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CRIMINAL PROCEDURE

discovery

Law Reform Commission of Canada

Working Paper No.4

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NOTICE

This *Working Paper* presents the views of the Commission at this time. The Commission's final views will be presented later in its Report to the Minister of Justice and Parliament, when the Commission has taken into account comments received in the meantime from the public.

The Commission would be grateful, therefore, if all comments could be sent in writing by September 1, 1974 to:

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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?

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 pre-trial 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 he 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 it 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

⁴Traynor, “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 conviction 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 per cent 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.

		<i>Disclose</i>	<i>Do Not Disclose</i>	<i>No Fixed Practice</i>
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 elsewhere 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:

		<i>Disclose</i>	<i>Do Not Disclose</i>	<i>No Fixed Practice</i>
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:

	<i>Disclose</i>	<i>Do Not Disclose</i>	<i>No Fixed Practice</i>
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 pre-trial 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.
(For details of the disclosure required in pre-plea discovery see Part 2) Pre-plea discovery
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.

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.

Additional powers or functions of judge at discovery hearing

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

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.

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

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.

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.

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

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. Sanctions

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.

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

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.

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]):

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

- (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.

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

Material and
information
not subject
to disclosure

- (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 is 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.