PART VII

PROPOSAL FOR REFORM

Although it may seem somewhat premature at this stage to actually advance any recommendations for reform, however tentatively they are drawn, we nevertheless feel that this study would be incomplete not to do so. As stated in the introduction there is still work in progress. An analysis of the information received in the questionnaire-survey of the profession is nearing completion and will be published separately. As well, the operation in practice of some of the discovery models is receiving a closer examination.

But notwithstanding the fact that there is still research to be completed, we agree with the opinion of Chief Justice Traynor that "it would be meanly pedantic to make merely descriptive comparisons (with other systems) without setting forth provisional views . . ."[1]. Therefore, it is in this spirit that this doctrinal study is concluded by the presentation of a detailed proposal for reform. Even if this proposal should require modification, its statement in this study should serve to elicit a full response and lead to the discovery of the correct or "definitive answer".[2]

From the discussion to date it should be clear that it is the view of this Project that discovery in criminal cases should not be left to the discretion of either the prosecutor or the Court. Instead, a formal system providing discovery to the accused as of right should be established. The arguments bearing on this question have already been presented[3] and will not be repeated. What remains to be done is to outline the features of a formal system that, at this stage of our research, would seem to be the best system for the Canadian criminal process. The remainder of this part is devoted to a precise description of this system.

The procedure set out in this proposal for reform is a formal one in two senses. First, it requires that the importance of discovery in the Canadian criminal process be recognized in legisla-

tion. Second, it proposes that the subject matter of discovery and the procedures for implementing it be precisely identified and described in that legislation. This approach may be contrasted with that adopted in Israel where the system is a formal one only in the first sense described above. We emphasize that by proposing a formal system of discovery in the second sense the Israeli approach which, as has already been indicated, has a number of attractive features, has not been completely rejected. However, further study of the actual operation and effectiveness of the Israeli model is required before it can be seriously considered as a model for Canada. Without such information, despite the legislative recognition of the right of the accused to pre-trial discovery of the prosecution, the Israeli model appears both vague and informal and hence resembles a system that depends on the discretion of the prosecution. Because of the absence of a formal discovery system in Canada, it seems, at this stage at least, that a formal discovery system should be more precise and should specify both the nature of the information and material to be disclosed and the very discovery procedures themselves. It should be noted, however, that it is not intended here to set out the actual legislation that would be required to implement these proposals. Rather, the provisions set out below are merely basic standards which ought to be incorporated in future legislation.

The proposal itself is in two parts. The first part describes the discovery procedures. The second part sets out the material and information that should be disclosed according to the procedures. The proposal is then followed by a discussion of some of the problems that may arise in the implementation of the discovery proposal in the present court system, and by a statement of a position on the question of prosecutorial discovery of the accused.

SPECIFIC PROVISIONS FOR A DISCOVERY SYSTEM

I—Discovery Procedures

Application of discovery

1. *A uniform formal discovery procedure should apply in all criminal cases.*

Comment: In principle discovery should be available to the accused in all criminal proceedings. The law should not take the position, directly or indirectly, that the need of accused persons to appreciate the case to be met and to prepare for trial upon a thorough investigation of all available information and material is less pressing in some criminal cases than in others. At present, in most cases the law denies access to the most effective avenue of

discovery—the preliminary inquiry. In general this denial is based upon an arbitrary designation as to seriousness or lack of seriousness of particular criminal offences. However the need for discovery bears little relation to the supposed "seriousness" of any particular criminal offence. If the accused has a right to defend himself in an effective manner, that right ought to be realistically available in every criminal case. Moreover, if the result of conviction for every criminal offence is a criminal record, then every criminal charge must be taken to be "serious".

The criterion of "complexity-of-the-case" as a basis for granting or denying discovery rights is also unsatisfactory, even if it were possible to develop legislative guidelines to separate less complex from more complex cases. A case of causing a disturbance arising out of a political demonstration which may involve hundreds of eye witnesses and a testing of police motives and credibility, may be more complex in terms of pre-trial preparation, than a murder case where the case for the prosecution is based upon the testimony of one eye witness or the confession of the accused. In fact, the degree of resort to a discovery procedure will always depend upon the facts of each case.

However, rather than arbitrarily denying discovery on the basis of a presumed absence of any need for it, which appears to characterize present practice, it should be available in all criminal cases subject to the possibility of it being waived if it is not necessary in any particular case.

In addition, the phrase "all criminal cases" is intended in this proposal to include all criminal offences under the *Criminal Code, Narcotic Control Act,* and Parts III and IV of the *Food and Drugs Act.* But it does not include offences created by provincial legislation or regulatory offences in all other federal statutes. Of course the provinces could later decide to adopt some of the provisions of this discovery proposal. So too, Parliament could decide to extend it to other federal offences. But at this stage our concern is to provide a discovery system for those offences that are generally regarded as being in the criminal law.

2. *The prosecution should supply the accused on or before his first court appearance with a standard form discovery statement. The statement should, in essence, contain the facts, information and material that will be presented to the court if the accused pleads guilty.* Pre-Plea Discovery

[*For details of the disclosure required in pre-plea discovery see Part 2*]

Comment: This section assumes the continuance of the present system in which all persons charged with criminal offences

initially appear in court before a magistrate or provincial court judge. A more thorough discussion of the problems raised in the application of this proposal in the existing system, as well as a discussion of possible changes to the system that might enable this proposal to operate more effectively, may be found in B of this Part. Nevertheless, perhaps this is a good point to describe how both the pre-plea and pre-trial discovery procedures may be applied in the existing court system.

For offences within the absolute jurisdiction of a magistrate or provincial court judge, the accused, after being given an opportunity to consider the pre-plea discovery statement, would be asked to plead. If he should decide to plead guilty, the plea could be taken immediately or the case adjourned for plea at the discretion of the court. If a plea of not guilty should be entered, the procedures in sections 5 to 15 of this proposal would apply and a trial date would be set after completion of these discovery procedures, as provided in section 9(*f*).

For offences within the absolute jurisdiction of a superior court of criminal jurisdiction it would be presumed that the full range of pre-trial discovery provided for in this proposal would apply, unless the accused should decide to plead guilty. In the latter event, the case could be scheduled before the superior court for receiving the guilty plea and for sentencing.

If the offence is one in which the accused may elect the court and mode of trial, the accused would be asked to make his election after having an opportunity to consider the pre-plea discovery statement. If he should elect trial by a magistrate he would then be asked to plead. Should he then enter a plea of guilty the case would be dealt with in the same way as cases where guilty pleas are to be entered to offences within the absolute jurisdiction of a magistrate. If he should plead not guilty, the pre-trial discovery procedures in sections 5 to 15 would apply.

If the accused should elect trial by judge alone or by judge and jury it would be presumed, for the purpose of the pre-trial discovery procedures, that this election indicates an intention to plead not guilty, and the pre-trial discovery procedures in sections 5 to 15 would apply. When pre-trial discovery is completed the case would be referred to the appropriate court for plea and for trial. Of course, as with cases in the absolute jurisdiction of the superior courts, should the accused decide at any time to plead guilty, the case could be referred to the appropriate court for entry of the plea and for sentencing. In this way if the accused should so decide early enough, the application of the pre-trial discovery procedures may be avoided. But this is nothing new. In our system as it stands, having elected trial before a judge alone

or a judge and jury an accused person proceeds without plea to a preliminary inquiry and then to the appropriate trial court where it is usually expected that a not guilty plea will be entered. All of this procedure can be avoided by an accused person deciding to plead guilty and either re-electing back to the magistrate or to a judge alone for the plea to be entered there, or by being taken to the court elected to and there entering the guilty plea. Therefore the application of the pre-trial discovery procedures do not alter either the structure or the jurisdiction of the courts. They merely provide a specific pre-trial discovery system that may be co-ordinated with existing election and plea procedures.

No doubt the implementation of this discovery system will create pressure for a thorough reconsideration of the need to continue with the present system of criminal courts and elections for trial. From a purely administrative point of view, the operation of this proposal would be considerably simplified in a unified criminal court structure. But even aside from such far-reaching change, the application of this proposal will make some present distinctions meaningless. For example, replacing the preliminary inquiry with a discovery system applicable to all criminal cases eliminates any procedural difference in electing trial before a magistrate as opposed to trial before a judge alone; at present one election leads to a preliminary inquiry and the other does not.

Questioning validity of plea

3. *The law should enable a plea of guilty to be struck out at the request of the accused if the accused pleads guilty without receiving the discovery statement, or if the accused pleads guilty after receiving the discovery statement but the information actually presented to the court deviates from that contained in the discovery statement to the prejudice of the accused, or if the information set out in the discovery statement is inaccurate or misleading and the incorrect information has caused the accused to plead guilty without appreciating the nature or consequences of his plea.*

Comment: This provision is intended to serve two purposes. It provides an incentive to prosecutors to promtly supply accurate pre-plea discovery to the accused, and it establishes a sanction for failure to do so. The entry of a guilty plea in the absence of an acknowledgment of receipt of the pre-plea discovery statement would be sufficient in itself to warrant a later nullification of the plea. Thus, in practice no prosecutor would wish to risk proceeding upon a guilty plea before he has been able to supply the accused with the required pre-plea discovery. It might be advisable to specify some outside period of time after which a request for

a reversal of the plea, on the basis of failure to receive a pre-trial discovery statement, would not be entertained.

This section would also allow the accused to change a plea of guilty to not guilty where the pre-plea disclosure deviates from the information related to the court "in a manner prejudicial to the accused". However, the fact that the prosecution may be generous and relate to the court information that is less damaging to the accused than that contained in the pre-plea discovery statement would not be a basis for later challenging a guilty plea.

Use of pre-plea discovery statement

4. *The prosecution should not be bound by the discovery statement if the accused pleads not guilty. The accused should not be entitled to use or refer to the discovery statement itself in a subsequent trial.*

Comment: As earlier discussed in this paper, it is extremely important for the prosecution to disclose early all information material to the entry of a plea. But if, in cases of not guilty pleas, the prosecution were to be bound by or prejudiced by any deviation from the pre-plea discovery provided to the accused, it would necessarily be extremely cautious in determining the theories and evidence to be advanced at trial. As well, it would be wrong if the spontaneity and diligence which the prosecution should display in providing proper pre-plea discovery to the accused should subsequently result in prejudice to them in the presentation of the crown's case at trial. This is especially so because of the limited nature of pre-plea discovery. Thus section 4 avoids any problem here by stipulating that the prosecution should not be bound by the pre-plea discovery statements if the accused should plead not guilty.

On the other hand, this section should not be interpreted as allowing the prosecution to disclose with impunity, false or misleading information for the purpose of obtaining a guilty plea. Section 3 would avoid this result by allowing a guilty plea based on such information to be withdrawn.

Procedure if plea of not guilty entered

5. *If the accused pleads not guilty the court should require the representatives of the prosecution and defence before the court to agree upon a date, time, and place for a discovery meeting. At this meeting the disclosures required by law would take place.*

[For details of the disclosures required at the discovery meeting, see Part 2]

Scheduling discovery meeting and discovery hearing

6. *Upon being informed of the agreed date for the discovery meeting the court should schedule a discovery hearing to take place 3 weeks from the agreed date of the discovery meeting.*

The three week period would normally apply but could be shortened or extended depending upon the convenience of the parties and the court, the circumstances of the case, or the anticipated time required to complete discovery and other trial preparation.

Comment: These provisions exemplify the position articulated at the beginning of Part 7. In Canada, at this stage at least, the most appropriate discovery system for criminal cases is one that sets out the precise rules and procedures for implementing discovery.

These sections contemplate that discovery would be carried out by means of informal meetings between the prosecution and the defence and it would not be necessary for the accused to be present. Counsel attending the discovery meeting would be taken to be familiar with the terms of the legislation and would be aware of the fact that compliance would be verified at a later date in a court hearing.

Where an accused is unrepresented and intends to conduct his own case at trial, consideration should be given to the advisability of appointing counsel for the accused to attend the discovery meeting with the prosecutor. With the broad availability of legal aid, this situation should seldom occur. But if it should occur, it would seem improper to require the accused to attend personally on a prosecutor in order to receive discovery of the prosecution case.

In the majority of cases, many of the items set out in Part 2 as being subject to disclosure at the discovery meeting would not be a matter of concern. In the average case the meeting would take little time. On the other hand, in highly complex cases the meeting could extend over a longer period of time, but this eventuality should be measured against the average time involved in the existing process, particularly in serious cases, between the first appearance and the preliminary inquiry, at the preliminary inquiry itself, and finally between the preliminary inquiry and the date for trial. As well, even for cases for which a preliminary inquiry is unavailable, it is a rare case that does not proceed through two to three remands before trial and this time could be employed to provide for discovery as contemplated in these sections.

No doubt in the larger population centres the introduction of these procedures may cause difficult administrative and scheduling problems for both prosecution offices and defence counsel. But these problems need not be seen as insurmountable. The meeting itself would not have to be attended by the prosecutor or the defence counsel who would in fact be attending at the trial,

although the persons who do attend, particularly the prosecution representative, would certainly have to possess sufficient knowledge of the case and of its tactical implications in order to make decisions at the meeting that may bind the prosecutor at trial. In line with this suggestion, consideration might be given to setting up special branches of prosecution offices designed to deal only with discovery. Another approach that might commend itself is for prosecution offices to schedule definite assignments of cases once an accused pleads not guilty. This would ensure that the prosecutor at trial has made all of the discovery decisions that might affect the conduct of the case at trial.

Ordinarily, the discovery meeting should take place within a very short time of the appearance in court at which the date for the discovery meeting would be set. The involvement of the court in scheduling the meeting is suggested here because all of the parties or their representatives would be present before the court and because, as will be discussed later, the court would at the same time remand the case for three weeks from the date set for the discovery meeting at which time a judicially supervised discovery hearing would take place. But involvement of the court in the scheduling of the meeting does not mean that the convenience of the prosecution and defence need be ignored.

For most cases the time flow in implementing these discovery provisions should adhere to the following schedule:

(a) Upon the accused's first appearance in court he would receive a pre-plea discovery statement as provided herein and then the case would be remanded for a maximum of one week on the understanding that at the next court appearance the accused would be asked to plead—subject to any reasonable delay that may be occasioned by the accused experiencing difficulty in retaining defence counsel.

(b) Upon the accused's second appearance in court having retained counsel (or deciding to proceed unrepresented) and having up to one week to review the pre-plea discovery statement, the accused would be asked to plead, or to elect trial, as the case may be. If the accused should plead not guilty, or elect trial in a higher court, the court would schedule the discovery meeting as provided in section 5. At the same time the court would then remand the case for a maximum of three weeks from the date set for the discovery meeting at which time a discovery hearing would be conducted to review the discovery obtained by the defence at the discovery meeting and to fix a date for trial.

(c) In the meantime the prosecution and the defence would conduct their discovery meeting or meetings if more than one is required, the defence would conduct informal interviews of witnesses if necessary, and both parties would ready themselves for the discovery hearing.
(d) Any special discovery problems would be taken care of at the discovery hearing—as provided in later sections.

Of course it is not intended that the initiation of the full discovery process should bar the entry of a plea of guilty at any stage. It is expected that, if additional discovery were to reveal information that would warrant the entry of a plea of guilty, in many cases the accused and his counsel would act accordingly. Also, it would not be necessary for the prosecution to again supply material or information, pursuant to this section, that has already been supplied in the pre-plea discovery statement.

Discovery meeting summary memorandum

7. *At the conclusion of the discovery meeting, the prosecution representative would prepare a summary memorandum indicating disclosures made or refused and any other matters determined at the discovery meeting. The memorandum would be signed by the defence representative attending the meeting and filed with the court at the beginning of the discovery hearing.*

Comment: This section ensures that a record would be available of the discovery meeting in the event of a dispute as to whether or not a required disclosure was made at the discovery meeting. While it would not be necessary for the memorandum to contain the actual material disclosed, it would list the witnesses whose names and addresses were disclosed, indicate the number and type of statements or summaries provided to the defence with respect to each witness, indicate whether or not a criminal record was supplied with respect to each witness, identify the number, type, and date of each disclosed statement of the accused or co-accused, and identify all other physical evidence and other material or information disclosed to the defence pursuant to the sections in Part 2 of the proposal and would specify any refusal to disclose and identify the heading under which such refusal to disclose is sought to be justified. In this regard a standard form memorandum could be prepared.

In providing a summary memorandum to the judge at the discovery hearing it would be unnecessary for the court to conduct a detailed inquiry as to the disclosures made or refused at the discovery meeting. The court need only refer to the memorandum of the meeting. Then, the memorandum along with

a transcript of the discovery hearing would provide a comprehensive reference for later use either at trial or on appeal.

Period between discovery meeting and discovery hearing

8. *When the discovery meeting is concluded both parties would keep in mind that a discovery hearing is scheduled in 3 weeks. The defence, during this 3 week period, would have an opportunity to conduct further investigation, if necessary, of material or information disclosed at the discovery meeting, or to conduct informal interviews of disclosed witnesses, and would also be expected to continue its own overall general trial preparation.*

Comment: In the time between the discovery meeting and the discovery hearing, the defence would assess the material provided at the meeting and would decide whether or not to proceed to trial on the basis of the witness statements or summaries received along with the witness lists. It is likely that with respect to many witnesses, the copies of the written statements or summaries received by the defence would be sufficient and that interviews of such witnesses would be unnecessary. However, where an interview is necessary, the defence would be expected to arrange for it and to conduct it promptly after the discovery meeting.

Since the right to conduct questioning of witnesses would be formally recognized, the prosecution would be expected to cooperate and, where necessary, to assist the defence in arranging interviews. The prosecution should also advise potential witnesses to cooperate in submitting to informal interviews when requested to do so. In some cases it may be possible to meet the convenience of all witnesses by arranging one time and place for the conduct of all interviews.

It should be remembered that the essential purpose of such interviews would be discovery. Thus, wide latitude should be allowed in the informal questioning.

Discovery hearing

Functions of judge at discovery hearing

9. *The discovery hearing would be presided over by a judge, whose functions at the discovery hearing would include:*

(*a*) *Verification that discovery required by law has been completed to the satisfaction of the parties.*

(*b*) *Consideration of and ruling upon disputes as to whether legal discovery requirements have been, or ought to be, carried out, and making appropriate orders, where necessary, to ensure that they are carried out.*

(*c*) *Consideration of requests for the release of disclosed material or potential evidence for examination or testing.*

(*d*) *Hearing and determining arguments that may be raised as to the form of the charge, the question of joinder or severance of counts or accused, or the need for further and better particulars of the charge.*

(*e*) *Upon completion of discovery, an exploration of the willingness of the parties to make admissions of fact or other disclosures that may avoid the necessity of presentation of formal proof or of witnesses at trial or that may expedite the trial, and consideration of argument, if raised by the defence, as to the sufficiency of the evidence to warrant placing the accused on trial.*

(*f*) *Recording any re-election of the accused as to mode and court of trial, and setting a date for trial.*

Comment: The discovery hearing is essentially a procedure for verifying the discovery obtained at the discovery meeting and for resolving any dispute as to material or information not disclosed. As with the discovery meeting it is likely that in most cases the discovery hearing would take little time. The parties would be expected to be familiar with the matters to be covered at the discovery hearing and would be prepared to make appropriate submissions. In complex cases or where it has not been possible to complete discovery prior to date of the hearing, the hearing may have to be adjourned to allow the parties to determine their positions on all discovery issues before involving the court.

Subsection (a) Verification of Discovery

As discussed in the comment to section 7, the summary memorandum drawn at the discovery meeting would be filed with the court at the beginning of the discovery hearing. The court would then review it to verify the completion of discovery pursuant to the requirements of Part 2.

Subsection (b) Consideration of Disputes

Then the court would resolve any dispute as to whether discovery of any item has been wrongfully withheld or as to whether the extent or nature of the discovery provided is satisfactory. This would include questions such as whether material known to exist need not be disclosed, as allowed in Part 2, and whether material not subject to discovery ought to be excised from other material.

Subsection (c)

This subsection would preserve the right of an accused, presently available under section 533(1) of the *Criminal Code*, to apply for the release of an "exhibit" for the purpose of a

scientific test or examination, and extends it to cover any material or potential evidence that has been disclosed in discovery proceedings. Of course, as with all of the discovery provisions, it would apply to all criminal cases, contrary to the limited application of section 533(1) of the *Code*.

Subsection (d)

The question whether the discovery hearing should be drawn to permit collateral issues to be disposed of before trial has been the subject of considerable discussion. There is a certain attraction in suggesting that some collateral issues now resolved at trial be disposed of prior to trial at the discovery hearing. This could include such matters as the admissibility of evidence now subject to a "voir dire", constitutional and Bill of Rights issues, the making of admissions, and the order of counsel in examining witnesses, presenting evidence, and summing up where there will be multiple counsel at trial. The pre-trial resolution of these issues would clearly facilitate the trial process. Indeed, if the only issues an accused might wish to raise are collateral ones, the very need for the trial might be avoided if these issues could be resolved at a pre-trial proceeding.

However the inclusion of these issues in the discovery hearing process would raise a number of serious problems such as:

(a) whether a trial judge would be bound by decisions of the discovery hearing judge on admissibility of evidence,

(b) how the decision of a discovery hearing judge, in our system of differing tiers of courts, would affect the decision at trial of a superior court judge,

(c) if such decisions were made at the discovery hearing, whether there should be a pre-trial appeal procedure for their review, and if so, to which court. These are serious enough questions when strictly confined to the discovery purpose of the hearing and thus, at this stage at least, collateral matters are not included in the discovery hearing process, except for a number of closely related issues that are already decided prior to trial under present procedure, such as issues as to the form of the charge, the joinder and severance of counts and accused persons, and particulars. Once the discovery-hearing procedure has become established, further consideration could then be given to the inclusion of a wider range of collateral matters, as indicated above, in this pre-trial process.

Subsection (e) *Procedure After Completion of Discovery*

(i) Admissions and Disclosures

One of the purposes of discovery is to enable the parties to better assess which issues ought not to be contested at trial. Once full discovery is completed the parties ought to be in a position to indicate whether there are any matters of fact which they are prepared to admit or which do not require formal proof at trial and the judge at the discovery hearing should be authorized to explore these questions with each party.

(ii) Committal for Trial

The procedure for a possible review of a committal for trial is set out in section 13 and is explained thereafter in an extensive comment.

(iii) Recording Re-elections and Setting Date for Trial

Since all criminal cases would be subject to the discovery hearing process, the precise charge to be prosecuted at trial should be clearly known at the conclusion of the discovery hearing. Thus the discovery hearing judge would be able to assess the complexity of each case, the amount of time needed for further trial preparation, and therefore should be able to set a firm trial date, particularly for cases within the court's trial jurisdiction. In other cases where it would be impossible for the discovery hearing judge to set a firm trial date, for example where the trial is to take place in the superior court on assize, the case would then be referred to the appropriate court for trial dates to be assigned. As a general rule however, once full discovery is completed any delay between the time of the discovery hearing and trial should be minimal.

10. In some cases the judge at the discovery hearing may preside over the taking of testimony under oath of certain witnesses, or order the attendance, before a qualified person, of certain witnesses for pre-trial questioning under oath.
[*For details of the circumstances under which these functions of the discovery hearing judge may be called into play, see sections 11 and 12*]

Additional powers or functions of judge at discovery hearing

11. The law should allow the prosecution to refuse to disclose the identity of potential witnesses where it is likely that disclosure will result in intimidation, physical harm, threats of harm, bribery, or economic reprisal directed against the potential witness or other persons. In such cases the prosecution should inform the defence at the discovery meeting that disclosure of the identity of a witness is being withheld and should indicate the number of witnesses involved. At the discovery hearing the prosecutor would present these witnesses and have their

Procedure upon non-disclosure by the prosecution of identity of potential witnesses

evidence recorded under oath. The defence would then be given a reasonable time to prepare cross-examination. After the completion of questioning the witness would be formally ordered by the discovery hearing judge to appear at trial.

If, through no fault of the police or prosecution, the witness should fail to appear at trial, the admissible portions of the transcript of the testimony of the witness taken at the discovery hearing would be admissible at trial. If the witness does appear at trial but changes his testimony from that given at the discovery hearing, the transcript of his testimony given at the discovery hearing could be used by either party to contradict the witness.

Comment: This section attempts to reconcile the need of the defence to be fully informed of the identity and possible testimony of potential witnesses, and the interest of the prosecution in avoiding distortions of testimony through possible witness intimidation or other abuses. This procedure gives the prosecution an opportunity to have a potential witness testify under oath before there would be any opportunity for improper conactt with him. At the same time the defence would be provided with full discovery of the evidence of this witness.

Since the time needed by the defence to prepare for cross-examination of a witness called at the discovery hearing may vary greatly, depending upon the nature of the evidence given in chief, no definite time limit has been suggested for that preparation except one of "reasonableness".

It is expected however that the cases in which the identity of a witness would be kept secret would be rare. It should also be expected that any possible incentive for witness intimidation would be lessened in a system where the procedures themselves allow for the pre-trial testimony of a witness, as provided in this section, to be used at trial if the witness is in fact later intimidated. Thus this section would extend the present law in section 643 of the *Criminal Code* by providing that the evidence taken at the discovery hearing could be read in evidence at trial if the witness should be so intimidated as to fail to attend the trial. As well, if the witness should attend the trial but be intimidated to change his testimony thc section would provide that the transcript of his evidence at thc discovery hearing could then be used to impeach him.

Procedure upon defence request for attendance of disclosed witnesses for pre-trial questioning under oath

12. *At the discovery hearing the defence should be entitled to apply to the presiding judge to exercise his discretion in order that potential witnesses, whose identities have been disclosed by the prosecution at the discovery meeting, attend before a person qualified to preside over the taking of the testimony of witnesses under oath.*

On an application under this provision, the judge should ordinarily grant an order authorizing an examination, in the interests of proper pre-trial preparation, where:

(*a*) *it would be reasonable to provide for an examination under oath of an essential prosecution witness, such as, without restricting this category, an identification witness in a charge of murder where identification is in issue.*

(*b*) *it would be inadvisable for the defence to interview a witness, for example the complainant in a prosecution for a sexual offence, except in an examination in which all parties would be protected.*

(*c*) *a witness has unreasonably refused to submit to an informal interview or to answer proper questions during an interview. What would be reasonable or unreasonable in a refusal would be dependent upon the time, place, and circumstances surrounding both the request for the interview and the interview itself.*

In exercising his discretion the judge at the discovery hearing should be entitled to examine any previous statements of such potential witnesses already supplied to the defence, and to consider any information supplied in argument by either party as to the conduct of the defence in relevant informal interviews.

Since the purpose of the pre-trial questioning would be discovery, the defence in these proceedings should be entitled to put leading questions to the witnesses. However, as opposed to the case of witnesses who testify at the discovery hearing after non-disclosure by the prosecution, the record of the testimony in these proceedings would be inadmissible at trial except insofar as it may be admissible under section 643 of the Criminal Code or may be used for purposes of cross examination at trial.

Comment: This section describes a procedure that is analogous to an oral examination for discovery in civil cases, except that it would not be available as of right for any witness. Rather it would be available only upon an application to the court and in the exercise of judicial discretion. At this stage, despite the proposed abolition of the preliminary inquiry, perhaps it would be going too far in terms of real need and in terms of a burden on all witnesses to propose an unlimited right in the defence to a pre-trial examination of witnesses under oath.

However, for some witnesses, as set out in the proposal, there may be a real need for a formal pre-trial examination procedure, and this need is not confined to cases that proceed through a

preliminary inquiry where a formal pre-trial examination procedure is now available. Thus the object behind this provision is to accommodate this need but to confine it to the purpose of discovery where the need, on application, can be shown.

The examination of a witness pursuant to an order under this section would be before a court reporter with the prosecutor, or his representative, having the right to be present. Defence counsel would be entitled to conduct its examination as a cross-examination as in a civil examination for discovery. Any objection could be brought before the judge sitting at the discovery hearing for his decision, the only rule of inadmissibility being as in civil discovery, the complete lack of relevance of a question or its privileged nature.[4]

Contrary to the situation outlined in section 11, a deposition under this section would not be admissible at trial, except in so far as its admissibility may be permitted by section 643 of the *Criminal Code*. The only purpose of this section is discovery and therefore there is no need here to guard against possible witness intimidation by making the deposition admissible should the witness disappear. However, when a deposed witness gives evidence at trial, the deposition could, of course, be used in cross-examination.

Questioning committal for trial

13. Implementation of this proposal would involve the abolition of the present form of the preliminary inquiry. Subject to the qualification set out below committal for trial would be automatic after completion of the discovery hearing.

At the discovery hearing the defence should be entitled, at the completion of the hearing, to present a motion that there is no evidence to warrant placing the accused on trial. The motion should be precise and should specify the exact area and nature of the lack of evidence that is alleged.

In considering the motion, the presiding judge should examine all relevant available material, hear argument, and if there is clearly a complete lack of evidence on any essential element of the offence, discharge the accused, or commit the accused for trial on any appropriate lesser or included offence disclosed by the material.

In any other case the presiding judge should commit the accused for trial. The defence, if still maintaining that the evidence is insufficient, should be offered a preferred, early trial date.

The court should not be entitled to commit for trial on any charges other than those set out in the information, or lesser and included offences.

Comment: We have already discussed the basic incompatibility between a proceeding designed to provide discovery to the accused and a proceeding having the purpose of evaluating whether there is sufficient evidence to warrant a committal for trial.[5] In this proposal these two objectives are separated and provided for in separate procedures. While it is necessary to provide discovery to the accused in every case, it is not always necessary to determine by judicial means whether there is sufficient evidence to warrant a trial.[6] Looking at the question from this point of view, this proposal provides for the abolition of the preliminary inquiry and the establishment of a uniform pre-trial discovery procedure applicable to all criminal offences.

The objective of the preliminary inquiry, in allowing for the discharge of accused persons in those cases where evidence is clearly lacking, should, of course, be maintained. But this objective can be accomplished just as adequately and much more realistically by the procedure provided in this section.

This section continues the main purpose of the preliminary inquiry in determining if there is sufficient evidence to justify committal for trial. But the issue of committal would be raised by a simple motion procedure and it would be available for all offences. The essence of this provision is that committal to trial would be automatic unless disputed by the defence after receiving discovery of the prosecution case. Thus the judge sitting at the discovery hearing would not discharge the accused on his own motion.

In regard to the basis for a discharge on this motion, it is suggested that it should be the same as a motion of "no evidence" at trial. "No evidence" refers of course to a complete lack of evidence on any element essential to guilt. During the hearing of a motion for a discharge the judge would not be authorized to make a full inquiry by hearing witnesses. He would have to decide on the merits of the motion by reference to the disclosed material and on hearing the arguments of counsel. Thus it seems that he would really only be in a position to make a decision on a question of "no evidence". In the result, if he should decide that there is some evidence, however weak, on the essential elements of the offence, he would commit the accused for trial and perhaps set a preferred trial date.

Finally, the last substantial change to the present law is found in the 5th paragraph of this section. As the motion for discharge would only be incidental to the pre-trial discovery procedure, it should operate within the limits of this procedure. Therefore committal to trial after a motion for review should be confined to the offences set out in the information or to lesser or included offences, that is to those offences for which full discovery has been provided.

Sanctions

14. The law should require the trial court to exclude any evidence or witness' testimony not previously disclosed or, where appropriate, presented for inspection or copying as required by law, unless good cause is shown by the prosecution for failure to comply with these discovery requirements. If good cause for such failure is shown, the defence should be entitled to an adjournment to enable it to inspect copy or otherwise obtain the discovery to which it is legally entitled, or if it chooses, the defence should be entitled to defer cross-examination with respect to the previously undisclosed evidence.

If at any time prior to or during the trial it is brought to the attention of a court that the prosecution has wilfully or negligently failed to comply with an applicable discovery rule or order the court should require the prosecution to permit the discovery of material and information not previously disclosed, grant an adjournment, and make such other order as it deems just under the circumstances.

Moreover, the court should have a discretionary power to dismiss the charge against the accused if the prosecution wilfully or negligently destroys or otherwise makes unavailable to the defence material subject to legal discovery requirements.

Comment: These sanctions are provided to cover three types of situations. First, they provide for the case where the prosecution offers evidence at trial that has not been disclosed to the defence. In this case this provision allows the court to rule such evidence inadmissible unless the prosecution can show a valid reason for its omission—for example the fact that it only recently found out about the evidence. If the prosecution does show good cause, the defence would still not be taken by surprise, since it would be entitled to an adjournment or to defer cross-examination on this evidence.

The second paragraph provides a sanction for the situation where the prosecution has wilfully failed to disclose certain information to the defence, and which, because the information is exculpatory or is otherwise favourable to the defence, the prosecution has no intention of presenting it at trial. Obviously, the sanction of inadmissibility could not apply in this situation. Thus, the second sanction is especially designed to force the pre-trial disclosure of information which only the defence may wish to use.

The sanction in paragraph three of this section provides for the situation in which the prosecution has not only failed to disclose certain information, but has wilfully made such disclosure impossible. It is our view that in this event, depending of course on the importance of the information required, the judge should

have the ultimate authority to discharge the accused where he has been denied any possibility of making a full answer and defence. No doubt this situation would be most uncommon. But it can occur and a sanction for it should exist during the course of pre-trial or trial procedure without the accused waiting to be acquitted or raising the error on appeal.

15. *If subsequent to compliance with these discovery provisions, the prosecution should find other material or information which would otherwise be subject to disclosure, it should be required to promptly notify the other party or his counsel of the existence of such additional material or information and if the additional material or information is discovered during trial, the prosecution should also be required to notify the court and the court should issue appropriate orders to ensure that the defence obtains the full discovery that would otherwise be available.*

Continuing duty to disclose

II—Material and Information Subject to Discovery

1. *The prosecutor should ensure that a flow of information is maintained between the various investigative personnel and his office sufficient to place within his possession or control all material and information relevant to the accused and the offence charged or which is required by law to be disclosed to the defence.*

Duty of prosecution to inform itself and obtain relevant material

Comment: Under the terms of this provision, the prosecution would be obligated to make sure that information it is to disclose to the defence is placed at its disposal. Of course, this provision assumes the good faith of all parties concerned. But it also seeks to make sure that information to which the defence is entitled will in fact be made available whenever it should be found and from whatever source and not get lost in administrative red tape.

2. *The pre-plea discovery statement should contain the following information and material:*

Information and material to be disclosed in pre-plea discovery

   (*a*) *The charges against the accused, as set out in the information;*

   (*b*) *The narrative of facts with respect to each charge that the prosecutor intends to read or otherwise present to the court upon a plea of guilty;*

   (*c*) *The identity of witnesses, if any, the prosecution intends to call to establish the narrative of facts upon a plea of guilty;*

   (*d*) *In cases where the prosecution is entitled by law to elect to proceed by way of summary conviction or indictment, the election that will be made;*

(e) *The maximum penalty that may be imposed on each charge upon conviction;*

(f) *The minimum penalty, if any, that must be imposed on each charge upon conviction;*

(g) *A statement of the right of the accused to consult with counsel before deciding on the plea to be entered;*

(h) *A statement of the right of the accused to plead not guilty;*

(i) *A statement of the procedure to be followed, if the accused should decide to plead guilty, to the effect that: the narrative of facts will be read or presented to the court, the accused will be asked if such facts are substantially correct, the accused may bring to the attention of the court any facts or information presented that he disputes and may cross-examine any witness presented by the prosecution, the accused may make submissions as to sentence personally or by counsel if convicted, and the accused may call witnesses, if he chooses, to speak to sentence;*

(j) *There should be attached to the discovery statement: copies of all written material, including the accused's criminal record, and written statements, confessions or admissions of the accused or any other person, to which the prosecutor intends to refer in the event of a plea of guilty, either with respect to the question of guilt, or with respect to the question of sentence; a brief description of the physical evidence that the prosecutor intends to produce to the court upon a plea of guilty.*

Comment: The present law provides that a guilty plea is invalid if the accused at the time of entry of the plea does not have an appreciation of its nature, significance, and possible consequences. However, sometimes in practice this principle receives no more than lip service. Pressure to speedily obtain guilty pleas is sometimes justified on the basis that they are necessary to relieve overcrowded court dockets. But although guilty pleas are useful in achieving this goal, and although it may be true that some accused persons desire speedy disposition of charges out of a fear of prolonged publicity, or a desire to avoid repeated court appearances, or because they anticipate leniency as a reward for "co-operation", the law should still be structured to ensure that every guilty plea is in fact justified and entered by a fully informed accused. In our view the best means to achieve this goal is to provide the accused with pre-plea discovery sufficient to enable him to appreciate the true significance of his plea.

The proposed procedure would provide such discovery without placing any great burden on the prosecution. At the time of the accused's first court appearance the prosecutor is usually possessed of sufficient information to be able to provide the court with a narrative of facts in the event that the accused should plead guilty. Thus, there is no reason why the same information could not be provided to the accused before plea, possibly by use of a standard form, without creating an undue amount of additional paperwork.

Subsection (*j*) deals with the situation where the prosecution intends to adduce written material or other physical evidence in its submissions upon a plea of guilty. If this is the case, the material will of course be in possession of the prosecutor at an early stage and there should be no problem in providing the accused with appropriate copies or written descriptions of it.

Pre-plea discovery will not only assist in ensuring that guilty pleas are fully justified in fact and in law, but it will also tend to eliminate the occurrence of a court accepting a guilty plea upon the assumption that the accused appreciates its nature and consequence, then having an application presented to have the plea withdrawn. The accused, having admitted in court that he has read and understood the discovery statement, will rarely have any basis for later asserting that his guilty plea was improperly received.

In conclusion, in taking a pessimistic view of pre-plea discovery, at the most it can only result in a few less guilty pleas at the time of the first court appearance. But even so there can hardly be any objection to a procedure that ensures rationality in the guilty plea process. On the other hand, being more optimistic, pre-plea discovery should instead result in even more guilty pleas than are entered at present. Indeed this phenomenon has been the experience in those jurisdictions that have adopted a formal discovery system. Having received discovery of the prosecution case, many accused persons in these jurisdictions who might otherwise have pleaded not guilty have realized the futility of such a plea and have pleaded guilty.

3. *At the discovery meeting the prosecution should be required to supply to the defence, or allow the defence to inspect or copy, whichever is more reasonably appropriate, if not already supplied in pre-plea discovery.*

Material and information to be disclosed upon plea of not guilty or where the accused is to be tried in a higher court

Subject to legislation setting out the material or information not subject to disclosure (see #5 below):

(*a*) *The name, address and occupation of each witness the prosecution intends to call at trial, and all written, oral, or recorded statements of such witnesses made to in-*

vestigating or prosecution authorities or their representatives;

(*b*) *The name, address and occupation of all other persons who have provided information to investigation or prosecution authorities or their representatives in connection with any one of the charges against the accused, whether or not the information so provided is considered to be relevant or admissible at the trial;*

Where the statements referred to in (*a*) *and* (*b*) *do not exist, the defence should be supplied with a summary of the expected testimony of the witnesses intended to be called at trial and a summary of the information provided by those persons not intended to be called at trial, along with a statement of the manner in which the information in each summary has been obtained and prepared;*

(*c*) *The record of prior criminal convictions, if any, of persons whose names are supplied to the defence pursuant to* (*a*) *and* (*b*), *and of the accused;*

(*d*) *All written, recorded or oral statements made by the accused or co-accused, whether or not the prosecution intends to use or adduce the statements at trial, along with an accurate description of the circumstances surrounding the making, taking, or recording of each statement, the identification of persons involved in the taking or recording of each statement, and the identification of those statements the prosection does intend to adduce at trial;*

"Statement" should include the failure to make a statement where such failure will be used to in any way advance the prosecution case in chief;

(*e*) *Subject to legislation setting out the material not subject to disclosure (see #5 below), all books, documents, papers, photographs, recordings or tangible objects of any kind:* (*1*) *which the prosecution intends to use or produce at trial,* (2) *which have been used, examined or prepared as part of the investigation or prosecution of any one or more of the charges against the accused,* (*3*) *which have been obtained from or belong to the accused, or* (*4*) *which have been seized or obtained pursuant to a search warrant issued in connection with the investigation or preparation for trial of any one or more of the charges against the accused;*

(*f*) *All reports or statements of experts supplied to the prosecution or investigating authorities in connection with*

the investigation or preparation for trial of any one or more of the charges against the accused, including results of physical or mental examinations and of scientific tests, experiments or comparisons, and analysis of physical evidence, whether or not the prosecution intends to call the expert or present the report, statement, result, analysis or comparison at trial; and a statement of the qualifications of each expert witness the prosecution intends to call at trial;

(*g*) *Motor vehicle accident reports prepared in connection with the events forming the subject matter of any one or more of the charges against the accused;*

(*h*) *Subject to legislation setting out material and information not subject to disclosure (see #5 below) all information or material, not included in any of the categories already set out, that might reasonably be regarded as potentially useful to the defence in its preparation for trial, or that may tend to negate the guilt of the accused or may tend to mitigate his punishment upon conviction;*

4. *At the discovery meeting the prosecution should also inform the defence of its position with respect to the following matters:*

(*a*) *Whether it intends to adduce similar fact evidence;*

(*b*) *Whether it intends to adduce evidence of recent complaint;*

(*c*) *Whether it intends to adduce accomplice evidence;*

(*d*) *Whether it intends to adduce a prior criminal record of the accused for purpose of impeaching his credibility if he should choose to testify;*

(*e*) *The circumstances of all lineups involving the accused, or other attempted out-of-court identifications of the accused, whether the accused was in fact identified or not;*

(*f*) *The theory, or alternative theories, of the prosecution to be advanced at trial;*

(*g*) *Whether there is more than one charge against the accused the order in which the prosecution intends to try the charges.*

and should supply to the defence sufficient details of these matters to enable the defence to prepare as fully as possible to either prepare to meet or to use the information so disclosed.

Comment: Subsections (*a*) to (*h*) of section 3 set out the material or information that the prosecutor should disclose to the defence at the discovery meeting.

Disclosure by the prosecution to the defence of the material set out in subsections 3(*a*) to (*h*) would fulfil the ideal purposes of discovery, in making it possible for the defence to obtain information enabling it to directly or indirectly advance its own case, or to test the case for the prosecution, or lead the defence to a train of inquiry which may have either of these two consequences. Discovery in this context should not be limited by the strictness of relevance or admissibility at trial but rather, as in civil cases, it should emphasize the importance of facilitating trial preparation in the broadest sense.

Subsections 3(a) and 3(b)

Identity and Statement of Witnesses

It should be noted at the outset that the disclosures required by these standards are limited by the provisions of section 5 in Part 2, which sets out matters not subject to discovery. As well, the disclosures required by these subsections may be affected by the provisions of section 11 in Part 1 which sets out a special procedure for discovery of the identity of witnesses or other relevant persons in cases where possible witness intimidation is a real concern.

It should be clear that while these subsections require delivery of witness statements and summaries of witness information where signed statements are unavailable, the purpose, as in civil cases, is to provide discovery not to change the law of evidence at trial. Of course if witness statements exist the defence should have full use of them including the right to cross-examine on them at trial. But if the information is not in the form of a record that can be so used, then its value is strictly in discovery. This is not to suggest however that, by these provisions, police officers would be encouraged to avoid taking written statements of witnesses. Undoubtedly there are instances when signed statements are not obtained and of course police investigation practices can vary. But the police and the prosecution would be the first victims of any consistent policy to not record witness information and not to have witnesses sign their statements. Thus these provisions should not be seen as any real interference in the conduct of police investigation.

Subsection 3(c)

Previous Criminal Records

The information covered by this provision is information to which the police and the prosecution have ready access. Section 593 of the *Criminal Code* allows the prosecution to adduce evidence at trial of any previous conviction of the accused where the

accused adduces evidence of his good character. If, before trial, the accused is provided with an accurate copy of his own record, he and his counsel may then make an intelligent decision as to the advisability of adducing any character evidence. Similarly, section 12(1) of the *Canada Evidence Act* authorizes questioning of a witness as to previous convictions. This right is only realistically available to the defence if information is provided as to the criminal records of witnesses to be called by the prosecution. As well, the defence should also have the means of determining the presence or absence of a criminal record of any witness it may call. At present it is often impossible for the defence to obtain this information without the assistance of private investigators, while such information is readily available to the prosecution.

Subsection 3(d)

Statements of Accused and Co-Accused

The existence of a confession or any statement made by the accused often shifts the focus of the trial from the criminal event to the various legal issues surrounding the admissibility of that confession or statement. Thus, before trial, the accused should be permitted to prepare to meet what may become the critical issue in the case.

The requirement that a statement of the accused be held to be voluntary before it is admissible in evidence at trial is sufficient reason to require disclosure to the defence of all statements made by the accused and the circumstances surrounding their making and recording. In many cases the substance and specific wording of the statement may shed light, at least by inference, on the question of voluntariness.

The remaining requirements of this subsection are designed to facilitate full preparation for all of the issues that may arise in connection with any statement of the accused. While an exculpatory statement may not be introduced by the prosecution at trial, production to the defence prior to trial may provide some confirmation of the validity of a position of innocence taken by the accused, or may supply leads for further investigation by the defence.

Statements of co-accused are included in this provision in order to provide the defence with material that may be relevant in reaching a decision as to whether or not a motion for separate trials should be presented as well as to facilitate preparation in case a motion for separate trials should be refused.

Subsections 3(e) to 3(h)

The remaining subsections require disclosure by the prosecution of all other material and information that may assist the

defence in preparing for trial. The duty to disclose material or information that the prosecution does not intend to use at trial is justified simply on the basis that since the prosecution obtained it as part of its investigation, it is information of sufficient relevance for disclosure to the accused. The defence may find it directly relevant or useful in leading to the finding of relevant evidence. Thus the defence should at least have the opportunity of examining this information and material and making its own decision as to its importance or possible usefulness.

Finally subsection 3(*h*) is a general provision that clearly sets out the prosecution duty to disclose anything in its possession or knowledge that may assist the defence in its trial preparation whether or not it is specifically set out in the other parts of section 3.

Section 4

The matters set out in section 4 need no elaboration except to point out that disclosure to the defence of this kind of information will again better enable the defence to conduct its trial preparation and to assess the strength of the case for the prosecution.

Material and information not subject to disclosure

5. *These disclosure requirements should be qualified in two respects:*

(*a*) *The prosecution should be entitled to withhold disclosure of the identity of certain potential witnesses. The appropriate circumstances and procedure in such cases have already been described in Part I.*

(*b*) *Legislation should be enacted specifying certain material and information not subject to disclosure. This should include:*

(*i*) *Privileged Communications: The privileged communications between husband and wife and lawyer and client should not be subject to compulsory disclosure at any stage of the pre-trial discovery procedures.*

(*ii*) *Crown Privilege: When a Minister of the Crown certifies to the Judge sitting at the Discovery Hearing by affidavit that the discovery of a document or its contents would be injurious to international relations, national defence or security, or that it would disclose a confidence of the Queen's Privy Council for Canada, the Judge should examine the document and order its disclosure, subject to such restrictions or conditions as he deems appropriate, if he concludes in the circumstances of the case that*

the document is important for the fulfillment of the right of the accused to make full answer and defence.

After such an order is made, if the Crown still persists in refusing to disclose the document, the case against the accused should be dismissed.

(*iii*) *Work Product: With the exception of disclosure required of the theory or alternative theories of the prosecution to be advanced at trial, this privilege from disclosure should cover internal legal research, records, correspondence and memoranda, to the extent that they contain opinions, theories or conclusions of investigating or prosecution personnel or staff, or reflect their mental processes in conducting the investigation or preparing the case for trial.*

(*iv*) *Informants: Disclosure of the identity of an informant should not be required where it would be detrimental to the effective investigation by any government agency of criminal activity, unless the prosecutor actually intends to call the informant as a witness at trial, or unless the informant took part in the event from which the prosecution arises.*

Comment: The information which should not be subject to compulsory disclosure before the trial, or at the very least, which should only be disclosed under certain conditions are here grouped in four categories.

(i) *Privileged Communications:* The spousal privilege set out in section 4 of the *Canada Evidence Act* applies, except as otherwise indicated by that *Act,* to all Federal legislation. If this privilege from disclosure should continue, it seems logical that it should apply throughout the whole judicial process.[7]

Professional confidence, to which a lawyer is bound, should, of course, be respected before the trial. Therefore the solicitor-client privilege is another obvious limit to a party's right to discovery of information material to a case.

(ii) *Crown Privilege:* Even in criminal proceedings it may be necessary in the interests of internal security or international relations for the state to claim that certain information is privileged from disclosure. Indeed perhaps the final decision as to the application of this privilege is that of the state and not the court. But even if this is so, the claiming of crown privilege in a criminal proceeding—which should be seen as a rare event—need not result in prejudice to the accused. Where the claim of crown

privilege would have the effect of depriving the accused of a means of establishing a defence, the court should have the authority, if the state persists in its claim of privilege, to dismiss the prosecution. In the final analysis, the state cannot be allowed to persist both in a claim of crown privilege and in a criminal prosecution to which the privileged information is relevant.

(iii) *Work Product:* In civil practice the items listed here would be covered by the solicitor-client privilege. But, in criminal proceedings, it would seem that a prosecutor has no "client". And, in a detailed discovery system in criminal cases perhaps it should be made clear that a prosecutor is not required to disclose the product of his own mental processes. But, it should also be clear that this privilege does not apply to witness statements or to all of the specific information or material required to be disclosed pursuant to sections 2 to 4 in this part.

(iv) *Informants:* The present state of the common law on this question is quite confused and ambiguous.[8] While there are serious reasons for allowing the identity of police informants to remain secret, there are also cases where these reasons have no application. The first exception is quite evident. If the prosecutor should intend to call an informant as a witness at trial, he obviously should not allow that informant to become a surprise witness solely because he is an informant. In this situation, it seems reasonable to require the disclosure to the defence before trial of the identity of the informant along with the names and addresses of other prosecution witnesses.

The second exception to the non-disclosure of police informants should be where the police informant has in fact participated in the event from which the prosecution arises. In this situation it seems essential in the interests of justice that the informant's identity be disclosed to the defence before trial even if the prosecution does not intend to call the informant as a witness. In this situation the informant is a material witness, if only as to the identification of the accused, and should be disclosed.

Excision

6. *When some parts of certain material are discoverable under the law and other parts are not, as much of the material should be disclosed as is consistent with compliance with the law. Excision of certain material and disclosure of the balance is preferable to withholding the whole. Material excised by judicial order should be sealed and preserved in the court records to be made available to the appeal court in the event of an appeal.*

PROBLEMS RELATING TO THE IMPLEMENTATION OF THE DISCOVERY PROCEDURE AND THE PRESENT STRUCTURE OF THE COURTS OF CRIMINAL JURISDICTION

In the comment under section 2 in Part 1 of the proposal, certain questions were avoided because they seemed to require a separate examination. This part of the proposal takes up the problems created by the operation of the discovery proposal within the present structures and jurisdictions of Canadian criminal courts.

The comment to section 2 describes the procedure that would be followed in the existing system at an accused's first appearance. If the case is within the absolute jurisdiction of a superior court of criminal jurisdiction, or if the accused has elected trial by judge alone or by judge and jury, the presiding magistrate or provincial court judge would put the discovery procedures in motion. The accused would have received pre-plea discovery and it can be assumed for the purposes of the rules and procedures for pre-trial discovery that the accused will plead not guilty. Thus if the accused should wish to enter an early guilty plea and avoid these pre-trial discovery procedures it will fall to him or to his counsel to schedule the case before the appropriate court for the guilty plea to be entered.

From this brief description, it would seem that to have this procedure operate without any major change in the present jurisdiction of the courts, the pre-trial discovery procedures would have to be entrusted to magistrates and provincial court judges who presently preside at preliminary inquiries. However, this approach, which at first glance seems to be the most simple, does raise a few problems.

1. *Utilization of Provincial Court Judges*

While provincial court judges, who have traditionally been involved in the administration of pre-trial matters, seem to be the logical choice to sit at the discovery hearing and to settle any difficulties or disputes in the application of the rules for pre-trial discovery, a serious problem arises from the nature of the decisions that may be made at this hearing. Should decisions at the hearing bind county court judges or superior court judges for cases destined for trial in these courts? To this question there are perhaps three approaches.

(*a*) *Decisions of Provincial Court Judges at the Discovery Hearing Would be Final and Would Bind the Trial Judge*

One of the benefits expected from pre-trial discovery procedures is the speedy settlement of pre-trial matters, particularly

discovery issues, and perhaps some collateral questions such as motions for separate trials, severance of counts, and change of venue. It is a little uncertain, however, whether this objective can be realized through the use of provincial court judges at the discovery hearing. Is it realistic to have judges at this hearing make final decisions on these important issues without authorizing the trial judge, who may be a judge from a higher jurisdiction, to again review them? To deny such review to the trial judge would have the effect of transferring control to the discovery hearing over matters affecting the fairness of the trial, and perhaps the whole course of the trial.

(*b*) *Decisions of Provincial Court Judges Would Not be Final and Could be Reviewed by the Trial Judge*

To take the opposite position, and provide that the provincial court judge's decision at the hearing may be reviewed by the trial court would create other difficulties. Would there not be a serious danger that all discovery issues in dispute would automatically be brought up for a second time before the trial judge by the party not satisfied with the decision at the discovery hearing? If so would not one of the benefits of discovery, being the early settlement of collateral questions, be diminished? It is conceivable that this approach could make matters worse because there would be an increased number of motions and procedures to arrive at the same result.

(*c*) *Mixed Formula: Certain Decisions Would be Final, Others Would be Subject to Review by the Trial Judge*

This is perhaps the only model which allows for the satisfactory use of magistrates and provincial court judges at the pre-trial level. But how would one decide which matters should or should not be subject to review by the trial judge? Several approaches deserve consideration. First, perhaps all discovery issues decided before the trial at the hearing in favour of the accused could be subject to review by the trial judge on a motion by the prosecution, but the accused could await the verdict at trial and, if convicted, then raise any pre-trial decision on a regular appeal. The basis for this approach is that pre-trial decisions unfavourable to the accused could be remedied by an acquittal at trial. In this event any argument that an accused has not had a fair trial because of some pre-trial decision would become academic at best.[9] If the accused should be convicted, he could appeal to the Court of Appeal on the ground that he has not had a fair trial as a result of a wrong ruling at the discovery hearing and the Court of Appeal could allow the appeal and order a new trial for any substantial error in the pre-trial decision.

On the other hand, the trial cannot resolve all prosecution objections to pre-trial decisions. Notwithstanding an accused's conviction, the prosecution may be prejudiced simply by being forced to reveal to the accused before the trial confidential or otherwise privileged information. However, an approach which gives a right of review of pre-trial decisions only to the prosecution is still too general to be satisfactory. There are certain pre-trial matters which not only cannot be remedied by an acquittal at trial, but which cannot wait for a review by the trial judge. For example, in the present system judicial decisions relating to the interim release of accused persons or to the examination of the legality of searches are reviewable immediately. And, it is our view, that a similar interlocutory review procedure ought to be available for discovery decisions requiring the prosecution to disclose information that they claim to be privileged or confidential. But not all decisions made in favour of the accused at the discovery hearing need be reviewed at trial or on an immediate interlocutory review in order to prevent the prosecution from being prejudiced. In fact, perhaps only decisions rejecting a claim of privilege or confidentiality should be so reviewed.

An interlocutory appeal, either by right or by leave to appeal, has, of course, drawbacks when the judge sitting at the discovery hearing is not the judge sitting at the trial. Would not such a review place a finished product before the trial judge? Should this be the case?

Returning to the situation of the accused, while no immediate review by an interlocutory appeal need be provided, some of the issues which may be decided in favour of the prosecution during the discovery hearing are so closely tied to ensuring a fair trial that it is perhaps wrong to take away from the trial judge all right as to their final settlement. Following his view, should the accused at the discovery hearing be refused disclosure of certain information favourable to the defence, then perhaps he should be allowed to make another application for disclosure to the trial judge.

One more approach might be to allow the provincial court judge at the discovery hearing complete discretion to settle some questions and to reserve others for the trial judge. But would this compromise be a satisfactory solution to the problems in this area?

2. *Each Level of Jurisdiction Would Control Its Own Pre-Trial Procedures*

Given the existence of the various courts exercising criminal jurisdiction, sometimes exclusive and sometimes co-ordinate, perhaps it would be possible to require each court to deal with all

aspects of the discovery system for all cases coming before them for trial. Thus when a case is to be heard by one of the higher courts, a judge of that court, and preferably the trial judge, could sit at the discovery hearing and settle all pre-trial questions that might be in dispute, subject to a possible interlocutory appeal review of some decisions such as a decision rejecting a claim of privilege by the crown.

However, there are some very practical questions that must be asked in regard to this approach. Do superior court judges and county court judges have enough time and sufficient resources to take charge of all procedures relative to the trials which will come before them? Moreover, do they want to? These questions are especially relevant in rural districts where superior court judges do not sit on a permanent basis. On the other hand, they are not insurmountable, given the small number of cases now tried by these courts.

Another serious problem arises in the relationship between the pre-trial discovery procedures and the present re-election procedures. An accused who has elected for trial by a court composed of a judge and jury or a judge alone would, under the approach being presently considered, have a discovery hearing before a judge of such higher court but would then be able to re-elect to be tried by a magistrate or a provincial court judge. In the case of a first election to be tried by a court composed of a judge and jury at the superior court level, the accused may re-elect to be tried by either a county court judge sitting alone, or a magistrate or judge of the provincial court. But would it be desirable, or even realistic, to expect superior court judges to conduct pre-trial discovery hearings for cases that will eventually be tried in the lower courts? No doubt, in the event of the establishment of the proposed discovery system the right to a re-election after the discovery hearing could be removed. But to even contemplate such a change would bring into question the whole system of elections and re-elections for trial and the different criminal court jurisdictions from which they have sprung.

3. *Unification of Criminal Courts*

A third approach, as just suggested, would be reform at the level of the multiple jurisdictions of Canadian criminal courts by the establishment of a single court for the trial of all serious crimes. In terms of discovery in such a reformed system, the judge for each case, whether sitting alone or with a jury, would rule on all pre-trial issues including those that would be raised at the discovery hearing. Even if the judge at trial should be different from the judge at the pre-trial hearing, this would not be a serious problem because they

would both be judges of co-ordinate jurisdiction. In short, it seems clear that a formal discovery system would work best in a single court system.

However, to seriously consider this approach would require a study and analysis of many issues that are outside the scope of this study on discovery.[10] Therefore, at the present time, it is an approach that we will not pursue, although as we have already noted, this study emphasizes the need for such far-reaching examination and possible reform.

Conclusion

Having set out a number of different approaches in the implementation of the discovery proposal, the impression should not be left that the proposal cannot work in the existing court system. Although our discussion in this part suggests that the proposal would work best in a unified court system, obviously it can work in the present system without any change being made to the jurisdictions of the courts. Earlier in the comment to section 2 of Part I, the discussion outlines how the proposal would work by assigning all of the discovery rules and procedures to the control of magistrates and provincial court judges as part of the present pretrial system, subject to interlocutory appeals from some decisions at the discovery hearing and to the general review of judges at trial. However, it should still be kept in mind that the operation of the discovery system in this way could result in pressure for a review of our present trial court system.

PROSECUTORIAL DISCOVERY OF THE ACCUSED

Statement of Position

The defence should not be obliged in law to disclose or supply to the prosecution any material or information relating to the defences it intends to raise or witnesses it intends to call at trial. If the prosecution should in fact be taken by surprise at trial by the introduction of evidence or the raising of a defence for which it is not prepared, it should be entitled as of right to obtain an adjournment of the trial in order to conduct all necessary investigation and preparation occasioned by the surprise.

Comment: This statement of position on the issue of prosecutorial discovery of the accused provides a short answer to each of the three questions raised at the conclusion to Part 5 of this study. Based on the arguments examined in that part, it is our conclusion that any attempt by the state to obtain compulsory discovery of an accused's defences and evidence will conflict with long

established principles such as the presumption of innocence and the burden on the prosecution to prove guilt beyond a reasonable doubt, the accused's right against self-incrimination, and the accused's right to make a full answer and defence at any time, and therefore must be avoided.

In reaching this conclusion, we considered the possibility of confining compulsory discovery of the accused to the defence of alibi, to expert evidence, and to evidence that would not be incriminatory. But in each case we concluded that this approach could not be supported. In regard to alibi and expert evidence, we agree with the arguments, already expressed in Part 5, against making any exception for them. As to the possible compulsory disclosure of evidence that would not be incriminatory, we concluded that this approach was fundamentally unsound; no clear distinction can be drawn in advance between incriminatory and non-incriminatory information. And, for the sake of argument, even if it could be drawn, the only effective sanction to enforce such discovery would be that of inadmissibility at trial for any information not disclosed and this sanction would conflict with the present right of the accused to make a full answer and defence.

This position on the issue of discovery of the accused does not mean that accused persons would have a licence to call surprise evidence and thereby frustrate achieving the purpose of the criminal process. First, in terms of the ability to investigate and prepare for trial prosecutors are seldom disadvantaged by the lack of discovery of the accused, nor should they be. The human and physical resources of police investigation, the power to search and to seize, to question, and access to scientific laboratories, far outmatch the resources available to the defence. Second, for those cases where the prosecution would benefit from defence discovery, there are a number of incentives, some already in existence and some which would flow from the institution of discovery procedures in favour of the accused, which would encourage the defence to make pre-trial disclosures to the prosecution. In a number of cases an adjournment would allow the prosecution to investigate and rebut surprise evidence. But even more important, a policy of granting adjournments to allow the prosecution to counter surprise evidence would encourage defence discovery to the prosecution. As well, the very fact that evidence is disclosed later in the process will, in many instances, operate to diminish the weight to be attached to it and thereby encourage defence discovery. In addition to these existing incentives, the establishment of a formal system providing discovery to the accused would create new incentives for the defence to make

discovery to the prosecution. The pre-trial hearing suggested in this proposal to review the completion of discovery from the prosecution to the defence, would serve as an opportunity for the defence to make disclosures and admissions. The judge could inquire of defence counsel if there were any disclosures to be made or issues which could be resolved by admissions of fact to avoid unnecessary witness attendances at trial. While there would be no compulsion in this inquiry and while in the existing law the prosecution is free to ignore defence admissions of fact and to tender proof at trial anyway, fact-admissions and disclosures as to defences would be made. Having received discovery from the prosecution, many defence counsel would be just as interested as the prosecution in saving time and expense and getting down to the matters that are really in dispute. Moreover, trial judges and juries would soon be aware of the rules and procedures that provide the defence with full discovery and with an opportunity at the pre-trial hearing to make admissions and disclosures. It is likely that this awareness would further diminish the weight to be given to evidence or a defence that is not disclosed until trial. Finally, the establishment of a formal discovery system providing uniform discovery to the accused in all criminal cases would of itself encourage the defence to make discovery. An approach of openness by the prosecution will foster more openness by the defence just as a restrictive approach, which now characterizes discovery by prosecutors in many parts of Canada, tends to encourage defence counsel to play their cards close to their vests.

In passing it may be noted that this position against a system of compulsory discovery of the accused is contrary to the position advanced by the Evidence Project of the Law Reform Commission of Canada in a preliminary study paper entitled: Compellability of The Accused and the Admissibility of His Statements. The procedure recommended in the Evidence Project paper, which would require an accused to attend at a hearing for questioning followed by a judicial comment at trial inferring guilt from silence or a refusal to answer any question, is clearly a form of compulsory discovery of the accused, and is a position with which we are strongly opposed. While we agree that it is desirable to encourage accused persons to admit facts that are not in dispute and to pursue a policy of voluntary discovery to the prosecution, it is our view that any rule or procedure which will compel them to do so would seriously erode many valuable principles and thereby diminish the quality of the system of criminal justice in this country.

NOTES

1. Traynor, "Ground Lost and Found in Criminal Discovery in England" (1964), 39 N.Y.U. L. Rev. 749, at p. 767.
2. *Ibid.*
3. See Part 3 at pp. 60-63.
4. We are referring here to the civil law in effect in the English Provinces; Quebec Law on this question is more limited; see *supra*, footnote 22 at p. 56.
5. See Part 3 at pp. 64-67.
6. See Part 3 at pp. 67-71.
7. See the study paper prepared by the Law Reform Commission research group on Competence and Compellability, at pp. 9, 10 and 11.
8. See "Crime and Crown Privilege", 1959, Crim. Law Review, 10, especially pp. 12 and 13.
9. Reference might be made here to the possibility of recourse to a civil action or some other means of compensation that should exist in favour of the acquitted accused who has been the subject of a malicious or vexatious prosecution.
10. For a detailed study of this question see D. W. Roberts "The Structure and Jurisdiction of the Courts and Classification of Offences", draft, February 26, 1973, unpublished.

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APPENDICES

APPENDIX A

1. *Omnibus Hearing "Action Taken" Form Presently In Use In The Southern District of California*

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff, No. _____ Crim.

v.

Deft. #1_____

Deft. #2_____

Deft. #3_____

Defendants.

Offense(s) charged:

_____

_____

_____

OMNIBUS PROCEEDING AND

ORDERS THEREON

[NOTE—Circle appropriate portion(s) in each and every item.]

A. DISCLOSURE BY GOVERNMENT

1. The government will or has disclose(d) all evidence in its possession, favorable to defendant on the issue of guilt.

[N.A.] 2. The government will not rely on the Jencks Act (18 U.S.C. §3500) except with respect to: informants, if any; cooperating codefendants, if any; and

_____

_____

_____

[N.A.] 3. The government (has) (has not) made (full) (partial) (any) disclosure of investigative reports prepared by the following agencies:

a) Customs Agency Service
b) Bureau of Narcotics & Dangerous Drugs
c) Federal Bureau of Investigation
d) Secret Service
e) Immigration & Naturalization Service
f) _____

[N.A.] 4. The government (will) (has) disclose(d) all oral, written or recorded statements in its possession made by defendant to investigating officers or to third parties.

[N.A.] 5. The government (has) (has not) disclosed the names of plaintiff's witnesses and their statements, subject to those exceptions noted in A(2), *supra*.

[N.A.] 6. The government will seek to rely on prior similar acts, if any, or convictions of a similar nature, if any, for proof of knowledge or intent, and (will) (will not) disclose the investigative report(s) incident thereto.

[N.A.] 7. The government (will) (will not) supply the defense with names of expert witnesses it intends to call, their qualifications, subject of testimony, and reports.

[N.A.] 8. Inspection or copying of any books, papers, documents, photographs or tangible objects obtained from or belonging to the defendant (have been) (will be) supplied to defendant.

[N.A.] 9. Inspection or copying of any books, papers, documents, photographs or tangible objects which will be used at the hearing or trial (have been) (will be) (will not be) supplied to defendant.

[N.A.] 10. Information concerning prior convictions of persons whom the prosecution intends to call as witnesses at the hearing or trial (has been) (will be) supplied to defendant.

[N.A.] 11. Government will seek to use prior felony conviction(s) for impeachment of defendant if he testifies,

a) Date and type of offense: _____

_____

[N.A.] 12. Any information government has indicating entrapment of the defendant (has been) (will be) supplied.

[N.A.] 13. There (was) (was not) an informant or lookout involved.

[N.A.] 14. Identity of informant or source of lookout (will) (will not) (cannot) be supplied.

[N.A.] 15. Statement of informant or information from lookout (will) (will not) be supplied.

[N.A.] 16. There (has) (has not) been any electronic surveillance of the defendant or his premises.

[N.A.] 17. Proceedings before the grand jury (were) (were not) recorded.

B. DISCLOSURE BY DEFENDANT

[N.A.] 1. There (is) (is not) any claim of present mental incompetency of defendant under 18 U.S.C. §4244.

[N.A.] 2. Defense counsel states that the general nature of the defense is:

a) insanity at the time of the offense
b) lack of knowledge of contraband
c) lack of specific intent
d) alibi
e) entrapment
f) general denial. Put government to proof.

[N.A.] 3. Defendant stipulates to prior conviction(s) listed in A.11, *supra*, without production of witnesses or certified copies.

(yes) (no)

[N.A.] 4. The defense (will) (will not) supply names of expert witnesses it intends to call, their qualifications, subject of testimony, and reports.

[N.A.] 5. Defendant (will) (will not) supply the names of his lay witnesses, on the issue of sanity at the time of offense.

[N.A.] 6. Defendant (will) (will not) furnish a list of alibi witnesses.

[N.A.] 7. Character witnesses (will) (will not) be called.

[N.A.] 8. Defendant (will) (will not) furnish a list of character witnesses.

C. DISCOVERY MOTIONS – MAGISTRATES COURT

NOTE – CIRCLE MOVING PORTION ONLY IF DISCOVERY NOT VOLUNTARILY DISCLOSED OR TO BE VOLUNTARILY DISCLOSED BY APPROPRIATE PARTY. RULING PORTION TO BE CIRCLED BY MAGISTRATE ONLY.

1. The defendant moves for:

[N.A.] a) Discovery of all oral, written or recorded statements made by defendant to investigating officers or to third parties and in the possession of the government.

(Granted) (Denied)

[N.A.] b) Discovery of the names of government's witnesses and their statements, subject to limitations of the Jencks Act (13 U.S.C. §3500) if relied upon under A.2, *supra*.

(Granted) (Denied)

[N.A.] c) Discovery of names of expert witnesses the government intends to call, their qualification, subject of testimony, and reports.

(Granted) (Denied)

[N.A.] d) Inspection of all physical or documentary evidence in government's possession.

(Granted) (Denied)

[N.A.] e) Discovery of times, places and nature of any prior similar acts or convictions government will seek to rely on for proof of knowledge or intent.

(Granted) (Denied)

[N.A.] f) Production of the following witnesses for hearing or trial who are under the direction and control of the government:

_____

_____

_____

_____

2. The government moves for:

[N.A.] a) Discovery of names of expert witnesses defense intends to call, their qualifications, subject of testimony, and reports.

(Granted) (Denied)

[N.A.] b) Discovery of names of defense lay witnesses, on the issue of sanity at the time of offense.

(Granted) (Denied)

[N.A.] c) Discovery of names of defense alibi witnesses and their addresses.
(Granted) (Denied)

[N.A.] d) Discovery of names of character witnesses and their addresses.
(Granted) (Denied)

D. STIPULATIONS

It is stipulated between the parties:

[N.A.] [No Stip.] 1. That the official report of the chemist may be received in evidence as proof of the weight and nature of the substance referred to in the indictment (or information).

[N.A.] [No Stip.] 2. That if the official government chemist were called, qualified as an expert and sworn as a witness, he would testify that the substance referred to in the indictment (or information) has been chemically tested and is_____ a substance listed in Schedule_____ of the Comprehensive Drug Abuse Prevention and Control Act of 1970.

[N.A.] [No Stip.] 3. That there has been a continuous chain of custody in government agents from the time of seizure of the contraband to the time of its introduction into evidence at trial.

[N.A.] 4. Other:

_____

_____

_____

_____

NOTE — GENERAL ORDER REQUIRING CONTINUING DUTY TO DISCLOSE

IF, SUBSEQUENT TO THE OMNIBUS PROCEEDING AND ORDERS THEREON, A PARTY DISCOVERS ADDITIONAL EVIDENCE OR THE IDENTITY OF AN ADDITIONAL WITNESS OR WITNESSES, OR DECIDES TO USE ADDITIONAL EVIDENCE, WITNESS, OR WITNESSES, AND SUCH EVIDENCE IS, OR MAY BE SUBJECT TO DISCOVERY OR INSPECTION UNDER THE OMNIBUS PROCEEDING AND ORDERS THEREON, HE SHALL PROMPTLY NOTIFY THE OTHER PARTY OR HIS ATTORNEY OR THE COURT OF THE EXISTENCE OF THE ADDITIONAL EVIDENCE OR THE NAME OF SUCH ADDITIONAL WITNESS OR WITNESSES TO ALLOW THE COURT TO MODIFY ITS PREVIOUS ORDER OR TO ALLOW THE OTHER PARTY TO MAKE AN APPROPRIATE MOTION FOR ADDITIONAL DISCOVERY OR INSPECTION. IF SUCH ADDITIONAL DISCOVERY IS NOT PROVIDED 10 DAYS BEFORE THE DATE OF TRIAL, THE TRIAL COURT MAY APPLY APPROPRIATE SANCTIONS. IN ANY EVENT, SUCH ADDITIONAL EVIDENCE OR WITNESSES MUST BE REVEALED TO THE COURT OR ADVERSE PARTY 3 WORKING DAYS BEFORE TRIAL, OR THEY MAY NOT BE USED AT TRIAL, UNLESS SUCH DENIAL WOULD RESULT IN MANIFEST INJUSTICE. THE BURDEN

SHALL BE ON THE PARTY SEEKING DISCOVERY TO CONTACT OPPOSING COUNSEL ON THE APPROPRIATE DATES TO ASCERTAIN IF ADDITIONAL EVIDENCE OR WITNESSES HAVE BEEN DISCOVERED. GENERAL ORDER NUMBER 150.

Approved:

Dated _____

_____
Attorney for the United States

_____
Attorney for Defendant No. 1

_____
Defendant No. 1

_____
Attorney for Defendant No. 2

_____
Defendant No. 2

_____
Attorney for Defendant No. 3

_____
Defendant No. 3

THE FOREGOING FORM IS APPROVED AND THE PROVISIONS THEREIN SO ORDERED AND EXCHANGE OF INFORMATION, DOCUMENTS, ETC., SHALL BE ACCOMPLISHED AS SOON AS REASONABLY POSSIBLE.

Dated: _____

_____
U. S. MAGISTRATE

2. *Form For Waiver Of Omnibus Hearing Presently In Use In The Southern District of California*

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,	No. _____ Crim.
Plaintiff	Offense(s) charged:
vs.	_____
Defendant	_____ _____
	_____ _____

WAIVER OF OMNIBUS HEARING

1. The government, counsel for defendant, and defendant intend to dispose of this case by a plea of guilty. Counsel for defendant has received sufficient discovery to properly advise defendant, and defendant will enter a plea that is knowing and intelligent. Such a plea will be entered voluntarily, and with full understanding of the facts and circumstances of the case, and the possible consequences of the plea.

2. It is intended to dispose of this case by a plea of guilty to

_____ _____ _____

_____ _____ _____ _____

The maximum punishment that may be imposed for the offenses for which a plea of guilty will be entered is: _____

_____ _____ _____ _____

3. Defendant has received adequate discovery in this matter, and all parties waive Omnibus Hearing. It is requested that the Magistrate calendar this matter for arraignment.

4. After filing this form, either defendant or the government may later calendar Omnibus Hearing by making appropriate arrangements with the Magistrate having original jurisdiction of the case.

The undersigned have read, understand, and concur in the facts stated above.

SIGNED: _____ _____
Attorney for defendant Defendant

_____
Ass't U. S. Attorney

DATED: _____ APPROVED:

_____
UNITED STATES MAGISTRATE

APPENDIX B

1. *Omnibus Hearing Form Presently In Use In The Western District of Texas*

Form Oil-3
6-28-67
Revised 5-15-69

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

UNITED STATES OF AMERICA

V. CRIMINAL NO._____

_____
Defendant

INSTRUCTIONS

If an item numbered below is not applicable to this case, then counsel will note the same in the margin opposite the item number with the letters "N.A."

A. DISCOVERY BY DEFENDANT

(Circle Appropriate Response)

1. The defense states it (has) (has not) obtained full discovery and (or) has inspected the government file, (except)
   (if government has refused discovery of certain materials, defense counsel shall state nature of material: _____

   _____.)

2. The government states it (has) (has not) disclosed all evidence in its possession, favorable to defendant on the issue of guilt. In the event defendant is not satisfied with what has been supplied him in response to questions 1 and 2 above then:

3. The defendant requests and moves for -- (Number circled shows motion requested)

   3(a) Discovery of all oral, written or recorded statements or memorandum of them made by defendant to investigating officers or to third parties and in the possession of the government. (Granted) (Denied)

   3(b) Discovery of the names of government's witnesses and their statements. (Granted) (Denied)

   3(c) Inspection of all physical or documentary evidence in government's possession. (Granted) (Denied)

4. Defendant, having had discovery of Items #2 and #3, (requests and moves) (does not request and move) for discovery and inspection of all further or additional information coming into the government's possession as to Items #2 and #3 between this conference and trial. (Granted) (Denied)

5. The defense moves and requests the following information and the government states — (Circle the appropriate response)

   5(a) The government (will) (will not) rely on prior acts or convictions of a similar nature for proof of knowledge or intent.

   (1) Court rules it (may) (may not) be used.
   (2) Defendant stipulates to prior conviction without production of witnesses or certified copy. (Yes) (No)

   5(b) Expert witness (will) (will not) be called:

   (1) Name of witness, qualification and subject of testimony, and reports (have been) (will be) supplied to the defense.

   5(c) Reports or tests of physical or mental examinations in the control of the prosecution (have been) (will be) supplied.

   5(d) Reports of scientific tests, experiments or comparisons and other reports of experts in the control of the prosecution, pertaining to this case (have been) (will be) supplied.

   5(e) Inspection and/or copying of any books, papers, documents, photographs or tangible objects which the prosecution — (Circle appropriate response)

   (1) obtained from or belonging to the defendant, or
   (2) which will be used at the hearing or trial, (have been) (will be) supplied to defendant.

   5(f) Information concerning a prior conviction of persons whom the prosecution intends to call as witnesses at the hearing or trial (has been) (will be) supplied to defendant.

5(g) Government (will) (will not) use prior felony conviction for impeachment of defendant if he testifies,
Date of conviction_____ Offense _____

(1) Court rules it (may) (may not) be used.
(2) Defendant stipulates to prior conviction without production of witnesses or certified copy. (Yes) (No)

5(h) Any information government has, indicating entrapment of defendant (has been) (will be) supplied.

B. MOTIONS REQUIRING SEPARATE HEARING

6. The defense moves – (number circled shows motion requested)

6(a) To suppress physical evidence in plaintiff's possession on the grounds of – (Circle appropriate response)

(1) Illegal search and seizure

(2) Illegal arrest

6(b) Hearing on motion to suppress physical evidence set for:

_____

(Defendant will file formal motion accompanied by memorandum brief within_____days. Government counsel will respond within ____days thereafter.)

****

6(c) To suppress admissions or confessions made by defendant on the grounds of – (Circle appropriate response)

(1) Delay in arraignment
(2) Coercion or unlawful inducement
(3) Violation of the Miranda Rule
(4) Unlawful arrest
(5) Improper use of lineup (Wade, Gilbert, Stovall decisions)
(6) Improper use of photographs

6(d) Hearing to suppress admissions, confessions, lineup and photos is set for:

(1) Date of trial, or

(2) _____

(Defendant will file formal motion accompanied by memorandum brief within_____days. Government counsel will respond within_____days thereafter.)

****

The government to state:

6(c) Proceedings before the grand jury (were) (were not) recorded.

6(f) Transcriptions of the grand jury testimony of the accused, and all persons whom the prosecution intends to call as witnesses at a hearing or trial (have been) (will be) supplied.

6(g) Hearing re supplying transcripts set for

_____ _____ _____ _____

****

6(h) The government to state:

(1) There (was) (was not) an informer (or lookout) involved;
(2) The informer (will) (will not) be called as a witness at the trial;
(3) It has supplied the name, address and phone number of the informer; or
(4) It will claim privilege of non-disclosure.

6(i) Hearing on privilege set for

_____ _____ _____ _____

****

6(j) The government to state:

There (has) (has not) been any – (Circle appropriate response)

(1) Electronic surveillance of the defendant or his premises;
(2) Leads obtained by electronic surveillance of defendant's person or premises;
(3) All material will be supplied, or

6(k) Hearing on disclosure set for

_____ _____ _____ _____

****

C. MISCELLANEOUS MOTIONS

7. The defense moves – (Number circled shows motion requested)

7(a) To dismiss for failure of the indictment (or information) to state an offense. (Granted) (Denied)

7(b) To dismiss the indictment or information (or count _____ _____ thereof) on the ground of duplicity. (Granted) (Denied)

7(c) To sever case of defendant_____ _____and for a separate trial. (Granted) (Denied)

7(d) To sever count____of the indictment or information and for a separate trial thereon. (Granted) (Denied)

7(e) For a Bill of Particulars. (Granted) (Denied)

7(f) To take a deposition of witness for testimonial purposes and not for discovery. (Granted) (Denied)

7(g) To require government to secure the appearance of witness_____ _____who is subject to government direction at the trial or hearing. (Granted) (Denied)

7(h) To dismiss for delay in prosecution. (Granted) (Denied)

7(i) To inquire into the reasonableness of bail. Amount fixed_____. _____(Affirmed) (Modified to_____.)

D. DISCOVERY BY THE GOVERNMENT

D. 1. Statements by the defense in response to government requests.

8. Competency, Insanity, and Diminished Mental Responsibility

8(a) There (is) (is not) any claim of incompetency of defendant to stand trial.

8(b) Defendant (will) (will not) rely on a defense of insanity at the time of offense;

If the answer to 8(a) or (b) is "will" the

8(c) Defendant (will) (will not) supply the name of his witnesses, both lay and professional, on the above issue;

8(d) Defendant (will) (will not) permit the prosecution to inspect and copy all medical reports under his control or the control of his attorney;

8(e) Defendant (will) (will not) submit to a psychiatric examination by a court appointed doctor on the issue of his sanity at the time of the alleged offense.

9. Alibi

9(a) Defendant (will) (will not) rely on an alibi;

9(b) Defendant (will) (will not) furnish a list of his alibi witnesses (but desires to be present during any interview).

10. Scientific Testing

10(a) Defendant (will) (will not) furnish results of scientific tests, experiments or comparisons and the names of persons who conducted the tests.

10(b) Defendant (will) (will not) provide the government with all records and memoranda constituting documentary evidence in his possession or under his control or (will) (will not) disclose the whereabouts of said material. If said documentary evidence is not available but destroyed, the defense (will) (will not) state the time, place, and date of said destruction and the location of reports, if any, concerning said destruction.

11. Nature of the Defense

11(a) Defense counsel states that the general nature of defense is — (circle appropriate response)

(1) Lack of knowledge of contraband
(2) Lack of specific intent
(3) Diminished mental responsibility
(4) Entrapment
(5) General denial. Put government to proof, but (will) (may) offer evidence after government rests.
(6) General denial. Put government to proof, but (will) (may) offer no evidence after government rests.

11(b) Defense counsel states it (will) (will not) waive husband and wife privilege.

11(c) Defendant (will) (may) (will not) testify.

11(d) Defendant (will) (may) (will not) call additional witnesses.

11(e) Character witnesses (will) (will not) be called.

11(f) Defense counsel will supply government names, addresses, and phone numbers of additional witnesses for defendant _____ _days before trial.

D.2. Ruling on government request and motions

12. Government moves for the defendant —

12(a) to appear in a lineup (Granted) (Denied)

12(b) to speak for voice identification by witness (Granted) (Denied)

12(c) to be finger printed. (Granted) (Denied)

12(d) to pose for photographs. (not involving a re-enactment of the crime)
(Granted) (Denied)

12(e) to try on articles of clothing. (Granted) (Denied)

12(f) Surrender clothing or shoes for experimental comparison.
(Granted) (Denied)

12(g) to permit taking of specimens of material under fingernails.
(Granted) (Denied)

12(h) to permit taking samples of blood, hair, and other materials of his body which involves no unreasonable intrusion.
(Granted) (Denied)

12(i) to provide samples of his handwriting. (Granted) (Denied)

12(j) to submit to a physical external inspection of his body.
(Granted) (Denied)

E. STIPULATIONS

If the stipulation form will not cover sufficiently the area agreed upon, it is recommended that the original be attached hereto and filed at the omnibus hearing.

(All stipulations must be signed by the defendant and his attorney as required by Rule 17.1, F.R.Cr.P.)

13. It is stipulated between the parties:

13(a) That if _____ were called as a witness and sworn he would testify he was the owner of the motor vehicle on the date referred to in the indictment (or information) and that on or about that date the motor vehicle disappeared or was stolen and that he never gave the defendant or any other person permission to take the motor vehicle.

_____ _____
Attorney for Defendant Defendant

13(b) That the official report of the chemist may be received in evidence as proof of the weight and nature of the substance referred to in the indictment (or information).

_____ _____
Attorney for Defendant Defendant

13(c) That if the official government chemist were called, qualified as an expert and sworn as a witness he would testify that the substance referred to in the indictment (or information) has been chemically tested and is _____ and the weight is _____.

_____ _____
Attorney for Defendant Defendant

13(d) That there had been a continuous chain of custody in government agents from the time of the seizure of the contraband to the time of the trial.

_____ _____
Attorney for Defendant Defendant

13(e) Miscellaneous stipulations:

_____ _____
Attorney for Defendant Defendant

F. CONCLUSION

14. Defense counsel states:

14(a) That defense counsel as of the date of this conference of counsel knows of no problems involving delay in arraignment, the Miranda Rule or illegal search and seizure or arrest, or any other constitutional problem, except as set forth above.

(Agree) (Disagree)

14(b) That defense counsel has inspected the check list on this OH-3 Action Taken Form, and knows of no other motion, proceeding or request which he desires to press, other than those checked thereon. (Agree) (Disagree)

15. Defense counsel states:

15(a) There (is) (is not) (may be) a probability of a disposition without trial.

15(b) Defendant (will) (will not) waive a jury and ask for a court trial.

15(c) That an Omnibus Hearing (is) (is not) desired, and government counsel (Agree) (Disagree)

15(d) If all counsel conclude after conferring, that no motions will be urged, that an Omnibus Hearing is not desired, they may complete, approve and have the defendant sign (where indicated) Form OH-3, and submit it to the Court not later than five (5) days prior to the date set for the Omnibus Hearing, in which event no hearing will be held unless otherwise directed by the Court.

15(e) If a hearing is desired, all counsel shall advise the Court in writing not later than five (5) days prior to the date set for the Omnibus Hearing whether or not they will be ready for such hearing on the date set in the Order Setting Conference of Counsel and Omnibus Hearing.

APPROVED: Dated:_____

_____
Attorney for the United States

SO ORDERED:

_____
Attorney for Defendant

_____
United States District Judge

_____
Defendant

WORKING
PAPER

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I

The Importance of Criminal Procedure

1. In the foreword to *The Accused*, a comparative study of the criminal procedure systems of a number of countries, Leslie Scarman, later Chairman of the English Law Commission, emphasized the importance of procedural law by asserting that:

> "(I)n the civilized world the substantive criminal law does not greatly differ from one legal system to another: nor—with a few exceptions (eg. political offences, capital punishment, the treatment of the young offender)—do the differences greatly matter. If a man is proved a thief, he is almost the world over convicted of crime. But how does society set about proving its case and punishing the guilty? Here is the rub: for justice and liberty depend not so much on the definition of the crime as on the nature of the process, administrative as well as judicial, designed to bring the alleged offender to justice."[1]

This statement seems to capture the very special importance of criminal procedure and thus leads nicely into a discussion of Canadian criminal procedure and its possible reform, which is the central purpose of this working paper. But, one might ask, does it take us too quickly into a discussion of procedure? After all, one would not have to be concerned with the nature of the criminal process if there were no human acts defined as criminal and made subject to that process.

2. Thus, to assert that "justice and liberty depend not so much on the definition of the crime as on the nature of the process. . . designed to bring the alleged offender to justice", necessarily assumes that society is justified in repressing certain acts by the use of the criminal process, i.e. by police intervention, by prosecution, by stigmatization in the determination of guilt and by the application of a criminal sanction such as imprisonment. But of course bound up in this assumption are very difficult questions. What is the aim and purpose of criminal law? Is its purpose to protect society, or to reduce crime, or to rehabilitate offenders? Or is its purpose a combination of all three of these together with a recognition of society's right, indeed duty, to take note of an offence, to not allow it to go unchecked, and in this way to affirm, clarify, and support basic values?

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[1] J. A. Coutts, editor, *The Accused*, London 1966.

However, even preliminary to these questions, it might be asked why are certain acts made criminal; indeed, what is criminal law?

3. However it is unnecessary, perhaps even unwise, to go beyond the mere statement of these basic questions. This is a paper on criminal procedure not on the aims and purposes of the criminal law and whatever the ultimate answers to these questions, if there are any, it seems safe to hazard the opinion that the criminal process will be with us for some time to come. Therefore it is enough to recognize that in moving to a discussion of the procedures of the criminal process a major assumption is involved as to the validity of that process. In other contexts such as papers on the principles of sentencing, on the classification of offences, and on alternatives to the criminal process, this assumption and the questions posed above may be more properly examined.

4. At this point however, something more should be said about possible alternatives to the criminal law process. In posing the question "how does society set about proving its case and punishing the guilty", it is clear that Leslie Scarman was referring to the pre-trial and trial process by which guilt or innocence is determined. It is in this context, including the guilty plea process, that this working paper examines Canadian criminal procedure and discovery. But this is not the only context in which the criminal process may be defined. In fact even in present Anglo-American criminal law systems the criminal process includes situations where offences are committed and the actors identified but, in the exercise of discretion either by police or prosecutors, formal charges are not preferred. Or once charges have been preferred they are withdrawn or abandoned. These practices are also part of the criminal process.

5. More recently, experimental projects in the United States and Canada have sought to build on the discretionary power of the State in the charging of crime, i.e. the power to charge, not to charge or to abandon a charge, by developing that power into an alternative system to the traditional plea and trial process. In 1969 in New York the Vera Institute of Justice developed a project that diverted alcoholics from the criminal justice process by their voluntary participation in a program of alcohol detoxification. This diversion project then expanded to include young criminal offenders. Its aim was to stop the development of criminal careers by entering the court process after an individual had been arrested but before trial; offering the accused counseling and a start on a legitimate career by a job placement and, subject to his co-operation, a dismissal or abandonment of the prosecution. The Vera Institute ten year report notes that through the efforts of this project an encouraging number of individuals were able to change their anti-social life styles. Similar projects have been established in a number of other American cities—among them San

Antonio, San Francisco, Boston, Newark, Cleveland, Baltimore, Minneapolis, and Washington.

6. In Washington the diversion experiment is called Project Crossroads and it too has demonstrated the feasibility of working with the court and its personnel to provide a pre-trial intervention alternative for youthful first-time offenders. Through intensive counseling, job placement, remedial education, and other supportive services over a three month period following arrest but before trial, the program attempts to reorient young offenders before they are committed to crime as a way of life. If, at the end of the three month period, the defendants have shown satisfactory progress, the court will, upon Crossroad's recommendation, dismiss the charges. These diversion programs may be just the beginning of a completely different approach in dealing with criminal offenders. There is no reason why their success should be limited to alcoholics or youthful offenders. In fact the report of the American National Conference on Criminal Justice published in January of 1973 recommends that the diversion alternative, the halting or suspension before conviction of formal criminal proceedings upon an accused agreeing to participate in a rehabilitative or restitutive program, should be more widely used.

7. In Toronto, the East York Criminal Law Project has been examining criminal occurrences to determine whether some situations would be better handled in a non-adversarial criminal process. While the final report has not been received, interim reports strongly suggest that many offences that arise in the context of continuing relationships, such as an assault by a husband on his wife, would be better resolved in an arbitration type proceeding rather than in the traditional trial process which tends to lead to an alienation and polarization between the accused and the victim.

8. The full extent to which diversion programs might be developed in Canada will have to be left for another paper. But the benefits of diversion seem obvious enough, in allowing for criminal disputes to be resolved without the stigmatization of conviction, in employing broad assistance and resource services at an early stage, and in freeing the formal trial proceedings for more deserving or serious cases. However, in pursuing these benefits care must be taken not to cause unjustified participation in diversion programs. An accused who maintains his innocence should remain in the criminal trial process. To allow for involuntary or coerced participation is to violate in the name of treatment all of the due process safeguards that would otherwise be available in the criminal trial process.

9. But while this brief outline of the potential of diversionary programs makes for a wholly new context for discussion of the criminal process, there can be no diversion unless there is something to be diverted from. Thus behind the diversion alternative remains the more limited criminal

process for determining guilt or innocence in bringing the alleged offender to justice. Referring to the earlier assumption, for many cases, including more serious crimes and all crimes where the prosecution is continued and responsibility denied, this criminal process will be with us for some time to come. Thus interest in the concept of diversion must not deflect one from an examination of the traditional criminal process in both its pretrial and trial stages. It is this examination to which we now turn, although the subject of the diversion alternative will be returned to later in examining the guilty plea process.

II

The Nature of The Criminal Process

10. In proceeding to an examination of Canadian criminal procedure and the special issue of discovery in criminal cases, it will be helpful to pause and consider the nature of our existing criminal process. This review will cover its purpose and its form so that the significance of discovery, the disclosure to the other side of information, objects, or theories—in fact anything that may be relevant to the conduct or defence of a criminal prosecution—may be more clearly understood.

11. Unlike the difficulty encountered in answering the question as to the aim and purpose of the criminal law, it can be safely said that, given the existence of criminal law, the primary aim of the criminal process in the more limited context of bringing alleged offenders to justice is the determination of the guilt or innocence of those alleged offenders. In fact this is clearly the aim of all criminal procedure systems.

12. It is the pursuit of this aim, the procedure leading to the conviction of those who have committed criminal acts and the acquittal of those who have not, that is sometimes referred to as the pursuit of truth in the criminal process. The statement of the aim in this form emphasizes the concern that when the State does intervene by the criminal process in a person's life, it should be clear about its purpose and seek to establish responsibility to a satisfactory degree.

13. But the pursuit of truth in the criminal process is not an absolute value. Few jurisdictions, none in the western world, permit the use of truth drugs as part of the criminal process or force accused persons to undergo surgical operations to recover incriminating evidence—although in Canada the obligation on a suspected impaired driver to provide a breath sample, the failure or refusal to do so being an offence punishable on summary conviction, may be seen by some as a short but unmistakable step in this direction. Yet it is clear that society is not prepared to trample on all other interests in the search for truth and thus a second fundamental concern of the criminal process is respect for human dignity and privacy. There is perhaps no better statement of this concern than that of Vice-Chancellor Knight Bruce in the venerable English case of *Pearse v. Pearse*, (1846) 1 De. G. & Sm. 12, at page 28 where he said:

"Truth, like all the good things, may be loved unwisely—may be pursued too keenly—may cost too much".

14. There is a second general barrier to an untrammelled search for the truth in the criminal process that stems from a concern to minimize the risk of convicting innocent persons. In our own system the two best known examples of this concern are the principles that an accused is presumed to be innocent until proven guilty and the burden of proof on the prosecution to prove its case against an accused beyond a reasonable doubt. While these principles together with certain rules of evidence may be seen as attempts to improve fact-finding accuracy and therefore to lead to a high quality of truth, the extent to which their application may lead to the acquittal of accused persons who are factually guilty may cause some to view them as barriers to a search for truth. The problem here is that criminal procedure has a dual purpose of convicting the guilty and acquitting the innocent. "But unfortunately there is a conflict between these two goals: the more we want to prevent errors in the direction of convicting the innocent, the more we run the risk of acquitting the guilty".[2] Thus if the goal of pursuit of the truth is perceived as maximizing the number of positive results, convictions, as opposed to negative results, acquittals, these principles and rules will be regarded as barriers to the attainment of this goal.

15. Of course most criminal procedure systems have these or similar barriers, although there are noticeable differences. But rather than pursue a comparison of these differences it would seem better to simply state that a sound system of criminal procedure must take account of three concerns: pursuit of truth, respect for human dignity, and protection against the risk of convicting innocent persons. Moreover one can safely state that these concerns are reasonably well respected in our system, subject to certain tensions and disputes at various points in their application.

16. But what of the form of our criminal process for bringing alleged offenders to justice? Does it assist in realizing these principal aims or concerns of the process, and how do these matters, the concerns of the process and its form, relate to discovery in criminal cases?

17. Taking up the question of the form of our criminal process, it is well understood that in Canada, in common with England, the United States, and other countries whose trial systems are of English origin, we have an adversary system as opposed to the non-adversary or inquisitorial systems of France and West Germany. But the terms adversary versus non-adversary, or accusatorial as opposed to inquisitorial are much too imprecise to be employed without some definition or description. Yet is

[2] Mirjan Damaska, "Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study", U. of Penn. L.R. 506, 576 (1973).

it necessary for the purposes of this paper to digress in an analysis of these terms?

18. In the first research program of the Law Reform Commission, the Commission expressed its concern to study "the effectiveness of the adversary system". And in fact this working paper on discovery in criminal cases is a major study concerned with the effectiveness of our criminal law process—which is an adversary system. Therefore, can we leave it at that and not worry about what is meant by the adversary system?

19. Obviously we cannot. One cannot determine whether the system is effective if it is not known what it is and what its rationale is. Moreover, since this study does not compare the effectiveness of the adversary system with the inquisitorial systems of France or West Germany, but assumes that the adversarial form of our criminal process will remain, one cannot even begin to determine if that assumption is sound without being sure of the meaning of the label: adversary. Thus this digression cannot be avoided.

20. 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 between them which fixes the essential characteristics of each system. The fundamental matrix of the adversary model is based upon the view that the proceedings should be structured as a dispute between two sides—in criminal cases, between the prosecution representing the State and the accused—both appearing before an independent arbiter, the court, which must decide on the outcome. Flowing from this matrix the dispute depends upon the parties for the determination of the issues in dispute and for the presentation of information on those issues. Thus the protagonists of the model have definite, independent, and generally conflicting functions. In drawing the charge or in reviewing a charge laid by the police, the prosecutor determines the factual propositions he will attempt to prove and then marshalls the evidence in support of them. Further, should the accused dispute the charge, the prosecutor has the burden of presenting the evidence in court, and the burden of persuasion in proving the factual propositions. The accused, on the other side of the dispute, decides what position will be taken in respect to the charge, whether one of admitting or disputing it, and if the latter, the accused then decides which factual contentions will be advanced and then presents the evidence in support of them. In the middle of the dispute the adjudicator's role is that of an umpire seeing to it that the parties abide by the rules regulating the contest, and then at the end he determines the right and proper decision.

Although at some points this description may seem an over-simplification, emerging from it as essential characteristics of the adversary system are the relatively active roles of the parties in preparing and presenting the dispute and the relatively passive, independent, and impartial role of the court.

21. By contrast however, in the alternative, inquisitorial system the decision-maker independently investigates the facts, or has them investigated and prepared for him, and the proceedings are not conceived of as a dispute but as an official and thorough inquiry. Such proceedings are incompatible with the structuring of issues by the parties; indeed parties in the sense of independent actors are not needed.

22. Once again, while this description may seem over-simplified, what emerges as the essential characteristic of the non-adversary or inquisitorial system is the reliance on the active role of the judge and the relatively inactive role of the parties—in contrast with the adversary model. Thus the core of the opposition between these two systems lies in the alternative ways of conceiving of the adjudicator's role in pursuing the facts: judicial independence and passivity, relatively speaking, in contrast with judicial activity.

23. It is this core opposition between the two systems that is at the heart of the assumption that the adversary system will remain as the proof process both pre-trial and at trial in Canadian criminal procedure in bringing "alleged offender(s) to justice". In other words the assumption is that the essential characteristics of the adversary system, reliance on the relatively active roles of the parties in preparing and presenting the dispute and the relatively passive, independent, and impartial role of the court, will remain, and that the essential characteristics of the non-adversary (or inquisitorial system), reliance on the relatively active role of the court and the inactive role of the parties will not, indeed, need not be adopted.

24. When stated this way it becomes clear that adherence to the adversary system is not simply the result of an aura of dread and mistrust surrounding the adjective "inquisitorial". Of course in much earlier times in The Inquisition and the criminal proceedings of the Star Chamber, inquisitorial proceedings were associated with secret investigations, lengthy pre-hearing incarcerations without specific accusations, torture to obtain confessions (being the only legal proof in serious cases), and judgments rendered on the evidence gathered by investigators without formal hearings or even without having the decision-makers see the accused. And although these characteristics were not essential to inquisitorial proceedings, their relationship to this system of proof-taking left a profound aversion in Anglo-American history to anything inquisitorial. But more than history, it is assumed that the essential characteristics of

the adversary model will remain because it is not just a model, it is our system; it is the only criminal procedure system that our legal profession, our judiciary, and most people in our society have ever known. One aspect of this fact is that for reasons of history, ideology, or simply familiarity, many people are committed to it. Another aspect is that it would be a monumental task to change from the essential characteristics of the adversary system to the essential characteristics of the inquisitorial system. As a start the judiciary, the legal profession, and the public would have to be re-educated into a system that many would find philosophically unacceptable. Finally, to rest this assumption on an even higher plane, it is not at all clear that the adversary system is any less accurate or reliable in the pursuit of truth in the criminal process than the inquisitorial system. Here, one must leave aside the other concerns of respect for human dignity and protection against the risk of convicting innocent persons (which appear to have been at least as well accommodated in the adversary system as in any non-adversary system) and concentrate on fact-finding precision. On the narrow issue of adversary versus non-adversary presentation of evidence, it may well be the case that the fact-finding precision of the adversary method is preferable to that of the non-adversary method. At present, opinions on this issue are divided although the predominant view in Anglo-American jurisdictions is that the adversary method of proof-taking is to be preferred.

25. But, to avoid a misunderstanding, a final view on this issue does not have to be expressed. It is enough to support the assumption of the continuance of the adversary system to note that the burden of proof is clearly upon those who would advocate a different, non-adversarial system of proof-taking in the criminal process. And with the precise definition of the essential characteristics of the adversary system and the reasons why these essentials of the system should remain, it seems clear that at present this burden cannot be discharged.

26. This does not mean however that the adversary method, particularly in the criminal process, is free from criticism. Quite the contrary, the very concept of discovery in criminal cases, as will be argued later, is a response to the excesses of the adversary method when it is allowed to function unrestrained. But with the establishment of a discovery system it may then be concluded that the assumption of the continuance of the adversary system is sound.

27. While the discussion to this point has concerned itself with delineating the essential characteristics of the adversary system in order to understand the assumption as to its continuance and to establish a basis for our later examination of discovery, something is still missing. It is not every case that is adjudicated. In fact, quite the reverse, most criminal charges

are disposed of by guilty pleas. Recent studies in Canada indicate that accused persons plead guilty in about 70 percent of all criminal cases.[3] Thus an examination of the form of the criminal process that ignores the guilty plea process is quite inadequate.

28. But like the assumption of the continuance of the adversary system at trial and the procedures leading up to trial, it is also assumed that the guilty plea process will continue. Quite apart from the development of this process 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 why the guilty plea process will remain. First, it would be prohibitively expensive to process every case through to trial. To do so would require vast increases in judges, prosecutors, and court facilities and it is most unlikely that such increases would be made. Second, a limited use of the trial process for cases where matters are really in dispute may aid in preserving the significance of the presumption of innocence. And third, provided that care is taken in the process to make sure that an accused person is fully aware of the nature of the charge, the circumstances of the offence, and the consequences of a guilty plea, so that the plea is as free and voluntary as can be provided, it makes for practical good sense to ask someone charged with a criminal offence to admit or deny guilt.

29. This concludes our brief review of the nature of our existing criminal process covering its purpose and its form both at the trial and pre-trial stages. It is a system that allows for the accused to plead guilty or not guilty in response to charges alleged by the state, and at the trial stage it is a system that employs the adversary method in attempting to prove the case against the accused. As well, it is a system which pursues the truth of allegations of criminal conduct while respecting human dignity and privacy and attempting to minimize the risk of convicting innocent persons. As such, it is a system which has these well known features:

(a) The burden of proving guilt is on the prosecution throughout the trial being proof beyond a reasonable doubt on each and every essential ingredient of the charge.

(b) Throughout the criminal process, a person accused of crime is presumed innocent. He may remain silent and so require his guilt to be proven without his assistance. This does not, of course, mean that the police may not question him nor does it mean that they cannot offer in evidence a confession he may voluntarily make. Neither does it mean that inferences cannot be drawn

[3] See J. Hogarth, *Sentencing as a Human Process*, 270 (1971); *Canadian Civil Liberties Education Trust*, Due Process Safeguards and Canadian Criminal Justice 39 (1971); *Report of the Canadian Committee on Corrections*, 134 (1969).

against his credibility if he testifies in his own defence and offers explanations of his conduct that could have been offered earlier, inferences the strength of which may, of course, be tempered or dispelled by the circumstances surrounding his earlier silence. His right to be silent does mean, however, that knowing the risks involved, he may, if the chooses, play a passive role from beginning to end.

(c) At the conclusion of the prosecution's case the accused has the right to point to the absence of any evidence on any issue that is essential to guilt, or in the case of jury trials to inadequate circumstantial evidence, and thereby be acquitted.

(d) Or at the end of the prosecution's case, having elected not to call any evidence, the accused has the right to raise as a primary defence the weakness of the evidence for the prosecution and the existence of a reasonable doubt.

(e) At any time up until conviction, the accused has the right to offer a full answer and defence.

III

The Criminal Process and Discovery

30. Having outlined the purpose and form of our criminal process, the central question then becomes: what is the relationship between this purpose and form and discovery? Cannot the purpose of the process be realized without worrying about causing one side to disclose its case to the other? Cannot the form of the process, both for guilty pleas and at trial, work without discovery? The short answer is, however, that neither the purpose of the process nor the reasoning behind its form can be properly realized without discovery, and the object of this part of our paper is to develop this proposition.

(*a*) *The reasoning of the Adversary System and Discovery*

31. In regard to the purpose of the criminal process, defined earlier as pursuing the truth of allegations of criminal conduct while respecting human dignity and privacy and attempting to minimize the risk of convicting innocent persons, it may be argued that in an adversary setting of dispute resolution it is unlikely that this purpose will be achieved on any consistent basis without discovery. The police and the prosecution investigate, gather information, commence criminal prosecutions, and seek to establish the guilt of accused persons beyond a reasonable doubt. They do so in a setting which allows them almost total control over the evidence that will be introduced to establish guilt and, conversely, the evidence that will be ignored, either by not being followed up by further investigation or by not being offered at trial. This is not to suggest that in performing these roles the police and the prosecution will consciously withhold valuable information from the defence. But is does mean that without pre-trial disclosure of witnesses and their evidence and without disclosure of tangible evidence, for the vast majority of cases in which the defence does not have its own investigative resources or cannot afford them, or even in cases where such resources are available but the prosecution evidence will not be revealed by an independent investigation, the defence will be less able to examine and challenge the prosecution evidence and to expose that which may be suspect. It means also that without disclosure to the defence of evidence the prosecution does not intend to call at trial because it may seem irrelevant or unimportant, the defence is deprived of evidence which from a different perspective may indeed be relevant or lead to the finding

of relevant evidence. It means therefore that the absence of discovery to the accused places a serious limitation on the realization of the purpose of the criminal process.

32. This limitation is imposed on the achievement of the purpose of the criminal process because the effectiveness of the adversary system of trial is diminished when it is allowed to operate without discovery. Yet, while a relative lack of discovery may seem natural to the operation of the adversary system, it is far from essential. In fact it would seem that in order to achieve a rational working of the adversary model the very opposite is the case. As stated by former Chief Justice Traynor of the California Supreme Court, California being a jurisdiction that has taken major strides in providing for pre-trial discovery in criminal cases,

> "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".[4]

33. Therefore one may conclude that discovery is essential to the rational and effective operation of the adversary system and that this is especially the case in the criminal process as to the need for discovery to the accused. The case is rare where the accused has the same opportunities and capacities for investigation as the prosecution and therefore he is the party most likely to be adversely affected by a lack of discovery. No doubt on occasion a lack of discovery may adversely affect the prosecution too, a matter which will be more fully examined later. But because of the theory and the concerns of the process, and because of the lesser ability of the accused in terms of the opportunities, capacities, and resources, including finances, to conduct investigations, the need for discovery to the accused is essential.

(*b*) *Guilty Pleas and Discovery*

34. Finally, what about guilty pleas and discovery? Earlier we observed that most criminal charges are disposed of by guilty pleas and that the guilty plea process will continue. But this assumption does not mean that the present guilty plea process in Canada is perfect and could not stand improvement. No doubt one should avoid generalizing about any aspect of the application of procedural law, since the practice in one part of the country may not be the same as the practice in another. But it can be

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

safely stated that to the degree that an accused does not receive reasonably full information about the nature of the charge and the evidence that can be called to prove it (what may be considered as reasonably full information will be examined later) and to the degree that our courts do not inquire into the circumstances in which a guilty plea is offered in order to determine if it is based upon an understanding by the accused of the factual and legal implications of the charge and the consequences of the entry of a guilty plea, there is substantial room for improvement. Since the primary aim of the criminal process in the context of bringing "alleged offender(s) to justice" is the determination of the guilt or innocence of the accused, that same aim is involved in the process that leads to a convinction upon a guilty plea as it is in the process leading to a conviction or an acquittal at trial. Thus, if in the trial version of the criminal process it is sound to provide discovery to an accused in order to more consistently realize the aim of the process, it is equally sound to provide discovery before an accused is even asked to enter a plea. It should be remembered that in pleading guilty an accused admits not just factual involvement in a criminal act, but legal involvement as well. This admission covers all elements involved in the charge and the absence of any defence. Admittedly, some accused in experiencing feelings of guilt and remorse will want to plead guilty without insisting on being shown the nature and extent of the prosecution case. But the existence of these feelings does not relieve the criminal process of the responsibility of ensuring that the application of the criminal sanction to an accused's conduct is justified.

35. Therefore, this being the real context of guilty pleas, the criminal process should not be entitled to require an accused to enter a plea until he is fully informed, not just as to the nature of the charge, which may result from receiving a copy of a criminal information, but also as to the material and information comprising the prosecution's case and the consequences of a guilty plea. This is the connection between the guilty plea process and discovery in criminal cases.

IV

The Extent of Present Discovery

36. But what is the problem? If, one might ask, discovery allows the purpose of the criminal process to be better realized in our adversary system, do we not have it, and if not then why not? Yet, while these questions may be simply put, not all of the answers are so clear and so simple.

(a) *In Law*

37. As a start it can be safely stated that in existing Canadian criminal law there is very little discovery provided to the accused as a matter of right. Moreover that which does exist came about for reasons not directly concerned with the establishment of a discovery system. For example, while in cases of treason the law requires the accused to be provided with lists of potential witnesses and jurors, the origin of this requirement is not rooted in a concern to provide certain basic discovery to all accused persons. This requirement stems from the concern of the members of the English Parliament, from which it was borrowed, that should there be some misunderstanding as to their political activities resulting in a treason charge, it would only be fair *for them* to receive this kind of information. As another example, while the preliminary inquiry may be seen by some as a procedure providing discovery as a matter of law, its original purpose was as a check on unjustified pre-trial detentions and on the bail system of English magistrates for cases pending trial in the higher courts. Shortly thereafter it came to serve the more general purpose of reviewing the evidence of a charge to determine whether it was sufficient to warrant the accused standing trial.

38. Now, while the preliminary inquiry is still said to serve this latter purpose, it is more commonly seen as a general discovery vehicle. But this function of the procedure flies in the face of the facts. In reality the preliminary inquiry is only available in a small minority of criminal cases. According to the 1969 information from Statistics Canada, only 5 per cent of all criminal cases were tried by either judge alone (other than a Magistrate or a Provincial Court Judge) or judge and jury—being those cases in which a preliminary inquiry is available.[5] As well, even for those cases in

[5] Referring to the report of the Dominion Bureau of Statistics, *Statistics of Criminal and Other Offences 1969* published in 1972 (excluding Alberta and Quebec) out of 43,082 indictable offences 39,492 were tried by a Magistrate or Provincial Court Judge—being 94 per cent of all indictable cases. If one were to add all summary conviction offences in the total of criminal cases tried in the lower courts where a preliminary inquiry is not available, the 95 percent used in the text of this paper would be a conservative figure.

which the preliminary inquiry is available, our courts have ruled that its purpose is strictly to determine whether or not an accused should stand trial; it is not, if not clearly stated then clearly implied, to provide discovery to the accused. Thus, if the prosecution should adduce sufficient evidence at the preliminary inquiry to justify the accused standing trial, the purpose of the preliminary will have been satisfied despite the fact that the prosecution may not have called all of its witnesses or presented all of its evidence.

39. While there are other provisions in our law which may be employed for the purpose of providing discovery to the accused, such as the right of the accused, in certain cases, to obtain the release of exhibits for testing and his right to inspect a copy of his own statement made at the preliminary inquiry, they are clearly limited. In short, Canadian criminal law provides very little discovery to the accused as of right.

40. But a review of only the legal rules on discovery does not take into account the theory of the role of the prosecution in the criminal process and the actual practice of prosecutors in providing discovery. And it is here, in the general theory of the role and function of the prosecution, that an answer may be found to the "why not" in our previous question, because in theory the role of the prosecutor is said to be much more than that of a partisan party to a contest. In the administration of criminal justice the prosecutor is said to be a "minister of justice" not representing any special interest but having the single goal of assisting the court in determining the truth. Thus, as Mr. Justice Rand stated in *Boucher v. The Queen* (1955) S.C.R. 16, at page 23:

> "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 . . . The role of the prosecution excludes any notion of winning or losing".

41. The placing of this onerous responsibility on the prosecution appears to have resulted in the courts refusing requests by the accused for discovery and hence refusing to articulate specific discovery rules. Rather, the reasoning seems to be that since the prosecutor is above all else a minister of justice he can be counted on in the proper exercise of his discretion to hold nothing back from the accused. More particularly, should the Crown not make any pre-trial discovery of evidence sought by the accused, the implication of this theory is that the accused will still not be prejudiced because all evidence which may be helpful to him will be adduced on his behalf at trial—by the Crown.

42. However, while accepting the value of imposing a moral imperative on the prosecution to prosecute fairly, is there not a limit to the ex-

pectation that the Crown will adduce pertinent evidence that is favourable to the accused? For example, while stating that the prosecution must call witnesses essential to the unfolding of the narrative on which the prosecution is based, the courts have acknowledged that the prosecution does not have to call witnesses who they believe are unreliable. But, is this not sensible? While the prosecution may be in error as to the reliability of a witness, yet, and here is the limit of the moral imperative, the prosecution cannot discharge the functions of both prosecution and defence. This problem is not limited to the situation of possible witnesses who might have evidence favourable to the defence but who the Crown may regard as unreliable. It applies to all evidence that might have a different value or importance when examined by the defence and which might be admissible at trial or lead to the finding of admissible evidence. The fallacy of allowing the moral imperative on the prosecution to substitute for the formulation of precise discovery rules is fully revealed when it is remembered that prosecutions are conducted in an adversary system where both sides are expected to advance their own case and to challenge their opponent's, from which the result emerges. In essence, to substitute the moral duty on the prosecution to call evidence that may be favourable to the defence in place of a system of discovery that would allow the defence to examine the information for itself and make up its own mind about its importance, is a denial of the very reasoning of the adversary system.

(b) In Practice

43. Apart from the conceptual error in allowing the moral role of the prosecution to substitute for positive rules of law, what is the actual practice of prosecutors in providing discovery to the accused? To what extent do prosecutors disclose information and material in the exercise of their discretion so that a system of discovery may exist despite the absence of formal rules?

44. In a survey conducted by research officers of this Commission, detailed questionnaires were mailed to prosecutors and defence counsel across Canada for the very purpose of determining the nature and extent of informal discovery practices. The questions sought to cover all information and material that might be disclosed in a criminal prosecution and all possible ways in which pre-trial disclosure might occur.

45. While a full analysis of this survey will be published at a later time, its major contribution is very clear: it is that the exercise of prosecutorial discretion cannot be counted on to provide a system of discovery. No doubt for many this result may hardly be surprising because prosecutors cannot be expected to ignore the adversary nature of their role in exercising their discretionary power as to whether or not to grant dis-

covery. But this conclusion is emphasized by the inconsistency of discovery practices for even the most basic of information, for example the names and addresses of witnesses.

46. Included in the survey were prosecutors from Montreal, Toronto and Vancouver. They were asked, as were all prosecutors, to indicate their usual practice in providing pre-trial disclosure to the defence of the names and addresses of civilians who they either intended or did not intend to call as witnesses at trial. These questions were asked as part of the inquiry into practices in disclosure of specific information, and in answering the prosecutors were asked to assume that the information existed, that they had access to it, that it had been requested by the defence, and, in order to fix the context of the disclosure practice, that the cases were those in which a preliminary inquiry was unavailable. Lastly the prosecutors were asked to identify their usual practice in terms of: disclose, do not disclose, or no fixed practice—meaning, in the last instance, that the answer depends so much on any number of variables ranging from a concern that a witness will be intimidated to a personal dislike for a particular defence counsel that the prosecutor has never developed a general practice in favour or against disclosure of the specific matter. Answering these questions were 16 prosecutors in Vancouver, 21 prosecutors in Toronto and 9 prosecutors in Montreal. The specific discovery items and their usual practices are reproduced below.

		Disclose	*Do Not Disclose*	*No Fixed Practice*
Names of civilian witnesses you intend to call at trial	(Vancouver)	11	2	3
	(Toronto)	11	3	7
	(Montreal)	3	4	2
Addresses of civilian witnesses you intend to call at trial	(Vancouver)	7	3	6
	(Toronto)	6	8	7
	(Montreal)	0	6	3
Names of civilian witnesses you do not intend to call at trial	(Vancouver)	7	1	8
	(Toronto)	8	3	10
	(Montreal)	1	4	4
Addresses of civilian witnesses you do not intend to call at trial	(Vancouver)	6	1	9
	(Toronto)	7	5	8
	(Montreal)	1	4	4

47. The most obvious feature of these results is that there is a wide variation in usual discovery practices from Vancouver to Montreal. In Vancouver and Toronto most prosecutors disclose witness names while in Montreal most prosecutors do not. But even in Vancouver, and more so

in Toronto, a significant number of prosecutors either make a practice of not disclosing witness names or they do not have any fixed practice. Then turning to the addresses of witnesses, the practice of the 3 prosecutors in Montreal, 5 in Toronto, and 4 in Vancouver, who disclose witness names, changes. In all three cities the majority practice is a combination of not disclosing witness addresses and not having any fixed practice. But how effective is it to disclose the names of witnesses and not their addresses in cities the size of Montreal, Toronto, and Vancouver? Moving to witnesses the Crown does not intend to call at trial, the answers remain, in general, on the side of non-disclosure or not having any fixed practice, which for many accused will amount to the same thing. To be fair however, here as with all of the discovery questions, more prosecutors in Vancouver and Toronto indicated a usual practice of disclosure than was the case with prosecutors in Montreal.

48. Why is it that so many prosecutors make a practice of not disclosing such basic information as witness names and addresses? There is no property in a witness, and a citizen who gives information to the police which may lead to a criminal prosecution should, under normal circumstances, expect that his name and address and his information will be disclosed to the defence. Is it because of a concern that as a result of disclosure there will be more witness intimidation? No doubt some prosecutors fear that more intimidation will result, but studies eleswhere have confirmed that this is a concern confined to a minority of cases.

49. Similarly, it is unlikely that the general failure of prosecutors to disclose such basic information results from a concern that disclosure will facilitate perjury. In fact, the majority of prosecutors who answered the questionnaire rejected this concern. But even if, in some cases, discovery to the accused might lead to the fabrication of evidence, like witness intimidation it is only a real concern in a small minority of cases. Thus for both of these problems the prosecutors answering the questionnaire could have had a usual practice of providing discovery of witness names and addresses which would not have compromised their position that in some cases discovery should be restricted because of the concerns of witness intimidation and evidence fabrication.

50. Could it have been that those prosecutors in Montreal, Toronto, and Vancouver who did not have a usual practice of disclosing witness names and addresses felt that such disclosure was unnecessary because they supplied the defence with the full information received from these witnesses? In other words, did disclosure of witness statements take the place of disclosure of witness names and addresses? Well, disregarding the fact that a witness statement may be incomplete or may suggest other matters that could be explored with the witness before trial, the results

from the questionnaire do not support even this alternative discovery practice. The same prosecutors, in answering questions as to disclosure of witness statements or the anticipated testimony of witnesses, reported these usual practices:

		Disclose	*Do Not Disclose*	*No Fixed Practice*
Signed statements of witnesses you intend to call at trial	(Vancouver)	7	5	4
	(Toronto)	6	7	8
	(Montreal)	1	7	1
Signed statements of witnesses you do not intend to call at trial	(Vancouver)	3	7	6
	(Toronto)	5	6	10
	(Montreal)	0	8	1
Substance or summary of testimony expected to be given by witnesses you intend to call at trial	(Vancouver)	6	0	0
	(Toronto)	17	1	3
	(Montreal)	2	4	3
Substance or summary of statements made by witnesses you do not intend to call at trial	(Vancouver)	5	3	8
	(Toronto)	7	3	11
	(Montreal)	1	5	3

51. These tables make it clear that fewer prosecutors make a usual practice of disclosing witness statements than witness names, although when compared with disclosure of witness addresses the practices are about the same. The point is that since there is no pervasive practice of disclosure of witness statements it cannot be regarded as any substitute for failing to disclose witness names and addresses—if indeed it could ever be a substitute.

52. One other question that was asked of prosecutors in the questionnaire-survey again underscores the conclusion that a discovery system cannot be founded on the exercise of prosecutorial discretion. This question provides concrete evidence of the gap between the myth and the reality as to the expectation that moral dictates can take the place of positive rules of law. The prosecutors were asked to respond to this question: "do you disclose to the defence information of any sort that does not assist the prosecution but which may be helpful to the defence?" Their answers were:

	Disclose	*Do Not Disclose*	*No Fixed Practice*
Vancouver	7	2	7
Toronto	11	3	6
Montreal	1	4	4

53. To be fair, the majority of prosecutors in Toronto had as a usual practice the disclosure of evidence that may be helpful to the defence. But the majority in Montreal and Vancouver did not: they either did not disclose this information as a usual practice or they had no fixed practice as to its disclosure. But what valid reason can a prosecutor have for not disclosing information that might assist the defence? Is not the prosecutor a "minister of justice" obliged to disclose all evidence whether for or against the accused? Is it that the prosecutor distrusts the information as being unreliable or believes that it will be inadmissible? But why not let the defence and ultimately the court, should the defence offer this information into evidence, determine these questions?

54. In conclusion, while the value of discovery in our criminal process is clear, the problem remains that an orderly system of discovery has not been established; it does not exist either in formal rules or in the exercise of prosecutorial discretion. Moreover, as this brief discussion has revealed, the solution to the problem lies in recognizing that the moral duty on prosecutors to conduct prosecutions in a fair and honourable fashion, as valuable as it is, is not an adequate substitute for positive legal rules.

V

General Principles Guiding The Establishment of a Discovery System

55. Having fixed the importance of discovery in the criminal process and having determined that, in the main, it does not exist, the point has been reached at which something precise can be said about the kind of discovery procedure that our criminal law system ought to have. The emphasis here is on articulating principles of general application and on drawing the general contours of a discovery system. The exact details of a model that will faithfully achieve these principles and locate the boundaries of the system can be left until later.

(*a*) *A Formal System*

56. To begin, in our opinion it is clear that Canadian criminal procedure requires formal rules and some changes to its legal machinery to provide discovery to accused persons both before plea and, in the case of not guilty pleas, before trial. Not only should the rules give formal recognition to the general right of the defence to obtain discovery in criminal cases, but in order to make the exercise of that right effective the rules should specify all of the information that is to be disclosed, the form of the disclosure, and, as in civil practice, the role and authority of the courts in enforcing the discovery rules. In this way a system will be achieved which will provide for a uniform discovery practice in all criminal cases.

57. The idea of moving to a system where discovery is provided by formal rules is not new. In recent years a number of studies in the United States have recommended the institution of formal discovery procedures, and formal systems have been proposed or adopted in a number of States and in federal criminal practice. While there are differences in the details of the various proposals and systems—these differences and the systems themselves are fully examined in the Commission Study Paper on Discovery in Criminal Cases—they all demonstrate that discovery in criminal cases does not have to be left to the exercise of prosecutorial discretion. They show that clear and simple rules and procedures can be formulated providing for discovery in all cases while, at the same time, the concerns as to possible witness intimidation and evidence fabrication can be accommodated. Moreover, they show that a change to a formal discovery system

can be achieved without adding significantly to the burden of prosecutors and the courts in the pre-trial process, while actually tending to lessen their burden in the trial process as a result of the effect of discovery in encouraging the entry of guilty pleas and in reducing and sharpening the issues in dispute for contested cases.

(b) The Information and Material to be Disclosed

58. Before plea the formal rules should require discovery to be made to the accused sufficient to allow him to make an assessment of the nature and strength of the prosecution case and to understand the consequences of the pleas of guilty and not guilty. Again, this requirement does not mean that the prosecution role in preparing cases for court need be more burdensome than it is at present. All of the information that will satisfy this requirement exists, or should exist, in every prosecution; in fact in practice it is now customarily revealed to the court after the entry of a guilty plea. This includes the charge against the accused, a narrative of the facts supporting the charge, and the election by the prosecution to proceed summarily or by indictment. To this information should be added the right of the accused to plead not guilty, to consult with counsel, the maximum and minimum penalties, and the procedures to be followed upon the entry of guilty and not guilty pleas. The only real change in procedure resulting from this requirement would be the disclosure of this information before plea. As to the actual mechanism for achieving such discovery it should not be too difficult to draft a standard form that could be completed as a matter of routine in every criminal case.

59. The system of discovery before plea, as described above, would also apply to cases that would be diverted out of the criminal process. Earlier we noted the development of alternatives to the traditional criminal law process for the resolution of criminal charges. But all diversion programs require the voluntary participation of the accused, following upon which the criminal charge is abandoned. And so, just as pre-plea discovery should be provided to all accused before being asked to plead in the traditional process, it should also be provided to all accused for whom a diversion alternative may be contemplated. In effect the same basic discovery should be provided in all criminal cases after which the system would then be entitled to ask accused persons to either enter a plea or to acknowledge or deny responsibility as a condition precedent to participation in a diversion program.

60. The discovery to be provided before the operation of the plea process should then be amplified for all criminal cases in which pleas of not guilty are entered. Of course an accused should be entitled to enter a plea of guilty at any time or to change a plea from not guilty to guilty.

But in keeping with the goal of achieving the aim of the criminal process, the entry of a not guilty plea should be followed by full disclosure enabling the defence to directly or indirectly advance its own case, or to test the case for the prosecution, or to pursue a chain of inquiry that will have either of these two consequences. Thus while a narrative of the information in possession of the prosecution would suffice for pre-plea discovery, it is not sufficient for pre-trial discovery where the emphasis is on preparation for trial. Here the formal rules of procedure should require disclosure of witness names, addresses, and copies of witness statements. They should require disclosure of copies of all statements made by the accused whether oral or written and the circumstances in which they were made. They should require disclosure of all persons who have given information to the police but whom the prosecution does not intend to call as witnesses at trial. In fact, the rules should require disclosure of information and material of every kind with the only restrictions being for evidence that is privileged and for those instances in which a real danger exists that disclosure will lead to witness intimidation. But even for the latter, it is possible to provide a controlled form of discovery, such as requiring the interview of a witness to be in the presence of a prosecutor or by having the evidence of a witness officially recorded before trial.

(*c*) *The Procedures for Effecting Discovery*

61. In addition to prescribing the nature and extent of both pre-plea and pre-trial discovery, it would be necessary for the formal discovery system to establish the procedures by which the disclosure rules may be satisfied. In the case of pre-plea discovery, it would simply be a matter of providing that a plea, or an invitation to an accused to participate in a diversion program, could not be received until a pre-plea discovery statement containing the discovery as prescribed had been delivered to the accused. In the case of pre-trial discovery, new procedures would be required to provide for a time and place for the discovery to be accomplished, for its accomplishment to be reviewed, and for any matter in dispute to be resolved. The former could be met by a meeting of the defence and the prosecution, perhaps according to a date fixed by the court, at which time all pre-trial discovery would be completed. The latter, a review of the completion of pre-trial discovery and a resolution of issues in dispute, could be achieved by involving the court in a pre-trial hearing. The court could be provided with a check list acknowledging the matters disclosed according to the discovery rules and pointing to those matters, if any, that are in dispute such as a request for disclosure of certain information for which the prosecution claims a privilege or contends on some other ground that it should not be disclosed. While there may be still other procedures that are needed, such as a power in the judge at the

pre-trial hearing to actually hear a witness that the prosecution is justified in not disclosing, a power in the judge to order a witness, in a proper case, to submit to an oral examination by the defence before a court reporter, and a procedure for the review of some of the decisions made at the pre-trial hearing, they would be ancillary to these two main pre-trial procedures, being the meeting between the prosecution and the defence and the pre-trial hearing.

(d) Abolition of the Preliminary Inquiry

62. However, changes to the machinery of the pre-trial process would not stop with the addition of these few discovery procedures. With the establishment of procedures providing for uniform discovery to the defence in all criminal cases there is no substantial reason to continue the system of the preliminary inquiry and it should be abolished. Indeed even before the establishment of a discovery system one can challenge the utility of this procedure. Its chief purpose is to provide a preliminary review of the adequacy of allegations of crime and yet it is available in only about five per cent of all criminal cases—and even for these cases it can be avoided by the procedure of a preferred indictment taking a case directly to trial. For all other cases the adequacy of charges of crime are left for determination at trial. But since in more recent times the preliminary inquiry has come to serve a distinct discovery purpose, even though it is a somewhat cumbersome and expensive vehicle for achieving this purpose, its abolition without the provision of an alternative discovery procedure would be too harsh a change. However, with the establishment of procedures specifically designed to provide a discovery system for all criminal cases, as outlined in this working paper, this change can be made—indeed it must be made to avoid a duplication of pre-trial functions.

63. This justification for abolishing the preliminary inquiry does not mean that we should ignore the question of whether it is reasonable to have some pre-trial procedure whereby the adequacy of the prosecution's case causing the accused to stand trial can be reviewed. Granted this original purpose of the preliminary inquiry, which was instituted in England in response to a general distrust of the quality of justice in the bail system of lay magistrates, has been largely forgotten. With the development of modern police forces and professional crown prosecutors, and with the latter's acceptance of the role of reviewing charges laid by the police, very few cases lack sufficient evidence so as to justify a dismissal at the preliminary inquiry. But for those few cases that do warrant dismissal, is it not reasonable to have a procedure whereby they can be dismissed before the full trial process is engaged? Moreover, would it not be sensible to have this preliminary review procedure available for all cases and not, as with the present preliminary inquiry, for only those few cases that

are tried in the higher courts? The procedure ought not to be mandatory, nor even should it apply unless waived by the accused. But rather, a simple motion procedure could be available to be invoked by the defence where it is believed that, on the face of the documentary and other material, *prima facie* guilt cannot be shown. The motion could be in writing specifying the precise ground on which it is based and supported by the relevant information and material received on discovery. This procedure would be analogous to that available in civil practice where a pre-trial application can be brought to strike out a claim that is frivolous or vexatious. Similar to the practice in civil cases, since the majority of prosecutions are soundly based, it would be rare for an application to succeed and therefore applications would be the exception rather than the rule. But this is not a valid reason for failing to provide a procedure that will allow for a pre-trial determination of the exceptional case, especially where a simple and expeditious procedure, such as a motion to the court at the end of the pre-trial hearing, would suffice.

(*e*) *The Question of Discovery of the Accused*

64. So far, we have described the general outline of a discovery system that would provide discovery to the accused. But what about discovery of the accused in favour of the prosecution? Is there not an equal need to provide discovery to the prosecution in order to fully achieve the reasoning of the adversary system, that "with each side on its mettle to present its own case and to challenge its opponents, the relevant unprivileged evidence in the main emerges in the ensuing clash"?[6] In other words should not discovery in criminal cases be a "two-way street"?

65. However, while in an ideal system discovery rules would be reciprocal, as in civil cases, nevertheless because of the principles we have outlined, discovery in criminal cases ought not to be a compulsory "two-way street". We of course expect that in an open system of criminal procedure where discovery of the prosecution case is more widely provided, the defence will voluntarily respond and admit matters that are not in issue or volunteer discovery information to the prosecution. But it is inconsistent with the principles of the process to compel the defence to do so.

66. This position on the issue of discovery of the accused does not mean that accused persons will have a licence to call surprise evidence and thereby frustrate achieving the purpose of the criminal process. First, in terms of the ability to investigate and prepare for trial prosecutors are seldom disadvantaged by the lack of discovery of the accused, nor should they be. The human and physical resources of police investigation, the

[6] See *Supra* footnote 4.

power to search and to seize, to question, and access to scientific laboratories, far outmatch the resources available to the defence. But this should not be surprising for ours is a system in which the burden of proof is on the prosecution, not on the defence, and in order to discharge this burden the prosecution must conduct thorough investigations and fully prepare cases for trial. Moreover, in the very process of investigation and preparation, the prosecution will also become aware of possible defences and defence evidence. This is not just a theoretical response; it is borne out in present practice. In our survey of the profession the great majority of prosecutors acknowledged that they are generally able to prepare to meet the case for the defence by the material contained in the prosecution file.

67. Second, for those cases where the prosecution would benefit from defence discovery, there are a number of incentives, some already in existence and some which would flow from the institution of discovery procedures in favour of the accused, which would encourage the defence to make pre-trial disclosures to the prosecution. In a number of cases an adjournment would allow the prosecution to investigate and rebut surprise evidence. But even more important, a policy of granting adjournments to allow the prosecution to counter surprise evidence would encourage defence discovery to the prosecution. As well, the very fact that evidence is disclosed late in the process will, in many instances, operate to diminish the weight to be attached to it and thereby encourage defence discovery. This is true of evidence of alibi, of evidence explaining possession of stolen goods, and of the evidence of a witness generally where it would have been reasonable to have disclosed it earlier. Here one should distinguish between special rules which have developed for evidence of alibi and possession of stolen goods, and the rules of evidence generally which allow for the credibility of a witness, including the accused should he take the witness stand, to be tested.

68. In addition to these existing incentives, the establishment of a formal system providing discovery to the accused would create new incentives for the defence to make discovery to the prosecution. The pretrial hearing which we suggest should be established to review the completion of discovery from the prosecution to the defence, would serve as an opportunity for the defence to make disclosures and admissions. The judge could inquire of defence counsel if there were any disclosures to be made or issues which could be resolved by admissions of fact to avoid unnecessary witness attendances at trial. While there would be no compulsion in this inquiry and while in the existing law the prosecution is free to ignore defence admissions of fact and to tender proof at trial anyway, admissions of facts and disclosures of defences would be made. Having received discovery from the prosecution, many defence counsel would be just as interested as the prosecution in saving time and expense and getting

down to the matters that are really in dispute. Moreover, as another incentive, trial judges and juries would soon be aware of the rules and procedures that provide the defence with full discovery of the prosecution and with an opportunity at the pre-trial hearing to make admissions and disclosures. It is likely that this awareness will further diminish the weight to be given to evidence or a defence that is not disclosed until trial. Finally, the establishment of a formal discovery system providing uniform discovery to the accused in all criminal cases will of itself encourage the defence to make discovery. An approach of openness by the prosecution will foster more openness by the defence just as a restrictive approach, which now characterizes discovery by prosecutors in many parts of Canada, tends to encourage defence counsel to play their cards close to their vests.

69. In conclusion, through the incentives described, the Commission is in favour of encouraging the defence to voluntarily admit facts that are not in dispute and to pursue a policy of voluntary discovery to the prosecution. But we are opposed to formal measures or rules which would require such discovery to be made. It is our view that a system of compulsory discovery of the accused will erode the principles of our criminal process.

(f) The Scope of the Discovery System

70. The last issue to be examined concerns the scope of a formal discovery system. We have articulated the principles on which a discovery system should be grounded, and we have examined the general rules and procedures by which a formal system should be established in Canada. And throughout this discussion our focus has been on the need for discovery in all criminal cases. But what is meant by all criminal cases? Could the discovery system be waived? And, apart from waiver, should the discovery system apply to minor as well as serious crimes? Finally, what about regulatory offences, both provincial and federal? Are they included in the term "all criminal cases"?

71. The possible waiver of discovery procedures may be considered first. Since our system permits an accused to plead guilty and thereby waive the whole fact-finding process of a trial, it would not seem inconsistent to allow an accused to waive only part of that process such as one or more of the discovery procedures. Moreover, it would be going too far to compel a defence counsel to attend a discovery meeting or a court hearing to review the completion of discovery. Thus, of course the discovery procedures can be waived—particularly the discovery meeting with the prosecutor and the pre-trial hearing. However, the system itself should not set up procedures for the court to inquire into whether or not

an accused would be agreeable to waive discovery. Such an approach would suggest that the value of discovery extends only to the accused whereas the whole thrust of our discussion has been that the value of discovery extends to the validity of the criminal process itself in justifying the reception of guilty pleas and in allowing the reasoning of the adversary system to be realized. Moreover, from an administrative perspective it would be far more efficient to simply provide discovery in all criminal cases, or at least to make it available, than for the system to engage in an examination of the possibility of its waiver. This is particularly true of pre-plea discovery where all that would be required is the delivery to the accused of a discovery statement at an early point after the commencement of criminal proceedings. Therefore it is our view that while an accused may decline to avail himself of a pre-plea discovery statement, its preparation and delivery to the accused should not be capable of being waived. And while the procedures for pre-trial discovery could be waived, the court should not make inquiries as to whether they would be waived. This would be analogous to the present practice in regard to waiver of the preliminary inquiry.

72. Turning to the meaning of "all criminal cases", while all cases arising from offences contained in the *Criminal Code*, the *Narcotic Control Act*, and offences in relation to controlled and restricted drugs in parts III and IV of the *Food and Drug Act* should be included, it is not at all intended that the discovery procedures should apply to provincial offences nor even to the wide range of regulatory offences found in the general body of federal statutes. While it might later prove sound to extend the advantages of discovery to them, at present our concern in this working paper is to provide a better system of justice for those cases that are generally regarded as part of the traditional criminal law. The objection may be raised that such discovery would be too cumbersome in minor criminal cases. Our answer, at present, is that because of the stigmatization that attaches to a conviction for any criminal offence, a clear distinction between major and minor, being one of classification in law, cannot now be drawn. Thus, the Commission could not find a rationale for limiting discovery to certain offences and came to the conclusion that discovery rules and procedures should apply in all criminal cases. We have to rely for the time being on the reasonable assumption that in cases which are not complicated, discovery will be straight-forward, and in most of these cases pre-plea discovery would suffice.

VI

A Proposal for Reform

73. In conclusion, that which remains to be done to complete this working paper is the task of detailing specific provisions for a formal discovery system. Parts I, II, and III of this paper give the context for a discussion of criminal procedure by defining the purpose of the criminal process and relating that purpose to discovery. Part IV identifies the problem, being the lack of a uniform discovery system, and Part V examines some of the basic principles on which a discovery system should be grounded and suggests the general form that it ought to take. Therefore the point has now been reached at which the features of a proposal should be set out, not as draft legislation, but as basic standards which could be incorporated in future legislation.

(*a*) *General Description*

74. A proposal has been drawn that is faithful to all of the principles laid down in this paper and which accords with the guidelines suggested for a formal discovery system. The specific provisions of the proposal cover the information and material to be disclosed by the prosecution at the pre-plea and pre-trial stages, and the procedures by which the disclosure, at these two stages, is to be effected. For pre-plea discovery, the proposal requires the delivery to the accused of a written statement containing all of the information that a prosecutor would relate to the court in the event of a guilty plea. Thus the statement would include the charge itself, the circumstances of the commission of the offence, the penalties provided by law, and the names and evidence of any witnesses that the prosecution intends to call should the accused plead guilty. At present most of this information is contained in what is sometimes called a "dope sheet" and it would simply be a matter of modifying this document to meet the requirements of the pre-plea discovery statement.

75. In the event of a plea of not guilty or where the accused is to be tried in a higher court, unless waived the rules and procedures for pre-trial discovery would apply. Basically, there are two main procedures: a meeting between the prosecutor and the defence and a pre-trial court hearing. The meeting would be agreed to by the parties while before the court and thereupon the court would remand the case to a future date for the pre-trial hearing. At the meeting the prosecution would make discovery to

the defence in accordance with the rules. In between the meeting and the pre-trial hearing the defence would have the opportunity to conduct further investigations. Then at the pre-trial hearing the court would review the accomplishment of discovery at the meeting, settle any discovery issues that may be in dispute, and determine if any admissions might be made to expedite proceedings at trial. Finally the court would set the case for trial.

76. Other provisions in the proposal would vest the judge at the pre-trial hearing with authority to preside over the taking of testimony of witnesses the prosecution is justified in not disclosing at the discovery meeting, with discretion to order witnesses whose names and addresses have been disclosed and who unreasonably refuse to be interviewed by the defence to attend at an appointed place to submit to an interview, and to discharge an accused if, based upon the information and material disclosed, there is no evidence against the accused on any essential ingredient of the charge. But these powers of the judge at the discovery hearing are ancillary to the main purposes of reviewing the completion of discovery at the meeting between the prosecution and the defence and settling any issues that may be in dispute.

77. These brief remarks serve to introduce the discovery proposal itself which is divided into two parts. Part 1 sets out the procedures for effecting discovery both at the pre-plea and pre-trial stages and the sanctions for the enforcement of these procedures. Part 2 sets out the material and information to be disclosed according to these pre-plea and pre-trial procedures. As stated earlier, the provisions in this proposal should not be regarded as draft legislation, but as a way of achieving those basic standards which should be incorporated by legislative changes in Canadian criminal procedure. We realize that many questions will be raised about both the overall form of the proposal and some of its individual provisions, but we welcome that discussion. This is a working paper intended in part to stimulate discussion on this important subject so as to assist us in drawing our report for Parliament. It is also intended to record the present state of our research. The actual implementation of a discovery scheme has to be tested and further refined in practice by such means as pilot projects. While discovery is now provided by some Canadian prosecutors, in various degrees, what is needed is the development of a uniform discovery system for all criminal cases which would allow the aim of the criminal process to be more consistently and effectively achieved.

(b) Discovery Proposal

Part I—Discovery Procedure

1. A uniform formal discovery procedure should apply in all criminal cases. Application of discovery

2. The prosecution should supply the accused on or before his first court appearance with a standard form discovery statement. The statement should, in essence, contain the facts, information and material that will be presented to the court if the accused pleads guilty. Pre-plea discovery
(For details of the disclosure required in pre-plea discovery see Part 2)

3. The law should enable a plea of guilty to be struck out at the request of the accused if, the accused pleads guilty without receiving the discovery statement, or if the accused pleads guilty after receiving the discovery statement but the information actually presented to the court deviates from that contained in the discovery statement to the prejudice of the accused, or if the information set out in the discovery statement is inaccurate or misleading and the incorrect information has caused the accused to plead guilty without appreciating the nature or consequences of his plea. Questioning validity of plea

4. The prosecution should not be bound by the discovery statement if the accused pleads not guilty. The accused should not be entitled to use or refer to the discovery statement itself in a subsequent trial. Use of pre-plea discovery statement

5. If the accused pleads not guilty the court should require the representatives of the prosecution and defence before the court to agree upon a date, time, and place for a discovery meeting. At this meeting the disclosures required by law would take place. (For details of the disclosures required at the discovery meeting, see Part 2) Procedure if plea of not guilty entered

6. Upon being informed of the agreed date for the discovery meeting the court should schedule a discovery hearing to take place 3 weeks from the agreed date of the discovery meeting. The three week period would normally apply but could be shortened or extended depending upon the con- Scheduling discovery meeting and discovery hearing

venience of the parties and the court, the circumstances of the case, or the anticipated time required to complete discovery and other trial preparation.

Discovery meeting summary memorandum

7. At the conclusion of the discovery meeting, the prosecution representative would prepare a summary memorandum indicating disclosures made or refused and any other matters determined at the discovery meeting. The memorandum would be signed by the defence representative attending the meeting and filed with the court at the beginning of the discovery hearing.

Period between discovery meeting and discovery hearing

8. When the discovery meeting is concluded both parties would keep in mind that a discovery hearing is scheduled in 3 weeks. The defence, during this 3 week period, would have an opportunity to conduct further investigation, if necessary, of material or information disclosed at the discovery meeting, or to conduct informal interviews of disclosed witnesses, and would also be expected to continue its own overall general trial preparation.

Discovery Hearing

9. The discovery hearing would be presided over by a judge, whose functions at the discovery hearing would include:

Functions of judge at discovery hearing

(a) Verification that discovery required by law has been completed to the satisfaction of the parties.

(b) Consideration of and ruling upon disputes as to whether legal discovery requirements have been, or ought to be, carried out, and making appropriate orders, where necessary, to ensure that they are carried out.

(c) Consideration of requests for the release of disclosed material or potential evidence for examination or testing.

(d) Hearing and determining arguments that may be raised as to the form of the charge, the question of joinder or severance of counts or accused, or the need for further and better particulars of the charge.

(e) Upon completion of discovery, an exploration of the willingness of the parties to make admissions of fact or other disclosures that may avoid the necessity of presentation of formal proof or of witnesses at trial or that may expedite the trial, and consideration of argument, if raised by the defence, as to the sufficiency of the evidence to warrant placing the accused on trial.

(f) Recording any re-election of the accused as to mode and court of trial, and setting a date for trial.

Additional powers or functions of judge at discovery hearing

10. In some cases the judge at the discovery hearing may preside over the taking of testimony under oath of certain witnesses, or order the attendance, before a qualified person, of certain witnesses for pre-trial questioning under oath.

[For details of the circumstances under which these functions of the discovery hearing judge may be called into play, see 11 and 12]

Procedure upon non-disclosure by the prosecution of identity of potential witnesses

11. The law should allow the prosecution to refuse to disclose the identity of potential witnesses where it is likely that disclosure will result in intimidation, physical harm, threats of harm, bribery, or economic reprisal directed against the potential witness or other persons. In such cases the prosecution should inform the defence at the discovery meeting that disclosure of the identity of a witness is being withheld and should indicate the number of witnesses involved. At the discovery hearing the prosecutor would present these witnesses and have their evidence recorded under oath. The defence would then be given a reasonable time to prepare cross-examination. After the completion of questioning the witness would be formally ordered by the discovery hearing judge to appear at trial.

If, through no fault of the police or prosecution, the witness should fail to appear at trial, the admissible portions of the transcript of the testimony of the witness taken at the discovery hearing would be admissible at trial. If the witness does appear at trial but changes his testimony from that given at the discovery hearing, the transcript of his testimony given at the discovery hearing could be used by either party to contradict the witness.

Procedure upon defence request for attendance of disclosed witnesses for pre-trial questioning under oath

12. At the discovery hearing the defence should be entitled to apply to the presiding judge to exercise his discretion to order that potential witnesses, whose identities have been disclosed by the prosecution at the discovery meeting, attend before a person qualified to preside over the taking of the testimony of witnesses under oath.

On an application under this provision, the judge should ordinarily grant an order authorizing an examination, in the interests of proper pre-trial preparation, where:

(a) it would be reasonable to provide for an examination under oath of an essential prosecution witness, such as,

without restricting this category, an identification witness in a charge of murder where identification is in issue.

(b) it would be inadvisable for the defence to interview a witness, for example the complainant in a prosecution for a sexual offence, except in an examination in which all parties would be protected.

(c) a witness has unreasonably refused to submit to an informal interview or to answer proper questions during an interview. What would be reasonable or unreasonable in a refusal would be dependent upon the time, place, and circumstances surrounding both the request for the interview and the interview itself.

In exercising his discretion the judge at the discovery hearing should be entitled to examine any previous statements of such potential witnesses already supplied to the defence, and to consider any information supplied in argument by either party as to the conduct of the defence in relevant informal interviews.

Since the purpose of the pre-trial questioning would be discovery, the defence in these proceedings should be entitled to put leading questions to the witnesses. However, as opposed to the case of witnesses who testify at the discovery hearing after non-disclosure by the prosecution, the record of the testimony in these proceedings would be inadmissible at trial except insofar as it may be admissible under section 643 of the *Criminal Code* or may be used for purposes of cross-examination at trial.

Questioning committal for trial

13. Implementation of this proposal would involve the abolition of the present form of the preliminary inquiry. Subject to the qualification set out below, committal for trial would be automatic after completion of the discovery hearing.

At the discovery hearing the defence should be entitled, at the completion of the hearing, to present a motion that there is no evidence to warrant placing the accused on trial. The motion should be precise and should specify the exact area and nature of the lack of evidence that is alleged.

In considering the motion, the presiding judge should examine all relevant available material, hear argument, and if there is clearly a complete lack of evidence on any essential element of the offence, discharge the accused, or commit the

accused for trial on any appropriate lesser or included offence disclosed by the material.

In any other case the presiding judge should commit the accused for trial, although in doubtful cases a preferred, early trial date could be set.

The court should not be entitled to commit for trial on any charges other than those set out in the information, or lesser and included offences.

Sanctions

14. The law should require the trial court to exclude any evidence or witness testimony not previously disclosed or, where appropriate, presented for inspection or copying as required by law, unless good cause is shown by the prosecution for failure to comply with these discovery requirements. If good cause for such failure is shown, the defence should be entitled to an adjournment to enable it to inspect copy or otherwise obtain the discovery to which it is legally entitled, or if it chooses, the defence should be entitled to defer cross-examination with respect to the previously undisclosed evidence.

If at any time prior to or during the trial it is brought to the attention of a court that the prosecution has wilfully or negligently failed to comply with an applicable discovery rule or order, the court should require the prosecution to permit the discovery of material and information not previously disclosed, grant an adjournment, and make such other order as it deems just under the circumstances.

Moreover, the court should have a discretionary power to dismiss the charge against the accused if the prosecution wilfully or negligently destroys or otherwise makes unavailable to the defence material subject to legal discovery requirements.

Continuing duty to disclose

15. If subsequent to compliance with these discovery provisions, the prosecution should find other material or information which would otherwise be subject to disclosure, it should be required to promptly notify the other party or his counsel of the existence of such additional material or information, and if the additional material or information is discovered during trial the prosecution should also be required to notify the court and the court should issue appropriate orders to ensure that the defence obtains the full discovery that would otherwise be available.

Part 2—Material and Information Subject to Discovery

Duty of prosecution to inform itself and obtain relevant material

1. The prosecutor should ensure that a flow of information is maintained between the various investigative personnel and his office sufficient to place within his possession or control all material and information relevant to the accused and the offence charged, or which is required by law to be disclosed to the defence.

Information and material to be disclosed in pre-plea discovery

2. The pre-plea discovery statement should contain the following information and material:

(a) The charges against the accused, as set out in the information;

(b) The narrative of facts with respect to each charge that the prosecutor intends to read or otherwise present to the court upon a plea of guilty;

(c) The identity of witnesses, if any, the prosecution intends to call to establish the narrative of facts upon a plea of guilty;

(d) In cases where the prosecution is entitled by law to elect to proceed by way of summary conviction or indictment, the election that will be made;

(e) The maximum penalty that may be imposed on each charge upon conviction;

(f) The minimum penalty, if any, that must be imposed on each charge upon conviction;

(g) A statement of the right of the accused to consult with counsel before deciding on the plea to be entered;

(h) A statement of the right of the accused to plead not guilty;

(i) A statement of the procedure to be followed, if the accused should decide to plead guilty, to the effect that: the narrative of facts will be read or presented to the court, the accused will be asked if such facts are substantially correct, the accused may bring to the attention of the court any facts or information presented that he disputes and may cross-examine any witness presented by the prosecution, the accused may make

submissions as to sentence personally or by counsel if convicted, and the accused may call witnesses, if he chooses, to speak to sentence;

(j) There should be attached to the discovery statement: copies of all written material, including the accused's criminal record, and written statements, confessions or admissions of the accused or any other person, to which the prosecutor intends to refer in the event of a plea of guilty, either with respect to the question of guilt, or with respect to the question of sentence and a brief description of the physical evidence that the prosecutor intends to produce to the court upon a plea of guilty.

Material and information to be disclosed upon plea of not guilty or where the accused is to be tried in a higher court

3. At the discovery meeting the prosecution should be required to supply to the defence, or allow the defence to inspect or copy whichever is more reasonably appropriate, if not already supplied in pre-plea discovery (subject to legislation setting out the material or information not subject to disclosure [see # 5 below]):

(a) The name, address and occupation of each witness the prosecution intends to call at trial, and all written, oral, or recorded statements of such witnesses made to investigation or prosecution authorities or their representatives;

(b) The name, address and occupation of all other persons who have provided information to investigation or prosecution authorities or their representatives in connection with any one of the charges against the accused, whether or not the information so provided is considered to be relevant or admissible at the trial;

Where the statements referred to in (a) and (b) do not exist, the defence should be supplied with a summary of the expected testimony of the witnesses intended to be called at trial and a summary of the information provided by those persons not intended to be called at trial, along with a statement of the manner in which the information in each summary has been obtained and prepared;

(c) The record of prior criminal convictions, if any, of persons whose names are supplied to the defence pursuant to (a) and (b), and of the accused;

(d) All written, recorded or oral statements made by the accused or co-accused, whether or not the prosecution

intends to use or adduce the statements at trial, along with an accurate description of the circumstances surrounding the making, taking, or recording of each statement, the identification of persons involved in the taking or recording of each statement, and the identification of those statements the prosecution does intend to adduce at trial;

"Statement" should include the failure to make a statement where such failure will be used to in any way advance the prosecution case in chief;

(e) Subject to legislation setting out the material not subject to disclosure (see No. 5 below), all books, documents, papers, photographs, recordings or tangible objects of any kind: (1) which the prosecution intends to use or produce at trial, (2) which have been used, examined or prepared as part of the investigation or prosecution of any one or more of the charges against the accused, (3) which have been obtained from or belong to the accused, or (4) which have been seized or obtained pursuant to a search warrant issued in connection with the investigation or preparation for trial or any one or more of the charges against the accused;

(f) All reports or statements of experts supplied to the investigation or prosecution authorities in connection with the investigation or preparation for trial or any one or more of the charges against the accused, including results of physical or mental examinations and of scientific tests, experiments or comparisons, and analyses of physical evidence, whether or not the prosecution intends to call the expert or present the report, statement, result, analysis or comparison at trial; and a statement of the qualifications of each expert witness the prosecution intends to call at trial;

(g) Motor vehicle accident reports prepared in connection with the events forming the subject matter of any one or more of the charges against the accused;

(h) Subject to legislation setting out material and information not subject to disclosure (see No. 5 below) all information or material, not included in any of the categories already set out, that might reasonably be regarded as potentially useful to the defence in its preparation

for trial, or that may tend to negate the guilt of the accused or may tend to mitigate his punishment upon conviction;

4. At the discovery meeting the prosecution should also inform the defence of its position with respect to the following matters:

(a) Whether it intends to adduce similar fact evidence;

(b) Whether it intends to adduce evidence of recent complaint;

(c) Whether it intends to adduce accomplice evidence;

(d) Whether it intends to adduce a prior criminal record of the accused for purpose of questioning his credibility if he should choose to testify;

(e) The circumstances of all lineups involving the accused, or other attempted out-of-court identifications of the accused, whether the accused was in fact identified or not;

(f) The theory, or alternative theories, of the prosecution to be advanced at trial;

(g) Where there is more than one charge against the accused, the order in which the prosecution intends to try the charges;

and should supply to the defence sufficient details of these matters to enable the defence to prepare as fully as possible to either prepare to meet or to use the information so disclosed.

Material and information not subject to disclosure

5. These disclosure requirements should be qualified in two respects:

(a) The prosecution should be entitled to withhold disclosure of the identity of certain potential witnesses. The appropriate circumstances and procedures in such cases have already been described in Part I.

(b) Legislation should be enacted specifying certain material and information not subject to disclosure. This should include:

(i) *Privileged communications*

(ii) *Crown Privilege*

(iii) *Work Product:* With the exception of disclosure required of the theory or alternative theories of the prosecution to be advanced at trial, this privilege from disclosure should cover internal legal research,

records, correspondence and memoranda, to the extent that they contain opinions, theories or conclusions of investigating or prosecution personnel or staff, or reflect their mental processes in conducting the investigation or preparing the case for trial.

(iv) *Informants:* Disclosure of the identity of an informant should not be required where it would be detrimental to the effective investigation by any government agency of criminal activity, unless the prosecutor actually intends to call the informant as a witness at trial, or unless the informant has taken part in the event from which the prosecution arises.

Excision

6. When some parts of certain material are discoverable under the law and other parts are not, as much of the material should be disclosed as in consistent with compliance with the law. Excision of certain material and disclosure of the balance would be preferable to a withholding of the whole. Material excised by judicial order should be sealed and preserved in the court records to be made available to the appeal court in the event of an appeal.