WORKING PAPER 4

CRIMINAL PROCEDURE: DISCOVERY

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I welcome the publication of Working Paper 4 because I believe it will permit us to examine our existing criminal justice system practices on the subject of disclosure of evidence before plea and trial in a more realistic way than ever before. Many of the accepted procedures of our criminal law are critically examined in the Working Paper. I commend the authors of the Working Paper for their determination and forthright expression of opinion but alas, not for the wisdom and practicability of the final proposals.

This comment must needs fail to deal in detail with many aspects of the Working Paper and I hope that it will not be assumed that this failure to comment represents either agreement or disagreement with the views expressed therein.

I would commend to the authors of the Working Paper the following passage from the Federal Law Reform Commission publication which states: "Thus a specific effort must be made not only to improve the law in its substance, but to reduce legal *complexity and technicality.*" [1] Undoubtedly, the motives of the authors of the Paper are not in question. However, one must reflect upon whether the solutions proposed will create a system more complex and more unbalanced than the one presently in existence.

Crown representatives in Canada, I am convinced, are fundamentally imbued with that principle enunciated in *Boucher v. The Queen* [2] by Mr. Justice Rand:

> It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of the prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justice of judicial proceedings. [3]

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[1] LAW REFORM COMMISSION OF CANADA, 1 RESEARCH PROGRAMME at 7 (1972) (emphasis added).

[2] [1955] Sup. Ct. 16, 110 Can. Crim. Cas. Ann. 263, 20 Can. Crim. 1 (1954).

[3] *Id.* at 23-24.

And then again, see the case of *Rex v. Chamandy*,[4] where Mr. Justice Riddel stated:

> It cannot be made too clear, that in our law, a criminal prosecution is not a contest between individuals, nor is it a contest between the Crown endeavouring to convict and the accused endeavouring to be acquitted; but it is an investigation that should be conducted without feeling or animus on the part of the prosecution, with the single view of determining the truth.[5]

How can one of the "adversaries" in the concept of the adversarial system, envisaged in the Working Paper, face such a public responsibility in the search for the truth and at the same time be required to disclose fully all evidence in his knowledge on pain of serious sanction, when his adversary or opponent has no such sanction on him and can merely remain mute until at trial he chooses to disclose, by way of surprise, undiscovered evidence?

How, in the public interest, can such a proposal further the search for the truth which, subject to the accused's right against self-incrimination, must surely be the true purpose of the criminal process?

It is a linch-pin of the Working Paper that disclosure be compelled of only one side, namely that of the Crown. This flies in the face of the sources from which the authors draw their proposals. Even in the United States the vast majority of jurisdictions have two-way disclosure as a recognized procedure. In Israel, the system is going in that direction. In Scotland, it has existed for a time long before any of the material discussed in the Working Paper. In England, disclosure of alibi is statutory. The authors suggest that the creation of Crown disclosure sanctions will somehow compel the defence to disclose and make admissions. They write:

> Having received discovery from the prosecution, many defence counsel would be just as interested as the prosecution in saving time and expense in getting down to the matters that are really in dispute. Moreover, as another incentive, trial Judges and Juries would soon be aware of the rules and procedures that provide the defence with full discovery of the prosecution and with an opportunity at the pre-trial hearing to make admissions and disclosures.
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> It is likely that this awareness will further diminish the weight to be given to the evidence or a defence that is not disclosed until trial . . . an approach of openness by prosecution will foster *more* openness by the defence . . . .[6]

My reaction is to suggest that quite the contrary effect will result. Where defence counsel realizes that his opponent must disclose, on pain of sanctions being enforced, while he is not compelled by any statutory sanction to disclose, he will not only stop such disclosure as he presently makes but will insist on "to the letter" compliance by his opponent. I would assert that not only are these statements which have been extracted from the Work-

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[4] Rex v. Chamandy, [1934] Ont. 208, 61 Can. Crim. Cas. Ann. 224.

[5] *Id.* at 212.

[6] LAW REFORM COMMISSION OF CANADA, CRIMINAL PROCEDURE DISCOVERY, WORKING PAPER 4, at 30 (1974).

ing Paper arrant guesswork, but they are, where liberal Crown disclosure is presently practised, not borne out by the evidence. During fourteen years as a prosecutor at all levels of criminal trial court, it has been my regular practice to disclose liberally the material in the Crown file to defence counsel.

The volume of cases I have had represent several hundred jury trials and thousands of provincial and county court non-jury trials. My estimate of the number of cases in which trial admissions are made at all is a fraction of one per cent. I have at disclosure meetings with defence counsel regularly invited and encouraged the making of admissions to reduce the time, expense and where appropriate, the issues at trial. It is usually suggested that these admissions be framed by defence counsel and submitted for consideration. In those few cases where trial admissions have been made, they have seldom shortened the length of the trial or reduced the issues litigated in any material degree. In a significant number of trial cases the factual issues related to the conduct of the accused were not in issue. The main issue was his mental state as it related to intention. Where an accused has been mentally examined and reports are available, these, as a matter of course, are supplied to the defence. I can only recall two cases in my time as a prosecutor where the defence have reciprocated at trial.

I am convinced, nevertheless, that disclosure of Crown evidence before election or plea is vital and greatly enhances the ability of defence counsel to give his client proper advice on election and plea. A disclosure meeting does afford an opportunity for counsel to discuss and assess their respective positions. The existence of such an opportunity is vital in the criminal process. Without it, the process becomes protracted and the accused's right to decide how he should plead is materially affected.

Disclosure by the defence seems only to occur with any significance when defence counsel wishes to discuss what charge or charges his client may plead guilty to and when seeking the Crown representative's attitude on sentence. The authors suggest that defence disclosure is not needed as Crown counsel can assess what possible defences are available. The fact that an experienced Crown counsel can assess the possible defences from existing sources does not mean that he either knows what defences will in fact be advanced or if there is real evidence available in support thereof. If material evidence is known to the defence counsel which supports a defence, it should be disclosed provided always that this does not violate the right against self-incrimination. Surely, if the defence available can result in an acquittal, disclosure of it cannot violate the right against self-incrimination. Disclosure would certainly result in an assessment by Crown counsel of whether or not that evidence meets available tests and should be accepted. It will certainly ensure that, if Crown counsel elects to go to trial despite disclosure by defence counsel, he will realize that the fact of such disclosure will be an argument he must face at trial.

The Working Paper suggests that somehow beyond the existing jurisprudence, judges and juries will import a credibility sanction on late defences

introduced at trial. In this jurisdiction, the Bench, and I believe in many cases, juries, have become aware of the fact that early disclosure of Crown evidence has taken place. There is not one scintilla of evidence which exists to support the contention that in this jurisdiction, short of areas where the law allows comment, have the defence suffered by late disclosure. The use of the adjournment route, as suggested, is an almost useless tool.

How, six months late, can you investigate an alibi?

How, six months late, can you ask a psychiatrist to decide on "intention" when the defence in point of time have a better psychiatric assessment?

Defence counsel must assess the procedural and evidentiary advantages available to his client. Obviously, he will not choose a route which on balance will not give his client the best advantage. One must recognize that the adversary system as practised in Canada for the defence side, is *not* a search for the truth, unless, of course, truth is on his client's side.

The adjournment possibility may have some indirect effect but, in terms of disclosure as it is envisaged by the Working Paper, it is a weak sop to somehow force early defence disclosure. As a practical instrument, in my view, it would be quite ineffective.

I have had a great deal of source material delivered to me from the United States and cannot find any of the arguments of the authors for one-way disclosure tenable in the face of my own and substantial American experience. In the Working Paper the following statement is attributed to Chief Justice Traynor of the California Supreme Court:

> The plea for the adversary system is that it elicits a reasonable approximation of the truth. The reasoning is that with each side on its mettle to present its own case and to challenge its opponent's, the relevant unprivileged evidence in the main emerges in the ensuing clash. Such reasoning is hardly realistic unless *the evidence is accessible in advance to the adversaries so that each can prepare accordingly in the light of such evidence.*[7]

It is interesting to note that Chief Justice Traynor in *Jones v. Superior Court*,[8] in writing the judgment of the court upholding the State's request for discovery, required the defence to provide the names and addresses of witnesses the defence intended to call with copies of Reports or X-Rays to be introduced in support of a defence of impotence in a rape case. The Chief Justice stated: "Learning the identity of defence witnesses and of such Reports and X-Rays in advance merely enables the prosecution to perform its function at trial more effectively."[9] In this case, Chief Justice Traynor also stated that the right of discovery which a defendant possessed was not a matter of a constitutional mandate of due process, but rather a desire to promote the orderly ascertainment of the truth. Therefore, he asserted, it should not be a one-way street.

The Working Paper and the questionnaires which were circulated around Canada will be used to advance the view that the Crown representa-

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[7] *Id.* at 14 (emphasis added).
[8] 58 Cal. App.2d 56, 22 Cal. Rptr. 879 (1962).
[9] *Id.* at 58.

tive in Canada, in fact, does not practise according to the high principles enunciated in *Boucher* and *Chamandy*. From this argument must flow the criticism that Crown representatives in Canada do not make disclosure as fully and freely as might be expected. It must be frankly admitted that, while most Crown attorneys and prosecutors in Canada are fully in favour of disclosure of their cases, in some form, to the accused or his counsel, the hard realities of the situation place the Crown attorney and the prosecutor in the position where strictures exist. These strictures relate not only to the extent of disclosure, but also to the time available to preview the case and then sit down with those affected, *viz.* the police and defence counsel.

It is an accepted tenet of our Canadian prosecutorial system, that once the charge is laid, the prosecutor is fully in charge of the Crown side of the litigation. This presupposes knowledge, not only of the pre-charge investigation, but also of the real evidence in support of the charge. In reality, in the vast majority of cases, this is not the situation. When an accused is first arraigned in court on the charge against him, the prosecutor in Canada almost certainly has no prior knowledge of the evidence in the case. In fact, the accused may probably know more about it than he does.

This situation can be contrasted with that in the United States, where the district attorney or the federal prosecutor has actively engaged in the investigation with the police or has reviewed the warrant proceedings and knows the evidence before the accused is arraigned in court. It is interesting here to comment that, almost to a man, prosecutors in Canada eschew the concept that the Crown attorney or prosecutor is to be equated with the district attorney in the United States. Indeed, few, if any, of the Attorneys-General in Canada will want to accept the concept that their agents should be so closely involved in the investigation of a criminal offence as the district attorney or United States federal prosecutor. The basic argument against the Canadian prosecutor's involvement with those who have laid the charge is that it would create a question in the public mind that his quasi-judicial status has been compromised.

The Working Paper, in effect, presupposes a system which fixes real knowledge of the case in the Canadian prosecutor at the outset. The system recommended in the Working Paper, in part, has been drawn from jurisdictions operating under the American system, and accordingly, the concept that it advances is based upon the prosecutor as understood under the American system.

In Scotland, for example, the Procurator Fiscal is directly involved with the police in many cases before the charge is laid. He has substantial control in ways not presently used under the Canadian system. Indeed, prosecutions of a local nature in Scotland may run in the name of the Procurator Fiscal. In prosecutions handled from Edinburgh, they will run in the name of "Her Majesty's Advocate".

The police investigation evidence related to launching a criminal prosecution is not in all cases as closely scrutinized in Canada as it might be. I feel that our Canadian system can be changed to find a method consonant

with the quasi-judicial status of the prosecutor as described in *Boucher* which would at the same time allow him to have a real knowledge of the evidence supporting a proposed charge or, once the charge is laid, an immediate record of the evidence or circumstances which gave rise to its being laid. This would ensure that the Canadian prosecutor could be better informed and able to make disclosure of Crown evidence at an early stage.

In many United States' systems, the discovery procedure operates under rules of court related to the justice system and the problems thereof. A uniform system in Canada might appear to have merit from the fact of uniformity. This, however, would not recognize the very real question of local provincial problems. It is suggested that if amendments were made, they should relate to general guidelines directed to the superior courts of each province in order to allow them, having regard to regional provincial disparities or problems, to prepare rules which would be applicable within the courts of the jurisdiction of each province and reasonably operable.

It is interesting to read how the authors dispose of the inquisitorial system. I am not a strong advocate of that system in Canada, but may I, in the context of the disclosure paper, quote the following passage:

> I think it is particularly ironical that according to Mr. Justice Jackson, Soviet Prosecutors at the War Crimes Trials at Nuremburg vigorously protested against the adoption of the prevailing American procedures on the ground that they are just "not fair to defendants". The upshot was a compromise procedure which permitted the accused at those trials more liberal discovery than allowed under American Law, although narrower than Soviet or French practise sanctions. [10]

In the context of this quotation, it is interesting to see that in the inquisitorial system, the potential accused has a much wider ability to know the case against him than under the existing American procedures. The authors of the Working Paper, however, discard the inquisitorial system.

Space will not permit extended comment on the proposal in substitution for the preliminary hearing. While I am in favour of a re-examination of the adequacy of the function of the preliminary hearing, I do not feel that the alternative proposed is suitable. It is interesting to note that the authors have failed to discuss the system in Scotland where there is no preliminary hearing but a regular system of two-way discovery. Scottish law provides the same protections to an accused as exist in both Canada and England. Anyone interested in this system and in the inquisitorial system will find them discussed in a paper called, *A Comparative Study of French and Scottish Criminal Procedure, with Particular Emphasis on the Role of the Public Prosecutor.* [11] I believe copies can be obtained through the Federal Law Reform Commission. In my view, the authors of the Working Paper have failed to discuss and evolve proposals related to the role played by defence counsel. Vast sums in public funds are expended annually on legal aid

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[10] T. McCarthy, Discovery in Criminal Cases (1972).

[11] The author is A. V. Sheehan, Senior Depute Procurator Fiscal, Sheriff Court, Glasgow.

in criminal cases and one would have expected at least a passing reference to its effectiveness in assuring that accused persons are adequately represented.

As a compelling argument in favour of one-way discovery, the Working Paper highlights the investigative resources available to the State as creating a material imbalance requiring the sanction compelling discovery of the Crown case. Public defender systems have investigative staff to assist in gathering evidence, and in Scotland, the defence counsel use special clerks to interview Crown and defence witnesses for them. In my experience defence counsel in Canada seldom have Crown witnesses interviewed despite the fact that there is no property in a witness in a criminal case.

Why have these and other areas not been examined in the discovery Working Paper?

I would hope that whatever results come from this Working Paper, all who come to read it will seek not merely to understand the proposals but attempt to examine the total problem and not merely one side of it.

The processes by which criminal cases are disposed of do undoubtedly require examination. It is to be hoped that any proposals to be enacted will represent a material simplification of the criminal processes which will assure that not only accused persons are fairly treated but that the public interest in the welfare and protection of the community and its other members is not at the same time forgotten.

May I close this comment somewhat irreverently with a quotation from a non-legal source:

> No judicial system in the world affords so many Appeals to a convicted defendant to test the propriety of a Judge's conduct and ruling. No judicial system in the world has got itself quite so inextricably enmeshed in the coils of its own good intentions and its own avowed desire to accord "equal and exact justice to all men". They (Americans) are pathologically concerned about justice and equality. But they trust no one; neither their lawyers nor their Judges. To try to ensure their aims, they write everything down. No English Statute is as complex and intricate as an American enactment. No set of Judge's rules or code of evidence is so explicit and sub-paragraphed. Yet, in the end, it avails them little. American justice today is embattled as never before in its history. [12]

Perhaps those layman's words might be of some counsel at this time.

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[12] Bresler, *Heydey of the Attorney*, DAILY TELEGRAPH MAGAZINE (1971).