WORKING CONFERENCE

PREPARING FOR TRIAL

Law Reform Commission of Canada

Commission de réforme du droit du Canada

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A working proposal
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I. PROBLEMS AND PROPOSALS

A. Introduction

The Federal Law Reform Commission has, almost since its inception, made an on-going study of pre-trial criminal procedure. From that study two conclusions have emerged. Firstly, procedures from arrest to trial are among the most important yet problematic in the criminal law. Secondly, it is not an area in which it is easy to make sound recommendations for reform.

Pre-trial procedures are important because they consume a major portion of the resources allocated to the criminal process and because they affect so many different people in so many different ways. Police, prosecutors, defence counsel, accused, witnesses and the public generally all have important interests in the rules and practice governing what happens before trial. The area is problematic because of the increasing and often justified criticisms that present procedures are not as fair, effective or efficient as they should be.

Although the problems are generally recognized, their solution is not. In part this is due to the vastness

and diversity of our country. Size imposes a difficult logistical dimension to any proposed reform; diversity of practice manifests itself dramatically in the radically different attitudes and approaches taken to similar situations throughout the country. In the result, urban solutions become rural problems and vice versa. What is considered radical innovation in one part of the country is accepted as commonplace somewhere else. In part, the difficulties are due to the constitutional division of power between the federal and provincial governments. Questions of jurisdiction have tended to distract from the substantive problems. At times we become preoccupied with who should be able to do something rather than with what should be done. The difficulty in searching for a solution is partly due to a dearth of reliable statistics on current practice. What information we do have is spotty, often contradictory and impressionistic, and from it a fuzzy and troubled picture can be drawn.

It has become apparent that reform of pre-trial procedures will have to come from many sources and be predicated on the co-operation of the various groups involved. It is also apparent that the reform cannot be

introduced hastily and, when introduced, will require much consultation and experimentation.

Bearing these factors in mind, we are making recommendations which we hope will assist readers to explore the various problems, and themselves propose solutions for improving the system.

Accordingly, this paper focuses attention on areas of concern and interest in pre-trial criminal procedure; it identifies some of the problems and examines their apparent cause. It then makes a tentative recommendation for their remedy. Recommendations are also made regarding details of implementation because, in examining problems and making recommendations for change, the method by which that change will be implemented may have a profound effect on the success or failure of the ultimate product. In short, then, this model is at this stage put forth as a vehicle to assist study and discussion on this subject at the Working Conference. Following the Working Conference the Commission should be in a position to present recommendations which represent what should -- and can -- be accomplished.

B. Concerns About Pre-trial Procedure

Criminal procedure, in providing the rules and practices for guiding a criminal case from initial investigation through the trial process, reconciles or attempts to reconcile the competing needs of effective law enforcement and individual liberty in an adversarial setting. It was not, however, structured to guide a criminal charge through the system in the most fair and effective manner. The time and resources allocated to the preliminary, non-trial stages of a prosecution are considerable and largely determine the conduct of the police, prosecution and defence prior to trial. The vast majority of criminal cases are disposed of without trial. The conduct of those cases which do go to trial is considerably influenced by what occurs prior to trial. In sum, in terms of time, resources and substantive effect on the criminal justice system, pre-trial procedures are of key importance.

In this area of procedure many concerns are raised. We hear of the juror who sits through days of tedious testimony saying to himself "surely these guys are not arguing about all of this, there must be some common ground". We hear of the disgruntled witness who sits

around court all day and is never called (nor advised why not), or is called to give evidence on a limited point, say the ownership of his car, so that he wonders about a system that is so inflexible in the evidence it requires. We hear of counsel who put their case together at the last moment, ill-prepared for trial. There are many complaints and many symptoms. Let us look at perhaps the most telling symptom before examining some of the problems and complaints.

The most telling weakness in the operation of our criminal justice system is the feeling of discord in society itself; there seems to be a general feeling in society that the law is not effective in dealing with crime, that potentially dangerous criminals are permitted to remain at large and that those who are apprehended are unlikely to be brought to justice in the full sense of the word. The common saying "a good lawyer will get him off", is less a plaudit to the professional acumen of lawyers than a condemnation of a system of justice seen by the public to be so full of technicalities that it can be used by clever practitioners to circumvent its own stated purposes. Justice is not something to be waited for or bargained for, yet the public feels that is what's happening.

The reputation of the entire judicial process is tarnished by presenting the image of an unwieldy and unresponsive process. The citizen is often distressed by what he learns through the media or experiences personally. The man in the street is the oft-forgotten person when the specialized lawyers' areas of the law are considered. The views of the citizenry must be sought. Their rights and interests must be acknowledged and respected.

In our opinion there are two basic concerns at the root of most problems in this area. First, the accused normally does not have full knowledge of the case against him at an early stage of the proceedings, certainly not before the preliminary hearing and often not even then. Indeed, more often than not, he does not have a preliminary. The sooner he obtains this knowledge, the sooner he is able to assess his position and either enter a guilty plea or prepare adequately for trial. Second, in the period between first appearance and trial, a multitude of delays frequently arise from the efforts of the Crown or the defence to 'discover' their own case, or other equally frustrating delays which occur through miscellaneous reasons such as lack of preparation, unavailable witnesses or conflicting trial dates. Still other delays are

engineered by some counsel for tactical reasons. Persistent delays, in the long run, degrade the quality of justice meted out by our courts.

1. The Uninformed Accused

The accused person is normally at a disadvantage in obtaining information about the case against him in that he has inadequate access to the resources necessary to conduct an investigation and prepare his case. The preliminary enquiry, whose chief functions now are to provide discovery to the accused and screen out cases which have insufficient evidence to support a trial, is neither available to the accused in all cases nor provides full discovery when it is available. Until he knows the case against him, he is not in a position to adequately prepare for trial or to enter an informed guilty plea. In jurisdictions where procedures have been developed to provide full information to the accused, the percentage of guilty pleas increases with early and full disclosure of the prosecutor's case to the accused. While the right of the accused to plead not guilty and thus require a trial is a right that cannot be challenged, this surely does not justify failure to provide him with the means of making an early decision on plea. The accused should have the right

to complete knowledge of the Crown's case against him prior to trial at an early stage in the process. Not only is this fair and proper in protecting the rights of the accused, it will also assist in improving other aspects of the criminal process.

2. Delay

Many people feel that the single, most pressing problem facing the administration of justice in Canada today is that of unnecessary delay in resolving criminal cases. Delays beyond those essential to the proper administration of justice are becoming widespread, especially in jurisdictions with heavy case loads. The adverse effects of long delays in bringing cases to trial are numerous. The general preventive or deterrent effect of arrest, trial, and sentence is dissipated by long delays. The deterrent effect on the offender may likewise be lessened by delay, especially if it is seen as a symptom of a system that may be manipulated to his advantage. The accused who desires a speedy disposition may be frustrated in his efforts to present a defence and be subjected to agonizing uncertainty as to his future. Both the Crown and the defence may be prejudiced by the disappearance or forgetfulness of witnesses. There are many causes for delay in the process. We will refer briefly to several.

In stating our concern about delay, we do not imply that speed is all-important. Some time lapse between initial charging and trial is inevitable and desirable in the interests of a fair and properly conducted trial. The parties must be given adequate time for preparation; witnesses must be given adequate notice; trials should be scheduled at a time that is most convenient to all concerned; essential pre-trial procedures, such as the preliminary inquiry under the present system, or discovery and pre-trial hearings under our proposal must be completed. Speed and efficiency are not values in themselves: we are concerned about delay only as it adversely affects the process.

(a) Administrative and Managerial Problems

The lack of co-ordinated, professional management of the criminal justice system is, according to many studies, one of the principal causes of delay. Lack of proper caseflow management, inadequate systems for the collection and dissemination of data, lack of co-ordination between various segments of the system, uneven distribution of judges, delays in transcripts, large caseloads, centralization of criminal courts in units of unmanageable size, are all problems calling for solution at the administrative level.

(b) Legal Aid

Legal aid, like motherhood, is difficult to criticize; its abolition is certainly not recommended. It certainly has led to a higher percentage of legally represented accused and to the quite proper approach by counsel to use all available remedies in an endeavour to get the best result for their client. The impact of the increased caseload on the court system has been astonishing and it is no criticism of legal aid lawyers to point out that when court systems and procedures, inadequate to begin with, are burdened with increasing demands and workloads, they become unwieldy. In large urban centres where caseloads are heavy, the utilization to the hilt of the overburdened system, including, on the part of a few, the tactic of delay for the benefit of the client, emphasizes the necessity to at least streamline that system.

(c) Attitudes and Work Habits of Lawyers

Some say that lack of preparation by Crown and defence counsel is a chief cause of delay. Some prosecutors, the argument goes, 'discover' their own case as they parade a series of witnesses through a preliminary enquiry, questioning them from statements

they themselves are reading for the first time. Some defence counsel too, are known to 'fly by the seat of their pants'. They leave preparation to the last minute, often failing to take advantage of current means for learning about the Crown's case. No doubt there is merit to these opinions but they must be tempered by the knowledge that many counsel, particularly Crown counsel, can point to extreme workloads as the cause of their lack of preparation.

The familiar way is usually perceived as the easy way. The familiar method of practice in the criminal bar is, unfortunately, based on a system that has accepted delay as a way of life. Under the present system where the lawyer's primary duty is to his client, lawyers quite properly take advantage of rules that will assist their client, including the use of rules for the purpose of obtaining delays. Here, it is the rules themselves that require close scrutiny and tightening up to curb their abuse.

(d) Over-utilization of the System

When the witness says "You mean I've lost a whole day's work and pay to spend two minutes saying just

> that", his concern is a signal to pay attention. Undoubtedly, witnesses quite properly do miss work to give evidence on a contentious issue, but so often witnesses are called either at the preliminary or the trial stage when properly prepared counsel, acting in the proper interests of their client, could waive the hearing of the evidence or admit the non-contentious matter sought to be established. Indeed, pilot discovery projects in Montreal and Ottawa show that the services of thousands of witnesses per month can be dispensed with.

We have briefly described some current problems in the area of pre-trial criminal procedure. Each one identifies part of a very complex problem and points to part of its ultimate solution. We must recognize that the reasons for present concerns and the public's cynicism are complex and will doubtless require a variety of corrective measures before they are resolved. Among these may be the re-assessment of the role of defence and Crown counsel, increased judicial training and specialization, re-examination of the impact and funding of legal aid, and re-assessment of the need to expand and upgrade court facilities and personnel. For our part, we shall consider

those pre-trial practices and procedures, which in so many areas are no longer capable of adequately handling needs and demands. In so doing, we recognize that this initiative is but one of many which must be taken if present difficulties are to be resolved.

Our initiative concentrates on the current practice of competent responsible counsel. Generally speaking, these counsel, both Crown and defence, are able to gather sufficient information to adequately inform themselves of their position prior to the preliminary enquiry. Prepared beforehand, they understand the issues and direct the focus of the proceedings to them. Non-contentious issues are recognized and ways of expediting the trial, such as defence admissions, are often agreed upon. The well-informed counsel at the preliminary hearing is often the one who, from the Crown side, withdraws the charge or, from the defence side, recommends a plea of guilty. Such counsel very rarely go on lengthy 'fishing expeditions' which prolong the hearing.

Our recommendations are based on the belief that the earlier the Crown and defence become knowledgeable of their case, the earlier they will direct their minds to the

real issues. Familiarity with their case will lead to the realization that only a few Crown witnesses, if any, will have to be called at the discovery hearing and, after committal, non-contentious issues can be spoken to in order to limit witnesses and otherwise expedite the trial. Implicit, however, is the understanding that there be no lengthy delays between committal and trial.

C. A Proposal for Reform

Our proposal for reform offers a system which could be implemented with considerable legislation or, on the other hand, a system which could be implemented voluntarily with minimal legislative action. It borrows heavily upon the current practices of competent responsible counsel and on the experience of the pilot discovery projects in Montreal and Ottawa and has several broad objectives:

(1) to ensure that the accused is fully informed of the case against him at an early stage in the process;

(2) to facilitate and encourage thorough case preparation by counsel;

(3) to reduce the involvement of witnesses and jurors so as to avoid unnecessary discomfort, inconvenience and expense;

(4) to improve and expedite the trial itself by directing attention to the key issues and reducing trial length and complexity.

In the next few pages our proposal is briefly outlined. The following chapters expand it in detail. Simulations in the appendix of hypothetical case situations will assist the reader in better understanding its operation in practice. (See Appendices E and F).

1. PLAN A - Where election is made to a higher court

(a) Commencement of the Criminal Process

(i) The Charging Process

It will continue as it now exists with the exception that the investigating officer will convey the information and the police file to the prosecutor as soon as the information has been laid.

(ii) Initial Appearance(s)

(1) reading and delivery of information to the accused;

(2) delivery of information sheet (appendix);

(3) election;

(4) show cause application;

(5) date set for completion of discovery before provincial court judge.

(b) Discovery

The defence shall have the opportunity to examine all the Crown's evidence, receive copies of witness statements and documents, and examine exhibits.

(i) Informal Discovery Meeting

The procedure and format for this will be worked out by Crown and defence counsel. The purpose is to fully inform the accused of the Crown's case. Discovery should be completed one week prior to the Discovery Hearing. Counsel will advise each other which witnesses they will be making application to hear at the Discovery Meeting. At this time, the Court should be advised of anticipated length of the Discovery Hearing so as to adjust its calendar accordingly.

(ii) Discovery Hearing

(replaces preliminary enquiry)

This hearing will be in provincial court. At this hearing, the discovered materials, witness statements, documents and exhibits, will be filed with the court and form part of the court record. Witnesses may be examined in special cases with leave of the court, their evidence also forming part of the discovered materials. Disputes concerning the adequacy of the discovered material will be dealt with. Committal will be automatic unless there is a defence application to quash. Except in exceptional circumstances, this will be the last opportunity to elect or re-elect before trial. The case will be set over for the next sitting of the elected court.

(c) Preparation for Trial

(i) Informal meeting of counsel

This, an informal meeting of counsel, in person or by phone, is for the purpose of

preparing for the pre-trial hearing before a judge of the court elected to hear the trial. Discussions will be directed by reference to the Pre-trial Check List (Appendix C). This meeting should take place at least one week before the hearing.

(ii) Pre-trial Hearing and Assignment Date

Using the Pre-trial Check List as a guide, the judge, the Crown and defence will review the following matters with a view to making arrangements to expedite trial:

(1) Disclosure of positive defences intended to be raised.
(2) Admissions by accused.
(3) Settlement of collateral issues.
(4) Arrangements for introduction of non-testimonial evidence.

Any defence disclosures or admissions would be made voluntarily. A record of any admissions or other arrangements to facilitate the hearing of the trial will be prepared for the trial judge.

The trial date will be set at the conclusion of this hearing.

2. PLAN B - Trial in Provincial Court

(a) Commencement of the Criminal Process

This will be identical to I(a) above except adjournment or remand will be to a date at least two weeks prior to trial at which discovery will be completed and pre-trial matters discussed.

(b) Informal Discovery and Settlement of Issues Meeting

The informal meetings as described in Plan A between counsel for the purpose of preparing for discovery, and the pre-trial hearing, will be combined in this meeting.

(c) Discovery and Pre-trial Hearing

The Discovery Hearing and the Pre-trial Hearing referred to in Plan A are combined in Plan B.

NOTE: In the province of Quebec, due to the somewhat different jurisdiction of its courts, Plans A and B should read as follows:

PLAN A: (1) All cases to be heard by a jury either by election or because of absolute jurisdiction.

(2) All cases to be heard by a judge of Part XVI of the Criminal Code when the discovery judge is a municipal court judge.

PLAN B: (I) All cases to be heard by a magistrate of Part XVI either because of absolute jurisdiction or by election.

(2) All cases to be heard by a judge of Part XVI when the discovery judge is other than a municipal judge.

3. Implementation

This is applicable to Plans A and B.

Since the process of implementation may well have a profound effect on the nature of the final product, it deserves considerable attention. We recognize that if reforms are not properly introduced, their introduction may create more problems than the reforms were intended to

alleviate. We recommend that it be tried on a trial basis for several years applying only to a limited number of offences. Before any legislation is passed there should be comprehensive consultation with the provinces. Once the necessary legislation is enacted, there should be a delay of one year to enable provincial authorities to establish complementary rules of practice and procedure. During this period, workshops and seminars should be held to familiarize those actively involved in the criminal process with the new laws and procedures.

In developing our proposal in the following chapters our comments are directed to Plan A, where election is made to a higher court. We believe the procedure in provincial court can readily be determined by analogy.

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II. COMMENCEMENT OF THE CRIMINAL PROCESS

A. The Charging Process

Our proposal for reform, in the form of the model previously outlined, concentrates on pre-trial activity at the discovery and pre-trial hearing stages. Yet what occurs prior to them may well have considerable influence, not only on what happens during these latter stages, but also on how it happens. We should ask the following questions about initial stages of the criminal justice process. Who should lay the information and what should it contain? How should the police and Crown counsel co-ordinate their activities? With what information should the accused be provided at the beginning of the process? What is the most fair and effective way to proceed against the accused? How should election to trial court be handled? These and other questions will assist us in examining the system and seeking solutions.

1. The Police and the Crown

The police and Crown counsel have complementary but independent responsibilities in the administration of criminal justice. It is generally accepted that the police

have primary responsibility for the detection and investigation of crime. They also have the discretion, as does any person, to lay an information when they, upon reasonable and probable grounds, believe that a person has committed an offence.

In practice, the vast majority of criminal informations are laid by the police. Once an information has been laid, the Crown prosecutor should assume his prosecutorial responsibility by reviewing the charge to determine whether to proceed, whether the charge laid is correct, what further investigation is necessary for a successful prosecution, etc. He can only exercise this role if he has the relevant information before him. It is very important, therefore, that once an information is laid, the investigating officer send the police file and the information to the Crown at the earliest possible date. In the vast majority of cases, the time between the laying of information and the communication of the police file to the prosecutor should not exceed one week. Indeed, in many uncomplicated cases, one or two days should be sufficient. Early communication of the file to the Crown will allow errors to be corrected prior to the first court appearance.

Present co-operation between the police and Crown counsel in the charging process and the extent of that co-operation is a function of local conditions and priorities. A key element of our proposal is the need for both the Crown and the defence to be fully informed of their respective cases prior to the Discovery Hearing. To ensure effectiveness at the discovery and pre-trial hearing stages, co-operation between and co-ordination of police and prosecutorial functions is essential.

Recommendations

We therefore recommend that the following practices should be encouraged:

First, to more fully inform the accused and his counsel, the information sworn against the accused should contain a maximum rather than a minimum of information. This would ordinarily include:

(i) the section of the Code or other statutes under which the charge is laid;

(ii) the date, place and time of the alleged offence; and

(iii) a comprehensive description of the offence.

Second, while we acknowledge that as a practical matter policemen should continue to lay the majority of charges, the police should be encouraged, as they already are in some jurisdictions, to consult the Crown attorney on the charge to be laid in all difficult or serious cases. In these cases, consultation between police and Crown should, when possible, take place before the initial court appearance of the accused. This will allow the Crown to make whatever suggestions, amendments or changes that are necessary without the inconvenience and cost of an additional court appearance. It will also ensure that the charge laid is supported by the evidence.

Third, the police file should be sent to the Crown attorney as early as possible. Early communication of the police file to the prosecutor makes it possible for him to initiate discovery of the evidence and enables him to better prepare for the discovery and pre-trial hearings.

2. The Accused and his Rights

Introduction into the criminal process is normally a stressful occasion for accused persons. The setting, the terminology, the people -- the entire situation

is usually unfamiliar, often intimidating. His understanding of the proceedings about to be taken against him will be incomplete at the best. Prior to first appearance in court he should have information that will help alleviate these problems. An explanatory document which we call a 'standard form statement', should be delivered to the accused for this purpose. It should contain the following information:

An explanation of:

(1) the accused's right to remain silent;

(2) the right to plead not guilty;

(3) the presumption of innocence;

(4) the right, where the accused is in custody, to a hearing on the matter of judicial interim release;

(5) the procedure for obtaining legal advice, including the availability of legal aid;

(6) what will occur at his first court appearance, including the full meaning of a plea of guilty and an explanation of when an election as to mode of trial is available, and what each electable option entails;

(7) discovery and the pre-trial hearing

(See Appendix A).

Such a statement will be particularly helpful in directing an accused to a lawyer but also for the accused who chooses to remain unrepresented.

B. First Appearance(s)

The first court appearance, as under the present system, will be in provincial, magistrates' or sessions court. It is difficult to generalize as to precisely what will occur at this stage. This will depend on many factors, including the length of time between arrest or summons and first appearance, whether the accused has counsel, and whether the accused is prepared to enter a plea or make an election. In all cases, however, the accused will be arraigned, the charge will be read to him, a copy of the information will be given to him and -- where the accused is unrepresented -- the judge will explain the pre-trial discovery process. If he pleads guilty his sentence will be determined according to current practice. If the accused is in custody, he will be given an opportunity to have a show cause hearing for judicial interim release. A date will be set for the discovery hearing. These steps may be completed in one or several appearances.

At this stage the accused or his counsel should receive a document which we refer to as a 'General Case Report' - See Appendix B. It provides to the accused in a nutshell the basic information the Crown has about him and the circumstances of the alleged offence. It would assist him on such matters as plea, election and initial preparation for the discovery and pre-trial hearings.

C. Election

The election of the accused as to mode of trial requires further consideration because of the special consequences it will have on the discovery and pre-trial hearings. In current practice we are concerned by delays engineered by some accused or their counsel through use of election and re-election. We emphasize throughout this paper the necessity for the accused to be fully informed of the case against him early in the process, while at the same time taking measures to make the proceedings more efficient and expeditious. In the context of the accused's election, we recognize that it may be necessary for him to receive complete discovery before he is in a position to make the election of his choice. Once discovery is completed, however, he should indicate his final election, having the right to re-election only in exceptional

circumstances, for instance when the introduction of new Crown evidence substantially alters the nature of their case against the accused.

We make the following recommendations with respect to election. The accused should be able to make his election at an initial appearance, prior to the discovery hearing, but also should be able to reserve that right until after the discovery hearing. Where he initially elects trial in provincial court, the matter would be adjourned for the discovery and pre-trial hearing before that court. After the first stage of that hearing, the discovery portion, he could re-elect to a higher court and the proceedings would then be adjourned for pre-trial hearing in that court. Otherwise, the provincial court judge would proceed with the pre-trial hearing and set a date for trial. Should the accused initially elect trial by jury, but after discovery wish to re-elect before provincial court, on making such election the provincial court judge would merely proceed with the pre-trial hearing and set a date for trial. Where the accused reserves his election until after discovery is completed, the judge at the discovery hearing would, depending on the election, proceed with the pre-trial hearing or set the proceedings over to

County or Superior Court for that hearing. An accused who has the benefit of discovery should be in a position to make a competent election on completion of discovery. The court should give leave to re-elect only on the basis of exceptional and extenuating circumstances, where the absence of a re-election would cause the accused to suffer a substantial injustice. To do otherwise would be to encourage unnecessary and unjustified delays.

Once the accused has appeared at the discovery hearing, his next appearance in court (other than if in provincial court) will be for the pre-trial hearing. Exceptional circumstances may occasionally dictate a modification in the sequence of events that we have outlined. Where the accused is unrepresented by counsel, additional court appearances may be necessary to protect his rights, such as the right to discovery. In cases of special complexity, even where the accused is represented by counsel, additional court appearances may be required.

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III. DISCOVERY

The success of a pre-trial system like the one outlined in our proposal depends, to a large extent, on the Crown disclosing all relevant information and material to the defence. This disclosure, well before trial, is essential for several reasons. The accused should be fully informed of the strengths and weaknesses of the case against him. Given the limited resources of the average accused, he normally has to rely on the Crown as the source of this information. Discovery should encourage prompt and informed decisions as to defence strategy, including decisions as to election and plea. A policy of openness on the part of the Crown should encourage a more co-operative attitude on the part of the defence, particularly with respect to any admissions or disclosures it may be prepared to make. A system under which both Crown and defence counsel must gather sufficient information to adequately inform themselves of their respective positions prior to the discovery hearing is a system in which they will be more able to direct their efforts to the key issues to be resolved. The need to hear viva voce evidence at this stage should be drastically curtailed, thus reducing the time and expense of witness appearances.

Discovery should not be left, as it is, with few exceptions under the present law, to the discretion of the Crown. The present discretionary system has resulted in discovery policies that vary from area to area and from case to case. Discovery should be a legal right of the accused, the subject matter of disclosure being a matter of law.

At present the preliminary inquiry performs two principal functions: first, it provides a means of obtaining discovery of the main elements of the Crown's case; second, and this is its function in the eyes of the law, it is the method of determining if there is sufficient evidence to justify committal for trial. We believe the comprehensive system of full discovery found in our proposal would fulfil these current functions more effectively, while at the same time, establishing a fairer and more efficient system.

A. Basic Rules and Standards

The comprehensive system, of which we speak, should have its basic principles established as a matter of law. The rules and standards to be incorporated in such law should include the following:

1. A clear statement that a person accused of a criminal offence has a legal right to disclosure of all the evidence whether favourable or contrary to him, subject only to statutory exception.

2. As a corollary, the law should impose the obligation of disclosure on the Crown creating appropriate sanctions for non-disclosure. These sanctions could include such things as:

   (a) An adjournment for purposes of completing discovery, with cost, in more serious instances, to be borne by the Crown.

   (b) In extreme or wilful cases of non-disclosure the court in its discretion could order exclusion of the undisclosed evidence at trial.

3. A clear statement should be made of the materials and information to be disclosed:

(a) not subject to disclosure, e.g. state secrets and privileged communications;

(b) always subject to disclosure, e.g. statements by the accused; and

(c) information generally subject to disclosure.

NOTE: A comprehensive outline of such material is found in Working Paper #4 of the Commission, commencing at page 40.

4. A provision that a witness' statement be signed by him under a declaration that the statement is true to the best of his knowledge and belief and that he made the statement knowing that he would be liable to prosecution if he stated anything in it which he knew to be false or did not believe to be true.

5. A provision whereby the judge at the discovery hearing is able to order the pre-trial examination under oath of essential Crown witnesses in situations where the ordinary discovery process

does not give the defence adequate information to prepare for trial or where the Crown wishes to preserve evidence. Such applications could be made by the Crown or the defence.

6. A provision that committal for trial would be automatic at the conclusion of the discovery hearing unless the defence moved for discharge.

The establishment of these basic standards and principles would ensure that accused persons would receive fair and equal treatment in all parts of the country. At the same time they would provide the needed scope for informality, and flexibility in the manner in which discovery is conducted.

B. The Discovery Process

The key to full discovery and a useful pre-trial hearing will be the discovery of witnesses' statements. Whereas witnesses can now be examined at the preliminary hearing and cross-examined at trial on the transcripts from the hearing, we recommend that in those places where signed statements are not now obtained as a matter of course, such

statements should be obtained from all prospective witnesses. Knowing that copies of these statements will be delivered to the defence counsel and filed with the court at the discovery hearing, the persons responsible for obtaining them will prepare them earlier and more comprehensively. These statements along with exhibits and documentation will be the material filed at the discovery hearing and will make up the basic material on which any application to quash the Crown's case will be based.

Although we recognize that discovery can be completed without the delivery of signed witness statements, we are convinced that this is a wise procedure for a second discovery practice. Our studies have shown us that in some parts of the country there is poor communication between police and Crown counsel. We stressed earlier in the paper the need for co-operation and co-ordination of the police and the Crown activities and again stress the necessity for developing practices whereby the Crown has full knowledge of its own case at an early date. The signed witness statements will greatly assist in this respect.

Although we recommend legislation to establish the basic standards and principles of discovery, the actual

mechanics of discovery should be a matter for provincial and local determination. We make this recommendation for several reasons. Current attitudes and practices towards discovery and the preliminary enquiry vary greatly from place to place in Canada. Actual discovery techniques depend much on the circumstances of each case and the counsel involved. Accordingly, a comprehensive set of discovery rules is neither feasible nor warranted. We recommend a two-stage system for discovery; the first, an informal procedure to allow for the delivery of information; the second, a formal court hearing (replacing the preliminary enquiry) to ensure that discovery has been made, and where a superior court has been elected, to provide committal for trial.

1. Informal Discovery

The materials and information to be disclosed by the Crown (according to law as previously outlined) will be made available to the defence. In simple routine cases, discovery may be completed to the satisfaction of the defence by a telephone call; in complicated cases, discovery may be a lengthy process involving many meetings between the parties, interviewing witnesses, inspecting exhibits and obtaining copies of documents. It may well

be that discovery is completed at this stage. If, however, there is some disagreement over the information to be disclosed, or Crown or defence counsel are satisfied that discovery will not be complete until they examine one or more witnesses, discovery will not be completed until the discovery hearing. Where a party wishes to examine a witness or witnesses in aid of discovery at the pre-trial hearing, we recommend that this application be by notice of motion to the discovery hearing judge, such notice to be served on other interested parties several days before the hearing.

2. The Discovery Hearing

This hearing, before provincial or sessions court, will in effect replace the preliminary enquiry (where in current practice the accused is entitled to one). Crown and defence counsel, the accused, and a court reporter would be present. The hearing will examine questions or issues relating to adequacy of discovery and also, committal for trial. Specifically, we propose the following procedure:

(1) Crown counsel will file the indictment, a copy having been delivered to the defence three days prior to the pre-trial hearing.

(2) The discovered evidence (witness statements, exhibits, etc) will be filed and recorded.

(3) (a) Crown counsel, referring to the evidence, will briefly outline the Crown's case and advise whether or not discovery has been completed.

(b) If comprehensive discovery has not been granted by the Crown, it will bring this to the attention of the court. Defence will be called on to speak to the issues raised.

(4) The defence will respond to Crown's submission and raise any questions of its own concerning the adequacy of discovery. In exceptional cases, an adjournment may be necessary.

(5) Committal will be automatic unless there is an application for dismissal. Should such an application be successful, the accused will be discharged.

We have prepared a document entitled "Checklist for Discovery and Pre-trial Hearings". (See Appendix C) This checklist should assist counsel to complete discovery. It will also provide the basis for specifying disputes to be settled at the discovery hearing and matters to be dealt with at the pre-trial hearing.

3. Special Considerations

Several items listed above require further explanation. These include the application to hear a witness at the discovery hearing, the hearing of disputes relating to adequacy of discovery and committal for trial.

(a) Application for the attendance of a witness for pre-trial questioning

Crown or defence counsel should be entitled to make application to the presiding judge to hear the viva voce evidence of any witnesses whose identities have been disclosed during discovery. This procedure would approximate the hearing of Crown witnesses at a preliminary hearing. It would be incumbent on the defence to convince the court that examination of such witnesses was essential for full and complete

discovery. Guidelines for the exercise of judicial discretion could be:

(i) Where it would be reasonable to provide examination of a key Crown witness such as the complainant in a rape case.

(ii) Where the possibility of witness intimidation has been established.

(iii) Where a witness may be unavailable for trial and such evidence is necessary.

(iv) Where circumstances are such that it would be inadvisable for the defence to interview a witness.

(v) Where a witness has unreasonably refused to submit to an informal interview or to answer proper questions during an interview.

NOTE: Respecting the latter two points, Crown and the police should be encouraged to make arrangements whereby the defence counsel can interview Crown witnesses on neutral territory such as a court house.

In exercising his discretion as to whether to order a potential witness to give testimony under oath, the judge at the pre-trial hearing should have the opportunity to examine any previous statements made by those witnesses and supplied to the defence by the Crown. The judge should also consider any additional information that has been revealed through counsel's presentation.

Where a witness is called, the defence should be entitled to put leading questions, because the purpose of calling the witness is to provide the defence with discovery. As a general rule, such testimony will not be admissible at trial. The exceptions to this rule would include testimony falling within s. 643 of the Criminal Code, which deals with the admissibility of evidence given at a preliminary hearing in specified, unusual circumstances, as well as evidence given by a witness who may be subject to intimidation in the interval between the pre-trial hearing and the trial.

(b) Disputes arising from inadequate discovery

Example I

The Crown refused to disclose the address of the complainant for fear of reprisals.

Example II

The Crown refused to give any information about a witness for fear of intimidation.

The discovery judge would hear counsel on such points and make his ruling. In Example I he may find, under the circumstances, that the Crown should not be required to disclose this information. In Example II he may rule that the witness be called to give viva voce evidence before a reporter so that, on the one hand, the defence receives discovery of that witness and, on the other hand, his testimony is recorded prior to any possible attempt at intimidation.

(c) Committal for Trial

Under our proposed system, committal for trial at the pre-trial hearing will be automotic unless the defence at the pre-trial hearing moves for a discharge of the accused on the ground of no evidence on an essential element of the Crown's case. The defence will be required to specify the insufficiency in the Crown's case. The issue will be decided summarily by the judge, solely on the basis of the material disclosed during discovery. This material

disclosed during discovery should paint a complete picture of the Crown's case. If the judge finds that there is no evidence on a material point, he should rule that there is no case to go to trial and the case would terminate subject to an appeal by Crown. The possibility of a direct indictment, now available after a preliminary, would not be available.

Full discovery along the lines of our recommendations will require more out of court work on the part of the police counsel than is now the case. This will, in our opinion, be more than compensated for by the time saved at the discovery hearing and trial. It will ensure earlier and better preparation by the police, Crown and defence counsel. Keeping in mind that most accused appearing before the court eventually plead guilty, full information supplied to them early in the process will probably result in these guilty pleas being entered at a much earlier time. Most important, fewer witnesses will be called at both pre-trial and trial stages.

Where a committal is made at the discovery hearing, the case will be set over to the court of election for the pre-trial hearing and setting of the trial date. The pre-trial hearing is discussed in the next chapter.

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IV. PREPARATION FOR TRIAL

Our proposal calls for a new step to be taken between the discovery hearing (preliminary enquiry) and the trial itself. In most jurisdictions the accused must appear before the court of his election for a trial date to be set. This, we believe, would be the appropriate occasion to rationalize, simplify and expedite the trial process. Counsel, once familiar with their case, are aware that most trials are resolved around very few readily identifiable issues. Many factual matters are non-contentious. Certain collateral matters might well be determined prior to trial. Accordingly, our recommendation is made to improve the quality of the trial while at the same time expediting the process.

A. Objectives

Specifically, in seeking to improve the accuracy and efficiency of the trial process and decrease the expenses and inconveniences to all concerned, we believe the following objectives may be attained.

1. a reduction in the number of witnesses to be called at the trial;

2. a narrowing of the issues to be litigated at trial;
3. generally a more effective and efficient trial preparation and accordingly a reduction of time and expense involved in the trial itself.

B. Purpose of the Pre-trial Hearing

As the law is now, the accused is given the opportunity to make a statement following the closing of the Crown's case at the preliminary enquiry. Rarely does he choose to say anything. However, arrangements are often made between the Crown and the defence whereby admissions on non-contentious matters will be made by the defence pursuant to Section 582 of the Criminal Code at the time of trial. We believe that far greater use can be made of this procedure. Specifically, we recommend that a pre-trial hearing be held before a judge of the trial court for the following purpose:

1. To give the accused the opportunity to disclose the nature or theory of his defence;
2. To give the accused the opportunity to make admissions on non-contentious matters;

3. To consider, and where feasible, make a final determination on collateral issues; e.g. autrefois convict;
4. To make arrangements for the introduction of non viva voce evidence.

C. The Rationale for Reform

In making these recommendations, we recognize that any proposal that encourages disclosure from the accused is immediately suspect of infringing the accused's right to remain silent. Because of the importance of this matter, we will examine it in detail, outlining the rationale of our thinking before setting out the procedural steps to be taken.

Apart from a few procedures, such as the breathalyser law, the accused cannot be compelled to assist the Crown in establishing his guilt. Not only does he have the privilege against self-incrimination, he has the right to remain silent. The accused may, and frequently does, defend merely by pointing to the legal and factual weaknesses in the Crown's case without presenting any evidence on his own behalf. Truth, as perceived by the accused, is certainly not the most frequently invoked defence.

Our present system preserves the privilege against self-incrimination, the right of silence, the presumption of innocence, the Crown's burden of proof, the accused's right to make full answer and defence, and various tactical advantages for the defence at trial. It puts restraints on the prosecutorial powers of the state. The system, however, does little to discourage groundless pleas of not guilty, to encourage reliance on truth as a defence, or to improve the accuracy and efficiency of the trial process through, for example, eliminating unnecessary issues or surprise defences. Whether guilty pleas are entered in cases where there is no legal or factual basis for a defence, whether trials are limited to issues actually in dispute, and whether surprise defences are avoided depend mainly on the decisions of defence counsel. As a result, many defence counsel are unwilling to make concessions for fear of losing some ground on which to avoid conviction.

In looking at our criminal jurisprudence, we find two opposing, though not necessarily irreconcilable, requirements. The law exists to provide protection to society against law-breakers. On the other hand, it exists to guarantee the protection of individual liberty.

Accordingly, our system of criminal justice must strive simultaneously to guarantee that the rights of the accused will be respected without sacrificing the defence of society. It must be effective, efficient, yet humane. In examining the conflict between public interest and individual liberty, great care must be taken in making any recommendations for change so as not to promote improvement in the protection of the public interest if gained at unacceptable expense to individual liberty.

Our recommendations call for changes in law, practice and attitudes. They must, however, be evaluated in the context of the complete scheme of pre-trial procedures proposed in this paper. The accused's right to maintain silence remains. We are only changing the framework for the exercise of this right.

In the context of the present discussion, the fundamental principles that must be preserved are the following: the presumption of innocence, the accused's right to make full answer and defence, his right of silence, the limitation of the prosecutorial powers of the state, and the privilege against self-incrimination. The procedures proposed in the following pages will, in our view, adequately protect these principles.

Pre-trial discovery affords the defence the opportunity to thoroughly examine the Crown's case and obtain much the same information as it would have after the Crown has closed its case at trial. At trial, of course, the accused is in the position where he must either call evidence, and thus disclose the nature of any positive defence, or merely rely on a general denial arguing that the Crown has not established proof beyond a reasonable doubt. Since the defence will have received full discovery prior to the pre-trial hearing, we feel this is the appropriate occasion for it to disclose the nature or theory of the defence. Accordingly, we recommend that the accused be given the opportunity to do so at this hearing.

The accused may refuse to say anything, he may disclose the nature of his defence(s), or he may advise that he intends to rely on a general denial (the Crown cannot prove its case) while at the same time indicating that after he hears the Crown's case, he may introduce a specified defence. For example, the defence may say, "Our position is that the Crown must prove its case. If, after hearing the Crown's case, we find it necessary to call evidence, it will be to establish a defence of lack of mens rea."

The effect of these responses would be determined by what position the defence took at trial. The only consequences that we intend should flow from any inconsistency between the defence position at the pre-trial hearing and at the trial would be the weight to be given to the defence evidence. If the defence indicated a general denial at the pre-trial stage and continued this position at trial, the situation would be as it is in current practice. Should a general denial be indicated at the pre-trial hearing, but at trial evidence be called to establish a surprise defence, the judge or jury in considering that defence, may give less weight to it because it had not previously been disclosed. If the accused indicated a specific defence such as alibi at the pre-trial hearing but then introduced a different and inconsistent defence at trial, similarly the weight given to it would be affected. We should make it quite clear, that considerations of the weight to be given to the defence can only come into play if the defence introduces evidence at trial and such evidence is inconsistent with its stated position at the pre-trial hearing.

This is a two-way street. We see no reason why there should be any inconsistency between the accused position at pre-trial and at trial. In those rare instances where there is a valid reason for such an inconsistency, a logical and satisfactory explanation will undoubtedly be available. Disclosing the nature of his defence at an early date will serve to reinforce such defence when raised at trial. It is the doctrine of first opportunity - the earlier acknowledged, the more weight it carries. We can envisage no circumstance where the recommendations we make in this respect could detrimentally affect or prejudice an innocent accused.

D. The Pre-trial Hearing

We have already outlined the four general areas that this hearing could deal with. It would be of advantage to counsel to have an informal meeting to prepare for it. In most cases a telephone call would suffice. In general, counsel would exchange information as to what items might be raised at the hearing, what admissions might be made, what issues might be determined. As indicated in the previous chapter, the Checklist for Discovery and Pre-trial Hearings could assist in determining and organizing the issues.

At the hearing Crown and defence counsel would be present before the judge along with the accused and a court reporter. The following matters would be reviewed:

1. The accused would be invited to disclose the nature or theory of his defence and/or make a general statement. His response would be recorded. The implications of this have already been discussed in detail.

2. The judge would enquire if the accused wished to make any admissions on non-contentious matters for the purpose of expediting the trial. For example, in an arson case, the discovered materials include a certified copy of the title to the fire-damaged property in the accused's name, an insurance policy whereby that property is insured by him and a statement by the insurance agent witnessing the sale of that policy to the accused. If the defence were satisfied as to the Crown's ability to prove these matters, it could make the admission that for the purposes of the trial the fire-damaged property referred to in the indictment was insured by the accused under the said policy at the time of the fire. Any admissions would be recorded.

3. Issues collateral to the basic issues at the trial would next be raised. What was "collateral" or "basic" would depend on the circumstances of each case. Depending on each particular case, various matters may be considered. Some of them are:

(a) Issues collateral to the merits of the charge: pleas in bar of trial (autrefois acquit, autrefois convict, pardon), jurisdictional questions, venue, joinder and severance, and constitutional questions.

(b) Certain questions relating to the admissibility of evidence, for example, wiretap evidence.

(c) Voir Dire -

Where expedient, we recommend that Crown counsel arrange for these witnesses to appear at the pre-trial hearing for a final determination of this issue. Very often, as a result of the outcome, the Crown will withdraw its case or the defence will enter a guilty plea.

4. Counsel would next speak to any arrangements that might be made so as to avoid the necessity of calling viva voce evidence. For example, a certified copy of an automobile registration could be filed as proof of ownership or it could be agreed that the evidence of some expert could be videotaped for showing at trial.

5. The final matter to be dealt with at this hearing would be setting a date for trial.

We recommend that a record be made of the nature of any defence the accused may propose; any statements made by the accused; any admissions made by either the accused or the Crown; the disposition of any collateral issues; and any arrangements or agreements relating to the calling of evidence at trial. Care will have to be taken recording such information so that the record is an accurate statement of the matters and issues determined at this hearing.

E. Right of Appeal

Our recommendation here is simple. There should be a right of appeal arising out of any decision made by the judge on a disputed issue at the pre-trial hearing, but such appeal could only be launched after the determination

of innocence or guilt at the trial as part of a general appeal from conviction or acquittal. We can see no great benefit in such right of appeal being exercisable before trial. On the contrary, if it existed at that point, it could well be the cause for very considerable delays.

F. Important Considerations

The pre-trial hearing creates a novel situation in which judge and counsel are placed together for the purpose of considering means to improve and expedite the trial. The fact that this will occur, we believe will lead to admissions and arrangements being made for such purposes. The precise format for pre-trial hearing should be a matter of local or provincial decision. What occurs in each case will depend on a variety of circumstances. Some feel that the judge could play a key role at this stage by leading discussion and making recommendations for agreement. Certainly the role of both Crown and defence counsel is crucial. Both should be able to make positive recommendations. Indeed counsel, having discussed these matters informally, might well arrive at the hearing with a prepared list of admissions and agreements relating to the calling of evidence at trial. The key to its success is prior preparation and knowledge of one's case coupled with

a desire and recognition that many issues collateral to the key issues of the case can be dealt with at this stage without prejudice to either party.

Our proposal calls for a judge of the trial court to preside at the pre-trial hearing. In some instances it may be preferable for the pre-trial judge and the trial judge to be the same individual, perhaps in jury trials, or in remote areas where another judge of the same court is not readity available. Considering that many of the matters to be dealt with at this hearing are matters now under the jurisdiction of the trial judge, it seems both logical and convenient for the trial judge to continue to exercise his jurisdiction.

In most cases, however, we recommend that a different judge preside at the trial, for if the pre-trial judge were to take an active role in seeking arrangements whereby the trial could be expedited, it might be unwise for him to preside at both hearings. Also, in large urban centres, if the judge were to preside at both hearings, various administrative changes would be necessary. In any event, we put this out for consideration. Actual practice would be a matter of provincial determination.

Generally speaking, the same defence counsel acts throughout all stages of a criminal case on behalf of an accused. This is not necessarily the case with Crown counsel, particularly in large urban centres where they may be assigned to a trial at the last moment. It is well established that a counsel should be able to conduct a case as he sees fit. Where, for example, at a pre-trial hearing one Crown counsel might be quite satisfied to have certain evidence introduced at trial in the form of a medical report, another may wish to call the attending doctor. As such decisions will have to be made at the pre-trial stage, we recommend that the same Crown counsel handle a case throughout or otherwise reach understandings or develop practices so that the pre-trial Crown counsel can make all relevant decisions for the conduct of the trial. Again, this is a matter for local consideration and decision.

A word should be said about the unrepresented accused. In any system where legal counsel is not provided as of right, there inevitably will be unrepresented accused. Even where there is such right, an accused may choose to act on his own behalf. The court system is bewildering enough to most accused represented by counsel, let alone those without one. Our recommendations relating

to discovery and the pre-trial hearing will complicate matters for him even more. We have considered various means of simplifying the process for him including extensive use of explanatory forms but discarded these because we are satisfied that the accused requires direct advice from a person in authority, who is seen by the accused as disinterested, in order to truly comprehend and take advantage of these procedures. We recommend therefore that in the case of the unrepresented accused, the entire discovery process take place at the discovery hearing under the direction and guidance of the presiding judge. This may well encourage such judge to firmly recommend to the accused that he accept the appointment of legal aid counsel on his behalf. It will, nevertheless, ensure that there is a competent official whose responsibility it is to make certain that the accused's rights to discovery and a pre-trial hearing are observed.

G. The Necessity for Co-operation

Defence participation at the pre-trial hearing in the manner which we have recommended will simplify and expedite the trial. We believe that the degree of benefit will depend primarily on the attitudes of lawyers and judges. A negative attitude on the part of the bench and

bar will mean that the procedure will be merely a ritual where the defence routinely refuses to admit or make any statement, and the trial bench ignores the inferences to be drawn from the accused's responses. If the judiciary supports these proposals, its considerable influence will encourage the co-operation of counsel. The admission of non-contentious facts will save court time, witness time, and counsel time. It should prove a reasonable and practical improvement on the present system.

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V. IMPLEMENTATION

A. General Considerations

The reader may question why, in a paper such as this prepared as a guideline to discussion at a Working Conference on pre-trial procedures, anything should be said about implementation. Many of our proposals may not see the light of day. Our response is that in talking of law reform one must pay attention not only to the substantive reforms to be made but to the process by which they become incorporated in the existing system. We can all think of legislation enacted to accomplish a certain end but, which when put into force, produced a different effect. The process of implementation may have a profound effect on the nature of the final product. If not introduced properly, the supposed reforms may create more problems than those they were intended to alleviate. In the past, too little attention has been paid to the metamorphosis of new law into practice. Accordingly, careful attention must be paid to ways and means by which any proposals for reform are put into operation. We must constantly ask "how do I get in practice what is my mind's eye?".

Laws introduced into the statute books must be translated into practice. This, under our federal system, is primarily the task of the provinces in the exercise of their constitutional responsibilities for the administration of justice. Procedural law must not impose administrative impossibilities on the criminal justice system of the provinces. Those systems, however, must be capable of implementing desirable changes. Any significant reform of pre-trial procedures, or of any other part of the criminal law, demands close co-operation between the federal and provincial governments.

It would not be appropriate for the Law Reform Commission of Canada to recommend administrative procedures for adoption throughout the country. This is basically a matter falling within provincial jurisdiction, and one that requires study on the local level. No one system will be appropriate for all provinces, or indeed for all areas of one province; what is appropriate for a rural area may not be appropriate for a large, urban centre.

Nevertheless, we wish to add our strongest support to those who have advocated improvements in administrative structures and procedures. Many recent

studies in Canada, England and the United States have called for such improvements. Encouraging steps in this direction have already been taken in several jurisdictions in this country. We urge that this process be accelerated and extended to all aspects of the administration of justice in all jurisdictions.

We share the views of those such as the Ontario Law Reform Commission, the British Columbia Justice Development Commission, and the Alberta Board of Review, who have stressed the need for greater professionalism, co-ordination, and efficiency in the management of the criminal justice system. We agree with the assertion of the Ontario Law Reform Commission that adjudication, and not administration, should be the primary function of the judiciary. Professional management of the criminal justice system, including the courts, can be achieved without interfering with this adjudicative function or the independence of the judiciary. There must be a close working relationship between administrators and the judiciary; in cases of conflict, the will of the judiciary must prevail.

Sound administrative techniques can reduce costs, delays and inconvenience. More importantly, they can improve the quality and accessibility of justice. Within the context of present rules of procedure, significant improvements may be effected through efficient management of the system. The problem of delay is a case in point. Too often the problem is viewed as simply one of inadequate resources, when the real problem often lies in the inefficient use of resources. For example, experience in many jurisdictions has demonstrated that proper case-flow management can in fact reduce delay without increasing courtroom facilities or judge power.

We have a special interest in the question of administration because of its impact on proposals for law reform. Law reform in its broadest, most realistic sense, involves more than statutory amendment. The impact and success of a change in the law is shaped by social, individual, and institutional practices and attitudes.

Proposals for changes in the law are frequently rejected as impractical or beyond the resources of the system. Sometimes these criticisms are justified; and proposals must therefore be altered. What we cannot

accept, however, is the rejection of a proposal for change based on the assumption that existing practices are inviolable. Those charged with responsibility for the administration of justice must be sufficiently flexible in their approach to recognize that there is the need for change in practices and attitudes to complement changes in the law.

B. From Idea To Practice

Should a proposal like ours be put into practice it would call for participation and co-ordination at various levels. First, it would call for some legislation by the Federal government; second, it would call for the establishment of rules by provincial authorities; third, it would call for study and acceptance by those professionals - lawyers, judges, police, and court officials who would be adopting the scheme into day-to-day practice. Without a positive attitude, favourable to implementation from these groups, we doubt very much if any such scheme would be successful.

We reiterate that current practice in pre-trial criminal procedure varies greatly from one area of Canada

to another. Some of the recommendations found in our proposal adopt or have been built upon good practices currently followed in some areas. To some readers, these recommendations will be old hat. Others may feel that some recommendations would not work in their particular area. Any recommendations of the type that we make cannot be taken and applied without modification. They can, however, serve as the basis for discussion and a guideline for the implementation of the pre-trial scheme most suited to a particular province or area.

Our criminal justice system is ill-equipped to adopt overnight a whole new system of pre-trial procedure. Any new legislation or rules of practice and procedure have their growing pains. Where a new system calls for some radical changes with unknown stresses or consequences to the system, implementation must be approached with caution. For example, what does our recommendation for obtaining signed witness statements mean in terms of increased workload and benefit for the police? There are many unknowns which are unknowable until tried in practice. It is for this reason that we recommend that any proposal for reform of pre-trial criminal procedure with far-reaching consequences be done on a trial basis, limited initially

only to certain criminal code offences. Should the scheme be implemented, we envisage such steps as those enumerated hereafter being taken in terms of legislation, rule-making and education.

C. Legislation

Legislation covering the following points could be enacted to support the recommendations set out in our proposal.

Parliament could enact a statute implementing the pre-trial procedures recommended in this paper.

This legislation would provide:

1. that the statute will not be proclaimed until a year after its passage in Parliament;

2. that its provisions may be suspended at any time by proclamation of the Governor General in Council;*

* This is solely as a safeguard against unforeseen complications.

3. that its provisions apply to the following offences which will be known as "Discovery Offences",

a) trafficking in narcotics;
b) possession of a narcotic for the purpose of trafficking;
c) theft of a car (and contents);
d) possession of a stolen car (and contents);
e) forgery;
f) uttering a forged document;
g) criminal negligence (by indictment);
h) dangerous driving (by indictment);

and, in conjunction with one of the above offences, to all included offences and to conspiracy or accessory after the fact. Also, its provisions will apply to all offences where a count charging a discovery offence is joined in the same indictment or information with a count charging a non-discovery offence;

4. that an indictment be presented at the opening of the discovery hearing and preferred at its conclusion;

5. that there be no direct indictment for "discovery" offences but that the quashing of the charge be subject to appeal;

6. that the provincial court have jurisdiction for all purposes prior to the pre-trial hearing;

7. that Part XV of the Code apply mutatis mutandis to proceedings in respect of discovery offences. Any reference in Part XIV to the preliminary inquiry shall be read as a reference to the discovery hearing;

8. that election be either before or after completion of discovery and where re-election is sought at or after the pre-trial stage, it be granted only if exceptional circumstances are shown;

* * *

The legislation required to implement our discovery proposals is given in detail in the paper, and need not be repeated here. In brief, legislation will describe, define and provide for:

a) the accused's legal right to discovery, the obligation of Crown counsel to effect discovery, and sanctions for non-disclosure,

b) the type of information and material subject to disclosure, and exceptions,

c) the jurisdiction in the judge presiding at the discovery hearing to settle disputes as to discovery,

d) the judge in special cases, on cause being shown by either party, to order the examination of witnesses so as to compensate for the inadequacy of regular discovery, or to preserve evidence in cases where there is a danger of witness intimidation,

e) An offence for a potential witness to knowingly make a false signed statement;

10. that Part XV of the Code not apply to Discovery offences;

11. that committal for trial be automatic unless there is a defence motion to quash;

12. for a pre-trial hearing with jurisdiction in the trial court;

13. that discovery and pre-trial hearings be recorded and the items making up the record be specified;

14. that appeals or prerogative review be prohibited until the conclusion of the trial except where the decision attacked terminates the prosecution;

15. that the items and order of business to be conducted at the discovery hearing be specified, and provide

a) for the filing of proposed indictment,

b) for the filing of discovered evidence,

c) for the hearing of matters and issues relating to completion of discovery,

d) that the discovered evidence filed before the court be the material upon which a motion to quash shall be based,

e) for preferring indictment;

16. that the items and order of business to be conducted at the pre-trial hearing be specified, and

a) provide the accused the opportunity to make a statement disclosing the nature or theory of his defence and the opportunity to make admission(s), and explain to the accused the consequences of any disclosure by him in these respects,

b) provide for the determination of collateral issues, and

c) provide for the introduction of non-testimonial evidence at trial.

D. Rule Making

Should legislation incorporating the scope of our proposal be enacted, we recommend that consultation with the provinces and other interested parties be held. Any enabling legislation should be as wide as possible, leaving room for the provinces to work out the details of practice and procedure according to local needs and priorities. In keeping with this, our proposal has set out general guidelines, leaving many of the specifics to be determined by the provinces either by developing their own rules of practice or by establishing effective administrative procedures.

E. Education

If legislation is enacted, we recommend a delay of about one year before promulgation. This would allow sufficient time for those responsible for the establishment of rules and administrative practices to familiarize themselves with the legislation and provide such rules and regulations as would be required. At the same time it would provide the opportunity for workshops and seminars to be held for those actively involved in the criminal

process. It would be vital that these people should not only become familiar with the new legislation, rules and procedures but also be given the opportunity to make a positive contribution to implementation.

Once legislation had been promulgated and pre-trial procedures become operative, we recommend a constant monitoring of them in each province. In this way, practices can be tested, statistics collected, and a thorough investigation and appraisal made. A comprehensive report would contain these findings. Should the new procedures prove themselves, they could be expanded to other offences; should they prove unsuccessful they could be remodeled or discarded.

After much discussion with judges and lawyers throughout the country, we are satisfied that the success of pre-trial procedures will not depend so much on any new legislative enactment or specific rules of practice or procedure, but on the attitude of the bar and the bench and their desire to develop a more efficient and just criminal process. Our proposal has been developed with this concern in mind.

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APPENDIX A

STANDARD FORM STATEMENT

RIGHTS OF A PERSON ACCUSED OF A CRIMINAL OFFENCE

You have been charged with a criminal offence. As an accused person you are entitled to a trial. You also have certain rights for your own protection which must be observed. These rights are as follows:

1. The right to remain silent. You have the right to remain silent at all times. This means that you do not have to give a statement, either spoken or written, to the police or to the court. Any statement you make may be used against you at your trial.

2. The right to plead not guilty. You have the right to plead not guilty at all times. Because you are presumed to be innocent, you are entitled to require the Crown to prove that you are guilty.

3. The right to be presumed innocent. You are, in law, presumed innocent of the offence with which you are charged until such time as you may be

found guilty by a court on the basis of evidence presented against you. At trial, the Crown must establish beyond a reasonable doubt that you are guilty before you can be convicted. Your guilt may be established by pleading guilty. You should consider the consequences of pleading guilty very carefully before you do so. Pleading guilty means that you are admitting that you committed the offence you are charged with and that you are not going to require the Crown to prove your guilt by introducing evidence in a trial. A guilty plea also means that you will be subject to the sentence of the court, which may include a fine, a term of probation, or a term of imprisonment. You should read this entire document before making any decision on a plea of guilty.

4. The right to be represented by a lawyer, including the right to Legal Aid if you are eligible. You have the right to consult with a lawyer about your case. You also have the right to have a lawyer present when you appear before the court.

Because trials are often complex, it is in your best interests to seek the advice of a lawyer.

If you do not have the money to hire a lawyer, you may be eligible for Legal Aid. Legal Aid will provide you with a lawyer if you are unable to pay for one yourself. To find out more about Legal Aid, call the legal Aid Office at_____.

If you can afford a lawyer but do not know of one, call Lawyer Referral at_____. They will recommend a lawyer to you.

5. The right to a hearing on judicial interim release (Bail) If you are being held in custody, you have the right to a hearing before the court to determine whether you should be released. This hearing is referred to as a hearing on judicial interim release, and the words judicial interim release refer to your release from custody before and during your trial. It is up to Crown counsel (the prosecutor) to convince the court that you should be kept in custody. You have a right to legal representation at this hearing.

First Appearance Before the Court

You are required to appear before the court to have the charge read to you and to set the date for your trial. You have the right to be represented by a lawyer at this court appearance. You have all of the rights listed above, including the right to remain silent, the right to be presumed innocent, the right to plead not guilty, and the right to a hearing on judicial interim release. If you want a lawyer before proceeding you should ask the court for an adjournment so that you can seek legal advice. The following events should take place at your first court appearance:

(a) The charge will be read. The judge will read the charge against you out loud. He will also give you a copy of it. The charge will indicate what offence you are accused of committing.

(b) You will be asked to elect the mode of trial. Depending upon which offence you are charged with, you may be asked to choose one of the following modes of trial:

    (a) trial by a magistrate without a jury,

    (b) trial by a judge without a jury, or

    (c) trial by a court composed of a judge and jury.

You may make your election (choice) at this time or you may wait until you have had the opportunity to examine the evidence against you which is explained below. Once again, it is in your best interest to consult with a lawyer before making an election.

(c) If at this time you elect trial by a magistrate without a jury, you will be asked to enter a plea of guilty or not guilty. You have a right to enter a plea of not guilty. You may, of course, change your plea at any time.

6. You have the right to "discovery" of the Crown's case. This means you have the right to examine all the evidence against you before your trial. Crown counsel (the prosecutor) is required to show you all the evidence he has against you and favourable to you. At your first appearance the judge will normally set a date by which this discovery should be completed. Again, it is recommended you seek legal advice to assist you in this process. Your lawyer will assist you with it, or conduct it on your behalf. If you do not

have a lawyer, the judge will assist you in learning about the case against you at the discovery hearing.

7. Pre-Trial Hearing. At this hearing you will be invited to disclose your likely defence at trial and make admissions on non-contentious matters for purposes of expediting the trial itself. You will also be invited to agree on other matters for expediting and improving the trial. You are under no obligation to do any of these things. It would, however, be most unwise to go to this hearing without a lawyer.

APPENDIX "B"

GENERAL CASE REPORT

☐ ARREST ☐ APPEARANCE NOTICE
☐ SUMMONS ☐ TRAFFIC DEFENCE

Date
File No.
F.P.S. No.

Surname	Given Name(s)	Alias or Nickname	Age	Sex

Present Address	Teleph. No.	Previous Address

Citizenship Status	Place of Birth	Date of Birth	Racial Origin

Marital Status	Eye Colour	Height	Weight	Hair Colour	Hair Style	Build	Complexion

Peculiarities, Marks, Scars, Tattoos, Deformities, etc.

Medical Notes (Physical Condition)	Drug User	Type	Mental Illness History Yes ☐ No ☐ Attached ☐

Employed by or School Attended	Address	Teleph. No.	Position or Grade

If not Employed, State Source of Income	Religion	Soc. Insur. No.

Spouse ☐ Guardian ☐ Parent ☐ Next of Kin ☐	Name	Address	Teleph. No.

Notified by: Name	Number	Date	Time

Warrant Executed Yes ☐ No ☐	Arresting/Issuing Officer(s) Sign if Warrant Executed	Number	Unit(s)
	Name Signature		

Date of Arrest Time	Location of Arrest	Statement Obtained Yes ☐ No ☐ Attached ☐

Name and No. of Officer Taking Statement	Interpreter Needed Yes ☐ No ☐	Criminal Record Yes ☐ No ☐ Unknown ☐ Attached ☐

Admits Yes ☐ On Bail ☐ On Prob. ☐ Prev. Conv. No ☐ On Parole ☐	Was Medical Exam. Conducted Yes ☐ No ☐	Vehicle Type Owned/Used Auto ☐ Truck ☐ Motorcycle ☐

Licence No.	Licence Year	Province	Make	Model	Year	Driver's Licence

Booking Officer(s) No. Unit	Date and Time Booked	Investigated by Unit

Prisoner's Property Taken
Bag No. ☐
Cash $ _____ Held ☐ Not Held ☐
Return to: _____ (Prisoner's Signature)

I have been informed that I may use the telephone to call my lawyer or immediate relative
Call Desired ☐ Not Desired ☐ No.(s) Called

Complainant or Victim — Name and Address	Age	Accused Relationship to Victim	Telephone Res.	Telephone Bus.	Notified
I —					Yes ☐ No ☐
II —					Yes ☐ No ☐

Charge No. I

Charge No. II

Circumstances — (Give sufficient details for a plea of guilty, e.g. date, time, place of offence, etc., indicate co-accused name(s), injuries sustained, including accused's cooperation).

Parole Recommendations	Bail Release Recommendations	Held Yes ☐ No ☐

Method of Release
Promise to appear ☐ For summons ☐ Recognizance (no deposit) ☐ Recognizance (deposit) ☐ $

Checked Office No.	Clerk No.	Release Yes ☐ No ☐	Officer i/c BY: J.P.	Date and Time

Court	Date	Signature of Releasing Officer

APPENDIX C

CHECKLIST FOR DISCOVERY AND PRE-TRIAL HEARINGS

REGINA V _____

Date _____ Judicial District _____

Name of Accused: _____ Ref # _____

For the Crown _____

For the Defence _____

Part I - Discovery

(1) Indictment reads as follows:

1.

2.

3.

4.

5.

(2) SUMMARY OF BACKGROUND FACTS:

(3) PRELIMINARY MATTERS:

A. Will there be any preliminary matters raised by the prosecution?

B. Will there be any preliminary matters raised by the defence?

Motion to quash
Application for separate trial
Application for change of venue
Challenge for cause
Others?

(4) The Defence requests discovery of the following: (Circle appropriate request and response)

	Crown Responses	
a) Discovery of all oral, written or recorded statements made by the accused to investigation officers or third parties and in the possession or control of the Crown.	Granted	Denied

Crown Responses

b) Discovery of the names of all witnesses interviewed by the Crown and a copy of their statements. Granted Denied

c) Inspection of all physical or documentary evidence in the Crown's possession, including inspection and copying of any books, documents, photographs or tangible objects which the Crown obtained from the accused or which are being considered for use at trial. Granted Denied

d) Discovery and inspection of all further or additional information coming into the Crown's possession as to Items b and c after this request. Granted Denied

(5) Evidence not disclosed by the Crown - Where the Crown has refused discovery of some or all of the evidence requested above, it shall list the nature of the evidence and the reason for withholding it.

Nature of Evidence	Reason for Withholding

(6) Defence requests for information - The defence further requests the following information: (circle the appropriate request and response)

	Crown Response	
1. Whether the prosecution will rely on prior acts for conviction to the similar nature for proof of knowledge of intent.	Yes	No
2. Whether the informer will be called as a witness at the trial.	Yes	No

3. Whether the prosecution intends to raise the issue of the accused's sanity. Yes No

4. .....

5. .....

Part II - Pre-trial Hearing

(1) The defence voluntarily discloses the following information. (circle the appropriate response) *WND - Will not Disclose.

		Defence Response		
a)	Will the issue of the accused's fitness to stand trial be raised at trial?	Yes	No	*WND
b)	Will the accused rely on a defence of insanity?	Yes	No	WND

Defence Response

c) In the event of b), will the defence supply the names of the witnesses to be called and the substance of their proposed testimony? Yes No WND

d) In the event of b), will the defence allow the prosecution to inspect all medical reports? Yes No WND

e) Will the accused submit to a psychiatric examination by a court appointed doctor on the issue of insanity for fitness to stand trial? Yes No WND

f) Will the defence rely on the defence's alibi? Yes No WND

g) In the event of f), will the defence furnish a list of his alibi witnesses? Yes No WND

Defence Response

h) Will the accused furnish results of scientific tests, experiments or comparisons and the names of persons who conducted the tests? Yes No WND

i) Will the accused provide the Crown with all records and memoranda constituting documentary evidence in his possession or under his control or, where such evidence is not available or destroyed, will the defence state the time, place and date of said destruction and the location of reports, if any, concerning said destruction? Yes No WND

j) Defence counsel states that the general nature of defence is - (circle appropriate response)

(a) Lack of Mens Rea

(b) Duress or Compulsion

(c) General denial

(d) Provocation

(e) Self-defence

(f) Necessity

(g) Accident

(h) Intoxication

(i) Possession in good faith

(j) Others - (Specify)

(2) Can the following matters receive final determination at the pre-trial hearing

(a) Voir dire

(b) Admissibility of wiretap evidence

(c) . . .

(3) Can any arrangements be made to introduce non testimonial evidence instead of testimonial evidence.

(4) Such additional information as the defence deems appropriate.

NOTE: As a matter of law, no reference can be made at the trial of the accused to any response he has made to matters dealing with the nature of his defence unless the defence leads evidence and such evidence is in conflict with that response. The trial judge then may take such conflict into consideration in weighing the evidence.

CASE STUDY I

A. A CHARGE OF CRIMINAL NEGLIGENCE

The defendant was charged with operating a motor vehicle in a criminally negligent manner contrary to section 233 of the Criminal Code. The Crown proceeded by indictment.

(1) Preliminary Facts

After initial investigation, the Crown believed that it could establish the following facts. On September 16th, 1976 about 10:35 P.M. a motor vehicle operated by the suspect struck Mr. Apple while standing by the left rear fender of his automobile parked approximately four feet west of the travelled portion of Albert Street on the northern outskirts of Regina. At this location on Albert Street there are shopping centres, motels, service centres and restaurants. Mr. Apple was severely injured. It was estimated that full recovery would take many months.

The suspect had just arrived in Regina having driven non-stop from Edmonton via Saskatoon, a distance in excess of 500 miles. The suspect had had four hours of

sleep in the previous 41 hours, had been drinking alcoholic beverages in Edmonton and en route to Regina. He had a blood alcohol reading of .085, about one hour after the accident.

Due to his erratic driving between Saskatoon and Regina a passenger, Mr. Dumphy, had warned the suspect on several occasions to stop and rest because he seemed to be dozing at the wheel. Dumphy, the passenger, fell asleep near Lumsden, Saskatchewan some 20 miles north of the accident.

Mr. Steady, a witness to the accident, and the first on the scene, stated that the suspect appeared shaken up and tired but exhibited no sign of injuries. He stated that the suspect made the following comment to him, "I must have done it. I can't recall anything... I must have dozed off..."

The suspect was taken into custody, charged with the offence and appeared in court the following morning with legal counsel.

Prior to court appearance the file was delivered to Crown counsel who had approximately five minutes to review it. He was satisfied that the proper charge had been laid and that it had been laid in the proper manner. He delivered a copy of the information to the accused.

(2) First Appearance September 17th

Counsel for the defence acknowledged having received a copy of the information but indicated that he needed more time before advising on election and plea. Bail was set. The presiding provincial court judge set October 16th as the date for the discovery hearing.

Discovery

On September 20th, defence counsel called the Crown counsel by phone and recived a list of the witnesses that the Crown would call at the trial, their addresses and phone numbers and a brief outline of what their evidence would be. The complainant, Mr. Apple was still in serious condition at this time, however, it was indicated that preliminary medical reports would be available by the week-end. Also, a scale diagram of the accident scene was being

prepared and would likewise be available. Counsel agreed to meet in the prosecutor's office the following Tuesday, September 28th at 4:00 P.M., with a view to completing discovery at that time.

At that meeting, the prosecutor provided the following documents:

(1) a scale diagram of the accident scene showing the location of the complainant, the complainant's car and the accused's car in relation to the highway and neighbouring buildings;
(2) documents from the breathalyser test of the defendant;
(3) a medical report;
(4) criminal record of the accused showing one dangerous driving conviction in 1974 and two minor assaults in 1970;
(5) full signed statements of each of the proposed witnesses.

The witnesses and a brief resumé of their statements are as follows:

Dr. Billings:

An up-to-date medical statement indicating Mr. Apple had suffered a broken back, and concussion. Full recovery was expected by Christmas.

Mr. Steady:

This eye-witness to the accident identified the accused as the driver of the vehicle who struck the complainant. Visual conditions at the scene were excellent. He stated the accused was travelling 35 to 45 miles per hour at time of impact and stopped about 100 feet from where complainant was hit. He described the accused as getting out of his vehicle and walking back to the scene of accident, arriving there at about the same time as himself. The accused appeared bleary-eyed and shaken. The defendant told this witness, "I must have done it - I cannot recall anything - I must have dozed off". He fixed the time of the accident at 10:35 P.M. He will also testify that there was an odor of alcohol on the defendant's breath.

Constable Parks:

Constable Parks was the first police officer at the scene. He took samples of broken headlight glass from the defendant's car and samples of glass from the clothing

of the complainant. He will testify that the accused was slightly unsteady and appeared very tired. He took the accused to the police station where the accused called his lawyer who arrived at 11:30. At 11:45 a breathalyser was administered by Constable Parks and a reading of .085 was obtained. The accused was warned and asked to make a statement but refused. The defendant was then charged under section 233 of the Criminal Code.

Constable Van Wyck:

An identification officer, he was called by Constable Parks to take photographs and prepare a scale drawing of the accident scene. This he did as well as obtaining a signed statement from the passenger Dumphy.

John Thompson:

John Thompson is the assistant lab technician who prepared the report matching the glass collected by Constable Parks from the defendant's vehicle to glass splinters found in Mr. Apple's clothing.

Bill Dumphy:

Mr. Dumphy is a close friend of the accused and was a passenger in his vehicle. He and the accused were

roommates. They were looking for work in Edmonton and had left Regina at 6:00 A.M. on September 15. The accused did all the driving. They were together at all times and shared a motel room in Edmonton. His statement details events from 6:00 A.M. September 15 to 10:30 P.M. September 16. In particular, it indicates the extent of consumption of alcoholic beverages by both witness and defendant, their attendance at a bar and then a party until about 3:00 A.M. on the 15th followed by about 4 hours sleep. Various job inquiries were made the morning of the 16th and then they returned by car to Regina. Liquor was consumed on the return trip, the accused consuming about 12 oz. of liquor plus 3 beers. The witness became concerned about the accused's driving sometime after leaving Saskatoon for Regina. The vehicle would occasionally wander on the highway and on one occasion went partially into the ditch. On three separate occasions the witness asked the accused to pull over and rest. On one of these occasions they in fact stopped and had coffee. The last request to stop was near Lumsden, Saskatchewan about 20 miles from the accident's scene just after the defendant had almost forced an oncoming vehicle into the ditch. The accused again refused to stop saying "We're almost home". The witness fell asleep shortly after Lumsden and was asleep at the time of the accident.

Miss George:

Miss George's statement indicated that the defendant and witness Dumphy were at a party at her place until approximately 2:45 A.M. on September 16th in Edmonton. Both were "in good shape" when they left.

Tom Sebastian:

Mr. Sebastian is a general contractor in Edmonton who interviewed the defendant at 11:00 A.M. on September 16th and found him clear and coherent. He noticed no signs of drowsiness nor alcohol consumption.

Off the record, following discovery and after consultation with the defendant, counsel for the accused approached the Crown counsel with a view to communicating that his client would plead guilty to an offence of dangerous driving and that on the facts he had seen, this was the only charge warranted. Crown counsel refused, however, to reduce the charge.

Following discovery, counsel for the accused interviewed Mr. Steady, Constable Parksand John Dumphy. As a result of his interviews he considered Bill Dumphy to be the key witness and indicated to the Crown counsel that

at the pre-trial hearing he would be making an application for examining this witness prior to trial. Crown counsel also felt that Dumphy was the potential weak link in its chain and felt it would be its advantage to see how Dumphy would stand up under examination. Accordingly, Crown counsel prepared an application by notice of motion to the discovery judge to hear the evidence of Dumphy at the discovery hearing.

THE DISCOVERY HEARING

In attendance were the discovery judge, a judge of the Provincial Court of Saskatchewan, the Crown attorney, the accused and his counsel and a court reporter. The witness Dumphy was available.

The Discovery Hearing

The presiding judge asked defence counsel if complete discovery had been made. He replied it had.

Crown counsel made application for the examination of the witness Dumphy under oath. Defence consented to the application. The order was made

accordingly and Crown counsel proceeded to examine Mr. Dumphy followed by the cross-examination by defence counsel. Mr. Dumphy's evidence was fairly consistent with his statement but he could not be considered a strong Crown witness. He admitted to having consumed a considerable amount of liquor on the return trip from Edmonton, had been sick on one occasion and had several dizzy spells. He still felt that the defendant's driving was poor on occasion but admitted that his opinion in this respect could well have been influenced by his own condition. He never considered leaving the vehicle himself. On completion of discovery, the accused elected to be tried by judge and jury. The accused was committed to stand trial at the December sittings of the Court of Queens bench and the matter was adjourned to November 16th for the pre-trial hearing and for the actual trial date to be set.

Pre-trial Hearing

Prior to the pre-trial hearing, Crown and defence counsel had discussed various ways in which they might expedite the actual trial. They agreed that most evidentiary matters were not contentious and prepared an agreed statement of facts to be filed at this hearing. Its substantive contents were:

1. The accused drove his automobile from Edmonton to Regina on September 16th, 1976 leaving Edmonton approximately 12 noon and arriving in Regina approximately 10:30 P.M.

2. The accused consumed some alcoholic beverages en route.

3. On the outskirts of Regina heading in a southerly direction down Albert Street the accused's vehicle hit Mr. Apple, the complainant, who was approximately four feet off the travelled portion of the highway.

4. At 11:43 P.M. on September 16th the defendant's blood alcohol reading was .085. He had not consumed any alcoholic beverages in the preceding hour and a half.

5. The impact of the accused's vehicle with Mr. Apple shattered its right headlight and portions of the glass from the headlight remained in Mr. Apple's clothing.

6. The plan of the scene of the accident attached hereto represents a true scale drawing of the scene showing the location of Mr. Apple, Mr. Apple's vehicle and the vehicle of the defendant after the accident. Photographs 'A', 'B' and 'C' were taken at the accident

scene according to the notations on the back of each of them.

This statement was signed by the accused and witnessed by his lawyer.

The judge then asked what witnesses the Crown expected to call at the trial. Crown counsel indicated he would be calling Constable Parks, Mr. Steady and Bill Dumphy.

The judge asked the defence whether it wished to make any statement at this time or advise the court of the defence it intended to raise at trial. Defence counsel replied that it had no statement other than the admissions already recorded. He further stated that the defence would be putting the Crown to strict proof of its case and relying on a defence of lack of mens rea.

A record was made of these matters for the use of the trial judge. He thereupon set December 18th as the date for trial.

One week prior to trial Crown counsel having reviewed the transcript of Dumphy's evidence given at the

pre-trial hearing and considering the impression he gave in the witness stand, concluded that the best he could expect before a jury was a conviction on a charge of dangerous driving. This was intimated to the defence counsel who after consulting with his client, indicated a guilty plea would be entered to the lesser offence. The court was advised of this. The witnesses who had been subpoenaed for trial were advised not to come but were to be available on short notice on the trial date. On December 18th the trial judge accepted the plea of guilty to the lesser offence.

The above describes a very straightforward situation. Our second case study examines a more difficult case in which there is far less agreement between counsel and great reluctance by one accused to make any admissions.

CASE STUDY II

B. THE DRUG CONSPIRACY

On the 6th of May, 1974, Dave Purney, John Barnell and Jacques McKenna, all residents of the State of New York, were arrested in Saint John, New Brunswick on a conspiracy to traffic in cannabis resin.

According to the police report the three suspects had come to Saint John by different routes several days before their arrest. Purney registered at the Colonial Inn Motel near downtown Saint John on the 3rd of May. He was accompanied by suspect Barnell and then later joined by McKenna. They were driving a blue 1972 Toyota Jeep. In the morning of the 5th of May, McKenna rented a half ton truck from Superior Truck Rentals. He then took the truck to the railyard office of CP Express where he produced documents for a crate from Rawalpindi, Pakistan, alleged to contain tapestries. He was unable to obtain the crate due to an insufficient description for assessing the customs due. He was asked to return the following day.

The customs appraiser, Mr. Henry Jones, had earlier been informed by the R.C.M.P. that it was possible that one of the packages to be claimed in the next few days would contain illicit drugs. He therefore carefully inspected the tapestries in the crate and found several plastic bags containing resinous substance. He contacted the R.C.M.P. The substance was identified as cannabis resin and removed from the crate.

The next day, on the 6th of May, 1974 around 10:30 A.M., Mr. McKenna returned to the customs office to clear the crate. He signed the necessary documents as importer and owner, paid the duty assessed and then left to take possession of the crate which was stored in a nearby CP Express freight shed. While McKenna was in the customs office, a blue Toyota Jeep with suspects Purney and Barnell was observed circling the block. Upon leaving the customs office, McKenna proceeded north on Prince Williams St. and up Chipman Hill. He parked the rented truck in a shopping bay of the CP Express freight shed and went into the Express shed. There, he paid the air freight bill for the crate and then assisted a CP Express employee to load the crate onto the rented truck. While this was being done,

the blue Toyota Jeep containing Purney and Barnell was observed in a parking lot across the street with an unobstructed view of the freight shed and the parked truck.

McKenna then left the freight shed and proceeded along Carleton St. At the same time, the blue Toyota left the parking lot and followed the pick-up truck. After proceeding about two blocks, the R.C.M.P. stopped both cars and the three suspects were arrested.

Later that day, after questioning by the R.C.M.P. the suspect, McKenna, made a statement to the police. In the statement he admitted knowledge of the contents of the crate and identified the other two suspects as working in concert with him to obtain the cannabis resin.

The next morning, May 7th, Constable Donald Redden appeared before a local Justice of the Peace and swore an information charging the three with conspiracy to import cannabis resin.

The information was accepted and process issued.

First Appearance

At 11:00 A.M. that morning the three accused were arraigned before a provincial court judge. The information was read and a copy supplied to each accused, none of whom were represented by counsel. Each was given the Standard Form Statement (see Appendix A) to advise them of their rights, the availability of legal aid and the like. They were remanded in custody to May 15th at 9:30 A.M.

Second Appearance

At this time, Purney and Barnell were represented by legal aid counsel. McKenna had engaged his own lawyer. Each accused elected trial by judge and jury. The presiding judge set June 9th as the date for the discovery hearing before a provincial court judge. Applications for bail were made but refused, the court being satisfied that the accused were unlikely to appear on the return date.

Discovery

Between May 15th and June 1st, defence counsel obtained the following information from the Crown:

1. The names, phone numbers and addresses of witnesses the Crown was considering calling at trial plus a brief description of what they would say.
2. Certificate pursuant to Section 9(1) of the Narcotics Control Act establishing the substance to be cannabis resin.
3. Lab reports establishing the substance as cannabis resin.
4. Photocopies of all documents relating to the case - customs documents, invoices, car rental forms, hotel bills, restaurant bills, etc. - all of which had been obtained during the investigation.
5. Copy of confession provided to the police by the accused McKenna.

On June 4th, defence counsel met with Crown counsel to complete discovery. They were advised that the police had acted on information obtained from an informant but that he would not be called to give evidence at the trial nor would information about him be disclosed.

Copies of all witness statements were delivered to each defence counsel. These statements had been signed by each witness under a declaration that the statement was true to the best of his knowledge and belief and that he would be liable to prosecution if he wilfully stated anything which he knew not to be true.

A brief resumé of their statements is as follows:

Mrs. Bonness

Mrs. Bonness was the clerk on duty at the Colonial Inn Motel on the day when the accused, Purney and Barnell registered. She has identified Mr. Purney as being the individual who filled out the registration card on the night in question. On the registration card it is indicated that Mr. Purney's vehicle was a blue 1972 Toyota Jeep. Mrs. Bonness indicated McKenna registered on May 4th and that she saw the three of them at various times over the following three days.

Mr. Marshall

Mr. Marshall is the manager of the Superior Truck Rentals service. In his statement he says that Mr. McKenna signed a rental contract for a half ton pick-up truck leaving a deposit of $44.00.

Mrs. Lenningham

Mrs. Lenningham works as a cleaning lady at the Colonial Inn Motel. In her statement to the police she said she saw the three accused enter Purney's room the morning of May 6th. She later saw McKenna leave in the pick-up truck followed shortly by Purney and Barnell in the blue Toyota.

Ruth McBride

Miss McBride is a waitress at the Fairport Restaurant. In her statement to the police she testified the three accused had eaten lunch and dinner at the restaurant on the 4th and 5th of May and that when she asked if they wanted separate checks they told her that one would be fine.

Fred Simpson

Fred Simpson was the clerk on duty at the customs office the morning of May 5th and May 6th. In his statement to police he identified Mr. McKenna as the individual who signed the necessary documents to have the crate containing the cannabis resin released.

Mr. Henry Jones

Mr. Jones was the customs appraiser who opened the crate to inspect it for the purposes of assessing customs duty. In his statement to police he indicated that he found a resinous substance in the crate between the tapestries which caused him to call the R.C.M.P.

Constable Ronald Redden

Constable Ronald Redden was the officer called by Mr. Jones. In his report he indicates that he took a small amount of the resinous substance and sent it to the R.C.M.P. lab to be checked. When it was ascertained that the resinous substance was cannabis resin, he and Sgt. Ross Christensen removed the substance from the crate packaged it in several cardboard containers which were then labelled and returned to R.C.M.P. headquarters. He further states that he was present in the customs office when McKenna cleared the crate.

Sgt. Ross Christensen

In his report, Sgt. Christensen indicates that he helped Constable Redden as indicated above and that he then kept McKenna under surveillance from the time he left the Motel on the 6th of May until he was apprehended by the R.C.M.P. later that day. He followed McKenna in the half ton pick-up truck using an unmarked police vehicle.

Constables Dunhill and Winters

Constables Dunhill and Winters' statements indicate that they kept the accused Barnell and Purney under surveillance from the time they left the motel the morning of May 6th in the blue Toyota until they were arrested. They will testify that the Toyota circled the customs office while McKenna was clearing the crate, and that the Toyota then proceeded to a parking lot across from the CP Express freight shed. Once the pick-up truck left the Express shed, the blue Toyota followed it down Carleton Street until both vehicles were stopped by the R.C.M.P. Constables Dunhill and Winters also indicated in their reports that Purney and Barnell initially pretended not to know McKenna.

Sgt. Dunleavey

Sgt. Dunleavey received the sample of the resinous substance sent to him by Constable Redden. Using those standards approved for such matters, he identified the substance as being 98% pure cannabis resin. His conclusions are indicated in his report which forms part of the police file. He is an analyst under the Narcotic Control Act and prepared the certificate disclosed to the defence.

Undisclosed Witness

A witness, whose identity the Crown wishes not to disclose, made a statement to police that certain conversations of the three accused had been overheard. It indicated that they had come to Canada for the sole purpose of obtaining a shipment of cannabis resin to take back to the State of New York.

The three defence counsel requested the Crown Attorney to give them the name and address of the undisclosed witness but he refused on the grounds that the witness might be intimidated by the accused or friends of the accused. This meeting in the Crown Attorney's office lasted for one hour and forty-five minutes.

The discovery hearing did not proceed on schedule because counsel for Purney was engaged in a jury trial which had lasted much longer than anticipated. Notice to other counsel of an application for adjournment was given on June 7th and on the 9th the application was granted. June 28th was set as the new date.

Discovery Hearing: June 28th

Judge Wannamaker presided. The accused, their counsel and a court reporter were in attendance. Crown counsel filed the discovered materials, namely the witness statements and all documents and exhibits. Counsel for McKenna asked for all information relating to the informer and the undisclosed witness. The application concerning the informer was denied. The application concerning the undisclosed witness was then considered. The Crown Attorney explained to Judge Wannamaker that the reason the Crown withheld the name and address of this particular witness was fear that the witness would be intimidated by the accused or by friends of the accused. Evidence was given in support of this but nothing was said which could lead to the identity of this witness. As well, given the strength of its evidence, the Crown Attorney indicated that this particular witness would not be called at trial. Judge Wannamaker then ruled that it was not necessary for the Crown to disclose the name and address of the witness in question.

Counsel for Purney and Barnell at this stage indicated they were satisfied they had adequate discovery. Counsel for McKenna made application to have all Crown

witnesses examined under oath. Notice that such application would be made had been given four days in advance. Counsel for McKenna was noted for his expert cross-examination and his ability to confuse a witness. He requested their examination on the basis that he could not fully assess the case against his client until such time as he had heard all the witnesses. Judge Wannamaker adjourned for half an hour to review the witness statements. He concluded that the statements were comprehensive and no specific reasons being presented for their production, was satisfied that the statements themselves provided adequate discovery. He indicated to counsel that unless special circumstances were shown to indicate the defence would be prejudiced in obtaining full discovery of the case against it, such an application would not be granted. Judge Wannamaker also confirmed that if the accused were convicted at trial, the refusal of this application could be raised as a ground for appeal.

The accused were then committed for trial at the September sittings of the Superior Court with jury. Each accused was remanded in custody to August 20th for the pre-trial hearing and the setting of a specific trial date. This concluded the Discovery Hearing.

Prior to the pre-trial hearing, defence and Crown counsel met for forty minutes in an office at the Court House. Counsel for McKenna indicated he would not participate in the pre-trial hearing although, of course, he would be present with his client. Counsel for the other two accused advised that they would be making an application at the opening of that hearing for a trial of their clients separate from McKenna. Documents supporting this motion were served at this time on the relevant parties. At this stage, McKenna and his counsel departed. The remaining defence lawyers and the Crown discussed the pre-trial hearing and were in basic agreement that certain arrangements could be made at it for expediting the trial.

Pre-trial Hearing

Mr. Justice Milhaven of the Superior Court presided. He first heard the application on behalf of Purney and Barnell for a trial separate from McKenna. After hearing counsel on this application, he was satisfied that a joint trial with McKenna would prejudice the other accused in making a full answer and defence and ordered separation of trials accordingly.

Mr. Justice Milhaven then proceeded to the pre-trial hearing for McKenna. He asked counsel for McKenna if he was prepared to disclose the nature of his clients' defence at this stage of the proceeding. Counsel indicated that the obligation was firmly on the Crown to establish their case beyond a reasonable doubt. He said all aspects of the case were in contention and he expected the Crown to introduce all of its evidence according to the best evidence rule. His client was not prepared to make any admissions or arrangements to expedite the hearing of this case. Judge Milhaven then indicated that he was prepared to hold the Voir Dire concerning the taking of McKenna's statement. Witnesses for it were present. McKenna's counsel indicated he felt this should be done at trial. Crown counsel argued that if they failed to gain the introduction of this statement they might well be in a position where they could not proceed against this defendant. The judge ruled that he would proceed with the Voir Dire and after hearing the evidence and argument of counsel he ruled that it was a voluntary statement and could be introduced as evidence at his trial.

September 15th was set as the date for this trial of McKenna. The pre-trial hearing for the remaining two accused then commenced. Judge Milhaven again invited counsel to explore the possibility of reaching agreement on any non-contentious matters. In this respect he first asked if defence counsel were prepared to indicate the nature of their defence. In doing this he pointed out that should they indicate their defence but then take a position inconsistent with it at trial, that could be taken into consideration in weighing any evidence they might call unless there was a sound explanation for such discrepancy.

Both counsel denied any conspiracy on behalf of their clients and put the Crown to strict proof of its case. They were, however, prepared to make the following admissions.

1. The accused were American citizens, resident in New York City.
2. They entered New Brunswick on May 3rd and registered at the Colonial Inn where they stayed until their arrest.

3. Purney admitted ownership of a blue Toyota licensed HASH 98 and both accused admitted being in the vehicle as described by the statements of Constables Dunhill and Winters.
4. Both accused admitted being with the accused McKenna at the times referred to in the witness statements.
5. They further admitted knowledge that the accused McKenna rented a half ton truck to pick up a large parcel from the Customs shed at the CP Depot and that they were driving in that vicinity when the pick-up was made and followed the truck after it left the depot until the time they were stopped by the police.

In light of these admissions it was agreed that the witnesses, Mrs. Bonness, Mr. Marshall, Mrs. Lenningham, Miss McBride and Constable Winters need not be called at the trial. Crown counsel advised the court that Sgt. Christensen would be on a course in Winnipeg for three months commencing August 1st and asked that his evidence be heard and videotaped at the hearing. This request was consented to by counsel for the accused and they proceeded to examine and cross-examine this witness, the proceedings being videotaped for later use at the trial.

Mr. Justice Milhaven then prepared a record for the trial judge recording the response of the accused to his invitation to disclose the nature of their defence and further recorded in point form the admissions made by the accused.

Defence counsel reviewed these and agreed they correctly recorded the admissions made. It was understood that these admissions would be introduced as part of the Crown's case at trial. It was further understood that no mention would be made at trial to the defence raised by the accused unless they introduced evidence which was inconsistent with it.

Barnell and Purney made a final application namely to re-elect to be tried before a provincial court judge. Mr. Justice Milhaven was reluctant at this stage in the process to grant such re-election but after consideration, particulary of the fact that the trial of McKenna had been separated from Purney and Barnell, he granted the request. August 20th was set as the trial date and they were accordingly committed for trial on that date.