps a judge, have the discretion to disclose information to the defence, or, on the other hand, should there be a recognized right to discovery, expressed in a formal proceeding, which would entitle the defence to obtain discovery in every case?

As already discussed, few, if any, provisions of the *Criminal Code* or rules at common law provide discovery to the accused as a matter of right. Generally speaking, Canadian law on discovery in criminal cases rests to a very great extent upon the exercise of discretion: the discretion of the prosecution before trial, and the discretion of the judge at trial.[2] But, the discussion in Part I suggests that the advisability of maintaining discretion as the basis for obtaining discovery, as opposed to constructing a formal system, should

be questioned. In examining this question, attention will be focused on the exercise of discretion first by prosecutors and then by judges.

1. *Prosecutorial Discretion*

While the exact nature of the exercise of discretion by the prosecution in providing discovery to the accused is very difficult to determine,[3] this question can nevertheless be approached on another level. Basically it may be questioned whether it is realistic or even desirable that prosecutors should be invested with discretionary power to provide discovery to the defence.

The reposing of discretionary power in the prosecution on an administrative and quasi-judicial level seems based on a special conception of the prosecutor's role—more particularly the Crown prosecutor's role—within the criminal process. This conception was perhaps best described by Mr. Justice Taschereau in *Boucher v. R.*[4]. He commented:

> "The position of the prosecution counsel is not that of a counsel in civil matters. His duties are quasi-judicial. He ought not so much seek to obtain a guilty verdict as to help the judge and jury render the fullest possible justice. His conduct before the courts must always be moderate and impartial. He will indeed have done his duty honourably, and be above all reproach, if, putting aside all appeals to the emotions, he exposes, in a dignified way befitting his role, the evidence to the jury without going beyond what has been revealed by the evidence."[5]

In the same case Mr. Justice Rand made a similar statement, using words that have been widely quoted, to define the role of the Crown prosecutor as that of a minister of justice. He wrote:

> "It cannot be overemphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it also must be done fairly. *The role of the prosecutor excludes any notion of winning or losing*; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility."[6]

In attributing this role to the Crown prosecutor, some have gone so far as to claim that a prosecutor does not in any way occupy the position of an advisary in the criminal process. For example, Keith Turner in his article on "The Role of Crown Counsel",[7] wrote:

> "It is not his aim to obtain convictions, and the adversary system has no application to his work. . . In the truest sense of the term, the Crown never wins or loses a criminal case."[8]

This statement follows logically from the description of the prosecutor's role put forward by the Supreme Court of Canada in the *Boucher* decision,[9] and it is a good illustration of the high-sounding phrases that have been used to describe this special role. But there is an obvious limit to a prosecutor's duty to show impartiality and to make sure that all the material facts

of a case, even those facts favourable to the accused, will be presented to the court. This limit was clearly set down in *Seneviratne v. R.*[10] where it was decided that the Crown did not have to assume at the same time both its own duties and those of the defence.

The Canadian criminal process takes place in an accusatorial setting, and consequently it seems a fallacy to claim that the Crown prosecutor should in no way fulfil the role of an adversary. Mr. Justice Brossard, of the Quebec Court of Appeal has observed that:

> "While it is indeed true that the Crown should not browbeat an individual in order to get a conviction, it remains nonetheless true that the public interest would be betrayed if the Crown did not vigourously prosecute the individual it has good reason to believe is guilty. In this sense, 'in order to secure the conviction of the right person' the Crown really does have a case to win."[11]

In closing the gap between the myth and the reality, surrounding the prosecutor's role, Mr. Justice Brossard added:

> "If the Crown cannot be obligated to bring as evidence before the court all that the police inquiry has revealed to it—a large portion of the results of this inquiry may very possibly be of no interest—should it have the privilege of alone making a judgment, a judgment against which there is no appeal, on the relevance of the evidence?"[12]

Even conceding that many Crown prosecutors are willing to fulfil the role of a minister of justice, it still must be acknowledged that a Crown prosecutor is not the person most suited to act in the interests of the accused. As Mr. Justice Traynor, speaking on this subject, noted:

> "Though a representative of the prosecution is thus less a determined adversary than an expositor, does it follow that he is accordingly best qualified to determine what is of importance to the defence? Is it not expecting too much of even the most fair-minded prosecutor that he be also the judge of what witnesses the defence should know about? His very freedom from zeal may dull his judgment in this regard. Why not let the defence judge for itself?"[13]

Thus it seems utopian to assert that while Crown prosecutors exercise an accusatory and adversary role they must also conform with an attitude befitting a "minister of justice". On the contrary, if our process of criminal justice is to remain an accusatorial process, perhaps it is time to recognize that in the criminal process each party has his own separate role. In this way perhaps the presumption of innocence will be more effectively realized, that is, by giving the defence all the means necessary to assert that presumption rather than by asking prosecutors to have proper regard for it—while prosecuting.[14]

2. *Judicial Discretion*

The fact that the trial judge has the authority to make rulings on the subject of discovery is sufficient, according to some, to mitigate whatever abuses or inequalities may result from decisions of prosecutors.[15] But as

things stand now, judges make very limited use of this discretion. Most applications for disclosure of information presented by the defence to the courts before trial are refused on the basis that disclosure of information to the defence is a matter that is within the discretion of the prosecution. Then if such applications are made during a trial, the courts still generally refuse to intervene and over-turn the decisions of prosecutors—unless such decisions have been influenced by some "oblique motive".[16]

Thus what is called a discretion of the trial judge seems, at most, to be a power review which is only exercised in exceptional circumstances.[17] This almost total absence of judicial control makes the prosecution's great lattitude in the disclosure of information even more unacceptable. Mr. Shapray, in his article, "The Prosecutor as a Minister of Justice"[18] has argued:

> "It is obscure how the ends of justice and truth are best served by sanctifying such administrative discretion, apparently for its own sake, especially in the light of the vast disparity in investigation techniques and resources between the Crown and the accused. The burden of having to prove 'oblique motive' or concealment before the Crown can 'perhaps' be compelled to call a witness would seem to afford little solace to the individual accused whose liberty hangs in the balance."[19]

But, could this situation be reformed by actually reposing in trial judges the discretion now exercised by prosecutors, and by clearly defining the criteria which should apply in determining whether or not to grant discovery to the defence? Commenting on the numerous reforms undertaken in the United States in this field, an American judge recently wrote:

> "There is absolutely no need for cumbersome legislation which can only be another breeding ground for judicial interpretation. Rather, the entire matter can be handled by a motion for discovery available to both the State and the defendant. This can easily be promulgated under the rule-making power of the Court. . .
>
> The matter of discovery is therefore a basically simple procedure which can be administered through the inherent power of the courts without the need of enabling legislation."[20]

But this approach is deceptively simple. First, is it necessary to burden the courts in all cases with preliminary matters concerning discovery? In civil cases, for example, the discovery of information occurs administratively according to precise rules and the courts are only called upon to settle disputes.[21] In addition, it is very difficult to determine before trial the grounds upon which the judge might be called upon to exercise discretion in determining whether discovery should be ordered. In considering the relevance and availability of the required information, the judge would have to evaluate the prejudice that the accused might suffer by being denied discovery. But without being apprised of all of the evidence in the case, and considering the point at which the evaluation would have to be made, this would be extremely difficult, if not impossible, to do. Moreover, if the judge were to consider an application for discovery only on the ground of the relevance

of the information for purposes of admissibility at trial, such relevance might be extremely difficult to establish at this pre-trial stage. This observation points up the test which should apply in determining the scope of discovery. As in civil cases, discovery should apply to all information which may be relevant or which may fairly lead to the finding of relevant evidence. And, again referring to civil practice, this test can easily be applied without the necessity of judicial rulings in all cases.

Finally, in answer to those who believe that the discretion of the trial judge is the answer to the problem of pre-trial discovery,[22] we agree with the observation of David Louisell who wrote in an article entitled "Criminal Discovery: Dilemma Real or Apparent":[23]

> "By setting up the verbal formula 'discretion of the trial judge', we often mislead ourselves, at least subconsciously, into thinking of it as a legal doctrine like res judicata, or purchaser for value without notice, or consideration. But when we think precisely, we realize it is no such thing. It is as nebulous as 'fairness', or 'in the public interest', or 'justice' itself. It means little more than that, the appellate process being with us what it is—the review of a record rather than a case—some things are best left to the judgment of the trial judge; except, of course, when his judgment is so atrocious as to be intolerable. Looked at realistically, instead of as a neat concept, 'discretion of the trial judge' in the area of criminal discovery appears more clearly for what it often is: an escape hatch from the rigors of formulating a reasonable rule for a complex situation. Actually, discretion of the trial judge has been pretty much the rule in criminal discovery for many years with the result that in most jurisdictions there has been no such discovery."[24]

It should be clear that even if formal rules allowing for pre-trial discovery to the accused should be instituted, the courts would still continue to play a role in the administration of such legislation, as is the case, for example, in civil matters. If a dispute were to arise as to the relevance or confidentiality of certain information, it would obviously have to be referred to the courts. But this role should be limited to the resolution of such contentious issues and not allowed to expand to take the place of precise rules and procedures specifying the information and material to be disclosed to the defence in all cases.

3. *A Formal System*

For the reasons mentioned in the preceding paragraphs, it would seem that the better solution would be to establish a formal system which expressly recognizes the right of the accused to discovery. And in order that the right not be an empty one, precise rules and procedures governing its exercise are required. But leaving the examination of these rules and procedures to a later point in this study,[25] the question must be asked as to how such a formal system would fit in with some of the pre-trial procedures in our existing criminal law system. It is to this question that we now turn.

INTEGRATION OF A DISCOVERY SYSTEM WITHIN THE EXISTING PRE-TRIAL SYSTEM: DISCOVERY AND THE PRELIMINARY INQUIRY

A formal discovery system cannot be implemented without conflicting with some of the procedures which presently apply in the period between the first appearance in court of an accused and the beginning of his trial. While a number of changes may be required, and we cannot foresee them all, one question is very clear: what would become of the preliminary inquiry? This is a far-reaching question, not only because of the present importance of the preliminary inquiry in our criminal process, but especially because of its long usage and the tradition associated with it. When one speaks of changing or abolishing the preliminary inquiry, one is questioning a whole procedural philosophy which has given expression to certain values considered important in the pre-trial phase of the criminal process. It is thus not solely the form of the preliminary inquiry that is involved here but also the fundamental principles which have justified its very existence.

The preliminary inquiry is described in our legal system as a "committal proceeding", that is, a proceeding which has the function of determining whether the prosecution has sufficient evidence to warrant the committal of the accused for trial, either on the charge preferred, or on any other charge which may be revealed by the evidence.[26] This procedure is based on the reasonable concern that no one should have to undergo a criminal prosecution at trial if there is insufficient evidence to justify the holding of a trial. Before going into greater detail on the present form of this proceeding however, it would be useful to examine briefly how it evolved.

1. *Background of the Preliminary Inquiry*

Its Origin—In England, the first formal investigation of criminal activity that was conducted before the institution of proceedings against a suspect was the coroner's inquest.[27] The duties of the coroner were, in theory, varied and wide in scope. The coroner had to make an inquiry in all cases where a person was found to be "slain, or suddenly dead or wounded, or where houses are broken, or where treasure is said to be found".[28] However, it seems that in practice such inquests were limited to cases of death under suspicious circumstances, or concealment of found treasure. During the period from 1276 to 1554, only coroners were formally vested with this power of inquiry. Though justices of the peace existed since 1324, this power was not conferred on them before 1554.[29]

Inquisitorial Period—The first form of preliminary inquiry, which subsequently evolved to the type of preliminary inquiry which we are familiar with today, can be traced back to 1554. At that time, two justices of the peace were required by statute[30] to hold an inquiry into cases of manslaughter or felony, by examining the prisoner and by taking from the examination all evidence likely to establish his guilt. The law also required

the justices to put the results of the investigation in writing. It should be noted that this inquiry was only required in cases where the prisoner qualified for bail. According to Stephen,[31] this proceeding was established in order to prevent collusion between the justices of the peace and accused persons seeking bail. The following year,[32] the holding of a preliminary inquiry was made mandatory even in cases where the prisoner did not qualify for bail and had to remain in custody awaiting trial. This first form of preliminary inquiry was purely inquisitorial, and the role of the inquiring justices of the peace was more akin to that of a prosecutor or a police officer than that of an impartial judicial officer.[33]

Beginning of the Accusatorial and Adversary-Type Proceeding—As a regular and organized police force developed in the middle of the nineteenth century, the role of the justice of the peace at the preliminary inquiry changed. As long as the inquiring justice of the peace acted as a prosecutor, his duty was to gather evidence against the accused and the accused was not entitled to any rights especially that of being informed of the nature of the evidence against him. This situation was changed by two laws which, in modifying the preliminary inquiry, were in a manner of speaking, the precursors of what has become known as the "discovery" purpose of the prelmiinary inquiry. In 1836, the *Prisoners' Counsel Act*[34] allowed an accused, at the time of his trial, to be informed of the depositions taken against him at the preliminary inquiry. Then in 1848, by *Jervis' Act*,[35] the accused was given this right at the preliminary inquiry itself, and the whole concept of this proceeding was modified. By virtue of this *Act*, witnesses examined at the preliminary inquiry had to be examined in the presence of the accused, who also obtained the right to cross-examine them. After prosecution witnesses were heard, the accused was cautioned, asked if he had anything to say, and given the right to call witnesses to reply to the accusation. All of the depositions were taken down in writing and signed, and the accused could obtain a copy of them. Following this hearing, the inquiring justice discharged the accused, "if the evidence did not establish the strong and probable presumption of his guilt".[36] If the reverse were true, the accused had to be sent up for trial. Thus the preliminary inquiry became a formal "committal proceeding":

> "The next step to the preliminary inquiry held by the magistrates is the discharge, bail, or committal of the suspected person... It is obvious that, as soon as justices of the peace were erected into intermediate judges, charged to decide the question whether there was or was not ground for the detention of a suspected person, they must have acquired, on the one hand, the power of committal. The whole object of the preliminary inquiry was to lead to the one or the other result, and the history of the preliminary inquiry is in fact the history of the steps which led to the determination of this question in a judicial manner."[37]

The Present Preliminary Inquiry—The function of the preliminary inquiry, as provided in section 468 of the *Criminal Code*, has not changed since *Jervis' Act*.[38] In the *Patterson* case,[39] the Supreme Court of Canada recently restated this aim, as the only aim of the preliminary inquiry:

> "The purpose of the preliminary inquiry is clearly defined by the *Criminal Code* to determine whether there is sufficient evidence to put the accused on trial. It is not a trial, and should not be allowed to become a trial."[40]

Given this very clear definition of the function and *raison d'être* of the preliminary inquiry, we now turn to an analysis of the viability of this institution together with the need for a formal discovery procedure.

2. *Can the Preliminary Inquiry Still Serve the Purpose for Which it Was Established?*

If the purpose of the preliminary inquiry is a judicial examination of the justification for committing an accused for trial, two questions deserve to be considered: (a) is it still useful to conduct a judicial examination to determine whether there is sufficient evidence to justify an accused person standing trial, and if so, (b) is the preliminary inquiry the best procedure for achieving this purpose?

The review of committals for trial of accused persons arises out of the legitimate concern that no one should be caused to stand trial if there is not, *prima facie* at least, some reasonably sound evidence against him. However this concern is expressed somewhat inadequately in our criminal law system. The preliminary inquiry is only used in about seven percent of indictable criminal offences, and, of course, it is unavailable in summary conviction cases.[41] Taking all offences together, nearly ninety-five percent[42] of all criminal cases go to trial without preliminary inquiries being held to determine if *prima facie* evidence of guilt exists. As well, the number of discharges at the preliminary inquiry,[43] which is certainly very small, suggests that in the five percent of cases where a preliminary inquiry is available, perhaps the need for this procedure is not now so great. In England the low rate of discharges at preliminary inquiries has been explained[44] by reasons which are perhaps equally as strong in Canada. The professionalism of the police and the Crown's power to withdraw a charge contribute to the result that most charges are only pursued where sufficient evidence exists. In addition, the defence attitude may also be significant. The defence often prefers to pursue an acquittal at trial rather than a discharge at the preliminary inquiry and will thus avoid revealing its defences and evidence during the inquiry. This approach of course reduces still further the chances of an accused being discharged at the end of this proceeding. Finally, it should be noted that even in cases where the strength of the prosecution evidence ought to be examined at the preliminary inquiry, our system allows an Attorney-General to by-pass this procedure by a preferred indictment, and section 507 of the *Criminal Code* even allows a trial to be held notwithstanding that an accused has been discharged at a preliminary

inquiry. In sum, perhaps the need for an independent determination before trial of whether all accusations are at least based on *prima facie* evidence is not as acute as it once was, say at the end of the nineteenth century.

Thus, for the reasons just expressed, it should be asked whether it would be adequate for the defence to be able to raise the question of the sufficiency of the evidence in support of a committal for trial by a court application in those cases where it is really in issue. This could be done after receiving discovery from the prosecution. Of course, even now it is true that the preliminary inquiry is not an obligatory proceeding and the defence may always consent to a committal for trial in those cases where it does not consider committal to be really in issue.[45] But, the preliminary inquiry applies if the defence does not expressly waive it, and such waiver rarely occurs. Moreover, perhaps the preliminary inquiry is not commonly waived even in those cases where there is no doubt as to the outcome of the inquiry, because this proceeding serves purposes other than that given to it in legal theory—it provides some discovery to the defence, however adequate it may be in accomplishing this purpose.

3. *Does the Preliminary Inquiry Serve Other Purposes Besides Determining Committal for Trial?*

The preliminary inquiry, which has evolved in theory to provide a judicial examination of committal for trial, is said to fulfil other functions.[46] However, some of them seem to be no more than justifications after the fact. It has been suggested, for example, that the preliminary inquiry offers the accused a first chance to establish his innocence, prevents the use of illegal methods by the police such as the "third degree" during interrogation of the accused, and allows the Crown to compel uncooperative witnesses to provide information.[47] Perhaps more legitimately, it is said to provide a vehicle for pre-trial discovery to the defence of evidence that will be advanced at trial while giving the defence the benefit of cross-examination. Thus it allows for a witness's evidence to be tied down since the transcript of the preliminary can be used for cross-examination at trial. Finally, it also allows for the preservation of evidence.

However all of these secondary purposes of the preliminary inquiry run the risk of conflicting with, and being sacrificed to, the primary purpose of this proceeding, as earlier discussed.[48] In regard to pre-trial discovery, there is a fundamental incompatibility between the function of the preliminary inquiry as a committal proceeding and its function as a discovery proceeding. This incompatibility is so pervasive that the full realization of both functions cannot be properly accommodated in the same procedure. Mr. Justice Martin, while still in practice, compared the preliminary inquiry to an examination for discovery:

> "It (the preliminary inquiry) affords counsel an opportunity of ascertaining the nature and the strength of the case against his client and it may be likened in that respect to an Examination for Discovery."[49]

Without reviewing again the Canadian cases on this subject,[50] this "Examination for Discovery" is too limited to be entitled to such a name. By its very nature, it is impossible for the defence to always be able to become fully informed of the evidence of the prosecution in a proceeding in which the prosecution is only obliged to disclose sufficient evidence to establish a *prima facie* case.[51]

In 1967, England tried to combine the functions of a discovery proceeding and a committal proceeding by changes to its preliminary inquiry procedure.[52] But these changes still fell short of making the preliminary inquiry a real discovery procedure. In England the traditional preliminary inquiry, held pursuant to section 7 of the *Magistrates' Courts Act*,[53] was substantially modified b ysection 2 of the *Criminal Justice Act of 1967*[54] which allowed, under certain conditions, a witness's written statement to be admissible in evidence at the inquiry to the same extent as his oral evidence. Under this new *Act* a written statement of a witness becomes admissible if:

> (a) the statement purports to be signed by the person who made it;
> (b) the statement contains a declaration by that person to the effect that it is true to the best of his knowledge and belief and that he made the statement knowing that, if it were tendered in evidence, he would be liable to prosecution if he willfully stated in it anything which he knew to be false or did not believe to be true;
> (c) before the statement is tendered in evidence, a copy of the statement is given, by or on behalf of the party proposing to tender it, to each of the other parties to the proceedings; and
> (d) one of the other parties, before the statement is tendered in evidence at the committal proceedings, objects to the statement being so tendered under this section.
>
> Also
>
> (a) if the statement is made by a person under the age of twenty-one, it must give his age;
> (b) if it is made by a person who cannot read it, it must be read to him before he signs it and must be accompanied by a declaration by the person who so read the statement to the effect that it was so read; and
> (c) if it refers to any other document as an exhibit, the copy given to any other party to the proceedings must be accompanied by a copy of that document or by such information as may be necessary in order to enable the party to whom it is given to inspect that document or a copy thereof.[55]

Section 2 of the *Criminal Justice Act of 1967*, adds that the court may still, either on its own motion or on the application of any party to the proceedings, require that a witness attend before the court and give evidence.

These procedures are, at first glance, very liberal in the matter of discovery since they seem to require disclosure to the defence of all witnesses written statements. However a deeper analysis shows that this is unfor-

tunately not the case and that these proceedings remain committal proceedings and not discovery proceedings. Following the implementation of this legislation, a number of legal practitioners objected to the loss of their right to cross-examine when written statements were admitted at preliminary inquiries. These objections were answered as follows:

> "If, on the other hand the accused, or his advisers, wish to cross-examine all the witnesses, or any particular witness, at that stage, then they can object to the statement being put in and if they do object the witness or witnesses, to whose statements objection is taken, *must* be called and give evidence on oath. In this event, they will still have the right to cross-examine the witness."[56]

But unfortunately, this is not entirely correct. If the defence objects to the offer of a witness statement in place of the witness, the prosecution is still not forced to call the witness at the preliminary inquiry. Such an objection only prevents the witness statement from being admissible at the inquiry. Thus, if the prosecution thinks it is able to establish a *prima facie* case without this witness, it can always refrain from calling him at the inquiry. In this event, the only course open to the defence is to apply to the court and, by the terms of section 2(4), ask the magistrate to exercise his discretion to call the witness.[57] Of course, if the Crown decides not to call the witness and the court does not order the witness to be called at the inquiry, the Crown may still call him at trial provided that the defence has been given notice of the substance of this evidence.

Therefore, despite first impressions, one may conclude that in England the defence cannot force the Crown to call all of its witnesses at the preliminary inquiry and there cross-examine them. In this respect, the situation remains unchanged. While it is still open for the defence to cross-examine the witnesses the Crown calls to establish a *prima facie* case against the accused, the defence cannot force the Crown to call all possible Crown witnesses and thus use the preliminary inquiry as a "discovery proceeding". This was recently confirmed by the Court of Appeal in *R. v. Epping and Harlow Justices Ex Parte Massaro*.[58] Expressing the unanimous decision of the court, Chief Justice Widgery stated:

> "Thus stated, this as a point is a very short one: what is the function of the committal proceedings for this purpose: is it as the prosecution might contend, simply a safeguard for the citizen to ensure that he cannot be made to stand his trial without a *prima facie* case being shown; or is it, as Mr. Beckman would contend, a rehearsal proceeding so that the defence may try out their cross-examination on the prosecution witnesses with a view to using the results to advantage in the Crown Court at a later stage? This matter has never been raised to be the subject of authority, and that was another reason why leave was given in the present case.
>
> For my part, I think that it is clear that the function of committal proceedings is to ensure that no one shall stand trial unless a *prima facie*

> case has been made out. The prosecution have the duty of making out a *prima facie* case, and if they wish for reasons such as the present not to call one particular witness, even though a very important witness, at the committal proceedings, that in my judgment is a matter within their discretion, and the failure to do so cannot on any basis be said to be a breach of the rule of natural justice."[59]

(Application for leave to appeal to the House of Lords, refused.)

This Court of Appeal decision, which is quite faithful to the letter and spirit of the 1967 reform, is a good illustration of the incompatibility which, in the final analysis, must exist between a committal proceeding and a discovery proceeding. The former necessarily imposes limitations on the latter, limitations which should have no place in a discovery proceeding. Indeed, if there were to be a pre-trial discovery system existing outside of the bounds of the preliminary inquiry, such as we know it, limitations would be imposed by virtue of criteria peculiar to the need for discovery, such as relevance, confidentiality, and the availability of the information sought. In civil cases, for example, it has never been the case that discovery of the opposing party is restricted to that party's *prima facie* evidence.

4. *Would the Collateral Functions Fulfilled by the Preliminary Inquiry be Better Fulfilled by a Different Proceeding?*

A procedure which, like the preliminary inquiry, aims to determine whether there is sufficient evidence to warrant an accused's trial, must, by definition, only oblige the party on whom the burden of proof rests to establish a *prima facie* case. But requiring that party to reveal all of its evidence would run the risk of making the proceeding a full dress-rehearsal, a sort of preview of the trial or a trial before the trial. Perhaps it is for this reason that the scope of the preliminary inquiry has always been limited.[60] In any event it is precisely because of this limitation that the preliminary inquiry has always been, and will always remain, unsuitable for providing pre-trial discovery. The reverse, however, may not be true, and the incompatibility discussed here is perhaps not a two-way street. Thus a discovery system could at the same time fulfil the objectives of discovery and encompass a procedure that enables the primary function of the preliminary inquiry to still be fulfilled. As we have seen, even in England, despite their recent reform of the preliminary inquiry there is still a confusion as to its function. But both those who support it and those who are against it seem to agree that pre-trial criminal procedure ought to guarantee that no one will be called to undergo a trial without the existence of *prima facie* evidence of guilt, and that those called to undergo a trial should understand, to the greatest extent possible, the nature of the charge and the evidence that must be faced. But the traditional way of approaching both objectives—which is not changed by the 1967 reform—is a proceeding the *primary function* of which is to determine if there is sufficient evidence for a trial and the *incidental effect* of which is to inform the accused of the charge brought

against him. It seems to us that this way of going about things is perhaps at the root of the criticism against this proceeding.

Taking a new approach, why not reverse these two objectives? The first objective of pre-trial procedure should be to fully inform the accused of the prosecution brought against him. Then, having achieved this objective, the second objective of allowing for a completely unsupported charge to be dismissed and for an accused to be consequently discharged, can then be achieved. If an accused is fully informed before the trial, and preferably, even before plea, as to the nature of the Crown's evidence against him, he might then make an application to the court to be discharged on the basis of an absence of *prima facie* evidence. On such an application the court would be able to examine all the information disclosed by the prosecution to the defence and could base its decision on this disclosed information. In this way, the committal purpose of the preliminary inquiry would still be carried out, but with the advantage that it would be confined to those cases where the question of committal is really at issue. As well, such a motion procedure would have the advantage of being available in all criminal cases, and not just in those cases where a preliminary inquiry is presently held.

As to the basis for an accused being discharged before trial, arguably it need not be the same as that which presently applies at a preliminary inquiry[61] that is, a determination of an absence of *prima facie* guilt. Instead, perhaps it would be enough if the judge hearing the motion could discharge the accused, if on any issue essential to proof of guilt, no evidence exists. In cases where the evidence may appear to be only insufficient, as opposed to absent, rather than being discharged the defence could be given a preferred trial date. However, the exact basis for a discharge on such a motion need not be determined as here the discussion is focused on a general outline of a pre-trial procedure that would allow both the discovery and committal review objectives to be achieved.[62]

The other ancillary purposes of the preliminary inquiry, referred to earlier,[63] could also be accommodated in a new discovery procedure. For example, committing a witness to a definitive version of the facts,[64] if not satisfactorily achieved simply by an informal interview and the recording of a statement, could be met, as part of a discovery system, by a formal deposition procedure with the court ordering the witness to attend and be examined. This is not to say that there ought to be this additional power. But it is to say that if there is a need for his power, it can be properly achieved as part of a discovery system.

5. *Two Possible Ways of Integrating a Pre-Trial Discovery Proceeding Into The Present System*

There are two possible approaches that can be taken in setting up a discovery system:

(a) Retention of the Preliminary Inquiry

Uniformity: extension of the preliminary inquiry to cover all offences

We have already discussed the limited nature of the preliminary inquiry as an instrument for discovery and concluded that it is fundamentally unsound to think of it as a discovery proceeding that could be extended to apply in all cases. As well, on a purely administrative level, to make the preliminary inquiry available for all offences, including indictable offences presently under the absolute jurisdiction of magistrates and summary convictions offences,[65] would require massive increases in courts and personnel and it is quite unrealistic to think that this would be done. Thus, if a uniform discovery proceeding applicable to all offences ought to be established, it must be much more expeditious than the existing preliminary inquiry.

Non-uniformity: improvement of the preliminary inquiry and setting up a different proceeding for the cases where the preliminary inquiry is not available

If the preliminary inquiry were to be retained for offences triable by a judge alone or by a judge and jury, and a separate procedure were established for other cases, the preliminary inquiry would still have to be modified in order to make it effective to accomplish discovery. The law would have to recognize the preliminary inquiry's discovery function, and the prosecution would have to be obliged to present all of its evidence at the preliminary hearing. But, in doing so, the preliminary inquiry would indeed become a trial before the trial, although some of the means of proof could be modified such as allowing written statements to be introduced.[66] But then, to even consider this approach is to raise the question as to whether the objectives of both discovery and committal could be less cumbersomely achieved.

(*b*) *Abolition of the Preliminary Inquiry*[67]

The second approach, and in our view the soundest approach, would be to set up a distinct discovery procedure and to abolish the preliminary inquiry as it now exists. In doing so uniform procedures could be established providing for discovery to all accused persons, and leading, as earlier discussed, to a motion review of an accused's committal for trial. Later in this paper some of the discovery models, either proposed or in effect in other jurisdictions, by which uniform discovery may be achieved will be examined and their possible application in Canada considered.[68]

The abolition of the preliminary inquiry and its replacement by a uniform discovery system could lead to other quite wide-ranging procedural reform. In particular, such a change could not come about without bringing into question our system of offence classification and the jurisdiction of courts in criminal matters. If the preliminary inquiry were to be abolished, what distinction would remain between trials before a magistrate and trials before a judge without a jury? What criteria would be used in calling upon the accused to choose between these two types of trials? The present distinction between these competing jurisdictions, which already seems devoid of any

real significance, would lose all procedural meaning as well and would become a mere constitutional fiction.

While these additional problems raised by the abolition of the preliminary inquiry may not be so pressing as to require immediate solution, we should at least be aware of them and consider the adjustments that may have to be made as a result of the establishment of a formal discovery system. Moreover, it is our view that, in the long run, these problems can only be completely avoided by shying away from a formal discovery procedure and by continuing to rely on prosecutorial discretion for providing discovery—which is simply to maintain the *status quo*. But then, as argued in this paper, the value of discovery to the accused in criminal cases is too important a matter to be left to discretionary treatment, nor should collateral problems concerning the jurisdiction of criminal courts and the present technicalities as to elections for trial stand in its way.

NOTES

1. See *infra*, Part 5.
2. See report on questionnaire survey to be published shortly.
3. For a review of the different discretionary powers conferred on the prosecution in criminal matters, see Grosman, *The Prosecutor, An Inquiry Into the Exercize of Discretion (1969)*, Chapters 3 and 4.
   While Professor Grosman's study provided some empirical data on this question, our analysis of the questionnaires mentioned in the introduction to this study ought to allow us to go more deeply into these problems.
4. [1955], S.C.R. 16.
5. *Ibid.*, at p. 21.
6. *Ibid.*, at pp. 23-4 (emphasis added).
7. K. Turner, "The Role of Crown Counsel in Canadian Prosecutions", (1962), 40 Can. Bar Review 439.
8. *Ibid.*, at p. 452.
9. See *supra* footnote 4.
10. [1936], 3 All E.R. 36.
11. *The Duties and Obligations of the Police and the Crown*, quote taken from the report of Mr. Justice Roger Brossard, acting as Commissioner to inquire into the *Coffin* case, (1965), 25 R. du B. 637, at p. 641.
12. *Ibid.*, at p. 642.
13. R. Traynor, "Ground Lost and Found in Criminal Discovery in England", (1969), 39 N.Y.U.L. Rev. 749, at p. 759. See also H. Shapray, "The Prosecutor as a Minister of Justice: A Critical Appraisal" (1969), 15 McGill L. J. 124 at p. 140.
14. See the opposing view of Turner, *supra*, footnote 7 at p. 458, where he maintains that: ". . . it is still essential that that man be deemed innocent until proven guilty. And so long as this is the case, it remains essential that counsel for the prosecution shall continue to act as a minister of justice, and not as an advocate in an adversary proceeding".
15. For an outline of these "inequalities of treatment" see the information presented by Grosman, *supra*, footnote 3, at pp. 75-76.
16. See analysis of Canadian law on this question, *supra* Part 1, at pp.
17. Incidentally, there is no reported example of an "oblique motive" ever having justified the reversal of a Crown prosecutor's decision not to call a witness.
18. H. Shapray, *supra*, footnote 13.
19. *Ibid.*, at p. 131.
20. Honourable Robert F. Kane, "Criminal Discovery, The Circuitous Road to a Two-Way Street", (1973), 7 U. of S.F.L. Rev. 203 at p. 214.
21. See Part 2, footnote 22.
22. See quotation of Mr. Justice Kane, *supra*, footnote 20 at p. 137.
23. (1961) 49 Calif. L. Rev. 56.
24. *Ibid.*, at p. 98.
25. See description of foreign "models" *infra*, Part 6.
26. *Criminal Code* section 463, *R. v. Weiss and Williams*, (1913), 21 C.C.C. 438; *R. v. Mooney*, (1905), 11 C.C.C. 333; *R. v. Ostrove*, [1968], 1 C.C.C. 117.

27. Stephen, *A History of the Criminal Law of England,* (1883) I, at p. 217; Holdsworth, *A History of English Law,* Vol. I, at p. 529. For a general view of the question see also: Halyk, "The Preliminary Inquiry in Canada", (1967-68), 10 Crim. L.Q. 181.
28. *Statute de Officio Coronatoris,* (4 Edw. I, st. 2, A.D. 1276), cited by Stephen, *supra,* footnote 27, Vol. I, at p. 217.
29. Stephen, *supra,* footnote 27 at p. 219.
30. 1 and 2 Phil. and Mary, C. 13 (1554)—Stephen, *supra,* footnote 27 at p. 219.
31. *Ibid.,* at pp. 237-238.
32. 2 and 3 Phil. and Mary, C. 10 (1555).
33. Holdsworth, *supra,* footnote 27, Vol. I, at p. 259.
34. 6 and 7 Will. 4 C. 114, s. 4.
35. *Indictable Offences Act,* 1848, 11 and 12 Vict. C. 42.
36. Stephen, *supra,* footnote 27 at p. 220.
37. *Ibid.,* at p. 233.
38. See Martin's *Criminal Code* (1955) at p. 752: "This comes from the former ss. 682, 683 and 684(1). These were ss. 590 and 591 in the Code of 1892, which modified R.S.C. 1886, C. 174, ss. 69, 70 and 71. The Code provisions were taken from ss. 454 and 455 in the E.D.C. (English Draft Code (1878), which were based upon 11 and 12 Vict., C. 42, ss. 18 and 21, and 14 & 15 Vict., C. 93 s. 14".
39. 1970 S.C.R. 409.
40. *Ibid.,* at p. 412.
41. See Dominion Bureau of Statistics, *Statistics of Criminal and Other Offences, 1968,* (1971) at p. 14 and p. 122, for statistics on indictable offences.
    In 1968 (the last year for which full statistics for all provinces are available) out of 49,963 persons convicted for indictable offences, excluding those convicted under the terms of federal laws in the province of Quebec:
    —826 were tried by a judge and jury
    —2,490 were tried by a judge without a jury
    —26,680 were tried by a magistrate, after election
    —19,967 were tried by a magistrate exercising his absolute jurisdiction.
    A total of 46,647 cases were thus tried by a magistrate i.e. 93% of the total.
42. Then, if all summary conviction cases are added to this total, it is no longer 93% but at least 95% of all criminal cases that are heard by a magistrate without a preliminary inquiry.
    What is more, in 1965, in the judicial district of Montreal, a preliminary inquiry was held in about 7.2% of all criminal cases; see *Prévost Report,* Vol. II at p. 181.
43. There are unfortunately no Canadian statistics available on the number of discharges at the preliminary inquiry. We can however consider certain foreign statistics:
    Israel:
    Between 1956 and 1962, in those cases where a preliminary inquiry was held, only one percent of the accused were released: (*The Israeli Criminal Procedure Law,* introd. by Prof. U. Yadin, London, (1967), introduction at p. 8).
    England:
    "The position is summarized by the Tucker Committee in the proposition that only between 3 and 4 percent of offenders are discharged by the examining magistrate; the rest are committed for trial": (Glanville Williams, "Proposals to Expedite Criminal Trials", 1959 Crim. L. Rev. 82 at p. 83).
44. Glanville Williams, *supra,* footnote 43 at pp. 84-5.
45. Section 476 of the *Criminal Code,* introduced by an amendment in 1968-69, provides that at any stage of the preliminary inquiry an accused may be committed directly for trial, without any evidence being taken at a preliminary inquiry.
46. *R. v. Court,* (1947), 88 C.C.C. 27: "A preliminary inquiry serves a number of purposes: (a) to further the investigation of a charge; (b) to secure the presence of an accused person; or of a prosecutor or witness; (c) to perpetuate evidence; (d) to form a basis for statutory indictment under s. 872, or for a speedy trial under Part XVIII".

See also Halyk, "The Preliminary Inquiry in Canada", *supra*, footnote 30 at p. 186; Martin, G. A., "Preliminary Hearings", Special Lectures of the Law Society of Upper Canada, Evidence, (1955), I; Glanville Williams, *supra*, footnote 43 at pp. 85-86.

47. Halyk, *supra*, footnote 27 at p. 186.
48. *Patterson v. R., supra*, footnote 39.
49. Martin, G. A., *supra*, footnote 46 at p. I.
50. See *supra*, Part 1.
51. This incompatibility is well illustrated by the following quotation from a lecture given by Harry Walsh, entitled *"Discovery in the Criminal Process, Effective Use of the Preliminary Inquiry"*, published in Studies in Criminal Law and Procedure, Seminar of the Canadian Bar Association, Montreal, August, 1972, at p. 193:

    > "In the process, of course, of eliciting all the information possible at the preliminary inquiry, defence counsel runs the risk of losing the possibility of having the accused discharged at the preliminary inquiry because he is filling in the gaps that have been left in the case by Crown counsel. But if there is to be a choice between filling in the gaps and obtaining full disclosure, then I suggest to you that the latter course is the one that you should adopt, because a discharge at a preliminary inquiry does not preclude a charge being laid against the accused, perhaps a slightly different charge, at some time in the future".

52. For a more detailed analysis of the English system, see *infra*, Part 6.
53. 15 & 16 Geo. 6 & 1 Eliz. 2 c. 55.
54. 1967, c. 80.
55. See Criminal Justice Act 1967, sections 9(2) and 9(3).
56. Mark Carlisle, "Committal Proceedings in English Criminal Law", (1967) 10 Crim. L.Q. 147, at p. 153. (Emphasis added).
57. David Napley, *A Guide to Law and Practice Under the Criminal Justice Act, (1967)*, (1967).
58. [1973], 2 W.L.R. 158.
59. *Ibid.*, at pp. 159-60.
60. Discussing the preliminary inquiry as amended by *Jervis' Act* in 1848, Stephen said: 'The inquiry before the magistrates is now essentially judicial. It may indeed admit of a doubt whether it is not too judicial, and whether it does not tend to become a separate trial"; Stephen, *supra*, footnote 27 at p. 229; the same concern was expressed by the Supreme Court: "It (the preliminary inquiry) is not a trial and should not be allowed to become a trial": *Patterson v. R., supra*, footnote 39 at p. 412.
61. *Ex Parte Reid*, (1954), 110 C.C.C. 260; *R. v. Plouffe and Warren* (1958), 122 C.C.C. 291; *R. v. Latta*, (1961), 36 W.W.R. 699; R. Salhany, *Canadian Criminal Procedure*, (1968) at p. 65: "...the magistrate should put himself in the position of the trial judge. Thus if he is of the opinion that the evidence is such as would justify him, as trial judge, in withdrawing the case from a jury, he ought to discharge the accused. On the other hand, if he would submit the matter to a jury, then he should commit the accused".
62. See *infra*, Part 7.
63. *Supra* at pp. 129-30.
64. *Ibid.*
65. It will be remembered that these offences represent nearly 95% of criminal cases; see footnotes 41 and 42.
66. This amendment to the inquiry was introduced in England in 1967: see *supra*; see also more detailed description of "The British Model", *infra*, Part 6.
67. For a general discussion of this question, see: Mueller and Le Poole Griffiths, *Comparative Criminal Procedure*, (1969), at p. 69: "The Movement to Abolish Preliminary Hearings".
68. See, *infra*, Part 6.

PART IV

SANCTIONS

Another extremely important question in establishing a discovery system concerns the sanctions to be applied to make sure that discovery will occur. Without sanctions there is the risk that formal discovery rules and procedures will be ignored. On the other hand, the creation of drastic sanctions, such as an offence for failure to provide discovery, would seem to go beyond the boundaries of pure procedure and by adding to the number of criminal offences would tend to bring the justification for this sanction into question.

Therefore, at this point, perhaps it would be useful to discuss the range of possible sanctions, their merits and demerits, and how they might be applied in enforcing discovery rules and procedures.

SANCTIONS RELATED TO SUBSTANTIVE LAW

Earlier it was noted that contempt of court is the sanction provided in section 533(2) of the *Criminal Code* where there is a failure by anyone to comply with the terms of a court order for the release of an exhibit for testing or examination.[1] But, in a discovery system, this sanction would be applicable only for cases where the right to receive discovery of certain evidence is dependent upon a judicial order and, in our view, this would be too limiting. As well it would seem to be too extreme or heavy-handed to enforce discovery rules by contempt citations.

While it would indeed be very easy to establish various contempt offences for the failure to disclose certain information, or for the late disclosure of information that ought to have been disclosed earlier, or finally for the disclosure of false or misleading information, nevertheless, in our view this type of sanction is inappropriate for two reasons. First, not only is this sanction severe, but it is somewhat off target because it does not directly force the discovery of the desired information. Second, it is fundamentally wrong to create new offences in order to enforce procedural rules which are themselves solely designed for the proper prosecution of other offences. In

short, in designing procedural solutions one should try to avoid increasing the number or range of criminal occurrences.

It is also our view that this same approach applies to the possible use of disciplinary measures against a lawyer who fails to conform to the rules and procedures of discovery. A disciplinary decision would amount to the creation of another kind of offence and, for the reasons expressed above, this approach should be avoided in establishing a discovery system.

SANCTIONS RELATED TO THE RULES OF EVIDENCE

1. *Judicial Comment*

This type of sanction stems from the authority that could be given to the trial court to comment on the failure of a party to disclose certain information to the opposing party. The comment could relate to the credibility of a witness, or to the weight of evidence not earlier disclosed, and could emphasize the inability of the opposing party, at such late stage, to refute or weaken the impact of such prejudicial evidence.[2]

However, this sanction also has a limited application. It occurs both too late in the process and is too mild to achieve the purpose of the system —which is pre-trial, and even, pre-plea discovery. In some cases, if the defence had known of the prosecution evidence beforehand, guilty pleas might have been entered.

2. *Inadmissibility of Evidence*

The inadmissibility at trial of evidence not revealed to the opposing party is, in our view, one of the most effective sanctions in that it forces the disclosure of essential information if the prosecution intends to call it as evidence, and it prevents any prejudice to the defence by the introduction of surprise evidence at trial. This is the sanction applied in the Israeli discovery model,[3] without distinction as to what information is essential or non-essential. It is also the sanction that, in England for example, can be applied when the defence fails to disclose an alibi.

This sanction takes the form of an evidence rule of exclusion and thus seems to go beyond purely procedural considerations. Our legal system still generally recognizes the admissibility at trial of illegally obtained evidence, which is a position that is contrary to the exclusionary rule in the United States. But without going into the merits of the Canadian position on the admissibility of illegally obtained evidence, it should be emphasized that there is no contradiction in the co-existence of these two rules. A rule of inadmissibility of evidence not disclosed pursuant to discovery procedures and rules makes no judgment as to the nature of the evidence or the manner in which it has been obtained; indeed the evidence may have been illegally obtained. Exclusion or admission at trial pursuant to this rule, as a discovery sanction, would be determined simply by whether or not, if known, the evidence has been disclosed to the defence according to the discovery system.

As such it is only a sanction to enforce discovery and should not be confused with the existing Canadian position on the general admissibility of illegally obtained evidence—a position which, if it is to be re-examined, involves different questions about the manner in which prosecution evidence is obtained and the enforcement of rules of fair conduct against police officers.

This discovery sanction should also not be confused with rules of inadmissibility that apply only to the form of the evidence offered at trial as opposed to the evidence itself. For example, as we have seen, in a number of instances the prosecution is prevented from adducing certificate evidence if a notice is not given to the accused.[4] But these rules do not prevent proof of the fact in issue by other relevant evidence. They are simply rules which, if complied with, relieve the prosecution of some of the rigours imposed by the common law rules of evidence. A sanction of inadmissibility to enforce discovery to the defence would work in much the same way but the focus would not be on the form of the evidence disclosed, but simply on whether or not it was disclosed.

Finally, while a sanction of inadmissibility would seem appropriate to enforce the pre-trial disclosure of evidence the prosecution will advance at trial, it can hardly be effective to enforce the disclosure of other evidence or information which will not be so presented but which may be of assistance to the defence. Thus, to enforce the pre-trial disclosure of this evidence, some other sanction or sanctions must be found.

PROCEDURAL SANCTIONS

There is a third and final category of sanctions that will be considered which are solely within the domain of procedure.

1. *Adjournment of the Trial*

The first sanction that comes to mind here is recourse to an adjournment at trial to allow the party who has failed to disclose evidence to comply.[5] While the word "sanction" may seem inappropriate here, the defaulting party may well be affected by the prospect of an adjournment being ordered because of his failure to comply with the discovery rules and procedures. However, there is the danger that too many adjournments will cause unnecessary delay, and an adjournment of a trial in a jury case poses considerable practical problems. Finally this "sanction" is really only realistic to the degree that the defaulting party intends to comply and produce the previously non-disclosed evidence. Nevertheless, while not ignoring these drawbacks to the adjournment sanction, it should be used because in many instances it will be the only way in which all interests concerned, that of the accused, and that of the state, in having prosecutions continued to conclusion, can be accommodated. Moreover, perhaps the cases where an adjournment would be used could be minimized by establishing quite specific rules and procedures in the discovery system that would provide discovery of the prosecution case.

2. *Prerogative Writs: Mandamus*

No existing sanction could more directly force a party to comply with the rules and procedures of discovery than *mandamus*. But perhaps a softer measure would suffice just as well and be more readily available as part of the discovery system itself. In addition to the technicality attendant upon a *mandamus* application, it is a remedy that is only available from a judge of a superior court and therefore would not be a practical remedy in many regions.

However this reference to *mandamus* introduces the right context for considering sanctions for compelling discovery. It suggests that a specific pre-trial procedure should be found to quickly settle all discovery issues and that sanctions should be part and parcel of the discovery procedures themselves, applicable at the pre-trial stage and not left to the trial.

DISCRETION OF THE TRIAL JUDGE

One other approach that might be followed would be to leave the question of the appropriate sanction to enforce discovery to the trial judge to apply as he feels appropriate in each case. Of course one ought to be cautious and try to avoid the reposing of wide discretionary power, recognizing that without guidelines and reasonably certain criteria discretionary justice can become arbitrary injustice.

But this is not to say that there should not be some discretion in the choice of sanctions to enforce discovery because cases and circumstances differ. The conduct of Mr. Justice Byrne in the famous Daniel Ellsberg case, is an excellent example of the wise exercise of discretion in the application of discovery rules where the prosecution fails to disclose certain information which might be favourable to the defence. In the Ellsberg case, Mr. Justice Byrne, sitting with a jury, adjourned the case several times before finally, in the exercise of his discretion, dismissing the charges brought against the accused—being the ultimate sanction available against the prosecution.[6]

NOTES

1. See *supra*, Part 1, at p. 14.
2. See, for example, the present state of Canadian Law on the disclosure of alibi before the trial, *infra*, Part 1, at pp. 25-28.
3. See discussion of the "Israeli Model", *infra*, Part 6.
4. See *supra*, Part 1.
5. This is also the "sanction" provided for in the only true discovery provision in our criminal law: section 532 *Criminal Code* (treason), see *infra*, Part 1 at p. 14.
6. See a brief report of these events, in the New York Times, April 26, 1973, at pp. 1 and 7.

PART V

ISSUES AS TO PROSECUTORIAL DISCOVERY

In this part the right of the prosecution to obtain pre-trial discovery will be considered. The focus of this analysis is upon the question of whether the law ought to compel the defence to disclose information to the prosecution in advance in order to enable the prosecution to prepare for or rebut defences and defence testimony expected to be presented at trial.

THE ARGUMENTS BOTH FOR AND AGAINST PROSECUTORIAL DISCOVERY OF THE ACCUSED

The arguments in favour of prosecutorial discovery have only recently been advanced, mainly in response to the general trend towards expansion of discovery for the defence.[1] The concept of the desirability of a "two-way street" approach to discovery in criminal cases is, in one respect, merely a variation of the "balance of advantage" argument that has already been critically analyzed in Part 2 of the study.[2] However, instead of the argument being advanced to prevent expansion of discovery to the defence, it has been presented to support the position that if discovery to the defence is to be expanded, this "advantage" ought to be balanced by providing a similar "advantage" of discovery to the prosecution. For example it has been stated that:

> "... a one-sided grant of discovery is 'unfair' to the state, ... it overburdens a prosecutor confronted as he is with the privilege against self-incrimination and the requirement of proof beyond a reasonable doubt".[3]

On a more practical level it has been stated:

> "Most prosecutors are opposed to a plan by which they would be required to divulge their evidence while receiving no procedural or evidentiary benefits in return".[4]

And Glanville Williams has observed that:

> "It is felt that the scales are already so tipped in favour of the defendant that any further reform should not be conceived merely in his own interest".[5]

It has also been argued that the recognition in civil cases that the adversary system works best if discovery is reciprocal and if each party is as fully prepared as possible to counter the evidence and arguments of the other, should apply in the criminal process which also operates in an adversary setting. In keeping with this view it has been said that:

> "If the same freedom of access to information is not available to the prosecution, to know the details of the defendant's case, to pin down the defendant and his witnesses, to 'freeze' their testimony, have we sought the benefits of discovery without the protective aspects of its use in civil litigation?"[6]

Supporters of prosecutorial discovery have also asserted that such discovery would not interfere with or impair the procedural rights and protections otherwise available to the accused. In the leading California case of *Jones vs. Superior Court,*[7] Chief Justice Traynor upheld, (for the first time in the United States) a trial court's use of its inherent power to grant a prosecution motion for discovery of the defence. He stated in discussing his decision:

> "Since the defendant could not be compelled to testify or produce private documents in his possession, we recognized that ordinarily the prosecution could not require him to reveal his knowledge of the existence of possible witnesses and the existence of reports and X-rays for the purpose of preparing its case against him. Did it therefore follow that the defendant could not be required to reveal in advance the witnesses he intended to call at the trial and the evidence he intended to introduce? A number of states by statute require a defendant specifically to plead certain defences such as insanity or alibi and to reveal in advance of trial the names of the witnesses who will be called in support of such defences. These statutes have been sustained over the objection that they violate constitutional privileges against self-incrimination, for they do not compel the defendant to reveal or produce anything, but merely regulate the procedure by which he presents his case. We found this reasoning persuasive. The trial court's order that the defendant reveal the names of witnesses he intended to call and produce reports and X-rays he intended to introduce in evidence simply required him to disclose information that he would shortly reveal in any event. He was thus required only to decide at a point earlier in time than he would ordinarily have to whether to remain silent or to disclose the information. He lost only the possible tactical advantage of taking the prosecution by surprise at the trial, an advantage that in any event would easily have gone for naught given the probability that the trial court would have granted the prosecution a continuance to prepare a rebuttal. We therefore concluded that in this regard the order did not violate the defendant's privilege against self-incrimination or the due process requirements of a fair trial and held that the prosecution could discover such information before trial."[8]

Finally, supporters of prosecutorial discovery supplement their arguments by suggesting that a number of benefits for the operation of the

criminal process would result. First, it has been argued that prosecutorial discovery would improve the trustworthiness of the fact finding process by eliminating the use of surprise as a trial tactic and by deterring fabrication of defences and presentation of perjured testimony.

> "Permitting the defendant to withhold every element of his case until after the state has rested its case-in-chief may prevent the prosecutor from adequately preparing cross-examination and gathering rebuttal evidence. Accordingly, convictions may be more difficult to obtain in cases where the prosecutor could have adequately impeached or rebutted the defendant's allegations if only he had been given advance warning.
>
> In addition, a prosecutor's knowledge, prior to trial, of a defendant's tangible evidence and of the identity of his witnesses would make it less likely that that accused would offer false evidence or perjured testimony, a result which would improve the trustworthiness of the fact finding process and decrease the chance that guilty men will go free. With advance notice the prosecutor could more easily obtain impeaching evidence to forestall any attempt by the accused to fabricate a defence. Moreover, by interviewing defence witnesses prior to trial the prosecutor might discourage any inclinations they had toward perjuring themselves."[8]

Second, and related to this anticipated benefit, it is further suggested as an advantage that unnecessary litigation would be avoided if each side could obtain in advance as thorough a knowledge as possible of the true strength of the opponent's case. This result has already been suggested in this paper as a benefit of discovery to the defence.[10] It has been argued that prosecutorial discovery might contribute to a similar result by "giving the prosecution an opportunity to omit a piece of evidence which is clearly mistaken."[11]

Furthermore it has been argued that prosecutorial discovery would generally assist in making the criminal process more efficient.

> "Another prosecution interest in pre-trial discovery is the streamlining of the criminal process. Pre-trial disclosure is less costly than disclosure after a continuance since the trial is not disrupted. As the increasing load of criminal trials has already caused a backlog in the courts, granting a continuance would only worsen the situation. An innocent defendant, unable to raise bail, might be forced to remain in confinement until trial. Granting pre-trial discovery eliminates the need for a continuance".[12]

Finally, it has been suggested that prosecutorial discovery would discourage defence counsel from acting unethically. Advice is given to defence counsel, for example, that it is safe to expose the defence of alibi at committal proceedings only when:

> ". . . the alibi is so strong that the police investigation which will undoubtedly follow its disclosure will merely be additional proof of its truth. Seldom is an alibi sufficiently strong to allow this risk to be taken".[13]

This advice could be interpreted to mean that an alibi should not be exposed if it is possible that investigation will likely establish that it is false. But if this interpretation is correct, the comments of Glanville Williams would seem to apply. He wrote that:

> "A lawyer who deliberately keeps back till the last moment a defence of alibi, suspecting that it is manufactured and wishing to prevent the deception being exposed makes himself from the moral point of view a party to the lie."[14]

Presumably, therefore, prosecutorial discovery would make it impossible for defence counsel to succumb to this type of temptation and would consequently improve the ethical standards of the defence bar.

On the other hand, proposals and arguments in favour of prosecutorial discovery have met with considerable criticism. For example, the invalidity of the "balance of advantage" argument in determining appropriate rules of criminal procedure has already been discussed.[15] With respect to this argument as a basis for prosecutorial discovery it has been stated that:

> "All arguments concerning the need to balance the rights of the prosecution against those of the defendant seem out of place as more akin to the "sporting theory of justice" than to our present emphasis upon the presumption of innocence. Just as it should not be an argument against the extension of discovery rights to the defendant that it might cause an imbalance between the prosecution and the defendant, so too it should not be an argument that granting such rights to the defendant requires a reciprocal grant to the prosecution."[16]

The argument that prosecutorial discovery is necessary to redress a supposed "unfairness" to the state created by defence discovery has been similarly criticized:

> "Frequently if not usually in the criminal case it is now the state which is highly favoured in the discovery of evidence, as where the police seize the defendant and possibly others for questioning. We may for our present purposes assume that questioning is conducted without coercion, but we certainly would not countenance the circumstances surrounding the usual type of police questioning if done as part of any pending civil litigation. . . .
>
> . . . In any event, whether the chances to win the lawsuit are one-sided or evenly balanced is immaterial. Criminal prosecution is not designed to determine the better of two contestants."[17]

In response to the argument that prosecutorial discovery is necessary for the effective functioning of the criminal process in its adversary setting, it has been pointed out that the functions and obligations of the adversaries in civil and criminal cases are quite different. The prosecution in criminal cases ordinarily formulates in advance a definite trial plan designed to meet a burden of proof which is much more onerous than the plaintiff's burden in a civil case. The burden on the prosecution in criminal cases imposes on

it a duty to use its own investigative resources to predict and prepare to meet all matters of significance that may be advanced to establish a defence or the existence of a reasonable doubt. In responding to this burden, it may be the case that the prosecution is, in most cases, able to adequately predict and prepare for such matters through its own efforts,[18] but if it is not, it has been argued that encouraging more effective use to be made of the state's enormous investigatory ability so as to reduce to a minimum the number of cases in which the prosecution is genuinely surprised is more in keeping with the underlying philosophy of the criminal process than compelling the accused to assist the prosecution to prepare its case against him.

As well, the burden upon the prosecution places the accused in a position quite different than the defendant in a civil case.

> "... (T)he burden is on the prosecution to prove the defendant guilty and that burden is never properly shifted to the defendant to show his innocence. With such an underlying policy, the question of whether and to what extent the defendant must anticipate the prosecution's evidence and disclose his defence raises practical as well as constitutional problems. In the situation where a person is charged with a crime on the basis of dubious evidence, it is difficult to know whether he should show as an alibi that he was committing another crime elsewhere, or that he was engaged in an activity which is in violation of his parole, while not itself illegal. He may hope that the evidence which the prosecution presents will be insufficient to prove a *prima facie* case or be so weak that a jury would not convict him in spite of his silence. A pre-trial discovery rule or statute based on the 'advance notice' theory would in fact force him to either incriminate himself or expose himself to other sanction, possibly needlessly. The uncertainty is not confined to the example given. The defendant may, for other reasons beside surprise, wish to withhold evidence which may not be needed for his defence.
>
> It is no practical solution to say that if the defendant were entitled to disclosure by the prosecution that he would know what he must present to establish reasonable doubt. This would depend upon immeasurable elements of judgment, such as the impact of testimony and other evidence at the trial. It would also depend on how successful cross-examination may be in casting doubt on the testimony of the witness for the prosecution and no attorney can clearly anticipate this.
>
> Further, defence witnesses are often impeachment witnesses. Whether they are called to testify largely depends upon the testimony of the witnesses for the prosecution. Questions are certain to arise as to whether the defence should have anticipated the testimony by the prosecution witnesses."[19]

It has also been argued that prosecutorial discovery conflicts with long established and fundamental procedural protections that ought to be maintained in the criminal process. In answer to the argument that prosecutorial

discovery does not compel the accused to disclose incriminating material, it has been contended that:

> "Advocates of prosecutorial discovery might further argue that because the defendant would only have to identify evidence or witnesses he intended to use at trial, it is unlikely that the items discovered would be incriminating. In the case of witnesses, however, the prosecutor would have been directed to a source of a variety of information concerning the defendant, some of which might be incriminating. For example, a defendant might be aware of a witness who could identify him as a killer but who would testify that the defendant acted in self-defence. The defendant would be likely to call such a witness only if the prosecutor could show, at trial, that the defendant was the killer. But by being forced to identify him prior to trial in order to preserve the ability to call him at trial, the defendant would be supplying the prosecutor with incriminating information. Even in cases where the defendant was not consciously making such a trade-off between the incriminating and exculpatory information possessed by a witness, he could never be sure how the witness' version of the events would come out under questioning by the prosecutor. Like the testimony of potential witnesses, a document or piece of tangible evidence might also tend to incriminate the defendant on one element of a crime while tending to exonerate him from another. Or it might be incriminating or exculpatory concerning a single element of a crime depending on the proof of other facts. For example, the effect of a document placing a defendant in a certain location at a certain time might depend upon the resolution of conflicting theories of when the crime was committed. In each of these cases the defendant might introduce the evidence or call the witness at trial should the need arise, but the information could nevertheless be incriminating. Finally, even if evidence or anticipated witness testimony were altogether exculpatory, it might nonetheless provide leads to incriminating information. Of course, not every discovered witness or piece of evidence would incriminate the accused; but since there would be no way to determine this until other issues were resolved at trial or until the full extent of a witness' knowledge was known, a prophylactic rule denying all such discovery is required.
>
> Conceivably, the incriminating effect of discovered items could be eliminated by restrictions on the use to which discovered information could be put. A rule might provide, for example, that discovered information be used only to impeach or rebut evidence offered by the defendant and preclude substantive use in the state's case-in-chief. Two problems cast doubt on the wisdom of such use restriction. First, the approach would have to rely too heavily upon the effectiveness of instructions which directed the jury to consider evidence only for a certain purpose. Second, the defendant's difficulty in ascertaining the extent to which substantive evidence was in fact the fruit of discovery would make any use restriction too hollow a safeguard."[20]

Disagreement has also been expressed with the argument that prosecutorial discovery does not cause coercion or compulsion of the accused because

its only effect is to accelerate the timing of disclosure which would otherwise be made at trial. In response it has been argued:

> "Of course, there is some similarity between defendant's pre-trial and at trial choices: in each case the defendant must weigh his critical need to produce exculpatory evidence against the risks of revealing incriminating information. But because of the prosecutor's heavy burden of proof, the defendant is best advised not to open up any source of potentially adverse information unless he feels that the state has in all likelihood proved its case; and it is only after the prosecution has presented its evidence in court that the defendant can adequately make this judgment. By contrast, there is no way the defendant can know before trial the actual strength of the evidence against him as it will appear to the trier of fact even if he has himself benefited from extensive discovery... The at trial choice to present evidence is far less speculative. Because the choice to refuse discovery and waive a defence is potentially so much riskier before trial, the element of coercion to disclose seems far greater."[21]

These statements reflect an even more basic concern that prosecutorial discovery would be an indirect method of effecting fundamental change to the nature of the criminal process because its effect would be to compel persons accused of crime to assist the state in prosecuting them and to diminish the prosecutor's burden of proof in criminal cases. In this light, it has been argued that attempts to justify prosecutorial discovery as a measure designed to protect accused persons from unjustified prosecution must be viewed with skepticism,[22] and that the real effect of prosecutorial discovery upon the criminal process, as just outlined, should be recognized. These concerns were best expressed by Mr. Justice Black of the United States Supreme Court when he wrote:

> "It seems to me at least slightly incredible to suggest that this procedure may have some beneficial effects for defendants. There is no need to encourage defendants to take actions they think will help them. The fear of conviction and the substantial cost or inconvenience resulting from criminal prosecutions are more than sufficient incentives to make defendants want to help themselves. If a defendant thinks that making disclosure of an alibi before trial is in his best interests, he will obviously do so. And the only time the State needs the compulsion provided by this procedure is when the defendant has decided that such disclosure is likely to hurt his case.
>
> It is no answer to this argument to suggest that the Fifth Amendment as so interpreted would give the defendant an unfair element of surprise, turning a trial into a 'poker game' or 'sporting contest', for that tactical advantage to the defendant is inherent in the type of trial required by our Bill of Rights. The Framers were well aware of the awesome investigative and prosecutorial powers of government and it was in order to limit those powers that they spelled out in detail in the Constitution the procedure to be followed in criminal trials. A defendant, they said, is entitled to notice of the charges against him, trial by jury, the right to

> counsel for his defence, the right to confront and cross-examine witnesses, the right to call witnesses in his own behalf, and the right not to be a witness against himself. All of these rights are designed to shield the defendant against state power. None are designed to make convictions easier and taken together they clearly indicate that in our system the entire burden of proving criminal activity rests on the State. The defendant, under our Constitution, need not do anything at all to defend himself, and certainly he cannot be required to help convict himself. Rather he has an absolute, unqualified right to compel the State to investigate its own case, find its own witnesses, prove its own facts, and convince the jury through its own resources. Throughout the process the defendant has a fundamental right to remain silent, in effect challenging the State at every point to: 'Prove it'!"[23]

It may be further argued that prosecutorial discovery would be inappropriate because it is impossible to devise appropriate sanctions for the purpose of enforcing it without infringing upon the basic right of the accused to make full answer and defence at trial, and because alternatives are available which, if implemented properly, would satisfy the interests of the prosecution without infringing upon other important values protected in the criminal process.

The "preclusion sanction" is the sanction most often advocated to enforce prosecutorial discovery; that is, defence evidence not disclosed to the prosecution before trial would be inadmissible. This is the sanction used in the English and most of the American "notice of alibi" statutes. Proponents of this sanction argue that it does not involve a restriction upon the right of the accused to make full answer and defence at trial. The accused would still retain full freedom of choice but would merely have to make the choice at an earlier stage. Further, they argue that the rationale of the sanction is not that an innocent accused should be punished by being prevented from defending himself if he fails to make pre-trial disclosure, but rather that failure to disclose evidence prior to trial makes such evidence presumptively untrustworthy and for this reason not properly admissible at trial.

However, in answer to this position it is argued that a preclusion sanction would improperly add to pressure upon the accused to make possibly damaging disclosures of information or evidence that he could never be certain he would have to use at trial, in order to avoid the risk of being forbidden at trial from presenting evidence on material issues. In addition, because there may be legitimate reasons for non-disclosure prior to trial, other than desire to surprise the prosecution, where the choice of non-disclosure is made because of a judgment that the evidence will not be necessary, a preclusion sanction would in fact restrict the right to make full answer and defence at trial if it turns out that this judgment was wrong.

Furthermore, the second argument that non-disclosure makes evidence presumptively untrustworthy, has never been applied to prosecution evidence. And the argument for not applying such a standard with respect to defence evidence is even more compelling because of the respective functions and

burdens of the prosecution and the defence in our criminal process. Thus, it has been stated that:

> "Although there may be a rational connection between intentional non-disclosure and falsity, the correlation hardly approaches a degree of predictability sufficient to justify the imposition of an irrebuttable presumption that prevents a defendant from introducing material evidence in his defence. In short, preclusion is merely another a priori classification of presumptive untrustworthiness which would seem to violate the defendant's right to present a defence".[24]

Finally, it has been argued that the sanction of inadmissibility creates the opportunity for conviction of innocent persons because of the commission of an entirely separate wrong, failing to comply with pre-trial discovery, and that the legal encouragement of such a possible result is unacceptable.[25]

A number of other sanctions and the difficulties in applying them for the purpose of achieving discovery without creating undesirable side effects are set out and discussed in Part 4.

The difficulty in devising an appropriate sanction to enforce prosecutorial discovery compels serious consideration to be given to finding some alternative approach that may be used to achieve the same purpose within the operation of the present criminal process. In this regard it has been argued that a full recognition of the right of the prosecution to obtain an adjournment when confronted with surprise evidence would satisfy the prosecution interest in being able to effectively deal with this situation without creating a fundamental change in the nature of the criminal process.[26] This is the approach adopted in Israel,[27] and also in Oklahoma, where adjournment is the sole remedy when, at trial, the defence calls surprise evidence of alibi.[28]

The certainty of obtaining an adjournment if surprise evidence should be used would in itself go a long way to discourage the use of such evidence. The party considering calling surprise evidence would know that the trier of fact would likely react strongly against its demonstrated use, particularly when inconvenienced by an adjournment, and even more so where the surprise evidence is subsequently rebutted. Such an adverse reaction would be compounded if the trier of fact were then informed of the reason for the adjournment. While delay in the criminal process is generally undesirable, it could be argued that the benefit of a single, limited adjournment at trial to enable the prosecution to investigate surprise evidence should be viewed differently from delay caused by unnecessary adjournments in bringing the case on to trial in the first place. If the latter kind of delay could be effectively overcome, as it should be, the granting of an adjournment at trial to meet surprise evidence should not unduly overburden the courts or significantly impair the administration of justice.

Finally, it is argued that an adjournment procedure at trial should be viewed in its practical context. An accused person acting in his own best interests would rarely deliberately withhold evidence for the purpose of surprising the prosecution at trial where there is a clear policy of the courts of

allowing the prosecution an adjournment to investigate and rebut that surprise evidence. In such circumstances the anticipated benefits of surprise would nearly always be outweighed by the anticipated disadvantages, such as an adverse reaction of the trier of fact. Thus, such a policy would keep a strong pressure on the defence to refrain from the use of surprise evidence and the interests of the prosecution would still be satisfied. At the same time the essential characteristics and safeguards of the present criminal process would be preserved.

In addition to the doctrinal arguments against prosecutorial discovery, it has been argued that two important disadvantages for the operation of the criminal process would result from such discovery. First, it has been argued that prosecutorial discovery would likely interfere with the solicitor-client relationship: the argument is that:

> "This is engendered by the increased likelihood that information revealed to counsel by the defendant may then be revealed to the prosecution: Defendants may come to regard counsel as a possible conduit to the prosecution and be reluctant to reveal information to them".[29]

Thus since complete candour in communication between a counsel and his client is essential, the rules of procedure should not be structured so as to directly or indirectly inhibit this relationship.

Second, it has been argued that prosecutorial discovery would increase the number of unwarranted prosecutions:

> "...(I)f a prosecutor could obtain information from the defendant there would be an increased likelihood that he would engage in exploratory prosecutions.... if convictions could legitimately be based upon information extracted from the defendant, the prosecutor would have an incentive to initiate proceedings on the chance that the suspect would supply sufficient information or leads to secure a conviction. Such a reduction in the state's predicate for initiating a prosecution seems undesirable, for even if the defendant is not incarcerated while awaiting trial, he must re-channel a portion of his time and resources to the task of preparing a defence. In addition to the actual disruption of his life, an accused is likely to suffer anxiety and encounter a loss of esteem in the community simply because of the accusation. Exploratory prosecutions impose this burden on a greater percentage of innocent individuals than do other prosecutions, in which verdicts are far more predictable when the criminal process is initiated.
>
> The danger of exploratory prosecutions is mitigated, but not eliminated, in two ways. First, the requirement that no prosecution can proceed to the discovery stage without a showing of probable cause would offer some protection against exploratory prosecutions. However, since a prosecutor can obtain an indictment with substantially less evidence than is required to obtain a conviction, there would be a group of cases where, without compelled information from the defendant, the prosecutor could easily proceed with a prosecution but could not hope for a conviction. In these cases the incentive for exploratory prosecutions would still

persist. Second, the danger of prosecutors engaging in fishing expeditions based upon pre-trial discovery might not be great given the heavy workload of most prosecutors. The danger would be more appreciable, however, in particular cases of great public interest. Furthermore, the protection against exploratory prosecutions afforded by the fact that prosecutors might have insufficient time lacks the permanence of the protection provided by eliminating the incentive for such exploration."[30]

NOTICE OF ALIBI AND EXPERT EVIDENCE

Supporters of prosecutorial discovery of the accused sometimes take the position that even if such discovery is generally incompatible with the present nature of the criminal process, the practical interest of the state in obtaining it in the specific areas of alibi and expert evidence is so great that any possible infringement of other values inherent in the process is outweighed. Thus, in regard to expert evidence, it is argued that the prosecutor has as great an interest as the defence in having ample opportunity to investigate and to rebut at trial any kind of expert evidence. Furthermore, in many cases adequate rebuttal of complex or technical scientific evidence is possible only if the prosecution is able to instruct its own experts to consider anticipated defence expert evidence. It is also suggested that preparation of prosecution experts and preparation for cross-examination of defence experts is essential and may be achieved in many cases only if there is advance access to the theories, conclusions, and reasoning processes of the experts to be presented by the defence.[31] Moreover advance notice of such defence evidence is considered necessary in the interests of administrative efficiency and effective court scheduling.[32] Then, as to alibi, a concern has been expressed that if prosecutorial discovery is not available, a manufactured defence may succeed because the prosecution is deprived of a reasonable opportunity to test it.[33] The danger of perjury is seen to be greatest with an alibi defence which, it is claimed, "is easily fabricated and relatively difficult to contradict".[34] For these reasons, the defence of alibi is stated to be another special issue that justifies prosecutorial discovery of the accused. Finally, advocates of such discovery have pointed to the relatively recent enactment of notice of alibi and insanity statutes in the United States and England as evidence of the recognition that these matters deserve special treatment, and have suggested further that enactment of such legislation in Canada would not amount to a radical change but would merely codify already existing practice in most cases.[35]

However, on the other hand, it may be argued that pressure for special treatment for these issues is misconceived and based upon a number of invalid or unsupported assumptions. First, there is no obvious basis for the assertion that alibi or insanity evidence is more susceptible to fabrication than other evidence that the defence may wish to present. All defences may be adduced by means of perjury if the witness is so inclined but the present law makes perjury a criminal offence with severe penalties. The strict enforce-

ment of the laws against perjury would seem to be more likely to effectively deter perjury than prosecutorial discovery which is not intended for this purpose. Second, recognition should be given to the fact that in practice an accused person who is aware of persuasive exculpatory evidence will likely volunteer that information to the prosecution. In turn, this fact suggests that the cases in which surprise evidence is used with a realistic hope of success must be exceedingly rare.[36] Seen in this context, rather than there being a pressing need for discovery of alibi and expert evidence, the case for their treatment as special or pressing is quite weak and the need for a law compelling the accused to make such disclosure in every case is exaggerated. This view is supported by the observation of Glanville Williams who wrote:

> "One must not exaggerate the frequency of defences of alibi, or the frequency with which they succeed. In fact the defence is comparatively rare and when raised it usually fails. It is regarded with distrust by the courts, for the simple reason that those who speak to it are generally friends or relatives of the accused. The price of this attitude is that a genuine alibi coming from biased persons is occasionally rejected because it fails to provide a convincing answer to evidence of identification which is in fact mistaken".[37]

Third, the arguments in principle against prosecutorial discovery of the accused have already been stated. If these are accepted it seems reasonable to take the position that the only basis for creating any specific exception would be where it is clearly demonstrated that the absence of prosecutorial discovery creates or would create a serious injustice that cannot be avoided by use of an alternative approach, for example, an adjournment, that is less likely to infringe upon the essential safeguards of our present criminal process. As one commentator has observed:

> "To the extent that efforts to make criminal discovery a "two-way street" erode the right of a defendant to require the state to prove every element of a crime without the defendant's assistance . . . they should be met with stiff resistance".[38]

In conclusion, a reasoned response to proposals for specific prosecutorial discovery legislation is found in a recent comment upon an Israeli proposal to enact a notice of alibi statute based on the new English statute:

> "What distinguishes the alibi defence from all other defences, so as to call for an exceptional rule? The accused will be free, in the future as today, to reserve till the end of the case for the prosecution, defences such as necessity, drunkenness, consent of the victim, a legal right to perform the act. He may even open his case with the allegation. 'I was at the place as a mere onlooker and A, B and C saw me all the time'. But if he intends to say 'I stood behind a fence', or 'I was 10 metres away—too far to participate', then he must announce it before the opening of the case for the prosecution. What is the logic of this arrangement? Sec. 11 of the English Act is a piece of *ad hoc* legislation, enacted without regard to any allied problems and to the general order of criminal procedure . . .

> ... the effect of the pragmatic approach to the isolated question of alibi is to threaten one of the basic rules of ... criminal procedure—i.e., that the case for the defence should be opened only after the completion of the case for the prosecution, not for the purpose of secrecy or surprise, but because the accused must see the case against himself, before he is in a position to answer it—and what is the defence of alibi if not part, or even the essence, of the answer to the charge?
>
> True, the separation of the cases for the prosecution and for the defence is no sacred principle—a continental lawyer may consider it a stiff, pedantic and formalistic rule, and if we were dissatisfied with it, we might well build our criminal procedure on another basis. But there is a world of difference between discarding a system and enacting an isolated provision incompatible with a principle praised by all admirers of English law.
>
> Nor is this mere theory of legislation. ... the accused has to answer ... the case as presented after hearing the prosecution evidence and not before it. For in court a witness may give a description of time and place which is more accurate, more vague, or altogether different from that noted by the police. The charge itself may be changed from theft to receiving, so that the alibi for the place of theft becomes useless. As long as such alterations are possible—is it just, is it logical to elicit from the accused an allegation of alibi which may hamper him in his defence against amended allegation of the prosecution? Here the practical importance of the afore-mentioned principle becomes apparent: as long as the factual allegations against the accused have not become unalterable by the closure of the case for the prosecution, the defence is still in a stage of internal preparation and must be fluid, to meet changes in the evidence brought against the accused; there can be no 'alibi' before the 'ibi' is definitely fixed."[39]

THE PRESENT STATE OF PROSECUTORIAL DISCOVERY IN SOME OTHER JURISDICTIONS

In Canada, prosecutorial discovery of the accused in criminal cases, in the sense of disclosure forced by a sanction of inadmissibility, does not exist. The longest step in this direction is the judicially developed requirement of early disclosure of alibi evidence. But the enforcement of such disclosure stops short of inadmissibility and is content with judicial comment as to the credibility of the alibi when not disclosed at an earlier time.[40]

In England legislation has been enacted requiring notice to be given of alibi evidence. The legislation[41] goes all the way in requiring a notice of the intention to raise the defence of abili and details of the intended alibi evidence, and inadmissibility of the non-disclosed evidence and even of the alibi testimony of the accused himself is the sanction.

In Israel, on the other hand, the concept of prosecutorial discovery was rejected in their new code of Criminal Procedure. The reasons for this approach are examined in Part 6.[42] However, there has been recent pressure

to enact a notice of alibi statute based on the English model even though in England, prior to enactment of their notice of alibi legislation, there appeared to be no attempts to consider its compatibility with the general principles of English criminal procedure.[43]

In the United States, notice of alibi legislation has been enacted in sixteen states.[44] Fourteen states have also enacted legislation requiring notice of insanity and of the intention to raise the special pleas.[45] The American Bar Association Standards go further in suggesting that legislation should provide for prosecutorial discovery of physical or mental examinations, scientific tests, experiments or comparisons, other expert reports or statements which defence counsel intend to use at a hearing or trial, the nature of any defence intended to be used at trial, the names and addresses of persons whom defence counsel intend to call as witnesses in support, and even of some matters that are normally considered to be part of pre-charge police investigation.[46] In California, where the courts have taken the initiative in the development of both defence and prosecutorial discovery, numerous attempts to enact a notice of alibi statute have failed.[47]

In California prosecutorial discovery has been a recent product of judicial creativity where some attempt has been made to relate the issue to the general principles of the criminal process. In *Jones v. Superior Court*[48] the California Supreme Court first expressed the view that discovery should be a "two-way street". The majority[49] took the position that the purpose of criminal discovery was to "ascertain the truth" and the accused had no valid interest in denying to the prosecution access to "evidence that can throw light on issues in the case".[50] The majority also took the position that an order by a trial judge for an accused to provide discovery to the prosecution was not an infringement of the accused's privilege against self-incrimination because it only required the accused to disclose information that would shortly be revealed in any event. Thus in *Jones* it was held permissible for a trial judge to order the defence to comply with prosecutorial discovery because this would enable the prosecution to perform its function more effectively. The only limits on prosecutorial discovery there recognized were legal privileges such as the sollicitor-client privilege.

The dissenting judgments in *Jones*[51] stressed the right of an accused to remain silent until a *prima facie* case was presented against him, and argued that the majority had confused the privilege of a witness not to answer incriminating questions with the right of the accused not to testify. The dissenting judgments also argued that trial judges would find it impossible to administer a requirement that discovery be limited to information supporting an affirmative defence, since it was impossible to determine in advance what matters would relate only to affirmative defences and what matters could aid in establishing a "prima facie" case. Finally, it was argued that the system should not require an accused to take an active part in the ascertainment of the facts and that the right of the accused to remain silent while the State attempted to meet its burden was absolute.

While the "two-way street" theory was upheld and developed in a number of cases,[52] the case of *Prudhomme v. Superior Court*[53] ultimately narrowed and qualified the impact of *Jones*. In the *Prudhomme* case the California Supreme Court held that prosecutorial discovery demands must be directed only to evidence the accused intends to introduce at trial, and further that it must appear that disclosure of the information demanded could not possibly incriminate the accused. The Court held that if evidence is possibly incriminating, the accused is entitled to wait to the last moment before deciding whether or not to introduce it at trial. The Cour reasoned:

> "A reasonable demand for factual information which, as in *Jones* pertains to a particular defence or defences, and seeks only that information which defendant intends to introduce at trial, may present no substantial hazards of self-incrimination and therefore justify the trial judge in determining that under the facts and circumstances in the case before him it clearly appears that disclosure cannot possibly tend to incriminate the defendant. However, unless these criteria are met, discovery shall be refused."[54]

While the court did not clearly define what information might prove to incriminate a defendant within the meaning of this test, it seems that, by the *Prudhomme* test, disclosure will be denied if it might conceivably lighten the prosecution's burden of proving its own case in chief. In practical terms, the result may be a complete reversal of the *Jones* reception of prosecutorial discovery, because it is difficult to see how any significant prosecutorial discovery can be determined in advance and not raise a danger of incriminating the accused.

Shortly after the decision in *Prudhomme,* the United States Supreme Court in the case of *Williams v. Florida*[55] held that the fifth amendment[56] was not violated by a Florida statute requiring that notice of an alibi be provided to the prosecution at least 10 days before trial, including in the notice: the intention to assert an alibi, the place at which the accused claims to have been at the time of the alleged offence, and the names and addresses of witnesses intended to be called to support the alibi defence. For the majority, the important provision in the Florida statute, leading them to uphold it as not violating the right of the accused, was the requirement that within 5 days after receiving the accused's alibi information as required by the statute, the prosecution must then provide to the accused the names and addresses of any rebuttal witnesses that bear on the alibi defence. The statute also provided that the trial court could exclude evidence offered by the accused to prove an alibi if the accused refused to comply with the notice requirements.

While the majority in *Williams v. Florida* conceded, for the sake of argument, that the disclosures were testimonial and of an incriminating nature, they took the position that there was no compulsion upon the accused to

furnish the state with information useful in convicting him. In the words of Mr. Justice White, speaking for the majority:

> "Nothing in such a rule requires the defendant to rely on an alibi or prevents him from abandoning the defence; these matters are left to his unfettered choice. That choice must be made, but the pressures that bear on his pre-trial decision are of the same nature as those that would induce him to call alibi witnesses at the trial: the force of historical fact beyond both his and the State's control and the strength of the State's case built on these facts. Response to that kind of pressure by offering evidence or testimony is not compelled self-incrimination transgressing the Fifth and Fourteenth Amendments.
>
> . . . At most, the rule only compelled petitioner to accelerate the timing of his disclosure, forcing him to divulge at an earlier date information that the petitioner from the beginning planned to divulge at trial."[57]

Chief Justice Burger, concurring,[58] saw alibi notice rules as a possible means of disposing of cases without trial as a result of the exposure through discovery of their strengths or weaknesses.

However, in what he characterized as his "most emphatic disagreement and dissent", Mr. Justice Black[59] (joined by Mr. Justice Douglas) expressed concern about the encroachment upon the defendant's Fifth Amendment guarantees and attacked the "acceleration-of-timing" rationale of the majority. Justice Black argued that the decision to plead an alibi in advance of trial was a far different one from that at trial, since before trial the defendant only knows what the state's case might be. Few defence counsel would be prepared to risk not pleading alibi before trial if by doing so they would lose the opportunity to do so at trial. Yet by doing so they might well be giving the prosecution names of persons who have knowledge of the defendant and his activities which could develop into new leads and incriminating evidence which the State otherwise would not have discovered. Justice Black argued that the coercive nature of the pre-trial dilemma which is forced upon a defendant under such a statute is in no way lessened by the fact that at trial the defendant is not compelled to actually present the alibi evidence previously disclosed.

Subsequently, in the case of *Wardius v. Oregon*[60], a notice of alibi statute which did not on its face provide for reciprocal discovery but prevented the accused from introducing any evidence to support an alibi defence as a sanction for failure to comply with the notice rule, was held by the Supreme Court to be unconstitutional. In the unanimous judgment of the court, the requirements of "due process" forbade enforcement of alibi notice rules unless the accused was guaranteed an opportunity to discover the state's rebuttal witnesses before trial. Justice Marshall, speaking for the court stated:

> "The State may not insist that trials be run as a 'search for truth' so far as defence witnesses are concerned while maintaining a 'poker game secrecy' for its own witnesses. It is fundamentally unfair to require a

> defendant to divulge the details of his own case while at the same time subjecting him to the hazard of surprise concerning refutation of the very pieces of evidence which he disclosed to the State."[61]

Justice Douglas, concurring in the result (along with Chief Justice Burger who wrote a separate opinion), also reiterated his fundamental opposition to any concept of prosecutorial discovery:

> ". . . the State would see no need for the rule unless it believed that such notice would ease its burden of proving its case or increase the efficiency of its presentation. In either case the defendant has been compelled to aid the state in his prosecution."[62]

Thus, the same courts that pioneered in the development of prosecutorial discovery have now seen fit to carefully limit the scope and context of its operation. In addition, the Supreme Court, in both of the cases discussed above, has expressly refrained from deciding whether a valid notice of alibi rule may be enforced by excluding at trial the undisclosed testimony of the accused or of supporting witnesses.[63]

CONCLUSION TO PART V

From this discussion there are three important questions that should be answered in considering whether or not prosecutorial discovery ought to be introduced in Canada on a formal basis.

(1) Are the interests of the State in obtaining compulsory discovery of the accused so important or pressing as to outweigh the interests protected by a denial of such discovery, for example where there is a substantial danger of self-incrimination as a result of compliance with a discovery rule or order, or where the effective application of prosecutorial discovery must involve restriction on the right of the accused to make full answer and defence?

(2) If the interests in avoiding the possibility of compelled pre-trial self-incrimination and in preserving the right of the accused to make full answer and defence at trial are considered paramount to the interest of the state in pre-trial discovery of the accused, should the state's interests nevertheless be accommodated by permitting such discovery when confined to those cases where the safeguards considered essential to the operation of the criminal process are least infringed? Examples that might be considered here are: (a) defence of alibi; (b) presentation of expert evidence and (c) presentation of character witnesses. Or is the distinction in this compromise valid?

(3) Are there alternatives to enforced prosecutorial discovery of the accused which would preserve the interest of the prosecution in being able to effectively deal with surprise evidence without creating the danger of infringing other fundamental values of the criminal process?

NOTES

1. See Glanville Williams, "Advance Notice of the Defence", 1959 Crim. L. Rev. 548; Comment, "The Self-Incrimination Privilege: Barrier to Criminal Discovery?" (1963), 51 Cal. L. Rev. 135; Roger J. Traynor, "Ground Lost and Found in Criminal Discovery" (1967), 39 N.Y.U.L. Rev. 228; D. Louisell, "Criminal Discovery and Self-Incrimination: Roger Traynor Confronts the Dilemma" (1967), 53 Cal. L. Rev. 80; M. Wilder, "Prosecution Discovery and the Privilege Against Self-Incrimination" (1967), 6 Am. Crim. L.Q. 3; Note, "Prosecutorial Discovery Under Proposed Rule 16" (1972), 85 Harvard. L. Rev. 994; Note, "The Preclusion Sanction—A Violation of the Constitutional Right to Present a Defence" (1972), 81 Yale L. J. 1342; Hon. R. Kane, "Criminal Discovery—The Circuitous Road to a Two-Way Street" (1973), 7 U. of S.F. L. Rev. 217; S. Dyer, "Prosecutorial Discovery: How far may the Prosecution Go?" (1973), 7 U. of S.F. L. Rev. 261.
2. See Part 2 at pp. 42-45.
3. R. Fletcher, "Pre-Trial Discovery in State Criminal Cases" (1960), 12 Stan. L. Rev. 293, at p. 312.
4. J. Norton, "Discovery in the Criminal Process" (1970), 61 J.C.L.C. & P.S. 11, at p. 17.
5. Williams, *supra* footnote 1 at p. 548.
6. Fletcher, *supra* footnote 3 at p. 312.
7. (1962) 58 Cal. 2d 56; 372 p. 2d 919.
8. Traynor, *supra* footnote 1 at pp. 247-8. For a more detailed discussion of prosecutorial discovery and its relationship to the privilege against self-incrimination see the articles by Wilder, Louisell and Dyer, *supra* footnote 1 and the cases before the California Supreme Court, including *Jones v. Superior Court, supra* footnote 7 and *Prudhomme v. Superior Court* (1970), 2 Cal. 3d 320, 80, Cal. Rptr. 129, and before the Supreme Court of the United States including *Williams v. Florida* (1969), 399 U.S. 78 and *Wardius v. Oregon* (1973), 93 S.Ct. 2208. These cases are discussed *infra* at pp. 179-186.
9. See Note, "Prosecutorial Discovery Under Proposed Rule 16", *supra* footnote 1 at p. 998.
10. *Supra* Part 2 at pp. 52-53.
11. Williams, *supra* footnote 1 at p. 549.
12. Note, "Prosecutorial Discovery: How Far May the Prosecution Go?" *Supra* footnote 1 at p. 279.
13. B. Fraser Harrison, "Advocacy at Petty Sessions" 1955 Crim. L. Rev. 153, at p. 156.
14. Williams, *supra* footnote 1, at p. 551.
15. *Supra,* Part 2 at pp. 42-45.
16. Wilder, *supra* footnote 1 at p. 19.
17. Fletcher, *supra* footnote 3 at pp. 312-13.
18. This was the subject of inquiry in the Discovery Questionnaire mailed to prosecutors, Part VI, Q. 1.
19. Norton, *supra* footnote 4 at p. 18.
20. *Supra* footnote 9 at pp. 1004-5.
21. *Ibid.,* at pp. 1007-8.

22. See Note, "The Preclusion Sanction" *supra* footnote 1 at p. 1355.

23. *Williams v. Florida*, *supra* footnote 8, at pp. 111-12.

24. Note, "The Preclusion Sanction—A Violation of the Constitutional Right to Present a Defence", *supra* footnote 1 at p. 1351.

25. M. Shalgi, "Criminal Discovery in Israel", (1966) 4 Am. Crim. L.Q. 155, 159.

26. See Note, "Prosecutorial Discovery Under Proposed Rule 16", *supra*, footnote 1, at p. 1010; Note, "Prosecutorial Discovery: How Far May the Prosecution Go?", *supra* footnote 1, at p. 278.

27. Shalgi, *supra* footnote 24 at p. 159.

28. *Okla. Stat. Ann.*; Tit. 22 S. 585.

> "Whenever testimony to establish an alibi on behalf of the defendant shall be offered in evidence in any criminal case .... and notice of the intention of the defendant to claim such alibi, which notice shall include specific information as to the place at which the defendant claims to have been at the time of the alleged offence, shall not have been served upon the county attorney at or before five (5) days prior to trial of the case, upon motion of the county attorney, the court may grant a postponement for such time as it may deem necessary to make an investigation of the facts in relation to such evidence."

29. G. Lapides, "Cross-Currents in Prosecutorial Discovery: A Defence Counsel's Viewpoint" (1973), 7 U. of S.F. L. Rev. 217 at p. 232.

30. Note, "Prosecutorial Discovery Under Proposed Rule 16", *supra* footnote 1, at pp. 999-1000.

31. See Law Reform Commission of Canada Study Paper on Evidence, Number 7, "Opinion and Expert Evidence" July 1973, at pp. 34-6.

32. The contrary opinion is expressed in Note, "The Preclusion Sanction", *supra* footnote 1, at p. 1355.

33. Williams, *supra* footnote 1, at p. 549.

34. Dyer, *supra* footnote 1, at p. 279.

35. See Evidence Paper, *supra* footnote 31 at p. 35; see also Williams, *supra*, footnote 1, at p. 553, referring to the rarity of the prosecution being taken by surprise at trial by the presentation of insanity defences, even where the defence fails to directly disclose its intentions prior to trial.
Section 7 of the *Canada Evidence Act* probably also effectively eliminates the possibility of prosecution surprise at trial as to the intention of the defence to present great numbers of expert witnesses, by requiring that leave of the court must be obtained before more than five expert witnesses may be called by either party.

36. Note, "The Preclusion Sanction—A Violation of the Constitutional Right to Present a Defence", *supra* footnote 1, at p. 1355.

37. Williams, *supra* footnote 1, at p. 549. Williams proceeded to advocate an advance notice statute while conceding that this would probably not make such practical difference to the administration of justice. *Ibid.*

38. Lapides, *supra* footnote 29 at pp. 230-31.

39. E. Livneh, Comment, "The Criminal Procedure (Amendment No. 2) Bill" (1971), 8 Is. L. Rev. 275, at pp. 284-5.

40. See Part I at pp. 25-28.

41. See Part I at pp. 25-28.

42. See *infra* at pp. 224-5.

43. See Livneh, *supra* footnote 39 at p. 284.

44. See Fla. Rule Crim. Proc. 1.200; Ariz. Rule Crim. Proc. 192B (1956); Ind. Ann. Stat. ₰9-1631 to 9-1633 (1956); Iowa Code ₰9-1633 (1956); Iowa Code ₰777.18, (1966), Kan. Stat. Ann. ₰62-1341 (1964); Mich. Comp. Laws ₰768.20, 768.21 (1948); Minn. Stat. ₰630.14 (1967); N.J. Rule 3:5-9 (1958); N.Y. Code Crim. Proc. ₰295-L (1958); Ohio Rev. Code. Ann. ₰2945.58 (1954); Okla. Stat., Tit. 22, ₰23-37-5, 23-37-6 (1967); Utah Code Ann. ₰77-22-17 (1953); Vt. Stat. Ann.,

Tit. 13 ¶6561, 6562 (1959); Wis. Stat. ¶955.07 (1961), see generally, Wigmore, *Evidence* ¶1855B (3rd ed. 1940).

45. See eg., Arizona R. Crim. P. 192(a)(1956); Kan. Stat. Ann. ¶22-2319 (Supp. 1971); Mich. Comp. Laws Ann. ¶768.20, 768.21 (1968); Cal. Penal Code ¶1016 (West 1970); Fla. Stat. Ann. ¶909.17 (1944); see also Mont. Rev. Codes Ann. ¶95-1803(d) (1967) for an example of a Statute requiring advance notice of the intention to rely on the defence of self-defence.

46. American Bar Association Standards on Discovery and Procedure Before Trial, (approved draft, 1970), Sections 3.1, 3.2, 3.3. Section 3.1 allows a judicial officer to require the accused to appear in a lineup, be fingerprinted, pose for photographs not involving re-enactment of a scene, try on articles of clothing, permit the taking of specimens of material under his fingernails, permit the taking of samples of his blood, hair and other materials of his body which involve no unreasonable intrusion thereof, provide specimens of his handwriting; and submit to a reasonable physical and medical inspection of his body. The commentary to this Standard, at pp. 94-5, states:

> "Practically speaking, it is likely that, in most cases, this sort of discovery will have been accomplished prior to formal charging, if for no other reason than the fact that delay will defeat its purpose. But, from time to time the need arises when, for example, the original fingerprint has been smudged or a new witness to the occurrence has been found; and it would be far more appropriate to recognize the power of the court to direct that the defendant appear, than to have the prosecution resort to subterfuge under inadequate conditions in order to accomplish its valid objectives."

47. "But there is not only merely the absence of a relevant statute in California. There has been a definite rejection of notice-of-alibi legislation. A rather elaborate statutory plan was recommended by the California Law Revision Commission and considered by the Legislature in 1961, but was rejected (3 Cal. Law Revision Com. Rep. Rec & Studies [1961] pp. J-5 at J-21; Assem. Bill 464, 1961 Reg. Sess.). Earlier bills had been introduced in 1959 (Sen. Bills 530 and 531, 1959 Reg. Sess.), and as far back as 1926 the subject had been broached to the Legislature (Cal. Bar Ass'n Proc. 248 [1925-1926]; 1931 Cal. Crime Com. Rep. at p. 10.). Opposition of the State Bar to the 1961 Law Revision Commission proposal was based not on doubts as to the constitutionality of the proffered statute (doubts which might be dissolved presently under the *Williams* case), but on the ground that 'it would cause the harassment and intimidation of alibi witnesses by public officers'."

    Report of the Commission on Criminal Law and Procedure, [1961] 36 State Bar J. 487.

48. *Supra,* footnote 7.

49. Judgment of Traynor, C.J.

50. *Supra* footnote 7 at 59.

51. Of Peters J. and Dooling J.

52. *People v. Lopez,* (1963) 60 Cal., 2d 223, 32 Cal. Rptr. 424; cert. denied, (1965) 375 U.S. 994 (granting of prosecution motion to discover names and addresses of intended alibi witness and their written statements did not involve a denial of the right to a fair trial); *People v. Houser,* (1965) 238 Cal. App. 2d 930, 48 Cal. Rptr. 300 (order to produce copy of the report of a defence psychiatrist, held to be within the *Jones* rule); *People v. Dugas,* (1966) 242 Cal. App. 2d 244, 51 Cal. Rptr. 478 (discovery order, made when accused had not yet indicated he would attempt to establish an affirmative defence, upheld); *People v. Pike* (1969) 71 Cal. 2d 595, 78 Cal. Rptr. 673 (discovery of expected testimony of defence witness upheld).

53. (1970), 2 Cal. 3d 320, 85 Cal. Rptr. 129.

54. *Ibid.,* Cal. Rptr. at p. 134.

55. *Supra,* footnote 8.

56. "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled, in any criminal case, to be witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation".

57. *Supra* footnote 8 at pp. 84-5.

58. *Ibid.*, at pp. 105-6.

59. *Ibid.* at pp. 106-116.

60. *Supra* footnote 8.

61. *Ibid.*, at pp. 2212-13.

62. *Ibid.*, at pp. 2214-15.

63. *Williams v. Florida, supra,* footnote 6:

> "We emphasize that this case does not involve the question of the validity of the threatened sanction, had petitioner chosen not to comply with the notice-of-alibi rule. Whether and to what extent a State can enforce discovery rules against a defendant who fails to comply, by excluding relevant, probative evidence is a question raising Sixth Amendment issues which we have no occasion to explore. . . . It is enough that no such penalty was exacted here". White J. at p. 83, note 14.

Wardius v. Oregon, supra footnote 8:

> "Petitioner also argues that even if Oregon's notice of alibi rule were valid it could not be enforced by excluding either his own testimony or the testimony of supporting witnesses at trial. But in light of our holding that Oregon's rule is facially invalid, we express no view as to whether a valid rule could be so enforced".
> Marshall J. at p. 2211, note 4.

PART VI

PROCEDURAL MODELS FOR REFORM OF PRE-TRIAL DISCOVERY IN CRIMINAL CASES

The purpose of this Part is to describe the approaches and experiments of other jurisdictions in reforming pre-trial and discovery procedures in criminal cases. The models selected appear to have some features that at least theoretically might be applied in the reform of Canadian procedure. Presumably these models were designed to meet the particular needs and to solve the specific problems of the jurisdictions in which they apply. This should be kept in mind in evaluating the applicability of each model in Canada. None of these models is advocated as being ideally suited, in itself, for application in Canada; nevertheless, none should be automatically rejected merely because they are used in other jurisdictions. Rather, it is hoped that they will be examined constructively, that they will expand our appreciation of the wide range of options that are available in considering reform of Canadian procedure, and that the best features of each model will be considered in determining that reform which would be most appropriate in Canada.

While the needs and problems of the jurisdictions attempting major reform of discovery in criminal cases may not in all respects be similar to those in Canada, it is still important to recognize that the legal systems of these jurisdictions, at least prior to the implementation of reform, have had many significant features common to those in Canada. To this extent, therefore, the reforms implemented in these jurisdictions are not academic. They have been designed to apply in legal systems which, as in Canada, accept the common law and the adversary system, apply a presumption of innocence in criminal cases, and place the burden of proof of guilt in criminal cases upon the prosecution. Also, in these legal systems, as in Canada, before the introduction of reform discovery in criminal cases was mainly carried out informally within the discretion of prosecutors, comprehensive discovery was available in civil but not in criminal cases, and there was increasing recognition and development of legal aid and the right to counsel in criminal cases.

THE OMNIBUS HEARING

1. *Description*

This procedure has been introduced as an experiment in Federal criminal cases in parts of Texas and California.[1] It is also the procedure recommended for implementing the standards of the American Bar Association on "Discovery and Procedure Before Trial".[2]

The Omnibus Hearing is more than merely a discovery procedure. While it does provide broader and more comprehensive discovery for both the prosecution and the defence than obtains in any other jurisdiction in the United States,[3] it is also a mechanism for achieving regularity in the exposure and treatment of issues in criminal cases. It is a simple, judicially supervised procedure designed to facilitate full exploration of questions usually raised by pre-trial motions, and the resolution before trial of issues of a collateral nature that are normally raised at trial. The procedure involves a routine court exploration of pre-trial issues most commonly raised by the accused using a check list to ensure as far as possible that none remain unexposed. It also requires that these issues be raised and considered as far as possible without the preparation and filing of formal documentation, and that they be waived if not asserted at the hearing. This recognizes the fact that it is the same issues, or some of them, that demand attention before trial in most cases, and that many issues are sufficiently typical to be capable of objective presentation and disposition in each case.

The use of a check list serves to suggest to defence counsel the various procedures and tools that are available to them in preparing for trial and advances the view that in criminal cases confrontation of the various pre-trial issues should be procedurally designed into the system rather than left entirely to the perceptiveness and ingenuity of counsel. In this way the systematic treatment of issues is provided for automatically and informally,[4] both at the informal conference and, where necessary, at the Omnibus Hearing itself.

The Omnibus Hearing is a judicial proceeding that takes place between the first appearance of the accused in court and his arraignment at trial. In its experimental phase participation is strictly voluntary and the process applies only if both the prosecution and the defence consent. It operates in three basic stages; (1) An exploratory stage, involving the interaction of prosecution and defence counsel without court intervention; (2) The Omnibus Hearing stage, supervised by the trial court and entailing court appearances as necessary; and (3) A trial planning stage, entailing pre-trial conferences as necessary. These stages may be adapted to the needs of each particular case and may be eliminated or combined as appropriate.

In the Texas experiment[5] the mechanics of the plan are as follows. When the court clerk's office ascertains the identity of defence counsel, it sends counsel a letter containing information about the Omnibus Hearing Project, along with a notice of the date of the accused's arraignment. After

consulting with his client, defence counsel is required to advise the court and the United States Attorney in writing, within 3 days, whether or not they will participate. If the accused desires to participate it is assumed that the prosecutor will do so as well, unless he indicates to the contrary within a further 3 days. If all agree to participate a conference of counsel is held on or before 15 days from the date of the clerk's original notice for the purpose of engaging in discovery as required by the plan, entering upon plea discussions, and reviewing the check list by circling the paragraph numbers with respect to which action is requested.

At the time of the arraignment an Omnibus Hearing is set far enough in advance to allow the full 15 day period to expire. However it is not used unless either side has indicated on the action form that one or more motions are pending. If counsel conclude at their conference that no motions will be urged and that an Omnibus Hearing is not desired or necessary, no such hearing will be held unless the court otherwise directs.

The accused may plead guilty before the Omnibus Hearing or he may indicate his intention to do so at the trial. If the accused wishes to plead guilty and does not wish to raise collateral issues, an Omnibus Hearing will be brief, serving only the function of creating a record and it may be combined with the proceeding at which the plea is formally received. Or, as indicated above, it may be entirely eliminated.

The function of the hearing itself is to verify, by use of the check list filled out by the parties and provided to the judge, the exchange of information that has taken place, to supervise the speeding of the discovery process for those cases requiring it, to determine if the case should go to trial or be otherwise disposed of, and to ensure that all conceivable collateral issues are immediately exposed and dealt with. The accused is advised in open court that no admissions made by him or his counsel will be used against him unless reduced to writing and signed by him and his counsel.

If the Omnibus Hearing does take place and the case is to be contested, a trial date is set at the conclusion of the hearing, or where the trial is likely to be protracted or otherwise unusually complicated, a date is set for a pre-trial conference to consider such matters as will promote a fair and expeditious trial, including such things as the making of admissions as to facts about which there can be no dispute, marking for identification various documents and exhibits, waiving the necessity for formal proof of such documents, excising from admissible statements inadmissible material prejudicial to a co-accused, severing defendants or counts, determining seating arrangements for accused and counsel and the procedure on objections where there are multiple counsel and determining the order of evidence, argument, and cross-examination where there are multiple accused.

Prior to the Omnibus Hearing, each party fills out a check list or "Action Taken Form" indicating the information that was requested and received from the other party. The check list is provided to the judge at the hearing

and he uses it to determine whether counsel has been provided to the accused and whether the parties have completed required discovery. Then the judge determines whether any orders are necessary to expedite completion of discovery, for example, where counsel disagree as to what disclosure is required, or where the prosecution requests a "protective order" restricting the scope or timing of disclosure in order to prevent some anticipated abuse such as intimidation of witnesses. Thus the check list becomes a motion for discovery by both the prosecution and defence.

The hearing is recorded and as many matters as possible are disposed of upon the oral argument of counsel. If a sufficient record has been made the court summarily hears, considers, and decides the motions checked on the action form; but the court may reserve the right to require written motions supported by briefs. Where formal written motions or the calling of witnesses are necessary, the case hearing may be scheduled for a future date. In addition, as already indicated, provision is made for the recording of formal admissions. At the conclusion of the hearing an order is entered indicating the disclosures made, the rulings and orders of the court, the admissions of the parties, and any other matters determined or pending.

As a discovery vehicle the Omnibus Hearing ensures that the prosecution will disclose the following material or information to the defence:

(1) All evidence in possession of the prosecution favourable to the accused on the issue of guilt;

(2) All oral, written, or recorded statements made by the accused to investigating officers or to third parties that are in possession of the prosecution;

(3) The names of the prosecution witnesses and their statements;

(4) The inspection of all physical or documentary evidence in possession of the prosecution;

(5) Whether the prosecution will rely on prior acts or convictions of a similar nature for proof of knowledge or intent;

(6) Whether or not the prosecution will call expert witnesses, and if so, their names and qualifications, the subject of their testimony, and reports they have prepared;

(7) Reports or tests of physical or mental examinations that are in the control of the prosecution;

(8) Reports of scientific tests, experiments or comparisons and other reports of experts that are in control of the prosecution;

(9) Books, papers, documents, photographs, or tangible objects which the prosecution has obtained from the accused or which will be used at the hearing or trial;

(10) Information concerning prior convictions of persons whom the prosecution intends to call as witnesses at trial;

(11) Whether the prosecution will use prior convictions for impeachment of the accused, if he should testify, including the details of the convictions that will be so used;

(12) Information in possession of the prosecution that may indicate the entrapment of the accused;

(13) Whether or not an informer was involved, and if so whether the informer will be called as a witness at trial, and his identity.

The Omnibus Hearing requires the defence to disclose to the prosecution the following information:

(1) Whether there is a claim of the incompetency of the accused to stand trial;

(2) Whether the accused will rely on a defence of insanity at the time of the commission of the offence and if so, the names of his witnesses, both lay and professional, that will be called in support. In such cases the defence is required to disclose to the prosecution all medical reports and to submit the accused to a psychiatric examination by a court appointed doctor on the issue of his sanity;

(3) Whether or not the accused will rely on alibi and a list of all alibi witnesses;

(4) Results of scientific tests and experiments conducted for the defence and the names of persons conducting such tests;

(5) The general nature of the defence or defences to be raised at trial including a general denial;

(6) Whether or not there is a probability of disposition without trial;

(7) Whether or not the accused will elect or waive trial by jury;

(8) Whether or not the accused may testify;

(9) Whether or not character witnesses will be called and their identity;

(10) At the request of the prosecution, the accused may also be ordered to appear in a lineup, to speak for purposes of voice identification, to be fingerprinted, to pose for photographs, to try on articles of clothing, to permit the taking of speciments of material under his fingernails, to permit taking samples of blood, hair and other materials of his body involving no unreasonable intrusion, to provide samples of his handwriting, and to submit to a physical external inspection of his body.

At the Omnibus Hearing the following matters are automatically raised if they are not specifically waived in the check list, and are dealt with summarily by the court or set over for formal hearing if necessary:

(1) Issues as to the disclosure of material the prosecution or defence have not revealed or have refused to reveal;

(2) Inadmissibility of physical evidence on grounds of illegal search or arrest;

(3) Inadmissibility of the accused's confession;
(4) Transcripts of proceedings before the grand jury;
(5) Claims of non-disclosure of material on grounds of privilege;
(6) Material or leads obtained by electronic surveillance;
(7) Dismissal of the charge for failure to state an offence;
(8) Dismissal of the charge or count thereof on ground of duplicity;
(9) Application for severance of counts or of accused;
(10) Request for particulars;
(11) Request for deposition of witnesses for testimonial but not discovery purposes;
(12) Request by the defence to require the prosecutor to secure the appearance at trial or for pre-trial interviews, of witnesses that are under its direction or control;
(13) Inquiry as to the reasonableness of bail.

The check list also provides for the making of formal admissions, signed by the accused where necessary, with respect to any relevant matter including:

(1) Previous convictions of the accused without production of witnesses or a certified copy of the record;
(2) Ownership of stolen property;
(3) Chemical analyses and the use of certificates as proof;
(4) Admissibility of documentary evidence;
(5) Chain or continuity of custody or possession of exhibits;
(6) Qualification of expert witnesses.

Finally, the following matters are not subject to disclosure:

(1) *Work Product:* including legal research or records, correspondence, reports or memoranda to the extent that they contain the opinions, theories or conclusions of the prosecuting attorney or members of his legal staff;
(2) *Informants Identity:* where this is a prosecution secret and a failure to disclose will not infringe the constitutional rights of the accused, but not including cases where the informant is a witness who will be produced at trial;
(3) *National Security:* where disclosure would involve a substantial risk of grave prejudice to national security, except with respect to witnesses or material to be produced at trial;[6]

2. *Tentative Evaluation of the Omnibus Hearing*

Although the American Bar Association Standards have been designed in the hope that legislation will be enacted across the United States in conformity with the standards, the Omnibus Hearing procedure, which is recom-

mended in the Standards, has to date been implemented only on an experimental level in two States. In one of the States, California, pre-trial discovery in criminal cases had already been fairly comprehensive due to developments in the case law. In California before 1955 applications for pre-trial discovery to both the trial and appeal courts were rejected on the ground that the courts had no jurisdiction in such matters. Then in 1956 the law changed when the California Supreme Court in *People v. Riser*[7] first expressed the right in the accused to pre-trial discovery from the prosecution. This was subject, however, to the exercise of discretion by the trial court.

After this decision a series of California cases[8] expanded the scope of discovery to the point where a trial court could no longer exercise a discretion to deny discovery in criminal cases when an application therefor had been made according to the proper procedure (usually by motion with an affidavit in support). The content of discovery for the accused was expanded to include such things as the right to inspect all of the accused's statements to the police however made or recorded and whether or not admissible, the right to inspect a statement of a third party that was in possession of the prosecution and which might assist in the ascertainment of the facts whether or not the statement was signed or acknowledged by the third party, and the right to inspect documents and other tangible objects in the hands of the prosecution, including expert, medical, and other scientific reports.

At the same time the California Supreme Court recognized and expanded the scope of pre-trial discovery for the prosecution.[9] Thus, in California at least, the very broad scope of discovery required under the Omnibus Hearing procedure was probably not seen as a radical change—at least not as much as the procedure dealing with pre-trial motions and collateral issues.

In Texas, it seems that the development of discovery prior to the introduction of the Omnibus Hearing was less extensive.[10] At first many prosecutors in the San Antonio area strongly opposed the introduction of the experiment.[11]

The effect of the introduction of the experiment in these two jurisdictions seems to have led, ironically, to the ultimate elimination of the use of the Omnibus Hearing itself. The procedure is a voluntary one and is used to verify the implementation of informal discovery. But the existence of the procedure has led to the granting of full, informal discovery in many of the cases which otherwise would be dealt with by the Omnibus Hearing. The need or desire to resort to more formal procedures has thus been diminished.

In Texas the initial suspicion by prosecutors has changed to an attitude of enthusiasm.[12] The general thrust of the only criticism expressed by prosecutors in the legal writing[13] has been directed towards the need for certain specific areas of discovery in the Omnibus Hearing Procedure, rather than towards the usefulness and viability of the experiment and the concept of discovery as a whole. The comments of a prosecutor, initially opposed to this procedure, and of a defence counsel and a judge involved in the experiment,

are found in a recent panel discussion dealing with the Texas Omnibus Hearing:

> "On January 22, 1968, after a few months' experience with omnibus, the United States Attorney in San Antonio received a memorandum from one of his assistants, who characterized the omnibus hearings as 'a complete waste of time wherein both sides play cagey with each other and refuse to tell each other anything'. His sentiments were shared by a number of other assistants, as well as by many of those serving as defence counsel. However, I do not currently know of any lawyer for the prosecution or the defence at the San Antonio Bar who does not now welcome the opportunity to participate in the program, regardless of what his original impressions may have been. Mr. Reese Harrison Jr., author of the memorandum . . . is still an Assistant United States Attorney, but he has greatly changed his views concerning omnibus. . . .
>
> Mr. Harrison: . . . Perhaps the greatest advantage of the omnibus hearing is that it results in more pleas of guilty than we have ever experienced in the past. This is brought about by making full disclosure of everything in the government file to the defendant. At first the prosecutors will be wholly skeptical and perhaps incensed, as I was. Many will say that the result of such disclosure of the government file will result in more acquittals and dismissals. However, the figures in the San Antonio Division are to the contrary.
>
> Why the increase in pleas of guilty? I have had many of the outstanding lawyers of the San Antonio Bar, including the one with me today, state that they do not like to buy a pair of shoes without trying them on. In other words, they are apprehensive about advising their client to plead guilty if they do not know how good or how bad the government's case may be. When the defendant has the opportunity to see the government's case and discuss it with his lawyer, and both are fully informed concerning the case, the defence lawyers tell me that they feel their clients are more receptive to pleading guilty. One reason for this is that the defence attorney and his client are able to base their discussion concerning a plea by what is contained in the government file. . . .
>
> Mr. Gillespie: Under the Omnibus Hearing Project, defence attorneys have found that without sacrificing any of their clients' rights they are able to move cases much faster, and thus close out files with greater rapidity than under the standard procedure. In short, they have found omnibus to be: a time saver; an eliminator of paperwork (resulting in an economic savings); an eliminator of useless sparring with the United States Attorney; an effective way to boil a case down to the critical issues in question.
>
> By the project order requiring a conference of counsel, the defence attorney must meet the particular Assistant United States Attorney handling his client's case. This creates a better understanding of the adversary, lessens tension, and after the exchange of the requisite information, each is able to see the other's viewpoint. In addition to the economic advantage, the defence attorney, after viewing the government's case, can give an objective appraisal of whether the client should

plead guilty or not guilty. Under omnibus, he no longer has to contend with the surprise witness, and generally speaking he knows what testimony will be adduced from each of the government's witnesses."

"Chief Judge Spears: After two years of operation in our court, omnibus is largely automatic as the lawyers have become more accustomed to the procedure. Unless motions or other legal questions need to be resolved, it is now seldom necessary for an omnibus hearing to be held, whereas, in the beginning of the project considerable prodding and cajoling on the part of the court was required.

To what has already been said, I simply add that those cases tried after omnibus are more logically and understandably presented, requiring only a fraction of the time formerly needed for the same kinds of cases . . .

It will no doubt take much time and patience of lawyers and judges alike to get the project rolling in any court, but in my considered judgment it has substantial merit, and I commend it to you for your consideration and action."[4]

With respect to the possible application of an Omnibus Hearing procedure in Canadian criminal cases, a number of features of the experiment are attractive, but on the other hand a number of problems remain to be resolved.

The concept of an automatic pre-trial consideration of collateral issues may appear to be more suited to the solution of problems arising in the United States because of their use of an exclusionary rule. In regard to the present law relating to illegally obtained evidence, some items that are included in the Omnibus Hearing check list would have no application in Canada. However, there are numerous "collateral" matters presently dealt with at trials in Canada that could be considered at a pre-trial hearing, including motions to quash charges, motions for severance of charges and of accused, constitutional and "Bill of Rights" issues, admissibility of confessions, and so on. In short there does not appear to be anything peculiarly foreign about the Omnibus Hearing system or some version of it that would make it inapplicable to Canadian procedure.

The automatic raising of pre-trial issues also assists in minimizing or even eliminating disparities in the ability of counsel to raise matters that may be of great importance to the accused, and disparities in the fullness of discovery provided to different accused and to their counsel.

Finally the extensive discovery required in this procedure in an attractive feature for both the prosecution and the defence. At the same time provision is made for restrictions upon discovery in those particular cases in which a genuine concern as to its abuse can be shown. The onus, however, is upon the party asserting the possibility of such abuse to establish its likelihood before restrictions upon discovery will be ordered. Unquestionably the possibility of the accused abusing discovery is more properly dealt with in this way rather than by uniformly denying discovery in all cases because of a general fear that it will be abused in some.

On the other hand, a great deal of information remains to be gathered before a final judgment should be drawn about this procedure. What kinds of cases are subjected to the procedure, as opposed to those which receive informal discovery? How has the procedure in California affected the rate and volume of guilty pleas and the conduct of "plea bargaining"? What has been the experience with delay in the criminal process before and after introduction of the experiment? How does the Omnibus Hearing procedure affect the length, nature, and final disposition of trials that subsequently take place? What specific problems in the previous discovery system based upon prosecutorial discretion was the experiment designed to meet and to what extent have the expectations of the designers of this model been realized? Does the more active role of United States prosecutors at the investigatory and fact gathering stage of criminal proceedings make implementation of discovery by this procedure easier than it might be in Canada?

The relationship of the Omnibus Hearing to committal proceedings also must be examined more closely. Does use of this procedure involve a waiver of the right to contest committal for trial, or waiver of a preliminary inquiry? In the United States considerable reliance is placed upon direct action by a grand jury that bypasses the preliminary inquiry. Is the Omnibus Hearing acceptable merely because it provides information that otherwise would not be available at all because the preliminary inquiry is not as readily available? Has use of the Omnibus Hearing been restricted because it involves relinquishing the right at a preliminary inquiry to cross-examine potential witnesses before trial? (The check list does not appear to provide for a right to cross-examine witnesses before trial for discovery purposes.) Have defence counsel been satisfied to relinquish this right in return for full discovery, and if so, why?

More information is also required about the real cost of the procedure in terms of time, money, and human resources, particularly as compared with the cost of maintaining the previous system. Does the system in fact result in a greater number of pre- or post-trial appeals on collateral issues? Failure to raise a matter at the Omnibus Hearing amounts to waiver of the issue, but what of cases where one or the other of the parties do not agree with a decision made at the Omnibus Hearing? Does the system provide for a review of such decisions and if so what is the nature of the review and does the availability of such review result in a general lengthening-out of the criminal process?

Finally, much may depend upon the fact that the procedure is optional. For example, very wide prosecutorial discovery of the accused may be acceptable as long as it is tied to an optional procedure that provides for discovery to the defence. Thus the defence retains the right to refuse discovery if this course of action is seen to be in its own best interests. But how would a compulsory Omnibus Hearing be viewed in these jurisdictions if such wide prosecutorial discovery were to be mandatory in every case? Also, in a

voluntary procedure, the question of sanctions for failure to provide required discovery is academic. If the procedure were to be compulsory, how could its requirements be enforced without redrawing many of the principles of the criminal process?

In conclusion, the Omnibus Hearing is a procedure which attempts, on the surface, to accomplish many significant and worthwhile goals. The questions are whether it tries to accomplish too much, whether its apparent success is outweighed by the costs incurred in order for it to operate properly and effectively, and whether the simplicity of the check list is illusory and in fact results in more complication than before in terms of the overall operation of the process and of the ability to those who must practice within the system to properly carry out their functions.

ISRAEL

1. *Description*

The Israeli model for reform of discovery in criminal cases deserves serious study not simply because it is an interesting model but also because it was developed in a criminal process that is, in nearly all respects, similar to the Canadian process. As in Canada, criminal procedure in Israel is essentially derived from English common law. The process is accusatory and adversary. The accused is presumed to be innocent until proven guilty and he has a right to remain silent. The Israeli penal law classifies offences into 3 categories: contraventions punishable by imprisonment of not more than one month or a small fine, misdemeanors punishable by imprisonment of more than one month and less than 3 years, and felonies punishable by imprisonment of more than 3 years or death. The courts of first instance for contraventions and misdemeanors are the Magistrates' Courts, of which there are 25 across the country. Felonies are tried in the 4 District Courts which also review Magistrate's Court judgments by way of appeal. The Israeli Supreme Court exercises only appellate jurisdiction in criminal matters. Generally, trials are conducted by single judges. A bench of 3 District Court Judges is required in trials of more serious cases where the possible punishment is death or imprisonment for 10 years or more. One major difference however is that trial by jury has never been available in Israel.

In Israel before 1958, a preliminary inquiry preceeded committal for trial in all felony cases. The basis for this review of the prosecution evidence in determining committal was essentially the same as it is now in Canada. The preliminary inquiry was also considered to be the main source of pre-trial discovery in criminal cases. All other cases were tried summarily without a preliminary inquiry and pre-trial discovery in such cases was in the main a matter of prosecutorial and judicial discretion.[15]

In 1958, the preliminary inquiry was made optional, at the request of either the accused or the prosecution, and it was restricted to cases where the possible punishment was death or imprisonment for 10 years or more. At the

same time, the loss of such discovery rights as were available at the preliminary inquiry in felony cases was compensated for by enactment of a statutory right of the defence to the pre-trial inspection of prosecution evidence.[16] This right to inspect was also advanced in time, starting when the Statement of Charge was filed, and it included all material collected by the prosecution, whether incriminating or favourable to the accused, and not merely the evidence the prosecutor intended to submit at trial.

Between 1958 and 1962, a preliminary inquiry was requested, mainly by the accused,[17] in approximately 30 percent of the cases in which it was available, and of the cases in which a preliminary inquiry was held to conclusion, the accused was discharged in only 1 percent.[18] On the basis of these statistics it was decided that the utility of the preliminary inquiry was minimal and that its value in a small number of cases was far outweighed by the disadvantages in terms of cost and delay in the vast majority of the cases.[19]

In 1965, a new Code of Criminal Procedure was enacted. The preliminary inquiry was completely abolished, the statutory provision for discovery in cases of felony was extended to cover misdemeanors as well (but not contraventions) and substantial modifications were made to the charging and plea taking processes. The legislation enacting the changes and setting out the present Israeli law of discovery in criminal cases is quite simple and brief. It provides:

Capter 4. Proceedings Prior to Trial

Title C. *Inspection of the Prosecution's Evidence*

Section 67. *Inspection of Investigatory Material*

Where a statement of charge has been filed in respect of a felony or misdemeanour, the accused and his counsel and any person so authorized by counsel or, with the consent of the prosecutor, by the accused, may, at any reasonable time, inspect the material of the investigation in possession of the prosecutor and make copies thereof.

Section 68. *Modes of Inspection and Copying*

Inspection of the investigatory material and the copying thereof shall take place in the office of the prosecutor or some other place indicated by the prosecutor for that purpose and in the presence of the person appointed by him, either generally or in respect of any particular case, in order to ensure that the inspection and copying is done in accordance with the law in the directions of the prosecutors.

Section 69. *Penalties*

Anyone who interferes with or obstructs a person appointed by Section 68 in the exercise of his duties shall be liable to imprisonment for three months; anyone who, without permission in writing from a prosecutor, removes any document or exhibit from the material given to him for inspection or copying shall be liable to imprisonment for one year.

Section 70. *Restrictions in Producing Evidence*

The prosecutor shall not produce any evidence in court nor call any witnesses, unless the accused or his counsel has been given reasonable opportunity to inspect and copy the evidence or the statement, if any, made by the witness in the investigation, except where the right to do so was waived by them.

Section 71. *Secret Material*

The provisions of section 67, shall not apply to material, concealment of which is permitted or disclosure of which is prohibited by law but the provisions of section 70 shall apply to such material.

Section 72. *Furnishing Copy of Evidence in Possession of Complainant*

The private complainant shall not produce in court any written evidence which was in his possession unless he has provided the accused with a copy thereof.

Section 73. *Limitation of Right to Inspect Evidence*

The provision of this title shall not apply to evidence intended to rebut any plea of the accused which the prosecutor could not have anticipated, or evidence produced to explain the absence of a witness or pertaining to any other formal matter not material to the determination of the charge.

Section 74. *Savings*

The provisions of this title shall not derogate from the provisions of section 38 of the Penal Law Revision, (state security) law, 5717-1957.

Section 71 denies a right to discovery of "material concealment of which is permitted or disclosure of which is prohibited by law". This apparently refers to material in the nature of state or defence secrets. However, when material is not disclosed the Code prevents it from being used in evidence at trial.[20] The prosecutor thus may refuse to disclose material but he must be prepared to possibly sacrifice a conviction when discovery is denied in order to safeguard some other important interest.

The changes made in discovery must also be considered along with the reform made at the same time with respect to the charging and plea-taking processes. The new Code has attempted to eliminate formalism in the drawing of criminal charges. Before 1965, the practice was similar to that in most Anglo-American jurisdictions. The statement of charge consisted of one or more counts each composed of 2 parts: the "Statement of Offence" stating the nature of the offence and the relevant section alleged to have been violated, and the "Particulars of Offence" which essentially merely set out the section in ordinary language, adapted to the circumstances of each case.

The following is an example of the former practice:

"*Statement of Offence*: Murder, contrary to section 214 of the Criminal Code Ordinance, 1936.

Particulars of Offence: AB on the ....day of..... at ..... with premeditation caused the death of C.D."[21]

This form of charge, quite similar to that required in Canada, was criticized in these terms:

> "Frequently, charges were incomprehensible to the uninitiated and required a good deal of elucidation. A person who did not have the services of an advocate might often fail to grasp the implications and in particular to perceive the possible defences that were open to him."[23]

As well, the former requirements were seen to be:

> . . . archaic, too formalistic and containing too little information especially in cases—frequent under modern criminal statutes—where the offence alleged is the result of a complicated set of facts. It was felt that instead of describing the accused as presumptively guilty of an offence, the statement of charge should rather set out the facts which the prosecution proposes to prove and upon which the court is to reach its decision as to the guilt or innocence of the accused."[23]

The new Code makes major changes in the former practice. Instead of merely requiring that the charge set out a recital of formal counts, the aim is now to provide "a simple narrative of the facts in the same style and manner as a statement of claim in civil proceedings."[24] An example taken from a schedule to an early draft of the Code provided:

"Statement of Charge"

"1. The accused is an officer of the ..... Bank Ltd., and a manager at the branch at ....

2. On the ..... day of..... ten bearer bonds issued by..... Ltd., enclosed herewith, and marked as exhibits "A" to "J" were delivered by "X" to the accused in the said branch for safekeeping by the Bank.

3. The value of the said bonds is ..... Israeli pounds.

4. The delivery of the said bonds was by mistake not entered into the records of the Bank.

5. On the same day, after finishing his work, the accused took the bonds to his home and left them there.

6. On the ..... day of..... "X" visited the accused, informed him that the delivery of the bonds had not been entered into the records of the Bank and asked him to make the entry and to give "X" a receipt. The accused denied receiving the bonds and refused "X's" request.

7. The facts described above constitute an offence under section 275 of the Criminal Code Ordinance, 1936."[25]

The new code also requires that a list of the names of prosecution witnesses be appended to the statement of charge,[26] but the prosecution is not barred from calling additional witnesses as long as the disclosure requirements are satisfied. The prosecutor need not call a witness whose name is disclosed, and if the witness is called by the defence the court may allow the defence to cross-examine the witness immediately.[27]

The accused is also no longer asked to admit or deny guilt, but rather to admit or deny the facts alleged in the statement of charge. The admission of a fact is not conclusive and it may be rejected by the court, in which case the court may require that fact to be proved. Finally, the court may convict the accused of any offence supported by the facts proved, even if not alleged in the statement of charge, if the accused has been given a reasonable opportunity to defend himself, and on the condition that the Court may not impose a more severe penalty than could have been imposed if the original facts alleged had been proved.[28]

Finally, no steps have been taken to provide pre-trial discovery of the accused to the prosecution. Among the reasons for the adoption of this position were first, that prosecutorial discovery was not logically consistent with a presumption of innocence, and second, that such discovery was not necessary because prosecutors were always granted reasonable adjournments to examine surprise evidence and, if possible, to rebut it. Moreover it was also found difficult to devise an effective sanction for prosecutorial discovery of the accused, apart from an adjournment. The section of inadmissibility was expressly rejected in these terms:

> "It would be contrary to our legal conscience to proclaim a valid defence inadmissible by reason of non-discovery to the prosecution, and let an innocent man be adjudged guilty."[29]

2. *Tentative Evaluation of the Israeli Model*

The present Israeli discovery legislation is clear, simple and, for the accused, comprehensive. As opposed to the Omnibus Hearing concept, where the very broad discovery of specific matters is set out in great detail in the check list, the Israeli legislation does not attempt to specify the details of the material that must be disclosed, but merely provides that any material not disclosed to the defence is inadmissible at trial. Another feature distinct from the Omnibus Hearing is the decision to require pre-trial disclosure to, but not by, the defence.

In evaluating the Israeli legislation for possible application in Canada, it would assist if more information could be obtained with respect to the actual discovery practices in Israel prior to the new Code. Was the new legislation merely a codification of what was essentially existing practice, or was it a radical departure from previous practice enacted in the face of opposition from the bench or bar? How is the legislation implemented in practice? Are defence lawyers critical of the abolition of the preliminary inquiry and the accompanying loss of the right to cross-examine witnesses before trial for discovery purposes? How well do lawyers, prosecutors and judges believe the legislation is working and accomplishing the goals originally intended for it? Have prosecutions been handicapped by the broadening of defence discovery and a prohibition upon prosecutorial discovery? How do crime rates and court case load pressures compare with Canada, and what effect has the legislation had in relieving or aggravating these problems? How

has this legislation, applying to all but the most minor criminal cases, affected the speed of disposition of criminal cases? Have informal guidelines or regulations been devised to supplement the broad legislation with respect to details of timing, priorities, manner of disclosure, and with respect to material that would otherwise be withheld?

Notwithstanding these questions the Israeli model does suggest an attractive method for testing the utility of the preliminary inquiry in Canada. In Israel the procedure was made optional for a period of time and during that period detailed statistics were collected on the frequency of its use, the time and costs involved, the nature of the outcomes of preliminary inquiries, and the nature of final dispositions at trial in cases where preliminary inquiries were and were not held. At the same time, a broad right of discovery of prosecution material was provided in those cases where a preliminary inquiry was not used or available. Such an approach proved useful in determining the nature and possible effects of important reforms in this area of the law.

The Israeli legislation also reminds us that it may not be sufficient to merely enact discovery legislation. Some changes may also be necessary with respect to the charging and plea-taking processes. The new Israeli requirements for charging offences are also in fact discovery requirements. The accused in Israel, unlike in Canada, is provided from the moment the charge is laid, with reasonable information about the theory of the prosecution and the facts to be proved against him. This must certainly be of assistance to the accused and to defence counsel in reaching a decision as to plea. However, information is still required as to the effect of the new procedure upon the incidence and comparative rates of contested and non-contested cases. Was "plea bargaining" a matter of concern prior to enactment of the new Code? If so, what has been the effect of the new legislation? Does the requirement that facts rather than guilt be admitted or denied result in a greater or lesser incidence of contested cases?

In Conclusion, in its straight-forward simplicity the Israeli model is unique. However, as with every model, it is necessary to study the context in which it operates, and to compare that context with the context in which Canadian reform must operate, before a final judgment is possible as to its total or partial extrapolation.

VERMONT

1. *Description*

In 1961 the Vermont Legislature passed a statute[30] providing for the taking of depositions of witnesses in criminal cases for discovery purposes. The Act provided in part:

> "A respondent in a criminal cause at any time after the filing of an indictment, information or complaint, may take the deposition of a witness, upon motion and notice to the State and other respondents, and on showing that the witness's testimony may be material or relevant on the trial or of assistance in the preparation of his defence . . ."

The Act also provided for certain rights of discovery and inspection of items "obtained from or belonging to the respondent".[31]

Since the passage of the Vermont Statute similar legislation permitting discovery by deposition in criminal cases has been passed in the States of Texas, Ohio, and Florida.[32] Such a procedure has also been recommended by the Report of the President's Commission on Law Enforcement and Administration of Justice[33] stating:

> "The flexibility and utility of the deposition make it an extremely valuable factfinding procedure in the criminal process. Jurisdictions should amend their statutes or rules to permit the taking of a deposition wherever the prosecutor and defence counsel agree, and a compulsory process should be made available for this purpose. Even when they cannot agree, it would be desirable to allow prosecutors and defence counsel, with the permission of the court, to take depositions."[34]

In 1967, a survey was conducted in Vermont to assess the impact of the deposition legislation. Several conclusions were drawn from this study.[35]

(*a*) The witnesses deposed were nearly all police officers and eye witnesses. In only one case was an expert witness, a psychiatrist, deposed;

(*b*) Generally, four reasons were given for the taking of depositions: (1) it provided general discovery, (2) it tied a witness to a particular story, (3) it permitted the presentation of formalized facts to indicate to the prosecutor the weakness in his case, and (4) it permitted the presentation of formalized facts to show a defendant the nature and strength of the prosecution's case. There was no indication of use of depositions for "blind fishing expeditions", but interrogation of investigating officers "usually went into the realm of what evidence the State did have and sometimes produced information of which the defendant was previously unaware".

(*c*) The provisions requiring a motion before an appropriate judge in order to obtain the right to take depositions have been seldom used because, after the first few months of operation of the Statute, "depositions were taken almost universally by stipulation between the State and defence counsel".[36]

(*d*) The frequency with which depositions have been taken is difficult to determine because they are usually taken informally. Their use has usually been restricted to the more serious offences. In Vermont, jury trials are available even for parking violations.

(*e*) Not one prosecutor, judge, or defence counsel indicated that the legislation increased the likelihood of trial. On the contrary, the reasons supporting a decrease in the likelihood of trial were that the defendant was given a much better chance to find from knowledge rather than conjecture the nature of the case for the

prosecution, and that the procedure eliminated the "bluffing" element as a consideration in trial preparation.

(*f*) There was not one indication of an instance of abuse of the discovery rights provided by these statutes.

2. *Tentative Evaluation of the Vermont Model*

To some extent the success of the Vermont model may be determined by the fact that Vermont is small in size and population—approximately 400,000 people. It is basically a rural state in which persons prosecuting and defending in criminal cases do so on a part-time basis while at the same time maintaining civil practices.[37] The small size and closeness of the Bar allowed for a general "open file" policy by the prosecution even prior to the new legislation. The real effect of the legislation may therefore merely have been as suggested by one judge in the state:

> "In this country prosecutors, usually have an 'open file policy', but I'm sure these statutes were helpful in keeping it that way."[38]

However, while one should be careful to note that the context for the operation of this legislation is a small, relatively nonpopulous state, similar statutes are now in existence in Ohio, Texas, and Florida. This would suggest that this model can be applied in more populous urban centres. As well, it should be remembered in these jurisdictions, especially Vermont, the procedure for the taking of depositions of witnesses does not exist alone but as part of other discovery procedures. In Vermont, as we have seen, it is combined with a prosecution open file policy.

The procedure for deposing witnesses in criminal cases is similar to the procedure in the United States Federal Rules of Civil Procedure.[39] The Federal Rules have long permitted persons other than parties to be examined under oath before trial as part of civil discovery. Under this procedure, it is clear that the main purpose of the rule is to provide discovery since in general the deposition cannot be used at trial except as a basis for cross-examination should the witness give conflicting testimony and only in the exceptional case where the witness is excusably absent from the jurisdiction can the deposition be received as substantive evidence. A similar civil practice rule has now been adopted in Nova Scotia[40] and recommended for adoption in British Columbia.[41]

Against this background of acceptance of deposition procedures, it is interesting to note that some jurisdictions in the United States, notably California[42] and New Jersey,[43] have denied a right in criminal cases to take depositions of prosecution witnesses as part of a discovery procedure. The refusal of California courts to allow discovery depositions of witnesses was justified by Chief Justice Traynor, as he then was, on the basis that:

> "The prosecutor is directly involved in the conduct of the action and is therefore subject at all times to the inherent power of the court to regulate the proceedings before it. Independent witnesses on the other

hand, may be strangers to the litigation except when testifying and the courts are understandably slow to invoke their inherent power to expand compulsory process against such witnesses.'"[44]

However, it is difficult to reconcile this position with the opposing attitude of the United States courts and legislators with respect to "strangers to the litigation" in civil cases, as previously outlined.[45]

A more substantial series of objections were set out in the Report of the New Jersey Supreme Court's Special Committee on Discovery in Criminal Cases.[46] The question whether pre-trial deposition of witnesses should be allowed in criminal cases was discussed as the result of a suggestion made by Chief Justice Weintraub of the New Jersey Supreme Court in the case of *State v. Tate*.[47] In that case, the court rejected an argument that the accused was constitutionally entitled to an order to permit him to take depositions of witnesses prior to trial, but suggested that a decision should be made as to whether or not the rules of court in the State should be amended to allow for such an order to be made. The Committee report stated:

"The special committee gave consideration to the desirability of a rule which would permit the taking of witnesses' depositions for discovery purposes in the same manner as depositions are taken in civil actions, but decided against such a recommendation at this time. Militating against such depositions are these considerations: (1) they are costly and time consuming; (2) they might result in undue harrassment of impartial or 'stranger' witnesses who may already be required to appear at a preliminary hearing, before the grand jury and at the trial itself, and the additional burden of being subject to depositions as well might result in unfortunate discouragement of witnesses cooperation by those who are in any case reluctant to become involved in criminal proceedings; (3) the question of the extent to which reciprocation, i.e., the taking of depositions of defence witnesses by the state, is permissible raises serious constitutional questions; and (4) depositions might be routinely and indiscriminately insisted upon by defendants, particularly indigent defendants, as a matter of course even where their need is not indicated . . .

. . . This special committee is nevertheless aware of the defendant's need for as full and liberal pre-trial discovery as is consistent with constitutional considerations and the legitimate needs of the State for non-disclosure in particular circumstances such as where the security of witnesses is involved (see in that regard the comments on the special committee's proposed revision of R. 3:13-3). It is presently of the opinion, however, that the advantages to a defendant resulting from free pre-trial depositions may be in large measure afforded by the increased discovery of revised R. 3:13-3, and particularly R. 3:13-3(c), which would permit the court in its discretion to direct the prosecutor to make available to the defendant the names and addresses of witnesses and their statements and grand jury testimony and to assist defendants in procuring voluntary interviews with witnesses. This general type of 'witness' discovery is made available to defendants in California, which

although perhaps the most liberal of the States in affording criminal discovery, does not permit free depositions . . . The special committee on balance believes that it may be worthwhile to test the efficacy of the scope of 'witness' discovery proposed by R. 3:13-3(c) before an experiment with depositions is undertaken.

Should the court, however, conclude otherwise, the special committee would recommend a rule which would permit depositions by the defendant of a State's witness only upon a showing that (1) he has attempted and failed to obtain a voluntary interview with a witness; and (2) the witness has either made no recorded statement to the police or prosecutor or such a recorded statement made by him and furnished the defendant indicates a special need in the preparation of his defence for the taking of his deposition. The defendant's motion would, of course, be subject to the State's showing of legitimate circumstances militating against the relief."

The text of the proposed rule 3:13-3(c) discussed in the report was as follows:

"3:13-3(c) *Materials Discoverable by Defendant in the Court's Discretion—Witness Names and Statements.* Upon motion made by a defendant showing that reasonable efforts have been made to obtain such information or material and on his showing of his need therefor in the preparation of his defence, the court shall order the prosecuting attorney:

(i) to disclose to the defendant the names and addresses of any persons whom the prosecuting attorney knows to have relevant evidence or information, and to indicate those persons whom he intends to use as witnesses;

(ii) to permit the defendant to inspect and copy or photograph any relevant written or recorded statements made by such persons or by co-defendants and any relevant records or prior convictions of such persons or co-defendants, or copies thereof, within the possession, custody or control of the State;

(iii) to permit the defendant to inspect and copy or photograph any relevant grand jury testimony of such persons or co-defendants if a transcript thereof has already been obtained by the prosecuting attorney pursuant to R. 3:6-6(b); and if not, the court may order such transcript to be prepared and a copy thereof furnished to the defendant and to the prosecuting attorney;

(iv) to cooperate in the defendant's efforts to conduct informal, voluntary interviews with such persons other than co-defendants . . ."[48]

While the specific arguments raised against the deposition procedure in the New Jersey report must be considered in assessing the impact of introducing such a procedure in Canada, it should be remembered that they were rejected because other discovery procedures already available or proposed made them seem unnecessary. In Canada however, both a deposition procedure and the possible alternatives to it are not available. Moreover it is

doubtful whether satisfactory pre-trial discovery is possible without some means to question at least certain witnesses prior to trial. Of course Canadian courts have always maintained that counsel are free to question crown witnesses prior to trial.[49] In fact it is often maintained that failure of defence counsel to interview witnesses may amount to a dereliction of duty. But if this is so, some recognition should also be given to the fact that in many cases the unsupervised and informal questioning of key witnesses by defence counsel is either impossible or inadvisable. In any event, at a minimum, our system should ensure that counsel for the defence is enabled to learn the identity of all persons who may be called as witnesses and to informally interview them should an interview be desirable. Although little objection has been expressed in Canada with respect to the fact that in most criminal cases potential crown witnesses cannot be examined under oath prior to trial because a preliminary inquiry is not available, there may be much opposition by defence counsel to the denial of the present right to cross-examine witnesses under oath before trial in cases where a preliminary inquiry is available. However it is quite possible that the real benefit gained by such examination at a formal preliminary inquiry could also be achieved by requiring the witnesses to be available for informal questioning by defence counsel and, failing this, to be required to submit to the taking of depositions.

The objections by some prosecutors to providing the defence with the power to take discovery depositions have also been criticized. As stated in a recent American article:

> "If the objective of the criminal process is the ascertainment of truth, it follows that diligent prosecutors, bent on bringing only the guilty defendant to justice, will use the process for honest fact-finding. . . .
>
> . . . it would seem that the adrenal reaction which prosecutors and others have to the use of depositions stems not from their concern for the future of the truth-finding propensity of the criminal process, but rather from their fear that the use of depositions will give the defence basically the same tool which the prosecution itself has always possessed in the form of its awesome investigative power.
>
> If any generalized conclusion can be drawn . . . it must be that, in the minds of those who oppose the use of depositions, there yet lingers a fear that the use of such a tool somehow threatens the state's interest in the prosecution of criminal offenders. If this fear is truly one of potential misuse of the procedure, then perhaps the arguments have some merit, if only by reason of the sincerity of those who wish to protect such a valid interest. But if the fear is a result of the anticipation that the use of depositions might better enable the defendant to uncover information essential to the preparation of an adequate defence, then the interest which the state is attempting to protect is certainly questionable. As Justice Traynor points out in speaking of criminal discovery in general:
>
> > '[A]bsent some governmental requirement that information be kept confidential for purposes of effective law enforcement, the state has

> no interest in denying the accused access to all evidence that can throw light on the issues in the case, and in particular it has no interest in convicting on the testimony of witnesses who have not been as rigorously cross-examined and as thoroughly impeached as the evidence permits.'
>
> Since the experience which Vermont and other states have had with criminal deposition statutes indicates that abuse is not a problem, there appears to be no valid reason why the above observation should not apply with equal force to depositions specifically."[50]

In conclusion, the Vermont model serves a useful purpose in suggesting one possible solution to a difficult issue in discovery. Even if the specific Vermont solution is not acceptable, a comprehensive discovery procedure must provide for "witness discovery" in a realistic and effective manner without compromising other important values that must be maintained by the criminal justice process. A deposition procedure is one possible solution to this problem and it deserves serious consideration.

COMBINATION OF OTHER AMERICAN MODELS

Proposed model of Harvard Journal of Legislation, 1966.[51]

United States Federal Rules of Criminal Procedure, as amended to 1966.[52]

American Bar Association: Standards on Discovery and Procedure Before Trial, October, 1970.[53]

Oregon: Proposed Code of Criminal Procedure, November 1972.[54]

Tennessee: Proposed Code of Criminal Procedure, January, 1973.[55]

1. *Description*

A number of different models are here grouped. Some are in force; some are under study. All are sufficiently similar to be considered together. These models are mainly attempts to codify or reform a combination of existing case law, statute law, and informal practice, and to enact legislation putting into effect some or all of the American Bar Association Standards. They generally involve precise statutory description of the material to be disclosed before trial, either in a compulsory way or subject to the exercise of discretion.

In these models specific positions are usually taken with respect to the following topics: disclosure to the defence, disclosure to the prosecution, timing of disclosure, material not subject to disclosure, extent of a continuing duty to disclose, protective orders, and sanctions for failure to comply with disclosure requirements.

The models also tend to apply to all criminal cases regardless of seriousness.[56] Some require that disclosure occur automatically or in response to the initiative of the prosecutor and the defence counsel, with later supervision

of a court,[57] and some provide for disclosure enforced by a court order after the filing of pre-trial motions.[58] All of the models have in common a degree of increased judicial involvement in supervising criminal pre-trial discovery, and a restriction upon judicial discretion to refuse to order discovery in the absence of a clear justification that must be established by the prosecution or the defence.

The following general summaries of these discovery systems are set out to provide a general impression as to their scope. The full significance of each proposal may be found by an examination of the specific wording of the statute concerned. These statutes and standards are generally well drafted, clear, concise, and readable.

(a) Disclosure to the Accused

In varying degrees, the statutes require that the accused be allowed before trial, or as soon as possible after charges are filed, to inspect, copy or photograph relevant categories of information, including: material that is exculpatory or that tends to negate the guilt or mitigate the punishment of the accused, written or recorded statements or confessions of the accused and co-accused, details of the circumstances of the taking of such statements, results or reports of scientific tests or experiments and of physical or mental examinations, records of previous convictions of the accused and witnesses, books, papers, documents, tangible objects, buildings or places in the possession, custody or control of the prosecution, the occurrence of a search and seizure and relevant information that has been obtained thereby, names and addresses of persons who, to the knowledge of the prosecution, have relevant information or evidence, and names and addresses of persons the prosecutor intends to use as witnesses along with the relevant written or recorded statements of such witnesses that are in the possession of investigating authorities.

In two of the statutes[59], the phrases "exculpatory information or material" and "material tending to negate the guilt of the accused" are included in order to codify and extend the principle established by the United States Supreme Court in the leading case of *Brady v. Maryland.*[60] In that case, it was held that a prosecutor's withholding of exculpatory "evidence", whether negligent or willful, violated the accused's constitutional right to a fair trial. Codification of this principle and its extension to "information" or "material" was still considered insufficient by the drafters of these statutes and thus specific matters were listed even though they might theoretically be included within the scope of the general duty to disclose pursuant to the *Brady* principle. In this way the legislation seeks to prevent refusals to disclose, either based upon a difficulty of determining which pieces of information are exculpatory, or based upon prosecutorial rejection of the credibility of sources of evidence that may be favourable to the defence.[61]

As well, some of the statutes distinguish between material discoverable by the accused as of right and material discoverable only upon a showing by the accused that reasonable efforts to obtain the information have been

made but have been unsuccessful. In addition, the requirement of disclosure of names and addresses of intended or potential prosecution witnesses is often coupled with the imposition of a duty on the prosecution either to assist in arranging informal interviews by the accused of persons whose names are disclosed, or to advise persons with relevant material or information that they ought to co-operate in allowing themselves to be interviewed by defence counsel. The obligation to disclose the identity of witnesses is also often made subject to the issuance of "protective orders" in favour of the prosecution where a real risk of abuse of disclosure can be shown. These are discussed later in this section.

In these statutes, the scope of the obligation to disclose is often couched in terms broader than merely requiring disclosure of material that the prosecutor intends to use at trial. For example, some models require disclosure of any information that is "material to the preparation of the defence". Also, the statutes attempt to deal with the possibility that disclosure may be restricted because of the failure of prosecutors to obtain material or information from the police. For example, one model requires prosecutors to disclose "material in the possession, custody or control of the state, the existence of which is known or by the exercise of due diligence may become known to the district attorney". As another example, the A.B.C. Standards in a commentary states:

> "In discharging his duties [the prosecutor] should know or seek to know, of the existence of material or information at least equal to that which he should disclose to the defence. The prosecutor should ensure the flow of information to him from investigative personnel so that he will have possession or control of all material or information relevant to the accused and the offence charged. This means that among other things, he should not discourage such flow in order to avoid having to make a disclosure."[62]

(b) Disclosure to the Prosecution

All of these models provide for a limited prosecutorial discovery of the accused upon a motion to the court. For example, the proposed statute of the Harvard Journal of Legislation gives the trial judge a discretion once discovery has been made available to the accused in accordance with the statute to order discovery to the prosecution of similar material that the defence intends to use at trial.[63] The material subject to such reciprocal discovery includes results or reports of scientific tests or experiments and of physical or mental examinations, books, papers, documents, tangible objects, buildings or places within the possession, custody or control of the defence, and the names and addresses of those persons known to the defence that it intends to call as witnesses.[64] However, the defence is protected from prosecutorial discovery under this procedure if it has made no request for discovery of similar information from the prosecution, but it may nevertheless obtain statements of prosecution witnesses already identified even if it refuses to disclose the names of its own witnesses.[65]

The rationale for reciprocity as a basis for prosecutorial discovery was set out by the drafters of the discovery statute of the Harvard Journal of Legislation:

> "It is difficult to imagine a case where the defendant can have a legitimate objection to revealing part of his case a little earlier than anticipated and where, at the same time, he will be deterred from using the discovery procedures available to him under the statute. When the defence counsel fears that revealing the names and addresses will facilitate their impeachment by the prosecution, he need only refrain from using section 3(a) and he may still obtain statements of government witnesses whose names he already knows. Besides, the interest in avoiding thorough cross-examination of witnesses is perhaps not one entitled to protection."[66]

The commentary to the Federal Rules of Criminal Procedure also points out that in respect of expert opinion evidence:

> "In cases where both prosecution and defence have employed experts to make psychiatric examinations, it seems as important for the government to study the opinions of the experts to be called by the defendant in order to prepare for trial as it does for the defendant to study those of the government's witnesses."[67]

Another usual provision in these models, not dependent upon reciprocity, is a requirement of disclosure by the defence of notice of the intention to rely upon the defences of alibi or insanity, including specific details of the alibi and the identity of witnesses in support. These requirements are consolidations or extensions of previously existing legislation. However, the A.B.A. Standards go further and suggest that the trial court may require that the prosecutor be informed of the nature of any defence intended to be used at trial, along with the names and addresses of persons to be called in support.[68]

While, in this description, we have sought to faithfully set out the extent of discovery of the accused as provided in these models, this description should not be taken as any acceptance of such discovery. In Part 5 of this study the matter of prosecutorial discovery of the accused is more thoroughly explored and, in the tentative directions for reform, a contrary position is taken.

(c) Timing of Disclosure

One purpose of the statutes is to provide for discovery without adding to delay in the processing of criminal charges. The statutes are thus usually specific in setting an outside limit to the time within which a request or motion for discovery must be presented to a court. The time is usually 10 days after either the arraignment or the first appearance in court of the accused with counsel.

(d) Material Not Subject to Disclosure

The statutes also tend to specify the categories of material that need not be disclosed. These usually include: work product, informants, and matters affecting national security. The models require privileged material to be specified and subject to the requirement that it may still have to be disclosed if relevant and required to be disclosed under other sections of the statutes.

Work Product

The models recognize that there are disadvantages in requiring advocates to share on a continuing basis with opposing counsel all ideas and notions that occur to them in preparing a case. Thus the innermost thoughts of counsel are protected by a work product privilege. The "work product" exception will ordinarily vary according to the nature of the material and the circumstances of each case. It generally includes those items prepared in connection with prospective litigation that reflect the lawyer's mental impressions, opinions, or legal theories. Matters normally included are: legal research, records, correspondence and memoranda to the extent that they contain opinions, theories or conclusions of the advocates or members of their staff, or of peace officers in connection with the investigation of the case. Included as well are notes or outlines of trial strategy, of arguments to be made, questions to be asked of witnesses, inter-office memoranda on legal questions and evidence, opinions with respect to prospective jurors, summaries and analyses of case files, evaluation of anticipated witnesses or their testimony and of investigative sources or techniques, all to the extent that they reflect the mental processes of the advocate.

Of course the necessity to restrict the scope of the meaning of "work product" has been recognized. While it could theoretically include almost anything but physicial evidence in the hands of the prosecutor, it will normally not include witness statements made to the police or prosecution, or opinions, theories, and conclusions of expert witnesses.[69]

Informants

Where the identity of an informant is a prosecution secret and his sole connection with the case has been to inform the prosecution of suspicious circumstances, or the location of a fugitive, contraband, or stolen property, rather than actually being a witness to or participant in the alleged offence, the statutes exempt disclosure. However, they provide that the exemption does not apply if the informant is to be called as a witness at trial.

National Security

The A.B.A. Standards specifically exempt disclosures involving a substantial risk of grave prejudice to national security, while making it clear that such privilege should be invoked only for the most compelling reasons where the maintenance of secrecy is clearly of importance paramount to the advantages of disclosure in the criminal justice system.[70]

(e) Protective Orders

The models set out procedures enabling trial judges to take into account the possible harmful effects of pre-trial discovery and to deny, restrict, or defer discovery upon a sufficient showing in appropriate cases. Each model recognizes that the possibility of serious abuse exists only in exceptional cases but that flexibility is necessary in order to cope with demonstrated potential abuse.

Section 6 of the Harvard Journal statute provides that in considering a motion for a protective order, the court may consider: (a) protection of witnesses and others from physical harm, threats of harm, bribes, economic reprisals and forms of intimidation; (b) maintenance of such secrecy regarding informants as is required for effective investigation by a governmental agency of criminal activity; (c) protection of such confidential relationships as are recognized by applicable law; and (d) any other relevant considerations which may include a particular danger of perjury, protection of information vital to national security, and protection of businesses from economic reprisals.

The models provide that the protective order may be invoked as well by third persons who have an interest in restricting disclosure. Also, the court may permit that all or part of the showing of cause for a denial or regulation of disclosure be made "in camera", based upon the submission of written statements. But to provide for the possibility of an appeal, the record must be sealed and preserved to be made available for the appeal court.

The order itself can be tailored to the particular circumstances of the case and may involve decisions as to timing of disclosure or the uses to be made of the material disclosed, or both. In the A.B.A. Standards commentary to the section on protective orders (4.4) it is stated:

> "It is not intended to permit denial of disclosure altogether, although it may result in deferral until the eve of trial or, in extreme and rare cases, until almost the time when the revelation would have to be made in any event. The limitation on the court's power is expressed in the requirement that disclosure be made in time for the defence to make beneficial use of it... The point is that, while the protective order is designed to permit flexibility, it is to be used under a policy of as full and early disclosure as possible."[11]

One interesting and unusual form of protective order relating to the disclosure of names and addresses of prosecution witnesses is provided for in the proposed Tennessee Code of Criminal Procedure. Section 1506(b) provides that names and addresses of prosecution witnesses are not subject to disclosure if the district attorney certifies that disclosure may subject the witness or others to physical or substantial economic harm or coercion. However, where this certification is made, the court, upon a motion of the accused, must order that the testimony of the witness be perpetuated at a court hearing

at which the accused may, after being given a reasonable time to prepare, cross-examine the witness. Then, before trial, the accused must be given a copy of the perpetuation hearing transcript and if the witness has become unavailable, without the fault of the state, the transcript is admissible as part of the state's case as substantive proof of the facts stated therein and not merely in respect of the witness credibility. And if the witness has changed his testimony the transcript may be used at trial to test his credibility. In general however, the models recognize that the cases in which the identity of a witness must be kept secret should be rare.

(f) Continuing Duty to Disclose and Sanctions to Compel Disclosure

The models also specifically provide a continuing duty on all parties to promptly notify the other parties or bring to the attention of the court information discovered, either before or during trial, that has been the subject of an earlier discovery order.

The models also give the court power to impose a range of orders or sanctions for failure to comply with disclosure requirements, including: (a) ordering the errant party to permit the discovery or inspection of relevant material; (b) granting an adjournment; (c) prohibiting the party from introducing the material or testimony not disclosed; or (d) entering any order that it deems just under the circumstances. The discretion given to the judge is intended to permit the court to consider such matters as the reasons for non-disclosure, the extent of prejudice, if any, to the opposing party, and the feasibility of correcting the prejudice by ordering an adjournment.

The A.B.A. Standards have deliberately omitted the sanction of prohibiting the party from introducing in evidence the material not disclosed on the basis that while this sanction might be useful in some situations, it cannot be applied against accused persons without undermining fundamental principles of the criminal process and, without enforcement against the accused, it would be unfair if applied only against the prosecution:

> "The committee's general view, moreover, was that the court should seek to apply sanctions which affect the evidence at trial and the merits of the case as little as possible, since these standards are designed to implement, not to impede, fair and speedy determination of cases."[73]

2. *Tentative Evaluation of the Combination of Models*

The statutes and standards of these other models are useful, if only to illustrate that in many jurisdictions, specific and detailed schemes broadening the scope of discovery in criminal cases have been enacted. Each of the models is supplemented by extensive commentary setting out the rationale for both the concepts embodied in the statutes or standards as well as the specific wording employed. To this extent it is possible to have a more thorough understanding of the real meaning and intention behind these statutes, and thus, to evaluate their possible applicability in Canada. Of course, for those models that are now implemented, it is still necessary to

determine how effectively they are working. Nevertheless, whether successful in their respective jurisdictions or not, these well thought out and concisely drafted models deserve serious consideration.

ENGLAND

1. *Description*

English law contains few formal criminal discovery rules. Their present discovery "system" is the product of gradual change in statute law, case law and informal practice. Many of the changes have had the effect, although often not the original purpose, of broadening discovery. As in Canada, the focal point of discovery is the preliminary inquiry. However, it may be the case that despite the similarity of the procedural structure, discovery is more effectively achieved in England than in Canada. But in cases where a preliminary inquiry is not available, it would seem that in England, as in Canada, discovery has been largely ignored.

(a) Developments in Statute Law

Reference has already been made to the origin and development of the preliminary inquiry as a "committal" proceeding.[73] Recent legislative changes have served to further emphasize the lack of concern in England to promote discovery as a desirable value in itself, at least by statutory means.

In 1957 the *Magistrates' Court Act*[74] provided a form of limited discovery to the accused in certain summary offences. The purpose of the *Act* was to enable the accused, in summary offences not also triable by indictment, or where the maximum possible punishment was not greater than three months imprisonment, to plead guilty without appearing before the court. This may be done provided that the clerk of the court is notified by or on behalf of the prosecutor that along with the summons the accused has been served with a notice of the effect of the *Act*, and a concise statement of such facts relating to the charge as are to be placed before the court by or on behalf of the prosecutor if the accused pleads guilty without appearing before the court. Before accepting the plea, the court must hear the statement of facts as well as any written submission received from the accused in mitigation of sentence. The prosecutor in speaking to sentence is also bound by the statement of facts sent to the accused.

It is interesting to note that in summary cases the accused may be supplied with a statement of facts at an early date if the prosecutor anticipates a plea of guilty and does not require the presence of the accused. On the other hand, if a contested case is anticipated, a statement of facts need not and likely will not be delivered, and thus since a preliminary inquiry is not available in such a case the accused is not formally able to obtain discovery.[75]

The *Magistrates' Court Act* of 1957 puts into effect recommendations of the Departmental Committee on the Summary Trial of Minor Offences presented to Parliament in July, 1955. The real purpose of the recommendations was to reduce the need for unnecessary attendances of witnesses in

minor cases.[76] Again discovery seems to have been an accidental effect of this legislation which was in fact designed to serve another purpose—the achievement of efficiency in the processing of minor cases.

Another significant reform, dealing with committal proceedings, was enacted in the 1967 *Criminal Justice Act*.[77] The nature and significance of the changes have already been partially discussed in Part 3 of this study. The *Act* provides for new methods of proving matters not in dispute both at trial and at committal proceedings. Evidence of witnesses may now be received by the court in written form subject to certain conditions.[78] Written statements are only as admissible as oral testimony to the like effect would be; thus hearsay, opinion and other inadmissible evidence in the statements may be excluded. The conditions of admissibility of written statements in committal proceedings have already been set out in Part 3.[79]

The 1967 *Act* creates a method of committal for trial alternative to committal upon consideration of the evidence pursuant to Section 7 of the *Magistrate's Court Act* of 1952. Section 1 authorizes a magistrate to commit an accused for trial without considering the evidence if all of the evidence consists of written statements as described by Section 2 and if:

(a) all and each of the accused are represented by counsel or a solicitor, and

(b) none of the accused makes a submission of no case.

In such a case, the magistrate may commit for trial without examining the contents of the written statements. Thus, if one of the accused is not represented by counsel, or the defence wishes to make a submission of no case, or a part of the evidence is not offered in writing, or one of the parties objects to the written statements pursuant to section 2, or a party asks, and the court orders, that a witness give his testimony orally, the magistrate may not commit for trial under Section 1 and must proceed by way of a conventional preliminary inquiry. However, even at the conventional proceedings, written statements of witnesses are admissible if the required conditions are met.

At first sight in both section 1 and section 7 of the 1957 *Act* committal proceedings appear to be liberal in terms of discovery because they permit the defence to have some advance knowledge of all of the written statements of the witnesses. However, as has already been pointed out,[80] it is now clear that the English Courts do not accept discovery as being a purpose of committal proceedings in general, and the new (1967) procedure in particular. Thus the discovery value of committal proceedings is limited by the extent to which prosecutors may perceive their duty in such proceedings as merely that of presenting sufficient evidence to justify committal for trial.

The restrictive position taken in the case law with respect to the discovery significance of the 1967 Act may be contrasted with the previous assertion by Glanville Williams that:

> "The Crown is regarded as under a duty to put forward its full case at the preliminary hearing . . . the practice is . . . to produce, where they

exist, more witnesses at the preliminary hearing than will be needed to prove the point at trial."[81]

It seems that the English courts are not prepared in every case to enforce the "practice" and "duty" as described by Williams but rather will uphold the validity of committal proceedings where the Crown has chosen not to put its full case forward, provided that a *prima facie* case is established.

In conclusion, it is apparent that English statute law has developed committal proceedings to the point where they now provide significant safeguards against the subjection of accused persons to unwarranted trials. However, from the point of view of discovery, the legislation itself does not ensure that committal proceedings will in all cases facilitate adequate trial preparation by the accused and in some cases may even impede or conflict with the achievement of the latter purpose. In any event, committal proceedings apply to only a small proportion of criminal matters tried in England and for the other cases it has been said:

"To conduct a case summarily in this country, it is a very considerable advantage if you have some powers of clairvoyance, because the first time you really know the case you've got to meet is when you stand up in court to say that you're appearing in the case . . . the solicitor conducting these cases has to wait for the opening to learn precisely the way the case is going to be put against him, or against his client, and then to adjust his tactics and forensic ability to what he hears."[82]

In the 1967 Act it is also interesting to contrast the reluctance to expand discovery to the accused with the clear broadening of discovery for the prosecution. Section 11 of the Act is the first English "notice of alibi" legislation. The text of this legislation has also been already set out in Part I.[83]

(b) Developments in Case Law and Informal Practice

IN GENERAL

The lack of concern to provide for discovery illustrated in earlier English legislation was paralleled in the case law. It has been observed that:

"Pre-trial discovery in criminal cases was a stranger to English common law. Initially the unavailability of discovery was but one aspect of the pervasive policy of restriction upon defendant's rights. At common law defendants were denied counsel, disqualified for interest, and were even unable to call witnesses on their own behalf. Only in trials for political offences, where members of Parliament presumably saw the possibility that they themselves might someday be in the prisoner's dock was the prosecution required to submit a copy of the indictment to the defendant before trial or to deliver to him a list of names and addresses of the prospective witnesses and veniremen."[84]

The leading case of *The King v. Holland*[85] in 1792 revealed the extent to which the common law viewed with suspicion any proposal to reduce the element of surprise in criminal cases. In the *Holland* case, a board of inquiry

was appointed in India to inquire into charges of corruption. The board examined witnesses, issued a report, and sent it to England in consequence of which charges were laid. The accused applied to inspect the report, arguing that it was a public document, and pointed out the difficulty in finding witnesses because of the distance of the prosecution from the location of the alleged crime. The prosecutor argued, on the other hand, that:

> "There never was yet an instance of such an application as the present, to give the defendant an opportunity of inspecting the evidence to be produced against him upon a public prosecution. It would lead to the most mischievous consequences . . . The effect of this application, if successful, would be not only to inform the defendant who were the witnesses to be examined against him but also the whole detail of their evidence."[86]

The Court agreed. One judge believed that if the application were granted "it would subvert the whole system of criminal law".[87] Another was certain that the practice was that the accused could not inspect the evidence forming the basis of the prosecution "till the hour of trial."[88]

The English courts began to qualify these seemingly absolute prohibitions at about the same time as the enactment of the legislative reforms of the 19th century already discussed, at least to the extent that in some cases, without establishing principles of general application, the accused was held entitled to inspect specific items of evidence either before or at trial.[89] Lord Devlin described the process of liberalization as one culminating in a judge-made rule of practice having the effect of compelling the prosecution to make a complete disclosure of the whole of its case to the defence prior to trial. He said:

> "He is not obliged at the trial to confine his case only to the material which he put before the magistrates because he may obtain other material afterwards; but if he does so he must disclose it by serving on the defence a notice setting out in the form of a statement by the witness the additional evidence he proposes to call. In this way the defence gets to know the whole of the material that will be put against them . . .
> . . . to my surprise I found that there was no case in which such a rule had specifically been laid down. There is no doubt about the practice; and the way in which it came about affords so good an example of the steps by which the judges have formed a rule of practice that I think they are worth setting out . . . "[90]

The cases cited by Devlin illustrate a progressive development of the notice "rule" as a result of acceptance by prosecutors, of judges' suggestions as to the proper practice.[91]

The result, according to Devlin, was that:

> "The prosecution now always considers it is its duty to give notice of any new evidence, and I believe would hesitate to tender new evidence without notice. If they did tender it and the defence objected and the matter was substantial, I think the defence would get an adjournment

almost as of right; and if the judge thought that an adjournment would create difficulties, it is very probable that he would tell the prosecution that the evidence should not be tendered and it would not be."[92]

The application of this rule of practice would seem to ensure full discovery for the defence, but analysis of the case law suggests that there are many areas where either significant gaps exist or the practice is far from clear. For example, at the preliminary inquiry the prosecution need only call those witnesses that are necessary to establish a *prima facie* case.[93] But then it may be argued that the defence must be notified of evidence to be presented at trial that has not been presented at the preliminary inquiry, and since at trial the prosecutor must call witnesses "essential to the narrative on which the prosecution is based whether in the result the effect of such testimony is for or against the accused",[94] the defence is assured of receiving notice of such evidence whether or not it has been presented at the preliminary inquiry. However, there is no general obligation upon the prosecution to give notice to the defence of relevant information or evidence coming into its possession before or after the preliminary inquiry that it does not intend to use at trial. And furthermore the calling of witnesses essential to the narrative, even if it is clear what that means, does not recognize the full scope of discovery.

As to witnesses called by the prosecution at the preliminary inquiry or whom the defence might reasonably expect to be present,[95] they must be made available by the prosecution at the trial. If the prosecution does not intend to call the witnesses at the trial they must tender them for cross-examination retaining the right to re-examine.[96] If the prosecutor does call such witnesses he has a discretion to call and examine them or to call and merely tender them for cross-examination.

"The prosecution do not, of course, put forward every witness as a witness of truth, but where the witness' evidence is capable of belief, then it is their duty, well recognized, that he should be called, even though the evidence that he is going to give is inconsistent with the case sought to be proved. Their discretion must be exercized in a manner which is calculated to further the interest of justice and at the same time to be fair to the defence. If the prosecution appear to be exercizing that discretion improperly, it is open to the judge at trial to interfere and in his discretion in turn to invite the prosecution to call a particular witness, and if they refuse, there is the ultimate sanction in the judge himself calling that witness."[97]

STATEMENTS OF WITNESSES TO THE PROSECUTION

Where the prosecution have taken a statement from a person whom they know can give material evidence but decide not to call him as a witness, it has been held that they are under a duty to make that person available as a witness for the defence, but they do not have the further duty of supplying

the defence with a copy of the statement that they have taken.[98] It seems that the witness is "made available" if his name and address are supplied.[99]

If a witness is called to testify and the defence has somehow acquired knowledge of the contents of his previous statement, it may be used to contradict his evidence in court. However while in practice prosecutors regard it as their duty to supply the defence with a copy of any statement made by a prosecution witness which varies with his prospective testimony, the authorities are not clear or consistent as to whether the defence has a right to see, or to use such statement at trial. It has been held that the prosecution ought to inform the defence of the fact that they have in their possession a statement of a prosecution witness substantially conflicting with the evidence he has given on the stand.[100] Although the discrepancy relates to that part of a witness's evidence which is evidence against one defendant only, the information should be supplied to any other co-defendant against whom the witness also gives evidence, as it goes to the credibility of the witness.[101] It has also been recognized that in certain cases where the discrepancy involves minute details it may be impossible to convey accurate information to the defence without handing them a copy of the earlier statement.[102] And there have been cases where, because of the particular circumstances, judges have ordered the prosecution to hand to the defence statements to the police made by prosecution witnesses.[103] While these cases may not be taken as authority for a general duty of the prosecution with respect to disclosure to the defence of statements given to the police by witnesses or potential witnesses,[104] in *Dallison v. Caffery*[105], Lord Denning, M.R. seemed to create such an authority when he stated:

> "The duty of a prosecuting counsel or solicitor, as I have always understood it, is this; if he knows of a credible witness who can speak to material facts which tend to show the prisoner to be innocent, he must either call that witness or make his statement available to the defence."[106]

WRITTEN OR ORAL STATEMENTS OF THE ACCUSED OR CO-ACCUSED

There is also some uncertainty as to whether the accused may inspect or have a copy of his own confession prior to trial. In the view of one observer, "(T)he defence in England has ready access to any statement written and signed by the accused . . . and . . . ordinarily the prosecution does not reveal the gist of [oral] statements."[107] On the other hand, it has also been stated that:

> "The availability of copies of the defendant's own statements and of co-defendant's statements (written or oral) remains . . . a procedural courtesy to the unsatisfactory consequences of which (particularly in regard to unrepresented defendants or to those whose advocates, for reasons good or bad are 'personae non gratae' to a prosecution or a particular prosecution advocate or representative) the memorandum draws attention."[108]

PREVIOUS CONVICTIONS AND INFORMATION WITH RESPECT TO CHARACTER OF WITNESSES

Where the witness is of known bad character the prosecution must inform the defence of this fact but they need not examine their records to see whether there might exist anywhere in the country any matter which might affect the character of a witness.[109] Details of previous convictions of the accused and the prosecutor must be supplied by the police to the defending solicitor on request.[110] Convictions have been quashed where erroneous information as to convictions has been supplied and has prevented effective cross-examination,[111] or has resulted in the court misleading a jury in summing up.[112] However, it has also been held that where defence counsel has been informed of the bad character of a prosecution witness and has elected not to cross-examine him, the prosecution has no duty to disclose the character of the witness to the jury.[113]

SCIENTIFIC, FORENSIC, AND MEDICAL EVIDENCE AND REPORTS

It has been held that, while it is not proper for the Crown to call evidence of the insanity of the accused, any evidence in its possession on this issue should be placed at the disposal of the prisoner's counsel to be used by him as he thinks fit.[114] Medical reports are always supplied to the defence.[115] The prosecution makes laboratory reports available to the defence, often upon its own initiative, and always upon request. It automatically supplies any reports that appear "to be of value to the defence"[116] and it has been held that it has a duty to do so, at least in respect to forensic evidence.[117] Such disclosure is limited to scientific findings. If the defence wants them interpreted it must employ its own experts, but it can obtain legal aid for that purpose if necessary.[118]

But limiting discovery, the defence is not informed of prosecution experiments that have been abortive or unsuccessful and while the government Forensic Science Laboratories are available to the defence the police or prosecution are usually informed of the findings of defence tests or experiments.[119]

OTHER DOCUMENTS

> "Defence solicitors are always given facilities to examine and take copies of all documents which the police have seized from the accused or have obtained from other sources.
>
> When any such documents appear to be of use to the defence, the defence are notified and given facilities for inspection."[120]

RIGHT TO INTERVIEW PROSECUTION WITNESSES

It appears that prosecution witnesses are in fact rarely interviewed by the defence before trial because of fears that subornation of the evidence of

such witnesses will be alleged.[121] In fact the English practice has been thus described:

> "... in this country we do not, as a matter of practice, get in touch with prosecution witnesses. Although there has been some dispute, it has been established that there is no property in a witness. Some years ago the Law Society was contending that there was no property in a witness; the then—Director of Public Prosecutions was contending to the contrary. The matter was referred to the then—Lord Chief Justice, who confirmed that in his view there was no property and that anyone could approach any witness. But he went on and said that rarely would it be necessary for anyone representing the defence to have recourse to seeing a witness after he had given evidence at the preliminary hearing."[122]

THE INDICTMENT

The charging document was for a long period the only formal source of information available to the accused about the charges against him.

> "Originally it provided the accused with all the notice it was thought he was entitled to of the offence with which he was charged, and all the information which he was supposed to need about the acts complained of. These were matters about which, until the 19th century, when he was allowed to read the depositions, the accused could only guess. When for the first time he heard the indictment read out in court, he had to listen to it and make of it what he could. For many years he was not even entitled to a copy of it. It had to be exactly correct in all particulars, and often the accused's best chance of acquittal lay in finding technical flaws in it; judges were reluctant to let the accused have a copy because they considered he would use it only for the purpose of trying to find a loophole."[123]

The accused now obtains his information about the facts from committal proceedings, from the various additional informal disclosure practices, and through the conduct of his own independent investigation. As the present time the indictment merely informs of the legal character of the crime and it need not be informative or accurate about the facts.[124]

In summary proceedings, however, subject to the changes of 1957 already discussed, discovery is not available to the accused through committal proceedings or otherwise and the charging document remains the sole pre-trial notification to the accused of the case he must meet at trial. In effect no information beyond that contained in the charge itself need be given to the defence until the opening of the case for the prosecution at trial.

2. *Tentative Evaluation of the English Model*

The English discovery "system" has been the subject of much comment, much of it inconsistent. The preliminary inquiry has been described glowingly as "the quintessence of discovery"[125] and disparingly as "a tedious and time wasting ceremony".[126] As in Canada, the English discovery process is based

to a great extent upon prosecutorial and judicial discretion and, except for the recent requirement as to notice of alibi in the 1967 Criminal Justice Act, it does not formally provide for prosecutorial discovery of the accused. Thus, in both jurisdictions, it is difficult to describe the discovery system without relying upon the opinions of individual prosecutors, defence counsel and judges as to the practices that are followed. It seems, however, that the principle that the defendant should have a thorough pre-trial knowledge of the case he must meet receives more effective recognition in England than in Canada. A discretionary system may be satisfactory in the English context where "there is great mutual trust at the bar between both sides" and where a small number of barristers act in most of the serious criminal cases both for the prosecution and the defence.[127] On the other hand, in Canada the same involvement of counsel in prosecution and defence work in criminal cases is not the case, and the degree of trust and respect between prosecution and defence counsel is both less apparent and less certain. In any event, in considering prosecutorial discretion as a basis for discovery it has been observed that:

> "If a prosecutor bars discovery except to a defence attorney who answers to his concept of a trustworthy opponent, or at least a good risk, he in effect imposes his own standards on the criminal bar and discriminates against defendants represented by counsel whom he chooses to lock out from discovery. Even a defence attorney who has received the boon of discovery from the prosecutor may feel constrained not to use disclosures with maximum effectiveness, however proper such use would be, lest he be cut off from discovery in future cases. There is always the risk that in the contentious atmosphere of a trial a prosecutor may view a defence attorney's quite proper use of his disclosures as an abuse of his generosity. Pre-trial discovery can operate effectively only if it is impartially administered in accord with objective standards free of adversary considerations of trial strategy."[128]

As in Canada, in the overwhelming majority of criminal cases the preliminary inquiry is not available. Where it does apply discovery is limited to admissible evidence only; it does not include the evidence the prosecutor does not plan to offer at trial. However the test of admissibility may not be appropriate when the concern is focused on the needs of pre-trial preparation and investigation. For example, it is recognized that proper police investigation requires access to inadmissible confessions and hearsay material because these may provide clues to other relevant and admissible evidence. Yet the defence is denied access to similar material in conducting its investigation of the facts. Similarly, the mere fact that the prosecutor does not wish to use certain evidence at trial makes its attractiveness for defence preparation obvious; yet before trial such material is not available to the defence as of right.

Where the accused seeks information other than admissible evidence to be presented against him at trial he raises issues not directly related to the question of whether there is sufficient evidence to justify committal. It

may be that such issues are appropriately dealt with in separate pre-trial proceedings. Once the discovery function is separated from the committal function, any number of alterations may be made to the system of committal for trial. For example, it has been variously suggested that committal proceedings be made optional at the request of either party, or that they take place much more quickly after discovery is provided, or that the function of committal may be removed completely from the judiciary and left in the hands of the prosecution, as in Scotland or Israel. This would enable changes to be made to cope with criticisms that committal proceedings are time wasting and inconvenient for witnesses. However, in each case where the separation of function has been made or proposed, full, formal discovery for the accused has also been required.

In England in recent times, pressure to completely abolish the preliminary inquiry has developed.[129] Also, the present state of the practice with respect to disclosure of the identity of witnesses and their statements has also been criticized and a number of suggestions have been made for legislative reform.[130] As well, a series of reforms has been recommended to provide for some discovery in summary conviction proceedings.[131]

The developments in England with respect to discovery in criminal cases are still quite recent and because discovery depends so much upon informal and discretionary practices and understandings, the exact nature and limits of the "English system" are difficult to define. As with all of the other models described in this chapter, one must approach the question of extrapolation with caution. A model based upon the exercise of discretion which is so dependent upon attitudes, understandings, and trust would appear to be particularly unsuited for extrapolation into a different context. Thus it would seem that we should look elsewhere if Canada is to have a full and clear recognition of discovery in criminal cases.

CONCLUSION TO PART VI

As a note on which to conclude this part, the overall significance of a study of discovery models is captured by a statement of Chief Justice Traynor of the California Supreme Court (as he then was). In examining other discovery systems he remarked that:

> "Of course, in a process still as experimental as that of discovery, some disagreement is inevitable as to what is virtue and what is not. Still, it would be meanly pedantic to make merely descriptive comparisons without setting forth provisional views that, even if eventually proved to be misconceptions, could serve at least to elicit correct information and perhaps also to stimulate enough experiment to yield a definitive answer."[132]

In the next part of this study such provisional views will be set out. It is hoped that they will yield results of the kind anticipated by Chief Justice Traynor.

NOTES

Omnibus Hearing

1. In the Southern District of California, including San Diego, and the Western District of Texas, including San Antonio.
2. American Bar Association Standards Relating to Discovery and Procedure Before Trial, Approved Draft, August 11, 1970.
3. *Ibid.*, at p. 1.
4. *Ibid.*, at p. 28, Additional pressure for speedy informal contact between prosecution and defence is generated by effective judicial calendar control and a requirement that criminal charges be disposed of within a specified time period. See A.B.A. Standards, *supra* footnote 2, at p. 8.
5. See "Why the Omnibus Hearing Project", panel discussion, (1972), 55 Judicature, 377 at pp. 378-9. In San Diego the Omnibus Hearing is presided over by the United States Magistrates rather than the District Court Judges.
6. A.B.A. Standards, section 2.6 *supra* footnote 2, at p. 88.
7. (1956), 47 Cal. 2d 566, 305 p. 2d I.
8. *Powell v. Superior Court* (1957), 48 Cal. 2d, 704, 312 p. 2d 698; *People v. Estrada* (1960), 54 Cal. 2d. 713, 355 p. 2d 641; *People v. Norman* (1960), 177 C.A. 2d 59, 1 Cal. Reptr. 691; *McAllister v. Superior Court* (1958), 165 C.A. 2d 297, 331 p. 2d, 654; *McCarthy v. Superior Court* (1958), 162 C.A. 2d 755, 328 p. 2d 819; *Schindler v. Superior Court* (1958), 161 C.A. 2d, 513, 327 p. 2d 68; *Cordrey v. Superior Court* (1958), 161 C.A. 2d, 267, 321 p. 2d 222; *Cash v. Superior Court* (1959), 353 Cal. 2d 72, 346 p. 2d 407; *People v. Cartier* (1959), 51 Cal. 2d 590, 335 p. 2d 114; *Vance v. Superior Court* (1958), 51 Cal. 2d 92, 330 p. 2d 773; *People v. Chapman* (1959), 52 Cal. 2d 95, 338 p. 2d 428; *Brenard v. Superior Court* (1959), 172 C.A. 2d 314, 341 p. 2d, 743; *People v. Garner* (1962), 57 Adv. Cal. 6; *Funk v. Superior Court* (1959), 52 C.A. 2d 423, 340 p. 2d 593; *Walker v. Superior Court* (1957), 155 C.A. 2d 134, 317 p. 2d 130; *Norton v. Superior Court* (1959), 173 C.A. 2d 133, 343 p. 2d, 39.
9. Starting with the case of *Jones v. Superior Court* (1962), 58 A.C. 55, 372 p. 2d 919, See also "Comment, The Self-Incrimination Privilege: Barrier to Criminal Discovery?" (1963) 51 Calif. L. Rev. 135; Michael S. Wilder, "Prosecution Discovery and the Privilege Against Self-Incrimination", (1967), 6 American Crim. L.Q.3; Roger J. Traynor, "Ground Lost and Found in Criminal Discovery" (1964), 39 N.Y.U.L. Rev. 228; David W. Louisell, "Criminal Discovery and Self-Incrimination: Roger Traynor Confronts the Dilemma", (1965), 53 Calif. L. Rev. 89.
10. There was generally no right to inspection until the subject of the requested inspection was offered in evidence. See *Dowling v. State* (1958), 317 S.W. 2d 533; *Pettigrew v. State* (1956), 289 S.W. 2d 935; *Hill v. State* (1958), 319 S.W. 2d 318.
11. See, "Why the Omnibus Hearing Project?" *supra* footnote 5, at p. 379.
12. *Ibid.*, at pp. 379-82.
13. Edwin L. Miller Jr., "The Omnibus Hearing—An Experiment in Federal Criminal Discovery", (1968), 5 San Diego Law Review 293.
14. *Supra* footnote 5, at pp. 379-82.

15. During the period of the British Mandate there was no general right of access to the police file. The courts however did recognize the right of a person charged with felony to inspect previous written statements of witnesses whose names appeared on the back of the charging document and to use such statements in cross-examination at trial. See High Court 33/37 *Scheinzwit v. Inspector General of Police*, 4 Palestine Law Reports 221, 224; Criminal Appeal 162/28, *Sa'adeh Abu Rashid*, 1 Palestine Law Reports, 348. Also, the accused or his counsel or expert was held entitled, under proper safeguards, to have access to the exhibits upon which the prosecution's expert based his opinion. See the *Sheinzwit* case 4 Palestine Law Reports 221, 225. Failure to provide such access at the trial was considered sufficient to reverse a conviction. See Criminal Appeal 35/50, *Malka*, 4 *Piskei Din* 429, 432-33, 436. In 1951, the Supreme Court of Israel in *Tzinder v. Head of Police Investigation Dept.*, 10 Psakim Elyon 236, High Court 147/50, refused to consider itself bound by the limited common law modes of discovery and held first, that prior to trial, even in cases that were not felonies, the trial court may grant inspection at its discretion and second, where there is a right to inspect it extends not only to the depositions of prosecution witnesses, but to any relevant matter in the possession of the police, except matters the disclosure of which is contrary to public policy. However, in no case could inspection be allowed in felony cases prior to a preliminary inquiry which was considered an appropriate vehicle for discovery. See generally Eliahu Harnon, "Criminal Procedure in Israel—Some Comparative Aspects" (1966-67), 115 U. of Penn. Law Rev. 1091, 1102-3.
16. Criminal Procedure Amendment (Investigation of Felonies and Causes of Death) Law 5718-1958, Laws of the State of Israel, Vol. 12 (5718-1957/8) at p. 66.
17. More than 95 percent of requests for preliminary inquiries were made by the defence. See *The Israeli Criminal Procedure Law 5725-1965*, U. Yadin, introduction, (London, 1967), p. 8.
18. Of the preliminary inquiries begun at the request of either party, 60 percent were terminated by withdrawal of the request prior to the conclusion of the proceedings, and of the 1,161 cases where preliminary inquiries proceeded to conclusion, 16 resulted in discharge of the accused, see M. Shalgi, Comment, "The New Code of Criminal Procedure in Israel" (1966), I Is. L. Rev. 448, 453.
19. *Ibid.*, at p. 453.
20. In the case of state or defence secrets, certain provisions of the State Security Law of 1957 seem to allow for presentation of evidence to the Court without discovery to the accused, but these instances are probably extremely rare. See M. Shalgi, "Criminal Discovery in Israel" (1966), 4 Am. Crim. L.Q. 155, 157.
21. Cited by U. Yadin, *supra* footnote 17 at p. 6.
22. Shalgi, *supra* footnote 18, at p. 454.
23. Yadin, *supra* footnote 17 at p. 6.
24. Shalgi, *supra* footnote 18 at p. 454.
25. *Ibid.*, at p. 454.
26. Section 75, The Criminal Procedure Law, 5725-1965.
27. *Ibid.*, Section 160.
28. *Ibid.*, Section 166, it may be of assistance to here set out the text of a number of the sections dealing with the charging and pleading processes.

Section 52. *Complaint*

Any person may lodge a complaint with the police concerning the commission of any offence.

Section 53. *Police Investigation*

The police shall open an investigation whenever informed, either by complaint or otherwise, that an offence has been committed; provided that in the case of an offence other than a felony, a police officer of or above the rank of superintendent may direct that there shall be no investigation, if he is of the opinion

that no public interest would thereby be served or if there is another authority lawfully competent to investigate the offence.

Section 54. *Forwarding Material to Prosecutor*

The material procured in the investigation of a felony shall be forwarded by the police to the District Attorney, and in the case of any other offence—to a prosecutor authorized to conduct the prosecution as may be determined under section 10.

Section 56. *Committal for Trial*

Where it appears to the prosecutor to whom the material of the investigation has been forwarded that there is sufficient evidence to charge a particular person he shall commit such person for trial, unless he is of the opinion that no public interest would be served by the trial; provided that where the material of the investigation has been forwarded to a prosecutor referred to in section 10 (a) (2), the decision not to commit for trial on the ground aforesaid requires the approval of a police officer of or above the rank of superintendent.

Section 61. *Statement of Charge*

Where a person is to be committed for trial, a Statement of Charge against him shall be filed by the prosecutor.

Section 75. *Contents of Statement of Charge*

A Statement of Charge shall contain:

(1) The name of the Court in which it is filed;
(2) The designation of the State of Israel as plaintiff or the name and address of the private complainant;
(3) The name and address of the accused;
(4) A description of the facts constituting the offence, indicating the time and place insofar as they can be ascertained;
(5) A statement of the provisions of the enactment under which the accused is charged;
(6) The names of the witnesses for the prosecution.

Section 81. *Amendment of Statement of Charge by Prosecutor*

At any time until the commencement of the trial, the prosecutor may amend the Statement of Charge, add thereto or detract therefrom, by filing a notice in court specifying the charge; the court shall serve a copy of such notice on the accused.

Section 82. *Amendment of Statement of Charge by Court*

At any time after the commencement of the trial, the court may, upon the application of any party, amend a Statement of Charge, add thereto or detract therefrom, provided that the accused is given reasonable opportunity to defend himself; the amendment shall be made in the Statement of Charge or entered on the record.

Section 83. *Withdrawal of Charge*

At any time after the commencement of the trial, the prosecutor may withdraw any charge contained in the Statement of Charge against any one or more of the accused; provided that he shall not do so if the accused has, either in writing in accordance with section 113 or in his plea to the charge, admitted such facts as are sufficient to convict him of that charge; where the facts admitted are not sufficient for conviction, the prosecutor may withdraw the charge by leave of the court.

Section 84. *Effect of Withdrawal of Charge*

Where the prosecutor withdraws a charge before the accused has pleaded thereto, the court shall strike out the charge so withdrawn; where he withdraws a charge at some later stage, the court shall acquit the accused of such charge.

Section 113. *Written Admissions*

Until the commencement of the trial, the accused may, by notice in writing to the court, admit all or any of the facts alleged in the Statement of Charge and may plead additional facts; a copy of the admission shall be served by the court on the prosecutor.

Section 114. *Written Admission Not a Bar to Preliminary Objection*

An admission in writing shall not preclude the accused from raising any preliminary objection or from admitting facts or pleading additional facts in the course of the trial.

Section 131. *Commencement of Trial*

At the commencement of the trial, the court shall read the Statement of Charge to the accused and, if it deems it necessary, explain to him its contents.

Section 136. *Plea of Accused*

Where the charge has not been struck out on a preliminary objection, the court shall ask the accused to plead to the charge; the accused may remain silent, and if he pleads, may in his plea admit or deny all or any of the facts alleged in the Statement of Charge and may also, whether or not he has made any admission as aforesaid, plead additional facts. The response of the accused may be made by his counsel.

Section 137. *Retraction of Admission*

Where the accused has admitted facts, either in writing before the trial or in the course of the trial, he may, at any stage of the trial until the verdict, retract the admission, wholly or in part, by leave of the court.

Section 138. *Effect of Fact Admitted*

Facts admitted by the accused shall be deemed proved against him, unless the court considers that the admission shall not be accepted as evidence or the accused has retracted it under section 137.

Section 139. *Sentence of Accused Persons Who Have Made Admissions*

Where a number of persons have been charged in the same Statement of Charge and some of them have admitted facts sufficient to convict them and others have not done so, the court shall not pass sentence on those who have made the admission before the trial of the others has been concluded; provided that if an accused has made an admission and is called to give evidence at the trial, either on behalf of the prosecution or of the defence, the court shall pass sentence on him and he shall not give evidence until after he has been sentenced.

Section 140. *Case for Prosecution*

Where the accused has not admitted facts sufficient to convict him of all or any of the charges in the Statement of Charge or, having made an admission, the court refuses to accept it, the prosecution shall submit its evidence of the facts in respect of which no admission has been accepted and may, before doing so, open its case by addressing the court.

Section 160. *Prosecution Witness Not Called to Testify*

Where a witness named as a prosecution witness in the Statement of Charge has not been called by the prosecutor and such witness is called by the accused, the court may allow the accused to conduct the examination-in-chief of the witness as if it were a cross-examination and may determine the order of examination by the other parties.

Section 166. *Conviction of an Offence on Facts Not Alleged in Statement of Charge*

The court may convict the accused of any offence of which his guilt has been disclosed on the facts proved, notwithstanding that such facts were not alleged in the Statement of Charge, provided that the accused has been given a reasonable opportunity to defend himself; but it shall not impose upon him a more severe penalty than could have been imposed if the facts alleged in the same had been proved.

29. M. Shalgi, *supra* footnote 20 at pp. 158-9.

Vermont

30. 5 Vt. Stat. Ann. tit. 13 §6721 (1961).

31. This legislation was enacted in response to a number of restrictive decisions on discovery in criminal cases by the Vermont Supreme Court. In *Reed v. Allen* (1959), 121 Vt. 202, 153 A. 2d 74, an attempt was made to apply a 1957 Vermont statute in a murder case. The statute, providing for the taking of depositions of witnesses seemed to have been enacted for application in civil cases. The Court rejected its application in criminal cases without a clear statement to this effect by the Legislature. The other cases were *Hackel v. Williams* (1960), 122 Vt. 168, 167 A 2d 364; and *Vermont v. Fox* (1961), 122 Vt. 251, 169 A 2d 356.

32. Tex. Code of Cr. Proc. Art. 39.02 (1966); Ohio Rev. Code Ann. §2945.50 (1966), Fla. Rules Cr. Proc. rule 1.220(f) (1968).

33. The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts, (1967).

34. *Ibid.*, at p. 43.

35. See Langrock, "Vermont's Experiment in Criminal Discovery" (1967), 53 American Bar Association Journal, 732.

36. Except in cases where the witness might be subject to possible civil liability. See Langrock, *supra* footnote 35.

37. Langrock, *supra* footnote 35.

38. *Ibid.*

39. Rule 26(a). The United States Federal Rules of Civil Procedure, Rules 26 through 37 require the parties to disclose the facts in their possession prior to trial and enable each party to obtain sworn pre-trial testimony of prospective witnesses. The techniques available are (1) oral and written depositions of parties and witnesses; (2) interrogatories to adverse parties; (3) motions for inspection and copying of documents; (4) physical and mental examinations and (5) demands for admissions.

40. See Civil Procedure Rules of Nova Scotia, September, 1970, rule 18.01.

41. See Bouck & Roberts, *A Proposal For The Reform of The British Columbia Supreme Court Rules, 1961*, August, 1972, at 37.

42. *Clark v. Superior Court* (1961), 190 Cal. app. 2d 739, 12 Cal. Rptr. 191.

43. See N.J. Criminal Practice Rules, Rule 3:5-8.

44. Traynor, "Ground Lost and Found in Criminal Discovery", 39 N.Y.U. L. Rev. 228, 245.

45. See J. Norton, "Discovery in the Criminal Process", (1970), 61 J.C.L.C. & P.S. 11, 35, footnote 217.

46. (1967), 90 New Jersey Law Journal 209.

47. (1966), 47 N.J. 352; 221 A 2d 12.

48. Proposed rule 3:1303(c) was adopted in September, 1967, as Rule 3:5-11(c) with the following substantial changes: the provision in 3:1303(c)(iii) which authorizes the Court to order a transcript to be prepared and furnished was deleted; provision 3:1303(c)(iv) was deleted; and a provision was added (Rule 3:5-11(d)(ii)) which authorizes a court to condition its order for discovery under Rule 3:1303(c) "by requiring the defendant to disclose to the prosecuting attorney the names and

addresses of those persons, known to the defendant, whom he intends to use as witnesses at trial and their written statements, if any."

49. See Part 1 at pp. 21-2. See also Preliminary Report of the Canadian Bar Association Special Committee on Legal Ethics (1973), Ch. 8 at pp. 55-62 and footnote 15 at p. 64.
50. Comment, "Depositions As A Means of Criminal Discovery", (1973), 7 U. of S.F. L. Rev. 245, at pp. 256-7.

Combination of Models

51. "A State Statute to Liberalize Criminal Discovery" (1966), 4 Harv. J. Legis. 105.
52. Rules 16 and 17 U.S. C.A., Title 18, (hereinafter referred to as "Federal Rules"). As amended, February 28, 1966 effective July 1, 1966.
53. Approved draft, "Discovery and Procedure Before Trial", 1970 (hereinafter referred to as "A.B.A. Standards").
54. Final draft and report, Oregon Criminal Law Revision Commission, November, 1972.
55. Tentative draft, Law Revision Commission of Tennessee, January, 1973.
56. Except for the A.B.A. Standards which apply "in all serious criminal cases", section 1.5.
57. A.B.A. Standards, section 1.4. Oregon Proposed Code, section 322.
58. Harv. J. Legis. Section 1; Federal Rules, Sections 16 and 17; Tennessee Proposed Code, section 1501.
59. Harv. J. Legis. Section 1; A.B.A. Standards, section 2.1(c).
60. (1963), 373 U.S. 83.
61. However, see also A.B.A. Standards, commentary to section 2.1 at pp. 77-8.
    "There may be found in prosecution files miscellaneous pre-arrest memoranda indicating tentative hypotheses and imaginative speculation about who committed an offence and how. To the extent that such memoranda are limited to officers' hypotheses and speculations, they should not be considered relevant, nor for that matter would they truly tend to negate guilt... But should such memoranda contain information about evidence tending to negate guilt of the accused, that information must be disclosed."
62. A.B.A. Standards, commentary to section 2.2, at p. 81.
63. Section 4.
64. *Ibid.*
65. Compare Federal Rule 16(c), permitting the court to *condition* a discovery order for the defence by requiring prosecutorial discovery of similar material.
66. *Supra* footnote 51, commentary to section 4.
67. Federal Rules, commentary to rule 16(c).
68. A.B.A. Standards, section 3.3.
69. See Note, 1966, Wash. U.L.Q 321, at pp. 326-334 and collections of cases there cited.
70. A.B.A. Standards, section 2.6(c).
71. *Ibid.*, at p. 102.
72. *Ibid.*, at pp. 107-8.

England

73. See *supra* Part 3, at pp. 123-127.
74. 1957, 5 & 6 Eliz. 2, C.29.
75. Home office circular No. 151/57, Aug. 14, 1957, cited in Halsbury, *Statutes of England,* Vol. 37 at p. 629 suggests, in any event, that it is not the intention that the new procedure be used in all cases within the scope of the section and in particular, is not to be used in the following cases:
    (i) In cases of a kind in which the courts are accustomed to insist on the defendant's attendance;

(ii) In any other cases the particular facts of which render it inevitable to be disposed of in the defendant's absence;
(iii) In any case in which a juvenile and adult are jointly charged;
(iv) For any offence of motor racing on the highway where disqualification must be imposed;
(v) For any offence punishable on a second conviction by imprisonment exceeding 3 months, unless it is known that the accused has no previous conviction for the offence;
(vi) Where the accused is charged with more than one offence, one or more of which is outside the scope of the new procedure;
(vii) For any offence where there is a right to claim trial by jury even if the maximum penalty on summary conviction is not more than 3 months.

76. See preliminary note to the legislation in Halsbury, *Statutes of England*, Vol. 37 at p. 626.
77. 1967, C. 80.
78. *Ibid.*, sections 2 and 9.
79. *Supra* Part 3 at p. 68.
80. See *supra* Part 3 at pp. 69-70.
81. Glanville Williams, "Proposals to Expedite Criminal Trials", 1959, Crim. L. Rev. 82, at p. 87.
82. "A Criminal Case in England: From Arrest Through Appeal", Comments of David Napley, (1971), 10 American Crim. L. Rev. 263, at p. 276.
83. *Supra* at pp. 51-53.
84. *Bender's Forms of Discovery*, Vol. 13 (1968) at pp. 367-8.
85. (1792) 4 T.R. 691; 100 E.R. 1248 (K.B.).
86. *Ibid.*, at pp. 1248-49 (E.R.).
87. *Ibid.*, per Lord Kenyon C.J., at p. 1249 (E.R.).
88. *Ibid.*, per Buller J., at p. 1250 (E.R.).
89. See *Rex v. Harrie*, 6 Car & P. 105; 172 E.R. 1165; *The Queen v. Connor*, 1 Cox. C.C. 233-34; *R. v. Woodhead*, 1847 2 C. & K. 520; 175 E.R. 216; *Reg. v. Spry & Dore*, (1848) 3 Cox. C.C. 221; *R. v. Ward*, 1848, 2 C. & K. 759; *R. v. Colucci*, (1861), 176 E.R. 46; *R. v. Greenslade*, 1870, 11 Cox. C.C. 412; *R. v. Flannagan*, (1884), 15 Cox. C.C. 403.
90. Patrick Devlin, *The Criminal Prosecution in England*, (London, 1960), at p. 93.
91. *R. v. O'Connor; R. v. Ward; R. v. Greenslade; R. v. Flannagan; supra* footnote 89.
92. Devlin, *supra* footnote 90 at p. 96.
93. *Regina v. Epping and Harlow Justices, Ex parte Massaro*, [1973] 2 W.L.R. 158. See also *R. v. Collier* [1958] Crim. L. Rev. 544. The Crown has no duty to call at the preliminary inquiry witnesses whom they do not believe.
94. *Seneviratne v. R.*, [1936] 3 All. E.R. 36 (P.C.).
95. *R. v. Cavanagh and Shaw*, [1972] 1 W.L.R. 676, 679B 2 All. E.R. 704 (C.A.); *R. v. Woodhead, supra* footnote 89.
96. *R. v. Woodhead, supra* footnote 89; *R. v. Cassidy*, (1858) 1 F. & F. 79. See also "Practical Problems", 1959 Crim. L. Rev. 603 at p. 604, and *R. v. Sterk*, 1972, Crim. L. Rev. 391 (C.A.).
97. *R. v. Oliva*, (1965), 49 Cr. App. R. 298, at pp. 309-10; [1965] 1 W.L.R. 1028 [1965], 3 All. E.R. 116 per Lord Parker C.J., See also *R. v. Simmonds*, (1823) 1 C. & P. 84; 1959, Crim. L. Rev. 604.
98. *R. v. Bryant and Dickson*, (1946) 31 Cr. App. R. 146; Archbold *Criminal Pleading, Evidence and Practice*, 37th ed., (London, 1969), ¶1374 at p. 532.
99. Justice Committee on the Laws of Evidence "Availability of Prosecution Evidence for the Defence" (1967), at p. 2.
100. *R. v. Howes*, unreported, March 27, 1950, C.C.A. cited in Archbold, *supra* footnote 98.
101. *Baksh v. R.*, [1958] A.C. 167.

102. *R. v. Clarke*, (1930) 22 Cr. App. R. 58.
103. See *R. v. Hall*, (1958), 43 Cr. App. R. 29; *R. v. Xinaris*, (1955), 43 Cr. App. R. 30.
104. Archbold, *supra* footnote 98.
105. [1965] 1 Q.B. 348.
106. *Ibid.*, at p. 369. Diplock L.J., however, appeared in the same case to believe that the prosecution, while acting properly, had gone further than they were strictly bound to do. (at p. 376) See Archbold, *supra* footnote 98 and *R. v. Fenn.*, (1959) J.C.L. 253.
107. Traynor, "Ground Lost and Found in Criminal Discovery in England", (1964), 39 N.Y.U. L. Rev. 749, at p. 762.
108. J. E. Adams, "Pre-Trial Discovery", A Memorandum by the Council of the Law Society, 1966, Crim. L. Rev. 602, at p. 605.
109. *R. v. Collister and Warhurst*, (1955), 39 Cr. App. R. 100.
110. Practice Direction, 1966, 30 J.C.L., at pp. 256-7.
111. *R. v. Barthelmy*, 1963, Crim. L. Rev., 295 (C.C.A.).
112. *R. v. Greenfield, Hope and Green*, 1964, Crim. L. Rev. 817 (C.C.A.).
113. *R. v. Carey R. v. Williams*, (1968), 52 Cr. App. R. 305.
114. *R. v. Casey*, (1947), 32 Cr. App. R. 91.
115. Traynor, *supra* footnote 107 at p. 761, citing memorandum by Mervyn Griffith—Jones Q.C., "Pre-Trial Discovery to the Defence", p. 1, (1963).
116. *Ibid.*, at p. 761.
117. *R. v. Howick*, 1970, Crim. L. Rev. 463.
118. Traynor, *supra* footnote 107 at 761.
119. Ibid., citing synopsis of discussion by David Napley, "Aspects of Criminal Defences", 1963.
120. Traynor, *supra* footnote 107, at p. 762.
121. Edited transcript of remarks of David Napley, solicitor, to Criminal Law Section of the American Bar Association, July, 1971, reported in "A Criminal Case in England: From Arrest Through Appeal", 10 American Crim. L. Rev. 263, at p. 283.
122. *Ibid.*
123. Devlin, *supra* footnote 90 at p. 531.
124. *Ibid.*
125. Louisell, "Criminal Discovery, Dilemma Real or Apparent?" (1961), 49 Calif. L. Rev. 56 at p. 64.
126. Devlin, "The Police in a Changing Society", (1966), 57 J.C.L. C. & P.S. at p. 125 (1966), Compare his earlier description of the preliminary inquiry as "an essential safeguard against wanton or misconceived prosecutions" in *The Criminal Prosecution in England, supra* footnote 90 at p. 92.
127. See remarks of David Napley, solicitor, and Jeremy Hutchinson, barrister, (1971), in 10 Am. Crim. L.Q. 276-7, 306. Napley indicates that there are approximately 22,500 solicitors and 2,500 barristers and the bulk of the work goes to a very small proportion of available barristers: The solicitor, however, has a right of audience in the lower courts where 98 percent of the criminal work is done. The higher courts deal with approximately 32,000 cases a year as against 1¼ million in the lower courts. *Ibid.*, at p. 277.
128. Roger J. Traynor, "Ground Lost and Found in Criminal Discovery" (1964), 39 N.Y.U. L. Rev. 228, at pp. 237-8.
129. See, for example, Glanville Williams, *supra* footnote 80.
130. See Samuels, "Provision of Information to Defendants" 1972 New Law J. 996, at pp. 996-7; Justice Committee on the Laws of Evidence, (1965); "The Problem of Perjury", Report by Justice, (London, 1973), p. 30; Glanville Williams, "Proposals to Expedite Criminal Trials", 1959, Crim. L. Rev. 82, at pp. 93-94, and comments on the Williams proposals, 1959, Crim. L. Rev. 269.
131. J. E. Adams, "Pre-Trial Discovery", *supra* footnote 108.
132. Traynor, *supra* footnote 107 at p. 750.