This study paper, prepared by the Criminal Procedure Project of the Law Reform Commission of Canada, is circulated for comment and criticism. The proposals do not represent the views of the Commission.

DISCOVERY IN CRIMINAL CASES

REPORT ON THE QUESTIONNAIRE SURVEY

The Law Reform Commission of Canada will be grateful for comments before May 1, 1975. All Correspondence should be addressed to:
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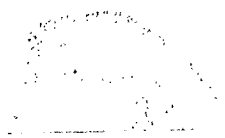

LAW REFORM COMMISSION

COMMISSION DE RÉFORME DU DROIT

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INTRODUCTION

1. Purpose of the Survey

As indicated in the letter of introduction attached to the questionnaires distributed to prosecutors and defence counsel, these questionnaires were drawn in order to assist in the assessment of the informal aspects of present discovery practices in criminal cases. The term "discovery" refers to all of the formal and informal procedures or means available to the parties to facilitate the pre-trial preparation of their own cases, and to enable them to have access to evidence and information in the possession of their opponents.

The Criminal Procedure Project of the Law Reform Commission of Canada carried out a theoretical study of this subject and concluded that no true discovery system existed in Canadian law, and that discovery was mainly a matter left to the discretion of the parties. This suggested a need to investigate further the extent to which prosecutors nevertheless provide discovery in practice. The study also suggested that certain institutions, such as the preliminary inquiry, might be perceived and administered differently in different regions of the country. It was hoped that a questionnaire survey would assist in exposing and evaluating these disparities. Finally, the Criminal Procedure Project thought that it would be advisable to consult the profession and seek the opinions of as many lawyers, interested in the future of the criminal law, as possible, so that the widest range of opinions and suggestions for reform could be considered by the Commission.

2. Methodology

(a) *Form of the Questionnaires*

The two questionnaires, although similar in form, differed somewhat depending on whether they were intended for prosecutors or defence counsel. After several revisions, the questionnaires were sent to approximately twenty practitioners throughout the country for criticism. This approach helped to eliminate certain ambiguities and repetitions and to give the questionnaires a satisfactory form from the legal research point of view. Correction work was then undertaken, in concert with the research staff of the Data Center of the University of Ottawa, in order to ensure that the answers given could be easily analyzed by computer.

There were certain disadvantages in using a questionnaire distributed in thousands of copies. Concise and precise language had to be used in framing the questions, sometimes sacrificing shade and distinction of expression. This requirement may have made the task of the recipients, requested to describe their "usual practices," more difficult. However, it was explained in the letter of introduction that recipients could clarify or elaborate their answers in a space provided for this

purpose at the end of the questionnaire. Many made use of this space to point out that certain answers were not as categorical as they seemed, and often to make general comments on the subject of discovery. On the other hand, there were a number of advantages to using questionnaires rather than interviews. This method permitted consultation with a much larger number of lawyers throughout the country. It also made possible a degree of communication with lawyers who are not necessarily "well known" practitioners in the criminal field, but who nevertheless handle a considerable number of criminal cases. This method also preserved the anonymity of the respondents and provided them with an opportunity to express honest opinions.

(b) *Method of Distribution*

Once the decision was made to consult the lawyers in Canada interested in criminal law by the use of a mailed questionnaire, distribution to only a representative sample of prosecutors and defence lawyers was found to be unworkable because it was almost impossible to be certain that any particular questionnaire would, in fact, reach a lawyer with an interest in criminal practice. Instead, an attempt was made to first identify all lawyers who might be interested or active in criminal practice, and then to mail a questionnaire to every person so identified. This task presented many problems, especially with regard to the identification of defence counsel. The best method might have been to send a copy of the questionnaire to every lawyer registered with the Law Society of each Province; however, in addition to the prohibitive cost involved, this method of distribution presented a serious disadvantage in that a considerable number of lawyers with no experience or interest in criminal law would have received the questionnaire.

It was finally decided to contact the legal aid services in the various Provinces. This permitted identification of lawyers in each Province who had indicated an interest in the practice of criminal law. The lists which were provided varied substantially in comprehensiveness and completeness, and in order to complete the lists received from some Provinces lawyers active in professional organizations related to criminal practice were also consulted.

In Montreal, certain additional problems arose since the Legal Aid Commission had instituted permanent legal departments, resembling public defender services, which were responsible for nearly all of the criminal cases eligible for the legal aid plan. The Defence Counsel Association in Montreal was also consulted but this Association was composed mainly of lawyers who practiced criminal law on a full time basis. The Legal Aid Commission of Quebec was also contacted and they forwarded a list of persons who had indicated an interest in the practice of criminal law. In Montreal, the names of all counsel who had represented defendants at the Court of Sessions of the Peace during the three months prior to the distribution of the questionnaires were also obtained. These somewhat simple methods permitted identification of the largest possible number of defence counsel in Quebec.

The general objective was to reach all lawyers practicing criminal law, even those who devoted only a small amount of time to it, as it seemed clear that these

rarely consulted lawyers would also be affected by present discovery practices, and would have many unique and useful comments to make. This objective was probably accomplished most effectively in Ontario. A questionnaire was sent to all lawyers registered on criminal case panels established by the Ontario Legal Aid Plan. It appears, however, that a large number of these lawyers never actually engage in criminal practice.

Less difficulty was encountered in attempting to consult with prosecutors. Current lists of full and part-time prosecutors were obtained from each Provincial, Federal, or Municipal government department concerned and questionnaires were sent to each prosecutor listed.

Because of the different methods of identification and distribution used in the various Provinces, it is more difficult to compare the percentage of answers obtained from the different Provinces, particularly from defence counsel. After distribution of the questionnaires, advertisements were placed in various legal publications, inviting lawyers who had not been reached to contact the Law Reform Commission in the event they desired to be consulted, but the response to these advertisements was negligible. On the whole, it seems that the number of lawyers who practice in criminal cases, including those who practice only occasionally, were over-estimated. Many questionnaires were returned unanswered with the comment that despite the fact that the recipient's name was on a criminal legal aid list, he in fact did not have any experience in criminal cases.

The following table indicates the distribution by Province of the questionnaires sent to defence counsel and prosecutors:

	Defence	Prosecution	Federal Prosecutors	Total
British Columbia	383	209	15	607
Alberta	220	30	4	254
Saskatchewan	152	33	—	185
Manitoba	241	27	6	274
Ontario	3370	142	10	3522
Quebec	519	115	8	642
Nova Scotia	367	25	1	393
New Brunswick	175	17	1	193
Prince Edward Island	32	12	—	44
Newfoundland	98	4	—	102
Yukon	13	—		14
Northwest Territories	9	—	3	12
Total	5579	614	49	6242

All of the questionnaires distributed in Quebec were in French. The English version was used in the other Provinces. A total of 201 questionnaires were completed and returned by prosecutors. This represented approximately 30% of

those who had been sent the questionnaire. A total of 805 completed questionnaires were returned by defence counsel. This was approximately 15% of the number sent.

On the whole, over one thousand Canadian lawyers interested in the practice of criminal law completed and returned the questionnaire. Many of the responses proved to be most interesting, and in many respects unexpected.

CHAPTER I – Pre-Trial Discovery and the Prosecutor

Of the 666 prosecutors consulted, 201 answered the questionnaire. Of these 201 questionnaires returned, the profile of the average prosecutor emerged as follows: He was under 40 years of age, and was admitted to the Bar of his Province after 1960. He had been employed on a full time basis for over one year by the provincial government and resided in British Columbia, Ontario or Quebec. He was involved mainly in Criminal Code offences and prosecuted mainly in Magistrates' or Provincial Court. He usually spent only half of his time in argument with respect to the merits of contested cases. Finally, the average prosecutor, at some point in his career, had acted as a defence counsel.

While this typical portrait emerged as representative of 60% of the responses to the survey, it is impossible, from the responses received, to define the typical practice in matters of pre-trial disclosure. For example, when referring to the practice before magistrates (the practice of the typical prosecutor) it becomes apparent that the nature of this practice itself escapes systematic description. For example, with respect to question 11(a): "When, prior to trial, do you usually obtain possession of the complete file in the trials you are to prosecute? " the answers were as follows: (in percentages of the total responses to each question)

	Magistrate Summary Offences	Magistrate Indictable Offences
Day of trial	21.1	14.3
1 to 3 days before trial	23.7	19.0
3 days to 1 week before trial	19.1	21.7
8 days to 2 weeks before trial	13.9	21.2
Over 2 weeks before trial	22.2	23.8

Furthermore, those prosecutors who practice mainly before magistrates indicated that the fact the file is received only on the day of trial prevents them from disclosing certain information to the defence that otherwise would be disclosed. If they were to receive the file 1 or 2 days prior to the trial, this obstacle could disappear. Regarding the cases heard before judge alone, the prosecutors indicated that they would have to obtain possession of the file at least 3 days before the trial and, regarding the cases heard before judge and jury, over one week before the trial, in order to be able to disclose certain material or information to the defence[1]. Moreover, it is clear that even when time permits, prosecutors

[1] This inference is based on the comparison between the answers to questions II(A) and II(B).

nevertheless occasionally exercise their absolute power of discretion and refuse to disclose certain information to the defence. How is this power exercised? By virtue of what criteria? What are its results?

1. National Results with respect to the Exercise of Prosecutorial Discretion

It is difficult to explain certain results of the survey and the purpose of this study is more to present than to explain them. For example, during a previous writing of the questionnaire intended for prosecutors, the first two questions of Part II were combined. The question at that time read as follows: "Indicate your usual pre-trial disclosure practices with respect to each item listed below: 1. Names and addresses of civilian witnesses you intend to call at trial." Before proceeding with the general distribution of the questionnaire, it was submitted to several prosecutors and defence counsel for criticism in an attempt to eliminate ambiguities, repetitions and faulty drafting. One prosecutor unexpectedly objected to the formulation of this question, stating that it was double-barrelled, and consequently could not be answered properly. He said that his usual practice was to disclose the names of his witnesses to the defence, but never their addresses. "On the one hand," he said, "I do not intend to take the defence by surprise at trial by calling witnesses it knows nothing about, but on the other hand, I do not intend to permit the defence to contact my witnesses and harass them uselessly before trial, let alone risk intimidation if the accused himself approaches them." The form of the question was changed, and the results were that 20% of prosecutors indicated that they followed the usual practice of disclosing the names but not the addresses of their witnesses.

It cannot be concluded with certainty that all prosecutors act for the same reasons, although it is difficult to think of an explanation other than the one expressed, which would reasonably justify such an attitude. The results thus show that in cases where a preliminary inquiry is not available close to 60% of the prosecutors answering the questionnaire are willing to disclose to the defence the names of their witnesses before trial, but only 40% go as far as to provide the defence with a full opportunity to positively identify these witnesses and, if necessary, to communicate with them. If the defence is not able to interview the crown witnesses before the trial, it risks being taken by surprise at the trial if not by the identity, at least by the testimony of these persons, unless the defence attorney can otherwise obtain prior knowledge of their version of the facts. In this regard, it may be also observed that although 60% of the prosecutors indicated they usually disclose the names of their witnesses, 70% indicated disclosure to the defence of the substance or summary of the testimony expected to be given by these witnesses. Thus, the peculiar result is reached that 70% of the prosecutors answering indicated that they disclose to the defence, on request, the substance of the testimony of their witnesses, 60% reported disclosing the names of their witnesses, 40% the addresses of their witnesses, 37% their criminal record, 30% their signed statements, and, finally, 16% other information with respect to the character of witnesses.

The answers to Part II of the questionnaire permit similar curious conclusions to be drawn; although most prosecutors indicated that they usually disclose the specific evidence which they intend to use at trial, only a minority reported that they disclose the same information if it is not intended to be used as evidence; 67%

indicated that they usually inform the defence of the circumstances surrounding the identification of the accused; but only 36% reported disclosing the identity of the persons who had an opportunity to, but failed to identify the accused; 72% reported that they disclose the objects or documents obtained by warrant from the accused, but only 52% indicated that they provide discovery of search warrants themselves.

It is not intended here to find a rational explanation for this state of affairs. There may be an individual, regional, or even a provincial explanation in those Provinces where policies are conceived and directives given with regard to the practices to be followed. Results at the national level tend to show the broad average norm of conduct. Thus, certain prosecutors within a Province, town, or age group, who act in accordance with the practices usually followed by the limited and more homogenous group with which they associate, may be surprised to find that their way of acting or thinking is that of a minority.

With respect to the question of their usual pre-trial disclosure practices, an average of approximately 30% of prosecutors answered that they had no fixed practice; that is, the practice is based on the circumstances of each specific case. However, before studying more closely this decision making process based on specific cases, it is necessary to first examine the 70% of cases where a fixed practice is usually followed.

The ratio of 70-30 between cases where the prosecutor follows a fixed practice and cases where he decides according to the circumstances of each specific case may seem predictable from the point of view of the person making the decision, but the situation is somewhat different from the point of view of the observer. Indeed, in the 70% of cases where the prosecutor usually follows a fixed practice the question still remains whether he will or will not disclose the requested information. In such cases, the decision is based less on the various circumstances of the case and more on the nature of the information requested by the defence. Broadly speaking, it may be stated that in Canada prosecutors generally disclose certain information and generally refuse to disclose other information. The most difficult situation to define is that of the 70% of prosecutors who follow a fixed practice which is divided equally between the categories "disclose" and "do not disclose."

(a) *Usual Practices with respect to the Disclosure of Specific Matters*

If the 30% of cases where no fixed practice is usually followed are eliminated for the moment, it is possible to describe Canadian practice by dividing it into two broad categories: (a) majority practices (position with respect to "disclose" or "do not disclose" adopted by over 75% of those who stated that they usually follow a fixed practice), (b) non-uniform practices (positions, divided roughly equally between "disclose" and "do not disclose," of those who stated that they normally follow a fixed practice).

(i) Majority Practices

Generally, in Canada there is a net tendency on the part of prosecutors with a fixed practice to make pre-trial disclosure of the following information to the

defence: the names of civilian witnesses which the prosecution intends to call at trial; the identity of police officers and expert witnesses which it will also call at trial; the existence and nature of "similar fact" evidence which the prosecution intends to use at trial; the criminal record of the accused; signed, unsigned or oral statements of the accused whether or not the prosecution intends to introduce them as evidence at trial; signed statements of co-accused to be used as evidence; the summary of testimony expected to be given by witnesses which the prosecution intends to call at trial; search warrants; objects or documents obtained from the accused with or without warrant; photographs which will be used at trial; the circumstances surrounding the identification, arrest and taking of statements from the accused; the theory of the case for the prosecution; information relating to circumstantial evidence; and the drawings, plans, graphs and diagrams which will be used at trial.

In a similar proportion, there is a net tendency on the part of prosecutors with a fixed practice to not disclose to the defence before trial: the confidential brief prepared for the prosecutor by the police ("dope sheet"); police note-book entries; as well as the identity and activities of undercover police officers and police informants.

Of course, these practices are not followed unanimously, but they are nevertheless stated to be the usual practices adopted by the majority of prosecutors who indicate a fixed practice.

(ii) Non-uniform Practices

On the other hand, there was a range of information which, although subject to a fixed disclosure practice by 70% of prosecutors was more or less divided equally between the two options offered: "disclose" and "do not disclose."

This category, characterized by a lack of uniformity, includes the following items: addresses of civilian witnesses which the prosecution intends to call at trial; names and addresses of witnesses it does not intend to call at trial; the identity of police officers and expert witnesses who will not be called at trial; the identity of persons who had an opportunity to, but failed to identify the accused; the criminal record and other material relevant to the character of witnesses which the prosecution intends to call at trial; statements of co-accused which will not be used at trial; signed statements and summary of the testimony of witnesses whom the prosecution does not intend to call at trial; objects and documents obtained by warrant or without warrant from persons other than the accused; photographs taken in connection with the case which the prosecution does not intend to use at trial; the existence and nature of illegally obtained evidence or evidence obtained by electronic apparatus[2]; material to be used in rebuttal; results of legal research and, in general, information of any sort that does not assist the prosecution but that may be helpful to the defence.

[2] Under the *Protection of Privacy Act*, it is now mandatory to disclose such evidence, at least when it is to be used at trial (Section 178.16(4) (a) and (b) of Bill C-176).

(b) *Methods of Disclosure*

A lack of uniformity among the usual practices of prosecutors is also apparent with respect to the method of disclosure.

30.9% of the prosecutors who indicated that they disclose information to the defence as their usual practice revealed that "disclosure" meant, in the case of written material, oral summaries only, 26% meant a visual inspection of the material by the defence counsel, and 43.1% meant a full inspection including even a copy of the material. In the case of physical evidence, 24.2% referred to oral description only, 40.1% to visual inspection, and 35.1% to full inspection including release for testing if requested.

(c) *Factors Affecting the Prosecutor's Decision to Disclose or not to Disclose Information*

The nature of the information requested is obviously the major factor affecting the decisions of prosecutors to disclose or not to disclose information to the defence, but it is not the only factor. An average of 30% of prosecutors indicated that they had no fixed practice, thus implying that often the particular circumstances surrounding a case would dictate their decisions.

In his daily practice, a defence counsel can reasonably expect, upon request, to obtain discovery of his client's criminal record (91% of prosecutors answering indicated that they usually disclose this information to the defence). On the other hand, the chances are slight that he will obtain information relating to the identity and activities of police informants connected with the case (70.1% of prosecutors usually do not disclose this information). On the other hand, if he attempts to inquire as to the existence and nature of illegally obtained evidence, his chances of obtaining such information may depend on one or more of a multitude of factors (50.2% of prosecutors have no fixed practice with respect to the disclosure of such information).

In decreasing importance, the following factors were acknowledged as affecting the prosecutor's decision to disclose information to the defence: reputation of counsel (62.4% of prosecutors); prosecutor is engaged in plea discussions with defence counsel (56.5%); opinion of prosecutor's superior or colleagues (44.7%); defence was not able to get the needed information at the preliminary inquiry (42.1%); prosecutor's personal relationship with defence counsel (39.6%); the accused is representing himself without counsel (39.2%); nature of the offence (37.9%); the case for the prosecution is strong (33.8%); character and background of the accused (32.3%); defence can get the needed information at the preliminary inquiry (30.3%); the case for the prosecution is weak (23.4%); the accused is in custody pending trial (21%); opinion of police officer in charge of investigation (16.9%); defence can obtain the material by court order at trial (16.7%); and finally, the financial resources of the accused (7.7%).

Among the factors which seem to greatly affect the prosecutor's decision not to disclose information to the defence, the reputation of counsel again takes first

place (60.4%); however, the second most commonly considered factor in such cases is the opinion of the prosecutor's superior or colleagues (45.9%), then, in decreasing importance, the prosecutors indicated that they consider the nature of the offence (36.2%); the character and background of the accused (34.4%); the fact that they are engaged in plea discussions with defence counsel (34.1%); their personal relationship with defence counsel (33.5%); the fact that the defence can get the needed information at the preliminary inquiry (30.6%); the fact that the accused is representing himself without counsel (28.4%); the opinion of the police officer in charge of the investigation (26.6%); the fact that the defence was not able to get the needed information at the preliminary inquiry (21.4%); the fact that the case for the prosecution is weak (20.9%); the fact that the Criminal Code does not provide a preliminary inquiry in the case (16.7%); the fact that the case for the prosecution is strong (14%); the fact that defence can obtain the needed information by court order at trial (12.4%); the fact that the accused is in custody pending trial (11.2%); and finally, the financial resources of the accused (3.2%).

The only factors which most often seem to have a more negative than positive influence on the prosecutor are the following: the opinion of the police officer in charge of the investigation (26.6% of prosecutors indicated that this factor greatly affects their decision not to disclose information to the defence, and 16.9% of them stated that it influences their decision to disclose information); the character and background of the accused (34.4% negative and 32.3% positive), and finally, the opinion of superior or colleagues (45.9% negative and 44.7% positive).

2. Regional Variations

Comparing the various regions of Canada with the national norm defined by all the answers given to Part II of the questionnaire, it is possible to determine whether each region follows or differs from this national norm. We will, therefore, compare the various Provinces with this norm, then the rural areas and urban areas separately, and finally three large urban centers, Montreal, Toronto and Vancouver.

(a) *The Provinces*

The distribution of answers from most Provinces reflects the national norm quite closely. While Quebec differs in almost all respects from the norm, other Provinces also show interesting peculiarities which deserve closer examination.

(i) Prince Edward Island

Only two prosecutors from Prince Edward Island answered the questionnaire, thus projections are risky. However, three interesting observations may be made. First, there seem to be a small number of usual practices which are clearly contradictory; that is, where the usual practice of one prosecutor is to disclose the information and the usual practice of the other is not to disclose the same information. This only occurs with respect to the following items: material relevant to the character of witnesses, other than the criminal record, that the prosecution intends to call at trial; search warrants; confidential briefs prepared for the prosecutor by the police ("dope sheet"); and the existence and nature of evidence which the prosecutor intends to use by way of rebuttal. There were also a very low

number of "no fixed practice" answers. Finally, there was no specific material or information which both prosecutors were agreed was usually not disclosed to the defence before trial.

(ii) Nova Scotia

Seven prosecutors from Nova Scotia answered the questionnaire, but only 6 completed Part II. Their situation seems to resemble quite closely the average national practice, with perhaps a greater frequency of "no fixed practice" responses. Answers to the item, "results of legal research conducted by the prosecution" were equally distributed: 3 indicated that they usually disclose this information, and 3 indicated they do not. However, the general distribution of responses was usually that 2 disclose, 2 do not disclose, and 2 have no fixed practice.

(iii) New Brunswick

Five prosecutors from New Brunswick answered the questionnaire. In spite of this small number of responses, an appreciable divergence from average Canadian practice was exhibited. Of all items, the 5 prosecutors indicated unanimous agreement on the pre-trial disclosure to the defence of only two: the criminal record of the accused (information disclosed by 91% of Canadian prosecutors), and photographs which the prosecution intends to use at trial (information disclosed by 86.6% of Canadian prosecutors). On the other hand, the 5 prosecutors indicated unanimous agreement that one piece of information is not disclosed, police note-book entries related to the case, information which 62.7% of Canadian prosecutors usually do not disclose.

A divergence from the national norm was revealed with respect to the following items: 3 out of 5 prosecutors from New Brunswick indicated usual disclosure of the names of their witnesses to the defence before trial and only one indicated disclosure as well of the addresses of these witnesses. Three out of 5 indicated they do not usually disclose the criminal record or other material relevant to the character of crown witnesses (in relation to 26.9% and 33.8% at the national level). Finally, with respect to the general item, "information of any sort that does not assist the prosecution, but that may be helpful to the defence," one prosecutor indicated a usual practice of disclosure of this information, one answered negatively, and 3 indicated no fixed practice. This may be compared with the national figures, which were: 41.8% disclose, 10% do not, and 46.3% have no fixed practice.

(iv) Quebec

A total of 32 prosecutors from Quebec answered the questionnaire. From these 32 responses it is apparent that Quebec is the only Province where the usual practices followed by prosecutors are in complete opposition with average practices on the national level. Practices in Quebec are consistently more restrictive than average Canadian practices in matters of pre-trial disclosure. It should first be noted that there is only a small difference between Quebec and the entire country with respect to the percentage of prosecutors who have "no fixed practice." As already discussed, an average of approximately 30% of Canadian prosecutors belonged to that category. The Quebec average is the same. However, the usual pre-trial

disclosure practices of "fixed practice" prosecutors are quite different. The most outstanding examples of these differences, as revealed in the responses of Quebec prosecutors, are set out below.

In Canada, 59.9% of prosecutors disclose the names of their witnesses to the defence, and 39.8% also disclose their addresses. In Quebec, 9 out of 22 (28%) disclose the names of their witnesses and only 4 (12.5%) also disclose their addresses.

In Canada, 36.3% reveal to the defence the identity of persons who had an opportunity but failed to identify the accused (for example, persons present when the offence was committed, or persons called to identify the accused at a line-up). In Quebec, 2 out of 32 (6.2%) usually reveal this information.

In Canada, 61.7% usually disclose to the defence the signed statements of the accused which the prosecution does not intend to use at trial. In Quebec, 7 out of 32 (21.7%) usually disclose such information to the defence.

In Canada, approximately 62% usually do not disclose to the defence police note-book entries or the confidential briefs prepared for the prosecutor by the police ("dope sheet"). In Quebec, 26 out of 32 (81%) usually follow this practice.

In Canada, 10% of prosecutors usually do not disclose to the defence information of any sort that does not assist the prosecution but that may be helpful to the defence. In Quebec, 10 out of 32 (31%) usually do not disclose this type of information.

(v) Ontario

Fifty of the 201 prosecutors who answered the questionnaire practiced in Ontario. Ontario practices resemble the national norm quite closely. However, there was a slight decrease of approximately 3 or 4% in the proportion of prosecutors with no fixed practice. Consequently, Ontario practices seem slightly more liberal than national average practices, or put another way, there is a slightly higher proportion of prosecutors who usually disclose certain information. For example, in Canada, 36.3% of prosecutors indicated that they usually reveal the identity of persons who failed to identify the accused. In Ontario, 26 out of 50 (52%) indicated that they reveal this information to the defence. In Canada, 19.9% reported disclosing to the defence the signed statements of witnesses which the prosecution does not intend to call at trial. In Ontario, the proportion was 15 out of 50 (30%). In Canada, 69.7% indicated they provide the defence with the summary or substance of testimony expected to be given by witnesses that the prosecution intends to call at trial. In Ontario, 41 out of 50 (82%) reported providing this information to the defence. In Canada, 16.4% indicated they disclose to the defence the confidential briefs prepared for the prosecutor by the police ("dope sheet"). In Ontario, 17 out of 50 (34%) reported revealing these documents to the defence before trial. Also, it may be observed that there were 5 items with respect to which no respondent from Ontario reported a usual practice of non-disclosure.

(vi) Manitoba

Seventeen responses were received from prosecutors in Manitoba. Here again, the responses are closely similar to average national practices. As in Ontario, the situation in Manitoba seems more permissive or "liberal" than that of the entire country in matters of pre-trial disclosure. However, as opposed to the Ontario situation, this "liberalism" is not indicated by a greater proportion (in relation to the national norm) of prosecutors who usually disclose certain information, but by a slight decrease under the heading "do not disclose" and an increase under the heading "no fixed practice." Consequently, this apparent "liberalism," if examined more closely, suggests only that Manitoba seems to be "less negative" than the entire country in certain cases.

In Canada, for example, 13.4% of prosecutors indicated a usual practice of non-disclosure to the defence of the identity of expert witnesses that they do not intend to call at trial. In Manitoba, there were no responses indicating such non-disclosure as a usual practice. Although 6 prosecutors stated that they usually reveal this information, 10 prosecutors indicated no fixed practice. In Canada, 13.4% do not disclose the signed statements of the accused which they do not intend to use at trial. Again, no responses from Manitoba indicated a usual practice of non-disclosure with respect to this material: 12 indicated they disclose this information, and 4 indicated no fixed practice. With regard to the statements made by the accused which the prosecution does not intend to use at trial, 15.9% of Canadian prosecutors indicated that they usually do not disclose this information to the defence, but again, no such practice was indicated in Manitoba: 10 indicated that they usually provide the information and 6 indicated no fixed practice.

However, with respect to statements of witnesses, Manitoba becomes less "liberal" or permissive than the entire country. In Canada, 30.8% of prosecutors provide the defence with signed statements of crown witnesses. In Manitoba, only 3 out of 17 (approximately 17.6%) indicated that they provide this information before trial. In Canada, 19.9% reveal prior to trial, the signed statements of witnesses they do not intend to call at trial. In Manitoba, 2 out of 17 (11.7%) disclose this information. While 32.3% of Canadian prosecutors provide a summary of such statements, only 4 out of 17 (23.5%) do so in Manitoba.

(vii) Saskatchewan

Sixteen prosecutors from Saskatchewan answered the questionnaire. Here again, there is no noticeable deviation from the national norm. As in Manitoba, there are few entries under the heading "do not disclose." The answers are generally divided between "disclose" and "no fixed practice." However, this distribution is constant and no change of attitude was observed with respect to statements of witnesses, as in Manitoba.

(viii) Alberta

The 13 responses from Alberta generally follow the national trend. As opposed to the situation in Manitoba and Saskatchewan, the "do not disclose" answer was checked quite frequently.

(ix) British Columbia

A total of 57 questionnaires were completed by prosecutors from British Columbia. Once again, the distribution of these responses is similar to that of the national norm. However, British Columbia appears slightly more "liberal" than the entire country. One remarkable fact is that in the 57 responses the heading "do not disclose" was rarely checked, whereas in Quebec, for example, in each of the 32 responses, there was always at least one entry under this heading. This "liberalism" of prosecutors from British Columbia is sometimes quite pronounced. For example, while 79.6% of Canadian prosecutors usually disclose before trial the identity of police officers they intend to call at trial, 52 out of 57 (91%) of prosecutors from British Columbia do so.

(x) Northwest Territories and Yukon

Two responses were received from prosecutors practicing in the Northwest Territories and in the Yukon. Rarely in straight opposition with the national norm, the answers of these 2 prosecutors were however, very often divided between the usual practice of disclosing the material listed to the defence before trial and no fixed practice. They both agreed that information was not disclosed as a usual practice in only two cases: police informants and confidential briefs prepared for the prosecutor by the police ("dope sheet").

(b) *Rural Areas and Urban Areas*

Contrary to popular belief, it appears that there is little difference between the manner in which prosecutors practicing in rural areas and those in urban centers exercise discretion in matters of pre-trial disclosure. For the purpose of this study, all the municipalities listed in the first part of the questionnaire were considered as urban centers. Rural areas, as defined in the questionnaire, consequently include smaller urban centers. In fact, all prosecutors who indicated that they practiced in regions or a Province other than those specifically listed in the first part were considered as working in rural areas. Out of a total of 201 prosecutors who completed the questionnaire, 92 indicated that they practice in urban centers and 109, in areas defined as "rural." Upon close examination of the answers to each question, there does not seem to be a significant difference between the two groups, except for a slight decrease in the proportion of answers from rural areas under the heading "no fixed practice." However, this decrease in number does not result in a greater number of answers under either the heading "disclose" or "do not disclose;" instead, it is divided more or less equally between the two so that it becomes impossible to determine any single significant characteristic of the pre-trial disclosure practice in rural areas that is opposed to that in urban areas.

(c) *Three Large Urban Centers: Montreal, Toronto, Vancouver*

A comparison of the answers given by prosecutors from these three cities suggests the conclusion that a person accused of a criminal offence under the Criminal Code of Canada will probably receive very different treatment depending on whether he is prosecuted in Montreal, Toronto or Vancouver. His chances of

obtaining disclosure of evidence which the prosecution may use against him vary considerably from one city to another. For example, while most prosecutors in Vancouver usually disclose to the defence the names of their witnesses before trial, approximately half reported doing so in Toronto and only one third in Montreal. The chances of the accused obtaining the addresses of these witnesses are greatly reduced in Vancouver as well as in Toronto. No Montreal prosecutor indicated a usual practice of disclosure of this information, and 3 out of 9 indicated no fixed practice in this regard. In addition to the addresses of witnesses, no prosecutor in Montreal indicated a usual practice of disclosure to the defence prior to trial of information other than criminal records with respect to character of crown witnesses, of signed statements of witnesses not intended to be called at trial, of confidential briefs prepared for the prosecutor by the police, of police note-book entries, of the identity of police informants, or of the nature of evidence intended to be used by way of rebuttal.

Furthermore, while answers from Toronto or Vancouver were very often allocated to either the headings "disclose" or "no fixed practice," in Montreal there was always at least one prosecutor who indicated a usual practice of not disclosing certain information. The only exception was with respect to the identity of police witnesses to be called at trial. Seven indicated a usual practice of disclosure and 2 indicated no fixed practice. Also, in Vancouver, all of the prosecutors who answered the questionnaire indicated a usual practice of providing the defence with the summary or substance of testimony expected to be given by witnesses intended to be called at trial. In Toronto, the proportion was 17 out of 21, but in Montreal it was only 2 out of 9.

Finally, in spite of the relative "liberalism" of prosecutors practicing in Vancouver, the following significant situation was revealed. In answer to the question whether they usually disclose, prior to trial, information of any sort that does not assist the prosecution but that may be helpful to the defence, the answers given by the prosecutors of these three cities were as follows:

Montreal:	1 disclose 4 do not disclose 4 no fixed practice
Toronto:	11 disclose 3 do not disclose 6 no fixed practice
Vancouver:	7 disclose 2 do not disclose 7 no fixed practice

Furthermore, if these differences are examined more closely, it becomes apparent that the method of disclosure increases their impact even further.

Indeed, in Part II(B) of the questionnaire, the question was asked: "With respect to those items in Part II(A) that you have indicated you usually disclose, indicate your usual method of disclosure." The answers from these three cities were as follows:

Written Material	Oral Summaries Only	Visual Inspection	Full Inspection and Copy
Montreal	3	5	1
Toronto	4	5	10
Vancouver	6	2	6

Physical Evidence	Oral Description	Visual Inspection	Full Inspection Including Release for Testing, if Requested
Montreal	2	4	1
Toronto	4	6	10
Vancouver	3	6	6

Without covering the substance of later chapters, some differences of opinion among the prosecutors of these three cities were revealed which may explain this situation. In Part VII of the questionnaire, question number 5 was: "Are you satisfied with the present range of pre-trial discovery available to the defence *by law*, in cases where a preliminary inquiry is not available under the present Criminal Code?" In Montreal, 8 prosecutors were satisfied and one was not; in Toronto, 6 were satisfied and 15 were not, and in Vancouver, 5 were satisfied and 11 were not. One possible conclusion is that where prosecutors are satisfied with the discovery presently available in law, they are less likely to informally disclose material that may assist the defence.

Finally, with respect to question number 3 of Part VII: "Does the surprise element usually play an important part in your trial strategy?", in Montreal, 2 answered yes and 6 no; in Toronto and Vancouver, all of the prosecutors answered no.

3. Variations According to Professional Data

The usual pre-trial disclosure practices of prosecutors sometimes change substantially from one region to another, but they also vary with different groups or different categories of prosecutors: federal as opposed to provincial prosecutors, working full time as opposed to part time, those practicing mainly before judge and jury rather than before magistrates, and so on. These differences

rarely create great contrasts between the different groups of prosecutors. They nevertheless permit us to identify groups which, by their more liberal or more restrictive practices, form a minority or majority in relation to the national average.

For example, the results were already noted that 12.4% of Canadian prosecutors do not usually disclose to the defence prior to trial the names of civilian witnesses that they intend to call at trial, and that this 12% minority probably includes more prosecutors from Quebec than elsewhere. An examination of other variables in the study, those representing personal and professional data, should make possible a more detailed definition of the composition of the majority and minority groups.

(a) *Length of Employment*

Question number 4 of the first part of the questionnaire divided prosecutors into three groups: Those practicing less than one year, those employed for one to five years, and those employed as prosecutors for over five years. Among the prosecutors who answered Part II of the questionnaire dealing with the disclosure of specific matters, 15 (7.5%) were employed as Crown prosecutor for less than one year, 82 (40.8%) from one to five years, and 100 (49.8%) for over five years.

It might have been tempting to combine the first two groups in order to compare equally those employed less than five years with those employed over five years. In this case, however, the differences between the two groups would practically disappear since the only important difference in usual pre-trial disclosure practices appears to exist between those prosecutors who have been employed less than one year and the rest. As might be expected, the highest proportion of answers under the heading "no fixed practice" were found among prosecutors employed less than one year. This is particularly true in the case of the pre-trial disclosure of evidence which the prosecution does not intend to use at trial. As an example, the four following tables may be compared:

LENGTH OF EMPLOYMENT

(a) Signed Statements of the Accused
You do not Intend to Use at Trial

	Disclose	Do Not Disclose	No Fixed Practice
Less than 1 year	7 46.7%	1 6.7%	6 40.0%
From 1 to 5 years	51 62.2%	14 17.1%	16 19.5%
More than 5 years	64 64.0%	11 11.0%	23 23.0%

(b) Substance or Summary of Testimony Expected to be Given by Witnesses You Intend to Call at Trial

	Disclose	Do Not Disclose	No Fixed Practice
Less than 1 year	8 53.3%	1 6.7%	5 33.3%
From 1 to 5 years	60 73.2%	11 13.4%	10 12.2%
More than 5 years	69 69.0%	13 13.0%	16 16.0%

(c) Existence and Nature of Evidence to be Used by way of Rebuttal

	Disclose	Do Not Disclose	No Fixed Practice
Less than 1 year	1 6.7%	3 20.0%	10 66.7%
From 1 to 5 years	20 24.4%	32 39.0%	28 34.1%
More than 5 years	13 13.0%	46 46.0%	40 40.0%

(d) Information of any Sort that does not Assist the Prosecution that may be Helpful to the Defence

	Disclose	Do Not Disclose	No Fixed Practice
Less than 1 year	9 60.0%	1 6.7%	5 33.3%
From 1 to 5 years	36 43.9%	11 13.4%	33 40.2%
More than 5 years	37 37.0%	8 8.0%	53 53.0%

Table (a) reveals a smiliar practice among all prosecutors employed for over one year: With respect to the pre-trial disclosure of signed statements of the accused which they do not intend to use at trial, approximately 63% indicated that they usually disclose this information, approximately 15% do not and close to 20% have no fixed practice. Among prosecutors employed less than one year, 46.7% indicated that they usually disclose this information, only 6.7% do not, but 40% have no fixed practice. Tables (b) and (c) also reveal a relatively high proportion of "no fixed practice" answers among prosecutors employed less than one year with respect to the following two specific matters: Summary of testimony expected to be given by witnesses which the prosecution intends to call at trial, and the existence and nature of evidence to be used by way of rebuttal.

However, table (d), illustrating the distribution of answers to the general question: "Do you usually disclose to the defence prior to trial . . . information of any sort that does not assist the prosecution but that may be helpful to the defence? " shows a reduction in the proportion of "no fixed practice" answers among prosecutors employed less than one year, and thus shows their "liberal" character. "Liberalism" with respect to this item seems to decline with seniority since 60% of prosecutors employed less than one year, 43.9% employed from one to five years, and 37% employed for more than five years indicated that they reveal these matters to the defence.

(b) *Employer*

Of the 191 prosecutors who answered Part II of the questionnaire, 138 (68.7%) were employed by a provincial government, 22 (10.9%) by the federal government, 8 (4.0%) by a municipal government, 23 (11.4%) were employed by more than one level of government.

Because of their substantial majority, it is obvious that provincial prosecutors have the greatest effect on behaviour and their usual practices are close to the national norm. There are generally no differences in attitude between these groups, but with respect to almost each question, the number of federal prosecutors who indicated a usual practice of disclosure of the information requested was proportionally slightly higher than in the case of other groups. This does not apply however to the question regarding police informants. Of 22 federal prosecutors, not one indicated a usual practice of disclosure of this information to the defence, 19 indicated a usual practice of non-disclosure, and 3 indicated no fixed practice. With respect to all other information, including information relating to the activities of undercover police officers, federal prosecutors appear to adopt a more "liberal" disclosure position than the prosecutors employed by the other levels of government.

(c) *Full Time or Part Time Employment*

One hundred and fifteen (59.2%) of the prosecutors who answered the questionnaire were employed on a full time basis. Sixty seven (33.3%) of them were acting as part time prosecutors; among the prosecutors employed on a part time basis, 13 (6.5%) had at some point acted as full time prosecutors for more

than a year. There are no great differences in practice between these two groups; more part time prosecutors indicated a usual practice of disclosure to the defence of evidence intended to be used at trial, except for certain "police oriented" material or information, such as: confidential briefs prepared for the prosecutor by the police, evidence illegally obtained or obtained by electronic apparatus, and so on. Also, it seems that fewer part time prosecutors disclose to the defence evidence or information which is not intended to be used at trial, such as names of civilian witnesses, police officers or experts, statements of witnesses or of the accused. However, with respect to the last question, dealing with information that does not assist the prosecution but that may be helpful to the defence, the answers are equally divided between "disclose" and "do not disclose."

(d) *Types of Offences*

One hundred and sixty three prosecutors (81.1%) indicated they were mostly involved in the prosecution of Criminal Code offences; 22 (10.9%), the prosecution of other federal criminal offences, and 9 (4.5%), provincial offences. A comparison has already been made between the first two groups since the first group is composed of prosecutors employed by a provincial government and the second, of federal prosecutors. It is practically impossible to establish distinctions between provincial prosecutors enforcing the Criminal Code and provincial prosecutors involved in the prosecution of provincial offences because of the small number of prosecutors which make up the last group.

(e) *Types of Tribunals*

One hundred and fifty prosecutors (74.6%) indicated that they prosecute mainly before magistrates; 17 of them (8.5%) practice mainly before judge alone; 16 (8%) practice before judge and jury in most cases, and 9 (4.5%) before appeal courts. Here again, it is difficult to compare the four groups because of the unbalanced distribution of answers. However, disclosure practices seem to be slightly more "liberal" in cases prosecuted before judge and jury than before the other tribunals.

With regard to material relevant to the character of witnesses, or the criminal record of witnesses, disclosure practices seem to be more restrictive among prosecutors practicing mostly before judge and jury than among prosecutors in other categories. An average of 40.8% of prosecutors indicated that they do not usually disclose to the defence before trial the signed statements of witnesses they intend to call at trial. This average increases to 70% among prosecutors practicing mainly before judge alone. This might be due to the availability of a preliminary inquiry in the case of offences prosecuted before judge alone, but this does not seem to be a plausible explanation since it is not possible to draw a similar curve with respect to the answers of prosecutors appearing mainly before judge and jury.

Furthermore, prosecutors before judge and jury indicated the highest proportion of "no fixed practice" answers with respect to the pre-trial disclosure of confidential briefs prepared for the prosecutor by the police and of police note-book entries.

(f) *Types of Proceedings*

Seventy one prosecutors (35.3%) were involved mainly in remands and guilty pleas; 12 (6%), in preliminary inquiries; 86 (42.8%), in contested cases; 12 (6%), in appeals, and finally, 10 (5%), in administration and supervision.

In spite of this unbalanced distribution, the comparison of these activities reveals a number of peculiarities: the percentage of persons who usually disclose information before trial gradually increases depending on the type of proceedings in which they are mainly involved. The most liberal practices are generally found in the following decreasing order: in the "administration and supervision" group; secondly, in the "appeals" group (although there was a high proportion of "no fixed practice" answers in this group); thirdly, in the "preliminary inquiries" group; then, in the "contested cases" group, and finally the most restrictive practices were generally found in the "remands and guilty pleas" group. There are exceptions of course; for example, the "administration and supervision" group becomes the least liberal with regard to the pre-trial disclosure to the defence of confidential briefs prepared for the prosecutor by the police, police note-book entries, and the identity and activities of undercover police officers and police informants. On the other hand, the "appeals" group is the least liberal with respect to the pre-trial disclosure of evidence obtained illegally or by electronic apparatus, the circumstances surrounding the arrest or identification of the accused, the theory of the case for the prosecution, and the nature of the evidence to be used by way of rebuttal. The distribution of answers to the last general question, dealing with information of any sort that does not assist the prosecution but that may be helpful to the defence, is approximately even in each group.

(g) *Experience as Defence Counsel*

One hundred and fifty two prosecutors who answered the questionnaire (75.6%) indicated that at some point in their careers they had acted as defence counsel, and 47 (23.4%) indicated that they did not have such experience. Comparing these two groups with the national norm, the 75% who had experience in defence work followed practices very similar to the norm, whereas the other group generally tended to follow more restrictive practices. However, this difference was only in the order of 10 to 15% and there is certainly no evidence of systematic opposition between these two groups.

4. Variations According to Personal Data

The "personal data" includes the age and various opinions expressed by the prosecutors in Part VII of the questionnaire. It was surprising to find such marked differences of opinion within a professional group. Prosecutors have divided opinions just as they follow different practices in the exercise of their power and discretion. With reference to certain critical subjects, these differences of opinion often appear as contradictions rather than simple disagreements. However, before examining the prosecutors' opinions on certain subjects, significant differences revealed, depending on age groups, will be examined.

(a) *Age Groups*

Of the 201 prosecutors who returned completed questionnaires, 45 (22.4%) were under 30 years of age; 76 (37.8%) were between 30 and 39 years of age; 53 (26.4%) were between 40 and 49 years of age, and 27 (13.4%) were over 50 years of age. There were no great differences in the usual practices followed by the persons within each of these age groups and each group identified easily with the national norm. However, a higher proportion of answers under the heading "disclose" were found among prosecutors 30 to 39 years of age than in the other groups; this proportion is not always very much higher, it is quite constant and, in only rare instances, is surpassed by the group 40 to 49 years of age.

(b) *Opinions*

(i) Does the surprise element usually play an important part in your trial strategy?

This question was asked of prosecutors in Part VII of the questionnaire and the answers were as follows: 10 (5%) answered yes; 188 (93.5%) no. Considering this distribution, it might be interesting to not only compare these two groups but to examine more closely the usual practices followed by the 10 prosecutors who consider the surprise element important in their trial strategy. These 10 prosecutors usually disclose to the defence prior to trial the criminal record of the accused as well as most of the information which the defence can in any event obtain through various alternative sources, in the same frequency as the other group. A small number of the group of 10 disclose what they would undoubtedly consider as very important in maintaining the surprise element, that is, the criminal record and other material relevant to the character of crown witnesses, statements of witnesses and of the accused which the prosecution does not intend to use at trial, statements signed by the accused, the circumstances surrounding the arrest, identification and taking of statements from the accused, the theory of the case for the prosecution, evidence to be used by way of rebuttal, results of legal research and, generally, information of any sort that does not assist the prosecution but that may be helpful to the defence.

(ii) Does the surprise element usually play an important part in the trial strategy of the defence?

To this question, 122 prosecutors (60.7%) answered yes, and 75 (37.3%) no. The differences of opinion on this matter do not seem to affect the prosecutors' decisions to disclose or not to disclose certain information to the defence before trial. The 122 prosecutors who feel that they may be surprised by the defence at trial do not, in spite of that, seem to adopt more restrictive practices than the others with respect to the pre-trial disclosure of their own evidence to the defence.

(iii) Are you satisfied with pre-trial discovery available to the defence by law in cases where there is no preliminary inquiry?

Ninety eight prosecutors (44.8%) indicated they were satisfied with the present state of the law in this regard. One hundred and six (52.7%) indicated dissatisfaction. Here, the difference in opinion seems to reflect important differences in practice, sometimes in the order of 25%. For example, 46.7% of those who are

satisfied with the present state of things usually disclose to the defence the names of their witnesses, and only 26.7% of this group also provide the addresses. On the other hand, 70.8% of those who indicated dissatisfaction answered that they disclose before trial the names of their witnesses, and 50.9% also provide the addresses; 27.8% of the "satisfied" group answered that they disclose the criminal record of their witnesses as opposed to 44.3% of the "dissatisfied" group; 77% of the "satisfied" group disclose prior to trial the signed statements of the accused which they intend to use at trial; 98.1% of the "dissatisfied" group do so; 66% of prosecutors satisfied with the present state of things answered that they usually disclose to the defence the unsigned or oral statements of the accused intended to be used as evidence; 98.1% of prosecutors dissatisfied with the present state of law reveal such information to the defence. Finally, 55.6% of the "satisfied" group provide summaries of the testimony of crown witnesses as opposed to 81.1% of the "dissatisfied" group.

(iv) Are you satisfied with pre-trial discovery available to the prosecution?

Eighty five prosecutors (42.3%) indicated satisfaction with the range of pre-trial discovery available by law to the prosecution; 112 (55.7%) indicated dissatisfaction. Here again, there were very few differences in the usual practices of these two groups. However, it may be noted that those who indicated dissatisfaction with the present system in this regard, and who would probably favour a reciprocal discovery system, form the more "liberal" group, but by very little.

(v) If more extensive discovery were compulsory, would there be more intimidation of witnesses?

To this hypothetical question, 112 (55.7%) answered yes, and 80 (39.8%) answered no. The latter group are approximately 5 to 10% more "liberal" than their colleagues who fear that cases of intimidation of witnesses would increase within a system which would force the prosecution to disclose to the defence more information than it does at the present time.

(vi) Are you in favour of a formal discovery procedure applicable to all offences?

Ninety three (46.3%) indicated that they were in favour of such a system, as opposed to 104 (51.7%) against. These two groups usually never follow opposite practices and the differences between them are rarely greater than 10%. Oddly, a larger number of prosecutors, who usually disclose certain material or information, and who do not favour this proposition, were found than prosecutors who supported the establishment of a formal system applicable to all offences.

(vii) Are you in favour of discovery prior to plea?

One hundred and twelve prosecutors (55.7%) were in favour of discovery before plea; 80 (39.8%) were opposed. The first group is generally 10 to 20% more "liberal" in their disclosure practices than those who do not favour pre-plea discovery.

(viii) Are you in favour of a system mainly dependent on prosecutorial discretion?

Ninety five prosecutors (47.3%) believe that pre-trial disclosure to the defence should be mainly a matter of prosecutorial discretion; 98 (48.8%) do not. Here again, it is surprising to find that a larger proportion of those who favour prosecutorial discretion generally disclose to the defence prior to trial more liberally than those who are opposed. There is generally a difference of 10 to 15% between the two groups.

5. Conclusion

In this first chapter, an attempt has been made to analyze the answers of prosecutors in order to determine the manner in which they exercise their power of discretion to disclose or not to disclose certain material or information to the defence before trial. Although prosecutors are the most qualified persons to describe their own practices, many indicated that they felt the answers to be inadequate. Indeed, many pointed out the difficulty in describing situations in which there are always exceptions to the rule. We were aware of these difficulties and we certainly do not suggest that the data obtained from the analysis of the answers to this questionnaire provide an inflexible or totally accurate picture of the nature of informal discovery practice in Canadian criminal cases. We believe, however, that even this rough description of the usual practices of 201 prosecutors, with respect to the exercise of their discretion, gives a better than speculative understanding of the system. In this first chapter, many aspects of this system have obviously not been covered. Some of these will be examined in further chapters. Now that the manner in which, and the extent to which prosecutors disclose their information have been examined, we will attempt to use the questionnaire responses to determine and describe how defence counsel discover the facts before trial in criminal cases.

CHAPTER II – Pre-Trial Discovery and the Defence Counsel

At the beginning of this study the method of distribution of the questionnaires intended for defence counsel was described and some comments were expressed with respect to the significance and importance of the answers obtained. Part II of the questionnaire, dealing with the request and discovery of specific matters by the defence, had a dual purpose. On the one hand, we wished to evaluate the data obtained from the prosecutors by comparing the answers with those of defence counsel; on the other hand, we wished to determine the extent to which the defence was able to discover the facts of a criminal case before trial, and the sources from which the information was obtained.

Over half of the 805 responses from defence counsel came from Ontario. As with prosecutors, the distribution of these responses in the various Provinces will be examined more closely to determine whether certain categories of defence lawyers (those who practice criminal law exclusively, those who have once acted as prosecutors, etc. . .) are more active than others in requesting information from prosecutors, and whether they are more successful in obtaining the information they request. First, however, it might be useful to again describe the typical Canadian defence counsel as revealed in the survey: Under 40 years of age, he was admitted to the Bar of the Province after 1960 and, as might be expected, practices in Ontario; he works in a firm with less than 5 lawyers, or is a sole practitioner, and spends less than half of his working time defending criminal cases. He practices mainly before magistrates and is mostly involved in remands and guilty pleas (however, 40.4% are mostly involved in contested cases).

1. Usual Pre-Trial Discovery Practices of Defence Counsel

In answering the question aimed at determining their usual pre-trial disclosure practices, prosecutors were asked to base their responses on the following hypothesis: "The information exists, you have access to the information, the *Criminal Code* does not provide for a preliminary inquiry in this case, and the defence has requested the information." The analysis now examines whether or not the last mentioned part of this hypothesis was realistic. In the same circumstances, i.e. a case where there is no preliminary inquiry, do defence counsel usually request information from the prosecution? At first, it appears that defence counsel in fact do not request all information with the same consistency. It also appears that the higher the percentage of prosecutors who usually disclose information, the higher the percentage of defence counsel who request it; for example, 88.2% of defence counsel indicated that they usually request the criminal record of the accused, and 91% of prosecutors indicated that they generally agree to disclose this information. Similarly, 92.8% of defence counsel request from the prosecution the signed statements of the accused which will be used as evidence, and 89.1% of prosecutors generally agree to provide this information.

However, it seems that defence counsel also frequently request information which most prosecutors are little inclined to disclose: 63.1% of defence counsel usually attempt to obtain the confidential briefs prepared for the prosecutor by the police, but only 16.4% of prosecutors generally agree to provide this. An awareness of the availability of information is surely a factor influencing the percentage of requests made to obtain it: 61.2% of defence counsel indicated that they refrain from requesting certain information when they believe the prosecutor will refuse to disclose it. It seems at first that, in many cases, they are wrong in their belief. Indeed, it very often happens that less than half of the defence counsel indicate that they request a particular item of information, while it also appears that the majority of those who make the request very frequently obtain the information. It might be tempting to conclude that those who did not make the request committed an error of judgment, but this conclusion may be somewhat premature. There may be many factors, including the nature of the information requested, which influence the prosecutor's decision to disclose or not to disclose specific matters to a particular defence counsel involved in a specific case. Other factors might be the reputation of the defence counsel, the personal relationship between the two lawyers, the nature of the offence, and so on.

Therefore, even in those cases where 90% of defence counsel obtain information which they request, it may be that those who did not make the request had reason to believe that they would not obtain the information. For example, it is possible to compare certain answers obtained from prosecutors and defence counsel with respect to the item "identity of police officers the prosecution intends to call at trial." 74.4% of defence counsel indicated that they usually request such information from the prosecution before trial, and 73.5% indicated that they generally obtain it. This means that approximately 1% of those who request the information do not obtain it. On the other hand, 5.5% of prosecutors indicated usually not disclosing such information to the defence, and 12.9% indicated having no fixed practice. Should it then be concluded that the 25% of defence counsel who refrain from requesting such information are mistaken in believing that their request will be denied? Some of them are probably wrong. However, this data is still too general to provide a realistic view of the situation: who make up this 25%? Are they mostly young inexperienced lawyers, or are they concentrated in a Province where they have reason to believe that they will not obtain the information? Before examining the opinions expressed by the various groups of defence counsel, a few general examples, which confirm to a large extent the data collected from the prosecutors, can be given. Indeed, the two groups are rarely seen to be in opposition and all agree that certain specific matters are more easily disclosed than others. For example, with respect to the identity of expert witnesses the prosecution intends to call at trial, 69.8% of defence counsel indicated that they usually request this information and 63.7% indicated that they obtain it. This means that 8.6% of those who requested the information tended to meet with refusal from the prosecution. In fact, 5% of prosecutors indicated that they generally refused to reveal this information to the defence, and 12.9% admitted having no fixed practice in this regard. Similarly, the responses indicated that with respect to:

— *Identity of persons who had an opportunity, but failed to identify the accused*: 45.6% (defence) request; 25.8% obtaln; thus, approximately 21% of those who make the request

meet with refusal. Among prosecutors, 19.9% refuse to disclose and 41.8% have no fixed practice.

- *Criminal record of crown witnesses*: 51.9% (defence) request, 32.4% obtain; thus, approximately 38% of those who make the request are denied this information. On the other hand, 26.9% of prosecutors usually refuse to disclose this information and 34.3% have no fixed practice.
- *Signed statements of the accused which the prosecution intends to use at trial*: 82.4% (defence) request, 60.5% obtain; approximately 26% of those who make the request meet with refusal. Among prosecutors, 13.4% usually refuse and 22.9% have no fixed practice.
- *Signed statements of witnesses the prosecution intends to call at trial*: 58.9% (defence) request, 29.3% obtain; therefore, approximately 54% of those who request meet with refusal. On the other hand, 40.8% of prosecutors usually refuse and 25.9% have no fixed practice.
- *Substance or summary of testimony expected to be given by crown witnesses*: 78.1% (defence) request, 66.1% obtain; therefore, approximately 15% of those who make the request are denied this information. 12.4% of prosecutors refuse and 15.9% have no fixed practice.

However, there is an unexplainable difference with respect to the confidential briefs prepared for the prosecutor by the police: 63.1% of defence lawyers request this information and 37.5% obtain it. Thus, approximately 41% of those who make the request meet with refusal. On the other hand, 62.2% of prosecutors indicated they usually refuse to disclose such information and 19.4% indicated no fixed practice. However, the balance is re-established with regard to police informants: 41.7% of defence counsel indicated that they make the request and 9.4% reported that they obtain the information; therefore, close to 78% of those who make the request meet with refusal. 70.1% of prosecutors refuse to reveal this information and 24.9% have no fixed practice.

Finally, with respect to the general item "information of any sort that does not assist the prosecution but that may be helpful to the defence," 55% of defence counsel indicated that they usually request this information and 26% reported obtaining it; therefore, it would seem that approximately 52% of those who request do not obtain this information. 10% of prosecutors indicated that they usually deny this information and 46.3% indicated no fixed practice.

Therefore, this data collected from defence counsel generally confirms the results obtained from prosecutors as to the manner in which prosecutors exercise their discretion to disclose or not to disclose certain specific matters prior to trial. At this point, should it be concluded that defence counsel are generally inadequately informed as to the facts of their cases before trial? One may certainly suggest that defence counsel are inconsistently, if not inadequately, informed as to evidence held by the prosecution. Indeed, only 38% of those who indicated that they refrain from requesting information from the prosecution reported doing so because the information could be obtained from another source; 61.2% indicated they believe that the information would be denied by the prosecution, 8.8% reported a fear of having to disclose information in exchange, and 21% reported other reasons.

Finally, only 8.6% of Canadian defence counsel indicated they make frequent use of private investigators. Thus, theoretically, the prosecutor constitutes the most

accessible source of information to the majority of defence counsel. The extent and success of the requests of defence counsel depend on various factors. One important factor is undoubtedly geographical location.

2. Regional Variations

As in the previous chapter, we will attempt to compare the ability of defence counsel from various Provinces, in rural and urban areas, and finally in Montreal, Toronto and Vancouver, to "discover," prior to trial, evidence held by the prosecution. Table C in the appendix shows in detail the distribution of answers by regions.

(a) *The Provinces*

(i) Prince Edward Island

Only one defence counsel replied from Prince Edward Island, so it is impossible to make any meaningful comments.

(ii) Newfoundland

Seven defence counsel responded to the questionnaire from Newfoundland, and 6 responded to Part II. No response was obtained from prosecutors, and thus these 6 replies must be used to attempt to assess the situation. First, the 6 lawyers were rarely unanimous in requesting certain information from the prosecution. The percentage of requests indicated were generally low. Five out of 7 explained they do not request certain information from the prosecution because they believe that their request will be denied.

(iii) Nova Scotia

A total of 48 responses were received from Nova Scotia. The situation there often appears circular and reflects, on a smaller scale, the deadlock found at the national level: 26 out of 48 do not request information from prosecutors on the assumption that there will be a refusal to disclose. Nevertheless, as at the national level, the vast majority of defence counsel generally indicated that they obtain the information they do request. There was only one exception: nationally, 43.5% of defence lawyers generally request police note-book entries from the prosecution, and 18.6% obtain them, whereas in Nova Scotia, only 2 out of 48 indicated they usually make such a request, and without success.

(iv) New Brunswick

Twenty five defence counsel responded to the questionnaire. Eighteen out of 25 indicated that they do not request certain information in the belief that they have no chance of obtaining it. According to the responses, three items are never obtained: The identity of experts the prosecution has consulted but does not intend to call at trial, police note-book entries, and the identity of police informants. However, as already indicated, with respect to police note-book entries, the 5 prosecutors from New Brunswick who responded to the questionnaire stated

unanimously that they do not usually disclose this information to the defence before trial.

(v) Quebec

Fifty seven responses were received from Quebec. In relation to the national response, few defence counsel usually request information from the prosecution. Forty three indicated they assume that the prosecution will refuse, 8 reported a fear of having to disclose evidence in exchange, 18 indicated they are able to obtain the information elsewhere and 11 gave other reasons; only 3 reported making frequent use of private investigators.

This relatively low percentage of requests can be explained by the fact that Quebec prosecutors generally seem to disclose much less information than prosecutors in the rest of the country. This also results in a much wider gap between lawyers who request information and those who obtain it. For example, while 17 out of 57 counsel usually request the identity of persons who had an opportunity to, but failed to identify the accused, only 2 reported obtaining this information. On the other hand, only 2 Quebec prosecutors out of 32 indicated that they usually disclose this type of information to defence counsel. However, the greatest contrast appears with respect to the statements and testimony expected to be given by witnesses: Throughout Canada, 29.3% of defence counsel indicated they usually obtain signed statements of witnesses the prosecution intends to call at trial, and 66.1% indicated they receive the substance or summaries of these statements. In Quebec, only 5 out of 57 (8.7%) reported that they obtain signed statements, and 17 out of 57 (29.9%), summaries.

Another situation peculiar to Quebec was also revealed. In Canada, 16.4% of defence counsel indicated they obtain, on request, information relevant to illegally obtained evidence, and 12.5% reported they obtain information or evidence obtained by electronic apparatus; in Quebec, the responses suggest this type of information is usually never obtained although almost half of the defence counsel ordinarily request it.

(vi) Ontario

Because of the method of distribution of the questionnaire, a very large number of Ontario practitioners received the questionnaire, and 434 defence counsel responded. Thus, over half of the total number of responses came from this Province. Needless to say, Ontario practices resemble closely the national practices since they determine them to a large extent. While little may be gained by comparing Ontario with the entire country, this large number of responses nevertheless does allow for a more detailed examination of the Ontario situation, and of the sometimes substantial differences between the practices adopted in the various regions of the Province.

These 434 Ontario lawyers practice in the following locations: 163 in Toronto, 31 in Hamilton, 24 in Ottawa and 216 in other areas of Ontario. Throughout the Province, Ontario lawyers generally reported requesting and obtaining more

information than the average Canadian lawyer. However, in Toronto the responses from lawyers often fell below this national average, while those from Ottawa and Hamilton were often significantly above it. Here are a few examples of these gaps in Ontario practices:

- In Canada, 53.5% of defence counsel usually obtain the names and addresses of witnesses the prosecution intends to call at trial; 49.1% in Toronto, 54.8% in Hamilton, 75% in Ottawa, and 68.5% throughout the rest of the Province.
- In Canada, 25.8% obtain the identity of persons who had an opportunity to, but failed to identify the accused; 18.4% in Toronto, 41.9% in Hamilton, 33% in Ottawa, and 32.9% throughout the rest of Ontario.
- In Canada, 60.5% of defence counsel obtain signed statements of the accused which the prosecution does not intend to use at trial; 49.7% in Toronto, 58.1% in Hamilton, 75% in Ottawa, and 68.5% throughout the rest of the Province.

While most of the questions had a similar distribution of answers, there were some surprising exceptions: in Canada, 29.3% reported usually obtaining signed statements of witnesses the prosecution intends to call at trial; 19% in Toronto, 29% in Hamilton, 47.7% throughout the rest of the Province, and only 16.7% in Ottawa. However, the balance was re-established with respect to summaries of testimony expected to be given by these witnesses. In Canada, 66.1% reported obtaining this information; 58.9% in Toronto, 83.9% in Hamilton, 83.3% in Ottawa, and 76.4% in other locations in Ontario.

The only other substantial differences found in Ottawa concern the following items: First, the confidential briefs prepared for the prosecutor by the police. In Canada, 37.5% of defence counsel indicated that they usually obtain this information; 50.9% in Toronto, 58.1% in Hamilton, 25% in Ottawa, and 60.6% in other locations in Ontario. There is no apparent explanation for this percentage of 60.6% which is high in relation to the Province as well as the country.

Also, in Canada, 16.4% of defence counsel reported obtaining information on the existence of illegally obtained evidence; 9.8% in Toronto, 22.6% in Hamilton, 8.3% in Ottawa, and 17.6% in other locations of the Province.

Finally, 26% of Canadian lawyers indicated they generally obtain information of any sort that does not assist the prosecution but that may be helpful to the defence; 17% in Toronto, 22.6% in Hamilton, 12.5% in Ottawa, and 32.9% in other locations of Ontario.

To complete this study of the situation in Ontario, it is still necessary to determine why defence counsel usually refrain from requesting certain information from the prosecution.

As noted earlier, 61.2% of defence counsel in Canada indicated that they do not request information from the prosecution because they generally assume that it will be denied by the prosecutor. In Toronto, 73% think this way, 58.1% in Hamilton, 70.8% in Ottawa, and 52.8% throughout the rest of Ontario. Also, in

Canada, 8.8% of defence counsel indicated as the reason a fear of having to disclose information in return. In Toronto, 11.7% gave the same reason, 9.7% in Hamilton, 12.5% in Ottawa and 10.2% throughout the rest of the Province.

Finally, 38% of Canadian lawyers answered that they refrain from requesting certain information from the prosecution because they are able to obtain it by other means. In Toronto, 42.3% gave this reason, 29% in Hamilton, 37.5% in Ottawa and 36.6% throughout the rest of the Province.

When comparing the Ontario situation with that of the country with respect to the use of private investigators, the percentages are somewhat similar, except perhaps in Toronto: in Canada, 8.6% of defence counsel indicated they make frequent use of private investigators; 13.5% in Toronto, 9.7% in Hamilton, 4.2% in Ottawa and 8.3% throughout the rest of the Province.

(vii) Manitoba

A total of 43 responses were received from Manitoba. Twenty eight out of 43 defence counsel indicated they do not usually request information from the prosecutor on the assumption that he would refuse to disclose such information; only one defence counsel stated that he feared he would have to disclose evidence in return, and 13 indicated they are able to obtain the information needed by other means; 3 reported making frequent use of private investigators. Among those who usually request information from the prosecutor, the distribution of answers between those who obtain the information and those who do not is consistent with the distribution established at the national level.

(viii) Saskatchewan

Thirty one defence counsel responded to the questionnaire from Saskatchewan: 16 of them indicated they usually refrain from requesting information from the prosecutor, on the assumption that he would refuse to disclose it; only one defence counsel indicated as a reason the fear that he would have to disclose certain information in return, and 10 reported generally being able to obtain information elsewhere; 2 indicated they make frequent use of private investigators. Here again, there is no distinction between the distribution of answers in Saskatchewan and the established distribution throughout Canada.

(ix) Alberta

Fifty nine responses were received from Alberta; 34 defence counsel indicated that they refrain from requesting certain information from the prosecution because they expect a refusal; 3 indicated a fear of having to disclose their evidence in exchange, and 24 indicated they can usually get the information elsewhere. The percentage of defence counsel who obtain information they request is substantially the same as that of the entire country and shows no unusual characteristic.

(x) British Columbia

Eighty five responses were received from British Columbia. This Province takes second place far behind Ontario with regard to the gross number of responses. Forty

seven defence counsel out of 85 indicated they usually refrain from requesting certain information, expecting the prosecutor to refuse to disclose this information prior to trial; 5 indicated a fear of having to disclose their own evidence, and 35 indicated they can often obtain the information by other means; only 4 defence counsel, all from Vancouver, reported making frequent use of private investigators. Fifty one of the 85 defence counsel who answered the questionnaire came from Vancouver. The Vancouver lawyers seem to obtain more information from prosecutors than those of the rest of the Province and than defence lawyers throughout the country. This situation is therefore contrary to that of Ontario where practices in Toronto are often more restrictive than those throughout the rest of that Province.

(xi) Northwest Territories and Yukon

The 4 lawyers who answered the questionnaire indicated that their reason for refraining from requesting information from the prosecutor was the conviction that disclosure would be refused, and one of them also added the reason that the information could be obtained by other means. The 3 lawyers who do request information very often obtain it. However, the same exception also applies here with regard to the confidential briefs prepared for the prosecution by the police, and the identity of undercover police officers. Also, although 3 out of 4 indicated they usually try to obtain the criminal record of crown witnesses, only one reported that the request is granted.

(b) *Rural Areas and Urban Areas*

The answers given by defence counsel confirm the fact that there is little difference between rural areas and urban areas with respect to pre-trial discovery. The terms "rural" and "urban" have the same meaning in this context as in that already discussed in relation to the questionnaires intended for prosecutors[3]. According to this definition, 460 responses (57.1%) were received from "urban" centers, and 334 (41.5%) from "rural" areas. Although there seems to be little opposition or difference between these two groups, it does seem that practices are slightly more liberal in rural areas. In fact, a consistently greater proportion of defence counsel indicate they usually request information in urban centers and a greater percentage of defence counsel report that they obtain information in rural areas.

Answers indicating the reasons of defence counsel for not requesting information from the prosecution, were distributed as follows:

– You believe the prosecutor will refuse to disclose the information:	
urban	65.4%
rural	56.3%
total Canada	61.2%

[3] See supra, p. 14.

– You believe the prosecutor will require disclosure of information by the defence in exchange:	
urban	8.7%
rural	9.0%
total Canada	8.8%

– The information is usually available by means other than request to the prosecutor:	
urban	38.7%
rural	37.1%
total Canada	38.0%

Finally, 10% of lawyers practicing in urban centers indicated they make frequent use of private investigators, as compared to 6% in rural areas.

(c) *Three Large Urban Centers: Montreal, Toronto and Vancouver*

In the previous chapter, the usual practices of prosecutors practicing in these three large cities were compared. In order to complete this description, reference will now be made to the answers given by defence counsel.

Montreal lawyers generally seem to request less information from prosecutors than their colleagues in Toronto or Vancouver. The reasons given for not usually requesting information from the prosecution are: according to 81.8% of Montreal lawyers, the prosecution will refuse to disclose the information (this 81.8% is the highest percentage in the country in this regard), 12.1% the fear of having to give information in return, and 39.4% the ability to obtain the information elsewhere. In Toronto, 73% fear refusal, 11.7% expect a reciprocal request, and 42.3% are able to obtain the information elsewhere, and in Vancouver, these proportions are 56.9% 5.9% and 41.2% respectively. Montreal lawyers reported making less frequent use of private investigators than those of the other two cities: In Montreal, 7.1% of defence counsel indicated that they make frequent use of them, as compared to 13.5% in Toronto and 7.8% in Vancouver.

In certain cases, many Montreal lawyers may seem to be wrong in not requesting information for fear of being refused since the majority of those who request information in fact obtain it. For example, with respect to the item "Names and addresses of witnesses the prosecutor intends to call at trial," the answers were distributed as follows: in Canada, 62.4% request this information and 53.5% obtain it; in Montreal, 24.2% request it and 21.2% obtain it; in Toronto, 66.3% request it and 49.1% obtain it, and in Vancouver, 60.8% request it and 47.1% obtain it. Obviously, one cannot say that the 75% of Montreal lawyers who do not request this information would necessarily obtain it if they took the time to request it, especially since the refusals sometimes occur with regard to other matters; lawyers in Montreal request certain information more than anywhere else and still, they obtain it less than anywhere else. This occurs, for example, in the case of signed statements of the accused which the prosecution intends to use at trial. In Canada, 92.8% of defence counsel usually request this information and 82.2% obtain it. In Montreal, 100%

request it and 69.7% obtain it. In Toronto, 93.3% request it and 76.7% obtain it, and in Vancouver 94.1% request and 86.3% obtain this information.

However, the most common situation is that Montreal lawyers indicate that they request and obtain much less information than Toronto or Vancouver lawyers. Vancouver practices sometimes appear very liberal in relation to Montreal, Toronto, and even national practices. For example, with respect to the item "identity of persons who had an opportunity to, but failed to identify the accused," the answers were distributed as follows:

– In Canada	45.6% request 25.8% obtain
– In Montreal	39.4% request 6.1% obtain
– In Toronto	49.7% request 18.4% obtain
– In Vancouver	70.6% request 52.9% obtain

With respect to the item "Substance or summary of testimony expected to be given by witnesses the prosecutor intends to call at trial," the answers were distributed as follows:

– In Canada	78.1% request 66.1% obtain
– In Montreal	66.7% request 54.2% obtain
– In Toronto	81.6% request 58.9% obtain
– In Vancouver	94.1% request 92.2% obtain

There seems to be a particular interest in Toronto (as well as throughout Ontario) in the confidential brief prepared for the prosecutor by the police:

– In Canada	63.1% request 37.5% obtain
– In Montreal	39.4% request 6.1% obtain
– In Toronto	82.2% request 50.9% obtain
– In Vancouver	49.0% request 13.7% obtain

Finally, with regard to evidence illegally obtained or obtained by electronic apparatus, this information, according to the responses, is never disclosed in Montreal. In thefirst case:

– In Canada	45.0% request 16.4% obtaln
– In Montreal	45.5% request 0.0% obtain
– In Toronto	46.0% request 9.8% obtain
– In Vancouver	72.5% request 22.2% obtain

With respect to information or evidence obtained by electronic apparatus:

– In Canada	34.3% request 12.5% obtain
– In Montreal	36.4% request 0.0% obtain
– In Toronto	46.0% request 9.8% obtain
– In Vancouver	58.8% request 33.3% obtain

This data confirms and completes the description which emerged from the answers given by the prosecutors. To conclude the comparison, the prosecutors of these three cities were asked whether the surprise element played an important part in their trial strategy[4]. Defence counsel were also asked whether, in their opinion, the surprise element played an important factor in the prosecution's strategy. It is significant that the answers were distributed as follows:

– In Canada	22.9% yes 77.0% no
– In Montreal	54.5% yes 39.4% no
– In Toronto	25.8% yes 70.6% no
– In Vancouver	9.8% yes 86.3% no

[4]See supra, p. 22.

3. Variations According to Professional Data

The purpose of the questionnaire intended for defence counsel was partly to determine the extent to which the defence was able to discover the facts of a criminal case and the extent to which it requested evidence from the prosecutor. This third part attempts to determine to what degree defence counsel are successful in obtaining information from prosecutors, according to their professional environment, and to analyze the impact of factors such as the type of legal firm to which they belong, or the fact that they are full or part time defence lawyers.

(a) *Type of Practice*

The answers to question number 3, "Nature of practice," of the questionnaire intended for defence counsel were distributed as follows:

– sole practitioner	23.7%
– firm of 2 to 5 lawyers	56.7%
– firm of 6 to 12 lawyers	13.6%
– firm of more than 12 lawyers	6.0%

The counsel who indicate they request and obtain the most information from prosecutors are consistently lawyers who practice in a firm employing 2 to 12 lawyers, and especially lawyers employed by firms composed of 6 to 12 lawyers. The two other groups generally obtain less information and it seems that those who obtain the least are sole practitioners: the latter usually request and obtain less information than the others. One exception may be noted: Sole practitioners request and obtain confidential briefs and police note-book entries more than all the other groups. However, in general, it seems that the nature of practice is not a very significant factor since there are no great differences between the responses of the four groups.

(b) *Time Devoted to Criminal Defence Practice*

With respect to the proportion of working time devoted to criminal defence practice by defence counsel, the answers were as follows:

– 100% of their time	3.0%
– 80-90% of their time	6.3%
– 50-79% of their time	15.5%
– 25-49% of their time	22.8%
– 10-24% of their time	34.5%
– less than 10% of their time	17.9%

Before attempting to compare these different groups, the 3% of lawyers who practice criminal law exclusively will be examined. Considering their relatively small number, they are easily identified. This proportion is made up of 24 lawyers,

including 9 from Montreal, 2 from Quebec City, 7 from Toronto, 2 from the rest of Ontario, 1 from Winnipeg, 1 from Edmonton, 1 from Vancouver and 1 who did not indicate his location. Considering this distribution, caution must be exercised in drawing any conclusions with regard to the comparison of these various groups. Montreal may have a disproportionate influence upon the group of lawyers who devote all their working time to criminal cases. Indeed, as already discussed, defence counsel from Montreal practice in ways that are sometimes opposed to average Canadian practices. The influence of Montreal lawyers may indeed be felt within the group of full time criminal lawyers since the responses indicated that this group requests and obtains less information than the other groups, which in itself is unexpected. It would seem more normal to expect that the group of lawyers who devote less than 10% of their working time to criminal cases would request and obtain less information than the other groups.

The responses suggest that the "privileged" group in matters of discovery is composed of lawyers who devote 80 to 99% of their working time to criminal cases. One exception to the success of this group concerns the criminal record of crown witnesses: we find that full time criminal lawyers request and obtain this information more often than all the other groups. Generally speaking, however, even when their number is as great as the others in requesting certain information, full time criminal lawyers obtain it less often. Here are a few examples of this phenomenon:

– Unsigned or oral statements of the accused which the prosecution intends to use at trial:

Time Devoted to Defence	Request	Obtain
100%	95.8%	66.7%
80 – 99%	96.0%	72.0%
50 – 79%	95.2%	78.2%
25 – 49%	88.5%	68.7%
10 – 24%	87.6%	68.4%
Less than 10%	69.2%	54.5%

– Statements of co-accused which the prosecutor intends to use at trial:

Time Devoted to Defence	Request	Obtain
100%	87.5%	37.5%
80 – 99%	96.0%	70.0%
50 – 79%	93.5%	70.2%
25 – 49%	89.6%	70.3%
10 – 24%	89.8%	70.5%
Less than 10%	71.3%	60.8%

— Signed statements of witnesses the prosecution intends to call at trial:		
Time Devoted to Defence	Request	Obtain
100%	62.5%	16.7%
80 – 99%	74.0%	26.0%
50 – 79%	64.5%	27.4%
25 – 49%	58.2%	31.3%
10 – 24%	61.5%	33.8%
Less than 10%	45.5%	23.8%

Similarly, only 50% of full time defence lawyers indicated that they usually obtain a summary of the testimony expected to be given by crown witnesses, whereas the percentage of those who obtain such information is round 70% among the other groups.

When asked why they usually do not request certain information from the prosecutor, 66.7% of full time criminal lawyers answered that they expected refusal; among the other groups, an average of 60% gave this reason; 4.2% of full time criminal lawyers answered that they feared having to disclose their evidence in exchange, compared to 4 and 12% among the other groups. 45.8% of them indicated that they could obtain the information by other means, compared to approximately 35% among the other groups.

Finally, with regard to the frequency of their use of private investigators, the answers given by the different groups were as follows:

— full time criminal lawyers	25.0%	yes
80 – 99%	24.0%	yes
50 – 79%	11.3%	yes
25 – 49%	9.3%	yes
10 – 24%	4.7%	yes
Less than 10%	3.5%	yes

(c) *Use of Private Investigators*

Of the lawyers who responded to the questionnaire, 67 (8.3%) indicated that they make frequent use of the services of private investigators. It might be tempting to think that these persons are less able to obtain information from prosecutors than the others, but the situation is exactly the opposite. It seems instead that these 67 lawyers are simply more thorough in preparing their cases, since they indicate that they generally request and obtain more information from prosecutors than the others, with a few exeptions. For example, they request the following information more often than the others but obtain it less often: statements of witnesses, the

identity of undercover police officers and informants, the circumstances surrounding the arrest, identification or taking of statements from the accused, as well as information of any sort that may be helpful to the defence.

(d) *Types of Offences*

Eighty one percent of the defence counsel who responded indicated they were involved mainly in *Criminal Code* offences; 3% mostly represent persons accused of federal offences; 13.2% are mostly involved in provincial offences, and finally, 2.1% handle offences under local government by-laws.

The 3% of lawyers involved mainly in federal offences other than *Criminal Code* offences generally seem to request and obtain more information than the other groups. One remarkable fact is that they report obtaining more information than the others even when the percentage of their requests is appreciably the same. This is probably explained by the fact that these counsel deal mainly with prosecutors employed by the federal Justice Department and these prosecutors seemed, on the whole, slightly more "liberal" than provincial prosecutors.

A closer examination of the answers given by lawyers handling mainly federal offences other than *Criminal Code* offences, revealed a quite peculiar phenomenon based on a distinction that had not been previously made. There did not seem to be any substantial difference in prosecutors' treatment of information with respect to police informants and undercover police officers. In both cases, the identity and activities of these persons are generally kept confidential, but, within this group of lawyers a distinction between these two types of information is now made. Indeed, 54.5% of defence counsel dealing with federal offences indicated that they generally request the identity of undercover police officers from the prosecutor; 45.5% of them obtain this information. On the other hand, only 18.2% of the same group indicated that they usually request the identity of police informants and none reported that they obtain it. We stated previously that this group of lawyers generally seem to receive more information than the other groups; however, there is one exception. With regard to evidence illegally obtained or obtained by electronic apparatus, lawyers dealing with "federal cases" request as much information as the others but obtain much less.

Finally, the 2% of lawyers involved mainly in municipal offences request much information and obtain very little.

The reasons expressed by the different groups for not requesting information from prosecutors are appreciably similar everywhere. When lawyers dealing with "federal cases" do not request information, most of the time it is because they expect a refusal from the prosecutor and less often because they can obtain the information by other means.

(e) *Types of Tribunals*

Eighty six percent of defence counsel appear mainly before magistrates, 8.6% before judge alone, 2.4% before judge and jury, and 1.6% before appeal courts. The

last two groups seem to usually request and obtain more information than the first two. However, there are certain matters which are reported as being more difficult to obtain than others by lawyers practicing before juries; for example, the identity of expert witnesses the prosecutor has consulted but does not intend to call at trial. Similarly, 91.7% of these lawyers indicated they usually request the criminal records of crown witnesses, but only 50% reported that they obtain them; all lawyers practicing mainly before juries usually request signed statements of witnesses from the prosecutors; only 16.7% usually obtain this information. However, they are in the same situation as that of the other groups with respect to summaries of testimony expected to be given by crown witnesses.

Finally, 58.3% of lawyers practicing mainly before juries make frequent use of private investigators, compared to 33.3% of lawyers practicing mainly before appeal courts, 10% of those practicing mainly before judge alone, and 6.9% of those practicing mainly before magistrates.

(f) *Types of Proceedings*

Fifty four percent of the lawyers who responded to the questionnaire indicated they are mainly involved in remands and guilty pleas; 4.2% in preliminary inquiries, 33.7% in contested trials, and 1.1% in appeals. There were almost no differences in the responses between these groups, except that the 54% involved mainly in guilty pleas seem to request and obtain slightly more information than the other groups.

(g) *Experience as Crown Prosecutor*

Of the defence counsel who responded to the questionnaire, 8.3% had previously acted as full time crown prosecutors; 39% had previously prosecuted in specific cases, or were retained as part time prosecutors, and 52.7% had no experience as crown prosecutor.

The latter reported obtaining much less information than their colleagues who have previously been employed as prosecutors. For example, with regard to the criminal records of crown witnesses:

– Experience as full time prosecutor: 58.2% request 44.8% obtain
– Experience as part time prosecutor: 51.9% request 34.1% obtain
– No experience as crown prosecutor: 50.9% request 29.2% obtain

However, one exception may be noted: Lawyers with experience as full time prosecutor request and obtain less information than the others with respect to police note-book entries and confidential briefs prepared for the prosecutor by the police.

(h) *General Experience: Age*

Of the defence counsel who answered the questionnaire, 28.4% were under 30 years of age; 47% were between 30 and 39 years of age; 17.8% were between 40 and 49 years of age, and 5.2% were over 50 years of age. Lawyers under 30 years of age and those over 50 seem to request and obtain less information than the others. Those under 30 years of age obtain consistently less information even in cases where they request as much as the others. Obviously, the differences are not always great, but it is a consistent phenomenon.

4. Conclusion

This description of the results obtained from defence counsel confirms the conclusion drawn earlier from the analysis of the answers given by the prosecutors. Information held by the prosecution which is relevant to the defence of a criminal case is not always disclosed with the same readiness in the various regions of the country; it is also not disclosed with the same consistency to the different groups of defence counsel. Finally, although certain types of information are accessible to a majority to a certain extent, other types are, with rare exceptions, absolutely impossible to obtain.

CHAPTER III – The Present Discovery System in Criminal Cases

The exercise of prosecutorial discretion to disclose or not disclose before trial certain specific matters, as well as the success of counsel in obtaining the information of interest to them have now been examined. The operation of the system itself will now be analyzed in order to determine to what extent institutions and pre-trial procedures permit, facilitate, or prevent access to evidence by the parties in criminal cases. Reference to the pre-trial discovery system or procedures usually means the preliminary inquiry. Aside from the inquiry and the informal exchange of information between prosecutors and defence counsel, the only other means of access to evidence lies in contacts with witnesses (although this should not be strictly referred to as a procedure).

While the data collected from prosecutors and defence counsel with regard to the preliminary inquiry and contacts with witnesses are purely subjective, they nevertheless permit us to determine how some aspects of the system are perceived by the persons who operate within it. Here again, it is interesting to compare the differences in perception of the same system by lawyers throughout the country. It would have been very difficult, and probably useless, to compare this among all the provinces considering the disproportionate distribution in the number of responses from each Province, especially from defence counsel.

Therefore, an arbitrary choice has again been made to compare the situations in Montreal, Toronto and Vancouver. In these three large urban centers the identical institution operates within a similar administrative framework. Thus slight differences become much more striking and significant.

1. The Preliminary Inquiry

Part IV of the questionnaire sent to defence counsel, and Part V of the one answered by prosecutors, contained various questions on the importance of the preliminary inquiry as a means of discovery.

The preliminary inquiry, as a means of discovery, appears in the entire country as a rather limited means of pre-trial access to evidence, even in cases where it is available. Secondly, it appears that this means of discovery differs considerably in its actual operation in Montreal, Toronto or Vancouver.

In this case the figures speak adequately for themselves in demonstrating the extent to which the preliminary inquiry takes various forms according to the location of its operation.

(a) *Delays*

One of the factors that makes it possible to judge the effectiveness of the preliminary inquiry as a means of pre-trial discovery, is the delay encountered prior to its operation. It should be remembered, especially with regard to these delays, that the data collected is purely subjective and represents the opinion of persons consulted and not the conclusion of scientific observation. Nevertheless, it is clear that the lawyers practicing in the three cities mentioned, describe situations which are very different from one another. The prosecutors and defence counsel were asked to indicate in their experience the usual average time taken between the first appearance in court of the accused and the beginning of the preliminary inquiry. The following table establishes a comparison between the national average and the situation in the three cities in question:

TIME BETWEEN APPEARANCE AND PRELIMINARY INQUIRY

	CANADA		MONTREAL		TORONTO		VANCOUVER	
	P*	D*	P	D	P	D	P	D
Less than 2 weeks	6.3%	4.8%	55.6%	39.4%	0.0%	0.0%	0.0%	0.0%
2 weeks to 1 month	29.2%	25.5%	33.3%	45.5%	4.8%	5.5%	6.3%	11.1%
1 to 2 months	41.1%	47.5%	11.1%	9.1%	14.3%	44.2%	56.3%	55.6%
2 to 3 months	16.1%	18.0%	0.0%	6.1%	42.9%	33.1%	18.8%	11.1%
3 to 6 months	6.3%	3.9%	0.0%	0.0%	23.8%	8.6%	6.3%	11.1%
More than 6 months	1.0%	0.4%	0.0%	0.0%	9.5%	0.0%	0.0%	0.0%

From this, it is easy to understand that the preliminary inquiry is considered as a hasty procedure in Montreal, but probably not in Toronto. The tables which follow perhaps explain why it is possible to have relatively short preliminary inquiries in Montreal, and also that delays are not the only difference between Montreal practices and Toronto practices with regard to the inquiry.

Regarding the matter of delay, the lawyer's opinions are also interesting and are as follows:

IS THIS TIME:

	CANADA		MONTREAL		TORONTO		VANCOUVER	
	P*	D*	P	D	P	D	P	D
too long	41.7%	22.8%	22.2%	9.1%	76.2%	23.9%	37.5%	23.5%
not long enough	0.5%	2.2%	0.0%	3.0%	0.0%	1.2%	0.0%	0.0%
just about right	57.8%	75.0%	77.8%	87.9%	14.3%	64.4%	43.8%	72.5%

*P – Prosecutors
D – Defence counsel

(b) *Waiver of the Preliminary Inquiry*

Section 476 of the *Criminal Code* permits the parties to concede committal for trial and thus waive the preliminary inquiry or part of the inquiry. The prosecutors and defence counsel were asked three questions in order to determine whether there is any connection between waiving the inquiry and discovery. The first question asked how often prosecutors suggest waiver of the preliminary inquiry when defence counsel ask for informal pre-trial disclosure. The second question attempted to establish whether prosecutors sometimes insist on an undertaking to waive the preliminary inquiry before agreeing to make informal pre-trial disclosure to the defence. Finally, the third question dealt with the number of cases in which the defence agrees to waive the preliminary inquiry in return for pre-trial disclosure by the prosecution. The following is a comparative table of the answers given by each group (prosecution and defence) for the entire country and for each of the three cities in question:

Prosecution Suggests Waiver

	CANADA		MONTREAL		TORONTO		VANCOUVER	
	P*	D*	P	D	P	D	P	D
in every case	2.7%	4.7%	0.0%	6.1%	9.5%	11.7%	0.0%	0.0%
in most cases	14.4%	19.5%	44.4%	42.4%	38.1%	41.7%	0.0%	0.0%
In a few cases	33.7%	32.3%	33.3%	39.4%	33.3%	29.4%	25.0%	37.3%
In no cases	49.2%	43.5%	22.2%	12.1%	19.0%	6.7%	50.0%	52.9%

Prosecution Insists on Waiver

	CANADA		MONTREAL		TORONTO		VANCOUVER	
	P	D	P	D	P	D	P	D
in every case	0.0%	2.9%	0.0%	0.0%	0.0%	8.6%	0.0%	0.0%
in most cases	2.7%	9.5%	0.0%	12.1%	9.5%	24.5%	0.0%	2.0%
in a few cases	8.6%	18.2%	0.0%	24.2%	19.0%	30.1%	6.3%	5.9%
in no cases	88.8%	69.3%	100.0%	60.6%	71.4%	25.8%	68.8%	84.3%

Defence Agrees on Waiver

	CANADA		MONTREAL		TORONTO		VANCOUVER	
	P	D	P	D	P	D	P	D
in every case	1.1%	0.3%	0.0%	3.0%	0.0%	0.0%	0.0%	0.0%
in most cases	6.5%	6.6%	22.2%	15.2%	33.3%	9.8%	0.0%	0.0%
in a few cases	44.9%	34.3%	66.7%	48.5%	57.1%	47.9%	18.8%	21.6%
in no cases	47.6%	58.8%	11.1%	33.3%	9.5%	31.9%	50.0%	70.6%

*P — Prosecutors
D— Defence counsel

(c) *Manner of Prosecution*

Part V of the questionnaire sent to prosecutors contained a series of questions which were not asked of defence counsel. Questions number 7 to 14 concerned the manner of prosecution during the inquiry. The answers to these questions may allow a determination of the extent to which the preliminary inquiry constitutes a satisfactory means of discovery. Does the prosecution adduce all documents and witnesses' evidence at the inquiry? At that point, does it disclose all of the statements made by the accused? Does it give the defence the opportunity to cross-examine all witnesses it will call at trial? Finally, are practices at preliminary inquiries similar throughout the country?

Manner of Prosecution at Inquiry

	CANADA		MONTREAL		TORONTO		VANCOUVER	
	yes	no	yes	no	yes	no	yes	no
(7) Do you require all witnesses that you intend to call at trial to attend at the inquiry?	59.1%	40.9%	22.2%	77.8%	19.0%	81.0%	50.0%	31.3%
(8) Do you require all witnesses who attend at the inquiry to testify?	45.3%	54.7%	33.3%	66.7%	14.3%	81.0%	37.5%	43.8%
(9) Do you produce all items at the inquiry that you intend to use as exhibits at trial?	74.5%	25.5%	44.4%	55.6%	57.1%	49.2%	81.3%	0.0%
(10) Do you require all available expert witnesses to testify at the inquiry?	56.5%	43.3%	22.2%	77.8%	33.3%	66.7%	43.8%	37.5%
(11a) Do you inform the defence *on your own motion* of the presence at the inquiry of witnesses you have decided not to call?	69.7%	30.3%	22.2%	77.8%	47.6%	47.6%	56.3%	12.5%
(11b) Do you inform the defence at the request of the defence of the presence at the inquiry of witnesses you have decided not to call?	87.3%	12.7%	88.9%	0.0%	52.4%	14.3%	31.3%	12.5%

	CANADA	MONTREAL	TORONTO	VANCOUVER
(12) What position do you take with respect to witnesses present at the inquiry but whom you decide not to call at trial?				
(a) You agree to call them if requested to do so by the defence	62.4%	33.3%	42.9%	81.3%
(b) You refuse and insist that defence call them, if at all	37.6%	66.7%	57.1%	6.3%

Comparing the data taken from these three cities, it is clear that the preliminary inquiry takes on characteristics which sometimes differ considerably: in Montreal, it seems to be a perfunctory procedure in which the prosecution does not generally disclose all of its evidence. In Vancouver, however, the inquiry seems to be more elaborate in matters of discovery; in fact, from the prosecution point of view, it resembles a trial before trial. The following table serves to further stress these differences, and illustrates the usual preliminary inquiry practices of prosecutors with respect to the adducing of statements, confessions or admissions made by the accused. The answers to question 13 of Part V of the questionnaire sent to prosecutors were distributed as follows:

Adducing of Statements of the Accused at the Preliminary Inquiry

	CANADA		MONTREAL		TORONTO		VANCOUVER	
	yes	no	yes	no	yes	no	yes	no
At the inquiry, do you usually adduce:								
(a) Inculpatory written statements of the accused	77.2%	22.8%	0.0%	100.0%	71.4%	28.6%	87.5%	0.0%
(b) Inculpatory oral statements of the accused:	74.6%	25.4%	0.0%	100.0%	57.1%	42.9%	87.5%	0.0%
(c) All inculpatory statements of the accused even if production does not seem essential in order to obtain committal for trial?	63.4%	36.6%	0.0%	100.0%	42.9%	57.1%	75.0%	12.5%
(d) Exculpatory written statements of the accused?	27.3%	72.7%	0.0%	100.0%	28.6%	71.4%	31.3%	56.3%
(e) Exculpatory oral statements of the accused?	26.3%	73.7%	0.0%	100.0%	28.6%	71.4%	25.0%	62.5%

Finally, and still having regard to the adducing of statements of the accused at the preliminary inquiry, question number 14 addressed to prosecutors read as follows: "Do you usually try to obtain an admission from the defence as to the voluntariness of statements or confessions of the accused in order to avoid a "voir dire" at the preliminary inquiry? " The answers were as follows:

CANADA		MONTREAL		TORONTO		VANCOUVER	
yes	no	yes	no	yes	no	yes	no
40.0%	60.0%	66.7%	33.3%	66.7%	33.3%	37.5%	50.0%

This time, it was not possible to find much difference in this practice, the legality of which is uncertain.

(d) *Rules of Evidence*

One would expect the application of evidence rules to be the most uniform characteristics of the preliminary inquiry. Here again, however, there are differences of perception and opinion between prosecutors and defence counsel and a systematic opposition between opinions of Montreal prosecutors and Vancouver prosecutors.

Rules of Evidence	CANADA		MONTREAL		TORONTO		VANCOUVER	
	yes	no	yes	no	yes	no	yes	no
(a) Are the rules of evidence usually followed at preliminary inquiries?								
prosecution	94.9%	51.0%	88.9%	11.1%	95.2%	4.8%	87.5%	0.0%
defence	76.3%	23.6%	72.7%	24.2%	62.0%	29.4%	78.4%	19.6%
(b) Are you in favour of relaxation of the rules of evidence at preliminary inquiries?								
prosecution	36.7%	63.3%	100.0%	0.0%	52.4%	47.6%	0.0%	87.5%
defence	39.2%	60.6%	27.3%	72.7%	46.0%	44.8%	25.5%	74.5%

(e) *Committal for Trial*

The purpose of the preliminary inquiry is to determine whether the accused will be committed for trial or discharged of accusations brought against him. However, it is clear that most defence lawyers consider that it serves another purpose, that of informing the defence as to the nature of the evidence held by the prosecution which will probably be used at trial. The preliminary inquiry is not

recognized as a discovery procedure by all prosecutors with the same consistency. Many of them do not concern themselves with disclosing or not disclosing all their evidence, their sole preoccupation being to respect the strict rules of law and to consequently disclose only sufficient evidence to commit the accused for trial. Question number 17 asked: "Do you usually close the case for the prosecution when you are of the opinion that there is sufficient evidence to justify committal for trial, even if witnesses present at the preliminary inquiry at the request or demand of the prosecution have not yet been called? " The answers were distributed as follows:

	CANADA	MONTREAL	TORONTO	VANCOUVER
yes	37.3%	100.0%	66.7%	12.5%
no	62.7%	0.0%	33.3%	75.0%

The comparison between usual practices in Montreal, Toronto and Vancouver illustrates again how the preliminary inquiry can differ in practice from one region to another. While this procedure evidently is capable of providing discovery, it is certainly not used for this purpose throughout the country at the present time. This second purpose of the preliminary inquiry, a purpose which is not recognized by many prosecutors, is considered to be the main purpose of this procedure by most defence lawyers. This is claimed by defence lawyers in all regions of Canada, as is demonstrated by the answers to question number 9 of Part IV of the questionnaire.

Usual Practice of Defence Counsel at Preliminary Inquiries

	CANADA	MONTREAL	TORONTO	VANCOUVER
(a) You direct your efforts towards contesting the committal for trial rather than towards obtaining discovery	13.0%	18.2%	11.7%	3.9%
(b) You direct your efforts towards obtaining discovery rather than contesting the committal for trial	87.9%	81.8%	76.7%	92.2%

(f) *Preferred Indictments*

In certain cases, the prosecution is authorized to disregard the preliminary inquiry, proceeding directly by way of preferred indictment. This procedure could be used with the intention of avoiding a preliminary inquiry and thus depriving the defence of information it might otherwise be able to obtain. However, it seems that the preferred indictment procedure is not used systematically to avoid discovery. Question number 18 of Part V of the questionnaire sent to prosecutors asked: "In

your experience, are indictments preferred for the specific purpose of avoiding preliminary inquiries? " The answers were as follows:

	CANADA	MONTREAL	TORONTO	VANCOUVER
yes	3.1%	22.2%	0.0%	6.3%
no	53.3%	44.4%	81.1%	50.0%
no experience	43.6%	33.3%	14.3%	37.5%

In order to determine whether the "preferred indictment" procedure effectively deprives the defence of information it would otherwise obtain during the preliminary inquiry, defence counsel were asked whether they were usually able to obtain informal pre-trial discovery from the prosecution in cases where direct indictments are preferred. The answers were as follows:

	CANADA	MONTREAL	TORONTO	VANCOUVER
yes	29.1%	3.0%	27.0%	27.5%
no	9.4%	21.2%	13.5%	0.0%
no experience	61.4%	75.8%	51.5%	66.7%

2. Talking to Witnesses

Whether or not the nature of the case requires a preliminary inquiry, the defence has the right to meet with crown witnesses before trial—provided that it knows their identity of course—and interview them informally before their formal appearances in court. Theoretically, witnesses belong to neither party and both parties are free to meet with them. However, these meetings sometimes present difficulties due to the personality of the witness, his relationship with the accused, or the nature of the offence. In many cases, this meeting may be the first contact of the prospective witness with the judicial system and it is reasonable to believe that his attitude could be influenced by instructions or advice given by police or prosecution representatives. Therefore the questionnaire attempted to elicit the instructions given by police or prosecution representatives to their witnesses, and the impressions of defence counsel with respect to these matters. Again, a comparative table of the answers given by prosecutors and defence counsel throughout the country is set out, followed by a comparison of responses from Montreal, Toronto and Vancouver. In the next chapter, the instructions given by defence counsel to their witnesses with regard to their contacts with police or prosecution representatives will be examined.

The question asked of prosecutors began: "Potential crown witnesses are usually instructed," and that asked of defence counsel: "Potential crown witnesses

that you attempt to interview have usually been instructed;" in both cases, the list of possible instructions was the same and is reproduced in the following table:

I — Instructions Given to Crown Witnesses

— That they may speak with defence representatives but need not

	CANADA	MONTREAL	TORONTO	VANCOUVER
Prosecution	61.7%	33.3%	76.2%	93.8%
Defence	41.7%	18.2%	40.5%	80.4%

— That they should not speak with defence representatives

	CANADA	MONTREAL	TORONTO	VANCOUVER
Prosecution	4.0%	22.2%	9.5%	0.0%
Defence	19.1%	42.4%	27.0%	13.7%

— That they should cooperate fully with defence representatives

	CANADA	MONTREAL	TORONTO	VANCOUVER
Prosecution	6.5%	0.0%	0.0%	0.0%
Defence	6.1%	0.0%	3.1%	9.8%

— That they should not speak to defence representatives without first informing the police or prosecution representatives and obtaining their approval

	CANADA	MONTREAL	TORONTO	VANCOUVER
Prosecution	6.0%	11.1%	4.8%	6.3%
Defence	18.5%	21.2%	22.1%	25.5%

— That they should not speak to defence representatives unless the police or prosecution representatives are present

	CANADA	MONTREAL	TORONTO	VANCOUVER
Prosecution	7.0%	11.1%	9.5%	6.3%
Defence	7.6%	18.2%	5.5%	11.8%

— That they should not sign statements at the request of defence representatives

	CANADA	MONTREAL	TORONTO	VANCOUVER
Prosecution	24.4%	33.3%	23.8%	31.3%
Defence	18.1%	30.3%	29.4%	13.7%

– That they should report to the police or prosecution representatives all contact with accused or his representatives

	CANADA	MONTREAL	TORONTO	VANCOUVER
Prosecution	20.9%	33.3%	19.0%	12.5%
Defence	15.3%	30.3%	17.2%	11.8%

– Nothing about whom they may speak to or what they may discuss

	CANADA	MONTREAL	TORONTO	VANCOUVER
Prosecution	46.8%	55.6%	38.1%	25.0%
Defence	37.4%	33.3%	33.1%	21.6%

II – Instructions Given to Expert Witnesses

– That they may speak with defence representatives but need not

	CANADA	MONTREAL	TORONTO	VANCOUVER
Prosecution	44.8%	22.2%	66.7%	56.3%
Defence	39.6%	33.3%	45.4%	62.7%

– That they should not speak with defence representatives

	CANADA	MONTREAL	TORONTO	VANCOUVER
Prosecution	1.5%	0.0%	0.0%	6.3%
Defence	10.1%	12.1%	9.8%	7.8%

– That they should cooperate fully with defence representatives

	CANADA	MONTREAL	TORONTO	VANCOUVER
Prosecution	23.9%	0.0%	14.3%	12.5%
Defence	15.2%	9.1%	9.2%	29.4%

– That they should not speak to defence representatives without first informing the police or prosecution representatives and obtaining their approval

	CANADA	MONTREAL	TORONTO	VANCOUVER
Prosecution	6.0%	22.2%	4.8%	6.3%
Defence	15.8%	36.4%	20.9%	11.8%

– That they should not speak to defence representatives unless the police or prosecution representatives are present

	CANADA	MONTREAL	TORONTO	VANCOUVER
Prosecution	4.0%	11.1%	9.5%	0.0%
Defence	6.2%	15.2%	9.8%	5.9%

– That they should not sign statements at the request of defence representatives

	CANADA	MONTREAL	TORONTO	VANCOUVER
Prosecution	17.4%	22.2%	14.3%	18.8%
Defence	12.7%	15.2%	22.7%	7.8%

– That they should report to the police or prosecution representatives all contact with accused or his representatives

	CANADA	MONTREAL	TORONTO	VANCOUVER
Prosecution	15.9%	11.1%	14.3%	12.5%
Defence	9.8%	21.2%	14.1%	5.9%

– Nothing about whom they may speak to or what they may discuss

	CANADA	MONTREAL	TORONTO	VANCOUVER
Prosecution	44.8%	66.7%	38.1%	31.3%
Defence	27.5%	24.2%	19.6%	29.4%

III – Position Taken by Police Officers

– That they may speak with defence representatives but need not

	CANADA	MONTREAL	TORONTO	VANCOUVER
Prosecution	61.2%	77.8%	85.7%	50.0%
Defence	56.1%	63.6%	74.2%	62.7%

– That they should not speak with defence representatives

	CANADA	MONTREAL	TORONTO	VANCOUVER
Prosecution	8.5%	0.0%	0.0%	12.5%
Defence	15.7%	36.4%	10.4%	23.5%

– That they should cooperate fully with defence representatives

	CANADA	MONTREAL	TORONTO	VANCOUVER
Prosecution	12.9%	0.0%	0.0%	12.5%
Defence	18.9%	0.0%	16.0%	17.6%

– That they should not speak to defence representatives without first informing their superiors or prosecution representatives and obtaining their approval

	CANADA	MONTREAL	TORONTO	VANCOUVER
Prosecution	22.9%	0.0%	19.0%	25.0%
Defence	24.6%	12.1%	18.4%	35.3%

– That they should not speak to defence representatives unless their superiors or prosecution representatives are present

	CANADA	MONTREAL	TORONTO	VANCOUVER
Prosecution	7.0%	11.1%	9.5%	6.3%
Defence	7.2%	9.1%	3.1%	15.7%

– That they should not sign statements at the request of defence representatives

	CANADA	MONTREAL	TORONTO	VANCOUVER
Prosecution	40.3%	44.4%	38.1%	18.8%
Defence	7.2%	30.3%	43.6%	21.6%

– That they should report to their superiors or prosecution representatives all contact with accused or his representatives

	CANADA	MONTREAL	TORONTO	VANCOUVER
Prosecution	41.3%	44.4%	14.3%	37.5%
Defence	27.7%	6.1%	11.0%	3.9%

These figures speak for themselves. Again, great differences in position between Montreal and Vancouver in relation to the national average are revealed. Surprisingly, there is one case where the practice of the prosecutors from these three cities is identical: not one prosecutor in these three cities—and not one defence counsel from Montreal—indicated that the usual practice was for prosecutors to instruct crown witnesses to cooperate fully with defence representatives. This also applies in Montreal and Toronto with regard to expert witnesses. Furthermore, in their experience, the prosecutors from these two cities indicated that police officers usually do not cooperate fully with defence representatives.

On the other hand, however small their number, there were always persons who radically adopted an opposite attitude. Except in Vancouver, there was always one prosecutor who mentioned that witnesses are usually instructed not to speak with defence representatives. We find the opposite situation with regard to expert witnesses and police officers; it seems that they are sometimes given such instructions only in Vancouver.

Finally, one last question was asked of defence counsel with respect to their contacts with witnesses. The question read as follows: "Is your ability to obtain information from prosecution witnesses usually impaired by reason of the instructions given to those witnesses by police or prosecution representatives? "

	CANADA	MONTREAL	TORONTO	VANCOUVER
yes	40.9%	66.7%	45.4%	37.3%
no	59.0%	27.3%	45.4%	60.8%

CHAPTER IV – Disclosure by the Defence to the Prosecution

The data relevant to pre-trial disclosure by the defence to the prosecution may be found in Part VI of the questionnaire sent to prosecutors and in Part V of the questionnaire sent to defence counsel; Part III of the latter questionnaire also contains information on instructions given by defence counsel to their witnesses with respect to possible contact with police or prosecution representatives.

1. General

(a) *Needs of the Prosecution*

Prosecutors were first asked whether they were able to prepare adequately for trials without pre-trial disclosure by the defence. The question read as follows: "Are you usually able to predict and prepare for defences raised at trial by examination of the material in the prosecution file itself?" Throughout the country, 79.7% of prosecutors answered affirmatively. The answers do not vary significantly between Provinces so the detailed comparison is limited to answers from the three large cities examined earlier. The answers to this question were as follows:

Prosecutors able to predict defences:	CANADA	MONTREAL	TORONTO	VANCOUVER
yes	79.7%	77.8%	57.1%	93.8%
no	20.3%	22.2%	33.3%	6.3%

In Ontario mostly, a large number of prosecutors claimed that they are unable to predict and prepare for defences by examination only of the material in their own files. Indeed, 42.3% of Ontario prosecutors (excluding those of Toronto, Hamilton and Ottawa) indicated that they are usually unable to predict defences which will be raised at trial, compared to 53.8% who stated that they are usually able to do so. The percentage of prosecutors from the western Provinces including Manitoba, who stated that they are able to predict defences, never exceeded 12%.

This very important data permits a narrowing, within more realistic bounds, of the problem of pre-trial disclosure by the defence to the prosecution. Without saying that it is a false problem or a purely academic matter, it is clear that the relatively small proportion of prosecutors who claim a real need for pre-trial disclosure by the defence reduces the scope of the problem.

(b) *The Exchange of Information*

The fact that close to 80% of Canadian prosecutors stated they are usually able to predict and prepare for defences without pre-trial disclosure by the defence is confirmed by the fact that nearly the same proportion of prosecutors do not request or obtain information from the defence. The following question was asked of defence counsel: "Do prosecutors usually attempt to obtain informal pre-trial discovery from the defence prior to trial? " The answers were as follows:

	CANADA	MONTREAL	TORONTO	VANCOUVER
yes	16.4%	15.2%	13.5%	11.8%
no	83.4%	81.8%	80.4%	88.2%

To the question "If the prosecutor requests that you disclose information about the defence prior to trial do you usually agree to do so? " defence counsel answered:

	CANADA	MONTREAL	TORONTO	VANCOUVER
yes	53.4%	60.6%	57.1%	35.3%
no	46.5%	36.4%	36.8%	56.9%

Although more detailed and precise, similar questions were asked of prosecutors and their answers describe an almost identical situation.

Do you usually ask the defence to disclose:	CANADA		MONTREAL		TORONTO		VANCOUVER	
	yes	no	yes	no	yes	no	yes	no
(1) Technical defences or legal argument	22.2%	77.8%	22.2%	77.8%	33.3%	66.7%	6.1%	87.5%
– Does defence disclose	19.5%	79.9%	22.2%	66.7%	28.6%	57.1%	12.5%	75.0%
(2) The nature of defence	17.8%	81.7%	11.1%	88.9%	19.0%	81.0%	6.3%	87.5%
– Does defence disclose	20.2%	79.8%	11.1%	66.7%	28.6%	57.1%	12.5%	81.3%
(3) The nature of expert evidence	21.8%	78.2%	11.1%	88.9%	28.6%	71.4%	18.8%	81.3%
– Does defence disclose	26.4%	73.6%	11.1%	66.7%	28.6%	57.1%	31.3%	62.5%
(4) The identity of defence witnesses	9.1%	90.9%	0.0%	100.0%	9.5%	90.5%	6.3%	87.5%
– Does defence disclose	13.2%	86.8%	11.1%	66.7%	14.3%	66.7%	0.0%	93.8%
(5) Whether the accused will testify	14.6%	85.4%	22.2%	77.8%	19.0%	81.0%	25.0%	68.8%
– Does defence disclose	8.8%	91.2%	11.1%	66.7%	23.8%	52.4%	18.8%	68.8%

Again, only approximately 20% of the prosecutors indicated they request and obtain information from defence counsel. With respect to the amount of information obtained, there was quite a wide gap between the positions taken by defence counsel and by prosecutors; indeed, except for Vancouver, at least 50% of defence counsel stated that they usually agree to disclose certain matters at the request of prosecutors. On the other hand, the percentage of prosecutors indicating that they usually obtain this information was rarely more than 20%. However, this comparison must take into consideration the proportion of prosecutors who, in fact, indicated they request this information from the defence. Then, comparing the number of those who did so indicate and the number of those who reported obtaining such information, it is clear that there is rarely a wide gap between the two groups.

2. Disclosure of Defences

(a) *Defence of Alibi*

It is reasonable to believe that it is often difficult to predict a defence of alibi by examination of only the material in the prosecution file. The case law of Canada has confirmed this by encouraging the defence to disclose, prior to trial, its intention to rely on the defence of alibi.

(i) Does the Defence Disclose Alibi Prior to Trial?

This question was asked of defence counsel and prosecutors. Their answers were as follows:

Pre-Trial Disclosure of Defence of Alibi

	CANADA		MONTREAL		TORONTO		VANCOUVER	
	yes	no	yes	no	yes	no	yes	no
Prosecution	35.8%	64.2%	55.6%	44.4%	42.9%	52.4%	37.5%	62.5%
Defence	67.1%	32.5%	90.9%	9.1%	74.2%	19.0%	66.7%	31.4%

The highest proportion of disclosure of the defence alibi was found among defence counsel in Montreal. Montreal prosecutors similarly indicated, to the greatest extent, that a defence of alibi is usually disclosed prior to trial. However, there were quite sharp differences everywhere else between the answers of prosecutors and those of defence counsel.

(ii) When Does the Defence Disclose Alibi?

Pre-trial disclosure of the defence of alibi, as of other defences, is aimed at reinforcing the credibility of this defence during trial by preventing and countering allegations that the alibi has been recently invented or fabricated. In this context, it would be in the normal interest of the defence to disclose the alibi at the earliest opportunity. The following table indicates the point at which the defence usually discloses a defence of alibi according to the answers given by both prosecutors and

defence counsel, in cases where a preliminary inquiry is held, and also where none is available.

When Does the Defence Usually Disclose Alibi?

In cases where no preliminary inquiry is held

	CANADA		MONTREAL		TORONTO		VANCOUVER	
	P	D	P	D	P	D	P	D
– At the time of the first court appearance	10.3%	24.1%	22.2%	42.4%	4.8%	26.4%	0.0%	15.7%
– At the time of a remand in the case after the first court appearance	10.3%	22.5%	0.0%	15.2%	28.6%	24.5%	6.3%	25.5%
– At the time the plea is entered	8.0%	14.1%	0.0%	12.1%	0.0%	11.0%	6.3%	3.9%
– At the last possible moment before trial	16.7%	11.0%	33.3%	21.2%	14.3%	9.2%	18.8%	23.5%
– Not at all before trial	54.6%	28.1%	33.3%	9.1%	33.3%	13.5%	50.0%	23.5%

In Cases where a preliminary inquiry is held

	CANADA		MONTREAL		TORONTO		VANCOUVER	
	P	D	P	D	P	D	P	D
– At an early stage of the case and before the preliminary inquiry	11.4%	38.6%	0.0%	33.3%	0.0%	40.5%	6.3%	33.3%
– At the last possible moment before the preliminary inquiry	8.0%	5.4%	11.1%	12.1%	23.8%	9.2%	6.3%	0.0%
– At the preliminary inquiry but after the conclusion of the crown's case	20.6%	17.3%	55.6%	39.4%	14.3%	16.0%	6.3%	15.7%
– After the preliminary inquiry but at a reasonable time before trial	9.7%	13.1%	11.1%	15.2%	9.5%	8.0%	12.5%	13.7%
– After the preliminary inquiry and at the last possible moment before trial	8.6%	3.8%	0.0%	0.0%	19.0%	3.1%	6.3%	3.9%
– Not at all before trial	41.7%	21.8%	11.1%	0.0%	19.0%	8.0%	50.0%	25.5%

Prosecutors were also asked to indicate the point at which the accused usually discloses his intention to rely on the defence of alibi in cases where he is not represented by counsel. The answers were:

	CANADA	MONTREAL	TORONTO	VANCOUVER
– A reasonable time before trial	13.4%	0.0%	9.5%	12.5%
– At the last possible moment before trial	9.3%	44.4%	4.8%	12.5%
– Not at all before trial	77.3%	33.3%	76.2%	56.3%

(iii) What Information with Respect to Alibi Does the Defence Disclose?

When the defence discloses prior to trial its intention to rely on the defence of alibi, it does not necessarily disclose all details relevant to the alibi, including the names of supporting witnesses. The following table illustrates the proportion in which the defence only discloses to the prosecution its intention to rely on the defence of alibi, according to prosecutors and defence counsel.

Information Disclosed by the Defence with Respect to Alibi

	CANADA		MONTREAL		TORONTO		VANCOUVER	
	P	D	P	D	P	D	P	D
– The intention to rely on the defence of alibi	70.5%	54.7%	66.7%	60.6%	52.4%	39.3%	50.0%	54.9%
– The intention to rely on the defence of alibi and the nature of the alibi with the names of supporting witnesses	29.5%	44.9%	11.1%	33.3%	23.8%	41.7%	12.5%	27.5%

(b) *Defence of Insanity*

Although not normally required to do so by law, most defence counsel usually disclose to the prosecution prior to trial their intention to rely on an insanity defence. Both parties agreed that this defence is as readily disclosed prior to trial as the defence of alibi. The following table illustrates the distribution of answers to this question:

Pre-Trial Disclosure of Insanity Defence

	CANADA		MONTREAL		TORONTO		VANCOUVER	
	yes	no	yes	no	yes	no	yes	no
Prosecution	79.5%	20.5%	55.6%	22.2%	61.9%	14.3%	62.5%	18.8%
Defence	88.2%	11.2%	75.8%	15.2%	71.2%	4.3%	72.5%	0.0%

Comparing this table with the one on the disclosure of the defence of alibi, approximately the same number of defence counsel indicate they disclose these two defences prior to trial, except in Montreal where a greater proportion of defence counsel reported disclosure of the defence of alibi than of insanity. However, throughout the country, a greater proportion of prosecutors indicated that they are more often informed by the defence of a defence of insanity than a defence of alibi. The defence of insanity would likely often become apparent by examination of the file, much more so than alibi, and prosecutors would probably, in most cases, have no difficulty in predicting that the defence will be raised.

3. Plea Discussions

Because of the very informal nature of discussions between the parties prior to trial, it was expected that the defence would be more inclined to disclose information to the prosecution during the course of plea discussions; in order to reach a "settlement out of court" the parties would likely exchange information essential to the negotiation and formulation of a desired agreement. The following table indicates whether the defence usually discloses, during the course of plea discussions, more information than would otherwise be disclosed, according to both prosecutors and defence counsel:

	CANADA		MONTREAL		TORONTO		VANCOUVER	
	yes	no	yes	no	yes	no	yes	no
Prosecution	82.2%	17.8%	77.8%	22.2%	90.5%	4.8%	75.0%	25.0%
Defence	77.9%	22.1%	87.9%	12.1%	80.4%	17.8%	82.4%	15.7%

Therefore, it seems that meetings and plea discussions give the defence the opportunity and advantage of disclosing information to the prosecution.

4. Talking to Witnesses

In concluding this chapter dealing with pre-trial disclosure by the defence to the prosecution, the instructions that defence counsel give to their witnesses with respect to their contact with police or prosecution representatives will be examined. The questions asked made no distinction between expert witnesses and other witnesses. On the whole, the position taken by defence counsel was quite similar to that taken by prosecutors in each of the cities in question.

Instructions Given to Defence Witnesses

	CANADA	MONTREAL	TORONTO	VANCOUVER
— That they may speak with police or prosecution representatives but need not	35.9%	24.2%	45.4%	37.3%

	CANADA	MONTREAL	TORONTO	VANCOUVER
– That they should not speak with police or prosecution representatives	27.1%	33.3%	23.3%	35.3%
– That they should cooperate fully with police or prosecution representatives	9.8%	9.1%	9.2%	3.9%
– That they should not speak to police or prosecution representatives without first informing you and obtaining your approval	34.5%	24.2%	35.6%	49.0%
– That they should not speak to police or prosecution representatives unless you are present	25.5%	33.3%	25.8%	27.5%
– That they should not sign statements at the request of police or prosecution representatives	39.0%	45.5%	43.6%	45.1%
– That they should report to you all contact with police or prosecution representatives	42.0%	42.4%	55.2%	43.1%
– Nothing about whom they may speak to or what they may discuss	9.3%	9.1%	8.6%	5.9%

CHAPTER V – Opinions and Possibilities for Reform

The last part of the two questionnaires dealt with the opinions of prosecutors and defence counsel with respect to the present state of pre-trial discovery and with respect to possibilities for reform in these matters.

1. Opinions on the Present State of the Law

The first question asked of both parties concerned the importance or usefulness of the preliminary inquiry as a means of discovery. The question read as follows: "Does the preliminary inquiry, in your opinion, provide an adequate opportunity for the defence to obtain information necessary to effectively prepare for trial?" The answers were:

	CANADA		MONTREAL		TORONTO		VANCOUVER	
	yes	no	yes	no	yes	no	yes	no
Prosecution	89.9%	10.2%	88.9%	11.1%	90.5%	9.5%	87.5%	12.5%
Defence	60.8%	38.8%	30.3%	63.6%	48.5%	46.0%	76.5%	19.6%

It is not surprising to notice that 63.6% of defence counsel in Montreal expressed the opinion that the preliminary inquiry does not provide sufficient information for them to prepare adequately for trial. Even in Toronto, 46% of defence counsel were of the opinion that the inquiry is unsatisfactory in this respect.

Then, both parties answered the following questions:

"Are you satisfied with the present range of pre-trial discovery available *by law* to the defence?"

	CANADA		MONTREAL		TORONTO		VANCOUVER	
	yes	no	yes	no	yes	no	yes	no
Prosecution	65.3%	34.7%	88.9%	11.1%	57.1%	42.9%	37.5%	62.5%
Defence	27.2%	72.8%	12.1%	87.9%	22.7%	74.2%	11.8%	86.3%

"Are you satisfied with the present range of pre-trial discovery available *by law* to the prosecution?"

	CANADA		MONTREAL		TORONTO		VANCOUVER	
	yes	no	yes	no	yes	no	yes	no
Prosecution	43.1%	54.9%	66.7%	33.3%	19.0%	81.0%	37.5%	62.5%
Defence	76.1%	23.8%	63.6%	33.3%	67.5%	24.5%	76.5%	11.8%

"Are you satisfied with the present range of pre-trial discovery available to the defence *by law,* in cases where a preliminary inquiry is not available under the present Criminal Code?"

	CANADA		MONTREAL		TORONTO		VANCOUVER	
	yes	no	yes	no	yes	no	yes	no
Prosecution	45.9%	54.1%	88.9%	11.1%	28.6%	71.4%	41.4%	68.8%
Defence	10.1%	89.9%	3.1%	93.9%	6.7%	90.2%	3.9%	94.1%

Having given their opinion on existing proceedings, the lawyers were then asked to consider whether or not surprise played an important part in their respective trial strategies.

Does the surprise element play an important part in the strategy of the prosecution?

	CANADA		MONTREAL		TORONTO		VANCOUVER	
	yes	no	yes	no	yes	no	yes	no
Prosecution	5.1%	94.9%	33.3%	66.7%	0.0%	100.0%	0.0%	100.0%
Defence	22.9%	77.0%	54.8%	39.4%	25.8%	70.6%	9.8%	86.3%

Does the surprise element play an important part in the strategy of the defence?

	CANADA		MONTREAL		TORONTO		VANCOUVER	
	yes	no	yes	no	yes	no	yes	no
Prosecution	61.9%	38.1%	77.8%	22.2%	57.1%	42.9%	56.3%	43.8%
Defence	35.0%	65.0%	54.5%	45.5%	31.9%	64.4%	23.5%	74.5%

Again, this data agrees with the data collected earlier. Although no prosecutor in Toronto or Vancouver admitted to using the element of surprise as an important part of his trial strategy, 33.3% of Montreal prosecutors did state it was important. Of defence counsel in Montreal, 54.5% indicated that surprise is an important part of their trial strategy, compared to 31.9% in Toronto and 23.5% in Vancouver.

2. The Impact of Reform

In the chapter on opinions, the lawyers were also invited to predict the probable or possible impact of reform with respect to pre-trial discovery in criminal cases. The two groups were asked the following question: "If the prosecution were

required to make more extensive pre-trial disclosure to the defence do you believe? " followed by a list of possible events:

— Police sources of information would "dry up? "

	CANADA		MONTREAL		TORONTO		VANCOUVER	
	yes	no	yes	no	yes	no	yes	no
Prosecution	37.7%	62.3%	55.6%	11.1%	28.6%	71.4%	31.3%	68.8%
Defence	17.6%	82.3%	9.1%	90.9%	14.1%	77.3%	19.6%	78.4%

— There would be more reluctance by witnesses to assist police or prosecution?

	CANADA		MONTREAL		TORONTO		VANCOUVER	
	yes	no	yes	no	yes	no	yes	no
Prosecution	42.4%	57.6%	55.6%	33.3%	47.6%	47.6%	25.0%	75.0%
Defence	13.3%	86.7%	3.0%	93.9%	14.1%	76.1%	9.8%	86.3%

— There would be more perjury?

	CANADA		MONTREAL		TORONTO		VANCOUVER	
	yes	no	yes	no	yes	no	yes	no
Prosecution	24.7%	75.3%	55.6%	44.4%	19.0%	76.2%	12.5%	87.5%
Defence	6.0%	93.9%	0.0%	100.0%	7.4%	82.2%	5.9%	92.2%

— There would be more pleas of guilty?

	CANADA		MONTREAL		TORONTO		VANCOUVER	
	yes	no	yes	no	yes	no	yes	no
Prosecution	51.0%	49.0%	11.1%	88.9%	52.4%	47.6%	50.0%	50.0%
Defence	79.4%	20.6%	90.0%	9.1%	71.8%	21.5%	72.5%	25.5%

— There would be more pleas of not guilty?

	CANADA		MONTREAL		TORONTO		VANCOUVER	
	yes	no	yes	no	yes	no	yes	no
Prosecution	23.1%	76.9%	22.2%	77.8%	19.0%	81.0%	12.5%	81.3%
Defence	17.0%	83.0%	15.2%	84.8%	20.9%	66.9%	17.3%	86.3%

– There would be more convictions?

	CANADA		MONTREAL		TORONTO		VANCOUVER	
	yes	no	yes	no	yes	no	yes	no
Prosecution	16.4%	83.6%	0.0%	100.0%	9.5%	81.0%	0.0%	87.5%
Defence	22.8%	77.2%	9.1%	87.9%	23.9%	66.9%	15.7%	84.3%

– There would be more acquittals?

	CANADA		MONTREAL		TORONTO		VANCOUVER	
	yes	no	yes	no	yes	no	yes	no
Prosecution	35.9%	64.1%	77.8%	22.2%	19.0%	74.4%	37.5%	50.0%
Defence	46.8%	53.1%	57.6%	42.4%	42.9%	46.6%	62.7%	37.3%

– There would be more intimidation of witnesses?

	CANADA		MONTREAL		TORONTO		VANCOUVER	
	yes	no	yes	no	yes	no	yes	no
Prosecution	58.3%	41.8%	88.9%	11.1%	57.1%	42.9%	37.5%	56.3%
Defence	14.2%	85.8%	18.2%	81.8%	11.0%	77.9%	7.8%	90.2%

– Trials of contested cases would be shorter?

	CANADA		MONTREAL		TORONTO		VANCOUVER	
	yes	no	yes	no	yes	no	yes	no
Prosecution	58.2%	41.8%	22.2%	77.8%	57.1%	42.9%	68.8%	31.3%
Defence	88.5%	11.3%	90.9%	9.1%	77.9%	16.0%	96.1%	3.9%

– Trials of contested cases would take more time?

	CANADA		MONTREAL		TORONTO		VANCOUVER	
	yes	no	yes	no	yes	no	yes	no
Prosecution	25.9%	74.1%	44.4%	55.6%	19.0%	71.4%	6.3%	87.5%
Defence	8.7%	91.3%	6.1%	87.9%	11.0%	77.9%	5.9%	92.2%

These tables reveal that the opinions of Montreal practitioners differ greatly. For example, a greater proportion of Montreal prosecutors foresaw a potential increase in the amount of perjury (55.6%), and the proportion of defence counsel in Montreal who indicated that they anticipate more perjury is the smallest (0%).

3. Models for Reform

The last question of both questionnaires contained various statements with regard to solutions which could be applied to the problem of pre-trial discovery in criminal cases. These very brief statements merely indicated general avenues of reform. They were rarely supported by a majority among the two groups consulted and the number of supporters of any statement also varies with the place of practice. The distribution of answers between the two groups in each of the three cities is set out below.

Indicate whether you agree or not with the following statements:

— The nature and extent of pre-trial discovery should be regulated and determined only by a court or judge.

	CANADA		MONTREAL		TORONTO		VANCOUVER	
	yes	no	yes	no	yes	no	yes	no
Prosecution	11.3%	88.7%	11.1%	88.9%	14.3%	85.7%	18.8%	81.3%
Defence	14.0%	85.8%	6.1%	90.9%	12.3%	85.3%	11.8%	88.2%

— The law should specifically set out the information or evidence that the defence may discover from the prosecution prior to trial.

	CANADA		MONTREAL		TORONTO		VANCOUVER	
	yes	no	yes	no	yes	no	yes	no
Prosecution	52.6%	47.4%	22.2%	77.8%	57.1%	42.9%	56.3%	43.8%
Defence	67.4%	32.6%	84.8%	15.2%	65.6%	31.3%	60.8%	37.3%

— Pre-trial discovery by the defence in criminal cases should be followed by "some" pre-trial discovery of the defence by the prosecution.

	CANADA		MONTREAL		TORONTO		VANCOUVER	
	yes	no	yes	no	yes	no	yes	no
Prosecution	75.3%	24.7%	88.9%	11.1%	81.0%	19.0%	62.5%	37.5%
Defence	39.5%	60.4%	39.4%	60.6%	40.5%	56.4%	21.6%	78.4%

— A formal pre-trial discovery procedure for the defence should apply uniformly to all criminal offences.

	CANADA		MONTREAL		TORONTO		VANCOUVER	
	yes	no	yes	no	yes	no	yes	no
Prosecution	47.2%	52.8%	11.1%	88.9%	61.9%	38.1%	75.0%	25.0%
Defence	65.0%	35.0%	93.9%	6.1%	65.0%	32.5%	70.6%	29.4%

— A formal pre-trial discovery procedure for the defence should apply only to "more serious" criminal offences.

	CANADA		MONTREAL		TORONTO		VANCOUVER	
	yes	no	yes	no	yes	no	yes	no
Prosecution	37.5%	62.5%	33.3%	66.6%	47.6%	47.6%	31.3%	68.8%
Defence	30.7%	69.3%	6.1%	93.9%	30.1%	65.6%	19.6%	80.4%

— Discovery of the prosecution case ought to occur prior to any decision as to plea

	CANADA		MONTREAL		TORONTO		VANCOUVER	
	yes	no	yes	no	yes	no	yes	no
Prosecution	58.3%	41.7%	33.3%	66.7%	61.9%	33.3%	68.8%	31.3%
Defence	88.5%	11.5%	87.9%	12.1%	87.7%	11.0%	96.1%	3.9%

— A legal requirement that the prosecution provide the defence with signed statements or depositions of all witnesses to be called by the prosecution at trial would be a satisfactory substitute for the present preliminary inquiry.

	CANADA		MONTREAL		TORONTO		VANCOUVER	
	yes	no	yes	no	yes	no	yes	no
Prosecution	12.2%	87.8%	22.2%	77.8%	23.8%	76.2%	0.0%	100.0%
Defence	18.9%	80.9%	36.4%	63.6%	19.6%	76.1%	13.7%	84.3%

— Pre-trial discovery by the defence should be mainly a matter of prosecutorial discretion.

	CANADA		MONTREAL		TORONTO		VANCOUVER	
	yes	no	yes	no	yes	no	yes	no
Prosecution	49.2%	50.8%	77.8%	11.1%	28.6%	71.4%	31.3%	68.8%
Defence	4.9%	95.1%	3.0%	93.9%	4.3%	92.6%	3.9%	96.1%

CONCLUSION

The information obtained from Canadian lawyers, using these questionnaires on pre-trial discovery should help to define the nature of informal discovery practices and the manner of the exercise of this one aspect of prosecutorial discretion. Moreover, this information has demonstrated the extent to which these informal practices, and opinions about them, differ, and the inconsistency in the treatment of accused persons, from the discovery point of view, in different parts of the country. Even more important, the responses have clarified the extent to which the same institutions, such as the preliminary inquiry, operate differently in different locations in Canada. It is clear that the preliminary inquiry in Vancouver and Toronto shares little in common with the procedure as it operates in Montreal.

This study of the Canadian situation with respect to pre-trial discovery will, it is hoped, assist in the definition of problems requiring reform and in the formulation of possible solutions. It is further hoped that future reform in this area of Canadian law and practice can be directed towards the elimination of the disparities and deficiencies revealed in this study.

APPENDIX A — PROSECUTION

LAW REFORM COMMISSION

COMMISSION DE RÉFORME DU DROIT

Si vous désirez recevoir la version française de ce questionnaire, veuillez en faire la demande à l'adresse indiquée plus bas.

PE

CRIMINAL PROCEDURE

QUESTIONNAIRE

PRE-TRIAL DISCOVERY

The Law Reform Commission of Canada will be grateful for the return of this questionnaire within one month's time. All correspondence should be addressed to: Mr. Jean Côté, Secretary, Law Reform Commission of Canada, 130 Albert Street, Ottawa, Ontario, K1A 0L6.

April 1973

The Criminal Procedure Project of the Law Reform Commission of Canada is examining the need for reform of the laws and practices related to pre-trial discovery in criminal cases. The term "discovery", for purposes of this study, includes all of the processes and procedures, formal and informal, that facilitate pre-trial access to information and preparation by the parties in Criminal cases. The attached questionnaire and a similar one to be distributed to defence counsel have been drawn in order to assist in the assessment of the informal aspects of present discovery practices.

Many of the questions have been framed so as to permit only precise responses. It is understood that you may encounter difficulty in specifying definite answers to questions dealing with situations in which your practice may vary from case to case because of the influence of different variables. You are nevertheless requested, wherever possible, to provide definite answers based on your usual, personal practice, by checking only one appropriate numbered box for each question unless otherwise instructed. If you feel that your answer to any question should be clarified or elaborated, please use the space on the last page of the questionnaire which is provided for this purpose.

In supplying information about the nature and variety of present discovery practices and in expressing your opinions about the present system and possible directions for reform you will be of great assistance to the Procedure Project in our task of preparing recommendations to the Law Reform Commission.

The Director,
Criminal Procedure Project

Project Staff

Darrell W. Robert, Director
Louise Arbour
David Pomerant
Tom H. Wilson

PRE-TRIAL DISCOVERY QUESTIONNAIRE FOR PROSECUTORS

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PART I

BACKGROUND

1. Age:
   - Under 30 years ..... (29.4%)
   - 30 to 40 years ..... (34.1%)
   - 40 to 50 years ..... (25.3%)
   - Over 50 years ..... (11.2%)

2. Year of Call to Bar:
   - Before 1960 ..... (39.2%)
   - 1960 to 1970 ..... (48.2%)
   - After 1970 ..... (12.6%)

3. Nature of your present employment as prosecutor:
   - Full time ..... (61.6%)
   - Part time (excluding private prosecutions) ..... (38.4%)

4. Length of employment as prosecutor:
   - Less than one year ..... (7.6%)
   - 1 to 5 years ..... (41.4%)
   - More than 5 years ..... (50.5%)

5. If you are now employed as a part time prosecutor have you ever been employed as a full time prosecutor for one year or more?
   - Yes ..... (15.9%)
   - No ..... (84.1%)

6. By which one or more of the following are you presently employed (if you are a part-time prosecutor refer to your practice in the last 3 years): (Check one or more boxes)
   - Provincial Government ..... (72.3%)
   - Federal Government ..... (11.5%)
   - Municipal Government ..... (4.2%)
   - More than 1 ..... (12.0%)

7. Location of regular practice in the past 3 years as full or part-time prosecutor (check one or more boxes for applicable Province):

   I. *Prince Edward Island*
   - Charlottetown ..... (0.4%)
   - Other location in Prince Edward Island ..... (0.4%)

   II. *Newfoundland*
   - St. John's ..... (0.0%)
   - Other location in Newfoundland ..... (0.0%)

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III. *Nova Scotia*
- Halifax (metropolitan area) (2.0%)
- Other location in Nova Scotia (1.4%)

IV. *New Brunswick*
- St. John (metropolitan area) (0.6%)
- Other location in New Brunswick ..... (2.0%)

V. *Quebec*
- Montreal (metropolitan area) (4.1%)
- Quebec City (metropolitan area) ..... (2.4%)
- Other location in Quebec .... (9.3%)

VI. *Ontario*
- Toronto (metropolitan area) (9.7%)
- Hamilton (metropolitan area) (1.0%)
- Ottawa (metropolitan area) . (1.2%)
- Other location in Ontario ... (14.5%)

VII. *Manitoba*
- Winnipeg (metropolitan area) (3.1%)
- Other location in Manitoba . (3.7%)

VIII. *Saskatchewan*
- Regina ..... (3.3%)
- Saskatoon ..... (0.6%)
- Other location in Saskatchewan ..... (2.8%)

IX. *Alberta*
- Edmonton (metropolitan area) (3.5%)
- Calgary ..... (1.6%)
- Other location in Alberta ... (2.0%)

X. *British Columbia*
- Vancouver (metropolitan area) (6.8%)
- Victoria (metropolitan area) (3.5%)
- Other location in British Columbia ..... (18.1%)

XI. *Yukon and Northwest Territories* ..... (1.0%)

8. Indicate the order of frequency of your involvement in the past 3 years in the following activities as full or part-time prosecutor.

   Classify your answers by filling in the boxes in numerical order, using "1" to indicate the most frequent, and "2", "3", "4", "5", in decreasing order of frequency.

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Use "0" if the frequency is "nil".

Use the same number if the frequency of your involvement in two or more activities is equal.

I. *Offences*	Criminal Code Offences	(81.8%)
	Other Federal Criminal Offences ..	(11.9%)
	Provincial Offences	(7.5%)
	Offences Under Local Government by-laws	(0.5%)
II. *Tribunals*	Magistrate	(74.6%)
	Judge alone	(14.4%)
	Judge and Jury	(11.9%)
	Appeal Courts	(6.5%)
III. *Proceedings*	Remands and guilty pleas	(35.3%)
	Preliminary inquiries	(11.9%)
	Contested cases	(55.2%)
	Appeals	(9.0%)
	Administration or supervision	(10.4%)

9. Have you ever acted as a defence counsel in your career?

Yes	(76.4%)
No	(23.6%)

10. Indicate the frequency with which you act as prosecutor at trial after prosecuting at the preliminary inquiry in the same case:

In every case	(28.3%)
In most cases	(34.3%)
In a few cases	(24.7%)
In no cases	(12.6%)

11. (A)
When, prior to trial, do you *usually* obtain possession of the complete file in the trials you are to prosecute:

I. *Before Magistrates — Summary Conviction Offences*

Day of trial	(21.1%)
1 to 3 days before trial	(23.7%)
3 days to 1 week before trial .	(19.1%)
8 days to 2 weeks before trial .	(13.9%)
Over 2 weeks before trial	(22.2%)

II. *Before Magistrates — Indictable Offences*

Day of trial	(14.3%)
1 to 3 days before trial	(19.0%)
3 days to 1 week before trial .	(21.7%)
8 days to 2 weeks before trial .	(21.2%)
Over 2 weeks before trial	(23.8%)

Office Use Only

III. *Before Judge Alone*

Day of trial	(0%)
1 to 3 days before trial	(9.7%)
3 days to 1 week before trial	(14.6%)
8 days to 2 weeks before trial	(18.9%)
Over 2 weeks before trial	(56.8%)

IV. *Before Judge and Jury*

Day of trial	(0%)
1 to 3 days before trial	(3.5%)
3 days to 1 week before trial	(9.9%)
8 days to 2 weeks before trial	(11.7%)
Over 2 weeks before trial	(74.9%)

11. (B)
Does the timing of receipt of the complete file in the case *in itself* usually restrict the disclosure you would otherwise make to defence counsel with respect to trials:

Before Magistrates – Summary Conviction Offences	Yes	(18.0%)
	No	(82.0%)
Before Magistrates – Indictable Offences	Yes	(17.3%)
	No	(82.2%)
Before Judge Alone	Yes	(12.8%)
	No	(86.6%)
Before Judge and Jury	Yes	(11.8%)
	No	(87.6%)

PART II(A)

DISCLOSURE OF SPECIFIC MATTERS

Basing your answers on the following assumptions:

I The information exists
II You have access to the information
III Defence has requested the information
IV The case involves an offence for which a preliminary inquiry is not provided under the present criminal code.

Check *one* box indicating your *usual* pre-trial disclosure practices with respect to each item listed below:

	USUAL PRACTICES		
	Disclose	Do Not Disclose	No Fixed Practice
I. IDENTITY OF WITNESSES			
Names of civilian witnesses you intend to call at trial	(59.7%)	(12.4%)	(25.9%)

	USUAL PRACTICES			Office Use Only
	Disclose	Do Not Disclose	No Fixed Practice	
Addresses of civilian witnesses you intend to call at trial	(39.8%)	(22.4%)	(35.8%)	
Names of civilian witnesses you do not intend to call at trial	(39.8%)	(16.4%)	(41.8%)	
Addresses of civilian witnesses you do not intend to call at trial	(36.8%)	(18.4%)	(42.3%)	
Identity of police officers you intend to call at trial	(79.6%)	(5.5%)	(12.9%)	
Identity of police witnesses you do not intend to call at trial	(50.7%)	(12.9%)	(33.8%)	
Identity of expert witnesses you intend to call at trial	(80.1%)	(5.0%)	(12.9%)	
Identity of expert witnesses you do not intend to call at trial	(49.8%)	(13.4%)	(34.3%)	
Identity of persons who had an opportunity to, but failed to identify the accused	(36.3%)	(19.9%)	(41.8%)	
II. MATERIAL RELEVANT TO CHARACTER OR BACKGROUND OF WITNESSES OR ACCUSED				
Existence of relevant "similar fact" evidence	(67.2%)	(7.0%)	(23.9%)	
Nature of "similar fact" evidence you intend to use at trial	(60.7%)	(10.4%)	(26.4%)	
Criminal records of witnesses you intend to call at trial	(37.3%)	(26.9%)	(34.3%)	
Information other than criminal records with respect to character of witnesses you intend to call at trial	(15.9%)	(33.8%)	(48.3%)	
Criminal record of the accused	(91.0%)	(1.0%)	(6.0%)	
III. STATEMENTS OF ACCUSED AND CO-ACCUSED				
Signed statements of the accused you intend to use at trial	(89.1%)	(4.0%)	(6.0%)	
Signed statements of the accused you do not intend to use at trial	(61.7%)	(13.4%)	(22.9%)	
Unsigned or oral statements of the accused you intend to use at trial	(80.1%)	(5.5%)	(12.4%)	

	USUAL PRACTICES			Office Use Only
	Disclose	Do Not Disclose	No Fixed Practice	
Unsigned or oral statements of the accused you do not intend to use at trial	(54.2%)	(15.9%)	(27.4%)	
Statements of co-accused you intend to use at trial	(71.6%)	(10.0%)	(16.4%)	
Statements of co-accused you do not intend to use at trial	(47.3%)	(21.9%)	(28.9%)	
IV. STATEMENTS AND EXPECTED TESTIMONY OF WITNESSES				
Signed statements of witnesses you intend to call at trial	(30.8%)	(40.8%)	(25.9%)	
Signed statements of witnesses you do not intend to call at trial	(19.9%)	(44.8%)	(33.3%)	
Substance or summary of testimony expected to be given by witnesses you intend to call at trial	(69.7%)	(12.4%)	(15.9%)	
Substance or summary of statements made by witnesses you do not intend to call at trial	(32.3%)	(24.4%)	(41.3%)	
V. OBJECTS AND DOCUMENTS CONNECTED WITH THE CASE				
Search warrants	(52.2%)	(11.4%)	(32.8%)	
Objects or documents obtained by warrant from the accused	(72.1%)	(5.0%)	(20.9%)	
Objects or documents obtained by warrant from persons other than the accused	(38.8%)	(14.4%)	(43.3%)	
Objects or documents obtained from accused without warrant	(69.7%)	(5.5%)	(21.9%)	
Objects or documents obtained from persons other than the accused without warrant	(38.3%)	(15.9%)	(42.3%)	
Photographs you intend to use at trial	(86.6%)	(5.0%)	(7.5%)	
Photographs taken in connection with the case that you do not intend to use at trial	(45.8%)	(19.4%)	(32.8%)	

	USUAL PRACTICES			Office Use Only
	Disclose	Do Not Disclose	No Fixed Practice	
The confidential brief prepared for the prosecutor by the police ("dope sheet")	(16.4%)	(62.2%)	(19.4%)	
Police note-book entries related to the case	(8.0%)	(62.7%)	(27.4%)	
VI. CIRCUMSTANCES SURROUNDING POLICE INVESTIGATION OF THE CASE				
Identity and activities of undercover police officers connected with the case	(9.0%)	(54.2%)	(34.3%)	
Identity and activities of informants connected with the case	(3.5%)	(70.1%)	(24.9%)	
Existence and nature of illegally obtained evidence connected with the case	(22.9%)	(21.9%)	(50.2%)	
Existence and nature of evidence obtained by electronic apparatus connected with the case	(16.9%)	(17.9%)	(58.2%)	
Circumstances surrounding identification of the accused	(67.2%)	(11.4%)	(19.4%)	
Circumstances surrounding arrest of accused	(67.7%)	(8.5%)	(19.9%)	
Circumstances surrounding taking of statements from the accused	(74.1%)	(10.0%)	(14.9%)	
VII. THEORY AND MANNER OF PROSECUTION AT TRIAL				
The theory of the case for the prosecution	(53.7%)	(19.9%)	(24.4%)	
Existence and nature of circumstantial evidence you intend to use at trial	(67.2%)	(11.4%)	(19.9%)	
Diagrams, graphs, drawings, plans, etc., prepared to assist or be used by prosecution in presenting case at trial	(76.1%)	(7.5%)	(14.9%)	
Existence and nature of evidence you intend to use by way of rebuttal	(17.4%)	(40.8%)	(39.8%)	

Office Use Only

	USUAL PRACTICES		
	Disclose	Do Not Disclose	No Fixed Practice
Results of the legal research conducted by or for the prosecution in connection with the case	(29.4%)	(30.8%)	(37.3%)
Information of any sort that does not assist the prosecution that may be helpful to the defence	(41.8%)	(10.0%)	(46.3%)

PART II(B)

METHOD OF DISCLOSURE

47. With respect to those items in Part II(A) that you have indicated you usually disclose, indicate your usual method of disclosure:

1. *WRITTEN MATERIAL:*	Oral summaries only	(30.9%)
	Visual inspection	(26.0%)
	Full inspection and copying	(43.1%)
2. *PHYSICAL EVIDENCE:*	Oral description only	(24.2%)
	Visual inspection	(40.1%)
	Full inspection including release for testing if requested	(35.1%)

PART III

FACTORS AFFECTING DISCLOSURE PRACTICES

Indicate the influence of the following factors on your usual decision both to disclose and not to disclose information prior to trial.

With respect to each factor, please check 2 boxes, answering #1 or #2 in part A *and* #3 or #4 in part B.

For example if, with respect to the second listed item the reputation of defence counsel has an important influence on your decision both to disclose and not to disclose, check boxes #1 and #3.

	A		B	
	Important influence on decision to disclose	No effect on decision to disclose	Important influence on decision not to disclose	No effect on decision not to disclose
Accused requesting disclosure is representing himself without counsel	(39.2%)	(60.8%)	(28.4%)	(71.6%)
Reputation of counsel	(62.4%)	(37.6%)	(60.4%)	(39.6%)
Your personal relationship with defence counsel	(39.6%)	(63.1%)	(33.5%)	(66.5%)

	A		B	
	Important influence on decision to disclose	No effect on decision to disclose	Important influence on decision not to disclose	No effect on decision not to disclose
The present Criminal Code does not provide a preliminary inquiry in this case	(30.3%)	(69.7%)	(16.7%)	(83.3%)
Opinion of police officer in charge of investigation	(16.9%)	(83.1%)	(26.6%)	(73.4%)
Opinion of superior or colleagues	(44.7%)	(55.3%)	(45.9%)	(54.1%)
You are engaged in plea discussions with defence counsel	(56.5%)	(43.5%)	(34.1%)	(65.9%)
The case for the prosecution is weak	(23.4%)	(76.6%)	(20.9%)	(79.1%)
The case for the prosecution is strong	(33.8%)	(66.2%)	(14.0%)	(86.0%)
Defence can get this information at the preliminary inquiry	(31.3%)	(68.2%)	(30.6%)	(69.4%)
Defence was not able to get this information at the preliminary inquiry	(42.1%)	(57.9%)	(21.4%)	(78.6%)
Defence can obtain the material by court order at trial	(16.7%)	(83.3%)	(12.4%)	(87.6%)
Nature of the offence	(37.9%)	(62.1%)	(36.2%)	(63.8%)
Character and background of the accused	(32.3%)	(67.7%)	(34.4%)	(65.6%)
Accused is in custody pending trial	(21.0%)	(79.0%)	(11.2%)	(88.8%)
Financial resources of the accused	(7.7%)	(92.3%)	(3.2%)	(96.8%)

Office Use Only

PART IV

TALKING TO WITNESSES

Check one or more boxes indicating your usual experience:

1. *Potential Crown Witnesses are usually instructed:*
   That they may speak with defence representatives but need not ..... (61.7%)

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That they should not speak with defence representatives . (4.0%)
That they should cooperate fully with defence representatives ..... (6.5%)
That they should not speak to defence representatives without first informing the police or prosecution representatives and obtaining their approval ..... (6.0%)
That they should not speak to defence representatives unless the police or prosecution representatives are present (7.0%)
That they should not sign statements at the request of defence representatives ..... (24.4%)
That they should report to the police or prosecution representatives all contact with accused or his representatives ..... (20.9%)
Nothing about whom they may speak to or what they may discuss ..... (46.8%)

II. *Expert witnesses consulted by the prosecution are usually instructed:*

That they may speak with defence representatives but need not ..... (44.8%)
That they should not speak with defence representatives . . (1.5%)
That they should cooperate fully with defence representatives ..... (23.9%)
That they should not speak to defence representatives without first informing the police or prosecution representatives and obtaining their approval ..... (6.0%)
That they should not speak to defence representatives unless the police or prosecution representatives are present (4.0%)
That they should not sign statements at the request of defence representatives ..... (17.4%)
That they should report to the police or prosecution representatives all contact with accused or his representatives ..... (15.9%)
Nothing about whom they may speak to or what they may discuss ..... (44.8%)

III. *Police officers connected with the case usually take the position:*

That they may speak with defence representatives but need not ..... (61.2%)
That they should not speak with defence representatives . . (8.5%)
That they should cooperate fully with defence representatives ..... (12.9%)

Office Use Only

That they should not speak to defence representatives without first informing their superiors or prosecution representatives and obtaining their approval ..... (22.9%)

That they should not speak to defence representatives unless their superiors or prosecution representatives are present ..... (7.0%)

That they should not sign statements at the request of defence representatives ..... (40.3%)

That they should report to their superiors or prosecution representatives all contact with accused or his representatives ..... (41.3%)

PART V

PRELIMINARY INQUIRIES

For each question, check the one box that indicates your usual experience or practice.

1. Indicate the usual average time taken between the first appearance in court of the accused and the beginning of the preliminary inquiry.

   less than 2 weeks ..... (6.3%)
   2 weeks to 1 month ..... (29.2%)
   1 to 2 months ..... (41.1%)
   2 to 3 months ..... (16.1%)
   3 to 6 months ..... (6.3%)
   more than 6 months ..... (1.0%)

2. In your opinion is the time indicated in #1:

   too long ..... (41.7%)
   not long enough ..... (0.5%)
   just about right ..... (57.8%)

3. Does the usual average time between the first appearance in court of the accused and the beginning of preliminary inquiry appear to be

   increasing? ..... (52.9%)
   decreasing? ..... (5.8%)
   staying the same? ..... (41.4%)

4. How often do you suggest waiver of the preliminary inquiry when the defence asks you for informal pre-trial disclosure?

   in every case ..... (2.7%)
   in most cases ..... (14.4%)
   in a few cases ..... (33.7%)
   in no cases ..... (49.2%)

Office Use Only

5. How often do you insist on an undertaking to waive the preliminary inquiry before agreeing to make informal pre-trial disclosure to the defence?

in every case	(0%)
in most cases	(2.7%)
in a few cases	(8.6%)
in no cases	(88.8%)

6. How often does the defence waive the preliminary inquiry in return for pre-trial disclosure by the prosecution?

in every case	(1.1%)
in most cases	(6.5%)
in a few cases	(44.9%)
in no cases	(47.6%)

7. Do you usually require all witnesses that you intend to call at trial to attend at the preliminary inquiry?

Yes	(59.1%)
No	(40.9%)

8. Do you usually require all witnesses who attend at the preliminary inquiry at the request or demand of the prosecution, to testify?

Yes	(45.3%)
No	(54.7%)

9. Do you usually produce all available objects, documents and photographs at the preliminary inquiry that you intend to use as exhibits at trial?

Yes	(74.5%)
No	(25.5%)

10. Do you usually require all available expert witnesses to testify at the preliminary inquiry?

Yes	(56.5%)
No	(43.3%)

11. Do you usually inform the defence of the presence at the preliminary inquiry of prosecution witnesses you have decided not to call:

Inform on your own motion?	Yes	(69.7%)
	No	(30.3%)
Inform at the request of the defence?	Yes	(87.3%)
	No	(12.7%)

Office Use Only

12. With respect to those witnesses present at the preliminary inquiry whom you intend to call at trial but decide not to call at the preliminary inquiry, which of the following two positions do you usually take?

You agree to call such witnesses if requested to do so by the defence . . .	(62.4%)
You refuse to call such witnesses if requested to do so by the defence and insist that such witnesses be called by the defence, if at all	(37.6%)

13. At the preliminary inquiry:

Do you usually adduce all inculpatory written statements of the accused?	Yes	(77.2%)
	No	(22.8%)
Do you usually adduce all inculpatory oral statements of the accused?	Yes	(74.6%)
	No	(25.4%)
Do you usually adduce all inculpatory statements of the accused even if production does not seem to you to be essential in order to obtain a committal for trial?	Yes	(63.4%)
	No	(36.6%)
Do you usually adduce all exculpatory written statements of the accused?	Yes	(27.3%)
	No	(72.7%)
Do you usually adduce all exculpatory oral statements of the accused?	Yes	(26.3%)
	No	(73.7%)

14. Do you usually try to obtain an admission from the defence as to the voluntariness of statements or confessions of the accused in order to avoid a "voir dire" at the preliminary inquiry?

Yes	(40.0%)
No	(60.0%)

Office Use Only

15. In your experience are the rules of evidence usually followed at preliminary inquiries?

Yes ..... (94.9%)
No ..... (5.1%)

16. Are you in favour of relaxation of the rules of evidence at preliminary inquiries?

Yes ..... (36.7%)
No ..... (63.3%)

17. Do you usually close the case for the prosecution when you are of the opinion that there is sufficient evidence to justify committal for trial, even if witnesses present at the preliminary inquiry at the request or demand of the prosecution have not yet been called?

Yes ..... (37.3%)
No ..... (62.7%)

18. In your experience are indictments preferred for the specific purpose of avoiding preliminary inquiries?

Yes ..... (3.1%)
No ..... (53.3%)
No experience ..... (43.6%)

PART VI

PRE-TRIAL DISCLOSURE BY THE DEFENCE

1. Are you usually able to predict and prepare for defences raised at trial by examination of the material in the prosecution file itself?

Yes ..... (79.7%)
No ..... (20.3%)

2.1 Do you usually ask the defence to disclose prior to trial the existence and nature of proposed "technical" defences and legal argument to be raised at trial?

Yes ..... (22.2%)
No ..... (77.8%)

2.2 Does the defence usually agree to disclose this information?

Yes ..... (19.5%)
No ..... (79.9%)

3.1 Do you usually ask the defence to disclose prior to trial the nature of affirmative defences to be raised at trial?

Yes ..... (17.8%)
No ..... (81.7%)

Office Use Only

3.2 Does the defence usually agree to disclose this information?

Yes ..... (20.2%)
No ..... (79.8%)

4.1 Do you usually ask the defence to disclose prior to trial the existence and nature of expert evidence to be presented at trial?

Yes ..... (21.8%)
No ..... (78.2%)

4.2 Does the defence usually agree to disclose this information?

Yes ..... (26.4%)
No ..... (73.6%)

5.1 Do you usually ask the defence to disclose prior to trial the identity of defence witnesses?

Yes ..... (9.1%)
No ..... (90.9%)

5.2 Does the defence usually agree to disclose this information?

Yes ..... (13.2%)
No ..... (86.8%)

6.1 Do you usually ask the defence to disclose prior to trial whether or not the accused will testify?

Yes ..... (14.6%)
No ..... (85.4%)

6.2 Does the defence usually agree to disclose this information?

Yes ..... (8.8%)
No ..... (91.2%)

7. Does the defence usually disclose to you prior to trial the intention to rely on the defence of alibi?

Yes ..... (35.8%)
No ..... (64.2%)

8. When does the defence usually disclose to you the intention to rely on the defence of alibi in cases where the present Criminal Code *does not* provide a preliminary inquiry:

at the time of the first court appearance ..... (10.3%)
at the time of a remand in the case after the first court appearance ..... (10.3%)
at the time the plea was entered ..... (8.0%)
at the last possible moment before trial ..... (16.7%)
not at all before trial ..... (54.6%)

Office Use Only

9. When does the defence usually disclose to you the intention to rely on the defence of alibi in cases where the present Criminal Code *does* provide a preliminary inquiry:

at an early stage of the case and before the preliminary inquiry ..... (11.4%)
at the last possible moment before the preliminary inquiry ..... (8.0%)
at the preliminary inquiry but after the conclusion of the Crown's case ..... (20.6%)
after the preliminary inquiry but at a reasonable time before trial ..... (9.7%)
after the preliminary inquiry and at the last possible moment before trial ..... (8.6%)
not at all before trial ..... (41.7%)

10. When does the defence usually disclose to you the intention to rely on the defence of alibi where the accused is not represented by counsel:

a reasonable time before trial ..... (13.4%)
at the last possible moment before trial ..... (9.3%)
not at all before trial ..... (77.3%)

11. What information with respect to alibi does the defence usually disclose to you?

the intention to rely on the defence of alibi ..... (70.5%)
the intention to rely on the defence of alibi *and* the nature of the alibi with the names of supporting witnesses ..... (29.5%)

12. Does the defence usually disclose to you prior to trial the intention to rely on an insanity defence?

Yes ..... (79.5%)
No ..... (20.5%)

13. In your experience does the defence usually disclose to the prosecution during the course of plea discussions more information than would otherwise be the case?

Yes ..... (82.2%)
No ..... (17.8%)

PART VII

ATTITUDES AND OPINIONS ABOUT DISCOVERY

1. Do you believe the bulk of pre-trial disclosure of information to the defence is usually due to:

informal initiative of prosecutor .... (41.3%)

Office Use Only

informal initiative of police ..... (1.6%)
informal initiative of the defence ... (48.9%)
formal legal requirements ..... (8.2%)

2. Does the preliminary inquiry, in your opinion, provide an adequate opportunity for the defence to obtain information necessary to effectively prepare for trial?

Yes ..... (89.8%)
No ..... (10.2%)

3. Does the surprise element usually play an important part:

In your trial strategy?	Yes	(5.1%)
	No	(94.9%)
In the trial strategy of the defence?	Yes	(61.9%)
	No	(38.1%)

4. Are you satisfied with the present range of pre-trial discovery available *by law*:

To the defence?	Yes	(65.3%)
	No	(34.7%)
To the prosecution?	Yes	(43.1%)
	No	(56.9%)

5. Are you satisfied with the present range of pre-trial discovery available to the defence *by law*, in cases where a preliminary inquiry is not available under the present Criminal Code?

Yes ..... (45.9%)
No ..... (54.1%)

6. If the prosecution were required to make more extensive pre-trial disclosure to the defence do you believe:

Police sources of information would "dry up"?	Yes	(37.7%)
	No	(62.3%)
There would be more reluctance by witnesses to assist police or prosecution?	Yes	(42.4%)
	No	(57.6%)
There would be more perjury?	Yes	(24.7%)
	No	(75.3%)
There would be more pleas of guilty?	Yes	(51.0%)
	No	(49.0%)
There would be more pleas of not guilty?	Yes	(23.1%)
	No	(76.9%)

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There would be more convictions?
Yes ..... (16.4%)
No ..... (83.6%)

There would be more acquittals?
Yes ..... (35.9%)
No ..... (64.1%)

There would be more intimidation of witnesses?
Yes ..... (58.3%)
No ..... (41.7%)

Trials of contested cases would be shorter?
Yes ..... (58.2%)
No ..... (41.8%)

Trials of contested cases would take more time?
Yes ..... (25.9%)
No ..... (74.1%)

7. Indicate whether you agree or do not agree with the following statements:

The nature and extent of pre-trial discovery should be regulated and determined only by a court or judge
Agree ..... (11.3%)
Do Not Agree ..... (88.7%)

The law should specifically set out the information or evidence that the defence may discover from the prosecution prior to trial
Agree ..... (52.6%)
Do Not Agree ..... (47.4%)

Pre-trial discovery by the defence in criminal cases should be followed by "some" pre-trial discovery of the defence by the prosecution
Agree ..... (75.3%)
Do Not Agree ..... (24.7%)

A formal pre-trial discovery procedure for the defence should apply uniformly to all criminal offences
Agree ..... (47.2%)
Do Not Agree ..... (52.8%)

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A formal pre-trial discovery procedure for the defence should apply only to "more serious" criminal offences
Agree ..... (37.5%)
Do Not Agree ..... (62.5%)

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Discovery of the prosecution case ought to occur prior to any decision as to plea

Agree ..... (58.3%)
Do Not Agree ..... (41.7%)

A legal requirement that the prosecution provide the defence with signed statements or depositions of all witnesses to be called by the prosecution at trial would be a satisfactory substitute for the present preliminary inquiry

Agree ..... (12.2%)
Do Not Agree ..... (87.8%)

Pre-trial discovery by the defence should be mainly a matter of prosecutorial discretion

Agree ..... (49.2%)
Do Not Agree ..... (50.8%)

PART VIII

MISCELLANEOUS COMMENT

Use the space below to clarify any answer given or to express any views you may have with respect to pre-trial discovery in criminal cases.

APPENDIX B — DEFENCE

LAW REFORM COMMISSION

COMMISSION DE RÉFORME DU DROIT

Si vous désirez recevoir la version française de ce questionnaire, veuillez en faire la demande à l'adresse indiquée plus bas.

DE

CRIMINAL PROCEDURE

QUESTIONNAIRE

PRE-TRIAL DISCOVERY

The Law Reform Commission of Canada will be grateful for the return of this questionnaire within one month's time. All correspondence should be addressed to: Mr. Jean Côté, Secretary, Law Reform Commission of Canada, 130 Albert Street, Ottawa, Ontario, K1A 0L6.

April 1973

The Criminal Procedure Project of the Law Reform Commission of Canada is examining the need for reform of the laws and practices related to pre-trial discovery in criminal cases. The term "discovery", for purposes of this study, includes all of the processes and procedures, formal and informal, that facilitate pre-trial access to information and preparation by the parties in criminal cases. The attached questionnaire and a similar one to be distributed to prosecutors have been drawn in order to assist in the assessment of the informal aspects of present discovery practices.

Many of the questions have been framed so as to permit only precise responses. It is understood that you may encounter difficulty in specifying definite answers to questions dealing with situations in which your practice may vary from case to case because of the influence of different variables. You are nevertheless requested, wherever possible, to provide definite answers based on your usual, personal practice, by checking only one appropriate numbered box for each question unless otherwise instructed. If you feel that your answer to any question should be clarified or elaborated, please use the space on the last page of the questionnaire which is provided for this purpose.

In supplying information about the nature and variety of present discovery practices, and in expressing your opinions about the present system and possible directions for reform you will be of great assistance to the Procedure Project in our task of preparing recommendations to the Law Reform Commission.

The Director,
Criminal Procedure Project

Project Staff

Darrell W. Roberts, Director
Louise Arbour
David Pomerant
Tom H. Wilson

PRE-TRIAL DISCOVERY QUESTIONNAIRE FOR DEFENCE COUNSEL

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PART I – BACKGROUND

1. Age:
   - Under 30 years ..... (35.8%)
   - 30 to 40 years ..... (40.9%)
   - 40 to 50 years ..... (15.9%)
   - Over 50 years ..... (7.4%)

2. Year of Call to Bar:
   - Before 1960 ..... (25.4%)
   - 1960 to 1970 ..... (56.3%)
   - After 1970 ..... (18.3%)

3. Nature of Practice:
   - sole practitioner ..... (23.7%)
   - firm of 2-5 lawyers ..... (56.7%)
   - firm of 6-12 lawyers ..... (13.6%)
   - firm of more than 12 lawyers ..... (6.0%)

4. Approximate proportion of working time devoted to criminal defence (trial and appeal) work in the past 3 years.
   - 100 per cent ..... (3.0%)
   - 80-99 per cent ..... (6.3%)
   - 50-79 per cent ..... (15.5%)
   - 25-49 per cent ..... (22.8%)
   - 10-24 per cent ..... (34.5%)
   - less than 10 per cent ..... (17.9%)

5. Location of the *bulk* of your criminal defence work in the past 3 years (check one or more boxes for applicable Province):

   I. *Prince Edward Island*
   - Charlottetown ..... (0.1%)
   - Other location in Prince Edward Island ..... (0.0%)

   II. *Newfoundland*
   - St. John's ..... (0.6%)
   - Other location in Newfoundland ..... (0.3%)

   III. *Nova Scotia*
   - Halifax (metropolitan area) .. (3.1%)
   - Other location in Nova Scotia . (3.1%)

   IV. *New Brunswick*
   - St. John (metropolitan area) .. (0.5%)
   - Other location in New Brunswick..... (2.7%)

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V. *Quebec*
- Montreal (metropolitan area) . (3.1%)
- Quebec City (metropolitan area) . . . . . (1.5%)
- Other location in Quebec . . . . (1.3%)

VI. *Ontario*
- Toronto (metropolitan area) . . (20.9%)
- Hamilton (metropolitan area) . (4.0%)
- Ottawa (metropolitan area) . . (3.1%)
- Other location in Ontario . . . . (27.7%)

VII. *Manitoba*
- Winnipeg (metropolitan area) . (4.1%)
- Other location in Manitoba . . . (1.3%)

VIII. *Saskatchewan*
- Regina . . . . . (1.9%)
- Saskatoon . . . . . (1.1%)
- Other location in Saskatchewan (0.7%)

IX. *Alberta*
- Edmonton (metropolitan area). (3.8%)
- Calgary (metropolitan area) . . (1.9%)
- Other location in Alberta . . . . (1.8%)

X. *British Columbia*
- Vancouver (metropolitan area). (6.5%)
- Victoria (metropolitan area) . . (1.2%)
- Other location in British Columbia . . . . . (3.1%)

XI. *Yukon and Northwest Territories* . . . . . (0.5%)

6. Have you ever acted as a full time Crown Prosecutor?
   - Yes . . . . . (8.5%)
   - No . . . . . (91.5%)

7. Have you ever been employed or retained as a part time prosecutor or to prosecute specific cases (excluding private prosecutions)?
   - Yes . . . . . (46.0%)
   - No . . . . . (54.0%)

8. Indicate the order of frequency of your involvement in the past 3 years in the following activities as defence counsel.

   Classify your answers by filling in the boxes in numerical order, using "1" to indicate the most frequent, and "2", "3", "4", in decreasing order of frequency.

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Use "0" if the frequency is "nil".

Use the same number if the frequency of your involvement in two or more activities is equal.

I. *Offences*	Criminal Code Offences	(81.0%)
	Other Federal Criminal Offences	(3.0%)
	Provincial Offences	(13.2%)
	Offences Under Local Government by-laws	(2.1%)
II. *Tribunals*	Magistrate	(86.1%)
	Judge alone	(8.6%)
	Judge and Jury	(2.4%)
	Appeal Courts	(1.6%)
III. *Proceedings*	Remands and guilty pleas	(54.0%)
	Preliminary inquiries	(7.5%)
	Contested trials	(40.4%)
	Appeals	(2.0%)

PART II

DISCOVERY OF SPECIFIC MATTERS

I. Considering that you are dealing with a case where the present Criminal Code does *not* provide a preliminary inquiry, indicate your *usual* practices and experience with respect to pre-trial discovery of the items listed below.

(Check #1 *or* #2, and #3 *or* #4 with respect to each listed item)

	USUAL PRACTICE AND EXPERIENCE			
	Request	Do Not Request	Obtain	Do Not Obtain
I. IDENTITY OF WITNESSES				
Names and addresses of civilian witnesses the prosecutor intends to call at trial	(62.4%)	(34.7%)	(53.5%)	(35.9%)
Names and addresses of civilian witnesses the prosecutor does not intend to call at trial	(33.2%)	(63.5%)	(25.1%)	(61.7%)

	USUAL PRACTICE AND EXPERIENCE				Office Use Only
	Request	Do Not Request	Obtain	Do Not Obtain	
Identity of police officers the prosecutor intends to call at trial	(74.4%)	(22.7%)	(73.5%)	(18.5%)	
Identity of police witnesses the prosecutor does not intend to call at trial	(39.3%)	(57.3%)	(32.3%)	(55.4%)	
Identity of expert witnesses the prosecutor intends to call at trial	(69.8%)	(26.2%)	(63.7%)	(27.3%)	
Identity of expert witnesses the prosecutor has consulted but does not intend to call at trial	(27.7%)	(67.7%)	(16.4%)	(68.8%)	
Identity of persons who had an opportunity to, but failed to identify the accused	(45.6%)	(48.4%)	(25.8%)	(59.9%)	
II. MATERIAL RELEVANT TO CHARACTER OR BACKGROUND OF WITNESSES OR ACCUSED					
Existence of relevant "similar fact" evidence	(57.9%)	(36.4%)	(50.8%)	(37.9%)	
Nature of "similar fact" evidence the prosecutor intends to use at trial	(58.9%)	(35.2%)	(49.2%)	(39.1%)	
Criminal records of witnesses the prosecutor intends to call at trial	(51.9%)	(44.1%)	(32.4%)	(57.5%)	
Information other than criminal records with respect to character of witnesses the prosecutor intends to call at trial	(29.9%)	(65.3%)	(18.4%)	(67.3%)	
Criminal record of the accused	(88.2%)	(8.4%)	(85.3%)	(9.4%)	

	USUAL PRACTICE AND EXPERIENCE				Office Use Only
	Request	Do Not Request	Obtain	Do Not Obtain	
III. STATEMENTS OF ACCUSED AND CO-ACCUSED					
Signed statements of the accused the prosecutor intends to use at trial	(92.8%)	(4.0%)	(82.2%)	(13.4%)	
Signed statements of the accused the prosecutor does not intend to use at trial	(82.4%)	(13.5%)	(60.5%)	(32.3%)	
Unsigned or oral statements of the accused the prosecutor intends to use at trial	(86.0%)	(11.2%)	(67.3%)	(27.6%)	
Unsigned or oral statements of the accused the prosecutor does not intend to use at trial	(71.9%)	(24.2%)	(48.3%)	(43.5%)	
Statements of co-accused the prosecutor intends to use at trial	(87.1%)	(9.2%)	(67.6%)	(25.5%)	
Statements of co-accused the prosecutor does not intend to use at trial	(67.0%)	(28.4%)	(43.1%)	(47.0%)	
IV. STATEMENTS AND EXPECTED TESTIMONY OF WITNESSES					
Signed statements of witnesses the prosecutor intends to call at trial	(58.9%)	(37.3%)	(29.3%)	(60.6%)	
Signed statements of witnesses the prosecutor does not intend to call at trial	(41.6%)	(53.9%)	(16.1%)	(71.2%)	
Substance or summary of testimony expected to be given by witnesses the prosecutor intends to call at trial	(78.1%)	(18.6%)	(66.1%)	(26.2%)	

	USUAL PRACTICE AND EXPERIENCE				Office Use Only
	Request	Do Not Request	Obtain	Do Not Obtain	
Substance or summary of statements made by witnesses the prosecutor does not intend to call at trial	(49.3%)	(46.2%)	(29.7%)	(59.1%)	
V. OBJECTS AND DOCUMENTS CONNECTED WITH THE CASE					
Search warrants	(39.3%)	(53.9%)	(34.3%)	(51.1%)	
Objects or documents obtained by warrant from the accused	(64.8%)	(28.8%)	(53.9%)	(34.2%)	
Objects or documents obtained by warrant from persons other than the accused	(36.8%)	(55.3%)	(25.2%)	(58.3%)	
Objects or documents obtained from accused without warrant	(66.8%)	(27.5%)	(52.5%)	(36.5%)	
Objects or documents obtained from persons other than the accused without warrant	(35.9%)	(56.3%)	(23.4%)	(59.8%)	
Photographs the prosecutor intends to use at trial	(79.6%)	(14.7%)	(69.1%)	(22.5%)	
Photographs taken in connection with the case that the prosecutor does not intend to use at trial	(51.7%)	(41.5%)	(34.8%)	(51.9%)	
The confidential brief prepared for the prosecutor by the police ("dope sheet")	(63.1%)	(33.2%)	(37.5%)	(50.8%)	
Police note-book entries related to the case	(43.5%)	(52.4%)	(18.6%)	(69.1%)	

	USUAL PRACTICE AND EXPERIENCE				Office Use Only
	Request	Do Not Request	Obtain	Do Not Obtain	
VI. CIRCUMSTANCES SURROUNDING POLICE INVESTIGATION OF THE CASE					
Identity and activities of undercover police officers connected with the case	(41.7%)	(51.6%)	(16.3%)	(68.6%)	
Identity and activities of informants connected with the case	(41.7%)	(51.6%)	(9.4%)	(76.1%)	
Existence and nature of illegally obtained evidence connected with the case	(45.0%)	(46.1%)	(16.4%)	(67.1%)	
Existence and nature of evidence obtained by electronic apparatus connected with the case	(34.3%)	(52.0%)	(12.5%)	(64.7%)	
Circumstances surrounding identification of the accused	(81.7%)	(12.9%)	(66.8%)	(24.7%)	
Circumstances surrounding arrest of the accused	(84.6%)	(11.4%)	(74.2%)	(19.0%)	
Circumstances surrounding taking of statements from the accused	(85.7%)	(10.1%)	(65.5%)	(27.6%)	
VII. THEORY AND MANNER OF PROSECUTION AT TRIAL					
The theory of the case for the prosecution	(58.6%)	(37.0%)	(52.9%)	(36.5%)	
Existence and nature of circumstantial evidence the prosecutor intends to use at trial	(68.7%)	(26.7%)	(56.0%)	(34.0%)	

USUAL PRACTICE AND EXPERIENCE

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	Request	Do Not Request	Obtain	Do Not Obtain
Diagrams, graphs, drawings, plans, etc., prepared to assist or be used by prosecution in presenting case at trial	(67.3%)	(27.2%)	(53.7%)	(37.0%)
Existence and nature of evidence the prosecutor intends to use by way of rebuttal	(37.8%)	(55.0%)	(17.3%)	(66.6%)
Results of the legal research conducted by or for the prosecution in connection with the case	(24.6%)	(68.9%)	(14.8%)	(68.9%)
Information of any sort that does not assist the prosecution that may be helpful to the defence	(55.0%)	(39.6%)	(26.0%)	(60.4%)

II. What are your usual reasons for *not* requesting information from the prosecution? (check one or more boxes)

You believe the prosecutor will refuse to disclose the information ..... (61.2%)

You believe the prosecutor will require disclosure of information by the defence in exchange ..... (8.8%)

The information is usually available by means other than request to the prosecutor ..... (38.0%)

Other (Check box #4 and specify) ..... (21.0%)

_____

_____

_____

_____

_____

III. Do you make frequent use of private investigators in preparing the facts in criminal cases?

Yes ..... (8.6%)
No ..... (91.4%)

PART III

TALKING TO WITNESSES

Office Use Only

Check one or more boxes indicating your usual experience:

I. *Potential Crown Witnesses that you attempt to interview have usually been instructed:*

That they may speak with defence representatives but need not . . . . . (41.7%)

That they should not speak with defence representatives . (19.1%)

That they should cooperate fully with defence representatives . . . . . (6.1%)

That they should not speak to defence representatives without first informing the police or prosecution representatives and obtaining their approval . . . . . (18.5%)

That they should not speak to defence representatives unless the police or prosecution representatives are present (7.6%)

That they should not sign statements at the request of defence representatives . . . . . (18.1%)

That they should report to the police or prosecution representatives all contact with accused or his representatives . . . . . (15.3%)

Nothing about whom they may speak to or what they may discuss . . . . . (37.4%)

II. *Expert witnesses consulted by the prosecution that you attempt to interview have usually been instructed:*

That they may speak with defence representatives but need not . . . . . (39.6%)

That they should not speak with defence representatives . (10.1%)

That they should cooperate fully with defence representatives . . . . . (15.2%)

That they should not speak to defence representatives without first informing the police or prosecution representatives and obtaining their approval . . . . . (15.8%)

That they should not speak to defence representatives unless the police or prosecution representatives are present (6.2%)

That they should not sign statements at the request of defence representatives . . . . . (12.7%)

That they should report to the police or prosecution representatives all contact with accused or his representatives . . . . . (9.8%)

Nothing about whom they may speak to or what they may discuss . . . . . (27.5%)

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III. *Police officers connected with the case that you attempt to interview usually take the position:*

That they may speak with defence representatives but need not . . . . . (56.1%)

That they should not speak with defence representatives . (15.7%)

That they should cooperate fully with defence representatives . . . . . (18.9%)

That they should not speak to defence representatives without first informing their superiors or prosecution representatives and obtaining their approval . . . . . (24.6%)

That they should not speak to defence representatives unless their superiors or prosecution representatives are present . . . . . (7.2%)

That they should not sign statements at the request of defence representatives . . . . . (7.2%)

That they should report to their superiors or prosecution representatives all contact with accused or his representatives . . . . . (27.7%)

IV. *You usually instruct your own witnesses:*

That they may speak with police or prosecution representatives but need not . . . . . (35.9%)

That they should not speak with police or prosecution representatives . . . . . (27.1%)

That they should cooperate fully with police or prosecution representatives . . . . . (9.8%)

That they should not speak to police or prosecution representatives without first informing you and obtaining your approval . . . . . (34.5%)

That they should not speak to police or prosecution representatives unless you are present . . . . . (25.5%)

That they should not sign statements at the request of police or prosecution representatives . . . . . (39.0%)

That they should report to you all contact with police or prosecution representatives . . . . . (42.0%)

Nothing about whom they may speak to or what they may discuss . . . . . (9.3%)

V. Is your ability to obtain information from prosecution witnesses usually impaired by reason of the instructions given to those witnesses by police or prosecution representatives?

Yes . . . . . (40.9%)

No . . . . . (59.0%)

Office Use Only

PART IV

PRELIMINARY INQUIRIES

For each question, check the one box that indicates your usual experience or practice.

1. Indicate the usual average time taken between the first appearance in court of the accused and the beginning of the preliminary inquiry:

less than 2 weeks	(4.8%)
2 weeks to 1 month	(25.5%)
1 to 2 months	(47.5%)
2 to 3 months	(18.0%)
3 to 6 months	(3.9%)
more than 6 months	(0.4%)

2. In your opinion is the time indicated in #1:

too long	(22.8%)
not long enough	(2.2%)
just about right	(75.0%)

3. Does the usual average time between the first appearance in court of the accused and the beginning of preliminary inquiry appear to be

increasing?	(46.8%)
decreasing?	(8.0%)
staying the same?	(45.3%)

4. How often do prosecutors suggest waiver of the preliminary inquiry when you ask for informal pre-trial disclosure?

in every case	(4.7%)
in most cases	(19.5%)
in a few cases	(32.3%)
in no cases	(43.5%)

5. How often do prosecutors insist on an undertaking to waive the preliminary inquiry before agreeing to make informal pre-trial disclosure to the defence?

in every case	(2.9%)
in most cases	(9.5%)
in a few cases	(18.2%)
in no cases	(69.3%)

6. How often do you waive the preliminary inquiry in return for pre-trial disclosure by the prosecution?

in every case	(0.3%)
in most cases	(6.6%)
in a few cases	(34.3%)
in no cases	(58.8%)

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7. In your experience are the rules of evidence usually followed at preliminary inquiries?

   Yes . . . . . (76.3%)
   No . . . . . (23.6%)

8. Are you in favour of relaxation of the rules of evidence at preliminary inquiries?

   Yes . . . . . (39.2%)
   No . . . . . (60.6%)

9. Which of the following two positions best represents your usual practice at preliminary inquiries in the past 3 years:

   You have directed your efforts towards contesting the committal for trial rather than towards obtaining discovery of the case for the prosecution . . . . . (13.0%)

   You have directed your efforts towards obtaining discovery of the case for the prosecution rather than contesting the committal for trial . . . . . (87.0%)

10. In cases where direct indictments are preferred are you usually able to obtain informal pre-trial discovery from the prosecution?

    Yes . . . . . (29.1%)
    No . . . . . (9.4%)
    No experience . . . (61.4%)

PART V

PRE-TRIAL DISCLOSURE BY THE DEFENCE

1. Do prosecutors usually attempt to obtain informal pre-trial discovery from the defence prior to trial?

   Yes . . . . . (16.4%)
   No . . . . . (83.4%)

2. If the prosecutor requests that you disclose information about the defence prior to trial do you usually agree to do so?

   Yes . . . . . (53.4%)
   No . . . . . (46.5%)

3. Do you usually disclose to the prosecution during the course of "plea discussions", more information than would otherwise be the case?

   Yes . . . . . (77.9%)
   No . . . . . (22.1%)

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4. Do you usually disclose to the prosecution prior to trial the intention to rely on the defence of alibi?

   Yes . . . . . (67.1%)
   No . . . . . (32.5%)

5. When do you usually disclose the intention to rely on the defence of alibi in cases where the present Criminal Code *does not* provide a preliminary inquiry:

   at the time of your first appearance in court in the case . . . . . (24.1%)
   at the time of a remand in the case after your first court appearance . . . . . (22.5%)
   at the time the plea is entered . . . . . (14.1%)
   at the last possible moment before trial . . . . . (11.0%)
   not at all before trial . . . . . (28.1%)

6. When do you usually disclose the intention to rely on the defence of alibi in cases where the present Criminal Code *does* provide a preliminary inquiry:

   at an early stage of the case and before the preliminary inquiry . . . . . (38.6%)
   at the last possible moment before the preliminary inquiry . . . . . (5.4%)
   at the preliminary inquiry but after the conclusion of the Crown's case . . . . . (17.3%)
   after the preliminary inquiry but at a reasonable time before trial . . . . . (13.1%)
   after the preliminary inquiry and at the last possible moment before trial . . . . . (3.8%)
   not at all before trial . . . . . (21.8%)

7. What information with respect to alibi defence do you usually disclose?

   the intention to rely on the defence of alibi . . . . (54.7%)
   the intention to rely on the defence of alibi *and* the nature of the alibi with the names of supporting witnesses . (44.9%)

8. Do you usually disclose to the prosecution before trial the intention to rely on an insanity defence?

   Yes . . . . . (88.2%)
   No . . . . . (11.2%)

PART VI

ATTITUDES AND OPINIONS ABOUT DISCOVERY

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1. Do you believe the bulk of pre-trial disclosure of information to the defence is usually due to:

informal initiative of prosecutor . .	(24.8%)
informal initiative of police	(3.8%)
informal initiative of the defence .	(64.7%)
formal legal requirements	(6.7%)

2. Does the preliminary inquiry, in your opinion, provide an adequate opportunity for the defence to obtain information necessary to effectively prepare for trial?

Yes	(60.8%)
No	(38.8%)

3. Does the surprise element usually play an important part:

In your trial strategy?	Yes	(35.0%)
	No	(65.0%)
In the trial strategy of the prosecution?	Yes	(22.9%)
	No	(77.0%)

4. Are you satisfied with the present range of pre-trial discovery available *by law*:

To the defence?	Yes	(27.2%)
	No	(72.8%)
To the prosecution?	Yes	(76.1%)
	No	(23.8%)

5. Are you satisfied with the present range of pre-trial discovery available to the defence *by law*, in cases where a preliminary inquiry is not available under the present Criminal Code?

Yes	(10.1%)
No	(89.9%)

6. If the prosecution were required to make more extensive pre-trial disclosure to the defence do you believe:

Police sources of information would "dry up"?	Yes	(17.6%)
	No	(82.3%)
There would be more reluctance by witnesses to assist police or prosecution?	Yes	(13.3%)
	No	(86.7%)
There would be more perjury	Yes	(6.0%)
	No	(93.9%)

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There would be more pleas of guilty?
Yes . . . . . (79.4%)
No . . . . . (20.6%)

There would be more pleas of not guilty?
Yes . . . . . (17.0%)
No . . . . . (83.0%)

There would be more convictions?
Yes . . . . . (22.8%)
No . . . . . (77.2%)

There would be more acquittals?
Yes . . . . . (46.8%)
No . . . . . (53.1%)

There would be more intimidation of witnesses?
Yes . . . . . (14.2%)
No . . . . . (85.8%)

Trials of contested cases would be shorter?
Yes . . . . . (88.5%)
No . . . . . (11.3%)

Trials of contested cases would take more time?
Yes . . . . . (8.7%)
No . . . . . (91.3%)

7. Indicate whether you agree or do not agree with the following statements:

The nature and extent of pre-trial discovery should be regulated and determined only by a court or judge
Agree . . . . . (14.0%)
Do Not Agree . . . (85.8%)

The law should specifically set out the information or evidence that the defence may discover from the prosecution prior to trial
Agree . . . . . (67.4%)
Do Not Agree . . . (32.6%)

Pre-trial discovery by the defence in criminal cases should be followed by "some" pre-trial discovery of the defence by the prosecution
Agree . . . . . (39.5%)
Do Not Agree . . . (60.4%)

A formal pre-trial discovery procedure for the defence should apply uniformly to all criminal offences
Agree . . . . . (65.0%)
Do Not Agree . . . (35.0%)

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A formal pre-trial discovery procedure for the defence should apply only to "more serious" criminal offences

Agree . . . . . (30.7%)
Do Not Agree . . . (69.3%)

Discovery of the prosecution case ought to occur prior to any decision as to plea

Agree . . . . . (88.5%)
Do Not Agree . . . (11.5%)

A legal requirement that the prosecution provide the defence with signed statements or depositions of all witnesses to be called by the prosecution at trial would be a satisfactory substitute for the present preliminary inquiry

Agree . . . . . (18.9%)
Do Not Agree . . . (80.9%)

Pre-trial discovery by the defence should be mainly a matter of prosecutorial discretion

Agree . . . . . (4.9%)
Do Not Agree . . . (95.1%)

PART VII

MISCELLANEOUS COMMENT

Use the space below to clarify any answer given or to express any views you may have with respect to pre-trial discovery in criminal cases.