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Audit,
Evaluation and
Control Branch

SURVEY OF THE PROSECUTIONS
SERVICES FOR THE MARKETING
PRACTICES PROGRAM OF THE
DEPARTMENT OF CONSUMER AND
CORPORATE AFFAIRS



Consommation
et Corporations
Canada

Consumer and
Corporate Affairs
Canada

SURVEY OF THE PROSECUTIONS
SERVICES FOR THE MARKETING
PRACTICES PROGRAM OF THE
DEPARTMENT OF CONSUMER AND
CORPORATE AFFAIRS

F I N D I N G S

March 7, 1986
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SURVEY OF THE PROSECUTIONS SERVICES

FOR THE MARKETING PRACTICES PROGRAM

OF THE DEPARTMENT OF CONSUMER AND

CORPORATE AFFAIRS.

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SURVEY OF THE PROSECUTION SERVICES FOR THE MARKETING PRACTICES
PROGRAM OF THE DEPARTMENT OF CONSUMER AND CORPORATE AFFAIRS

INTRODUCTION

The evaluation assessment report found five areas requiring evaluation in the prosecution function of the Marketing Practices Program, Department of Consumer and Corporate Affairs.

Those five areas were:

1. The link between investigation and prosecution.
2. Case selection .
3. Winning prosecutions.
4. Effective penalties.
5. Effective publicity.

A pre-test survey was carried out in the eastern region in July and August, 1985. This study was concerned with the the first four areas targeted by the evaluation assessment report. The pre-test covered services in three cities; Ottawa, Toronto and Montreal, and consisted of interviews with fourteen Project Managers (hereinafter called investigators) , two Commerce Officers, one Policy Analyst, fifteen Assistant Crown Prosecutors and three Chief Crown Prosecutors in the various cities. Two

written submissions from Quebec City were also considered.

Throughout the pre-test interviews, the questionnaire was modified and tailored to meet the perceived concerns of each region. The effect of these changes was that not all persons interviewed during the pre-test were asked the same questions, and therefore the actual number of times that a response is given is not meaningful unless the total number of responses received is also given.

From the experience gained during the pre-test, standard questionnaires were developed for the main survey. A separate set of questions was used for all investigators, all assistant crown prosecutors, and all chief prosecutors so that all members of each group were asked the same questions. Samples of these questionnaires are included in Appendix I.

Where possible all Marketing Practices investigators were interviewed in each city, in addition to the regional managers.

For the main survey interviews were conducted in the central region, Winnipeg; the prairie region, Calgary and Edmonton; and the Pacific region, Vancouver.

The selection of Crown Prosecutors was made on the basis of availability and the relative number of Marketing Practices

prosecutions that they had handled when compared to other prosecutors in the same office. This resulted in the selection of thirteen prosecutors out of a total pool of thirty-three in the three cities. (Calgary has no federal Crowns' office) During the pre-test, using the same selection criteria, eighteen prosecutors from a total pool of forty-five were interviewed.

All interviews for the pre-test were completed during the months of July and August 1985, and those for the main survey during the first half of November, 1985. Interviews were conducted by a lawyer acting on a consulting basis, and a member of the program evaluation division of the Department of Consumer and Corporate Affairs. Hand written notes were taken during the interviews which were subsequently compared and typed.

All participants were assured of the confidentiality of their responses, and therefore throughout this report, the pronoun "he" has been used to denote participants of either gender unless their identity is otherwise obvious from the context.

For the purposes of clarity all the findings in the main study are followed by the findings from the pre-test where they contrast with or add to the main findings. The findings for the pre-test are in brackets so that they are easily identified.

The only criterion used to evaluate the success of current practices is that of the satisfaction of the participants in the prosecution function, as determined from personal interviews. No verification of the truth of responses was made, or of the accuracy of the participants' impressions. If a participant said that a policy exists in the department, what has been recorded is that that person believes such a policy exists, when in fact it may not.

A complete report on the pre-test survey was written and is available under separate cover.

GENERAL FINDINGS

Investigators:

Each region in the main survey rates the satisfaction it feels with the Justice Department services differently.

In the Pacific region the investigators are divided, with one saying he felt frustrated and badly served, particularly in the six months preceeding the interview, and two saying that they felt the services rendered were either satisfactory or that they were satisfied.

In the prairie region none of the investigators felt that they receive good services from the Justice department, but in

contrast, in the central region there was a high degree of satisfaction.

(During the pre-test survey the results were quite different with agreement among investigators that they are presently receiving very good to excellent services from the regional crown prosecutors. The dissatisfaction which was expressed came from the policy persons interviewed and centred on the risks that the lawyers in the Department of Justice were prepared to take, or were not prepared to take in prosecuting cases.)

Justice Prosecutors:

Again different regions feel differently about the case investigations which are forwarded to Justice for prosecution. In the Pacific and central offices the prosecutors are well pleased with the department. In the prairie region there appear to be a large number of problems and a lot of frustration is evident among the prosecutors who are very dissatisfied with the investigations which they receive.

(In the pre-test survey of the eastern region there was very high satisfaction with the investigations done, and the summaries of evidence presented. It was continually emphasized that the preparation was very professional and thorough.)

DATA ON SURVEY PARTICIPANTS

EXPERIENCE OF PROSECUTORS

On average prosecutors interviewed in the central, prairie and Pacific regions have 3.4 years' experience as crown prosecutors, with an average of five years' call to the bar. One half of them have more than four years at the bar, and one half have less than four years.

By their own estimates they spend from 1% to 15% of their time doing Marketing Practices cases and all were assigned their first case within their first year working as a prosecutor. Two said that they received cases as soon as they joined the prosecutors' office, but they had either articulated for the Justice department, or had other lengthy experience at the bar.

Because of complaints from investigators about the experience of lawyers . investigators were asked if they felt that the prosecutors have enough experience. Four investigators felt that the lawyers at Justice do not have enough. They attribute this to the high turnover rate in the prosecutors' office, and the low salary that they pay the lawyers. Seven did, however, feel that they were experienced enough despite problems with turnover.

When asked however, what effect the inexperience has upon the Marketing Practices Program, only one investigator said that it caused the loss of a case because they had failed to prove an

essential element. Most conceded that their inexperience did not cause the loss of cases.

(In the pre-test investigators said that when they have an inexperienced prosecutor, they have to spend more time explaining the case and the legislation to him or her.)

EXPERIENCE OF INVESTIGATORS

The investigators interviewed have an average of 7.5 years' experience with the department with four having more than five years' experience, and four with less.

Seven have police detective or RCMP backgrounds in investigations while only two have other backgrounds with police school training; one of these was promoted internally from within the department.

There is a very high degree of job satisfaction, with seven of those interviewed saying that they love their work and find it challenging and stimulating. Only one senior administrator said he found it stressful and one investigator mentioned that he felt frustrated dealing with the Justice department.

In total, by their own estimate, they have done five thousand three hundred and fifty five investigations which have led to approximately 256 prosecutions for an average per investigator of thirty two. A high percentage of these prosecutions has been resolved by way of a guilty plea, with estimates ranging from 25%

to 100% (New investigators with only a few cases turned in the 100% estimates) Very few of the contested cases resulted in acquittals except in the Edmonton area where the number appears unusually high.

GENERAL ASSESSMENT OF THE INVESTIGATORS

Prosecutors were asked the general question of whether the investigators were helpful when they undertook their first Marketing Practices cases. Ten said that they were both helpful and available. Only one volunteered that he did not need the investigator once he had the summary of evidence.

CASE STATISTICS

Using the prosecutors own recollections it is estimated that they have handled a total of approximately one hundred and thirty nine cases. Roughly 60% of these were trials and 40% were resolved by way of a guilty plea.

PROSECUTOR'S ATTITUDE TOWARDS MARKETING PRACTICES CASES

All prosecutors were asked if they enjoyed Marketing Practices cases. Ten said that they do and only two said that they do not. One was not asked and general counsel and the department heads were not asked.

(Pre-test findings were similar in that 12 out of 15 prosecutors said that they enjoy doing Marketing Practices cases.)

The things that interest them are the variety that the cases pose from the regular drug prosecutions, and the element of what is perceived as "consumer law" which is present in these cases.

Several lawyers mentioned that it is refreshing to be prosecuting for a "moral right", while others liked learning about new products and the examination of the expert witnesses that Marketing Practices cases usually involve.

(In the pre-test prosecutors felt that marketing practices cases fell in the mid-range of interest and complexity when compared to the rest of their case load.)

Even when lawyers enjoy doing these cases, they say they do not like it if the investigation is not well prepared and the brief is lacking or contains misleading information. Three prosecutors who said that they liked the cases said that bad investigations was an aspect of the files that they did not appreciate. Of all twelve questioned, only two said that they found the cases to be trivial and insignificant.

Despite these problems half of the lawyers say they would be willing to do up to 20% of their work-load in Marketing Practices cases. This proportion would be larger if the material in the summaries of evidence were more reliable.

THE INVESTIGATION

CASE SELECTION AT MARKETING PRACTICES

When complaints are received in the Marketing Practices office, or as a result of monitoring carried on by the investigator, they are classified by the senior investigator, and coded with a priority. This coding classifies the complaint into one of several categories and determines if the complaint will be resolved with an information visit, an investigation with a view to prosecution, or no action taken at all. The coding can be changed by the investigator, in consultation with the senior investigator if it appears necessary. In general it appears that the investigators try information visits first, and if that does not resolve the problem, or they discover that the misrepresentation is larger or the harm greater than anticipated, they may upgrade the investigation to prepare for a prosecution.

(During the pre-test considerable time was spent obtaining the reactions from the prosecutors and investigators to the case impact statement which was in use at the time. As a result of the responses from both prosecutors and investigators it was recommended that the use of the statement be discontinued. A

copy of the summary of the case impact statement is included in the Appendix.)

CONSULTATION DURING THE INVESTIGATION

Prosecutors were asked when an investigator should consult them during the course of their investigation. It was the strongly expressed feeling of all of the prosecutors that consultation during the investigation was both welcome and sometimes advisable. They said that investigators should be encouraged to contact them anytime that they feel that there is a problem. They wish to encourage this consultation early on in an effort to avoid problems at a later stage, or to save the investigator time and effort.

(In the pre-test similar sentiments were expressed. All but one prosecutor welcomed consultations during the investigation, seeing them as useful and constructive. Concern was voiced that it was not the department policy to permit consultations.)

With few exceptions investigators do feel free to consult with prosecutors during their investigations if they see the need. In general they consult if they have a technical problem, or if they are not clear on a legal point. Seven said that the Justice prosecutors were available. One in the Pacific region said that it was not the department policy to permit consultations, but

that he would like it if it were possible. Only one investigator said that it was not necessary and that he never consulted.

(In the pre-test one third (five) investigators said that they do not consult Justice during their investigations, two-thirds (10) said that they do. Again two said that it was not department policy to permit consultations even though they felt that it would be useful under certain circumstances.)

If there is prior consultation four of the investigators feel that they may get the lawyer who consulted assigned to the case. Four also thought that it would be helpful if they did.

In all western areas except Winnipeg, the prosecutors said that if they were consulted by an investigator during the investigation it would be unlikely that they would be assigned the case. Eight felt this way while one said that it was possible that they would be given the case.

(During the pre-test it was suggested by a lawyer that prior consultation with a prosecutor was undesirable because it would involve the lawyer too closely in the investigation, and he would therefore lose objectivity. However when asked in the main survey, only one prosecutor saw this as a potential problem.)

Prosecutors were asked to characterize the length of time that investigators take to prepare their cases. Of the seven lawyers

answering the question, only one of them commented that the investigations appeared rather long, while the others said that there was no problem.

(This is in contrast to the results obtained in the pre-test interviews where nine prosecutors, when asked, expressed concerns about the length of time that it takes the department to complete its investigations and prepare the summary of evidence. They felt that the delays were too long, and that the department could be faster. Given the high degree of satisfaction with investigations in the eastern region, it is possible that these findings illustrate a trade-off between saving time and achieving quality.)

SUMMARIES OF EVIDENCE

All of the investigators agree that there are no time constraints put on them for their investigations. They all say that they can take as much time as they need to complete their work.

The evaluation of the quality of the summaries of evidence varied considerably from region to region although in all areas prosecutors say that they are getting well organized briefs with a short synopsis of the case as an introduction.

The Pacific region prosecutors' office expressed general satisfaction with the summaries of evidence, rating them in the

good to very good and excellent category.

The prairie region appears to have the most problems with five prosecutors rating the summaries as bad and one as fair only. There was remarkable unanimity in the complaints which seem to centre on the accuracy of the witness "will says". Other lawyers commented that there were major errors or oversights in the investigations.

In the central region prosecutors say that the summaries are not the best, but that they have improved. Again both lawyers say that the investigators' statements generalize too much and are not accurate. One felt that more of an effort to get accurate summaries from the witnesses should be made, while the other felt that investigators should be taking written statements from witnesses whenever possible.

(During the pre-test eight prosecutors evaluated the summaries as either excellent or of very high quality, four felt that they were well pleased or that the summaries were satisfactory.)

WITNESS STATEMENTS

Dealing specifically with witness' statements, of fourteen canvassed, eleven lawyers said that they view signed witness' statements as essential. Particularly in the prairie region where "will says" are seen as inaccurate, the signed statement is seen as indispensable. Only three prosecutors said that they are not necessary, two in the Pacific region and one in the Central

Region. One lawyer preferred not to have the statements on the grounds that they would have to be disclosed to the defence. This was not seen as a problem for other prosecutors who were asked.

(While during the pre-test there were not the same concerns expressed about the accuracy of the investigators' "will says", six prosecutors still suggested that obtaining signed witness' statements would be helpful to them.)

The reasons given most frequently for wanting the signed statement were to ensure the accuracy of what the witness would say and to avoid surprises. Secondary considerations were to provide the witness with a means of refreshing his memory, and then to contradict witnesses should they become hostile. The investigators say that the department policy is not to obtain signed statements from potential business witnesses. Only one said that he tries to get them on a regular basis and views them as essential. He pointed out that in his opinion all the investigators need training in the techniques of taking statements. Others felt that they would be bothering business people who would be reluctant to give statements and that the witnesses' integrity could be relied on. One investigator is under the impression that Justice prosecutors do not want signed statements and another said that he had been asked to get signed statements, but that he still did not do it.

As a result of a suggestion made by a lawyer during the pre-test, prosecutors were asked if they thought that a certain portion of the preparation of the brief could be delayed until after a trial date had been set, thereby avoiding the work should there be a guilty plea. All lawyers felt that it was important to complete the investigation in its entirety prior to laying the charges and none supported this idea.

The investigators agree with the prosecutors, not one finding this suggestion acceptable. They felt that all the material was necessary in order to lay the charge and to give the prosecutor the information necessary to speak to sentence if there was a guilty plea.

PAPERWORK BURDEN OF INVESTIGATORS

Investigators were asked to assess the necessity of any paperwork requirements of their job. Not one of them felt that they were presently doing anything which was unnecessary. Three suggested that if more person hours were available, it would be a good idea to have clerks handle the over the telephone complaints, freeing investigators to handle more cases.

REFERRAL TO JUSTICE

CASE ASSIGNMENTS TO LAWYERS AT JUSTICE

In all areas the prosecutor enjoys a great deal of independence. Once a case is assigned, the decisions concerning the conduct of the case or its resolution are made by the prosecutor. The section head is only involved in the event of a disagreement, or if he is consulted.

In the prairie region cases are assigned to lawyers by the head of criminal prosecutions at Justice. She reviews cases and determines the degree of difficulty and then assigns them based on scheduling considerations and experience of the prosecutor. There appears to be no deliberate specialization.

In the central region there is one contact person for Marketing Practices cases. The same person does all preconsulting and screens all the cases that are ultimately referred for prosecution. Other prosecutors handle the files if the contact person has a scheduling conflict or too large a case load.

In the Pacific region the administration says that cases are assigned on the basis of difficulty, and expertise.

(In the eastern region, in Montreal and Ottawa cases are assigned on the basis of workload and interest, creating some specialization. In Toronto it appears that cases are assigned mainly on the basis of workload.)

(During the pre-test survey prosecutors agreed that specialization reduces the preparation and work required for each case. In the eastern region chief prosecutors were prepared to permit specialization of up to 25% of a prosecutor's case load and seven lawyers out of nine said that they would enjoy doing 25% of their case load in Marketing Practices cases.)

In the Pacific region the acting head of criminal prosecutions said that he would permit four to six lawyers to specialize in Marketing Practices cases. This would give them the opportunity to concentrate their talents and to pool their research. In the prairie region where there is no specialization, the general counsel does not consider it good training for prosecutors. He did see some merit in a limited form of specialization after a few years experience, however, he felt that specialization should only come after at least ten years in practice.

Seven lawyers felt that having a few specialized prosecutors would be acceptable, and that in fact this does exist informally in some of their offices. Only one cautioned that if the specialized lawyer leaves the office problems would be created, and for this reason he was against the idea.

CASE SELECTIONS

It is easy to understand that different people, different investigators and prosecutors, have different ideas about what

constitutes a misleading advertisement. Throughout the survey the interviewers were presented with examples of advertisements and it was clear that what is misleading to one person, is not necessarily misleading to another. Obviously this can lead to disagreements over which cases should go forward.

Prosecutors say that they prefer Marketing Practices cases which are at the serious end of the spectrum, with good evidence to prove all the necessary elements.

In an attempt to characterize what was seen as serious, lawyers were asked what type of case they felt did not warrant prosecution. Five indicated that if a misrepresentation was trivial that they would not like to see it proceed. Others said if the practice was corrected, the company bankrupt or no real profit was made from the activity that they would not proceed. When asked if they get trivial cases, one prosecutor said that about 25% of his cases have been trivial. All the rest said that they do not get trivial cases, and two mentioned that they used to get them but do not any more.

It appears that, in general, prosecutors do not have any difficulty laying the criminal charges for these offences. Only one felt that he had trouble laying charges, and then only if it was a trivial breach.

(In the eastern region prosecutors expressed satisfaction with the cases that the department forwards for prosecution, saying

that trivial cases are not referred. The characterizations of trivial were similar to those in the main survey.)

When asked if there was any consistency in case selections, and if so how it was achieved, eight lawyers felt that a type of informal consistency was achieved through office discussions when a case was to be rejected. Three said that they discuss all rejections with their supervisor which provides some consistency. Only two said that there was no consistency in case rejections in their offices.

(In the eastern region there is no formal method of achieving consistency for case selection either. Again it was emphasized that in all areas where a case is to be rejected, informal discussions among the prosecutors take place, and that in this way consistency is achieved.)

Four investigators indicated that they have never had a case rejected by the Justice department, while five had. In the Winnipeg office a system of preconsultation exists whereby cases are screened by the Justice contact person prior to going to Ottawa for formal referral. Because of this no cases are now rejected once formally referred.

COMMUNICATIONS WITH THE INVESTIGATOR CONCERNING CASE REJECTIONS

Of the five investigators who have had cases rejected, three said the reasons for the rejection were discussed with them and they felt allright about it, or that the rejection was justified. Of the other two, one felt frustrated and the other was concerned that recently rejections were being made without reasons being given.

When asked if the pattern of rejections was predictable, four said that they cannot predict what cases Justice will reject or accept, and one was of the opinion that it was the case which was not "black and white" which would be rejected. He implied that risky or novel cases were not being accepted.

All prosecutors say that if they intend to reject a case that has been referred for prosecution that they will discuss it with the investigator. Two said that they will phone and speak to the investigator directly, or provide a letter with reasons. Four said that they usually follow the phone call or letter with a meeting if the investigator wants to discuss the rejection.

LAYING MARKETING PRACTICES CHARGES

In the Pacific region, the lawyers estimate that it takes them from one to six weeks to lay an information once the case has been referred.

In the prairie region the head of criminal prosecutions estimates that it takes three months. However, the prosecutors themselves seem to feel that it is somewhere between two weeks and one month, with only one of them estimating three months. This difference may be accounted for by the fact that it is the head of criminal prosecutions who has to screen and assign the cases, and this additional time has not been considered by the prosecutors themselves as they may only have counted the time from the assignment of the file to them, not from its referral to Justice.

In the central region the prosecutor who is the client contact, and to whom all cases are referred, feels that three weeks is an accurate estimate of the length of time to lay charges.

(In Montreal the guideline is three weeks for laying a charge; in Ottawa one month, and in Toronto two months. Prosecutors in these regions feel that these guidelines are being met.)

Delays at Justice are perceived as much longer by the investigators. This could be because delays in the progress of

their cases are much more evident to them than they are to the prosecutor because of the relatively fewer number of prosecutions that they are involved with.

The investigators see the Winnipeg office as being the most responsive with an average thirty day turnaround. The Edmonton office is seen to have the most problems with delays of up to fifteen months. It was admitted, however, that in Edmonton the turnaround has improved recently and seems to be kept in the ninety day range. Vancouver falls in the thirty to forty- five day range.

(In the pre-test survey, nine eastern investigators found that it takes from two to four months to have charges laid; two said less than two months, and one more than four months.)

EFFECT OF DELAYS

All lawyers were asked the hypothetical question "what effect do delays, however caused, have on your success in a prosecution?" Four said that there was no effect at all in these cases, six said that there was an effect, particularly in the sentence that would ultimately be imposed, but three said that there would be no effect on sentence.

(In the pre-test survey only one prosecutor thought that delays would affect his ability to get a conviction, while five said that it could serve to reduce the sentence. Two, however, felt that in Marketing Practices cases, delays would make no difference because the accused is a corporation, and that Judges are more concerned about delays when they involve individuals.) When asked how delays could be shortened it was suggested that more consultation during the investigation would be helpful, and the provision of signed witness' statements would shorten delays.

Only two investigators felt that delays might affect the ability to obtain a conviction. They recognized that witnesses do forget and that if there are any problems with the investigation they are much harder to correct if there are delays. Four felt that there was no sentence effect, while five said that delays can lead to lower sentences.

(In the eastern region results were similar with only one investigator saying that delays have any effect on the ability to obtain a conviction in a case. Three felt that there was a reduction in the sentence imposed, while four said that there was no effect on either conviction or sentence. There was concern that delays would undermine the effectiveness of the program by preventing it from responding quickly to market practices.)

LEGAL RESEARCH

Five investigators say that they regularly supply case law to the prosecutor with the summary of evidence. Three include it if there is a case on point known to them and the legal issue is new or unusual. One investigator only supplies sentencing law and another supplies cases only if and when asked.

One prosecutor has had case law provided to him on a regular basis by the investigator in the summary of evidence. Others have received it on occasion, and most when they have requested it. With one exception they are not opposed to it being supplied on a regular basis, but they felt it would be more efficient for them to isolate the relevant areas, and to make specific requests of the investigators. Given the ready access to the case law through the computer in the Marketing Practices offices, this appears a workable suggestion.

(In the pre-test survey, six investigators say that they provide the prosecutor with case law as a matter of routine, five do occasionally or when requested, while two said that they never do.)

CASE LAW INDEX

During the pre-test survey in the eastern region all prosecutors said that if the department compiled an indexed manual of the case law it would be very useful. As a result of this suggestion all prosecutors in the main survey were given a copy of the new case law index that was made available in the fall of 1985. They were asked if they had seen it before, and if they thought that it looked useful.

Some prosecutors had seen the index before, particularly in the Edmonton office where it had been circulated by the head of criminal prosecutions.

All lawyers appeared genuinely impressed with the case law index, and thankful for being provided with a copy. All but one of them thought that it would prove extremely useful in the future. Several prosecutors commented that the judgments that are sent to their libraries are next to useless because they are unindexed, and as a consequence they are rarely used.

MISLEADING ADVERTISING BULLETIN

Despite the fact that the libraries in the regional Justice offices receive the Misleading Advertising Bulletin, three lawyers said that they had never heard of it before. Of the seven who had heard of it only two made use of it for research purposes. It was pointed out that the information contained in the Bulletin concerning convictions was too sparse to be of use in sentencing research, other than to establish a range. It was

suggested that the prosecutor's name should be included in the case annotation, thus permitting lawyers to contact each other directly. This may also be a way of generating more interest in the Bulletin among the lawyers.

One investigator says that he does bring the Misleading Advertising Bulletin to the attention of the prosecutor; the remainder assume that the prosecutors see the Bulletin routinely as it is sent to their office.

PLEA NEGOTIATIONS.

ROLE OF THE INVESTIGATOR IN PLEA NEGOTIATIONS

Three prosecutors take the view that the decisions involved in plea negotiations are theirs to make , and while they do see the need to keep the investigator informed of developments, they do not expect either his approval or concurrence. This, however, appears to be the minority view, with the other fourteen prosecutors actively involving the investigators during the negotiations by either having them present, or by discussing proposals for settlements with them.

(In the pre-test survey similar findings were made with one prosecutor saying that he did not have ongoing discussions with the investigator and one saying that he never proceeds without his written agreement. In general, prosecutors appear to hold consultations with the investigators which are useful and appreciated by both sides.)

Only one investigator in the survey says that he is not involved in plea negotiations, yet he never disagrees with the result. All the others are involved to some extent ranging from being advised, to sitting in on the disclosure meetings with the

defence counsel. All investigators say that they are satisfied with their input.

(In the pre-test results there appeared to be less satisfaction among the investigators with the amount of consultation. On the whole they were satisfied, but a minority did say that they were not consulted enough, or that reasons were not provided as to why a particular agreement was arrived at.)

All prosecutors who responded said that they discuss specific fine levels with the investigators, but two said that they are not interested in the investigator's opinion of the appropriate fine unless it can be backed up with case law. Only two did not want any suggestion of specific fines, the rest felt that it was helpful to them in establishing a range, and was only unwelcome if the investigator was either unrealistic, or too tenacious.

Six investigators recommend specific fine levels to the prosecutor, which they report are well received, and only one waits for the lawyer to initiate discussions before putting forward his opinions.

(In the pre-test survey results were similar with both prosecutors and investigators agreeing that discussions concerning the fine levels are held and that they are useful.)

TRIAL

JUDICIAL CONSIDERATIONS

The prairie region prosecutors see the courts as less sympathetic to the Marketing Practices cases than courts in other jurisdictions. They believe that this presents some problems for them in prosecuting their cases.

Three lawyers mentioned that in the prairie region, Judges have a "caveat emptor" philosophy which is in tune with the free enterprise attitude in Alberta. One prosecutor said that he thinks that the Judges see Marketing Practices cases as a civil, not a criminal matter, and that they should be pursued in the civil courts.

However, in other regions, three lawyers said that they found the Judges to be sympathetic, having no special difficulties with Marketing Practices cases. One pointed out that the Judges are unfamiliar with these cases because of the low volume prosecuted in each jurisdiction and that this can present some problems.

Investigators, even in the prairie region, feel that Judges are concerned about the harm to both the consumer and to the competition.

DISPOSITIONS

SENTENCING MEMORANDUM

The department has developed a new sentencing memorandum (called the economic impact statement) which it hopes will illustrate the seriousness of the offences to the prosecutors and to the courts. It is anticipated that the new memorandum will have the effect of raising the fines. The prosecutors were asked if the information contained in the memo would be new information that they had not previously received, and secondly if they did receive it, would it be effective in helping to increase the fines.

Of the twelve prosecutors asked, only one said that he was previously getting the information contained in the economic impact statement.

All but two see it as very useful and important, and were of the opinion that it will lead to higher fines. Of the two who did not consider it useful, one thought that it was dangerous in that the defence had a right to put the crown to the strict proof of all of the facts tendered by them on a sentencing, and that the statement contained too many generalizations which would be difficult to prove if he were called upon to do so.

Investigators were also very positive about the new sentencing memo. Seven said that they thought that it was very good and would be helpful. One said that he was previously supplying most of the information, and another that the Crown had asked for it

and he had provided it before. While the memo was criticized as adding to the paperwork and to the length of the investigation, it was still recognized as being useful.

One investigator suggested that it might be useful to list both the mitigating and aggravating circumstances of the offence on the memo, and another that the specific fine recommendation be eliminated, as it is just an opinion.

Five investigators said they felt the lawyers would use the information if it was provided, and three that they think the end result will be an increase in fines. Two said that they do not think that it will have any effect at all.

Traditionally the compilation of the type of material that is contained in the sentencing memo is the responsibility of the prosecutor. Normally if specific details were required they would be requested from the investigator on a piecemeal basis. This traditional division of tasks was seen by one investigator as the proper division, as he saw the preparation of the sentencing memo as the work of the prosecutor.

FINE LEVELS

In the last year the Marketing Practices Program initiated a study on ways to increasing the level of fines imposed. One of the major concerns is that fines should be realistic and reflect the true harm done to the marketplace and to consumers, and not be so low as to act merely as a licence to operate or a cost of

doing business. In trying to raise the fines, the attitude of the prosecutors is crucial, since the Judges are unlikely to be moved to impose substantial fines without strong submissions from the prosecutors.

When asked if they felt that fines in Marketing Practices were high enough, six prosecutors said that they found them to be appropriate or high enough, while eight said that they were too low.

This finding is in contrast to the attitude of the prosecutors in the eastern region where fourteen prosecutors said that still they were not high enough, and only two saying that they were adequate.

The satisfaction of western prosecutors with fine levels is also in marked contrast to the attitude of the investigators in the survey, nine of whom feel that the fines are not high enough, with only one saying that recently the fines have been appropriate.

(In the pre-test, eleven investigators said that the fines were too low, three that they were adequate for small traders and one that they were adequate in general.)

Six investigators expressed concern that the prosecutors are not interested in obtaining high enough fines, with three disagreeing. This is consistent with the findings from the

prosecutors themselves, where half do see the fines as adequate.

When asked what can be done to raise the fines, four lawyers said that better case selection, concentrating on really fraudulent misrepresentations would raise the fines. Five suggested that the new sentencing material contained in the economic impact statements should help. Two said that sentence appeals should be undertaken.

Six investigators felt that the new sentencing material would help to raise the fines, with one suggesting a legislative reform which would place a minimum fine in the act. One investigator thought that public education was necessary.

When questioned on their practices during plea negotiations, only two lawyers said that they requested higher fines if the case went to trial. Seven others said that the range that they will accept on a plea is the same range that they will recommend to a Judge on sentencing after a trial. It would therefore appear that in most cases, negotiated settlements are not keeping the level of the fines down.

RESTITUTION

Prosecutors were asked if they favoured restitution to consumers as a sentencing option in Marketing Practices Cases. Eight felt that it would be a very good idea, but of those, one expressed

concerns about the feasibility of locating consumers and assessing the damage, and two questioned its constitutionality. Two were opposed to the idea entirely, saying that there were too many administrative problems, and one of them observed that the consumer could not be forced to return the product if they did not want restitution.

(In the pre-test the prosecutors also supported the proposal, with only one objecting on the grounds of the administrative work required to implement it. In the eastern region two examples of restitution which resulted from successful plea negotiations were given.)

Eight investigators also favoured restitution to the consumer, with only one saying that it was not possible under the present law. All agreed that it would be very good if it were available, but one cautioned that in certain cases it would not be appropriate, such as pyramid sales schemes, where the "victims" are the willing participants and the unwilling witnesses.

(In the pre-test survey, results were similar with twelve investigators favouring restitution to the consumer. It was pointed out that if restitution was ordered in lieu of a fine, the government would not recover any of the cost of the prosecution.)

Not one prosecutor supported restitution for the competitor, seeing it more clearly as a civil matter which should not be a concern of the Crown, and where the damages were almost impossible to assess.

Investigators agreed, with only two seeing restitution to the competition as a viable sentencing option. They also saw it as a civil matter, which would be far too difficult to assess to be practical.

(Similarly in the pre-test only two investigators thought that restitution to the competitor was a viable option.)

Being cautious and practical one investigator pondered if the widespread use of restitution would not have the effect of lowering the fines paid by the traders, an effect which he thought would not be desirable.

STRATEGIES TO RAISE THE LEVEL OF FINES

In April of 1985, B.D. Linseman prepared a discussion paper on the Level of Fines for the Marketing Practices Branch. That paper contained several concrete suggestions for raising the levels of fines. These suggestions were taken and put to

prosecutors and investigators and their responses recorded. The suggestions included increasing the number of counts per case; the encouragement of a procedure by way of indictment; the use of the complainant witness; and a better case selection for cases with a bigger public impact.

PROCEEDING BY WAY OF INDICTMENT

Marketing Practices' cases are hybrid offences giving the prosecutor the choice to proceed by way of indictment or summary conviction. If the limitation period for swearing the information has expired, or if the maximum fine is considered too low, the prosecutor has the option of proceeding by indictment. The disadvantage from the prosecutor's viewpoint is that an election by way of indictment gives the accused the right to a preliminary hearing and a trial by Judge and Jury.

All lawyers agree that the indictment is to be reserved for those rare cases which are the most reprehensible and serious; those cases where there is a serious harm to the public or a large number of victims. Adjectives such as outrageous, malicious, and major were used to describe the type of case where an indictment would be used.

It is the consensus of the prosecutors that these cases are rare, and constitute only a very small percentage of cases.

(Findings during the pre-test were consistent with the findings

made in the main survey.)

LAYING MULTIPLE CHARGES

Marketing Practices has proposed that prosecutors be encouraged to lay multiple charges in order to raise the fine levels in the cases.

Prosecutors were asked what their current practice is, and what they hope to achieve through it.

There appears an even division between the lawyers on their practice in framing the information and characterizing the charges. One half of them lay the most particular charges possible with as many counts as the facts disclose, while others prefer to lay charges which are framed as between counts, or a combination of the two approaches. Their actions appear motivated by concerns for the validity of the charges and as a safety mechanism should any of the counts be challenged. An additional consideration is the leverage that is gained with defence counsel during plea negotiations. Interestingly enough, only two of the thirteen prosecutors felt that the framing of the charges had any effect on the sentence imposed. The other eleven said that the Judge looks to the conduct as disclosed by the facts to determine the sentence, not the number of charges that the Crown has chosen to lay. An observation made by one lawyer was that multiple charges can actually dilute the fine by

spreading it over numerous counts, thereby setting a bad legal precedent. The same comment was made by an investigator during the pre-test.

Obviously the prosecutors and the author of the department study of fine levels disagree on the connection between multiple counts and levels of fines.

(During the pre-test survey somewhat different results were recorded, with more lawyers seeing that multiple charges have a sentence effect, although again there was no consensus.)

The investigators take a somewhat different view of the utility of multiple charges and for different reasons. Three said that the Judges do not like them, two that they are used for leverage in plea negotiations and one that there is no effect at all to using them.

Four investigators believe that the use of multiple charges increases the fines, while four say that there is no effect at all.

(In the pre-test five investigators thought that laying multiple charges would have no effect at all on the fines, while seven did recognize the bargaining leverage gained through the use of multiple charges.)

CHARGING THE OFFICERS OF CORPORATIONS

There is no consensus among the prosecutors as to if and when officers of corporations are or should be charged. The evidentiary requirements dictate that the Crown must show that the officer sanctioned the advertising, so that all prosecutors are looking for the person who was the operating mind and will of the advertising campaign.

If the company is unstable or verging on bankruptcy, seven prosecutors say that they will try to charge the officer.

A prior conviction or other evidence that there is a need for additional deterrence was seen by two lawyers as another reason to charge officers.

It appears that the charging of officers may also be a plea negotiating strategy, giving the prosecutor some leverage to bargain for a substantial fine from the company in return for a withdrawal against the individual. This was suggested by two lawyers, although it may be the practice of a larger number who were not asked directly.

(During the pre-test prosecutors agreed that charging the officers would increase the impact of the program. The majority said that it is not done often enough. Two said that they should be charged where warranted, with no withdrawals during bargaining, while the majority used it as leverage to raise the

fine and were prepared to withdraw against the officer during plea negotiations.)

As a matter of practice most investigators conduct their investigations with a view to charging the officers whenever possible. Five said that if the evidence is present to link the officer to the overt acts that constitute the offence, then they will recommend charging them. Three said they will charge if the company is a shell corporation or is shaky. None of them thought that it was a problem to gather the evidence against the officers, nor had they encountered any problems convincing the prosecutors to lay the charges.

(In the eastern region the practices appear the same, with the exception of one investigator who said that in his region there was an internal policy not to charge officers because of the difficulty in proving the offence against them.)

In all regions the investigators are satisfied with the willingness of the prosecutors to lay and prosecute the charges against the officer.

THE USE OF COMPLAINANT WITNESSES

All sixteen prosecutors agreed that the use of complainant witnesses was important in Marketing Practices cases. They feel

that it gains the sympathy of the courts, shows that people were actually misled and that the prosecution is not merely a bureaucratic exercise on the part of the department. Five said that it does have or could have a positive effect on the sentence imposed.

Nine investigators said that they also favor the use of complainant witnesses. They feel that they can gain the sympathy of the courts and that the Judge appreciates them. One did say that he prefers to rely on the investigator, and two that it was not department policy to encourage the use of the complainant witness at trial even though they personally favoured it.

CONCENTRATING ON LARGER CORPORATIONS

During the pre-test several of the prosecutors in Montreal suggested that the department should concentrate on the infractions of the larger corporations in an effort to raise the fines. This idea was tested in the main survey and the prosecutors were asked if they thought that this would be an effective strategy.

Eight prosecutors did not feel that it would be effective, as it is not the size of the corporation that is the important factor, but the size of the fraud. It was emphasized that the harm to the public or competition should be the determining factor. Five other prosecutors did think that it would be effective.

When asked specifically if they would recommend that the department use such an approach, only two prosecutors thought it would be advisable, while others strongly disagreed, saying that the harm was just as real when caused by the smaller corporations and the case could be just as serious.

Among the investigators only one thought that concentrating on the larger corporations was advisable. One said that the size of the fraud was more important and four felt that the overriding principle should be fairness, and that the department should not discriminate between corporations which contravene the law.

EFFECTIVENESS OF PROSECUTIONS

In an attempt to assess the effectiveness of the prosecutions, investigators were asked if there are many repeat offenders. Six felt that there were, while three said that there were not. It was mentioned that in one region investigators have been told that it is regional policy not to charge repeat offenders.

When asked if the program had any effect within industries, investigators were much more optimistic. The stereo industry was seen as an example where specific corrective actions were taken by merchants as a result of the prosecutions by the department. Three investigators reported an increase in compliance calls from traders following a publicized conviction and five believe that a conviction of one trader does have a deterrent effect on others.

One investigator had been invited to speak to a trade convention following the prosecution of one of its members, and he felt that he was well received and that traders were interested in complying with the law.

(In the pre-test survey in the eastern region similar results were obtained with ten investigators observing that concentrating on industries was effective, and that positive changes in advertising were noticeable, although one observed that the improvements might not be long lasting.)

PUBLICITY

During the pre-test survey several prosecutors suggested that the department could do more to publicize their convictions and thereby increase public awareness and deterrence. As a result of this suggestion participants in the main survey were questioned about their present practices for publicizing cases.

Different regions appear to have differing practices concerning publicity and investigator contact with the media.

In the central and prairie region four of the investigators said that publicity is handled by the communications department.

Three of them believe that the media are always contacted and advised of court dates, pleas or convictions, while one said that

the communications department only calls the media for special cases. In this region none of the investigators was personally involved with contacting or speaking to the media, and their description of when the media are contacted were impressions only.

In the Pacific region no organized publicity work is being done. Two investigators said that no publicity is being done at all, and one said that he does sometimes call the media for important or interesting cases.

As a result of discussions which took place at the seminar held by Marketing Practices in Cornwall in the fall of 1985, five investigators said that they felt that they had been told to stay away from any media contact. In general there was strong disagreement and dissatisfaction with this policy. Four investigators felt strongly that the department is not doing an effective job of publicity, and that more should be done. Suggestions included more personal contact with media personnel, regular and routine press releases, and meetings with the business and consumer editors of the papers. Investigators see publicity as an important deterrent aspect of the enforcement program, and believe that the present department policy is overly cautious.

Investigators do seem to recognize the dangers inherent in dealing with the media, and the concerns of the department in this regard are seen as valid. However it was suggested that

some training in press relations would minimize the dangers of investigators being misquoted or misinterpreted. In addition a standard form fact sheet press release was seen as potentially helpful.

Two investigators mentioned the lack of publicity surrounding the SHACKLEE decision, and said that it was an important and interesting case where the appeal was successful. This was seen as a case which should have received publicity.

Investigators were asked to comment on the effect of a guilty plea on publicity. Three agreed that there is more publicity if there is a trial because of the number of court appearances and the volume of material that the media are exposed to in a trial. Four, however, said that it makes no difference, and it was pointed out by one investigator that it might be better publicity if there is a guilty plea because the accused publicly admits culpability. As long as the sentence is appropriate, a guilty plea is much less expensive than a trial, which was seen as an important factor to consider by one investigator.

(During the pre-test survey an investigator said he felt that negotiated settlements resolved by way of a guilty plea affected the publicity in cases, he was therefore against any discussions with the defence counsel.)

Justice lawyers were also asked if they felt that a guilty plea had any effect on the publicity accorded Marketing Practices cases. Five prosecutors declined to comment, saying that publicity was not their concern. Two said that it made no difference what the plea was and one pointed out that some of the biggest and most publicized cases have been guilty pleas. The other five did feel that because of the fewer number of court appearances in the event of a guilty plea, there is less publicity.

OBTAINING BETTER PUBLICITY

As a result of the dissatisfaction among both investigators and prosecutors with the publicity, prosecutors were asked to give examples of departments who do a better job of publicity than the Marketing Practices Program. Five mentioned Revenue Canada, one the Department of the Environment, and one thought that Marketing Practices was one of the best. Again five prosecutors would not comment or said that they did not know.

When asked to assess the amount of publicity that Marketing Practices presently gets, five said that they do not get very much, or that there is only limited coverage of the cases.

PROSECUTIONS IN RURAL AREAS

Only five prosecutors have handled cases in smaller towns or rural areas. Of these, three felt that there were no specific problems obtaining either a conviction or an appropriate sentence. One of the lawyers even commented that in his experience the fine obtained was even higher than which he would have predicted for an urban area.

Two did, however, report that they sometimes encounter a refusal to convict, or less of a chance of conviction on the part of the rural judge, but that the sentence was the same.

On the whole, when asked if a rural conviction provides a real deterrent, prosecutors seem to agree that it does. Publicity in the small town, and the higher profile of the cases and the accused seem to ensure that a prosecution is a deterrent.)

(In the pre-test survey only three prosecutors thought that small towns pose a problem in obtaining a conviction. Most did, however, agree if there is a conviction that the fine will be lower. This is in contrast to the views held in the western regions. Despite this most lawyers agreed that due to the nature of small towns a conviction and small fine would act as a deterrent.)

Seven investigators agreed that a rural prosecution does act as a

deterrent, with only one feeling that a prosecution was of limited utility. There was, however, disagreement among investigators on the sentences imposed. One thought that the fines were smaller, and one that they were the same. What appears to contribute to the deterrence in the view of the investigators is the impact of publicity in the smaller towns. It was felt that traders were less anonymous, and more concerned about their reputations, and that a conviction under the Act was big news in a small town.

(Among the investigators participating in the pre-test survey seven found that it was difficult to obtain a conviction or equivalent sentence in non-urban areas. Despite this it was generally agreed that the penalties were still appropriate for the areas.)

AGENTS

In areas where there are no federal prosecutors, agents are retained to handle the cases. Four of the investigators interviewed had had files prosecuted by agents. Two of those had had good experiences, while two felt that the services were not good and one of them had had a case which, although straightforward, had been very expensive. He observed that the Justice lawyers were more thorough when prosecuting cases.

(In the pre-test survey the results were also mixed with six investigators saying that they were satisfied, and four being unsatisfied.)

It is obvious from both the pre-test and the main survey that no generalizations can be made concerning the quality of agents' services.

APPEALS

Decisions concerning appeals are made in all regions except Winnipeg by an appeal committee at the Regional Justice office. In Winnipeg the decision to appeal is reached on a consensus basis between the prosecutor, the investigator and the prosecutor's supervisor.

In those areas with appeal committees, the prosecutor has input into the decision but the decision itself is made by the committee. All prosecutors agree that the decision to appeal is a legal one. Since an appeal is wholly based on the record, there is little role for the Marketing Practices investigator or the department. However, despite this, five lawyers did say that they appreciate input from the department.

(In the pre-test areas appeal decisions are made in Montreal and Toronto through an appeals committee, and in Ottawa informally on a consensus basis. Again, in these regions, representations

from the department are said to be welcome.)

Investigators recognize the limited role that they have to play in appeals. General agreement exists that the investigator is involved in informal discussions with the prosecutor immediately following the trial. Once this informal discussion has concluded, further input appears to be left to the supervisors or to the regional managers.

(In the pre-test areas investigators also accepted the limited role that they have to play in appeals. However, there was dissatisfaction among the central and regional management with the amount of consultation that Justice holds concerning appeals.)

It was stressed that if any input is to be made that it must be timely, taking into consideration the thirty day deadline for filing the notice of appeal. Prosecutors agreed that it was not necessary to put anything into writing and that a short note was sufficient if desired. All seemed to feel that through the routine informal discussions which take place following the hearing of a case most investigators' views were being expressed, and were being taken into account.

TRAINING NEEDS AT MARKETING PRACTICES

Prosecutors were asked to suggest areas where investigators require some additional training. In the Pacific region, five out of six lawyers did not see any need for more investigator training, while the other one said that it would be useful to have some training on the Charter of Rights, and evidence problems.

In the prairie region, prosecutors were quick to suggest that specific training in the techniques of taking statements was necessary. This was seen as a priority by seven prosecutors. Other areas mentioned were searches, document seizure, the Charter of Rights, and recognizing hearsay evidence. All prosecutors in the prairie region said that the investigators require some training.

In the central region (Winnipeg), training in the taking of statements, continuity of evidence and the Charter of Rights were seen as needs by both of the prosecutors interviewed.

(In the pre-test areas, perceived training needs are similar with four prosecutors also thinking that some training in the taking of signed statements would be helpful.)

Investigators see their needs somewhat differently, with only one mentioning the need for training in the taking of statements. No consensus was evident with one or two investigators seeing

section of the act training and Charter of Rights training were seen as needed by several investigators. Others saw a need for training in search warrants and their execution.

Two specifically mentioned that Marketing Practices is commercial crime, and as such they need special training in gathering the evidence, which is not the same as gathering the evidence in a murder or assault case. Special training in business practices or economics was suggested.

In some regions no computer training has yet been held and two investigators say that they require some training in order to use the department's computer programs.

LAW REFORM

The department has recognized for some time the need for legislative reform in particular sections of the act. The sections of the act that the prosecutors feel need changing are the same ones that the department has directed its attention to. The pyramid selling section is seen as incomprehensible and in some cases unprosecutable. All prosecutors agreed that pyramid sales are still a problem, even if the Court of Appeal decision in the Shacklee case is upheld.

Investigators agree with four saying that even if Shacklee is upheld that there will be problems. Three did think that Shacklee had made cases easier to prosecute.

In British Columbia and Saskatchewan pyramid schemes are legal

and regulated provincially so that no prosecutions are undertaken in those provinces.

Nine prosecutors anticipate a possible Charter of Rights challenge to the reverse onus under section 36(1)(b), while only three thought that such a challenge was not likely. It was suggested to them that if the crown had first to establish a reasonable inference that the element of the offence existed, that the section would be on firmer constitutional ground. Five prosecutors said that their present practice was not to rely on the reverse onus when prosecuting under the section, and in fact what they were doing was first establishing a threshold level. Three lawyers said that they did not think that it would hurt to try this legislative change, and that it might serve to protect the section from a Charter challenge.

There is no consensus among investigators on which areas of the act need attention. Pyramid selling, section 36(1)b, bait and switch, promotional contests, and telephone soliciting were all mentioned.

Some recent court decisions seem to indicate that if there are two possible interpretations to an advertisement, one of them misleading and the other one not, that the courts will give the accused the benefit of the doubt. Prosecutors were asked if they felt that there was a danger of some advertisers deliberately

making ambiguous representations and thereby being immune from prosecution. Four lawyers said that they felt this was a problem, but that realistically the benefit of the doubt must always be accorded to the accused in criminal cases. Six said that they did not see it as a problem at all as advertisers were not sufficiently sophisticated or clever.

To deal with this potential problem one lawyer suggested that the victim be called at the trial to show that people were actually misled. Three lawyers suggested that the only solution was legislative reform.

Investigators in the pre-test had expressed concern that the Judges are applying a test of the sophisticated consumer to determine if an advertisement is misleading. In the west, only two prosecutors share this concern, nine say that the Judges are applying the appropriate test to determine misleading.

Investigators agree with seven saying that Judges apply an appropriate test to determine misleading. Only one investigator thought that an inappropriate test might sometimes be a problem.

(In the pre-test three prosecutors felt that the Judges might be applying a more lenient test.)

Other areas where reform is suggested include the provision of a deeming section to provide that a person is deemed to have placed an advertisement if their name appears upon it, unless the

contrary is shown. This was suggested by two prosecutors as helpful to streamline and simplify the documentary proof at the trial.

THE USE OF THE LEGAL SERVICES BRANCH OF THE DEPARTMENT OF JUSTICE FOR PROSECUTIONS

It has been suggested by some members of the central office, that Justice lawyers with the Legal Services branch of the department be given special cases to prosecute. This has been suggested as a way of improving the effectiveness of certain prosecutions. Lawyers were asked how they would feel if the unusual, risky or precedent setting cases were handled by Justice lawyers in the the legal services branch of the department in Ottawa.

All fourteen lawyers objected to the suggestion. The prosecutors said that it would be bad for morale, and make their own on the job training of prosecutors difficult. Seven not only thought that it would be bad for morale, but that there would also be resentment towards the department if Legal Services prosecuted cases. The precedent setting, national cases are seen as interesting and challenging. and are seen as the reward for doing the routine cases which form the bulk of the work. Six lawyers said specifically that they need and want the interesting and challenging cases for the training, and the opportunity to make law that they provide.

Several lawyers did think that Marketing Practices would prefer such an arrangement. However, they cautioned against what they see as the evils of in-house counsel who both advise and prosecute.

They thought that there could be a lack of objectivity with no separation between the investigation and the prosecution functions, and therefore a sensitivity to political pressure which a prosecutor should not feel. They said that a separation between the investigation and the prosecution should be maintained to ensure fairness.

Other concerns were that specialized prosecutors become too narrow to be effective, and that unless they are in court all the time, they become afraid to go to court.

Two lawyers felt that Legal Services counsel from Ottawa, prosecuting cases in the local courts, would lack credibility which would effect their success.

In general the feeling was that there was no need for the department to employ Legal Services prosecutors as it was getting good service from the regional Justice offices.

(These findings bear out those from the pre-test where fifteen out of seventeen prosecutors said that they thought it would be a mistake for the program to have Legal Services prosecutors. Only one thought it was a suggestion worth trying, the other did not wish to comment.)

Nine investigators thought that Legal Services counsel would be an excellent idea, only two said that they prefer to use the local Justice office, and that it was less expensive.

(Investigators in the pre-test were not so overwhelmingly in favor of the idea as those in the survey. They were split more evenly, with four being completely against it, four favoring the idea and two who did not express a preference either way.)

When questioned about the effect it might have on local relations with the Justice Department, three investigators said that they thought Justice would appreciate being relieved of some of their work, and only two said that they thought that it would be harmful to their relationship. This difference between the investigators and the prosecutors seems to stem from the perception that the prosecutors are not interested in the Marketing Practices cases. Interestingly enough, those areas where the investigators feel the greatest frustration and lack of interest from the lawyers, are the ones where the lawyers object most strenuously to losing cases to Legal Services counsel.

IMPROVEMENTS TO THE MARKETING PRACTICES PROGRAM

Aside from the specific training suggestions and legislative changes suggested, the investigators see liason and communications between the two departments as a top priority. Two investigators said that they feel that the department only

communicates with the lawyers when there is a problem and that some type of letter of congratulation on the conclusion of a difficult or lengthy case would be a helpful courtesy. One investigator stressed that he felt that the lawyers did not have their departments backing them up, and that such a letter would do much to improve the relations between them.

(During the pre-test interviews this area was not a concern. There was a high degree of satisfaction with the communications between the two departments. On the personal level, the investigators reported that the prosecutors were accessible and helpful; on the organizational level there were frequent and useful seminars and joint meetings.)

This is in contrast to the findings in the western regions where four of the investigators felt that there were problems both on the personal level and in communications between the prosecutors and themselves. Four said that there were no problems, and one said that sometimes, depending on the personality of the lawyer, there could be problems.

Other suggestions made by different investigators included more public education, keeping complainants advised of the outcome of their complaints if they lead to a prosecution, and the regular provision of the updated case law index to the crown attorneys.

FINDINGS AT JUSTICE

In all the pre-test areas and all but one region of the main survey, investigators report that they are getting very good to excellent services from the Regional Justice offices. Some investigators did suggest minor improvements but on the whole there is a good deal of satisfaction.

The only exception was the prairie region, where investigators had numerous complaints and reported a very low level of satisfaction. Interestingly enough, lawyers in the same region were very dissatisfied with the quality of the investigations which were being forwarded by the department for prosecution.

(During the pre-test, prosecutors were asked to suggest program improvements in their own department. Three prosecutors thought there should be more supervision of junior lawyers by senior counsel. Two said they could specialize more, allowing people with expressed interests to take on a larger number of cases in the area of their choice. Three felt that more prosecutors would lead to an improvement in the services, and the chief prosecutors saw understaffing as a significant problem in all three cities.)

Prosecutors were not asked for suggestions for improvement in the Justice offices in the main survey.

Investigators were asked in both the pre-test and main survey to suggest how the Department of Justice could improve its services to the program.

Four investigators said that some specialization would permit the department to provide better services, three suggested more consultations with the investigator at all stages of the prosecution, and one felt that if prosecutors gave better explanations or reasons for the case rejections, it would be an improvement. Shorter delays in laying charges were mentioned by two investigators and one thought that the lawyers could be more courteous. A major concern, voiced by investigators in all cities, was the low salary which prosecutors are paid. This was seen as directly contributing to a high turnover rate at the Justice offices and to resentment towards the investigators who earn higher salaries.

SURVEY OF THE PROSECUTIONS
SERVICES FOR THE MARKETING
PRACTICES PROGRAM OF THE
DEPARTMENT OF CONSUMER AND
CORPORATE AFFAIRS.

A P P E N D I X

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SURVEY OF THE PROSECUTIONS SERVICES FOR THE
MARKETING PRACTICES PROGRAM OF THE DEPARTMENT
OF CONSUMER AND CORPORATE AFFAIRS

APPENDIX

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March 7, 1986
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Marketing Practices Case Selection Criteria

<u>Name of factor</u>	<u>Definition</u>	<u>Weight out of 10</u>
Coverage	Distribution of representation The proxy for this is amount spent on the ad	\$500=0 \$500-2,500=1 \$2500=2
Impact on purchasing decision	The percentage by which the value of the product is improperly inflated by the misleading misrepresentation	Value depends totally on misrep = 2 Value increased by >10%=1 Value increased by ≤10%=0
Recognition of Deception	How likely is a consumer to identify a deception and when	Before Purchase = 0 Shortly after purchase unless seller is "fly by night" = 1 "Fly by night" seller or very difficult recognition = 2
Public Concern	Proxy is number of complaints	3 complaints = 0 4 complaints = 1
Intent	Was the misrepresentation deliberate or accidental	Intent evident = 1 Intent not evident = 0
Jurisprudence significance		Sections 36(1)(b), 36(1)(c) 36.3, 37(2), 45.2 = 2 Medium = 1 Low = 2

SUGGESTED SENTENCING MATERIAL

ECONOMIC IMPACT OF THE OFFENCE

A calculation of the profit accrued from the deception
The loss to the consumer from the deception
The impact on the competition
Effect on public health and safety.

INFORMATION ON THE OFFENDER

The ability to pay a fine, particularly where company is very
profitable.
The number of information visits
The past record of convictions of the firm

THE OFFENCE ITSELF

Evidence of deliberate attempts to deceive
The cost of the advertising campaign
The projected profit to be made by the company.
The duration of the offence.

CASE LAW

Case law on the previous fine levels for similar offences

CHIEF CROWN PROSECUTOR

1. How many lawyers do you have on staff?
2. What is the number of Marketing Practices cases prosecuted by your office?
3. What is the percentage of Marketing Practices work in your office?
 - a) How is your office organized?
 - b) Do you have different sections?
4. How are Marketing Practices files allotted amongst Crown Prosecutors?
5. What arrangements do you have for consultations prior to the laying of charges?
6. If a file is complex, or requires consultation prior to a charge being laid, could a case be assigned earlier?
7. Do any Crown Attorneys in your office have special knowledge of Marketing Practices offences?
 - a) how was it obtained?
8. Has your office ever offered any special formal or informal training in Marketing Practices cases?
9. Has your office ever worked with Marketing Practices personnel to hold educational or problem-solving seminars?
 - a) Do you feel that they serve a useful purpose?

10. Do you have a central precedent file?
 - a) Does it contain Marketing Practices cases?
 - b) How is research done?
 - c) How is it updated?
11. How do you evaluate your Prosecutors' work on Marketing Practices cases?
12. Are new Prosecutors assigned to more experienced counsel as informal juniors?
 - a) For how long?
13. Do you feel that there is a correlation between the Crown's experience and the conviction rate?
 - a) Do you feel that there is a correlation between experience and the severity of the penalty imposed?
14. How do you achieve consistency in Marketing Practices case selections for prosecution?
15. Do you participate in the decisions concerning which Marketing Practices cases are to be prosecuted?
 - a) Negotiated settlements
 - b) Sentence requests?
16. Does your office have any guidelines or deadlines for the stages in the prosecution of a Marketing Practices case?
17. Do you have any suggestions as to how Justice could prosecute Marketing Practices cases more effectively?

18. How can Marketing Practices help Justice to prosecute their cases?

QUESTIONS FOR MARKETING PRACTICES OFFICERS

October 24th, 1985

1. How many years have you been with Marketing Practices?
2. How many investigations have you done?
3. How many prosecutions have you done?
4. How many pleas?
5. How many convictions?
6. How many acquittals?
7. What is your background prior to working for Marketing Practices?
8. Who decides which cases will result in an Information Visit, or an investigation leading to prosecution?
9. Can you reverse this decision on your own?
10. Under what circumstances would you make this change?
11. Do you find it is more difficult to collect the evidence for cases under some sections than for others? Which ones?
12. Do you feel that the Shaklee decision has remedied the difficulties with prosecutions under the Pyramid Selling Section?
13. Have you personally had any cases rejected by Justice lawyers?

M P O's

14. How do you feel about those cases?
15. Can you predict which cases they will accept, and which they will reject?
16. At what stage do you feel that it is appropriate for the investigators to consult Crown Prosecutors?
17. If you have prior consultation, can you be assigned the same prosecutor?
18. Is there a need to be assigned the same prosecutor?
19. Do you have sufficient time to prepare your Summary of Evidence?
20. Do you provide signed witness statements?
21. How long does each Departmental Approval stage take?
22. How would you feel if authority to approve routine cases were delegated to the Regional Office?
23. Do you feel that the department responds to a sufficient number of the complaints?
24. Is there some portion of your investigation, or organization of your case, which could be delayed until after a plea has been entered?
25. Do you prepare a short synopsis of your Summary of Evidence for the Prosecutor?
26. Do you assist by providing the Crown with case law?
27. Do the Crowns use your research?
28. How would you feel about providing it routinely?

M P O's

29. Do you use the indexed Case Law Manual provided by the Central Office?
30. Once a Summary of Evidence has been delivered to the Department of Justice, how long does it take before a decision to prosecute is made?
31. Do you feel that long delays bear any relation to the conviction rate? Why?
32. Can you give an example?
33. Do they bear any relation to the sentence imposed?
34. Do you find that Justice lawyers have enough court experience? Why?
35. Could they benefit from some type of training? If so, what type?
36. Do they have enough experience in Marketing Practices cases?
37. What effect does their inexperience have on your program?
38. Do you favour having civilian witnesses for your cases?
39. Do you encourage new prosecutors to take advantage of the free subscription to the Deceptive Marketing Practices Bulletin?
40. Are you involved in plea bargaining discussions with defence lawyers?
41. Are you satisfied with the impact of your input?

M P O's

42. Do negotiated settlements have any effect on publicity?
43. Could CCA do more to publicize the convictions amongst traders?
44. What factors do you believe influence the likelihood of conviction by the courts?
45. What type of harm to consumers do judges really care about?
46. Can you suggest any way to improve the success rate for convictions?
47. When do you consider prosecuting a company official, as well as the company?
48. What are the difficulties in obtaining evidence?
49. Does the Crown generally agree?
50. I have a list of factors which the department is considering having you collect for sentencing. Which ones do you presently provide to the Crown?
51. Are they used?
52. Do you have any comments on the list?
53. Do you recommend specific fines to the prosecutors? How is this received?
54. What is the effect of laying multiple counts for each day of the offence?

M P O's

55. Is there an effect on sentencing?
56. Do you feel that some sort of restitution order for victims would be a useful sentencing option?
57. Would it be a useful option for consumers?
58. Would it be a useful option for competitors?
59. Do you feel that the fines are large enough?
60. Do you feel that Justice lawyers are interested in large fines?
61. If not, what do you think could be done to change this?
62. Do you feel that a prosecution acts as a deterrent?
63. Does it act as a deterrent in small towns?
64. Does a conviction of one trader have a noticeable effect on other traders?
65. How would you feel about referring some of your cases for prosecution to the legal services branch (assuming it had the right sort of staff to handle these cases) instead of using the regional Crown's office?
66. Have you had any prosecutions handled by agents?
67. Have you been satisfied with their services?
68. Have you noticed any difference in the quality recently?
69. Who is involved in the decision to appeal cases?

70. What is your role?
71. At what stage are requests for appeal submitted by M.P.?
72. If this is too late, what prevents requests from being submitted earlier?
73. How much time do you spend meeting the paperwork requirements of your job?
74. Could any of this be shortened?
75. What sorts of paperwork appear unnecessary to you?
76. In an effort to increase fines and publicity, do you feel that it would help for the Department to concentrate prosecutions on the larger traders?
77. What does your office do now to get publicity for convictions?
78. Do you see a need for training sessions in any particular area?
79. During the pre-test phone survey, a significant number of Investigators said they felt that the Justice Department did not treat M.P. sufficiently as a client. Would you agree? If so, why?
80. Some recent decisions suggest that the courts are finding that if two reasonable interpretations exist, one misleading and the other not, then they will not convict. Do you feel that there is a danger of some advertisers deliberately making ambiguous representations and thereby being immune from prosecution?

M P O's

81. What can be done about this?
82. Have you found that judges are applying a "sophisticated consumer" test to determine if advertising is misleading? What can be done about this?
83. Do you have any suggestions as to how Justice could improve their services to the Marketing Practices program?
84. Do you have any suggestions as to how the Marketing Practices program could improve their services to the Justice department to aid prosecutions?
85. Could the liaison between the two departments be improved?
86. How?
87. Do you enjoy your work?
88. Do you have any suggestions you would like us to make for improving the program?
89. Have you had any difficulties with prosecutors from other jurisdictions?

ASSISTANT CROWN PROSECUTORS

October 24th, 1985

1. How many years have you been with this office doing prosecutions?
2. What is your previous law experience?
3. Roughly how many M.P. cases have you handled?
4. What percentage of your time would this represent?
5. Has this been constant?
6. When did you get your first M.P. case?
7. Were you provided with assistance from other prosecutors and investigators?
8. What percentage of your cases have gone to trial?
9. What percentage have been resolved by way of a guilty plea?
10. Do you enjoy doing M.P. cases?
11. What interests you?
12. What does not interest you?
13. Would you like to do more M.P. cases?
14. How would they compare in difficulty to your other cases?
15. When should an investigator consult you prior to the laying of charges?

A C P's

16. Are you likely to be assigned to the same cases that you have consulted upon?
17. Do you feel that prior consultation affects a prosecutor's objectivity?
18. How do you select cases for prosecution?
19. What type of case do you feel does not warrant prosecution?
20. Do you get many of these types of cases?
21. Have you rejected any cases for prosecution?
22. What percentage of cases have you rejected?
23. Some prosecutors have indicated that they have difficulty laying criminal charges in M.P. cases for what might be considered marginally criminal activity. Do you have any similar difficulties?
24. Do judges have any problems with M.P. cases?
25. Do you think there is consistency between prosecutors in making such decisions?
26. How is it achieved?
27. What communications do you have with M.P. investigators regarding the decision to prosecute or reject a case?
28. How would you characterize the length of time it takes investigators to prepare their summaries of evidence?

A C P's

29. Once a summary has been prepared, how long does it take to lay a charge for M.P. cases?
30. Does delay by the investigators, prosecutors, courts or by the defence counsel affect success in prosecution?
31. Does it affect success in sentencing?
32. How can delays be shortened?
33. What is the general quality of the summaries of evidence that you receive from the investigators?
34. Do they all provide a short synopsis at the beginning?
35. Do you have any suggestions to improve them?
36. Do you have any suggestions to shorten them?
37. Would you like to see more signed statements?
38. Would you find it useful to have civilian witnesses for the trial?
39. How would you feel if the investigators delayed indexing and organizing the documented evidence for trial until a trial date had been set?
40. We have given you the index for the M.P. case law manual. Would you use such a manual if you had one?
41. If not, why not?
42. Do you receive the Deceptive Marketing Practices Bulletin?

A C P's

43. Is the case law that is provided with individual cases generally useful?
44. Is it provided routinely?
45. Would that be useful?
46. When do you elect to proceed by way of indictment and when by way of summary conviction?
47. When would you charge an officer in addition to the corporation?
48. Do you consult with the investigator concerning plea negotiations?
49. Does a plea have any effect on the amount of publicity generated on conviction?
50. Do any other departments do better publicity?
51. Do you feel that there are any legislative changes that need to be made in the misleading advertising offences of the Combines Act?
52. Are there any sections for which it is especially difficult to obtain a conviction?
53. Do you feel that the Shaklee decision has solved important problems in these cases?
54. Under what circumstances would you lay multiple charges?
55. Does this have an impact on the sentence?
56. Marketing Practices is considering providing the following information for sentencing purposes:

A C P's

56. What is presently provided?
57. Would you find this information useful if available?
58. Do you consult with investigators regarding fine levels?
59. How do you feel about recommendations from the investigators for specific levels of fines?
60. Do you feel the fines are high enough?
61. If not, what can be done to raise them?
62. Do you request a higher fine if a case goes to trial?
63. How much more?
64. Would concentrating prosecutions on the infractions of the larger corporations increase the fines that are imposed?
65. Would you recommend such an approach? Why?
66. What do you think of restitution as an option for sentencing?
67. In small towns, do you feel that the sentence bears any relation to the social status of the trader?
68. What about the likelihood of conviction?
69. Given the present circumstances, does a rural prosecution provide a real deterrent?
70. How does the conviction rate for M.P. cases compare with that of your other files?

A C P's

71. Have you ever appealed an M.P. case?
72. Who decides which cases are to be appealed?
73. Can representations be made by an M.P. officer concerning an appeal?
74. When and in what form should these representations be made?
75. Have you discovered anything specific when prosecuting M.P. cases which helps you to get a conviction?
76. Do you see a need to hold training seminars for investigators in any particular area?
77. Do you anticipate a possible Charter of Rights challenge to the reverse onus provision of Section 36(1)(b)
78. Do you think that if the Crown had to first establish a reasonable inference that the element of the offence exists, that this would place it on firmer constitutional ground?
79. Some recent decisions suggest that the courts are finding that if two reasonable interpretations exist, one misleading and the other not, then they will not convict. Do you feel that there is a danger that some advertisers will deliberately make ambiguous representations and thereby be immune from prosecution?
80. What can be done about this?
81. Can you suggest any solution to this?
82. Have you found that judges are applying a "sophisticated consumer" test to determine if

A C P's

advertising is misleading?

83. What can be done about this?
84. Do you have any suggestions as to how the M.P. program could improve their services to the Justice Department to aid prosecutions?
85. How would you feel if the unusual, risky or precedent-setting cases were handled by the legal services branch of the C.C.A. in Ottawa?
86. Do you have any other specific recommendations that you would like to see us make to Marketing Practices?

SUGGESTED SENTENCING MATERIALECONOMIC IMPACT ON THE MARKET

A calculation of the profit accrued from the deception
The loss to the consumer from the deception
The impact on the competition
Effect on public health and safety

ECONOMIC IMPACT ON COMPETITOR

The projected profit to be made by the company
The duration of the offence

INFORMATION ON THE OFFENDER

The ability to pay a fine, particularly where company is
very profitable
The number of information visits
The past record of convictions of the firm

THE OFFENCE ITSELF

Evidence of deliberate attempts to deceive
The cost of the advertising campaign

CASE LAW

Case law on the previous fine levels for similar offences

CHIEF CROWN PROSECUTOR, MONTREAL, August 20th, 1985

1. How many lawyers do you have on staff?
2. What is the number of Marketing Practices cases prosecuted by your office?
3. What is the percentage of Marketing Practices work in your office?
 - a) How is your office organized?
 - b) Do you have different sections?
4. How are files allotted amongst assistant Crown prosecutors?
5. What arrangements do you have for consultations prior to the laying of charges?
6. If a file is complex, or requires consultation prior to a charge being laid, could a case be assigned earlier?
7. How many days a week are your prosecutors in court?
 - a) In the office?
8. How would you assess their overall work load?
9. Do any Crown Attorneys in your office have special knowledge of Marketing Practices offences?
 - a) How was it obtained?
10. Has your office ever offered any special formal or informal training in Marketing Practices cases?
11. Has your office ever worked with M.P. personnel to hold educational or problem-solving seminars?
 - a) Do you feel they serve a useful purpose?

2,

C.C.P. MONTREAL

12. Do you have a central precedent file?
 - a) Does it contain M.P. cases?
 - b) How is research done?
 - c) How is it updated?

13. How are your prosecutors evaluated?

14. Are new prosecutors assigned to more experienced counsel as informal juniors?
 - a) For how long?

15. Do you feel that there is a correlation between the crown's experience and the conviction rate?
 - a) Do you feel that there is a correlation between experience and the severity of the penalty imposed?

16. How do you achieve consistency in your office in case selections for prosecution?

17. Do you participate in the decisions concerning which cases are to be prosecuted?
 - a) Negotiated settlements?
 - b) Sentence requests?

18. How would you characterize the turnover rate at Justice among lawyers?
 - a) Has this created any problems for you?

19. Does your office have any guidelines or deadlines for the stages in a prosecution?

August 22, 1985

1. How many years have you been with this office doing prosecutions?
2. Roughly how many M.P. cases have you handled?
 - a) What percentage of your time would this represent?
 - b) Has this been constant?
 - c) What percentage have gone to trial? What percentage have been resolved with a guilty plea?
3. Roughly how many days a week are you in court?
4. Do you enjoy doing M.P. cases?
 - a) What interests you most about them?
 - b) What does not interest you?
5. Some prosecutors have indicated that they have difficulty laying criminal charges in M.P. cases for what might be considered marginally criminal activity. Do you have any similar difficulties?
6. When should an investigator consult you prior to the laying of charges?
 - a) Do you feel that prior consultation affects a prosecutor's objectivity?
 - b) What effect would it have if the M.P. officers would lay the charges?

7. When a summary of evidence is received from a Marketing Practices officer, how do you decide if a charge should be laid?
 - a) Do you always use the same approach?
 - b) Would you prosecute if the advertising was voluntarily withdrawn?
 - c) Have you decided not to prosecute some cases? Can you give me some examples? Reasons?
 - d) What percentage?
8. Do you think there is any consistency between prosecutors?
 - a) How could this be achieved?
9. Do you think it takes the investigators too long to complete their summaries of evidence?
 - a) How could these be shortened?
 - b) How long does it take your office to lay charges?
 - c) Could this be shortened?
 - d) Does delay by the investigators, courts, or by the defence counsel once a charge has been laid affect success in prosecution? In sentencing?
10. What is the general quality of the summaries of evidence that you receive from the investigators?
 - a) How could they be improved?
 - b) Would you like to see more signed statements?

- c) Could they do anything to get better evidence of intent?
 - d) Could the witnesses be better prepared?
 - e) How would you feel if the investigators delayed indexing and organizing the documented evidence for trial until a trial date has been set?
 - f) If M.P. prepared an indexed case law guide, would you use it? How would you like to see it organized?
11. I have a copy of the criteria used by the Marketing Practices officers to rate the cases they forward to Justice for prosecutions. Have you seen them before?
- a) Are they the criteria that you use?
 - b) Do you find it useful to apply a numerical weight?
12. What communications do you have with M.P. investigators regarding the decision to prosecute or reject a case?
13. When do you elect to proceed by way of indictment and when by way of summary conviction?
14. When would you charge an officer in addition to the corporation?
15. Do you consult with the investigator concerning plea negotiations?
- a) Does a plea have any effect on the amount of publicity generated on conviction?
16. Are judges prepared to convict on a strict liability basis?
- a) If not, what can be done about this?

- b) Do judges apply a "sophisticated consumer" test?
If so, what can be done about this?
 - c) Do judges appear to have any other problems?
 - d) Have you had any problems with telephone soliciting
or reasonable quantity cases?
 - e) Are traders becoming more sophisticated in their
advertising and therefore more difficult to charge?
 - f) Why has this happened?
17. Under what circumstances would you lay multiple
charges?
- a) Does this have an impact on the sentence imposed?
18. How do you determine the level of fine requested?
19. Marketing Practices is considering providing the
following information for sentencing purposes:
- a) What information is presently provided?
 - b) Would you find it useful if available?
20. How do you feel about recommendations from the
investigators for specific levels of fines?
21. Are the fines high enough? What needs to be done to
raise them?
- a) Do you feel that the sentences are consistent?
 - b) Do the judges follow your recommendations?
 - c) Do you request a higher fine if the case goes to trial?
How much more?

22. Is restitution a feasible option for sentencing?
23. In small towns do you feel that the sentence bears any relation to the social status of the trader?
 - a) What about the likelihood of a conviction?
 - b) Does a rural conviction provide a real deterrent?
24. What is your conviction rate by percentage for M.P. cases? How does this compare with your other prosecutions?
25. What criteria are used to choose cases for appeal?
26. Who applies these criteria?
27. Can representations be made by an M.P. officer concerning an appeal?
 - a) Have you had any problems with them being too late?
28. Have you ever appealed a sentence in an M.P. case?
29. Have you discovered anything specific when prosecuting M.P. cases which helps you to get a conviction?
30. Do you have any suggestions as to how the M.P. program could improve their services to the Justice Department to aid prosecutions?
31. Do you have any suggestions as to how Justice could improve their services to the M.P. program?
32. Do you have any suggestions as to how the two departments could better work together?
 - a) Would you find joint seminars useful?

33. How would you feel if the unusual, risky, or precedent-setting cases were handled by the Legal Services Branch of the C.C.A. in Ottawa?
34. Do you enjoy your work? Is there enough variety?
- a) What are your career plans?
35. Do you have any other specific recommendations you would like to see us make?

August 22, 1985

1. How many years have you been with Marketing Practices?
 - a) How many prosecutions have you done?
 - b) What is your background prior to working for Marketing Practices?
2. How do you select the cases you will forward to Justice for prosecution?
 - a) What criteria do you look for?
 - b) Do you forward a case if the advertising was voluntarily withdrawn?
3. Do you find it's more difficult to collect the evidence for cases under some sections than for others?
 - a) Which ones?
4. You've seen the guidelines for case selection formulated by the Department before;
 - a) What do you think of the criteria?
 - b) Do you use any other criteria that aren't included?
 - c) Who applies the numerical weight?
 - d) At what stage in your investigation do you use them?
5. Do you find a predictable pattern of case acceptance by Justice lawyers?

- a) What is it?
 - b) How do they achieve it?
6. At what stage do you feel that it is appropriate for the investigators to consult crown prosecutors?
- a) If you have prior consultations, can you be assigned the same prosecutor?
7. How long does it take you to prepare your summary?
- a) How long does it take to get it approved?
 - b) Could this be shortened?
 - c) Do you have sufficient time to prepare your summaries?
 - d) Do you have sufficient time to respond to the complaints?
 - e) Do you prepare a synopsis of the evidence?
8. Are you satisfied with the amount of risks that Justice is taking in selecting cases for prosecution?
- a) Can you give us examples of cases that have been rejected?
9. Once a summary of evidence has been delivered to the Department of Justice how long does it take before a decision to prosecute is made?
10. When delays appear too long, what do you think causes them?
- a) Can they be shortened?
11. Do you feel that long delays bear any relation to the conviction rate? Why?
- a) Can you give an example?

- b) Do they bear any relation to the sentence imposed?
12. Do you find that the Justice lawyers have enough court experience?
- a) Do they have enough experience in Marketing Practices cases?
13. Do you assist by providing the crown with case law?
- a) Do the crowns use your research?
 - b) How would you feel about providing it routinely?
14. Have you noticed that traders are becoming more sophisticated in their misleading advertising, and therefore more difficult to convict? Can anything be done about this?
- a) Do you find that there are certain cases where the judge won't convict?
 - b) Have you noticed any difference between small towns and larger cities regarding a judge's willingness to convict? Can anything be done about this?
 - c) Does a conviction and sentence provide a real deterrent in rural areas?
15. What factors do you believe influence the likelihood of conviction by the courts?
- a) What type of harm to consumers do judges really care about?
 - b) Are judges prepared to convict on a strict liability basis?
 - c) Can you suggest any way to improve the success rate for convictions?

- d) What types of cases do judges not appear to handle properly?
16. When do you consider prosecuting a company official, as well as the company?
- a) Does the crown generally agree?
17. I have a list of factors which the department is considering having you collect for sentencing. Which ones do you presently provide to the crown?
- a) Do you have any comments on the list?
- b) Are they used?
- c) Do you recommend specific fines to the prosecutors? How is this received?
18. What is the effect of laying multiple counts for each day of the offence?
- a) Is there an effect on sentencing?
19. Do you feel that some sort of restitution order for victims would be a useful sentencing option?
- a) for consumers?
- b) for competitors?
20. Do you feel that the fines are large enough?
21. Do you feel that Justice lawyers are interested in obtaining large fines?
- a) Why do you feel this way?
22. Do you feel that a prosecution acts as a deterrent?

MPOs, Montreal

- a) Is there any deterrent effect?
23. Does a conviction of one trader have a noticeable effect on other traders?
 24. Are you involved in plea bargaining discussions with defence lawyers?
 - a) Are you satisfied with the impact of your input?
 - b) Do negotiated settlements have any effect on publicity?
 - c) Could CCA do more to publicize the convictions amongst traders?
 - d) What effect would this have?
 25. How would you feel about referring some of your cases to the Legal Services Branch for prosecution instead of using the regional Crown's office?
 26. Have you had any prosecutions handled by agents?
 - a) Have you been satisfied with their services?
 - b) Have you noticed any change in the quality recently?
 27. Who is involved in the decision to appeal cases?
 28. What is your role?
 - a) Do you provide written material to the appeal committee?
When?
 29. What do you do in the event of a disagreement?
 30. How is this resolved?

31. Do you have any suggestions as to how Justice could improve their services to the Marketing Practices program?
32. Do you have any suggestions as to how the Marketing Practices program could improve their services to the Justice Department to aid prosecutions?
33. Could the liaison between the two departments be improved?
 - a) How?
34. Do you enjoy your work?
35. Do you have any suggestions you would like us to make for improving the program?

