III Preliminary Procedure

Where an accused person and his counsel go into court with little more in their possession than the facts contained in an indictment or summons, it is to be expected that a substantial amount of court time will be taken up not with actual adjudication but with the drawing out of information and issues from the prosecution's case. In the absence of any depth of knowledge about the strength of the case against him, the defendant will be unlikely to plead guilty at first appearance, and if the option is available, he may elect to have a preliminary inquiry in order to discover more of the nature of the case against him. If either party is ignorant of the details of a case before appearing in court, court appearances will be characterised by surprise and a confusion of the issues which will have to be clarified before the trial proper can proceed. To some, this teasing out of the points of contention and the evidence available to support them is fundamental to the adversary process, but this is debatable at the very least. In the words of Mr Justice Traynor, former Chief Justice of the California Supreme Court:

> The plea for the adversary system is that it elicits a reasonable approximation of the truth. The reasoning is that with each side on its mettle to present its own case and to challenge its opponent's, the relevant unprivileged evidence in the main emerges in the ensuing clash. Such reasoning is hardly realistic unless the evidence is accessible in advance to the adversaries so that each can prepare accordingly in the light of such evidence.[2]

Such measure of discovery between defence and prosecution can help lay down the basic groundwork in a case from which point a traditional hearing according to adversarial principles can commence and be concluded, hopefully with expedition. Those in favour of disclosure of one form or another are not advocating that adversary proceedings should be eliminated, merely that they should be restricted to the real points at issue. Pre-trial proceedings can clear away unimportant, formal or undisputed matters, promoting a speedier disposition of the case in hand and freeing more court time for the hearing of other cases.

There are three general types of pre-trial proceedings: discovery between counsel; a pre-trial hearing, usually before a judge and a preliminary inquiry or committal proceedings, the first being the most informal and the latter having been part of common law procedure since the 16th century. Innovations in relation to disclosure have concentrated on

encouraging discovery and pre-trial conferences; committal proceedings are perceived to have become too cumbersome and time-consuming a procedure for the clearing away of preliminary matters. Consideration of preliminary inquiries will be reserved for a separate section.

Closer cooperation between prosecution and defence in a criminal trial to determine which issues are in contention could reduce the length of preliminary inquiries, where they still exist, and of the actual trial.[3] If a fact is not disputed by the defence, witnesses will not be required to attend the proceedings and be heard and other evidence need not be introduced. More significantly, if the defendant acknowledges the strength of the prosecution's case by pleading guilty, a trial will be totally unnecessary.[4] Thus, discovery seeks to promote agreement between the parties as to certain of the facts at issue to eliminate the necessity of proof. The pre-trial conference on the other hand, which generally takes place with a judge present, while still a relatively informal procedure, tends to deal with those legal and procedural matters which cannot because of their very nature be agreed to, requiring instead a judicial decision. Included in this list are such matters as special pleas, res judicata and issue estoppel, severance of trial, venue, joinder of counts, alternative charges, amending of defective indictments, fitness to stand trial, issues of admissibility of evidence, statutory vires and the jurisdiction of the trial court.[5] These are basic matters which often disrupt and prolong trials, particularly jury trials, where the jury must retire until such issues have been decided. This represents a considerable waste of the jurors' time.

One Commonwealth jurisdiction which has had a longstanding practice of encouraging a much wider measure of disclosure than has existed in most others is Scotland. Scottish practice is to provide the defence with a list of the Crown's witnesses, whom they are entitled to precognose or examine.[6] This is not discovery in the sense in which it is generally used because this practice does not actually disclose the prosecution's evidence; it merely provides the defendant with the means of obtaining it by his own efforts. At one time it might have been difficult for the accused to take advantage of his right to take precognitions because of lack of facilities and finance; but since the introduction of legal aid, such obstacles have been largely removed.[7] There is no guarantee, of course, that even if the defence does precognose a Crown witness that they will receive the same information, not because of any deliberate deception on the witness' part, but purely because of differences in elucidating information. Nevertheless,

a report on criminal procedure issued in 1975 rejected proposals that Scottish practice should conform to the wider idea of discovery by providing that Crown precognitions should be made available to the defence.[8]

In one sense the Scottish discovery procedure is quite narrow and restricted. It does, however, have a much wider potential in terms of supplying the accused and his counsel with information about the case, but the onus is on the defence to make the most of it. A discovery scheme cast in this mould might counter some of the criticisms which aver that discovery is a one way operation.[9] Owing to the protection afforded the accused against self-incrimination, the direction of discovery tends to be from prosecution to defence, although, as we shall see later, some inroads are being made to turn the tide in relation to certain aspects of the defence. Objections to simply handing over the prosecution's evidence might be eliminated if such a modified scheme were to be introduced. Experience in Scotland with discovery is useful from another point of view: when rights to discovery are mooted fears are often expressed that allowing the accused access to police and prosecutorial information would unduly aid the criminal and help him escape his just desserts. More particularly, there is a feeling among police and prosecutors that interference with Crown witnesses is a real threat if their identity is revealed to the accused prior to court proceedings.[10] Longstanding Scottish experience has not found witness intimidation following release of the list of witnesses to be a significant problem.[11]

In other common law jurisdictions there has been no tradition of co-operation and discovery between the parties prior to trial. Now that delay is of such significant proportions, however, several countries have set up experimental schemes or enacted legislation to encourage a clearing away of preliminary matters before the case goes into court.

The English Criminal Law Amendment Act, 1977,[12] contains in section 48 a provision, still to be put into operation, which would enable rules to be made,

> (1)(a) for requiring the prosecutor to do such things as may be prescribed for the purpose of securing that the accused or a person representing him is furnished with, or can obtain, advance information concerning all, or any prescribed class of, the facts and matters of which the prosecutor proposes to adduce evidence; and
>
> (b) for requiring a magistrates' court, if satisfied that any requirement imposed by virtue of paragraph (a) above has not been complied with, to adjourn the proceedings pending compliance with that requirement unless the court is satisfied that the conduct of the case for the accused

will not be substantially prejudiced by non-compliance with the requirement;

The section also provides that such rules may apply to all cases or only to certain classes of cases and may bestow an absolute right to such information or one which would be exercisable at the option of the defence. In addition, failure by the prosecutor to comply with such rules would not constitute a ground of appeal against sentence.[13] This procedure will extend only to cases heard in the magistrates' courts. For the more serious and complex cases heard in the higher courts, an experimental scheme of pretrial hearings has been put into operation in the Central Criminal Court (the Old Bailey) in London.

Experimental court practice rules for the Central Criminal Court introduced on October 1, 1974 inaugurated a "summons for directions" procedure - a step in the proceedings between committal and trial at which counsel on both sides appear before a judge for the purpose of eliciting the live issues in the case, settling various preliminary matters before trial starts, thus avoiding undue wastage of time.[14] The procedure is set in motion by an application from either side once the case has been scheduled for a hearing, and the pre-trial procedure is normally held not earlier than 14 days before the date fixed for trial. The hearing, at which the defendant is entitled to attend, may be in the judge's chambers, although any orders will be made in open court. At the hearing, counsel are expected to be able to inform the court as to pleas; the necessary attendance of prosecution witnesses; any notices of further evidence and any additional witnesses who may be called, together with a written summary of the evidence they are expected to give if their statements are not available for service; any admissions of fact or exhibits under section 10 of the Criminal Justice Act, 1967; the probable length of trial; any issues relating to the mental or medical condition of the defendant or of a witness; any point of law or question relating to the admissibility of evidence that may arise; the designations of witnesses the prosecution does not intend to call and any alibi not already disclosed in accordance with the provisions of section 11 of the Criminal Justice Act, 1967.

This experimental procedure is intended primarily for long and complex cases. In the first six months of operation it was used in approximately 20 cases and was successful in reducing considerably the length of subsequent trials.[15] As the James Committee on the Redistribution of Criminal Cases between the Crown Court and the Magistrates' Courts pointed out, a procedure like this one is apt for long cases, but for short uncomplicated

cases it would be unnecessary and would also involve time, trouble and expense that would outweigh any small advantage which might accrue. It was concluded by the Committee that the procedure could not usefully be introduced as one of general application unless there were to be a concomitant provision enabling it to be waived if both parties and the court agreed that it was unnecessary in a particular case. It would seem more sensible to provide that the court should have the power to invoke the procedure in those cases in which it thought it appropriate.[16] If care is not taken over the range of application of schemes such as this one we may create more problems instead of solutions. Application to too narrow a range of cases will result in a negligible impact on the eradication of delay; use in every case will produce a process more unwieldy and time-consuming than the one it replaces.

Experience in South Australia provides a good example of another dilemma surrounding preliminary procedures, that is, should disclosure be a formal or an informal process? In summary proceedings in that State, if the prosecution fails or refuses to supply adequate particulars, the defendant may apply to the court for an order for further and better particulars, which in itself takes up more court time, and it is the duty of the court in an appropriate case to make such an order.[17] There is, however, no way in which a defendant or his counsel can, as of right, inspect before the hearing of the charge any documentary or tangible evidence which the prosecution may intend to tender at the hearing. As a matter of practice, police prosecutors do frequently permit defence counsel to inspect such items prior to trial which can result in the saving of considerable time and can permit advice as to plea to be given to the accused at an early time.[18] Discovery, however, rests solely on the good relationship between the prosecuting officer and defence counsel.

> Because of the variables involved, therefore, informal contacts and professional courtesies are not effective modes of discovery that can be relied upon. Invariably, the dispensation of these courtesies will be uneven and haphazard due to the nature of a rule of practice as opposed to a rule of law requiring disclosure of the evidence, and to the extent this is true, the fair application of the law is not achieved.[19]

In Canada, however, informality in disclosure between Crown counsel and defence seems to be favoured. The de jure situation as regards the defendant's right to discovery is that after he has been committed for trial he is entitled to inspect the indictment, his own statements, the evidence

and the exhibits, if any.[20] But he may not, as of right, demand production of the statements made by Crown witnesses since these do not constitute evidence within the statutory definition, though the trial judge has the discretion to order the prosecution to do so.[21] As in South Australia, discovery through inter-personal cooperation evolved to remedy this rather restrictive situation. Unfortunately, it would appear that in many cases this had militated against the success of more formal discovery procedures which would be available to all defendants, not just to those whose counsel have "good connections". For example, a disclosure project was begun in British Columbia in 1977 and the preliminary indications on its operation were that counsel felt that they were getting material prior to the project anyway. It was not giving them anything they were not getting previously, therefore admissions as a result of disclosure so as to save time in court were unlikely to result, the Crown being put to strict proof with the same frequency as previously.[22] The failure of a six month long project in Edmonton, Alberta was more unequivocal. This project initially covered such offences as breaking and entering, possession of stolen goods, thefts, fraud and false pretences, all over $200, assault, bodily harm and uttering. The procedure was that after arraignment for preliminary inquiry (committal) the accused was given the option of participating in a "Disclosure Court". If he took up this option the case was adjourned for two weeks to allow counsel to meet for discussions and then the case would appear before the Disclosure Court to find if the preliminary inquiry could be curtailed if there was to be a guilty plea or if the points at issue could be reduced. The results were disappointing. After a six week trial it became obvious that defence counsel did not appear interested in using the disclosure procedure; but of the small sample that did use disclosure, its advantages became evident. Over 50 percent of the witnesses who would have been required for the preliminary inquiry did not have to be called and there were instances of charges being withdrawn, stays of proceedings being entered, and defence counsel agreeing to a shortened preliminary inquiry. After this initial period, the programme was expanded to cover all offences for which a defendant could elect trial in higher court to get more participation and the defence Bar were canvassed to obtain more interest. Participation, unfortunately, remained poor. The rationale given for this was that historically there has been full disclosure on an informal basis and also there was not a large problem with case backlog in the Edmonton criminal courts and therefore there was no sense of urgency. Overall, very few preliminary inquiries were waived, a few were reduced in size but there

was no significant saving in time. It was concluded after six months that the project had been given a fair trial; that there did not appear to be any need for a formalised or legislated disclosure mechanism in the system and if there was to be legislation, then each province should be given the choice to opt into the system.[23]

More favourable results have been obtained in schemes launched in Quebec and Ontario. In Montreal, a system which could be labelled "communication in lieu of preliminary inquiry" is used: there is disclosure sufficient to give defence counsel all they need to prepare the defence. This includes a summary of the statements of witnesses, but not their names or addresses. The quid pro quo is that the defence waives the right to a preliminary inquiry under section 476 of the Canadian Criminal Code.[24] In 1976 this discovery project avoided the appearance of 35,000 witnesses who would otherwise have been summoned needlessly.[25]

In Ontario, a dual system operates: a discovery procedure followed by a pre-trial conference. In 1977 the Attorney General of Ontario issued a set of "Guidelines on Disclosure in Criminal Cases" designed to reduce the length of preliminary hearings by providing informal disclosure to defence counsel at an early stage in order to permit him to decide which witnesses are really necessary at a preliminary hearing and which ones can be dispensed with in favour of a written synopsis of their anticipated testimony along with other specified types of written disclosure.[26] After the preliminary inquiry has been held, the "Practice Direction Concerning Supreme Court Criminal Trials" issued by the Chief Justice of the High Court comes into operation.[27] Crown attorneys and defence counsel are invited to meet prior to trial to complete a Pre-trial Conference Report with a view to narrowing the issues. Where necessary, a judge may be present. In both instances, participation is purely voluntary. This scheme covers the whole of Ontario except Ottawa. There, a more formal scheme was found to be necessary. It is possible that this pattern may recur in other parts of the country and indeed, in other Commonwealth jurisdictions where there is currently a reliance on informal discovery procedures.

The public prosecutors' office in Ottawa had been committed for some time to a policy of liberal disclosure of prosecution evidence. Between 1960 and 1970, as a matter of practice, defence counsel were generally well informed of the case against their client before election as to mode of trial or plea. In 1972, however, a number of factors developed that altered significantly the ability of the Crown's office to meet counsel, make disclosure and discuss disposition. These factors we are already familiar with:

an increase in caseload; increasing complexity of cases; the impact of legal aid on the pursuance of legal remedies, etc. The informal discovery system in effect broke down. This led in 1976 to the establishment of "judicially supervised disclosure", also known as "pro-forma preliminary hearings".[28] The procedure is strictly voluntary and must have the consent of both prosecution and defence. In essence it is a cross between discovery and a pre-trial conference: disclosure is supervised by a regularly instituted Disclosure Court. All parties are called into court, defence, prosecution, investigating police officer and judge. The Crown Attorney then advises the Court; the defence counsel and investigating officer can retire from the courtroom, meet, and disclosure between them proceed. If defence counsel is not satisfied that he has had full disclosure, he may confer with Crown counsel, and, if no resolution is made, their respective positions may be stated to the Court and the presiding judge may, with inquiries, help resolve the issue. If defence counsel is satisfied with the disclosure, he so states for the record and his client is then arraigned in the usual way. The accused may then waive the preliminary inquiry, demand a preliminary inquiry on the evidence of certain named witnesses only, or require a full inquiry in the usual manner.[29] Between June 29th and November 30th, 1976, the Pro-Forma Court system obviated the necessity of subpoenaing 2,141 witnesses. In 87 per cent of all the cases the court dealt with, the attendance of one or more witnesses was waived by defence counsel. Of some 1,547 cases dealt with by the Disclosure Court, slightly over one third of them were finally disposed of by guilty plea, or by a plea of guilty to lesser charges or by withdrawal by the Crown.[30]

Thus far, "discovery" and "disclsoure" have referred more or less exclusively to the handing over of details of the prosecution's case to the defence. Pre-trial discovery is virtually a "one-way" affair. Reciprocal disclosure would appear to go against a basic principle of the common law that the onus of proof is on the Crown to prove its case beyond a reasonable doubt. The defendant is not expected to aid in his own conviction. Nevertheless, there are instances in some Commonwealth jurisdictions where the accused is under a legal duty to disclose some aspects of his defence.

The English Criminal Law Revision Committee, in a report issued in 1966, contrasted the position of defence and prosecution in relation to disclosure. The introduction of evidence at the very last minute, that is, during the course of a trial, often took the prosecution by surprise and

would occasion a demand for an adjournment to allow the prosecution time to reflect and prepare to meet this new aspect of the case. This was thought to be particularly harsh in relation to the defence of alibi. The Committee recommended that provision should be made placing the defendant under a duty to make prior disclosure of an intention to put forward an alibi defence.[31] This was enacted in section 11 of the Criminal Justice Act, 1967:

> (1) On a trial on indictment the defendant shall not without the leave of the court adduce evidence in support of an alibi unless, before the end of the prescribed period, he gives notice of particulars of the alibi.
> ...
> (8) "the prescribed period" means the period of seven days from the end of the proceedings before the examining justices.

This provision has been replicated, with minor variations, in other Commonwealth jurisdictions. To give a few examples:

(i) the New Zealand Crimes Amendment Act, 1973,[32] requires notice of an alibi to be given within 14 days of committal for trial;

(ii) the Tasmanian Criminal Code Act 1973 inserts section 368A into the Criminal Code which requires an alibi notice within 7 days of committal or within 7 days of having received notice of such requirement;

(iii) the Crimes and Other Acts (Amendment) Act, 1974, of New South Wales[33] provides that the "prescribed period" for giving an alibi notice is within 10 days of committal;

(iv) in Queensland, the Criminal Code and the Justices Amendment Act, 1975, provides a 14 day "prescribed period";[34]

(v) in Victoria, the requirement is a much more general one. The Crimes Act, 1976 inserts section 59(6A) into the Magistrates (Summary Proceedings) Act which provides that at any time after the accused person has been cautioned and before he has been discharged or committed for trial, the justice may, and, if he has been requested to do so by or on behalf of the informant, shall say to the accused person words to the effect that he will not be permitted to give evidence at trial of an alibi defence unless he has previously given notice of particulars of the alibi and of the witnesses in support of such alibi;

(vi) the Criminal Procedure Code (Amendment) Act, 1976 of Singapore[35] provides that in any summary trial notice of an alibi defence must be given within 14 days of "the end of the proceedings before the Magistrate on the occasion that the accused is charged in court for the first time with the offence in respect of which he is raising the defence of an alibi".

As a result of a Practice Note of the English Court of Appeal, Criminal Division, the alibi notice is no longer being used solely to prevent the prosecution being taken by surprise at trial but also to estimate the amount of time required to hear a case in which an alibi is put forward. The Note requests that the prosecution should send a copy of any notice of alibi to the court of trial as soon as it is given to them in order to enable the clerk of court to make more reliable estimates of the length of criminal trials.[36]

Other jurisdictions have not been so narrow in their requirements of disclosure by the defence. The Criminal Procedure (Scotland) Act, 1975[37] provides:

> s.82-(1) It shall not be competent for the accused to state any special defence unless a plea of special defence shall be tendered and recorded at the first diet, or unless cause be shown to the satisfaction of the court for a special defence not having been lodged till a later day, which must in any case not be less than two clear days before the second diet.[38]

There is no authoritative list of what constitutes a special defence, but it is generally thought to include alibi, insanity, incrimination, self defence and automatism.[39]

In Canada, a more extensive duty of disclosure is placed on defendants in criminal bankruptcy and security fraud prosecutions. Cases in these categories are often complex and involved and the successful prosecution of them is an arduous and time-consuming job. Accordingly, fuller discovery of the defendant's case is permitted.

To facilitate the prosecution of fraudulent bankrupts, the Canadian Bankruptcy Act[40] permits the examination of the bankrupt and other persons in aid of pending criminal procedures. Section 133(1) of the Act confers the right upon a trustee in bankruptcy without an order to examine the bankrupt, any person reasonably thought to have knowledge of the bankrupt, or any person who is or has been an agent, clerk, servant, director or employee of the bankrupt, respecting the bankrupt, his dealings or property. The section also provides that the trustee may order any person liable to be so examined to produce any books, documents, correspondence or papers in his possession or power, relating in all or part to the bankrupt, his dealings or property. Thus, this section confers a most unusual power of obtaining discovery in criminal matters. Where the trustee believes that a criminal offence has been committed, he can examine the bankrupt and others and obtain their evidence on oath before laying an information,

although the examination can equally well take place after criminal proceedings have been commenced.[41] In a "section 133(1) examination" it is customary for a witness to claim the protection afforded by the Canadian and provincial Evidence Acts in respect of questions which may prejudice him, and this protects the witness from having his answers used against him in subsequent criminal proceedings. Nevertheless, the carrying out of the examinations enables the investigator to obtain necessary information which would otherwise be unavailable to him. One commentator has observed that, in practice, the right of examination has proved to be a most useful tool in fraudulent bankruptcy prosecutions and has not been unduly oppressive to those being examined.[42]

Similar powers of investigation have been given to provincial securities commissions under provincial legislation. These commissions share responsibility with the police for the investigation of alleged securities offences such as fraud and "wash trading" and have certain powers designed to assist in the conduct of such investigations, in addition to those designed to facilitate day-to-day regulatory activities. There is no restriction stating that powers designed for purposes other than investigations may not be used in the conduct of investigations. Information obtained by the commissions in the performance of other responsibilities frequently leads to the initiation of an investigation and such information is also frequently used in the course of investigations initiated on the basis of information obtained in other ways. As a result, the commissions are able to conduct extensive inquiries and hearings prior to the initiation of criminal proceedings. Again, the witness may claim the protection of the Evidence Acts so that his testimony cannot be used directly against him, but these inquiries are nonetheless a valuable source of information which help expedite otherwise lengthy prosecutions.[43]

To summarize: developments in the area of pre-trial disclosure and discovery have been premised on the sensible notion that by having a freer exchange of information out of court, superfluous considerations will be excluded from the hearing of criminal cases and trials will be expedited. The adversary system does not demand that the participants must go into court "blind" or without having previously resolved technical, time-consuming, procedural issues. The actual administration of justice must, however, be done in open court.

Many cases appearing in the criminal courts are relatively straightforward. If more information is needed in addition to that provided as a

matter of course, counsel should be able to rely on ad hoc discussions. But for those cases which raise complex legal and procedural issues, involve large numbers of witnesses and allege tortuous fact situations, a more structured system may be advantageous. Nonetheless, it must not become so rigid that it consumes more time than it serves. The use of the preliminary inquiry or committal proceedings for discovery purposes provides a ready-made example of the dangers of over-formalisation. The current trend is toward the dismantling of this time-consuming process. Unless care is exercised, we may be replacing one procedural albatross with another.

Footnotes

[1]Great Britain. Criminal Law Revision Committee, Report no. 9, Evidence: Written statements, formal admissions and notices of alibi (London, 1966, Cmnd. 3145), para. 5.

[2]"Ground Lost and Found in Criminal Discovery", (1964), 39 New York University Law Review 228.

[3]M.W. Doyle, "Criminal Discovery in New Zealand", (1976-77) 7 New Zealand Universities Law Review 23 at p. 39.

[4]For a full discussion of the advantages of extended discovery see Scotland, Committee on Criminal Procedure in Scotland (The Thomson Committee), Criminal Procedure in Scotland (second report) (Edinburgh, 1975), Cmnd. 6218, para. 30.06.

[5]Law Reform Commission of Canada, Report on Criminal Procedure - Part I: Miscellaneous Amendments (Ottawa, 1978), p. 4.

[6]Thomson Committee, supra footnote 4 at para. 17.10. This practice is given statutory form in section 70 of the Criminal Procedure (Scotland) Act, 1975, c. 21, a consolidating statute: "The accused shall be served with a full copy of the indictment and of the list of the names and addresses of the witnesses to be adduced by the prosecution." A precognition is not the witness' own statement, but a narrative of what the witness stated.

[7]G.H. Gordon, "Institution of Criminal Proceedings in Scotland", (1968), 19 Northern Ireland Legal Quarterly 249 at p. 267.

[8]Thomson Committee, supra footnote 4 at paras. 17.10-17.12.

[9]M.W. Doyle, supra footnote 3 at p. 23.

[10]Id.

[11]Thomson Committee, supra footnote 4 at Chapter 17.

[12]c.45, section 48(1).

[13]Criminal Law Amendment Act, 1977, section 48(3).

[14]Central Criminal Court: Practice Rules in Archbold's Pleading, Evidence and Practice in Criminal Cases, (39th ed., 1976), para. 361b. For discussion of this scheme see C. Hampson, Criminal Procedure (London, 1977), p. 150 and Great Britain, Home Office, Report of the Interdepartmental Committee on the Distribution of Criminal Business between the Crown Court and Magistrates' Courts (the James Committee) (London, 1975), Cmnd. 6323, paras. 266-68.

[15]Id. at para. 267.

[16]Id. at para 268.

[17]Lafitte v. Samuels, [1972] South Australia State Reports 1.

[18]South Australia. Criminal Law and Penal Methods Reform Committee, Third Report, Court Procedure and Evidence (Adelaide, 1975), p. 67. In cases tried on indictment, discovery is obtained through the preliminary inquiry although there has been some limited use of experimental disclosure schemes - see pp. 113-14. In one scheme, defence counsel solicits further information from the prosecution on the basis of which admissions are made and objections taken to the admission of evidence etc. A memorandum is then prepared, signed by counsel and handed to the judge.

[19]M.W. Doyle, supra footnote 3 at p. 25.

[20]Canadian Criminal Code R.S.C. 1970, c. C-34, section 531.

[21]Patterson v. The Queen, (1970), 2 Canadian Criminal Cases (2d) 227 (Supreme Court of Canada).

[22]"Pre-Trial Disclosure and Discovery Practices" (1977) 59 Uniform Law Conference of Canada Proceedings 57.

[23]R.A. Cawsey, "Pilot Project in Edmonton" in Law Reform Commission of Canada, Preparing for Trial (Ottawa, 1977), pp. 211-16 and "Pre-Trial Disclosure and Discovery Practices", supra footnote 22 at pp. 57-58. At the time this latter survey was conducted Saskatchewan, Manitoba and Nova Scotia had no discovery projects, preferring instead to rely on their informal systems which depend on the goodwill of counsel.

[24]"Pre-Trial Disclosure and Discovery Practices", supra footnote 22 at p. 58.

[25]Law Reform Commission of Canada, supra footnote 5 at p. 3.

[26]Crown's Newsletter, February 1977, p. 1. See appendix for full text of guidelines.

[27]Crown's Newsletter, February 1977, p. 8. See appendix for outline of Pre-trial conference report.

[28]"Pro-forma Disclosure in Ottawa-Carleton" in Law Reform Commission of Canada, supra footnote 23 at pp. 257-58.

[29]Id. See also "Summary of the Ottawa Pro-forma Procedure", Crowns's Newsletter, February 1977, p. 31 and L.M. Shore, "Comments on the Ottawa Pre-Trial Discovery Procedure", (1976) Criminal Lawyers Association Newsletter vol. 2(4), p. 44.

[30]Law Reform Commission of Canada, supra footnote 5 at p. 3. The possible impact of extended discovery in inducing guilty pleas will be discussed in more detail below.

[31]Great Britain, Criminal Law Revision Committee, supra footnote 1 at paras. 31-33.

[32]1973, No. 118, section 11.

[33]Act No. 50, 1974 (N.S.W.), section 8 inserting section 405A into the New South Wales Crimes Act, 1900.

[34]No. 27 of 1975, section 22, inserting section 590A into the Queensland Criminal Code.

[35]No. 10 of 1976, section 11.

[36][1969] 1 All E.R. 1042 per Lord Parker C.J.

[37]c. 21.

[38]An identical provision appeared in the Criminal Procedure (Scotland) Act, 1887, section 36. Section 339 of the 1975 Act provides that a defendant must give notice of an intention to introduce an alibi defence in summary proceedings.

[39]Thomson Committee, supra footnote 4 at para. 37.01 See R.C. Savage, "Criminal Procedure: The Effect of Procedure upon Justice" in R.S. Clark (ed.), Essays on Criminal Law in New Zealand (Wellington, 1971), pp. 94-112 at pp. 109-110 for arguments in support of a wider duty of disclosure being put on the defendant.

[40]R.S.C., 1970, c. B-3.

[41]L.W. Houlden, "Discovery in Criminal Prosecutions in Bankruptcy Matters", (1972), 50 Canadian Bar Review 486 at p. 487.

[42]Id. at p. 495.

[43]J.C. Baillie, "Discovery-Type Procedures in Security Fraud Prosecutions", (1972), 50 Canadian Bar Review 496.