DISCOVERY IN CRIMINAL CASES

ANTHONY HOOPER*

Toronto

I. *Introduction.*

The aim of this study is to examine to what extent Canadian law entitles the accused to obtain discovery[1] of anything that might be relevant to the conduct of his case. We shall see that in Canada there is very little discovery compared with that available in other jurisdictions and we shall be looking at the practical consequences of this. The arguments for and against increased discovery will be examined and reference will be made to the reforms which are now being suggested and often implemented elsewhere. Before analyzing the Canadian position, we must set the background to the enquiry by looking at four areas: first of all, the aim of the criminal process, secondly, the nature of the adversary system of trial, thirdly, plea-bargaining and, fourthly, the ethical responsibilities of a Crown prosecutor. We shall see that decisions on discovery have usually been made without any reference to these four themes and, indeed, that these decisions run counter to what are generally accepted as fundamental principles of the common law system of criminal justice. The theme of this study can well be summed up in the following words:

> . . . What we should not do is to continue a system in which we pay lip service to grandiose concepts and then prevent them from having any practical effect by procedural rules which deny counsel access to the facts which he must know in order to make them effective.[2]

II. *The Aim of the Criminal Process and the Restrictions and Qualifications upon the Achievement of that Aim.*

The expression "process" is being used here in a limited sense,

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* Anthony Hooper, of Osgoode Hall Law School, York University, Toronto, Ontario. I am grateful to Professors Paul Weiler and Alan Grant of this Faculty, who read through an earlier version and made a number of helpful suggestions.

[1] For an extensive bibliography on discovery, see Appendix E to Discovery and Procedure before Trial (1970), A.B.A. Project on Standards for Criminal Justice.

[2] An extract from a speech by Professor A. K. Pye at a symposium in Washington, D.C.: see Discovery in Federal Criminal Cases (1963), 33 F.R.D. 47, at p. 94.

to refer to that part of our criminal justice system which comes into play after a decision has been made to charge a person and up to and including any decision as to that person's guilt or innocence. The aim of this part of our criminal process is the conviction of those who have committed, with the necessary *mens rea,* the *actus reus* of a crime and the acquittal of those who have not. For our present purposes, we may call these two groups the *de facto* guilty and the *de facto* innocent. Making the distinction is not an end in itself: its importance lies in the fact that consequences of varying severity follow the decision to convict.

Since there is at the present time no perfect system to separate the *de facto* guilty from the *de facto* innocent, we have had to decide whether the acquittal of all *de facto* innocent is more important than the conviction of all *de facto* guilty, or vice versa. In fact we have chosen the former, that is a system which is generally designed so as to acquit all the *de facto* innocent at the cost also of acquitting some *de facto* guilty.[3] The primary devices used to implement this preferred system are the presumption of innocence and the rule that guilt must be proved beyond a reasonable doubt,[4] with occasional resort being made to presumptions and reverse onus clauses[5] when it is felt that too many *de facto* guilty may escape.

[3] The ratio has been variously expressed as 5:1, 10:1 and 20:1, *i.e.* twenty guilty should be acquitted before one innocent man is convicted: see Fletcher, Two Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases (1968), 77 Yale L.J. 880, at pp. 881-882; Glanville Williams, The Proof of Guilt (3rd ed., 1963), pp. 186-190. The value of mathematical methods for formulating standards of proof has been questioned: see Tribe, Trial by Mathematics: Precision and Ritual in the Legal Process (1971), 84 Harv. L. Rev. 1329, esp.: at p. 1378 *et seq.* At p. 1375, he points out that the recognition of the necessity of tolerating some erroneous convictions does not mean that, in any particular case, the jury should convict if uncertain of guilt. One could add that the application of the reasonable doubt standard has resulted in the conviction of enough innocent persons and there is no need to weaken it further: see *e.g.* E. M. Borchard, Convicting the Innocent (1932); E. S. Gardner, The Court of Last Resort (1952); J. and B. Frank, Not Guilty (1957); E. D. Radin, The Innocents (1964); H. A. Bedau, The Death Penalty in America (1964), p. 434; A. Koestler, Reflections on Hanging (1956), ch. VII; The Evans Inquiry (1966), U.K. Cmnd. 3101; M. Houts, From Evidence to Proof (1956), particularly chs 1, 2 and 3; Glanville Williams, *op. cit.*, this footnote, ch. 5, and pp. 322-323; Paget and Silverman, Hanged and Innocent? (1953).

[4] In *In Re Winship* (1970), 90 S. Ct. 1068, at p. 1072, the court described the reasonable-doubt standard as "a prime instrument for reducing the risk of convictions resting on factual error". Much has been written on the relationship of the presumption to the burden of proof rule: see *e.g.* Thayer, A Preliminary Treatise on Evidence at the Common Law (1898), p. 551; Wigmore on Evidence (3rd ed., 1940), para. 2511.

[5] Unlike courts in the United States, the Supreme Court of Canada has given its blessing to reverse onus clauses: *R.* v. *Appleby*, [1971] 3 C.C.C. 354. For the position in the U.S.A., see Mosher, Statutory Criminal Presumptions: Reconciling the Practical with the Sacrosanct (1970), 18 U.C.L.A. L. Rev. 157 and Fletcher, *op. cit.*, footnote 3.

The need to create a system designed to acquit all the *de facto* innocent at the risk of acquitting some *de facto* guilty can be understood from a simple humanitarian standpoint. Few would agree with Paley that "he, who falls by a mistaken sentence, may be considered as falling for his country".[6] However, this need can also be understood in terms of the ultimate purpose of the criminal system—the imposition of sanctions to punish, deter or prevent conduct which is deemed undesirable by society.[7] If these sanctions are being imposed upon a person with a view to expressing the moral condemnation of society of that kind of conduct and to reaffirming its "boundaries",[8] then, although each imposition of sanctions will help this reinforcement, each erroneous imposition will do something to destroy the moral acceptability of the whole system.[9] As has been said in another context:

> To single out, in a systematic way, blameless or irresponsible individuals as the objects of this "morality play" is not only parasitic and unfair, but may be self-defeating. It results in a loss of the aura of moral acceptability and worthiness which it is the point of criminal punishment to reinforce.[10]

If the sanctions are being imposed to rehabilitate a person or protect society from him, then their imposition upon a *de facto* innocent person is useless[11] and also self-defeating—prison may corrupt him and he might feel justified in redressing the balance! A sanction imposed upon a *de facto* innocent might effectively deter him from further illegal behaviour (although it might also be self-defeating again). However, quite apart from the moral objections, it may be an expensive way of deterring a person who

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[6] The Principles of Moral and Political Philosophy (1785), Book 6, ch. 9, p. 553. At that period, "falls" would ordinarily have had a literal sense.

[7] This approach has been borrowed from recent writings justifying the need for *mens rea* in the light of the purposes of the sanctions: see *e.g.* Weiler, The Supreme Court of Canada and the Doctrines of Mens Rea (1971), 49 Can. Bar Rev. 280, at pp. 284-291.

[8] For an excellent statement of this approach, see K. Erickson, The Wayward Puritans (1966), particularly ch. 1. See also J. D. Morton, The Function of Criminal Law in 1962 (1962), pp. 42-44; Andenaes, The Moral or Educative Influence of Criminal Law (1971), 27 J. of Social Issues 17.

[9] This can be seen clearly, for example, in the works of A. Koestler and of the black writers in the U.S.A. See also footnote 18, *infra*.

[10] Weiler, *op. cit.*, footnote 7, at pp. 287-288. In *In Re Winship, supra,* footnote 4, at p. 1072, the court said: "Moreover, use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof which leaves people in doubt whether innocent men are being condemned." See also Tribe, *op. cit.*, footnote 3, at pp. 1376 and 1391-1392.

[11] It may be that a particular *de facto* innocent "needs" rehabilitating or that society "needs" protection from him, but this would be purely coincidental and, in any event, these "needs" would not normally have been the subject of enquiry at the judicial stage.

probably does not need this kind of deterrence anyway. Notwithstanding this, it could, of course, still be decided that the benefits of deterring, rehabilitating, and obtaining protection from, all *de facto* guilty outweigh these losses.

To the extent to which the concept of general deterrence is merely a restatement of the notion that the punishment of crime operates as a reaffirmation of the moral standards of the community, as we have seen, the punishment of the *de facto* innocent is positively dangerous. To the extent to which the punishment of crime operates as a warning light to potential law-breakers, it must, then, be admitted that from a utilitarian point of view it might be better to ensure the conviction of all the apprehended *de facto* guilty at the risk of convicting some *de facto* innocent too.[12] The adoption of such an approach, with its attendant danger of reducing the moral acceptability of the whole system and its unpleasant consequences on the innocent victims, could be justified only if its advantages for outweighed these disadvantages. But is the percentage chance of being acquitted after apprehension a significant factor taken into account by the potential offender? Although we know the percentage of accused persons who are acquitted,[13] we do not know how many *de facto* guilty fall into that category or how many *de facto* guilty are released without a trial for lack of evidence. We therefore cannot know whether potential offenders *correctly* estimate their chances of being released without a trial or of being acquitted at trial and we do not appear to know whether potential offenders make any such estimate at all.[14] It seems unlikely that the average potential offender considers the percentage chance of being acquitted or released after apprehension. Indeed the financial costs of obtaining an acquittal might be high (for instance, the cost of the lawyer and of pre-trial detention). Furthermore, the mere fact of apprehension may well result in his house being searched and other investigations being made, all of which may lead to the discovery of evidence involving him in other crimes. It can be argued that the more convictions there are (whether of the innocent or guilty), the more likely it is that the risks of engag-

[12] This argument has also attracted those who wish, for "crime control" reasons, to eliminate *mens rea*. To overcome opposition caused by sentimentality for persons convicted without any *mens rea*, it is sometimes said that such persons should receive a lesser sentence or that the executive will look after them: see *e.g.* Fauteux J., as he then was, in his dissenting judgment in *Beaver* v. *The Queen*, [1957] S.C.R. 531.

[13] Statistics of Criminal and other Offences (1968), D.B.S., Tables 1, 13 and 18.

[14] See generally on the question of public knowledge of the likelihood of apprehension and of various kinds of punishment, F. E. Zimring, Perspectives on Deterrence (1971), particularly pp. 56-73. As far as the effect that such knowledge might have on different personalities and in respect of different crimes, see *ibid.*, pp. 34-56.

ing in the conduct will seem greater. Even assuming that the potential offender knows about the number of convictions, it seems unlikely that the additional number of convictions obtained by convicting all the apprehended *de facto* guilty as well as some *de facto* innocent will be of much significance. All in all, a system which is designed to acquit all *de facto* innocent at the risk of acquitting some *de facto* guilty seems to be preferable to one which is designed to convict all *de facto* guilty, at the risk of convicting some *de facto* innocent.

The first and major restriction upon the aim of convicting the *de facto* guilty is the need to ensure that, so far as is possible, the *de facto* innocent are acquitted. There are, of course, many other restrictions and qualifications, for instance, the general right of an accused person to force the state to prove its case against him without the assistance of a statement or testimony from him,[15] the exclusion of evidence obtained by improper police practices[16] and the prevention of a prosecution because it constitutes an abuse of process.[17] However, there is only one qualification which is of particular interest here: the conviction of the *de facto* guilty must be obtained under conditions of scrupulous fairness. To a large measure, this qualification is necessary in order to ensure the acquittal of all the *de facto* innocent and the conviction of the *de facto* guilty on the right charges, but its justification is not wholly dependent on that.

It could, perhaps, be argued that the *de facto* guilty person who is convicted has no cause for complaint at the absence of fairness. However, not only is fairness important for societal reasons, it also seems to be important for the rehabilitation of the offender. It seems that this can be aided, delayed or prevented by the way that he is treated (or thinks that he is being treated) at the pre-trial and trial stage[18] and that fairness can prevent

[15] Canada Evidence Act, R.S.C., 1970, c. E-10, s. 4(1).

[16] In Canada, as a result of *R.* v. *Wray*, [1971] S.C.R. 272 and other cases, the only evidence of this kind which is apparently inadmissible is a true involuntary confession and this is subject to the rule in *R.* v. *St. Lawrence* (1949), 93 C.C.C. 376. *Cf. R.* v. *Pettipiece* (1972), 7 C.C.C. (2d) 133 (B.C.C.A.).

[17] *Sed quaere* whether there is such a concept in Canada: *R.* v. *Osborn*, [1971] S.C.R. 184.

[18] See *e.g.* D. Newman, Conviction: The Determination of Guilt or Innocence without Trial (1966), pp. 43, 45, 199, 221-222, ch. 18, p. 234. In *In Re Gault* (1966), 387 U.S. 1, at p. 26 the court said: "[Recent studies] suggest that the appearance as well as the actuality of fairness, impartiality and orderliness—in short, the essentials of due process may be a more impressive and a more therapeutic attitude so far as the juvenile is concerned" than an attitude of benevolent informality. See also the authorities cited by the court; the Report of the Canadian Committee on Corrections (1969), pp. 131-132; Davis, Justice for the Juvenile: The Decision to Arrest and Due Process, [1971] Duke L.J. 913, at p. 924 and the authorities there cited; Handler, The Juvenile Court and the Adversary System: Problems of Function and Form, [1965] Wis. L. Rev. 7, at pp.

self-deception and rationalization on his part.[19] Since many *de facto* guilty are not processed through to conviction, it is likely that some *de facto* guilty who are convicted will blame their predicament upon "chance" rather than upon any "choice" made by them. This cannot really be avoided. If, however, rehabilitation can be affected by the way that a person is treated at the trial and pre-trial stage, it is important that, as far as possible, steps should be taken to prevent him from feeling that his conviction was the result of unfairness,[20] for instance, racism on the part of police or judges, incompetence and lack of preparation on the part of counsel for the Crown or the defence, a lack of money to obtain the services of good counsel or incompetence, irritability and unwillingness to listen on the part of the judge. Indeed the mere fact that "somebody up there likes me" or, at least, will "listen to me" may have a significant effect on the future of the offender.

What is the relevance of this discovery? It is submitted that allowing the defence full discovery will increase the likelihood of obtaining "truer" verdicts. The following example should illustrate this. It is generally agreed that eye-witness testimony of the crime and any subsequent identification via photographs or an identification parade are particularly suspect.[21] It is critical,

19-21 and 31 and the authorities there cited; Grygier, The Concept of "The State of Delinquency"—an Obituary (1965), 18 J. of Leg. Ed. 131, at pp. 135-136. See also Fox and Spencer, The Young Offenders Bill: Destigmatizing Juvenile Delinquency? (1972), 14 Crim. L.Q. 172, at p. 192 *et seq.* For surveys of attitudes to the criminal system, see *e.g.* the annexes to La Société Face au Crime (1968-70), Govt. of Quebec; Jacob, Black and White Perceptions of Justice in the City (1971), 6 L. and Soc. Rev. 69; Studt, The Client's Image of the Juvenile Court, in Justice for the Child (1962, ed. M. K. Rosenheim); Baum and Wheeler, Becoming an Inmate, in Controlling Delinquency (1969, ed. S. Wheeler), pp. 165-174; Maher and Stein, The Delinquent's Perception of the Law and the Community, *ibid.*, p. 187; Snyder, The Impact of the Juvenile Court Hearing on the Child (1971), 17 Crime and Delinquency 180.

[19] As Professor L. Fuller has pointed out, the more effective the procedural guarantees, the more unambiguously the finger of shame will point at the offender and the more difficult it will be for him to console himself with the thought that those in charge did not know what they were doing: The Morality of Law (2nd ed., 1969), p. 179.

[20] This concept of fairness is developed at length in D. Matza, The Delinqency of Drift (1964), ch. 4 and particularly p. 106.

[21] See Houts, *op. cit.*, footnote 3, chs 1 and 2; Borchard, *op.cit.*, footnote 3, pp. xiii-xv and xx (of the 65 wrongful convictions studied by Borchard, errors in identification were responsible for 29 of them, see p. xiii); Frank, *op. cit.*, footnote 3, pp. 199-223; Radin, *op. cit.*, footnote 3, chs 6 and 7; Glanville Williams, *op. cit.*, footnote 3, pp. 86-124. The courts have, to a certain extent, recognized the dangers: see Carter, Identification Evidence in Studies in Canadian Criminal Evidence (1972, ed. by Salhany and Carter), p. 247 and the cases there cited, particularly *R.* v. *Sutton* (1970), 9 C.R.N.S. 45 and *R.* v. *Spatola* (1970), 10 C.R.N.S. 143. Aware of these dangers, the United States Supreme Court has held that an accused person is entitled to counsel at a line-up: see *U.S.* v. *Wade* (1967), 388 U.S. 218; this and other cases are discussed at length in Sobel, Assailing

therefore, that the defence be allowed to see every piece of evidence and to talk to any person in any way connected with the process of identification. The defence should be shown every statement made by witnesses to the event, whether or not the prosecution intends to call them, and be able to interview them, unless the prosecution prove that witness-tampering is likely. Good counsel would seek out a considerable amount of this information at a preliminary hearing[22] and there is no reason why it should be denied to an accused who chooses trial by magistrate.

The results of a recent sample survey of American lawyers involved in civil litigation in the United States seem to support this argument. It revealed that considerably more than half of the lawyers who used discovery stated that they obtained new evidence thereby[23] and that nearly half of the lawyers who used discovered evidence at the trial stated that it could not have been obtained by other means.[24] More important still, the survey showed that seventy-eight per cent of the lawyers who used discovery felt that it helped produce a just disposition.[25] Many of the writers who have collected examples of convictions of the innocent appear to share this view in that they stress the need for pre-trial discovery.[26] It is also interesting to note that discovery is being increasingly used in the United States in the field of administrative law.[27]

It must be admitted, however, that more discovery for the defence may also lead to more acquittals of the *de facto* guilty: witness tampering will be made easier, secondly, defence witnesses can more easily avoid the dangerous pitfalls[28] of having their testimony revealed to be false by the evidence of a surprise witness and, thirdly, those additional witnesses discarded by the prosecution for their unreliability, but called by the defence, may sow confusion in the minds of the judge or jury, when there should have been no such confusion. These objections will be discussed below. However, to the extent to which they are justified, it still has to be decided whether on balance it is better to have full

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the Impermissible Suggestion: Evolving Limitations on the Abuse of Pretrial Criminal Identification Methods (1971), 38 Brooklyn L. Rev. 261.

[22] See Martin, Preliminary Hearings in Law Society of Upper Canada Special Lectures (1955), pp. 8-17.

[23] W. A. Glaser, Pretrial Discovery and the Adversary System (1968), pp. 83-85. It is also interesting to note that defendants were helped more often than plaintiffs by discovery: *ibid.*

[24] *Ibid.*, p. 104.

[25] *Ibid.*, p. 112.

[26] Frank, *op. cit.*, footnote 3, pp. 242-248; Radin, *op. cit.*, footnote 3, pp. 232-235; Paget and Silverman, *op. cit.*, footnote 3, pp. 42-44; Glanville Williams, *op. cit.*, footnote 3, pp. 100-104. See also Borchard, *op. cit.*, footnote 3, pp. 194-200.

[27] Tomlinson, Discovery in Agency Administration, [1971] Duke L.J. 89.

[28] See *e.g.* Borchard, *op. cit.*, footnote 3, pp. xix-xx and *R.* v. *Sigmund*, [1968] 1 C.C.C. 92.

discovery in the hope that, thereby, the likelihood of *de facto* innocent persons being convicted is lessened, albeit at the risk of some *de facto* guilty being acquitted.

III. *The Trial—Adjudication in an Adversary Setting.*

In common law countries the criminal trial of adults[29] is of an adjudicatory and adversary nature. The primary responsibility for establishing guilt is upon the prosecutor and for "establishing" innocence upon the defence and the arbiter (the judge or jury) plays a passive and impartial role. By contrast, in those countries where criminal trials are of an inquisitorial nature,[30] the primary responsibility for establishing guilt or innocence is upon the arbiter, who, himself does most of the questioning. Much has been written on the characteristics, virtues and defects[31] of the adversary system. Those who favour the adversary system do so because they feel that, at least for certain kinds of disputes,[32] of which the criminal trial is one, its use will result in "truer" verdicts than would result from the use of the inquisitorial system. A "true" verdict is not necessarily one that reflects what actually happened, because rules of evidence and procedure may prevent the truth from being determined. The truth may be that A did commit the crime but the "true" verdict may be that A is not guilty because, for example, the only evidence against A is an accurate confession obtained from him under torture and because A cannot be forced to testify at his trial. However, since our system is also designed so as to acquit all the *de facto* innocent (albeit at the cost of acquitting some *de facto* guilty), it follows that a

[29] The actual and ideal nature of the trial of juveniles is the subject of much dispute: see the authorities cited in footnote 18.

[30] For a historical survey of the inquisitorial system see A. Esmein, History of Continental Criminal Procedure (1913, reprinted 1968); Ploscowe, Development of Inquisitorial and Accusatorial Elements in French Procedure (1932), 23 J. of Crim. L., Criminology and Police Sc. 372 and Ploscowe, The Development of Present-Day Criminal Procedures in Europe and America (1935), 48 Harv. L. Rev. 433. For discussions of this system, see *e.g.* Berg, Criminal Procedure: France, England and the United States (1959), 8 De Paul L. Rev. 256; Vouin, French Criminal Procedure, in The Accused, a Comparative Study (1966, ed. J. A. Coutts), p. 209; Vouin, Le rôle de l'avocat de la poursuite dans les causes criminelles (1969), 7 Colloque International du Droit Comp. 207.

[31] No attempt is made here to cite all the authorities but see generally the following and the material there cited: Handler, *op. cit.*, footnote 18, at p. 26 *et seq.*; W. A. Glaser, *op. cit.*, footnote 23, ch. 1; M. Weber, Law in Economy and Society (1954, ed. and ann. by M. Rheinstein), p. 46, footnote 12; Weiler, Two Models of Judicial Decision-Making (1968), 46 Can. Bar Rev. 406, at p. 412 *et. seq.*; Burns, Criminal Justice: Adversary or Inquest; Did Due Process Reform the Wrong System? (1971), 2 Loyola U. L. J. 249. For an alternative to what he calls the "Battle Model", see Griffiths' "Family Model" in Ideology in Criminal Procedure *or* a Third Model of the Criminal Process (1970), 79 Yale L. J. 359.

[32] See Weiler, *op. cit.*, footnote 31, at pp. 420-426.

"true" verdict can never be one which results in the conviction of a *de facto* innocent.

Why is it thought that, in a criminal trial, a "truer" verdict will more likely be achieved by using the adversary system? The answer given to this question is twofold. First, it is said that a "truer" verdict is more likely if one party to the dispute devotes his attention to putting forward a proposition (for instance, guilt) and if the other party devotes his attention to destroying that proposition (for instance, establishing innocence or guilt of a lesser included offence) and if an impartial arbiter makes the decision. Since the only task of the opponent of the proposition is its destruction and since the responsibility for fulfilling that task is upon his shoulders, it is more likely that he will find any loopholes in it. Secondly, it is said that if a single individual has the tasks of establishing the proposition, seeking to destroy it and then deciding the issue, his verdict is less likely to be "true". This is because, in seeking to establish the proposition, there is a likelihood that he will become convinced of its "truth" and less willing and able to see the contrary as a possibility. Indeed he may become so convinced that he ceases further investigation, especially if he has many other things to do.[33] Not only is the passive and impartial role of the arbiter important from the point of view of achieving "true" verdicts, but it is also important from the point of view of the moral acceptability of the system, epitomized in the maxim "justice should not only be done, but should manifestly and undoubtedly be seen to be done".[34] It is highly unlikely that the loser of the dispute will accept that a decision against his interest was made impartially and fairly, if the arbiter has engaged in the kind of strenuous cross-examination of him and his witnesses which may often be necessary to determine the validity of their testimony[35] or if he made findings of fact on evidence which was not before the court.[36]

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[33] In addition to the material cited, *supra*, footnote 31, see Hobbs, Prosecutor's Bias, an Occupational Disease (1949), 2 Alabama L. Rev. 40, at p. 50.

[34] *R.* v. *Sussex J. J.*, [1924] 1 K.B. 256, at p. 259.

[35] The dangers of these interventions are more acute in a jury trial, where a jury may well feel that the judge knows more about the matter than they do and thus reach the verdict which they think, having regard to his attitudes during the trial, he himself would have reached. For appellate attitudes towards judicial intervention at the trial, see *R.* v. *Denis*, [1967] 1 C.C.C. 196; Tremeear's Annotated Criminal Code (1964, 6th ed. by L.J. Ryan), p. 969 and in the 1971 Supplement, p. 223; *Re Regina and Ward* (1971), 4 C.C.C. (2d) 145; and see also *Phillips* v. *Ford Motor Company*, [1971] 2 O.R. 637. That this is a real problem with the inquisitorial system can be seen in Ploscowe, *op. cit.*, footnote 30 (1932), pp. 388-389; Glanville Williams, *op. cit.*, footnote 3, p. 24 *et seq.* and J. Heath, Eighteenth Century Penal Theory (1963), p. 39.

[36] See *e.g. R.* v. *Pallett*, [1970] 3 C.C.C. 430; *R.* v. *Woods* (1969), 7 C.R.N.S. 1; *R.* v. *Phillips* (1969), 8 C.R.N.S. 186.

This sense of injustice may well affect his rehabilitation,[37] may be shared by onlookers and may lead to a general loss of moral acceptability in the system. In other words, the "moral force" will only attach to the arbiter's decisions if "they stem from a context in which they appear most likely to be right".[38]

What is the relevance of this to the question of discovery? The question can perhaps best be answered in the words of Traynor C.J.:[39]

> 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.

Fundamental to the adversary system is the assumption that, for certain kinds of disputes, two opposing parties with an independent arbiter are more likely to reach a "true" verdict than one person playing all three roles. Even assuming that prosecutors always meet the high ethical standards demanded of them, it would not be humanly possible for them to defend with as much vigour as they prosecute. Indeed the nature of the adversary system would make it undesirable for them to do so.[40] If the adversary system requires that an accused should be represented by counsel, surely it also requires that counsel should be informed of the case against his client so that he can find any gaps or weaknesses in it?[41] And yet in countries using the adversary system there has traditionally been very little discovery, whereas, in France, there is full disclosure of the *dossier* prepared by the *juge d'instruction*.[42]

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[37] *Supra*, footnote 18.

[38] Weiler, *op. cit.*, footnote 31, at p. 416. See also, *supra*, footnote 10.

[39] Ground Lost and Found in Criminal Discovery (1964), 39 New York U.L. Rev. 228. There are many statements to a similar effect, see *e.g.* Brennan, The Criminal Prosecution: Sporting Event or Quest for Truth? [1963] Wash. Univ. L.Q. 279. At p. 283, he mentions that the Soviet prosecutors at Nuremberg protested that the adoption of American non-disclosure practices would not be fair to the defendants; Fletcher, Pretrial Discovery in State Criminal Cases (1960), 12 Stan. L. Rev. 293, at p. 305; Moore, Criminal Discovery (1968), 19 Hastings L.J. 865, at p. 871; Louisell, Criminal Discovery: Dilemna Real or Apparent (1961), 49 Calif. L. Rev. 56, at p. 102.

[40] See *e.g.* B. A. Grosman, The Prosecutor (1969), pp. 83-86; Louisell, The Theory of Criminal Discovery and the Practice of Criminal Law (1961), 14 Vand. L. Rev. 921, at pp. 927-928; Frank, *op. cit.*, footnote 3, pp. 233-236.

[41] "[T]he more innocent the defendant, the more ignorant he will be of the case against him, and the more his counsel will need discovery pretrial to obtain that information": Moore, *op. cit.*, footnote 39, at p. 871. See also *R.* v. *Nadin* (1971), 3 C.C.C. (2d) 221, at p. 227.

[42] See G. Stefani and G. Levasseur, Procédure Pénale (1968), paras 307, 452 and 574.

It could be argued that the adversary system does not necessarily require that the defence should be entitled to pre-trial discovery, provided that, at the trial, all the evidence favourable to the accused is made available to the court.[43] The argument depends for its validity on the assumption that all prosecutors (unlike plaintiffs) do, in practice, spontaneously present or make available at trial all evidence favourable or *unfavourable* to their case. Before looking at the argument, let us take a brief look at the assumption. Without in any way wishing to suggest that Canadian prosecutors are as open to criticism as their American counterparts,[44] one would have to be very optimistic to think that all prosecutors meet these high standards—and it must be all or nearly all for the argument to have validity. If Professor Grosman's description of prosecutors in the Toronto magistrates' courts[45] reflects the position across Canada, then one can say, at the least, that it would be highly dangerous to assume that all prosecutors disclose evidence favourable to the accused without empirical evidence to support the assumption. According to him, all facets of the average investigation are in the hands of the police who lay the charges and hand the "dope-sheet" to the prosecutor taking the case only minutes before the trial starts. So the assumption depends upon the even more questionable premise that the police *always* disclose to the prosecutor any evidence favourable to the accused. Quite apart from this fundamental objection to the validity of the assumption, there is a further equally strong objection. Evidence is not favourable or unfavourable in the abstract. What appears to a policeman or prosecutor to be a neutral fact may actually be of considerable value to the defence. In civil suits the party who is in possession of a document does not have the unfettered discretion to decide whether the other party would like to see it. What justification is there then for giving such a discretion to prosecutors or, worse still, to the police?

Even if we accept that all evidence favourable to the accused's case is produced or made available at trial, does this dispense with the need for pre-trial discovery by the defence? It could certainly be said that, in an adversary system, surprise is of con-

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[43] Unless this evidence is before the court, the reason for choosing the adversary system, *i.e.* that it results in "truer" verdicts, will be completely thwarted: see Louisell, *op. cit.*, footnote 39, at p. 102.

[44] See *e.g.* Radin, *op. cit.*, footnote 3, ch. 3; Frank, *op. cit.*, footnote 3, pp. 223-242; Borchard, *op. cit.*, footnote 3, p. xv (In 13 of the 65 cases examined "the prosecution's overzealousness was the operative factor in causing the erroneous conviction", *ibid.*); Singer, Forensic Misconduct by Federal Prosecutors—and How it Grew (1968), 20 Alabama L. Rev. 227; Hobbs, *op. cit.*, footnote 33.

[45] *Op. cit.*, footnote 40, pp. 20-28, 44-51.

siderable value.[45] The accused gives evidence that at the time of the crime he was in another city. Unknown to him, the Crown can apparently prove that he was not there and, after a vigorous cross-examination, the accused's story appears to be in tatters. Then the denouement—X is called in rebuttal to prove beyond doubt that A's alibi is false, a conviction is entered, justice is done and the virtues of the adversary system revealed for all to see. The accused was so surprised that he could not fabricate another story, but why was the Crown not so surprised by the alibi that nothing could be done to rebut it? It could be that the accused had already revealed the alibi—indeed, as we shall see later, the judge or jury are entitled, in determining whether or not to believe an alibi first raised at trial, to take into account that it was not revealed earlier. Alternatively, as soon as the accused said that he was in the other city, the prosecutor could have initiated an investigation, using the considerable facilities at his command.

Rather than assuming that our accused was guilty, let us assume that he was innocent. He revealed his alibi well in advance of the trial. The police find X who will testify that the alibi is false and, without informing the defence, call X at the trial. In fact X is lying. Investigation would have revealed that he has a previous criminal record for perjury and that he is related to the complainant. It could also have been proved, given enough time, that X did not see the accused at the time that he said he did. But of course the defence is completely surprised by the testimony, nothing can be done to cast doubt upon it and the accused is wrongfully convicted.

Why then is pre-trial discovery necessary? First, the arguments in favour of surprise must be viewed with scepticism if its advantages are more enjoyed by the prosecutor than by the defence. Secondly, and this is more important, the criminal trial has a characteristic which is not required in order to make the adversary system work successfully, but which must be taken into account in determining whether or not and how far surprise should be permitted. Unlike public inquiries, the criminal trial is not open-ended.[47] When X testifies, the defence may only have hours or even minutes to find the evidence to discredit him. It is true that the judge might decide to grant an adjournment to permit the neces-

[46] The dangers and benefits of surprise evidence have been much discussed. See Glaser, *op. cit.*, footnote 23, pp. 23-27, 106 and the authorities there cited; Glaser points out, at p. 107, that the use of discovery in civil cases has reduced surprise due to new evidence but increased the chances of a party being surprised by new contentions; Traynor, *op. cit.*, footnote 39, at p. 249; Louisell, *op. cit.*, footnote 40, pp. 922-923; *Williams* v. *Florida* (1970), 90 S. Ct. 1893, at p. 1896.

[47] Discovery in Criminal Cases (1961), Am. Law Institute, p. 3; Goldstein, The State and the Accused: Balance of Advantage in Criminal Procedure (1960), 69 Yale L.J. 1149, at pp. 1172-1179.

sary enquiries, but this would be unlikely in a jury trial and, in any event, any decision not to grant an adjournment would probably be unappealable.[48] It is also true that the defence could ask for leave to introduce fresh evidence on appeal. Not only is it very difficult to persuade the appeal court to hear the evidence,[49] but the very fact that the accused has been found guilty may mean, especially if he is in prison, that no one is prepared to do the necessary investigation to prove his innocence.[50] Futhermore, if finality is a virtue, any gains obtained by allowing this ground of appeal may be outweighed by the consequent loss of finality. It is submitted that the dangers of permitting surprise may often exceed the gains and that the use of surprise should be, at the least, closely supervised to avoid these dangers.[51]

IV. *Plea Bargaining—Negotiation in an Adversary Setting.*

The importance of the guilty plea and of plea-bargaining[52] in the criminal justice system makes it imperative to discuss the effect upon the negotiations of the presence or absence of discovery. We must therefore spend a short time examining plea-bargaining and the exercise of prosecutorial discretion in relation thereto.

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[48] See Tremeear, *op. cit.*, footnote 35, pp. 911-913, 963 and 1514-1516.

[49] *Ibid.*, pp. 1092-1095, and particularly *R.* v. *Grigoreshenko* (1945), 85 C.C.C. 129.

[50] See Borchard, *op. cit.*, footnote 3, p. xxi.

[51] *E.g.* the use of a surprise witness would entitle the defence as of right to an adjournment.

[52] The actual percentage in Canada of convictions preceded by a guilty plea is apparently unknown. In the Report of the Canadian Committee on Corrections (1969), p. 134 it is suggested that 40-50% of all convictions for indictable offences are pleas of guilty. For Quebec, see Table 7 of the Supplement to Statistics of Criminal and other Offences (1968), D.B.S. A recent survey of magistrates' courts in five Canadian cities indicates that 68% plead guilty (with 59% in Toronto and 82% in Winnipeg): Due Process Safeguards and Canadian Criminal Justice (1971, published by Canadian Civil Liberties Education Trust, Toronto), Tables 31-34. Whereas 56% of accused persons represented by counsel pleaded guilty, 82% of unrepresented accused pleaded guilty, *ibid.*, Table 37. The figures must, however, be viewed with considerable caution: see the strong criticism of the survey by Wilkins and Jeffries in (1972), 14 Crim. L.Q. 220. No published estimate of the amount of plea-bargaining that goes on seems to have been made. Grosman, *op. cit.*, footnote 40, p. 33, states that it plays a large part in the administration of criminal justice in Toronto. In the U.S.A. it has been said that guilty pleas account for some 90% of all convictions in criminal cases and that a "substantial" percentage of these pleas are negotiated: Newman, *op. cit.*, footnote 18, p. 3 and The President's Commission on Law Enforcement and the Administration of Justice, Task Force Report: The Courts (1967), p. 9. In 1970, 86% of the convictions in 89 U.S. District courts were pleas of guilty or of *nollo contendere: Santobello* v. *New York* (1971), 92 S. Ct. 495, at p. 500. See also Klonoski, Mitchell and Gallagher, Plea Bargaining in Oregon: An Exploratory Study (1971), 50 Oregon L. Rev. 114, at pp. 118-119. It is likely that there is less plea-bargaining in Canada because the sentencing structure is not as harsh as in the U.S.A., see Newman, *ibid.*, at pp. 87-90.

We have already seen that the aim of the criminal law process is the acquittal of the *de facto* innocent and the conviction of the *de facto* guilty and that the realization of this aim, insofar as the *de facto* guilty are concerned, is subject to a number of qualifications and restrictions. Is this also the aim of plea-bargaining and, if so, do the same restrictions and qualifications apply? Two examples will show how difficult it is to give any absolute answer to this question. The first example concerns plea-bargaining where, unknown to the defence, there is insufficient evidence to obtain a conviction at trial. The most important restriction upon the achievement of the aim of the criminal process is the requirement that guilt be proved beyond a reasonable doubt. Is this restriction of the same importance at the pre-trial stage? If the aim of allowing plea-bargaining is to permit the parties to agree upon the probable verdict if the case went to trial the rule which requires guilt to be proved beyond a reasonable doubt would apply with equal force at this stage. If it would be impossible to obtain a conviction without a certain witness and that witness is unavailable, the result of the pre-trial negotiations should be the dropping of any charge for the proof of which that witness is necessary. On the other hand, if agreement as to the probable verdict is not necessarily the aim of plea-bargaining, the proof beyond a reasonable doubt rule, designed as it is to separate the guilty from the innocent, is of much less importance if a person is prepared to admit his guilt. If the *de facto* guilty person is prepared to plead guilty to a negotiated plea because he is unaware that a conviction could not be obtained, the aim of the criminal process—the acquittal of the *de facto* innocent and the conviction of the *de facto* guilty—has been realized. For the second example, let us assume that A has been arrested for shop-lifting a $2.00 item, that it is his first known offence and that there is evidence that his behaviour was the result of some neurotic condition. If it is thought that withdrawal of the charge upon condition that A receive psychiatric help would be a desirable outcome, we would have to conclude that the aim of pre-trial negotiations may not always be the conviction of the *de facto* guilty. We will not be concerned further in this article with the second example, but the first example (lack of evidence) raises very difficult issues about the desirability of pre-trial discovery and we shall return to it later. Meanwhile, we must examine more closely the nature of, and problems relating to, plea-bargaining.

The failure to determine what are its aims and the fact that it has been allowed to develop in an uncontrolled way have brought plea-bargaining into disrepute. A number of the criticisms will be considered later and it will be suggested that discovery can meet many of the objections. However, these criticisms should

not be allowed to conceal the positive and desirable features of pre-trial negotiations.[53] Not only would it be very expensive to process every case through to trial, but it is likely that the sheer volume of cases would lead to inordinate delays, to less attention being paid to the difficult unnegotiable cases and to the eventual loss of any value that the criminal trial has as a "contemporary morality play" and "as a *demonstration* of certain values to the community".[54] Pre-trial negotiations also have an important role in alleviating the harshness of the law.[55] Indeed, more and more attention is being paid at both the juvenile and adult levels to the values of settling out of court. Furthermore, negotiated pleas and negotiated sentences may reduce the dangers of judge or jury verdicts that are "wrong" and sentences that are capricious or inconsistent.[56]

We have already seen that the criminal trial is conducted within the framework of the adversary system and why that system is preferred. Plea-bargaining is also conducted within the framework of the same system and for many of the same reasons. The representatives of the parties to the negotiation (the prosecutor, and through his defence counsel, the accused[57]) should be investigators and advocates for their own cause, each trying to achieve the best possible outcome for their "clients". Unless the judge decides not to accept the plea of guilty or the suggested sentence,[58] they are free to decide the outcome of the case and with

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[53] I am grateful to Professor P. Weiler for pointing out to me many of the desirable features of plea-bargaining and the fact that adjudication and negotiation are both means of settling disputes within the framework of the adversary system.

[54] Morton, *op. cit.*, footnote 8, pp. 31-32: "To substitute for the dignified, indeed awe-inspiring assize court dealing with a few serious cases at periodic intervals of time, the often dingy punishment assembly line of many contemporary courts must be to bring the law into contempt. Such contempt is unlikely to have a beneficial educative effect."

[55] This point is made at length in Newman, *op. cit.*, footnote 18. See also Grosman, *op. cit.*, footnote 40, pp. 37-40.

[56] See generally Newman, *ibid.*, Part VI and particularly at p. 230. *Cf.* Alschuler, The Prosecutor's Role in Plea Bargaining (1969), 36 U. of Chi. L. Rev. 50, at p. 78.

[57] The accused would be most ill-advised to bargain himself, because anything he said (*e.g.* I'll plead guilty to count 1, if you drop count 2) may be admissible at his trial, see *R.* v. *Draskovic* (1971), 5 C.C.C. (2d) 186. Section 3.4 of Standards Relating to Pleas of Guilty, A.B.A. Project on Minimum Standards for Criminal Justice, makes this evidence inadmissible.

[58] The role that the judge is allowed to play prior to the plea is not clear: in *R.* v. *Turner*, [1970] 2 W.L.R. 1093, the court said that a trial judge may only indicate what sentence he will give if he states that this same sentence will be given whether on a plea of guilty or not guilty. The role of the trial judge is discussed in Representation after Conviction (1970), Law Soc. of Upper Canada, Dept. of Cont. Educ., Panel 1, pp. 12-19; Defending a Criminal Case, Law Soc. of Upper Canada Special Lectures (1969), pp. 307-311. In *R.* v. *Soanes* (1948), 32 Cr. App. R. 136, the court said that neither the prosecutor nor the trial judge should

this freedom goes the responsibility which the adversary system places upon them. But in the same way that discovery is essential if the adversary system is going to work properly at trial, so also, it will be argued, is it necessary at the plea-bargaining stage.

Studies of plea-bargaining[59] reveal that the two main factors[60] which induce a prosecutor to negotiate a plea of guilty are, first, the weakness of the case and, secondly, an over-loaded docket. It has been said that, of the two, the first is viewed by prosecutors to be the more important[61] and, if this is so in the United States, then, given the apparent absence of as much overcrowding in Canada,[62] it may well also be the more important factor here.[63] On the other hand, a defendant will negotiate a plea of guilty if he thinks that it will result in a reduced sentence. The mere fact that he pleads guilty may well mean a lower sentence than he would have received after a trial.[64] But, in exchange for a plea of guilty,

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accept a plea of guilty to a lesser offence when, on the facts, the greater offence appears to have been committed. See further Davis, Sentences for Sale: a New Look at Plea Bargaining in England and America, [1971] Crim. L. Rev. 150, at pp. 222-224; Whitman, Judicial Plea Bargaining (1967), 19 Stanford L. Rev. 1082 and s. 534(6) of the Code. Courts do not permit the prosecutor to renege on his bargain: *R.* v. *Agozzino*, [1970] 1 C.C.C. 380; *Santobello* v. *New York, supra,* footnote 52; *R.* v. *Stone* (1932), 58 C.C.C. 262. If the trial judge did not agree to the bargain and if the accused knew that he could receive a greater sentence than that bargained for, then the award of a greater sentence does not appear to entitle the accused to withdraw his plea, see *R.* v. *McGrath* (1944), 81 C.C.C. 303; *R.* v. *Johnston and Tremayne*, [1970] 4 C.C.C. 64, at p. 67 (*passim*); *Brady* v. *U.S.* (1970), 90 S. Ct. 1463, at p. 1473 (*passim*); Newman, *op. cit.*, footnote 18, pp. 36-38; *cf. R.* v. *Stone, ibid.*, at p. 266. See also Note, Guilty Plea-Bargaining by Prosecutors to Secure Guilty Pleas (1964), 112 U. of Penn. L. Rev. 865, at pp. 876-878.

[59] See generally Davis, *op. cit., ibid.*, and the material there cited; Newman, *op. cit.*, footnote 18; Grosman, *op. cit.*, footnote 40. See also White, a Proposal for Reform of the Plea Bargaining Process (1971), 119 U. of Penn. L. Rev. 439 and McClure, Plea Bargaining: The Judicial Merry-Go-Round (1971), 10 Duquesne L. Rev. 253.

[60] There are others: see *e.g.* Alschuler, *op cit.*, footnote 56, at pp. 52-53. At pp. 106-110, he points out that prosecutors are often more interested in a conviction than in the sentence given.

[61] Alschuler, *ibid.*, at pp. 58-59. See also Klonoski, *op. cit.*, footnote 52, pp. 119-120; Representation after Conviction, *op. cit.*, footnote 58, at p. 6 *et seq.*; Newman, *op. cit.*, footnote 18, ch. 5.

[62] Recent surveys indicate that, in courts serving the larger urban areas in Canada, the average daily session time per court is less than three hours: see the Civil Liberties survey and the surveys referred to by Wilkins and Jeffries, *op. cit.*, footnote 52, respectively Tables 38-43 and at p. 228. To what extent is any alleged or apparent overcrowding the product of idleness?

[63] *Cf.* Defending a Criminal Case, *op. cit.*, footnote 58, at pp. 299-303 and Grosman, *op. cit.*, footnote 40, pp. 49-59.

[64] See *R.* v. *Johnston and Tremayne, supra,* footnote 58, at p. 67; but *cf.* M. L. Friedland, Detention Before Trial (1965), p. 121. See further Newman, *op. cit.*, footnote 18, pp. 62-66, 89; Davis, *op. cit.*, footnote 58, pp. 152-164; Note, The Influence of the Defendant's Plea on Judicial Determination of Sentence (1956), 56 Yale L.J. 204; Note, The Unconstitutionality of Plea Bargaining (1970), 83 Harv. L. Rev. 1387; New-

he may get the prosecutor's agreement to a further reduction[64a] or he may get the prosecutor to accept a plea of guilty to only some of the counts or to a lesser offence, expecting thereby to receive a lesser sentence.[64b] Among the other benefits which an accused can gain from successful negotiation are a reduction of counts so his record looks better, absence of adverse publicity, no pre-trial detention, the promise not to use the habitual criminal provisions or not to mention factors which could or would aggravate sentence, or conviction for an offence which is less destructive of the accused's social and professional prospects than the offence with which he is charged (for instance, indecent assault to assault, possession for the purposes of trafficking to simple possession).

There may be a further pressure on the accused to plead guilty—that exercised by his counsel.[65] There are two main reasons for the possibility of this pressure. First, if counsel receives a set fee whether there is a trial or not, he has no direct financial incentive to have a trial once the fee has been received[66] and if he receives no fee (or a reduced fee) there will be a temptation to do as little work as possible. Secondly, if the success of a

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man and NeMoyer, Issues of Propriety in Criminal Justice (1970), 47 Denver L. J. 367, at pp. 379-385. For examples of prosecutorial threats based on this sentencing policy, see Dash, Cracks in the Foundation of Criminal Justice (1951), 46 Ill. L. Rev. 385, at p. 393. See also for similar legislative threats: *Brady* v. *U.S.* (1970), 90 S. Ct. 1463 and *N. Carolina* v. *Alford* (1971), 91 S. Ct. 160.

[64a] According to Grosman, *op. cit.*, footnote 40, p. 35, in Toronto: "Prosecutorial promises linking reduction of sentence to an exchange for a guilty plea are minimal." The reason for this seems to be that there is considerable uncertainty as to what should be the role of the prosecutor at the sentencing stage: *ibid.*, Defending a Criminal Case, *op. cit.*, footnote 58, pp. 304-305; Representation after Conviction, *ibid.*, pp. 9 *et seq.* and 17.

[64b] Newman, *op. cit.*, footnote 18, at pp. 44 and 98-99, points out that, in many cases, the accused gains nothing because, having heard all the facts, the trial judge may give him the sentence that he would have been given had he been convicted of the more serious offence or on all the counts and that the approach of the correctional authorities towards him may be on the basis of what he actually did. See also Grosman, *op. cit., ibid.*, p. 34 and Alschuler, *op. cit.*, footnote 56, pp. 95-98; at p. 95 he mentions a case where, on a plea of guilty, the maximum possible sentence was reduced from 1000 years to 250 years.

[65] One survey in the United States showed that in 56% of the cases it was the defence counsel who first suggested a plea of guilty and that a privately retained counsel was less likely to make the suggestion at his first meeting with the accused than a legal aid or assigned counsel: A. S. Blumberg, Criminal Justice (1967), pp. 92-93. See also Representation after Conviction, *op cit.*, footnote 58, p. 6, where Mr. O'Driscoll, Q.C. (now on the bench) states that over the years he has received many letters from inmates complaining that their lawyers had entered a plea of guilty when they did not want to plead guilty.

[66] As in professional wrestling, there may be a mock trial, or what is called "a slow plea", to placate the client: Battle, In Search of the Adversary System—the Cooperative Practices of Private Criminal Defense Attorneys (1971), 50 Texas L. Rev. 60, at pp. 108-109; or there may be adjournments to obtain the fee: Blumberg, *op. cit., ibid.*, p. 114.

defence counsel in his future plea negotiations depends upon his having good relationships with the police, court officials, prosecutors and judges, there will be a strong pressure on him to do what he thinks they want, for instance, plead his client guilty so that the machine will not slow down.[67]

With the possibility of a negotiated plea and the almost total lack of judicial control in Canada over the laying of charges,[68] there is a strong temptation for the prosecution to engage in what has been called vertical and horizontal overcharging,[69] for instance, charging the most serious offence possible even though not really supported by the facts and charging many different offences.[70] In the case of vertical overcharging, the accused will be frightened that a capricious judge or jury will find him guilty of the offence charged. In the case of vertical and horizontal overcharging, he will fear that the judge or jury will take the attitude that he must be guilty of something or they would not have charged him with all these offences.[71] Furthermore, since Canadian courts do not forbid multiple prosecutions and the unreasonable splitting of a case,[72] the prosecutor has a further

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[67] See *e.g.* Grosman, *op. cit.*, footnote 40, ch. 7, pp. 86-93; Blumberg, *op. cit.*, footnote 65, pp. 47, 65-66, chs 4 and 5; Alschuler, *op. cit.*, footnote 56, at pp. 79-80 (at p. 111 he points out that prosecutors want to be liked too); Skolnick, Social Control in the Adversary System (1967), 11 J. of Conflict Resolution 52; Blumberg, The Practice of Law as a Confidence Game: Organizational Cooptation of a Profession (1967), 1 L. and Soc. Rev. 15; Battle, *op. cit.*, footnote 66; White, *op. cit.*, footnote 59, at p. 446; Klonoski, *op. cit.*, footnote 52, at p. 124. See also Fuller, Human Interaction and the Law (1969), 14 Am. J. of Juris. 1, at pp. 29-30, where the author shows how straightforward commercial dealings depend upon a certain social distance between the parties. A defence counsel recently told the author that simultaneous negotiations for more than one accused (which is done in the U.S.A.) are not unknown in Toronto. The effect upon the outcome of bargaining of "intersecting", "continuous" and "simultaneous" negotiations is discussed in T. C. Schelling, The Strategy of Conflict (1960), pp. 30-33.

[68] See *e.g. In re Tait* (1950), 11 C.R. 42; *Glover* v. *Mackay and Parsison* (1961), 34 C.R. 360; *Shumiatcher* v. *A.-G. for Sask.* (1962), 37 C.R. 268; *R.* v. *Jones ex parte Cohen*, [1970] 2 C.C.C. 374.

[69] Alschuler, *op. cit.*, footnote 56, at pp. 85-105. *Cf.* Newman, *op. cit.*, footnote 18, p. 81.

[70] For a conviction on two counts charging separate but almost identical offences, see *R.* v. *Lavoie*, [1970] 5 C.C.C. 331. *Cf.* M. L. Friedland, Double Jeopardy (1969), pp. 110-113, ch. 8, pp. 210-213 and *R.* v. *Pryce* (1966), 50 C.R. 80. A well-known judge recently told the author that when he was a Crown prosecutor he never charged an accused with a greater offence if he thought that he could only obtain a conviction on the lesser offence. Moments later he said that he *always* joined a charge of drunk driving (now disappeared) to a charge of impaired driving!

[71] See further Alschuler, *op. cit.*, footnote 56, at p. 98.

[72] See *R.* v. *Osborn*, *supra*, footnote 17; *Wright, McDermott and Feeley* v. *The Queen*, [1963] S.C.R. 539. *Cf.* Friedland, *op. cit.*, footnote 70, ch. 7, particularly pp. 193-194. The procedure of waiting until the end of a period of imprisonment to charge a person with an offence committed prior to that period is "most unfortunate": *R.* v. *Burke*, [1968] 2 C.C.C.

powerful weapon of potential harassment to force a guilty plea. The use of the large initial threat being an elementary tactic in negotiation,[73] it is unlikely that (judicially unsupervised[74]) prosecutors will forego it and it is even more unlikely that it will not be used where the decision to lay charges is in the unsupervised hands of the police.[75]

Quite apart from the possible harmful effects of unfair plea-bargaining on society generally[76] and on the rehabilitation of the convicted person,[77] there is the constant danger that the pressures will be such as to force an innocent person to plead guilty. Indeed there have been suggestions that this is happening in the United States[78]—who would not seriously consider pleading guilty to a charge of common assault rather than stand trial for robbery, whether innocent or not? There can be no doubt that a prosecutor should not pressure a plea of guilty by charging an offence of which he knows the accused could not be convicted when he himself thinks the accused to be *de facto* innocent.[79]

124; *cf. R.* v. *Parisien* (1971), 3 C.C.C. (2d) 433, where, notwithstanding this procedure, the accused still received a sentence of one year.

[73] Threats are discussed in Schelling, *op. cit.*, footnote 67, particularly pp. 6 and 35-43. At p. 69 he makes the point that what may appear, at the outset of negotiations, to be the obvious outcome (*e.g.* agreement to recommend to the judge a specified sentence) is only obvious because of the way that the problem has been formulated and that much of the "skill" will have been exercised before the negotiations start. In cruder terms, then, the prosecutor can fix the result of the game by upping the threat. The large initial bargaining demand, which, for our purposes is much like the large threat, is discussed in C. M. Stevens, Strategy and Collective Bargaining Negotiation (1963), pp. 32 *et seq.* and 60 *et seq.* See also C. L. Karrass, The Negotiating Game (1970), pp. 18-20 and p. 192 where the author states that: "Threat can be an effective technique when one party has the power to inflict relatively heavy punishment on the other *without substantial retaliation*—and both parties know it."

[74] There is almost no judicial control in Canada of the laying of charges: see *supra,* footnotes 68, 70 and 72, *infra,* footnote 90.

[75] See Grosman, *op. cit.*, footnote 40, pp. 20-28, 44-51.

[76] See Newman and NeMoyer, *op. cit.*, footnote 64, at pp. 396-399.

[77] One must have grave doubts about the rehabilative values of a system which manipulates the accused to plead guilty, which is manipulated by him to obtain a lesser penalty and in which the victim plays such an insignificant role. See further, *supra,* footnote 18. *Cf.* Newman, *op. cit.*, footnote 18, pp. 98, 226-228; Enker, Perspectives on Plea Bargaining, Task Force Report: The Courts, *op. cit.*, footnote 52, p. 115, where he suggests that, in this respect, the negotiated plea might be better than the non-negotiated plea of guilty.

[78] See *e.g.* Newman and NeMoyer, *op. cit.*, footnote 64, at pp. 393-394; Alschuler, *op. cit.*, footnote 56, at pp. 61-65, 94; Newman, *op. cit.*, footnote 18, pp. 66, 200-205, 225-226; Blumberg, *op. cit.*, footnote 65, pp. 89-94; White, *op. cit.*, footnote 59, at pp. 451, 452; Dash, *op. cit.*, footnote 64, at pp. 394-395; Borchard, *op. cit.*, footnote 3, p. 195. *Cf.* Enker, *op. cit., ibid.*, at pp. 112-115 and the response thereto by Alschuler, *ibid.*, pp. 69-79.

[79] See *Boyland Foundation* v. *Moog* (Ont. C.A., unreported, Nov. 6th, 1963); *Boyko* v. *Sitter* (1964), 49 D.L.R. (2d) 464; White, *op. cit.*, footnote 59, at p. 451; *cf.* Alschuler, *op. cit* footnote 56, at pp. 63-65; Dash, *op. cit.*, footnote 64, at p. 401.

But should he be entitled to bluff, if he thinks that the accused is *de facto* guilty, although he knows that a conviction would be unlikely or impossible, for instance, because only one of the witnesses could identify the accused, because a material witness has died, because the confession will be ruled inadmissible or because there is no corroboration?[80] Apart from the ethical issues which will be looked at in the next section, there are at least four other considerations to take into account in deciding whether to allow him to use bluff and, if so, in what circumstances.

First, even if we wish the prosecutor to distinguish the *de facto* innocent from the *de facto* guilty, he may well not be able to do so. He may not have read the file or discussed the case with the police before the negotiations start (that is perhaps only a few minutes before the court opens)[81] and so he will not have formed any independent opinion about the guilt of the accused. Since the police seem to think he is guilty, the prosecutor will have to think the same thing. In other words, the distinction between not allowing the prosecutor to bluff a person whom he thinks to be *de facto* innocent and allowing him to bluff a person whom he thinks to be *de facto* guilty but not *de jure* guilty, may be a theoretical rather than a practical distinction.[82] There is the second objection that the outcome of the case may well depend upon what the prosecutor "thinks" and this "thinking" is subject to no outside supervision. Thirdly, to the very limited extent to which Canadian courts exclude relevant but illegally obtained evidence as a method of controlling police practices,[83] this sanction can be sidestepped by plea negotiation.[84] Fourthly, if the threat of conviction that was used to obtain a plea of guilty is later shown to be pure bluff, it may impede the rehabilitation of the convicted person and of others within his group[85] and may bring the whole system into general disrepute.[86]

It must be stressed that, for lack of evidence, we do not know

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[80] See Representation after Conviction, *op. cit.*, footnote 58, p. 6 *et seq.* (at p. 11, a leading Crown attorney describes plea-bargaining as somewhat like a poker game); Alschuler, *op. cit.*, footnote 56, at pp. 65-69. The role of bluff in negotiations is discussed in Schelling, *op. cit.*, footnote 67, pp. 23, 33 and 36 and in Stevens, *op. cit.*, footnote 73, ch. 5.

[81] See Grosman, *op. cit.*, footnote 40, pp. 49-51.

[82] *Cf.* White, *op. cit.*, footnote 59, at p. 460. But see Alschuler, *op. cit.*, footnote 56, at pp. 63-65.

[83] *Supra*, footnote 16.

[84] Alschuler, *op. cit.*, footnote 56, at pp. 79-85. *Contra* White, *op. cit.*, footnote 59, at p. 461. *Cf.* Newman, *op. cit.*, footnote 18, p. 72. The same problem arises with the use of illegally obtained evidence at the sentencing stage: see Note, Sentencing and the Exclusionary Rule: Deterrence and Judicial Integrity (1971), 66 Northwestern U. L. Rev. 698.

[85] *Supra*, footnote 18.

[86] See *e.g. R.* v. *Pettipiece*, *supra*, footnote 16, where Davey C.J. said that "a person faced with judicial process ought to be able to rely upon the process being genuine", at p. 136.

whether many of the undesirable features of plea-bargaining found in the United States are also to be found in Canada. However, the study by Professor Grosman[87] of the situation in Toronto does give cause for concern. There is the further problem of the tremendous variations that exist not only across the country, but even in the same city. It is highly unlikely that the practices of plea-bargaining in large urban areas bear much relationship to what is happening in the rest of Canada. So it may be that a superior court judge whose experience as a lawyer has been in a rural area will be out of touch with the practice of criminal law in the much more anonymous magistrates' courts in the big cities.[88] Even in the same city it may be that a defence counsel who is treated "well" is unaware that there are other counsel who are treated quite differently. Notwithstanding the lack of evidence, it would seem that the experience in the United States is valuable as an aid to discover what is happening in Canada and what may happen here in the future.

It is submitted that discovery could do much to make the adversary system more effective at the pre-plea stage and thus eliminate some of the undesirable features of plea-bargaining.[89] We have noted the danger that a *de facto* innocent person will plead guilty to a lesser offence rather than take the risks and endure the hardships of a trial for the greater offence. Although the danger cannot entirely be eliminated, it can probably be reduced[90] by granting discovery. If defence counsel has an opportunity to discover the prosecution's case in advance, the weaknesses of the case can then be discussed with the prosecutor and the apparent strengths can be made the subject of further investigation, all with the aim of assuring his client that a verdict of not guilty is likely or of persuading the prosecutor to drop the charges completely.

Discovery makes defence counsel a more effective adversary by giving him a certain supervisory role over the prosecution—if discovery reveals that there has indeed been over-charging, the

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[87] *Op. cit.*, footnote 40.

[88] This is not to suggest that plea-bargaining is something new. What may be new, however, are the problems associated with plea-bargaining in large cities with over-burdened courts and less personal contact among the people involved.

[89] See Friedman, Preplea Discovery: Guilty Pleas and the Likelihood of Conviction at Trial (1971), 119 U. of Penn. L. Rev. 527.

[90] Other means could include more judicial control of the laying of charges (*cf. supra*, footnote 68) and more outside control or guidance in the process of negotiation. See Grosman, *op. cit.*, footnote 40, pp. 102-104; Newman, *op. cit.*, footnote 18, pp. 235-236; Enker, *op. cit.*, footnote 77, at pp. 117-118; K.C. Davis, Discretionary Justice (1969), pp. 207-214. *Cf.* White *op. cit.*, footnote 59, at pp. 452-453, 462-465. See also Abrams, Internal Policy: Guiding the Exercise of Prosecutorial Discretion (1971), 19 U.C.L.A. L. Rev. 1.

value of that over-charging as a threat to induce a plea of guilty is considerably reduced.[91] Discovery may also give the accused a supervisory role over his counsel. If, as has been suggested, some defence counsel may sacrifice a particular client in the interests of retaining a good overall negotiating position, then discovery should reduce this. If, after discovery, the accused was told by his counsel that the case against him was weak, he would be less likely to negotiate. Furthermore, discovery may also operate to prevent the prosecution from nullifying the effects of judicial control of improper police practices. The prosecutor may know, after looking at the file and talking to the police, that the confession is inadmissible and the accused may have told his counsel that improper pressures were used against him. However, if defence counsel has access to the files and to the police officers to verify the accused's story, he may be less sceptical of its truth and thus be less willing to join in pressuring the accused to plead guilty.

Compulsory discovery may, then, reduce some of the dangers attendant upon plea-bargaining. We now turn to another important reason for requiring it. Where discovery is not compulsory, the prosecutor has a discretion whether to grant it or not and the exercise of this discretionary power (which is only one of many such powers)[92] has led, in practice, to some very undesirable consequences. These have been catalogued by Professor Grosman in his study of prosecutors in Toronto and his conclusions are confirmed by similar studies in the United States. We have already noted the danger of defence counsel being co-opted by those in charge of the administration of criminal justice. This danger is considerably enhanced by making disclosure a discretionary matter. The price of what one prosecutor has called the "favour"[93] is co-operation:[94]

> A defence lawyer . . . who is "trusted", who is "safe", will obtain full disclosure. . . . Defence counsel who consistently take an adversarial position or regularly enter not guilty pleas on behalf of their clients will not share in the benefits of pre-trial disclosure.[95]

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[91] See Alschuler, *op. cit.*, footnote 56, at p. 66.

[92] See generally Silkenat, Limitations on Prosecutor's Discretionary Power to Initiate Criminal Suits: Movement Toward a New Era (1971), 5 Ottawa L. Rev. 104 and Abrams, *op. cit.*, footnote 90 and the literature there cited.

[93] Grosman, *op. cit.*, footnote 40, p. 76.

[94] See generally *ibid.*, pp. 68, 74-82, 91, 101-102; Battle, *op. cit.*, footnote 66, at pp. 68-80, 118; Brennan, *op. cit.*, footnote 39, at p. 282; Discovery in Criminal Cases (1967), 44 F.R.D. 481, at pp. 508, 524-525; Traynor, *op. cit.*, footnote 39, at pp. 237-238; Alschuler, *op. cit.*, footnote 56, at pp. 68-69, 79-80; Discovery in Federal Criminal Cases, *op. cit.*, footnote 2, at pp. 58-59, 85, 116.

[95] Grosman, *op. cit.*, footnote 40, pp. 76-77.

Even more incredible is the fact that discovery may be denied in the future if information gained is actually used:

> I have had a lawyer that I showed a dope sheet to,[96] use the information in the dope sheet in cross-examination, and he cross-examined the Crown witness on the dope sheet by saying, "You are saying this now and you didn't say it before." Now that lawyer will never see any Crown evidence again.[97]

An unrepresented accused or an accused who is represented by unco-operative counsel or by counsel whom the prosecutor does not know or trust or whose case is being handled by a non-disclosure prosecutor,[98] may thus suffer for reasons often entirely out of his control. Finally, to the extent that the discretionary power to grant discovery is only exercised where there is likely to be a plea of guilty,[99] it means that those accused who will plead not guilty and therefore most need discovery will be denied it.

V. *The Duties of a Crown Prosecutor.*

There appears to be no doubt that, in Canada, the primary duty of a prosecutor is to see that "justice" is done rather than that a conviction is obtained.[100] In the words of Taschereau J.:[101]

> Il ne doit pas tant chercher à obtenir un verdict de culpabilité qu'à assister le juge et le jury pour que la justice la plus complète soit rendue.

Or in the words of Rand J.: "The role of prosecutor excludes any notion of winning or losing. . . ."[102] This duty has been translated into two specific rules by the Supreme Court of Canada:

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[96] This comma has been added to make the sentence intelligible.

[97] Grosman, *op. cit.*, footnote 40, p. 76. See to a similar effect, Battle, *op. cit.*, footnote 66, at pp. 72-76 (discovery may also be made conditional on mutuality, *ibid.*, at pp. 76-78); Traynor, *op. cit.*, footnote 39, at p. 237.

[98] Grosman, *op. cit.*, *ibid.*, p. 68; Battle, *op. cit.*, *ibid.*, at p. 71.

[99] Grosman, *op. cit.*, *ibid.*, p. 76; Battle, *op. cit.*, *ibid.*, at p. 69; Discovery in Federal Criminal Cases, *op. cit.*, footnote 2, at pp. 85, 116-117; Brennan, *op. cit.*, footnote 39, at p. 282; Traynor, *op. cit.*, footnote 39, at p. 237; Discovery in Criminal Cases, *op. cit.*, footnote 47, p. 6.

[100] See generally Shapray, The Prosecutor as a Minister of Justice: a Critical Appraisal (1969), 15 McGill L.J. 124; M. Orkin, Legal Ethics (1957), pp. 116-120; Brossard, Les Devoirs et Obligations de la Police et de la Couronne (1965), 25 R. du B. 637; Turner, The Role of Crown Counsel in Canadian Prosecutions (1962), 40 Can. Bar Rev. 439; Bowen-Colthurst, Some Observations on the Duties of a Prosecutor (1969), 11 Crim. L.Q. 377. For the position in England, see Humphreys, The Duties and Responsibilities of Prosecuting Counsel, [1955] Crim. L. Rev. 739. For a bibliography of American material, see Appendix B to The Prosecution Function and the Defense Function (1970), A.B.A. Project on Standards for Criminal Justice.

[101] *Boucher* v. *The Queen*, [1955] S.C.R. 16, at p. 21.

[102] *Ibid.*, at p. 24. Of course a prosecutor must also comply with the general ethical duties of any lawyer. He must therefore not engage in deliberate misrepresentation. *Meek* v. *Fleming*, [1961] 2 Q.B. 366, or prosecute a charge which he knows to be unfounded: see the cases cited, *supra*, footnote 79.

(a) The prosecutor has a duty to call the "material witnesses",[103] whether their testimony is unfavourable or favourable to the accused.[104]

(b) "The prosecutor is free to exercise his discretion to determine who are the material witnesses"[105] and courts will not interfere with the exercise of this discretion, unless it can be shown that the prosecutor is holding back "evidence because it would assist [the] accused"[106] or that he was otherwise "influenced by some oblique motive".[107]

According to the Supreme Court of Canada, a prosecutor who has evidence which he knows is favourable to the accused must not "hold it back", or, in the words of the Canons of Legal Ethics, he must "withhold no facts tending to prove either the guilt or innocence of the accused".[108] This can only mean that he must either introduce such evidence as part of his case or must disclose its existence to the defence.[109] As Lord Denning has clearly put it:

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[103] *Lemay* v. *The King*, [1952] S.C.R. 232, at pp. 241, 242, 256 and *Boucher* v. *The Queen*, *supra*, footnote 101, at p. 19. See further Tremeear, *op. cit.*, footnote 35, 1971 Supplement, p. 222. It is not clear what is meant by "material witnesses". In *Seneviratne* v. *The King*, [1936] 3 All E.R. 36, at p. 49, the Privy Council used the expression "witnesses essential to the unfolding of the narrative on which the prosecution is based", but *cf. Lemay*, where this passage is discussed. Cartwright J. has spoken of the duty "to place before the Court evidence of every material circumstances known to the prosecution" and "to bring forward evidence of every material fact known to the prosecution" including all circumstances and facts favourable to the accused: *Lemay*, at pp. 256-257. In *Boucher*, Rand J. said that "the purpose of a criminal prosecution is . . . to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime" and Crown counsel has "a duty to see that all available legal proof of the facts is presented", at pp. 23-24.

[104] *Lemay* v. *The King*, *ibid.*, at pp. 256-257. See also, *infra*, footnote 106.

[105] *Ibid.*, at p. 241.

[106] *Ibid.* See also at pp. 242, 246, 256-257; *Boucher* v. *The Queen*, *supra*, footnote 101, at pp. 23-24.

[107] *Lemay* v. *The King*, *ibid.*, at p. 241.

[108] Canon 1(2). The American Bar Assoc. canon is even stronger: see Orkin, *op. cit.*, footnote 100, p. 118. The use of civil actions, disciplinary proceedings and criminal sanctions against prosecutors is discussed in Auler, Actions against Prosecutors who Suppress or Falsify Evidence (1969), 47 Texas L. Rev. 642; and see also Singer, *op. cit.*, footnote 44, at pp. 275-278.

[109] The United States Supreme Court has held that a defendant's constitutional right to due process is infringed when the prosecution knowingly uses false evidence or allows it to go uncorrected or when the prosecution suppresses a piece of evidence which is favourable to the accused and which the accused has requested: see *Giles* v. *Maryland* (1966), 386 U.S. 66 and *Moore* v. *Illinois* (1972), 92 S. Ct. 2562 and the cases there cited. In *Giles* v. *Maryland*, Fortas J., in a separate concurring judgment, went further and said that the State is obliged to bring to the attention of the court and of the defence any evidence which may exonerate the defendant or be of material importance to him (at pp. 99-102). However, Harlan J. (with whom Black, Clark and Stewart JJ. concurred), expressly repudiated this approach, pointing out that Fortas J. would thereby impose upon the

> The duty of a [prosecutor] . . . is this: if he knows of a credible witness who can speak to material facts which tend to show the prisoner to be innocent, he must either call that witness himself or make his statement[110] available to the defence. It would be highly reprehensible to conceal from the court the evidence which such a witness can give. If [he] . . . knows, not of a credible witness, but a witness whom he does not accept as credible, he should tell the defence about him so that they can call him if they wish.[111]

The ethical obligations of a prosecutor as interpreted by the Supreme Court of Canada, require him, as a minimum, to disclose evidence favourable to the accused at some stage prior to the verdict. This cannot be done unless the police disclose this evidence to the prosecutor and, according to Lord Devlin,[112] there is a duty upon them to do so. Indeed, it is strongly arguable that police or prosecutors who suppress evidence favourable to the accused are guilty of obstructing justice.[113] Do these ethical obligations also require him to do more? If the primary task of the prosecutor is to see that "justice" is done, should he not disclose this evidence before the trial and should he not also allow the defence access to unfavourable evidence so that there is an opportunity to make any necessary investigations? Surely surprise does not *always* result in "justice" being done? Surely "justice" also requires that the accused have access to what appears to the prosecution to be neutral evidence? If discovery is denied, are we not merely paying "lip service to grandiose concepts"[114] and preventing "them from having any practical effect by procedural rules which deny counsel access to the facts which he must know in order to make them effective"?[115]

Almost no attention appears to have been paid in the literature or in the cases to the ethical obligations of a prosecutor when plea-bargaining. It would no doubt be unethical for him to use the threat of a charge to force a plea of guilty from a person whom he thought to be *de facto* innocent[116] and one wonders how ethical it is to plea-bargain when he has not even looked at the files.[117] But is it unethical for a prosecutor to bluff an accused,

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States a constitutional requirement of broad discovery. See further Note (1960), 60 Col. L. Rev. 858; Moore, *op. cit.*, footnote 39, at pp. 893-899; Norton, Discovery in the Criminal Process (1970), 61 J. of Crim. L., Criminology and Police Sc., at pp. 19-26.

[110] But *cf. R.* v. *Bryant and Dickson* (1946), 31 Cr. App. R. 146.

[111] *Dallison* v. *Caffery*, [1965] 1 Q.B. 348, at p. 369 (footnote added); Danckwerts L.J. agreed with Lord Denning and the same point was made by Diplock L. J., at pp. 375-376. See also P. Devlin, The Criminal Prosecution in England (1958), p. 73.

[112] Devlin, *op. cit., ibid.*, pp. 71-76.

[113] S. 127 of the Code. See also Auler, *op. cit.*, footnote 108, at p. 647.

[114] *Supra*, footnote 2.

[115] *Ibid.*

[116] *Supra*, footnote 79.

[117] *Supra*, footnote 81. See also Alschuler, *op. cit.*, footnote 56, at p. 64.

whom he believes to have committed the offence charged, into pleading guilty when he knows that a conviction would be unlikely or impossible because for example, the main witness has died or because of the absence of corroboration. The practical considerations involved in allowing this kind of bluff have already been considered[118] and there seems little doubt that it is done,[119] but what of the ethical issues?

Deliberate misrepresentation would clearly be unethical.[120] If defence counsel were to ask whether the prosecutor could prove the case at trial or whether a witness was available to testify and the prosecutor were to lie, this would clearly be unprofessional conduct. A court might well set aside a plea of guilty induced by the lie, exercising a power analogous to that of a civil court to set aside a judgment obtained by fraud. Indeed, it could be argued that the prosecutor would have committed the tort of deceit. Although these sanctions would be of curative value, their imposition depends upon finding out about and proving the lie. Discovery, therefore, could be of value in preventing this kind of misrepresentation.

Given that bluff accompanied by deliberate misrepresentation is unethical, is simple bluff in circumstances where a conviction is impossible or unlikely also unethical? It is doubtful that the duties of "candour and fairness" to the court and of "courtesy and good faith"[121] to his fellow lawyer, would require a prosecutor who does not think the accused to be *de facto* innocent, to admit that the case could not be proved beyond a reasonable doubt. In this respect there would be no reason to put the prosecutor in a different position from defence counsel, who is under no duty to admit the weakness of his case.[122] But what of a prosecutor's duty to "see that justice is done" and to "withhold no facts tending to prove either the guilt or the innocence of the accused"?[123] If it is unlikely that the accused would be convicted at trial because, unknown to defence counsel, only one of the three persons who saw the incident can identify the accused, it would seem to be unethical of the prosecutor to engage in plea-bargaining with-

[118] *Supra,* text accompanying footnote 81 *et seq.*

[119] *Supra,* footnote 80.

[120] Canon 4(1) of the Canadian Bar Assoc. Canons of Legal Ethics requires that a lawyer's conduct "towards his fellow lawyer should be characterized by courtesy and good faith". See also *Meek* v. *Fleming, supra,* footnote 102. *Rondel* v. *Worsley,* [1969] A.C. 191, at pp. 227, 247. Examples of deliberate misrepresentation are mentioned by Alschuler, *op. cit.,* footnote 56, at pp. 66-67.

[121] Canon 4 of the Canadian Bar Assoc. Canons of Legal Ethics.

[122] In civil litigation there is no duty on counsel to admit the weakness of the claim, provided that, in the case of the plaintiff's counsel, he does not think it to be frivolous: see *Myers* v. *Elman,* [1940] A.C. 282 and the cases cited *supra,* footnote 79.

[123] Canon 1 (2) of the Canadian Bar Assoc. Canons of Legal Ethics.

out disclosing this. The fact that only one person could identify the accused may be a "fact tending to prove the innocence of the accused" and should not be withheld, whether or not there is other convincing evidence of his guilt. Neither the jurisprudence nor the Canons of Ethics suggest that these duties are relevant only when there is a plea of not guilty. Furthermore, any personal conviction on the part of the prosecutor that the accused is guilty should be irrelevant in the light of the well-known unreliability of identification evidence.[124] In order to "see that justice is done", the prosecutor must disclose the weakness of the case.

Similar considerations would seem to require on ethical grounds the disclosure of the absence of corroboration or of the fact that the prosecutor knows that the confession could not be proved to be voluntary. On the other hand, ethical obligations would not seem to require the prosecutor to reveal that the vital Crown witness, without whose testimony a conviction is unlikely or impossible, is unavailable for the trial.[125] This can hardly be said to be a "fact" within the meaning of the Canon 1(2). Nor would a prosecutor who is satisfied of the accused's guilt, seem to be in breach of his duty to "see that justice is done" by not objecting when the accused pleads guilty in ignorance of the unavailability of the witness.

In conclusion, the ethical obligations of a prosecutor require, as a minimum, that he disclose prior to the verdict any evidence which is favourable to the accused. It is strongly arguable that they also require the disclosure prior to trial of favourable evidence, as well as neutral or even unfavourable evidence.

VI. *The Subject Matter of Discovery.*

In this section a brief look will be taken at the kinds of information and material to which the defence would like to have access and to which, if our earlier conclusions have been accepted, it should have access. A comprehensive list would include at least the following:[126]

(a) any evidence favourable to the accused;

(b) the names and addresses of witnesses who will be called by the Crown if there is a trial and of other witnesses who have evidence relevant to the accused's guilt or innocence, and any statements made by them;

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[124] *Supra,* footnote 21. See also White, *op. cit.,* footnote 59, at pp. 458-460.

[125] See also White, *op. cit., ibid.,* at p. 459.

[126] See generally Discovery and Procedure before Trial, *op. cit.,* footnote 1, p. 52 *et seq.;* Miller, The Omnibus Hearing—an Experiment in Federal Criminal Discovery (1958), 5 San Diego L. Rev. 293, at p. 304; Moore, *op. cit.,* footnote 39, at pp. 881-892.

(c) any statement made by the accused or an accomplice;
(d) any evidence given at the preliminary inquiry;
(e) the testimony before the grand jury of any witnesses who will be called by the Crown if there is a trial;
(f) any reports by experts and the results of any tests;
(g) any documents, objects, and so on, which were seized from the accused or which will be used if there is a trial;
(h) the criminal record of any witness who will be called by the Crown if there is a trial.

Unavailable for discovery would be such things as memoranda, reports and other notes prepared by the prosecutor or his staff for the trial.[127] Discovery might also be refused or limited in matters of national security, where witness tampering is likely to occur or where an informant is involved.[128]

VII. *Arguments Against Discovery.*

The arguments against discovery have been set out and discussed at length elsewhere[129] and it is only necessary here to make a brief examination of three of them. It is said, firstly, that granting increased discovery will tip the scales too much in favour of the accused.[130] He already has "every advantage" and there is no reason to improve his position further, unless, at least, the position of the prosecution is improved. This argument depends for its validity upon the assumption that the accused does have "every advantage" in a criminal trial. In the area of discovery, if nowhere else,[131] this assumption seems highly questionable.[132] The investigatory resources of a prosecutor give him access to a great deal of information: for instance, statements made by the accused and by other people to the police or to anyone who is prepared to co-operate with the police, anything that can be obtained from the accused or from other people by consent or search[133] (whether lawful or unlawful), the criminal records of the accused and of his witnesses and, in the case of a person charged with an indictable

[127] These constitute what is called in the United States, the work product. See Discovery and Procedure before Trial, *ibid.*, pp. 88-93; Ellis, Basic Survey of Work Product in Federal and State Jurisdictions in Civil and Criminal Proceedings (1968), 35 Tenn. L. Rev. 474, at pp. 491-494; Moore, *op. cit., ibid.*, at p. 888.

[128] Discovery and Procedure before Trial, *ibid.*

[129] See *e.g.* Moore, *op. cit.*, footnote 39, at pp. 871-881; Louisell, *ibid.*, at pp. 87-101; Brennan, *ibid.*, at pp. 289-293.

[130] See *R.* v. *Lalonde* (1971), 15 C.R.N.S. 1, at p. 13, quoting Learned Hand J.

[131] See generally, Goldstein, *op. cit.*, footnote 47.

[132] Discovery by the Crown is discussed by S. I. Bushnell, Pre-Trial Discovery of Facts (1970), an L.L.M. Thesis on deposit in York University Library, pp. 119-130.

[133] Note the wide terms of s. 443 of the Code.

offence, his fingerprints.[134] While it is true that a person cannot be forced to take part in an identification parade or to submit himself to tests of blood and so on,[135] he will usually co-operate and in any event, the results of tests done against his will are still admissible.[136] Although his answers may be inadmissible at any subsequent trial,[137] a person charged with an offence is a compellable witness before an administrative tribunal.[138] Exceptionally, in the case of a coroner's court, a person charged with homicide cannot be compelled to testify,[139] although a person about to be so charged is compellable.[140] If a person is required by statute to make a statement to the police or other agency, that statement may be admissible at any subsequent trial.[141] A person charged with an offence may be forced to testify at the separate trial of his accomplice or co-conspirator[142] and a director may be forced to testify at the trial of his corporation.[143] Less direct pressures may also force an accused to disclose his case prior to trial. If he does not disclose an alibi prior to trial, his failure to do so may be made the subject of comment.[144] Where an accused gives an explanation for his conduct for the first time at trial, the jury are entitled to take that into account in determining what weight to give to it.[145] Disclosure at trial can be "forced" by the use of presumptions and reverse onus clauses, by the rule making exculpatory statements inadmissible (otherwise than at the option of the Crown) unless the accused testifies,[146] by downplaying the role of the judge

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[134] Identification of Criminals Act, R.S.C., 1970, c.I-1.

[135] See Galligan, Advising an Arrested Client in Arrest and Interrogation, Law Society of Upper Canada Special Lectures (1963), pp. 37-41. *Cf.* the position in the U.S.A.: Discovery and Procedure before Trial, *op. cit.*, footnote 1, pp. 94-97. An accused can in certain circumstances, be required to provide a sample of breath: see s. 235 of the Code.

[136] *A.G. for Quebec* v. *Begin*, [1955] S.C.R. 593.

[137] Canada Evidence Act, *supra*, footnote 15, s. 5.

[138] *R.* v. *Quebec Municipal Commission, ex parte Longpré*, [1970] 4 C.C.C. 133; leave to appeal to the Supreme Court of Canada refused, [1970] S.C.R. xi.

[139] *Batary* v. *A.G. for Sask.*, [1965] S.C.R. 465.

[140] See *Whitelaw* v. *McDonald*, [1969] 3 C.C.C. 4; leave to appeal to the Supreme Court of Canada refused, [1969] S.C.R. xii.

[141] *Marshall* v. *The Queen*, [1961] S.C.R. 123 and the cases cited in Tremeear, *op. cit.*, footnote 35, p. 769 and the 1971 Supplement thereto.

[142] *Re Regan* (1939), 71 C.C.C. 221.

[143] *Re Corning Glass*, [1971] 2 O.R. 3; leave to appeal to the Supreme Court of Canada refused, [1971] S.C.R. viii.

[144] *Russell* v. *The King* (1936), 67 C.C.C. 28 (S.C.C.); *R.* v. *Howarth* (1970), 1 C.C.C. (2d) 546.

[145] *R.* v. *Itwaru*, [1970] 4 C.C.C. 207; *R.* v. *Hogg* (1958), 122 C.C.C. 136; *R.* v. *Davis* (1959), 123 C.C.C. 242. *Cf. Hall* v. *The Queen*, [1971] 1 W.L.R. 298 (P.C.); *R.* v. *Eden*, [1970] 3 C.C.C. 280, noted by Sheppard in (1970-71), 13 Crim. L.Q. 399; Tremeear, *op. cit.*, footnote 35, pp. 744-745.

[146] See *R.* v. *Graham* (1972), 7 C.C.C. (2d) 93 (S.C.C.) and *R.* v. *Pappin* (1970), 12 C.R.N.S. 287 and annotation thereto. It is not clear from these cases whether the statement is always admissible upon examina-

at the stage of a motion for a directed verdict,[147] by allowing the Crown considerable freedom when it wishes to reopen its case,[148] by allowing comment on the accused's silence at trial[149] and by taking it into account on appeal.[150] Pre-trial disclosure of the likely testimony of those defence witnesses whose names are known to the prosecutor may be obtained through police interrogations and, theoretically at least, at the preliminary hearing or during the proceedings before the grand jury.[151] In the light of this, it can hardly be said that the accused has "every advantage". But even if the reforms suggested here would tip the "scales" (further) in favour of the accused, that should not necessarily condemn them. We could of course decide that it is desirable for the "scales" to be weighted in his favour. But, in any event, the "balance of advantage" argument conceals the real issue. The aim of the process is not to make sure that the advantages are even but to acquit the *de facto* innocent and to convict the *de facto* guilty. If it is thought that defence discovery will not help reduce the chances of convicting the *de facto* innocent, any other advantages of discovery will be outweighed by its disadvantages. If, on the other hand, it will help the *de facto* innocent, it is a question, not of balancing the strengths of the prosecutor and of the defence, but of balancing the risks of convicting the *de facto* innocent against the dangers of acquitting the *de facto* guilty. If it is wished to obtain the conviction of more *de facto* guilty, it may be that increased prosecutorial discovery would be a useful device to achieve this.[152] But there is no reason why granting the *de facto* innocent the protection of discovery should be made to depend upon and wait for legislative moves to increase the rate of conviction of the *de facto* guilty.

tion-in-chief of the accused or only if it is suggested by the Crown that the story is a recent concoction. See also R. Cross, Evidence (1967, 3rd ed.), pp. 193-195, 201-202.

[147] What is the proper test to be applied is not completely clear. In *Feeley* v. *The Queen,* [1953] S.C.R. 59, at pp. 60-61, the court said that the charge must be dismissed at that stage only if "there was no evidence on which . . . a properly instructed jury, acting reasonably, might have convicted the accused". There is, however, a tendency to talk in terms of "no evidence" and to forget the last part of the sentence: see *e.g., R.* v. *Heywood and Nash* (1971), 6 C.C.C. 141 and *R.* v. *Normandin* (1971), 14 C.R.N.S. 262. *Cf. R.* v. *Haughey,* [1972] 1 W.W.R. 60.

[148] See Tremeear, *op. cit.,* footnote 35, pp. 970-971 and the 1971 Supplement thereto.

[149] See *R.* v. *Avon,* [1971] S.C.R. 650; *R.* v. *Bouchard,* [1970] 5 C.C.C. 95.

[150] Tremeear, *op. cit.,* footnote 35, p. 1121.

[151] See Traynor, *op. cit.,* footnote 39, p. 231.

[152] There is some prosecutorial discovery in England (see s. 11 of the Criminal Justice Act, 1967, requiring the accused to give notive of an alibi before trial on indictment) and much more in the U.S.A. See *e.g.* Moore, *op. cit.,* footnote 39, at pp. 899-917; Miller, *op. cit.,* footnote 126, at pp. 317-322; Note (1963), 76 Harv. L. Rev. 838 and Note (1972), 85 Harv. L. Rev. 994.

The second argument against discovery is that it eliminates surprise. The value of surprise is two-fold. The fact that the accused has been shown to be lying may indicate that he is guilty. If he states in evidence that he was in X and it can be shown that he was not, the rest of his evidence can be viewed with scepticism.[153] Therefore, if he knows in advance that the prosecutor can prove that he was not in X, he will not testify that he was. Secondly, and this is the other side of the coin, if he knows that the prosecution has, at the present time, no evidence that he was not in X, he and other defence witnesses will perjure themselves by saying that he was in X. Although this undoubtedly does happen, perjury is not as safe for the accused as it may seem. If the case is sufficiently important, the prosecutor may well decide to have the matter investigated and, if the story is shown to be false, either introduce rebuttal evidence if there is time or, in the event of an acquittal, prosecute for perjury.[154] Furthermore, since the accused has given the story for the first time at the trial, this could be taken into account in determining the credibility of his testimony.[155] However, it must be admitted that giving the accused full discovery may well result in more *de facto* guilty being acquitted. One solution would be to allow the prosecutor to satisfy a judge that, in the particular case, discovery should not be ordered in respect of a particular piece of evidence. This could be coupled with an automatic right to an adjournment at trial when the surprise evidence is presented. Another solution would be to allow discovery of only that part of the prosecutor's case which will be presented in chief and not that part which might be presented in rebuttal. Even if these solutions were accepted, a number of *de facto* guilty might still be acquitted when, in the absence of discovery, they would have been convicted. The hazards of surprise for the *de facto* innocent have already been noted[156] and it is, once again therefore, a question of balancing out the risks of convicting the *de facto* innocent against the dangers of acquitting the *de facto* guilty. If discovery can prevent the conviction of the *de facto* innocent, should it not be available notwithstanding the dangers?

The third argument against discovery is that it may lead to tampering with witnesses and informants. Although this is a real danger in some cases, these are likely to be few and far between. If this is so, special measures can be taken. If the defence lawyer is trusted, disclosure to him could be on condition of non-communication to his client. This would require a prosecutor or judge to distinguish between trustworthy and untrustworthy defence lawyers. This may be good for the profession provided that

[153] *Supra,* footnote 28.
[154] See Friedland, *op. cit.,* footnote 70, pp. 157-160.
[155] *Supra,* footnote 145.
[156] *Supra,* text accompanying footnotes 47-51.

the accused knows why discovery was refused and therefore has the opportunity to change his lawyer. However, it would be very difficult to protect the defence lawyer's right to a fair hearing on an issue that would be so important for his career. Another way to prevent witness tampering is to give the prosecutor the right to apply for a "protective order" to the effect that:

> . . . specified disclosures be restricted or deferred . . . provided that all material and information to which a party is entitled must be disclosed to permit his counsel to make beneficial use thereof.[157]

Similarly the prosecution should be entitled not to disclose an informant's identity if a judge is satisfied that the accused would not be prejudiced thereby.[158]

VIII. *Discovery in Canada.*

Before discussing the position in Canada, a brief look will be taken at the position in England. Although English courts were traditionally hostile to discovery,[159] they have changed their approach in this century.[160] The prosecution has a duty to disclose the existence of any evidence favourable to the accused,[161] such as the fact that a Crown witness has a known bad character[162] or has earlier given a statement which conflicts with his testimony[163] or the fact that there is a person who can give material evidence but whom it is not intended to call.[164] In *Dallison* v. *Caffery*,[165] it was said that a prosecutor who knows of a witness who can speak to material facts which tend to show the accused to be innocent, must make his statement available to the defence if he does not call the witness himself.[166] However, in an earlier case,

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[157] Discovery and Procedure before Trial, *op. cit.*, footnote 1, s. 4.4.

[158] *Ibid.*, s. 2.6.

[159] See Fletcher, *op. cit.*, footnote 39, at pp. 294-295; Brennan, *op. cit.*, footnote 39, at p. 284; Norton, *op. cit.*, footnote 109, at pp. 11-13.

[160] Suggestions for further reform have been made by the Law Society (see [1966] Crim. L. Rev. 602) and by Justice (Availability of Prosecution Evidence for the Defence, undated report).

[161] See *Dallison* v. *Caffery*, *supra*, footnote 111; the cases cited in Archbold, Criminal Pleading, Evidence and Practice (36th ed., 1966), para. 1374; *R.* v. *Guertin* (1931), 23 Cr. App. R. 39.

[162] *R.* v. *Collister and Warhurst* (1955), 39 Cr. App. R. 100; Humphreys, *op. cit.*, footnote 100, at p. 742; Devlin, *op. cit.*, footnote 111, p. 74.

[163] *R.* v. *Howes* (C.C.A., unreported, March 27th, 1950); *Baksh* v. *R.*, [1958] A.C. 167.

[164] *R.* v. *Bryant and Dickson*, *supra*, footnote 110. See also *R.* v. *Casey* (1947), 32 Cr. App. R. 91 (duty to disclose expert evidence relating to accused's sanity); *R.* v. *Keirstead* (1918), 30 C.C.C. 175, at p. 184, and Devlin, *op. cit.*, footnote 111, p. 74 (duty to make available results of any forensic tests).

[165] *Supra*, footnote 111.

[166] See also *R.* v. *Casey*, *supra*, footnote 164; *R.* v. *Clarke* (1930), 22 Cr. App. R. 58 and the other cases cited in Archbold, *op. cit.*, footnote 161, para. 1374; Humphreys, *op. cit.*, footnote 100, at p. 742.

it was held that it was only necessary to reveal the witness' name.[167] Whether in all circumstances there is a duty to disclose prior statements of prosecution witnesses is not clear.[168] It has been said that the practice of the police in England is not to hand over such statements.[169] However, the Privy Council, in *Mahadeo* v. *The King*,[170] held that statements made by a Crown witness, who was also an accomplice after the fact, should have been produced at the outset of the trial and in *R.* v. *Clarke*,[171] the Court of Criminal Appeal criticized the refusal to produce a written description of the accused which had been made by a police officer in a report to his superior. And there are also a number of other reported cases where disclosure has been ordered.[172] The most effective method of obtaining discovery in England is through the preliminary inquiry. The prosecution is obliged to present, not only all the witnesses whom it is intended to call at trial, but also the evidence that those witnesses will be giving.[173] Where additional evidence comes to light after the preliminary inquiry "a notice setting out in the form of a statement by the witness the additional evidence he proposes to call" must be served on the defence prior to the trial.[174]

Turning now to the Canadian position, we have already noted that the prosecution has a general duty not to withhold from the defence evidence favourable to it.[175] It is difficult to know whether both the police and prosecutors comply with this duty. It has been said that they do not always do so,[176] and this

[167] *R.* v. *Bryant and Dickson, supra,* footnote 110. Devlin, *op. cit.,* footnote 111, p. 73 states that "the Crown would if asked give a general indication of the evidence he could give".

[168] Archbold, *op. cit.,* footnote 161, para. 1374; Glanville Williams, *op. cit.,* footnote 3, pp. 99-100.

[169] Glanville Williams, *ibid.*

[170] [1936] 2 All E.R. 813, at p. 816.

[171] *Supra,* footnote 166. See also *R.* v. *Bass,* [1953] 1 Q.B. 80, with which compare *Hinshelwood* v. *Auld,* [1926] S.C. (J) 4.

[172] See Archbold, *op. cit.,* footnote 161, para. 1374. See also Louisell, *op. cit.,* footnote 39, at p. 67, note 42.

[173] Devlin, *op. cit.,* footnote 111, pp. 112-116. Devlin does not state clearly that *all* the witnesses must be called. However, it is my understanding that this is done unless defence counsel is in agreement that it is not necessary. Provision is also made in England for the use of written statements at the preliminary, but only with the consent of both parties: Harris' Criminal Law (21st ed., 1968, by A. Hooper), p. 593.

[174] Devlin, *ibid.,* p. 112. See also Carlisle, Committal Proceedings in English Criminal Law (1968), 10 Crim. L.Q. 147, at p. 156; Archbold, *op. cit.,* footnote 161, para. 1375; *R.* v. *Harris* (1882), cited in Martin, *op. cit.,* footnote 22, p. 4.

[175] *Supra,* footnote 108. See also Inequalities of the Criminal Law (1956), 34 Can. Bar Rev. 245, at pp. 254-259. *Cf.* Galligan, *op cit.,* footnote 135, p. 48, where it is stated that there is no obligation to reveal the names of witnesses who could assist the defence unless the Crown is asked to do so!

[176] See Inequalities of the Criminal Law, *ibid.,* Problems in Litigation (1953), 31 Can. Bar Rev. 503, at p. 510. The apparent absence of cases

seems probably right. In Canada the preliminary inquiry is not as effective a discovery device as it is in England. "Some Crown counsel take the view that the only duty of the Crown at the preliminary hearing is to produce sufficient evidence . . . to warrant committal",[177] and according to one defence counsel, this is "the usual practice".[178] Nor is there any obligation upon the Crown to "elicit, from the witness called, all the evidence that the witness has within his knowledge as to the matter before the court".[179] Unfortunately, the Supreme Court of Canada has now confirmed that the preliminary inquiry is not to be viewed as a device to obtain discovery. In *Patterson* v. *The Queen*, the court, in the majority judgment said:[180]

> The purpose of the preliminary inquiry is clearly defined by the Criminal Code — to determine whether there is sufficient evidence to put the accused on trial.

No attempt was made by the majority to discuss what other purposes there could be, no reference was made to the English practice, notwithstanding the fact that both Canada and England have similar legislative provisions[181] and, incredibly, the majority saw the case as raising only "very narrow issues".[182] The case concerned the refusal of a magistrate at a preliminary inquiry to order the prosecution to produce a written statement which a witness had admitted on her cross-examination to have made to the police. The majority examined section 10(1) of the Canada Evidence Act,[183] decided that it did not apply and, without discussing any other reason why the magistrate should have ordered production, held that he was right in his refusal to do so. It was also held that even if the magistrate had been wrong, there would have been no defect entitling a superior court to quash the committal. Earlier cases had established that the defence is entitled to discover through cross-examination the names and addresses of all witnesses who had attended a line-up[184] and to call a

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in which an appeal has been allowed because of suppression of evidence could indicate general compliance, although it could also indicate that the cases in which there has been suppression have never come to light.

[177] Martin, *op. cit.*, footnote 22, p. 2.

[178] Salhany, Note (1967), 9 Crim. L.Q. 394, at p. 397. See also to a similar effect, Haines, Annotation (1970), 10 C.R.N.S. 69, at p. 73 and Chasse, Annotation (1970), 12 C.R.N.S. 288, at p. 296. See also *R.* v. *Read*, [1969] 4 C.C.C. 88, at p. 98.

[179] Halyk, The Preliminary Inquiry in Canada (1967), 9 Crim. L.Q. 181, at p. 189, citing *R. v. Grigoreshenko and Stupka, supra*, footnote 49. *Cf. R.* v. *Bohozuk* (1947), 87 C.C.C. 125.

[180] [1970] S.C.R. 409, at p. 412. *Cf. R.* v. *Mishko* (1945), 85 C.C.C. 410, at p. 415 and *R.* v. *McGavin Bakeries* (1950), 99 C.C.C. 330, at p. 337.

[181] Compare s. 475 (1)(a) and Harris, *op. cit.*, footnote 173, p. 596.

[182] *Patterson, supra*, footnote 180, at p. 411.

[183] *Supra*, footnote 15. The section will be examined below.

[184] *R.* v. *Churchman and Durham* (1954), 110 C.C.C. 382.

Crown witness whom the prosecutor had not called at the preliminary hearing but whom he proposed to call at trial.[185] However, after *Patterson,* a magistrate's refusal to follow these cases might be justified and, in any event, would seem to be unreviewable.[185a] There are other limitations on the use of the preliminary inquiry for discovery purposes. It can only be used for indictable offences not within the absolute jurisdiction of a magistrate[186] and it may involve the accused in extra expense, unwanted delay and a higher sentence than he would have received from a magistrate. In fact only about seven per cent of persons charged with indictable offences have a preliminary hearing, with the percentage increasing to sixteen per cent if offences within the absolute jurisdiction of a magistrate are excluded.[187] However, notwithstanding all these limitations, the preliminary hearing remains "perhaps the most valuable procedure available to the defence counsel to obtain a complete disclosure of the Crown's case".[188]

Section 531 of the Code entitles the accused "after he has been committed for trial or at his trial" to inspect without charge "his own statement, the evidence and the exhibits" and to receive, on payment of a fee, "a copy of the evidence" and "of his own statement". The expression "evidence" replaces the word "depositions" in the pre-1955 Code.[189] Having regard to this and to other sections,[190] it would seem, and it has been so held,[191] that it was not intended to change the meaning. Looking at the history of the section, it also seems clear that the expression "statement" was not meant to include any confession made to the police but only a statement made at the preliminary inquiry.[191a] Such a "statement" would not have been a "deposition" and thus a separate word was needed. In the light of this and of the wording of section

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[185] *R.* v. *Mishko, supra,* footnote 180.

[185a] *Cf. Re Regina and Roulette* (1972), 7 C.C.C. (2d) 244.

[186] S. 483 of the Code.

[187] These figures have been worked out from Tables 18 and 19 of Statistics of Criminal and Other Offences (1968), D.B.S.

[188] Martin, Preparation for Trial in Law Society of Upper Canada Special Lectures (1969), p. 221, at p. 234. A preliminary hearing is also useful if the defence is not certain that the prosecution can prove its case but is willing to plead guilty if it can. Although the point is not settled, it has been held that an accused may re-elect trial by magistrate at any time before the committal (see *R.* v. *Cooper* (1968), 2 C.C.C. 104) and, pursuant to sections 491 and 492 of the Code, he may re-elect with the consent of the Attorney General any time before trial. An accused can, thus, delay his plea of guilty until the prosecution have produced the material witnesses at the preliminary.

[189] See Tremeear, *op. cit.,* footnote 35, p. 904. The same change was made in section 478 of the Code.

[190] Ss 478 and 532.

[191] *R.* v. *Lantos,* [1964] 2 C.C.C. 52, *Contra:* Shapray, *op. cit.,* footnote 100, at p. 138.

[191a] *Cf.* Galligan, *op. cit.,* footnote 135, p. 51; Martin, *op. cit.,* footnote 22, p. 7.

478, it is unlikely that the word "statement" would now be extended to include "confessions". Given that this narrow interpretation of section 531 is correct, is it right to go further and conclude, as some courts have done,[192] that the section is exhaustive of the accused's rights? In favour of this conclusion is section 533 of the Code which extends discovery in the case of treason to include a list of the names and addresses of the witnesses. However, if an accused's rights are only to be found in section 532, the result is particularly harsh. By 1892, the year that the Code came into force, the English preliminary hearing had developed into a full discovery device: the prosecution was required to present all the evidence which it was intended to produce at trial and which was then available.[193] Thus, by not insisting that the Canadian prosecutor do the same and by holding that section 531 excludes other forms of discovery, Canadian courts have put the accused into a far worse position than his English counterpart. It is, of course, unnecessary to read section 531 as excluding other forms of discovery and, indeed, many courts have ignored it. An imaginative judge could always use section 7 (2) of the Code[194] or even the Bill of Rights[195] to avoid this conclusion. Surely, for example, no Canadian court would hold that a prosecutor is not obliged to disclose evidence favourable to the accused on the grounds that section 531 says nothing about this?

If, at the preliminary inquiry, the prosecution has not called a witness whom the Crown now wishes to call at the trial, is there any obligation to inform the defence? We have already seen that he is so obliged in England and, according to the Appeal Division of the New Brunswick Supreme Court:[196]

> If additional witnesses are to be called at the trial, the Crown should ordinarily notify the defence of the further witnesses and the nature of their evidence. There is no law laying down any definite rule in the matter.

In Prince Edward Island it has been held that the evidence of a witness not called at the preliminary inquiry and of whom the defence has had no notice:[197]

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[192] *R.* v. *Finland* (1959), 125 C.C.C. 186, at p. 188; *R.* v. *Weigelt* (1960), 33 C.R. 351, at p. 354.

[193] *Supra,* footnote 174.

[194] The common law is not to be considered as static. See *R.* v. *Carrière* (1955), 113 C.C.C. 11; Côté, The Introduction of English Law into Alberta (1964), 3 Alberta L. Rev. 262, at pp. 271-272 and the decisions of Canadian courts on such subjects as drunkenness, burden of proof and automatism.

[195] See *R.* v. *Musterer* (1967), 61 W.W.R. 63.

[196] *Childs* v. *The Queen* (1958), 122 C.C.C. 130, following two earlier decisions of the same court.

[197] *R.* v. *Gallant* (1943), 83 C.C.C. 48, at p. 49. See also s. 368 of the Crimes Act (N.Z.), 1961.

> . . . is admissible, subject to the observation of the Court on the failure of the prosecution to furnish the accused in advance with the name of the proposed witness, and the substance of his proof; and subject to the right of the accused, if prejudiced by surprise, to request postponement or adjournment of the trial. . . .

In Ontario, it has been held that the Crown has a discretion whether or not to divulge the names of the witnesses but an enforceable duty to "advise the defence of substantially the *evidence* which it proposed to adduce at the trial" including any "additional *evidence*" not presented at the preliminary inquiry.[198] On the other hand, in Alberta it has been held that:[199]

> . . . the name of any additional witness not examined at the preliminary inquiry which the Crown proposes to call in chief ought, as a matter of fairness, at a reasonably early period, at any rate if asked for, to be made known to the accused. But there is no law laying down any definite rule in this matter, which must be left to the presiding judge. . . .

The names of most, if not all, of the witnesses can also be discovered in those provinces which have a grand jury[200] and in others in which the practice is to put the names on the back of the indictment.[201]

Whereas an accused who has a preliminary hearing is able to make at least some discovery of the Crown's case, the same cannot be said of an accused who is tried by a magistrate. It is true that the Appeal Division of the New Brunswick Supreme Court has said that, in these circumstances:[202]

> . . . the Crown should . . . , if requested, ordinarily furnish the defence with the names of witnesses to be called and the nature of their evidence. If such information has not been given and the defence is taken by surprise with the testimony of a Crown witness an adjournment, if requested, should be granted by the magistrate.

However, although this may be the law in New Brunswick, there is no evidence that it is being observed elsewhere.[203]

Most of the cases on discovery deal with the question of disclosure by the Crown of pre-trial statements made by or taken

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[198] *R.* v. *Bohozuk, supra,* footnote 179, at pp. 126-127, underlining added. *Cf.* Problems in Litigation (1953), *op. cit.,* footnote 176, p. 510.

[199] *R.* v. *McClain* (1915), 23 C.C.C. 488, at p. 495. See also *R.* v. *Torrens,* [1963] 1 C.C.C. 383.

[200] Section 524 of the Code requires the names of any witness to be examined by the grand jury to be endorsed on the bill of indictment. This does not apply to non-grand jury provinces: *R.* v. *McClain, ibid.*

[201] Brossard, *op. cit.,* footnote 100, at p. 642. The Crown is not bound to call these witnesses, see Tremeear, *op. cit.,* footnote 35, p. 965 and *R.* v. *Tilford,* [1936] O.R. 35, at p. 36.

[202] *Childs* v. *The Queen, supra,* footnote 196, at p. 131.

[203] Grosman, *op. cit.,* footnote 40, pp. 74-80; Salhany, *op. cit.,* footnote 178, at p. 396; Inequalities of the Criminal Law, *op. cit.,* footnote 175, at p. 250; Bowen-Colthurst, *op. cit.,* footnote 100, at pp. 381-382.

down from Crown witnesses. Attempts to persuade courts to order the production of these statements prior to trial appear to have been uniformly unsuccessful, the decision to disclose being held to be a matter within the unfettered discretion of the prosecutor.[204] Where the statement is favourable to the accused's case or differs materially from the testimony given by the witness at the trial, disclosure at least of the existence of the statement would have to be made pursuant to the general ethical obligations of the prosecutor.[205] Apart from this, is there any further obligation to produce these statements during the trial? In order to answer this question, Canadian courts have turned to section 10(1) of the Canada Evidence Act.[206] This subsection sets out the procedure to be followed when it is desired to cross-examine a witness as to a previous statement made by him. The concluding part of the subsection states:

> . . . the judge, at any time during the trial, may require the production of the writing for his inspection, and thereupon make such use of it for the purposes of the trial as he thinks fit.

The origin of this subsection is section 5 of the Criminal Procedure Act (U.K.), 1865.[207] The history of section 5[208] indicates that it has nothing to do with disclosure and, where English courts have ordered disclosure, it has been without reference to it.[209] Presumably, the purpose of the concluding words of the section were to enable the judge to see that cross-examining counsel was not being unfair to the witness by misrepresenting the contents of the statement. Notwithstanding this, the courts have held that the effect of section 10(1) of the Canada Evidence Act is to give the trial judge a discretion whether to order production of a statement made by a Crown witness.[210] Other courts have adopted the same result without relying on section 10(1).[211] The

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[204] *R.* v. *Bohozuk, supra,* footnote 179; *R.* v. *Finland, supra,* footnote 192; *R.* v. *Silvester and Trapp* (1959), 31 C.R. 190; *R.* v. *Lantos, supra,* footnote 191; *R.* v. *Lalonde, supra,* footnote 130, at p. 7.

[205] See Archbold, *op. cit.,* footnote 161, para. 1374.

[206] *Supra,* footnote 15.

[207] 28 and 29 Vict., c. 18.

[208] See Cross, *op. cit.,* footnote 146, pp. 213-215. Indeed, according to the English authorities, cross-examining counsel must have the document with him before he can make use of the provisions of section 5: Cross, *ibid.,* p. 215, note 1.

[209] See *R.* v. *Clarke, supra,* footnote 166, and the cases cited in Archbold, *op. cit.,* footnote 161, para. 1374.

[210] *Patterson* v. *The Queen, supra,* footnote 180, at p. 412; *R.* v. *Silvester and Trapp, supra,* footnote 204, at p. 193; *R.* v. *McNeil* (1960), 33 C.R. 346, at p. 350; *R.* v. *Torrens, supra,* footnote 199, at p. 386; *R.* v. *Tousignant* (1962), 133 C.C.C. 270, at p. 274; *R.* v. *Lepine* (1962), 38 C.R. 145, at p. 146; *R.* v. *Lalonde, supra,* footnote 130, at p. 13. See also Popple, Annotation (1960), 33 C.R. 356, at p. 359. *Cf. R.* v. *Read, supra,* footnote 178, at p. 105.

[211] *R.* v. *Weigelt, supra,* footnote 192, at p. 354; *R.* v. *Smith,* [1963]

rule seems therefore to be firmly established,[212] although intelligible guidelines for the exercise of the discretion have not been developed. There is one clear exception to the rule. When a witness "refreshes his memory"[213] from a document, he is obliged to produce that document.[214] There is apparently a further exception — it has been held that where the witness does not come within the "refreshing the memory rule", the judge is not entitled to order production, whether pursuant to section 10 or otherwise, of any notes made by that witness.[215] If this is correct, there is a distinction between statements made by or taken down from a Crown witness and notes made by such a witness. The intelligibility of any such distinction is difficult to perceive.[216]

There appears to be no reported case where the defence has used a subpoena *duces tecum* pursuant to Part XIX of the Code to obtain from the investigating officer copies of all statements in his possession. He would appear to be an appropriate person on whom the subpoena could be served[217] and it is unlikely that refusal to produce could be justified on the grounds of privilege[218] or of some provincial statutory immunity[219] except, perhaps, where an informant was involved.[220] Furthermore, he could be required to produce the statements in order to determine whether they would

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1 C.C.C. 68, at p. 91, leave to appeal to the Supreme Court of Can. refused: [1963] 1 O.R. 249; *R.* v. *Lantos, supra,* footnote 191, at p. 54.

[212] However in *R.* v. *Weigelt, ibid.,* at p. 356, Johnson J.A., with Smith J.A. concurring, that such statements should be produced unless prepared for counsel's brief at trial.

[213] There is some conflict as to whether a witness can be required to produce if he refreshed his memory before the trial: Tremeear, *op. cit.,* footnote 35, 1971 Supplement, at p. 214.

[214] *R.* v. *Vallillee* (1954), 107 C.C.C. 405; *Isakson* v. *Jacobson,* [1946] 1 D.L.R. 612; Cross, *op. cit.,* footnote 146, p. 191. See also *R.* v. *Bass, supra,* footnote 171. *Cf. R.* v. *Musterer, supra,* footnote 195 and *R.* v. *Lewis,* [1969] 3 C.C.C. 235 where it was said that it is within the trial judge's discretion.

[215] *R.* v. *Kerenko* (1964), 45 C.R. 291, at p. 292, *contra, R.* v. *Lepine, supra,* footnote 210.

[216] It may also be that a police officer's notes of what a witness said are not producible (unless the officer is using them to refresh his memory), whereas a written statement made by the witness is: see *R.* v. *Finland, supra,* footnote 192 and *R.* v. *Levesque,* [1968] R.L. 255.

[217] *R.* v. *Snider,* [1954] S.C.R. 479. It is not necessary for the recipient of a subpoena *duces tecum* to be sworn, provided that another witness can identify the document: Cross, *op. cit.,* footnote 146, p. 161. Nor does it seem that counsel seeking the documents is obliged to use them.

[218] *R.* v. *Snider, ibid.,* and see also *Bruce* v. *Waldron,* [1963] V.R. 3; *Isakson* v. *Jacobson, supra,* footnote 214; *R.* v. *Lepine, supra* footnote 210. No mention was made of privilege in *R.* v. *Vallillee, supra,* footnote 214.

[219] See *Marshall* v. *The Queen,* [1961] S.C.R. 123 and the cases cited in Tremeear, *op. cit.,* footnote 35, 1971 Supplement, p. 193. *Cf. R.* v. *Smith, supra,* footnote 211, at p. 91.

[220] *R.* v. *Snider, supra,* footnote 217, at p. 483; *R.* v. *Lalonde, supra,* footnote 130, at pp. 11-13, and the cases there cited.

be relevant or admissible at the trial.[221] It is even arguable that defence counsel could obtain a warrant to have the police station searched for statements, on the basis that he has reasonable grounds to believe that they would "afford evidence with respect to the commission of an offence"![222]

A few other methods of obtaining discovery should also be mentioned. Section 533 of the Code provides for the release of exhibits for testing and section 446(5) permits any person who has an interest[223] in anything seized under a search warrant to examine it. No Canadian case appears to have established that the defence can see the results of scientific investigations made by Crown experts, but it has been said that they should be disclosed.[224] It has also been said that the Crown should furnish particulars of the previous convictions of Crown witnesses,[225] but again there is apparently no Canadian decision on point. There is some suggestion that the prosecutor should disclose to the defence any evidence of the accused's insanity which he has in his possession.[226] Finally, the defence has the right to interview Crown witnesses.[227] However, this is a hollow right if the witnesses refuse or are advised not to answer. It has been said that it is "very improper" for Crown counsel so to advise them,[228] but there is apparently no judicial statement to this effect.

Finally, in practice, do Canadian prosecutors grant full discovery rights to the defence? It has been said by W. B. Common, Q.C., that "usually in all criminal cases there is complete disclosure by the prosecution of its case to the defence".[229] However, it must be doubted whether this is true, having regard both to the number of cases in which, as we have seen, discovery was in issue and to the comments of practitioners.[230] According to Professor

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[221] *R.* v. *Snider*, [1953] 2 D.L.R. 9, at p. 16, with which Locke J. agreed in the Supreme Court of Canada: [1954] S.C.R. 479, at p. 495.

[222] S. 443(1) (b) of the Code. *Sed quaere* whether he would then have sufficient interest to examine the seized documents: see the very restrictive interpretation of section 446(5) in *Stewart* v. *The Queen* (1969), 70 W.W.R. 146.

[223] But see *supra*, footnote 222.

[224] Inequalities of the Criminal Law, *op. cit.*, footnote 175, at pp. 247-249.

[225] *Ibid.*, at pp. 259-260.

[226] *R.* v. *Keirstead* (1918), 30 C.C.C. 175, at p. 184.

[227] See *R.* v. *Gibbons* (1946), 86 C.C.C. 20, at p. 28; *R.* v. *Finland*, *supra*, footnote 192, at p. 187; Problems in Litigation, *op. cit.*, footnote 176, at pp. 512-514. It is advisable for defence counsel to have an independent person present to avoid charges of witness tampering: Inequalities of the Criminal Law, *op. cit.*, footnote 175, at pp. 252-253; Galligan, *op. cit.*, footnote 135, p. 52; Martin, *op. cit.*, footnote 188, p. 228.

[228] Inequalities of the Criminal Law, *ibid.*, at p. 252.

[229] Quoted in Martin, *op .cit.*, footnote 22, p. 3.

[230] See Inequalities of the Criminal Law, *op. cit.*, footnote 175, pp. 247-250; Problems in Litigation, *op. cit.*, footnote 176, pp. 509-512; Salhany,

Grosman: "The interview data do not support Mr. Common's description of prosecuting practice."[231]

IX. *Conclusion.*

It has been submitted that the aim of the criminal process is the acquittal of the *de facto* innocent and the conviction of the *de facto* guilty and that the acquittal of all *de facto* innocent is more important than the conviction of all *de facto* guilty. In order to ensure the acquittal of all *de facto* innocent and in order to have a procedure which appears to society and to the accused to be fair, the adversary system, albeit a modified version, is used both at the trial and pre-trial negotiation stage. The system is modified in that the prosecutor has a duty, not merely to obtain a conviction, but see that justice is done, a modification that is felt to be necessary in order that no *de facto* innocent be convicted. It has further been submitted that granting the defence discovery of the prosecution's case is indispensable to ensure the acquittal of the *de facto* innocent, to make the adversary system function effectively at both the trial and pre-trial stage and to make meaningful and enforceable the prosecutor's duty to see that justice is done. Unlike in Canada, the courts and the profession in England have done much to give the defence effective pre-trial discovery. In the United States, both at the federal level and in many states including New York and California, there is now a considerable amount of pre-trial discovery as a result of recent changes made to the law by courts and legislative bodies.[232] Canadian courts, on the other hand, have taken a haphazard approach, sometimes deciding in favour of an absolute right to discovery but usually deciding against, and, in either event, making little or no reference to the premises upon which the whole system is based. If discovery can succeed in England and in the United States, where crime rates are higher and where courts are more overloaded than in Canada, then there is no reason why it cannot succeed here. Reform is long overdue.

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op. cit., footnote 179, pp. 396-397; Bowen-Colhurst, *op. cit.*, footnote 100, p. 382. *Cf. ibid.*, at pp. 381-382 and Galligan, *op. cit.*, footnote 135, pp. 47-51.

[231] *Op. cit.*, footnote 40, p. 75.

[232] See the material referred to in footnote 1, *supra*, and Note (1971), 38 Brooklyn L. Rev. 164.