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Law Reform Commission  
of Canada

Commission de réforme du droit  
du Canada

# REPORT

## **disclosure by the prosecution**

# 22

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Canada

REPORT 22

DISCLOSURE  
BY  
THE PROSECUTION

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REPORT  
ON  
DISCLOSURE  
BY  
THE PROSECUTION

June, 1984

The Honourable Mark MacGuigan, P.C., Q.C., M.P.,  
Minister of Justice  
and Attorney General of Canada,  
Ottawa, Canada.

Dear Mr. Minister:

In accordance with the provisions of section 16 of the *Law Reform Commission Act*, we have the honour to submit herewith this report, with our recommendations on the studies undertaken by the Commission on disclosure by the prosecution.

Yours respectfully,



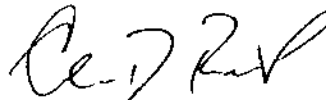
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## Introduction

Fairness and efficiency in the administration of justice depend in large measure upon the quality of information available to litigating parties. In Canadian law pre-trial disclosure and discovery are commonplaces of civil procedure, designed to expedite the resolution of a dispute by refining the issues to be debated at trial and minimizing the risk of surprise. Our rules of criminal procedure, however, do not provide for such disclosure, although the preliminary inquiry is commonly used by defence counsel as an opportunity to discover the strength and the scope of the Crown's case. The essential question of policy, then, is this: would the interests of fairness and efficiency in the administration of criminal justice be materially enhanced by the enactment of rules to require pre-trial disclosure of evidence and information? Assuming an affirmative answer, a further question arises: what is the proper extent and content of such rules?

These questions have been carefully examined in many jurisdictions that trace their system of criminal law to the common law of crimes. In Canada the principal catalyst for discussion has been the Working Paper entitled *Discovery in Criminal Cases*, which was published by this Commission in 1974. The scope of disclosure and the function of the preliminary inquiry have since been re-examined by the Commission and other interested groups within the legal community. The quality of these deliberations has been enriched by the results of several empirical studies and experimental projects.

Without prejudice to future work on disclosure by the accused and the preliminary inquiry, the recommendations advanced in this Report proceed from the conviction that statutory rules on pre-trial disclosure by the prosecution would promote both fairness and efficiency in the criminal process. Such rules would serve the interests of fairness to the extent that disclosure allows the accused a more enlightened appreciation of the case he has to meet and of his options in meeting it; the risk of surprise would also be

minimized, if not eliminated, by disclosure. Efficiency would be increased simply by the reduction of delay in eliciting information of direct relevance to the preparation and resolution of the case. In sum, our answer to the central question of policy raised above is affirmative.

This Report states the Commission's views on the proper scope and content of statutory rules for the regulation of pre-trial disclosure by the prosecution. We would emphasize, however, that the recommendations advanced in this Report mark only a first step toward a thorough revision of pre-trial procedure in criminal matters. While they may be partial, we firmly hope that these recommendations will enhance pre-trial disclosure by the Crown, minimize the need for preliminary inquiries, and thus promote efficiency in the disposition of criminal cases.

# CHAPTER ONE

## The law

### I. Current law and practice

Canadian criminal legislation has never formally provided for a general scheme of pre-trial disclosure by the prosecution. In specific instances, however, the *Criminal Code* stipulates that the Crown must make disclosure,<sup>1</sup> and it might also be said that the right of the accused to cross-examine and call witnesses at a preliminary inquiry provides incidental leverage for discovery.<sup>2</sup> Similarly, in a purely judicial development, Canadian courts appear to have accepted the English position that in order to eliminate the prejudice inherent in surprise the Crown is obliged before trial to furnish the defence with the statements of those witnesses to be called at trial who were not called at the preliminary inquiry.<sup>3</sup> But it cannot be said that Canadian criminal law enforces a policy of pre-trial disclosure by the prosecution. Apart from specific and limited requirements currently prescribed by law, pre-trial disclosure in Canada is characteristically an informal process, predicated upon the Crown's discretion in the management of its case.<sup>4</sup> To the extent that it exists, pre-trial disclosure is subject to the vagaries of regional practice, plea-bargaining and personal relations among members of the criminal bar; for these reasons alone it defies systematic analysis as an integral feature of Canadian criminal procedure.

## II. Evolution of proposals

The impetus toward formal procedures for pre-trial disclosure has gathered strength in Canada in the past fifteen years. Among the most significant factors contributing to this development are initiatives in Britain and the United States,<sup>5</sup> the sophistication of plea-bargaining, and the discussion of pre-trial discovery in academic writings and the publications of the Law Reform Commission of Canada.<sup>6</sup> In its Working Paper of 1974, the Commission recommended the abolition of the preliminary inquiry and its replacement with a formal system for disclosure by the prosecution that would consist, first, of an informal discussion between counsel, and then a pre-trial conference before a judge. Predictably, these recommendations provoked a substantial measure of discussion; they also provided a basis upon which several experimental projects were later established. We shall review these projects later in this Report, but it will suffice at this juncture to say that the net result was a significant saving of time in the preparation and disposition of cases, and thus the experiments clearly strengthened the argument for a formal system of disclosure.

Nevertheless, the argument for pre-trial disclosure has aroused particular controversy with respect to the ramifications that such a procedure would have in connection with the preliminary inquiry. It is perhaps self-evident that these two procedures would have a marked influence on each other in the law as it presently stands, and it is equally apparent that recommendations for a formal system of disclosure will necessarily have consequences for other aspects of pre-trial procedure. Indeed, the Commission's recommendation in 1974 was predicated entirely upon the benefits expected to accrue from the enactment of a comprehensive system of pre-trial disclosure. It was believed that such a system would alleviate problems of delay that attend the preliminary inquiry. At the same time, however, it must be acknowledged that the Commission's tentative recommendations confounded the advantages that might flow from disclosure and the function of the preliminary inquiry as a test of the sufficiency of the Crown's case. Various experimental projects affirmed that a system of disclosure avoided the needless summoning of witnesses and allowed the disposition of some cases ~~without a preliminary inquiry~~, either by

waiver or guilty plea, but it could not be asserted that disclosure obviated the utility of a pre-trial inquiry on the strength of the Crown's case.

Thus, while the experimental projects proved the advantages of a scheme of disclosure, they did not promote unanimity of opinion with respect to the modalities of such a scheme or the function of the preliminary inquiry. On the first point, opinion was and remains divided with respect to such central issues as the extent and timing of disclosure, the permissible uses of disclosed material, the discretion of the Crown, the judicial role in the process of disclosure, and the appropriate sanction for failure to make disclosure. These questions were considered in June 1976, when the Law Reform Commission presented a paper on pre-trial procedure to the annual meeting of ministers of justice in Vancouver, and again in March 1977 at a conference organized by the Commission on the theme of "better preparation for trial." At the conclusion of these discussions, it was clear to the Commission that pre-trial disclosure by the prosecution could not proceed solely on a voluntary basis and that legislation was the only effective alternative. Once again, however, there was no discernible consensus on the modalities of disclosure. In 1978, the Commission published its ninth Report to Parliament, consisting of recommendations for miscellaneous amendments on criminal procedure, and included among the proposals was a suggestion to allow proof of certain facts by solemn declaration. Such a procedure, which presumes a measure of pre-trial disclosure, could be construed as a step toward a more complete scheme of disclosure.

With the commencement of the Criminal Law Review in 1981, the Law Reform Commission once again turned its attention to pre-trial disclosure, and a new approach to the issue was discussed at a consultation with representatives of the provincial attorneys-general in June 1983. On this occasion the Commission suggested that the preliminary inquiry be retained but integrated within a detailed scheme of disclosure consisting, first, of an informal conference between counsel for the parties and second, of an appearance before a judge to resolve any outstanding disputes concerning disclosure. These proposals were resisted because they raised logistical problems concerning the scope of reform of pre-trial procedure in the Criminal Law Review. Accordingly, in October 1983, the Commission decided to modify its approach by

opting for discrete recommendations that would permit the introduction of a system of pre-trial disclosure in Canadian criminal procedure without major disruption in current law. This rather limited objective explains in part the Commission's confidence in proceeding directly to a Report to Parliament with these recommendations.

### III. Experimental projects

After the publication of the Commission's Working Paper in 1974, several experimental projects were established to test the viability of pre-trial disclosure as a feature of common practice. As recounted in the synopsis that follows, these experiments affirm that significant benefits would accrue to the administration of criminal justice by the introduction of a formal scheme for disclosure.

The first experimental project began under the guidance of His Honour Judge Lessard in Montréal on 28 February 1975. The foundation for the project was the consent of the criminal bar and the judiciary; thus, being voluntary, it was understood that defence counsel maintained the right to request a preliminary inquiry. In the absence of specific powers in the Code, the role of the judge supervising the process of disclosure was somewhat reduced. Although in practice he served as an adjudicator between the parties, his only jurisdictional authority derived from the powers conferred on a justice at the preliminary inquiry, and especially the powers of adjournment.

The procedure adopted in Montréal consisted of two stages, a disclosure conference between counsel followed by a hearing before a justice. On the date set for appearance before the justice, counsel would meet in advance for the purpose of disclosure. This session also provided an opportunity for plea-bargaining or for the preparation of future proceedings. Counsel would also discuss at this time possible admissions or the waiver of the preliminary inquiry under section 476 of the *Criminal Code*. (The disclosure "hearing" can be defined as a preliminary inquiry at which no

witnesses are subpoenaed.) The justice of the peace would ascertain whether disclosure had been made and, if one party indicated an intention to proceed to a preliminary inquiry, invite the parties to limit the issues. In principle, however, the *pro forma* hearing would consist mainly in noting the intentions and decisions of the parties with respect to the future course of the case. The options available to the defence would be these:

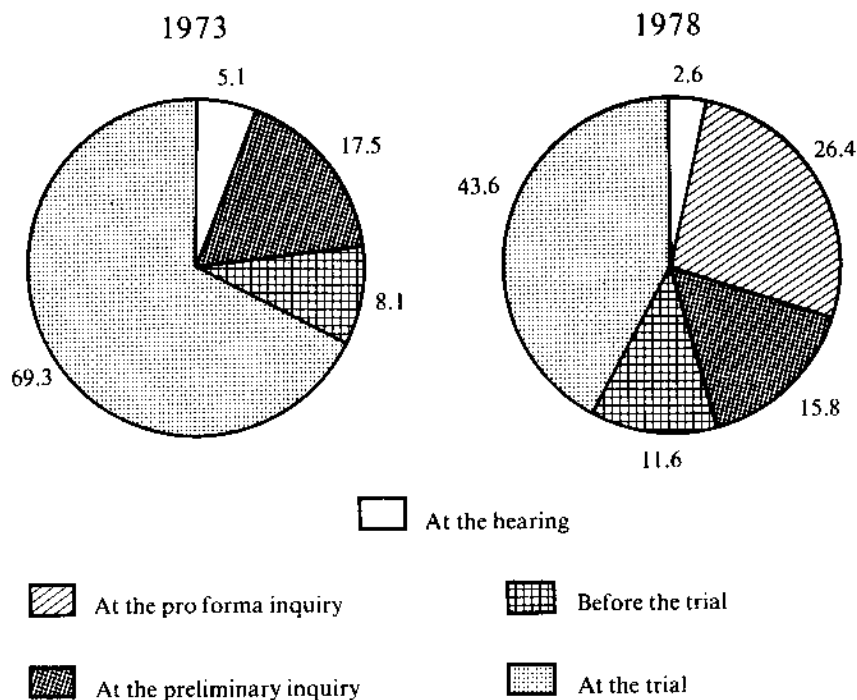
- . waive the preliminary inquiry, with the consent of the prosecution;
- . request that a partial preliminary inquiry be held, by undertaking to waive the continuation of the inquiry after one or more named witnesses had been heard;
- . request a preliminary inquiry;
- . enter a guilty plea;
- . request that the hearing be adjourned for purposes of a possible guilty plea or in order to complete disclosure; or
- . make certain admissions.

Finally, the parties would inform the court of the approximate duration of the next stage, whether it be a preliminary inquiry or trial.

The following table, which illustrates the stages at which cases were settled both before (1973) and after (1978) the commencement of the experiment in Montréal, demonstrates convincingly the advantages of a scheme for disclosure:

(See next page)





The table demonstrates that the “*pro forma* inquiry” allowed a conclusive settlement of 26.4% of cases. Moreover, it should be noted that a significant proportion of cases settled at trial were not preceded by a preliminary inquiry, due to a waiver under section 476 of the *Criminal Code*.

Another important effect revealed in the table is the net increase of guilty pleas between 1973 and 1978; at the preliminary inquiry, where a comparison is possible, the number jumped from 8.1% to 19%.<sup>7</sup> This same trend can also be observed with respect to guilty pleas just before trial, which increased from 10.5% in 1973 to 21% in 1978. It should also be noted that the number of charges withdrawn by the prosecution almost tripled after the introduction of the experiment, increasing from 4.5% in 1973 to 12.2% in 1978. All of these figures necessarily imply a significant saving in the cost of the administration of criminal justice.<sup>8</sup>

The thrust of the experiment in Montréal was the creation of a new step in the judicial process, between the first appearance and the preliminary inquiry, which automatically promoted the development of pre-trial disclosure as an essential aspect of criminal

practice in Montréal. (Indeed, what began as a temporary project in 1975 has since become common practice.) The creation of a distinct procedural stage in the judicial process would appear to be the touchstone of success in Montréal. In Vancouver, for example, the experiment was not part of the judicial process, with the result that the scheme remained characteristically informal and failed to become a regular aspect of local practice.

Although the pilot project in Montréal was the only experiment subjected to exhaustive evaluation,<sup>9</sup> it was not the only experiment undertaken in Canada. The project in Ottawa followed shortly after the commencement of the scheme in Montréal and adopted procedures that were virtually identical. It is worth noting, however, that this experiment placed considerable importance on preparation of the record. For example, the Ottawa project provided for a preliminary meeting between the Crown attorney and the investigating officer to decide the charges to be brought and any additional evidence that would be needed for purposes of discovery. This procedure directly affects the charging process and the commencement of proceedings. The Ottawa project was also distinctive in that the information to be disclosed was determined in advance. This affects the police report, of course, but also ensures that disclosure policies are uniform. The evaluation of the Montréal pilot project regarded the lack of prior definition of the evidence to be disclosed as a shortcoming. This shortcoming was one of the chief sources of defence counsel's dissatisfaction until the Crown office in Montréal adopted informal guidelines on the subject.

Another experimental project was conducted in Edmonton for a brief period at the beginning of 1977. The results were encouraging because there was a reduction of 50% in the number of witnesses called. Unlike the projects in Montréal and Ottawa, the experiment in Edmonton left little to the judge except verification of decisions taken by the parties as a result of disclosure.

Between 1977 and 1979 there were two experimental projects on disclosure in Vancouver, one conducted by the federal Crown and the other by the province. Both were distinguishable from other experiments because disclosure was left entirely to the parties, under the supervision of a co-ordinator who was not a judge.

#### IV. Disclosure and the preliminary inquiry

As already noted, the Commission's Working Paper in 1974 advocated the abolition of the preliminary inquiry and its replacement with disclosure and a right to make a motion on the disclosed material that there was no *prima facie* case. In May 1982, the Law Society of Upper Canada published the *Report of the Special Committee on Preliminary Hearings*, also known by the name of its chairman, Mr. Justice G. Arthur Martin, as the Report of the Martin Committee. In it the majority also recommended "paper committals," subject to the right of the prosecutor to call witnesses if he wished to do so, and subject to the right of the accused to call witnesses with the leave of the justice. The accused would have retained the right to make a submission that the case not be committed for trial, having regard to the documentary material and the testimony of any witnesses who were called. The documentary material was to consist, "generally speaking," of signed statements.<sup>10</sup>

The minority report of the Martin Committee concluded that there should be no alteration of the right to have a preliminary inquiry, and that proper discovery would reduce the length and number of preliminary inquiries, as it had done in England.<sup>11</sup> Indeed, the minority questioned the statistics relied upon by the majority to justify their recommendations. To the extent that there are abuses, according to the minority, one solution would be to permit judges to order counsel who wasted time to bear the costs for work not reasonably or necessarily done. The minority also recommended that Provincial Court judges should exercise more control over rambling examinations.<sup>12</sup>

At about the same time the Criminal Lawyers' Association of Ontario published a report entitled *The Preliminary Hearing*, which was largely to the same effect as the minority report.<sup>13</sup> The report included a statistical study of the preliminary inquiry by Dr. James Wilkins, who concluded that the preliminary hearing in Ontario was infrequent and accounted for between 0.5% and 4.7% of the dispositions by the Provincial Court (Criminal Division).<sup>14</sup> He found that in approximately half of all preliminary hearings the accused were discharged or the evidence waived. Like the minority, Dr. Wilkins concluded that improved disclosure would likely result

in a corresponding reduction in the duration of preliminary inquiries.

The recommendations of the Martin Committee, and particularly the suggestions concerning the abolition of the preliminary inquiry, were also discussed at meetings convened in 1983 at Toronto and Banff by the Canadian Bar Association. At the same time the federal Department of Justice undertook an empirical study of the preliminary inquiry. This study focussed upon 7,219 prosecutions in which a preliminary inquiry was available. The sample was drawn from thirteen judicial districts across Canada and each case began within the first quarter of 1980. Of all these prosecutions a preliminary inquiry was held in 2,174 cases, or 30%. Of the cases in which a preliminary inquiry was held, witnesses were summoned and heard in only 46% of the inquiries. Moreover, in 80% of those cases, the duration of the preliminary inquiry was less than a day, and 10% of the cases resulted in withdrawal of the charges or discharge of the accused. It should also be noted that of the 1,800 cases that led to a committal for trial after the preliminary inquiry, 71% of them resulted in a plea of guilty. These figures affirm that the preliminary inquiry and a scheme for pre-trial disclosure can coexist.<sup>15</sup>

For its part, however, the majority of the Martin Committee recommended that legislation implementing its proposals for change not be enacted until the system had been in force on a voluntary basis for a sufficient length of time to permit an assessment of its operation and sufficiency. But, the majority also said:

To provide an unqualified right to require witnesses in certain categories to be examined under oath would have the effect of superimposing the existing preliminary hearing on a pretrial disclosure system, which would do little, if anything to reduce the length of preliminary proceedings and might likely increase their length.<sup>16</sup>

We respectfully disagree. Based on the data reviewed above, it is our view that full disclosure will reduce the length and number of preliminary inquiries. If there is full disclosure, the preliminary inquiry will survive to perform its true function as a screen against an insufficient case.

## CHAPTER TWO

### Reforming the law

#### I. Recommendation

The Commission recommends that the following Part be added to the *Criminal Code*:

##### **PART XIV.2 Disclosure**

**462.5** A judicial officer shall not proceed with a criminal prosecution at the time that the accused first appears unless he has satisfied himself

(a) that the accused has been given a copy of the information or indictment reciting the charge or charges against him in that prosecution; and

(b) that the accused has been advised of his right to request disclosure under section 462.6.

**462.6 (1)** Upon request to the prosecutor, the accused is entitled, before being called upon to elect mode of trial or to plead to the charge of an indictable offence, whichever comes first, and thereafter,

(a) to receive a copy of his criminal record;

(b) to receive a copy of any relevant statement made by him

to a person in authority and recorded in writing (or to inspect such a statement if it has been recorded by electronic means);

(c) to inspect anything that the prosecutor proposes to introduce as an exhibit and, where practicable, to receive copies thereof;

(d) to receive a copy of any relevant statement made by a person whom the prosecutor proposes to call as a witness and recorded in writing or, in the absence of a statement, a written summary of the anticipated testimony of the proposed witness;

(e) to inspect the electronic recording of any relevant statement made by a person whom the prosecutor proposes to call as a witness;

(f) to receive, where his request demonstrates the relevance of such information, a copy of the criminal record of any victim or proposed witness; and

(g) to receive, where known to the police officer or prosecutor in charge of the investigation, and not protected from disclosure by law, the name and address of any other person who could be called as a witness, or other details enabling that person to be identified,

unless, upon an *ex parte* application by the prosecutor supported by an affidavit demonstrating that disclosure will probably endanger life or safety or interfere with the administration of justice, a judicial officer having jurisdiction in the matter orders, in writing and with reasons, that disclosure be delayed until a time fixed in the order.

(2) A request under subsection (1) imposes a continuing obligation on the prosecutor to disclose the items within the class requested, without need for a further request.

(3) A statement referred to in paragraph (b), (d) or (e) of subsection (1) does not include a communication that is governed by Part IV.1 of this Act.

**462.7** Where a judicial officer having jurisdiction in the matter is satisfied that there has not been compliance with the provisions of section 462.6, he shall, at the accused's request, adjourn the proceedings until in his opinion there has been compliance, and he may make such other order as he considers appropriate in the circumstances.

## II. Commentary

### A. *General remarks*

As noted in the introduction to this Report, fairness and efficiency in the administration of criminal justice are the only objectives that would justify the enactment of rules to govern pre-trial disclosure by the prosecution. If such rules would not materially enhance the ability of the defence to make an enlightened response to the prosecution's case, or significantly reduce delay in the disposition of cases, their enactment would only aggravate the blight of unnecessary legislation.

In favour of rules on early disclosure it is argued that non-disclosure or late disclosure can result in an uninformed election or plea and, consequently, a protraction of the case by recourse to procedures for re-election or change of plea. Failure to disclose in

whole or in part can impair the accused's ability to prepare his defence fully. Moreover, delay is rife in the criminal courts partly because the preliminary inquiry and the right of cross-examination are commonly exploited as mechanisms for disclosure. The primary function of the preliminary inquiry is to test whether the Crown can adduce sufficient evidence to put the accused in jeopardy of conviction at a subsequent trial: disclosure will inevitably be an element in that test of sufficiency, but it does not follow that the preliminary inquiry should be a forum for defence counsel to tease out the various strands of the prosecution's case. Similarly, the primary function of cross-examination is not to gather all information that might possibly be relevant to the case but to test the relevance and reliability of evidence or the credibility of witnesses. To the extent that non-disclosure provokes investigative cross-examination, in circumstances where disclosure would obviate the need for it, the case for disclosure is clear.

In sum, proponents of comprehensive disclosure take the view that rules for this purpose would promote both fairness and efficiency because the accused who is fully apprised of the Crown's case will naturally focus his response to the prosecution with greater acuity. With enhanced concentration on the contentious issues in the case, a scheme for disclosure would correspondingly accelerate the disposition of cases with more admissions, committals by consent, informed pleas of guilty or withdrawals by the Crown. Similarly, a judge with the knowledge that the defence has had disclosure from the Crown will be in a surer position to make rulings on amendments, severance or particulars, for example, and more generally to urge counsel to expedite proceedings by admissions or other means.

Opponents of disclosure argue in the main that comprehensive and obligatory disclosure would compromise the Crown's control over its case and thus the integrity of the prosecution. This is especially clear, they say, where the protection of witnesses is concerned. As a proponent of full disclosure, the Commission obviously does not find these arguments compelling, but it does not follow that we find them groundless. We take the view that the protection of witnesses and integrity of the Crown's case can be assured within a mandatory scheme of disclosure.

In many respects, attitudes toward pre-trial disclosure reflect the professional cleavage between the prosecution and the defence



in the practising bar. While the adversarial relationship exists, strictly speaking, between the state and the individual accused, it is part of the ethos of criminal practice in Canada that the adversarial relationship tinctures the relations between counsel for the state and counsel for the accused. As a result, the quality of disclosure, especially where disclosure is discretionary or voluntary, depends in large measure upon the quality of relations among members of these two groups. Partisanship of this nature does not arise where lawyers alternatively act for the prosecution and the defence. Indeed, it is certain that the absence of partisan divisions in the English criminal bar facilitated the passage of legislation on pre-trial disclosure by the prosecution in that country. In Canada, however, the polarization in the criminal bar makes consensus on issues of law reform difficult. The Attorney General's agent, whose daily occupation is the prosecution of alleged criminals, can scarcely be expected to adopt a disinterested posture on questions of policy where those questions involve the competing professional positions of the Crown and the defence. Nor, of course, can the defence. In general, however, professional prosecutors are in a stronger position to influence criminal-justice policy. This is in large part due to the fact that in Canada the responsibilities of chief law officer of the Crown and of senior adviser to the Government on the policy of the law have traditionally been vested in the same minister of the Crown, commonly the Attorney General. In our view these considerations sometimes obscure substantive issues.

The substantive question here is whether disclosure of the type proposed by the Commission will impede the efficient prosecution of crime. We must advance an argument that the rules we propose, which will make much of the Crown's case transparent, are not contrary to the public interest.

It has been argued that disclosure could prejudice the prosecution where investigation of the case is incomplete, as is commonly so at the time of first appearance. In these circumstances we feel that an obvious means of protection lies in the Crown's control over the decision to initiate a prosecution. There can be no right to disclosure where there is no charge. If the police and Crown prosecutors fear that disclosure after first appearance would endanger the success of an investigation or prosecution, their remedy lies in disciplined use of the power to charge. The fear that an incomplete investigation will be revealed with all its deficiencies simply does not make a case against disclosure.

Beyond this, the Commission has attempted to eliminate any grave risk that might result by disclosure through an exception to the duty to disclose. We will, however, defer our discussion of it to a later stage in this commentary.

The significance that we attach to the rights and obligations contemplated in this report is but one reason among three for which the Commission recommends legislation as the appropriate vehicle for rules on disclosure. Another is the need for national consistency, if not uniformity, regarding the timing and the content of the obligation to disclose: legislation is the surest instrument by which to achieve this aim. Third, to promote compliance, and to promote consistency of application, we advocate legislation as a means by which to ensure that pre-trial disclosure by the prosecution is subject to judicial supervision.

Having decided in favour of legislation, we should explain the reasons for recommending the enactment of a new Part in the *Criminal Code*. The dominant reason is that disclosure is a discrete issue in the law of criminal procedure that cannot conveniently be accommodated in existing parts of the Code. The Commission's proposal, for example, could not be brought within Part XIV or Part XV without raising significant problems relating to the classification of offences and the jurisdiction of various judicial officers. (For this very reason we have used the term "judicial officer" to designate any justice, magistrate or judge who would have jurisdiction to administer the rules that we propose.) The creation of a new Part in the Code would afford corollary advantages. In particular, it would provide a convenient container for any further reforms with respect to disclosure, whether disclosure by the prosecution or by the defence.

## B. *The timing of disclosure*

### 1. Notice of accusation

A notice of accusation is intrinsically different from statements, criminal records and other items of material relevance to a prosecution; it is not, strictly speaking, an element of the Crown's

case, and thus some may not consider it apt as an element of disclosure. Nevertheless, providing a notice of accusation and making disclosure are similar to the extent that both consist in the transfer of material from the prosecution to the defence, and thus we find it convenient to incorporate a right to notice of the accusation in our scheme for disclosure.

The Commission takes the view that the imposition upon the state of an obligation to provide a copy of the information or indictment, at or before the time the accused first appears, is a negligible imposition by contrast to the significance of the right. We regard this obligation as a specific elaboration of the right to notice guaranteed in section 11 of the *Canadian Charter of Rights and Freedoms*, and we would point out that there is a similar elaboration of this right in section 531 of the *Criminal Code* with respect to indictments.

## 2. Notice of right to disclosure

In the interests of equality before the law we recommend that paragraph 462.5(b) be enacted to ensure that every accused person, whether represented by counsel or not, is apprised at his first appearance of his right to disclosure under section 462.6. While the lack of representation at the first appearance in indictable cases is increasingly rare, due to the availability of legal aid and the bias of the law against pre-trial detention, the Commission believes that, in those instances where the accused is not represented, the right to know may be as important as the right to disclosure itself. Indeed, on this basis the accused might seek counsel. In many instances the effect of the warning provided in paragraph 462.5(b) will be nugatory, but the Commission categorically rejects the argument that the proposed section would add nothing but a useless encumbrance to the burden of procedural formalities now imposed upon judges sitting in the criminal courts. Such an argument is blind to essential precepts of principle and an affront to the competence of the judiciary. Though we prescribe no form for the notice in paragraph 462.5(b), the simplicity of the provision should not pose difficulties in daily practice. We should say, however, that we have no hesitation in characterizing a failure to comply with paragraph 462.5(b) as an error reviewable by prerogative relief or appeal.

### 3. Disclosure

We propose that the accused should be entitled to disclosure before he is called upon to make a decisive step toward the disposition of his case. In our view that point is the moment at which the accused is called upon to elect mode of trial or to plead. This is the moment at which the accused is truly in jeopardy of conviction. Lest there be any ambiguity about the Commission's proposal in this regard, we emphasize that our recommendation contemplates a right of disclosure *before* election or plea, and thereafter, rather than *at* election or plea. The operational nexus of the scheme is a request addressed to the prosecutor by the accused or his counsel. The Commission takes the view that this approach is preferable to the imposition of a statutory duty of disclosure upon the prosecution simply because the efficient operation of a scheme for disclosure must admit of some flexibility. An automatic duty of disclosure on the Crown would impose a massive obligation that would often be quite disproportionate to the needs of the defence in a given case. Moreover, the recommendation as framed allows defence counsel to assess the case and to make discriminating requests of the prosecutor. In practice, however, we do not expect defence counsel to abuse the system with early requests for the disclosure of everything in the proposed section. As we have prescribed no form or practice with respect to requests for disclosure, the hearing required by the defence would, we assume, be the subject of preliminary discussions between counsel for the accused and the Crown.

With respect to the moment at which disclosure is actually made, the Commission expects that Crown prosecutors will provide the material to the defence within a reasonable time to allow the defence to digest it in the preparation of its case. If such time should not be available, a motion for adjournment would be fully justified.

The flexibility inherent in our proposal is deliberate. While election and plea are necessary steps in the disposition of indictable cases, there are variations in local practice that affect the delay between the first appearance of the accused and his arraignment. To some extent the length of the delay is attributable to the jurisdiction of courts and to the volume of business in a given place. In many places the first appearance is little more than an occasion at which to consider matters of interim release, and

the arraignment is deferred in order to allow the accused to consult with counsel and make an intelligent assessment of the options available to him at the next appearance. This is especially true of offences for which the accused has the right of election; frequently it is also true of offences within the absolute jurisdiction of the magistrate. In these circumstances current practice already admits of a delay during which disclosure can be made.

In other jurisdictions, however, a prosecution can be significantly advanced, and even completed, at the first appearance. This is so in Québec, for example, where judges of the Sessions Court, the general court of criminal jurisdiction, usually preside at the first appearance and can preside in any case except those tried by judge and jury. The arraignment typically takes place at the first appearance, and disclosure commonly takes place after election and plea. For these courts our proposals on disclosure might imply a change in current practice, and the introduction of some delay in the process, to the extent that requests for disclosure could be made before election and plea.

While any clear prospect of delay in the disposition of cases is a matter of concern, we think that our recommendation is supportable for two reasons. First, the purpose of giving an accused access to material that will allow him to prepare an intelligent and enlightened response to the prosecution would be compromised if the right did not arise before election and plea. Second, we are convinced that delay in the interim between first appearance and the arraignment will be more than offset by the fact that a scheme of mandatory disclosure would diminish delay at later stages. Indeed, it is our view that such a scheme would reduce the incidence and the length of preliminary inquiries, reduce the incidence of perfunctory elections, and promote the speedy disposition of cases. In sum, we believe that adequate compensation for the cost of any initial delay necessary to make adequate disclosure will be found in savings elsewhere in the process.

Finally, we should emphasize that the right to disclosure under section 462.6 is a continuing right. The request by the defence entitles the accused to disclosure of materials that are covered by the request itself and permitted under the section. If further material defined in the request should later come into the possession of the prosecutor, the obligation to disclose would extend to such new information. Having put the initial obligation upon the accused, we are of the view that the imposition of a subsequent obligation to request further information would impose nothing but an administrative nuisance on all concerned.

### C. *The objects of disclosure*

The objects of disclosure contemplated in this Report are of three types: statements, criminal records and other items of disclosure.

#### 1. Statements

The Commission's recommendation for the disclosure of statements extends to those made by the accused and by persons whom the prosecutor proposes to call as witnesses. Before looking at each of these, it is appropriate to make a general observation about the terminology in paragraphs 462.6(1)(b), (d), and (e) with respect to statements.

First, we have attempted to impose a sensible restriction on the scope of disclosure by limiting the obligation to "relevant" statements. The assessment of relevance can vary markedly in the circumstances of a given case, but we are confident that this qualification will not of itself engender inordinate debate and thus delay. Relevance, in our view, signifies material pertinence with respect to the proof of charges against the accused in the instant prosecution or, more generally, with respect to the transaction upon which those charges are based. We adopt this broader notion of relevance to the transaction in order to ensure full disclosure to the accused who, after committal on a given charge at a preliminary inquiry, is brought to trial on an indictment charging other offences disclosed by the evidence at that preliminary inquiry.

As for the means of disclosure, there is no need to dwell on the meaning of "receive" or "inspect." These are words currently found in section 531 of the *Criminal Code*. With respect to statements, however, we propose a right of inspection where the statement is electronically recorded.

Although in principle we would agree that the accused should be entitled to a copy of any statement made by him to a person in authority, whether it was recorded electronically or in writing, we are reluctant at this point to recommend more than a right of inspection. We have already, in Working Paper 32, recommended the electronic recording of the interrogation of suspects as a

general practice and we are anxious to encourage the adoption of this procedure by police forces across Canada. There is general concern about the costs of such a requirement and especially with respect to the cost of providing copies to those who are interrogated. We would like to have more information about the difficulties, if any, that might be involved in complying with a general obligation to provide copies, before committing ourselves to such a recommendation in a report to Parliament on the interrogation of suspects. In the meantime we believe that a right of inspection would provide adequate disclosure of the contents of an electronic recording. Furthermore, we are confident that in cases where a copy would provide defence counsel with an added measure of convenience, a reasonable request could be negotiated between counsel for the defence and the Crown.

a. *Statements by the accused*

The importance of the accused's statements is self-evident and need not be developed. It is difficult to imagine a class of evidence that is of greater significance to the case for the defence. One difficulty that may arise from the language of paragraph 462.6(1)(b) lies in the definition of "statement." In particular, can a police officer's notes of an interrogation be assimilated to the accused's "statement" for purposes of disclosure? In the absence of express adoption by the accused, the notes cannot strictly be identified with his statement because they represent nothing but the officer's rendition of the statement. For practical purposes, of course, an identification is readily made between the two, and for present purposes we certainly have no hesitation in bringing the officer's notes within the scope of disclosure. The obligation to provide a copy would be satisfied by photographic reproduction of the appropriate excerpts from the notebook.

We should note that these remarks concerning the statements of the accused are equally germane to statements made by others.

Another possible difficulty is the exclusion from paragraph (b) of oral statements by the accused. However, in its work on the questioning of suspects by the police, the Commission contemplates a change in the law that would require the police to make a written or electronic recording of any statement made to them by a suspect. Accordingly, every statement made by a suspect to the police would be governed by paragraph (b) for purposes of

disclosure. Even in the absence of such a change, we are of the view that the content of a statement made by the accused to a person in authority, and not recorded, would be disclosed under paragraph (d).

b. *Statements by witnesses*

The thrust of paragraph 462.6(1)(d) is that the prosecution should provide the defence with identification of those persons to be called as witnesses, and notice of what those witnesses can be expected to say. The paragraph provides that this obligation can be discharged by supplying the defence with a written statement by the proposed witness or, if no such statement exists, with a document that describes the testimony that the witness can be expected to give. The policy that supports this paragraph is that thorough disclosure of anticipated testimony will promote admissions by the defence and diminish the need to call witnesses. Whether this objective can be realized by a provision such as paragraph 462.6(1)(d) depends, however, upon the quality of the statements disclosed.

In this regard, the Commission considered a proposal for the enactment of an amendment to the *Canada Evidence Act* that would permit, upon consent, the admission at the preliminary inquiry, or at trial, of a signed written statement by a witness on the same basis as oral testimony. This sort of statement, made on a voluntary basis, has been admissible in English law for committal proceedings for some time, and it draws its strength in practice primarily from a declaration by the witness that the statement is true and that deliberate falsehood renders him liable to prosecution.

Such a proposal would signify a change in the rules of evidence to expedite proceedings at the preliminary inquiry and at trial. At the same time, however, the proposal could offer the further benefit of improving the quality of disclosure. The scope of the proposal covers materials contemplated in our paragraphs (d) and (e), but the formality of the declaration would undoubtedly increase the detail and reliability of the statements.

We are not at this time recommending the enactment of such a provision. Until we are in a position to state our conclusions about the future of the preliminary inquiry, and about the trial process,



we are reluctant to recommend a change of this nature. We are uncertain of its broad implications for the law of evidence, and of its utility in improving disclosure, particularly if it were available only on a voluntary basis. Nothing in Canadian law prevents counsel from taking the benefit of the English provision informally if the statement in question is signed and admitted by consent, and we have no hesitation in encouraging this practice.

Where there is no statement by the witness, whether of the kind just referred to or of a less formal nature, we propose that the prosecutor should ensure that a "will say" statement is prepared and disclosed, setting out the anticipated testimony of the witness. As the recommendation would impose the statutory duty of disclosure on the Crown, it would be the prosecutor who, for practical purposes, would bear responsibility for the adequacy of disclosure should the defence allege non-compliance. In this regard the prosecutor's responsibility should enhance the quality of disclosure contemplated by paragraph 462.6(1)(d). For obvious administrative reasons we are reluctant to impose an obligation on prosecutors to provide a "will say" statement in every case. In the strongest possible terms, however, we would urge that "will say" statements should be prepared wherever the right to disclosure under paragraph (b), or otherwise under paragraph (d), does not adequately cover the anticipated testimony of a proposed witness.

## 2. Criminal records

The importance of the accused's criminal record in a criminal prosecution is obvious and we need not dwell on the justifications for including this information in our proposals for disclosure.

The case for disclosing the criminal record of a witness is not quite as obvious. The uses to which this information may be put are more limited. Witnesses are not in jeopardy, and the use of this information against them will not result in aggravation of penalty, as may be the case with the accused.

Nonetheless, the criminal record of a witness can bear significantly upon his credibility, and the ability of defence counsel to challenge the witness's credibility ought not to be impaired by difficulties in acquiring the appropriate information. The fact of a person's conviction is a matter of public record, and it appears

reasonable to us that the prosecution, which has easy access to this information, should be obliged to share it with the accused. This position is further supported by an elementary argument of fairness and reciprocity. With easy access to criminal records, the prosecution is always in a position to impugn the credibility of defence witnesses on the basis of their criminal records.

We cannot accept, however, that the criminal record of a witness should be disclosed to the defence as a matter of course. Not only would this impose a considerable administrative burden on the Crown, the disclosure of the record of a witness (especially a victim) may be unfair where it is minor or dated. Its relevance may not be ascertainable until well into the proceedings, and in many cases it will never be relevant. Accordingly, we propose that the defence should in its request for disclosure justify a request for the criminal record of a witness with information that demonstrates the relevance of this item.

### 3. Other objects of disclosure

Apart from statements and criminal records, we recommend that the defence should have access to other items of disclosure. Our proposal to give the accused the right to inspect anything the prosecution proposes to introduce as an exhibit merely reproduces the right now provided in section 531 of the Code. We propose to augment that entitlement with a right to request and receive copies of exhibits where it is practicable for copies to be made. Obviously, this right cannot be exercised with regard to all forms of real or documentary evidence. However, it seems plain that documents would be the items most commonly disclosed under this provision, although even here problems of impracticability will sometimes limit the accused to a right of inspection.

A minimal requirement would be that the thing in question be susceptible of duplication. It follows, therefore, that scientific specimens or samples would not be included in this provision. The extent to which a scheme of disclosure should entitle the accused to conduct forensic tests is a distinct problem, fully recognized by the Commission and partly covered by section 533 of the Code, but we will reserve this issue for future consideration. At the very least, however, our proposals would entitle the accused to the reports of any forensic tests where the expert is a proposed witness.

We have also recommended disclosure of the names or means of identifying those persons whom the prosecutor could call as witnesses, but who do not fall into the category of proposed witnesses covered by paragraphs (d), (e) and (f). The purpose of this is to afford the defence an opportunity to interview persons already interviewed by the police or the prosecutor with regard to the offence in question. To the extent that paragraph 462.6(1)(g) covers persons whose assistance might lead to acquittal of the accused or mitigation of his punishment, the prosecutor is already ethically obliged to disclose their identity to the defence. Our proposal, however, is more expansive. We do not regard it as sufficient to vest in the police, or in the prosecutor, undefined discretion to assess who may have relevant information to contribute to the trial of an offence.

Nevertheless, the right to disclosure under paragraph 462.6(1)(g) is limited to information known to the prosecutor or peace officer in charge of the case against the accused. Although it could be argued that the accused should be entitled to receive information known to any peace officer involved in the case, the Commission feels that it would be too cumbersome and difficult to enforce such a right. However, any officer who deliberately suppressed such information from the prosecutor or officer in charge of the case might well be liable to prosecution for obstructing justice.

With respect to potential witnesses we do not recommend, on a mandatory basis, the type of thorough disclosure that we recommend with respect to proposed witnesses. Complete disclosure would entail not only the identification of such persons, but the disclosure of any statement they made and in some cases their criminal records. In our view a recommendation to this effect would be excessive and disproportionate to the needs of the defence. In many instances these people are of no use, or of marginal use, to the case for either side. Their statements are not evidence, although they may be effectively used by the prosecution for purposes of impeachment in cross-examination in the event the witness is called by the accused. Prosecutors are understandably reluctant to disclose these statements because to do so would imperil their principal utility. It is our view that the interests of the defence are adequately served by the mandatory disclosure of the identity of such persons, although we would not wish our

comments to discourage prosecutors from disclosing statements and other relevant information on a voluntary basis.

There may be concern with respect to the privacy interests of those persons whose identity would be disclosed under paragraph 462.6(1)(g). In many cases they would be known to the accused in any event, but there will be those who are not known to the accused, and who will be unwilling to have their involvement in the case made known. There is always the risk that mandatory disclosure of identity may discourage persons from coming forward to volunteer information to the police. The issue of privacy is essentially a problem that demands a balance between the rights of the accused to make full answer and defence, and the interests of those who may become involved in the administration of criminal justice. It is our view on this question of policy that the jeopardy of the conviction militates in favour of the limited disclosure contemplated by our recommendation.

In cases where there was a substantial basis for concern an application could be brought under the saving provision that is found at the conclusion of subsection 462.6(1). Beyond this, the disclosure contemplated by paragraph (g) does not include the disclosure of information otherwise protected by law, as would be the case with respect to the identity of police informers.

Finally, in any case where the prosecution obtains information that would tend toward acquittal of the accused or mitigation, the ethical obligation of disclosure is plain, and nothing in this report should be construed as a diminishment of that obligation.

#### D. *Exceptions*

It must be acknowledged in any scheme for disclosure by the prosecution that there are instances in which the public interest is better served by late disclosure, in order to prevent an interference with the administration of justice. Accordingly, we recommend in subsection 462.6(1) that where the prosecutor demonstrates that the safety of a witness or some other legitimate cause justifies a delay in disclosure, the presiding judicial officer may issue an order to that effect. While this application would be *ex parte*, the

justification for its confidentiality would lapse upon disclosure. Thereafter, the accused should be able to inspect the application, the order and the reasons.

The Commission categorically rejects the view that disclosure should ever be completely denied. It is possible to accord simultaneously the benefits of disclosure and the protection of the court. For example, disclosure of the statement of a protected witness, even moments before he testifies, may facilitate the comprehension of his testimony and provide an avenue for cross-examination on the basis of the statement.

Second, while more of an interpretative provision than a true exception to disclosure, subsection 462.6(2) exempts from disclosure the fruits of wiretapping governed by Part IV.1 of the Code. Disclosure raises particular concerns that are currently dealt with in that Part.

#### *E. Enforcement*

As the purpose of disclosure is to give the accused an opportunity to consider certain material in the preparation of his case, the general remedy that we propose in order to ensure satisfactory disclosure is the power of adjournment. Admittedly, the power of adjournment is discretionary and entirely flexible, but we are of the view that it is sufficiently strong to ensure in most cases compliance with the substantive aims of disclosure.

Although we considered the possibility of recommending a power to exclude evidence not previously disclosed, we could not convince ourselves that such a power was necessary, even for purely hortatory purposes, to ensure compliance with the provisions. In few cases would the prospect of surprise or prejudice be so great as to support a claim for the outright exclusion of evidence, as opposed to a temporary exclusion of the evidence until satisfactory disclosure is made. We recognize, however, that there are at least two instances where non-compliance would be so prejudicial to the accused as to warrant more than an adjournment. The first would be a situation in which failure to comply has the effect of denying the accused a reasonable opportunity to rebut the

Crown's case. A second situation would be that in which a failure to comply exhibits a wilful disregard of the rights of the accused. In both of these circumstances the broader scope of section 462.7 would empower the judge to make an explicit order for disclosure. Furthermore, egregious cases might thereafter warrant renewed reference to section 462.7, recourse to the law of contempt, or a constitutional remedy under the *Canadian Charter of Rights and Freedoms*.

We do not foreclose the possibility of recommending a specific exclusionary mechanism as a remedy for non-disclosure upon the consolidation of our work in criminal procedure in a comprehensive new code, but we continue to have the concerns we expressed in Report 21 about the proliferation of exclusionary rules of varying formulations within the law of criminal procedure. This is an issue to which we intend to return in the future; for the moment, however, we refrain from recommending such a provision as part of the scheme advanced here, which we propose for implementation in the present *Criminal Code*.

#### F. *Costs*

The Commission recommends that the Crown should bear the costs of making disclosure as required by the proposals of this report. Although this burden may be substantial in certain cases, the costs should be recovered as a result of the speedier disposition of cases. Moreover, it is our belief that the right to disclosure is so essential to the fair administration of criminal justice that the law should preclude any possibility that the quality of a defence should be determined by the financial strength of an accused person. In many cases a mere inspection of material will not suffice and to us it is repugnant in principle that an accused person should be denied an opportunity to examine thoroughly any item of disclosure because of his inability to pay for copies.

#### G. *Consequential amendments*

At several points in this Report we have referred to section 531 of the present Code. This section, as far as it goes, is a useful

tool for the defence, both in the interval between committal and trial, and at the trial itself. The section allows an accused to inspect without charge the indictment, his own statement, the evidence and the exhibits, and to receive, on payment of a fee, copies of all but the exhibits. The right is, of course, judicially enforceable, and while it comes at an advanced stage of the proceedings, promotes important elements of disclosure.

Our proposals incorporate all of what is now provided by section 531, except for the right to receive, on payment of a fee, a transcript of the evidence at the preliminary inquiry. We have not included this important right in our scheme because we do not regard transcripts of evidence, strictly speaking, as objects of disclosure. Accordingly, we are of the view that section 531 should be amended to refer exclusively to this right; the remaining objects of disclosure would be covered by our proposed sections 462.5 and 462.6.

Finally, it should be noted that section 532, which provides a discrete disclosure requirement in certain cases of treason, would have to be amended. In particular, paragraph (1)(a), which provides specifically for a copy of the indictment to be given to the accused, coincides with our proposed section 462.5, and thus would have to be repealed. For the rest, there is no substantial duplication between our recommendation and section 532. Thus, the two can coexist, although it appears to us preferable that these remaining provisions be incorporated within the new Part of the Code recommended in this Report.

## Conclusion

The aim and scope of the proposals advanced by the Commission in this Report are somewhat narrow. On the premise that pre-trial disclosure by the prosecution would enhance the interests of fairness and efficiency in the administration of criminal justice, we have recommended that Parliament enact a scheme of rules specifically for that purpose. Although we have not taken this opportunity to make a thorough review of the preliminary inquiry and disclosure by the defence, we are confident that our recommendations can be conveniently accommodated in current Canadian law and, moreover, that the scheme proposed here would survive a general revision of the law governing pre-trial procedure. Our recommendations are also somewhat conservative in that we have not adopted, for example, devices such as the signed written statement that is now a standard feature of English procedure on committal. As we have done previously, we can only emphasize again that we will re-examine matters of this kind when we turn our attention to the preliminary inquiry and other aspects of pre-trial procedure.

Yet, despite the limited focus of this Report, there can be no doubt that the enactment of the proposals advanced here would mark a significant innovation in Canadian criminal law. The traditional notion of disclosure as a voluntary and discretionary procedure would be replaced by a legislative scheme that would afford judicially enforceable rights to the accused. While we regard it as important that the essentials of the scheme be set out in the *Criminal Code*, we are equally of the view that the success of any scheme is dependent upon its absorption in the daily practice of the criminal law. For this reason, the scheme is deliberately lean, thus allowing for a measure of flexibility to accommodate variations in local practice.



## Endnotes

1. See, e.g., *Criminal Code*, R.S.C. 1970, c. C-34 (as am.), ss. 178.16(4), 531 and 532. See also ss. 468, 469 and 533.
2. See *Patterson v. The Queen* [1970] S.C.R. 409; *Caccamo v. The Queen* [1976] 1 S.C.R. 786.
3. See *R. v. Demeter* (1975) 25 C.C.C. (2d) 417 (Ont. C.A.). With respect to statements by the accused to the police, see *Savion v. The Queen* (1980) 52 C.C.C. (2d) 276 (Ont. C.A.).
4. *Lemay v. The Queen* [1952] 1 S.C.R. 232.
5. See *Magistrates' Courts Act* 1980; *Magistrates' Courts Rules* 1981 (U.K.); *Federal Rules of Criminal Procedure*, Rule 16 (U.S.A.).
6. See, e.g., Hooper, *Discovery in Criminal Cases* (1972) 50 Can. Bar Rev. 445; Law Reform Commission of Canada, *Discovery in Criminal Cases* (Working Paper No. 4) (1974); Cassells, *Comment* [on Working Paper No. 4] (1975) 7 Ottawa L. Rev. 281; Sopinka, *Comment* (1975) 7 Ottawa L. Rev. 288; Swabey, *Comment* (1975) 7 Ottawa L. Rev. 291; Ferguson, "Discovery in Criminal Cases", in Atrens, Burns and Taylor, *Criminal Procedure: Canadian Law and Practice* (1981), ch. 13.
7. Rizkalla, *Pre-trial Discovery: Evaluation of the Montreal Pilot Project* (unpublished, 1980), 66.
8. *Ibid.*.
9. See Rizkalla, *supra*, note 7; Swabey, *supra*, note 6.
10. *Report of the Special Committee on Preliminary Hearings*, 18 *et seq.*
11. See *ibid.*, 12-15.
12. *Ibid.*, 22 *et seq.*

13. Criminal Lawyers' Association, *The Preliminary Hearing* (1982).
14. *Ibid.*, 18.
15. Alford, *The Preliminary Inquiry in Canada — Advance Report* (unpublished, 1983), 1-14.
16. *Supra*, note 10, 23.