

IN THE MATTER OF an Application Under Section 696.1(1) of the *Criminal Code*

B E T W E E N:

HER MAJESTY THE QUEEN

RESPONDENT

- and -

ROMEO PHILLION

APPLICANT

APPENDIX 1

**THE CROWN'S DISCLOSURE OBLIGATIONS IN 1972
AND THE DISCLOSURE ACTUALLY
PROVIDED TO ROMEO PHILLION'S DEFENCE**

1. THE CROWN'S DISCLOSURE OBLIGATIONS IN 1972

Introduction

1. When Romeo Phillion was tried for the murder of Leopold Roy in 1972, there was no enforceable right to pre-trial discovery as it is presently understood. Instead there was a mix of practice, discretion, and statutory provisions. Before trial, the *Criminal Code* provided certain rights in the case of indictable offences:

- the right to cross examine witnesses at the preliminary inquiry
- the right to call witnesses and to make submissions at the preliminary inquiry

- the right to examine the exhibits and the transcript of the evidence taken at the preliminary inquiry

All other matters of pre-trial discovery were within the discretion of the Crown, who, if requested, might provide:

- a copy of the accused's own statement
- a copy of the accused's criminal record
- a copy of the statements of accomplices
- a list of anticipated witnesses
- copies of exhibits and expert reports
- willsays of witnesses whom the Crown intended to call, or a *verbal* summary of the same,¹ usually accompanied by the Crown's demand for a defence undertaking that witnesses would not be cross-examined on their contents.

There were no set rules for the timing of disclosure. It might be provided before the preliminary hearing, during the preliminary hearing, witness by witness as they testified, after the preliminary hearing but before trial, or at trial, witness by witness. It was common for the Crown to give a witness' willsay to defence counsel literally as that witness was being called to testify. The Crown rarely, if ever, provided the defence with copies of

- original statements of witnesses
- police notes, from their notebooks, relevant to case
- police investigation reports (known in some police jurisdictions as occurrence reports).

At trial, issues of disclosure were said to be within the discretion of the trial judge. In practice, the trial judge deferred to the Crown. There was considerable complacency in 1972 about the inherent fairness of the criminal justice process and about the reliability of verdicts. The spectre of wrongful convictions was viewed as remote; *a fortiori* there was no recognition that wrongful convictions could be caused by non-

¹ If the Crown chose to give only a verbal summary, it would traditionally take place in the Crown's office with the Crown providing oral summaries of witness statements to defence counsel sitting across the table. It is submitted, for example, that Mr. Cogan was only given (incomplete) verbal information of the contents of Mr. Loyer's willsay (*infra* paragraph 80).

disclosure.

(a) Disclosure was a Matter of Crown Discretion

2. The Crown was said to be under an ethical obligation to exercise their considerable discretion fairly, and the accused was said to have the right to know the case he had to meet. The Crown's duties were expressed within the context of an adversarial system in which the Crown held a quasi-judicial position. In 1954, in *Boucher v. The Queen*, Rand J. said in an oft quoted passage:

“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 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 justness of judicial proceedings.”

On the other hand, in 1974, the *Law Reform Commission of Canada* recognized that it was

“...utopian to assert that while Crown prosecutors exercise an accusatory and adversary role, they must also conform with an attitude befitting a “minister of justice”.”

Boucher v. The Queen (1954), 110 C.C.C. 263 at 270

Yebe v. the Queen (1987) 46 C.C.C. (3d) 417 at p. 433 (S.C.C.)

R. v. C.(M.H.) (1988) 46 C.C.C. (3d) 142 (B.C.C.A.)

Law Reform Commission of Canada, Study Report: Discovery in Criminal Cases 1974, at p. 61

3. However this general obligation on the prosecution was not seen by the courts as a reason for them to interfere in the prosecution's disclosure decisions in a particular case. In *Lemay v. The King*, the Supreme Court of Canada considered the related issue of whether there was an obligation on the Crown to call all witnesses who could give material evidence on the guilt or innocence of the accused. The Court

concluded that there was no such obligation; and that the Crown had a discretion as to whom to call as a witness, which was unfettered unless it could be shown that it had been exercised with an “oblique motive”.

The only justice to recognize a more active duty on the Crown, and consequently the Court, was Cartwright

J. Dissenting in part, he stated:

“I wish to make it perfectly clear that I do not intend to say anything which might be regarded as lessening the duty which rests upon counsel for the Crown to bring forward evidence of every material fact known to the prosecution whether favourable to the accused or otherwise.... “

Lemay v. The King (1951), 102 C.C.C. 1 (S.C.C.)

4. The practice of prosecutors, and the perception of their practice, in providing disclosure varied widely. W.B. Common Q.C., Director of Public Prosecutions for Ontario, is quoted in the 1955 Special

Lectures as saying to a Parliamentary Committee:

“I might say for those members of the Committee who are unfamiliar with the procedure at trial - and I am not going into technical matters - it will suffice to say this: that in all of the cases not only in capital cases but usually in all criminal cases there is complete disclosure by the prosecution of its case to the defence. To use a colloquialism, there are no “fast ones” pulled by the Crown. The defence does not have to disclose its case to the Crown. We do not ask it for a complete and full disclosure of the case. *If there are statements by witnesses, statements of accused, the defence is supplied with copies, they know exactly what our case is, and there is nothing hidden or kept back or suppressed so that the accused person is taken by surprise at a trial by springing a surprise witness on him. In other words, I again emphasize the fact that every safeguard is provided by the Crown to ensure that an accused person, not only in capital cases but in every case receives and is assured of a fair and legal trial.*” (emphasis added)

G. Arthur Martin; “Preliminary Hearings” (1955) *Law Society of Upper Canada Special Lectures*, 1-21 at p. 3

5. In reality, virtually no Crown office nor individual Crown in Ontario adhered in practice to the spirit, let alone the letter, of Mr. Common’s confident approach to disclosure. For example, in 1954, at a preliminary hearing in Toronto in which a live issue of mistaken identification was at stake (defence counsel

had been present at the lineup and was aware that not all witnesses had identified the accused), Crown Attorney Henry Bull, Q.C. objected to defence counsel asking for the names of witnesses who had observed the lineup:

“I have no objection to the officer giving evidence that a number of people appeared before the line-up and some made identifications and some did not. But to go into the details of who those persons were, that may be in one respect against public policy, and it may be against public policy in a matter such as police investigation, and in any case, it can be only purely negative evidence.”

The preliminary hearing Justice agreed with the Crown’s position. On a *certiorari* application, the committal was quashed on the grounds that the Justice’s decision amounted to a denial of the right to cross-examine. But the case provides an opportunity to appreciate the attitude of senior Crown Attorneys of the day.

R. v. Churchman and Durham (1954), 110 C.C.C. 382, at 383 (Ont. H. Ct.)

6. Mr. Bull’s views on disclosure did not change with time. In 1964 when he was the Crown Attorney for the County of York (which included Metropolitan Toronto) he sent a memo dated July 27, 1964 to all Assistant Crown Attorneys concerning disclosure. He said:

“It has come to my attention that the practice is growing up of showing defence counsel the dope sheet². While this may be all right in certain circumstances, there have been instances

² The “dope sheet Mr. Bull refers to was (and is) the method by which the police managed the information and evidence concerning a prosecution at the Provincial Court level. The dope sheet was an envelope or jacket containing a synopsis of the charge and evidence suitable for a guilty plea, a copy of the record of arrest, summaries of evidence in the form of “will say statements”, the criminal record if any of the accused and copies of, or references to, any forensic reports. On the outside of the envelope, the Crown or the police officer assisting the Crown would list relevant appearances and dates, the names of defence counsel, investigating officers, key witnesses and the like. The “dope sheet” was formally known as the “confidential instructions for the Crown”, was held in police custody and was delivered to the Crown for each court appearance. It represented the case for the Crown. The dope sheet rarely contained original witness statements, police investigation reports, or police notes or details of other investigative

where confidential information has been passed to the defence which should not have been done.

I request in future that no dope sheet be shown to defence counsel. This does not preclude you from communicating any information you see fit to do verbally, or otherwise by some other means than showing the dope sheet.”

This attitude is a far cry from the one Mr. Common had expressed nine years earlier.

Henry H. Bull, “Memo. to all Assistant Crown Attorneys, July 27, 1964”

7. In a 1969 article entitled “Some Observations on the Duties of a Prosecutor”, T.G. Bowen-Colthurst Q.C., counsel for the Attorney-General in British Columbia, wrote:

“Sometimes Crown counsel is asked for a list of the witnesses that the Crown proposes to call. Sometimes it is at a preliminary hearing level, and sometimes it is before a trial where there is no preliminary hearing. I see no reason why that list should not be given to defence counsel on request. Certainly I do not make a list of witnesses I propose to call and search out defence counsel and give it to him, but if he asks me who I propose to call, I can see no reason at all why he should not be told and, of course, the fact that the Crown proposes to call a person as a witness, or subpoena a witness, gives the Crown no special property rights in that person, and the defence counsel has a perfect right and, on occasion, I would say a duty, to interview that witness. There is no reason why they cannot interview Crown witnesses.”

As to providing witness statements or memoranda to the defence, he said:

“And so it is a decision that has to be governed by the circumstances of the particular case and all the surrounding circumstances, and certainly on occasion I have given defence counsel the statements of Crown witnesses and on occasions I have declined. It is a difficult question, and one should bear in mind what Tysoe J.A. said [in *R. v. Lantos* (1964), 2 C.C.C. 52 (B.C.C.A.)] in making that decision.”

avenues that might be relevant to the case. The more formal “Crown brief”, which contained the confidential instructions for the Crown in more serious cases that were tried in the higher courts often contained more materials. In those cases the information from the dope sheet was augmented and organized and bound into brief form. The resulting “Crown Brief” contained all the “will say” statements the Crown might need to prove the case. The Crown might then, before, or during trial, be provided on request with further materials by the police, such as police investigation reports, a complete set of original witness statements, witnesses’ criminal records etc. for his/her perusal.

T.G. Bowen-Colthurst: “Some Observations on the Duties of a Prosecutor” (1968-69) 11 C.L.Q. 377 at pp. 381-82

8. Judges did not adopt Mr. Common’s stated views either. In 1975, in refusing a request for production of witness statements, Justice Haines of the Ontario Supreme Court had this to say in *Lalonde*:

“I would suggest that the point of the foregoing quotation [of Mr. Common] is that the prosecutor must never fail to make disclosure solely for the purpose of catching the defence by surprise at trial. However, the Crown Attorney must be firm while being fair in prosecuting the accused so that the Court will not be duped by defences which are not thoroughly examined in Court. The criminal law leaves to the Crown Attorney many discretions as to whom and what to prosecute, and the conduct of the Crown’s case. Our law does not equate a good and fair Crown Attorney with a weak lawyer.”

The Courts saw the *Criminal Code* as the governing authority. As the *Law Reform Commission of Canada* pointed out:

“But the unfortunate consequences of this position is that even when the *Code* is silent, as it so often is in the matter of discovery, because it is the governing authority, that silence prevails. As a result, Canadian law, already limited as to discovery in the *Code*, has failed to follow English common law in its gradual formulation of discovery rules. But at the same time, in certain areas, notably in the development of principles relating to the discretion of the prosecution in the presentation of its case, our courts have largely relied upon English precedent.”

R. v. Lalonde (1972), 5 C.C.C. (2d) 168 (Ont.H.C.) at 173
Law Reform Commission of Canada Report 1974 (supra) at p. 17

9. The first *guidelines* on disclosure for Crown Attorneys in Ontario were issued in October 1981.³

Prior to 1981, the closest thing to a policy on disclosure was a memorandum to “all Crown Attorneys” from **W.H. Langdon Q.C., the Deputy Director of Crown Attorneys** dated February 13, 1978. This

³ These guidelines were commonly known as “The McMurtry Guidelines”. They were the first guidelines on the Crown’s disclosure obligations issued in Canada. They were referred to by Griffiths J.A. in *R. v. Wood* 1989), 51 C.C.C. (3d) 201 (Ont.C.A.) at 235-6

memorandum, it should be noted, was issued six years after Romeo Phillion's trial. The memorandum stated in part:

“At the last meeting of the Regional Crown Attorneys, the present system of formal disclosure and the use of the Disclosure Report was reviewed. It was established that the formal system, as presently constituted, is not working satisfactorily.

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As a starting point for consideration, the following proposed guideline might be considered. It should be remembered that this is a proposal only, and is only the bare bones of a set of guidelines that might be formulated:

Generally, in the matter of pretrial disclosure, the accused and/or his counsel is entitled on request to the following information:

1. A copy of his own statement to the police, in writing, or whatever was reduced to writing by the Police.
2. A copy of laboratory reports.
3. The Criminal Record of the accused.
4. A copy of any medical report.
5. Copies of photographs, plans and other documents intended to be entered as evidence by the Crown.
6. The gist of statements of all witnesses. (May be delivered orally, or in writing).
7. In appropriate cases, the names and addresses of witnesses.

The above disclosure to be made at the discretion of the Crown Attorney”

Please consider these guidelines as a basis for your answer to Question No. 4. It is recognized that there must be some guidelines to Crown Attorneys concerning disclosure. Our aim is to try and keep them as simple and practical as possible. Your cooperation in achieving this, by completing the questionnaire, is essential.”

The documents which contained “the gist” of witnesses’ statements were the willsays.

Memorandum to Crown Attorneys, February 13, 1978

(b) Disclosure Practices Were Essentially Unreviewable by the Courts

10. Despite the use of expansive language about the Crown's duty of fairness, courts in practice were reluctant to recognize that minimal disclosure obligations should exist and even more reluctant to interfere with Crown's exercise of its discretion. As the *Law Reform Commission of Canada* said:

“At no time may the defence claim to have *a right* to discovery of these statements.” (emphasis added)

In dismissing a trial motion for disclosure in *Bohozuk* (1947), McKay J. of the Ontario Supreme Court set out the disclosure obligations on the Crown. The very modest disclosure he described was still the “baseline” in 1972:

1. The Crown was not obliged to provide names of the witnesses whom it may call at trial to the defence,
2. The Crown “should advise the defence of substantially the evidence which it proposed to adduce at the trial”,
3. The Crown was not under a duty to divulge the names of witnesses who would provide this evidence. It was in the Crown's discretion to divulge their names,
4. The Court had a discretion to order production of materials that the Crown refused to disclose if it was in the interests of justice.

R. v. Bohozuk (1947), 87 C.C.C. 125 (Ont.S.C.)
Law Reform Commission of Canada Report 1974 (supra) at p. 19

11. Efforts to obtain witness statements *before* trial were almost never successful (unless the Crown chose to provide them). In *Lantos*, the British Columbia Court of Appeal considered the issue in an influential decision in 1964. Tysoe J.A., reiterated the long standing position that pre trial disclosure was a matter within Crown discretion. He said:

“I would add only that, in my opinion, an accused is not entitled, as a matter of right, to have produced to him for his inspection before trial, statements or memoranda of evidence of Crown witnesses or prospective witnesses, whether signed or unsigned. That is a matter within the discretion of the Crown prosecutor who may be expected to exercise his discretion fairly, not only to the accused, but also to the Crown. What might be thought to be proper in one set of

circumstances may not be thought to be proper in another.”

R v. Lantos [1964] 2 C.C.C. 52 (BCCA) at p 55

12. **Any residual doubt on the issue was removed by the Supreme Court of Canada in 1970 in the case of *Patterson*. *Patterson* raised the issue whether or not the defence had a right to production of witness statements at a preliminary inquiry. Judson J. for the five member majority decided the issue on narrow grounds of statutory interpretation. He considered that an outright denial of the right to cross-examine a witness at the preliminary inquiry would be reviewable. But in *Patterson*, counsel was seeking production of the original statements of witnesses at the preliminary hearing. Judson J. concluded no right to production existed at the preliminary hearing. He said:**

“In the first place, I think that [the presiding Justice’s] ruling was correct and, further, even if it was in error, that there would still be no problem of jurisdiction.”

Justice Judson was not prepared to acknowledge any legally enforceable disclosure function in the preliminary inquiry. As to disclosure after the preliminary inquiry and before trial, he approved the analysis in *R v Lantos*, which located the issue within the discretion of the Crown.⁴

Patterson v. the Queen, (1970) 2 C.C.C. (2d) 227 (SCC) at 229

13. Of the seven justices who heard the case only two acknowledged any enforceable claim to

⁴ A number of references were made to the *Patterson* case at the preliminary hearing in Mr. Phillion’s case on occasions that Mr. Cogan sought further disclosure. See, for example, evidence of Neil Miller, Vol. 3, 187/10 to 191/20; Vol. 4, 261/50 to 263/30 Evidence of Gail Brazeau, Vol. 4, 297/40

production of witness statements. Justice Hall concurred in the result but was prepared to recognize a disclosure claim in certain circumstances. He said:

“Had counsel pursued the cross-examinations further he might well have made out a case for the immediate production of the statements.

I am unable to accede to the view that an accused or counsel for an accused at a preliminary hearing is under no circumstances entitled to production of statements given by witnesses for the prosecution who are then being cross-examined. It is my view that if production of a statement made by a witness then under cross-examination at a preliminary hearing is shown to be essential to the full exercise of the right to cross-examine, then a refusal to order production could result in a denial of natural justice, and such a denial would, within the language of Lord Sumner quoted above, be a failure in the observance of the law in the course of exercising jurisdiction, but that was not the situation here.”

Only Spence, J. in dissent made the case for an entrenched right to disclosure. He said:

“I take it as firmly established and need cite no further authority that the right of cross-examination conferred by s. 453(1)(a) is a right to full, detailed and careful cross-examination, and, as pointed out in the two cases which I have cited, a failure to permit that cross-examination is a failure to accord the accused an important right granted him by the provisions of the Criminal Code and, as I wish to extend hereafter, a denial of jurisdiction by the Magistrate. That right could not be exercised when the Crown refused to permit counsel for the accused to peruse and use in his cross-examination of the complainant and the second witness the statements in writing which they had previously signed.”

R. v. Patterson (supra) at 231 and 233

14. Provided herein is a summary of the contemporary caselaw:
- (a) **Witness statements were not ordered produced before trial, and only rarely at trial, if the trial judge considered it to be “in the interests of justice” to order production. More often than not, the defence was caught in a “Catch 22” position – it could not establish that the interests of justice required production of a statement without producing the statement; it could not produce the statement without showing that production was in the interests of justice.**

R. v. Bohozuk (1947), 87 C.C.C. 125 (Ont.S.C.)
R. v. Finland (1959), 125 C.C.C. 186 (B.S.S.C.)
R. v. Silvester and Trapp (1959), 125 C.C.C. 190, 31 C.R. 190, 29 W.W.R. 361 (B.C.S.C.).
R v. Weigelt (1960) 128 C.C.C. 217 (Alta C.A.)
R. v. Tousignant (1962), 133 C.C.C. 270, 38 C.R. 319, 39 W.W.R. 574 (B.C.C.A.)
R v. Lantos [1964] 2 C.C.C. 52 (BCCA)
Patterson v. the Queen, (1970) 2 C.C.C. (2d) 227, Affirming [1969] 4 C.C.C. 88 (SCC).
R v. Lalonde (1971) 5 C.C.C. (2d) 168 (Ont S.C.)
R. v. McNeil (1960), 127 C.C.C. 343, 33 C.R. 346, 31 W.W.R. 232; (Sask Mag Ct)

- (b) Failure to provide even basic information about witnesses who were not called at the preliminary inquiry did not lead to a reversal of the verdict, either because no prejudice was found or because a decision whether to provide the information was within the discretion of the Crown.

***R. v. Richard* (1957), 126 C.C.C. 255 (N.B.C.A.)**
R. v. Childs (1958), 122 C.C.C. 126 (N.B.C.A.)

- (c) Defence counsel cross examining a police officer was entitled to review his notes so long as he had used them to refresh his memory before, or while, testifying.

Re Nichols and the Queen (1977) 34 C.C.C. (2d) 153 (Ont. S.C.)
R v Monfils et al (1971), 4 C.C.C. (2d) 163 (Ont C.A.)
R. v. Lewis (1969), 3 C.C.C. 235 (B.S.S.C.)
R. v. Kerenko (1965), 3 C.C.C. 52 (Man.C.A.)
R. v. Bonnycastle (1969), 4 C.C.C. 55 (Sask.Q.B.)

- (d) The accused's *right* to a copy of his own statement was not finally recognized without qualification until 1980.

R v Savion and Mizrahi. (1980) 52 C.C.C. (2d) 276 (Ont.C.A.)

15. In Mr. Phillion's case, the undisclosed information that was essential to his defence was mostly found in three types of documents:

- (1) police investigation reports
- (2) original witness statements
- (3) willsays of witnesses who were not called at the preliminary hearing or trial.

Contemporary practice ensured that the defence never saw the police investigation reports because they were never disclosed by the Crown. Original witness statements were rarely provided by the Crown for the purposes of cross-examination unless, as in the case of Neil Miller, the Crown produced them for memory-refreshing purposes, or, as previous inconsistent statements on a section 9(2) application (on occasion in Mr. Phillion's case original statements were *obtained* by the defence through cross-examination techniques at the preliminary hearing). Willsays of witnesses who were not called as witnesses were rarely disclosed by the Crown. The Ottawa Crown's Office practices, as will be seen, were even more restrictive than elsewhere in Ontario and Canada (*infra* paragraph 38). The refusal of the Courts to review the exercise of the Crown's discretion on the production of witness statements applied *a fortiori* to the production of police investigation reports and willsays of non-witnesses. Such disclosure was never ordered and, consequently, until 1985 in *Wood (infra)*, never requested by the defence.

16. This deference to Crown discretion at first survived the arrival of the *Charter of Rights*. In 1989, in *Wood*, the Ontario Court of Appeal upheld the trial judge's rulings which approved the Crown's refusal to disclose materials to the defence which included the statements of two potentially material witnesses who were not called as witnesses at trial. Griffiths J.A. said:

“As was observed by Watt J. in *R. v. Belanger*, a judgment of the High Court of Ontario, released May 4, 1987 [summarized 2 W.C.B. (2d) 307], affirmed Ont. C.A. [unreported], *there is no principle of common law nor statutory enactment imposing upon Crown counsel in charge of a prosecution a duty to make full disclosure to the accused or his counsel of the prosecution's case*. In general, however, it has been the practice of Crown counsel in Ontario to furnish to the accused more than what was provided through the preliminary inquiry, and to comply with the published guidelines of the Attorney-General to Crown attorneys which require disclosure as follows:

In indictable (non-hybrid) matters, Crown counsel should, *at the request in writing of counsel for the accused* or counsel's agent, provide *a written outline or synopsis of the evidence of the witnesses whom the Crown, at the time of disclosure, intends to call as part of the Crown's case at trial*, unless in the opinion of the Crown there are extraordinary circumstances which make such disclosure inappropriate. Such a written outline or synopsis may take the form of a document prepared for the purpose of disclosure, copies of "Will Says", *or where considered appropriate by Crown counsel, copies of statements of the witnesses which have been reduced to writing.*

In my view, the trial judge correctly ruled that s. 7 of the Charter, enshrining the right of the accused to fundamental justice, guarantees the right only to such disclosure from the Crown as is necessary to make full answer and defence. *The disclosure given under the requirements of the Charter should be sufficient to fairly apprise the accused of the case to be met in sufficient time and substance to enable the accused to adequately prepare and defend that case.*" (emphasis added)

Wood can be fairly viewed as the last pre-*Stinchcombe* stand of the "prehistoric" days of disclosure rules.

R. v. Wood (1989), 51 C.C.C. (3d) 201 (Ont.C.A.) at 235-6

17. The *Law Reform Commission of Canada* summarized the unsatisfactory state of affairs at the time:

"In regard to discovery in favour of the accused, if a comparison is made between the confused situation in Canadian law and the statements of principle in English law, it seems that the need of the defence in a criminal case to have unlimited access to the facts likely to support its case or to reduce the impact of the prosecution's case has been neither recognized as valid in its own right nor expressed through adequate procedures. In the few cases in which the defence has been given access to certain information in the prosecution's case, disclosure has been confined to information that is admissible evidence at trial and not extended to information that might be useful in preparing for trial. Thus it may be concluded that the value of discovery to the accused, being the disclosure of any information which may either directly or indirectly enable the defence to advance its own case or damage that of the prosecution, which is the basis for discovery in civil cases, has yet to be recognized in Canadian criminal cases."

Law Reform Commission of Canada Report, 1974, p. 20

(c) Defence Counsel Obtained Their "Disclosure" at the Preliminary Hearing

18. At the time of Romeo Phillion's trial in 1972, the preliminary inquiry had come to be considered

the primary means for the defence to obtain disclosure of the prosecution case. The evolution of this process had been gradual, and can be traced to the interpretation of the *Criminal Code* provision granting the accused the right to cross examine witnesses at a preliminary inquiry.

R. v. Stinchcombe [1991] 3 S.C.R. 326 (SCC)

R. v. Grigoreshenko & Stupka, (1945) 85 C.C.C. 129 (Sask.C.A.)

R v. McGavin Bakeries et al.(1951) 99 C.C.C. 330 (Alta S. C.).

R. v. Churchman and Durham (1954), 110 C.C.C. 382 (Ont. S.C..)

19. G. Arthur Martin’s 1955 *Special Lecture* provided the template for conduct by the defence of preliminary inquiries for decades to follow, and was the “best practice” for Arthur Cogan to follow in his representation of Romeo Phillion in 1972.

G. Arthur Martin; “Preliminary Hearings” (1955) Law Society of Upper Canada Special Lectures, 1 - 21

20. First, in the context of a regime in which only minimal disclosure could be expected, defence counsel’s efforts were spent on meeting the case as the police and prosecution had constructed it. Little effort was expended on seeking information to bolster the defence. Mr. Martin said:

“From the point of view of defence counsel at the stage of a preliminary hearing, he is not so much concerned about the Crown withholding any evidence favourable to him; he is concerned with the Crown withholding Crown evidence which is unfavourable to him and of which he has no knowledge and concerning which he will be taken by surprise at the trial.”

Martin, “Preliminary Hearings” , p.2

21. Second, given the lack of remedy if the Crown refused to provide disclosure, Mr. Martin felt the appropriate approach was a skillful and careful use of the preliminary inquiry:

“The defence counsel who wishes to be thoroughly prepared must work within existing techniques and legal rules to obtain the fullest disclosure of the Crown’s case at the preliminary inquiry.”

Mr. Martin listed the most important techniques as he saw them. The list remains useful today:

- 1. Cross examine the witnesses called by the Crown in order to obtain the names of other witnesses; in order to obtain details not part of the Crown case, and , in order to pin the witness down to their testimony;**
- 2. Obtain statements of accomplices - all versions, particularly the earliest;**
- 3. Obtain all eye witness descriptions and have the officer to produce his notes or other places where description(s) were noted;**
- 4. Obtain a copy of the accused's own statement, and all the circumstances surrounding it;**
- 5. Obtain copies of exhibits.**

Martin, "Preliminary Hearings", pp 4 - 16

22. Regardless of skill and effort, this approach to disclosure has serious drawbacks. Counsel were working blind, on the one hand facing the risk that a failure to cross examine fully **would leave the defence with no argument or remedy at trial if a witness offered new evidence**, on the other hand risking a "malicious answer." As Mr. Martin said:

"But it is a very difficult thing to cross-examine a witness so as to obtain full disclosure of his knowledge of all particular events or conversations without perhaps putting ideas into his mind which might be detrimental to your case."

Martin, "Preliminary Hearings" pp 10-11

R. v. Grigoreshenko & Stupka, (1945) 85 C.C.C. 129 (Sask.C.A.)

23. **Other limitations were equally well known. For example, the voluntary disclosure made by the most liberal Crowns was provided on a "for information" basis only.** Mr. John Sopinka (who would subsequently author the seminal judgement on disclosure in *R v Stinchcombe*) identified the

problem in his comment on the *Law Reform Commission of Canada's* proposals:

“When information is provided by counsel for the Crown in the manner described [for “information purposes” in the exercise of Crown discretion], he would be horrified if, at trial, defence counsel proceeded to read from his notes statements of fact made to him by Crown counsel. Similarly, most Crown attorneys would be disturbed if information from the “dope sheet” relating, for instance, to the testimony of police officers were used to cross examine the officers. Crown attorneys will therefore only provide the information to those counsel who they are satisfied will not use the information except for the first purpose [information].”

John Sopinka, “Criminal Procedure: Discovery” (1975) 7 *Ottawa Law Review* 288 - 294 at p 289.

24. Given these constraints, counsel obtained information in a piecemeal fashion in a variety of ways.

Some contemporary counsel used to good effect a tactic which might result in the production of an original statement. Counsel would cross-examine witnesses at the preliminary inquiry to encourage them to refresh their memory from notes or written statements. In this way, original statements (or an officer’s notes) might be produced. Counsel who obtained witness statements in this way had the additional advantage of not being bound by the terms of undertakings.

25. Mr. Cogan attempted to use the tactic on a few occasions. For example, during Det. McCombie’s evidence at the preliminary hearing, he was trying to get access to a police report on McCombie’s conversation with Romeo Phillion on March 25, 1971. He asked McCombie:

Q. Is [the conversation] in any of the reports?

A. Yes, there is a report.

Q. Would the report help you to refresh your memory of what was said?

A. My memory does not need to be refreshed.

McCombie, therefore, did not cooperate with Mr. Cogan’s design. At trial, Mr. Cogan attempted to obtain

access to “the Occurrence Report” that McCombie admitted having prepared on the homicide. Mr. Cogan asked:

Q. Well, is the Occurrence Report there [in the file], or is that lost too?

A. No. The Occurrence Report is there.

Q. Did you read that report?

A. Yes, I did.

Q. When did you read that Occurrence Report before you gave your evidence today?

A. In January.

Q. In January of this year?

A. Yes, sir.

Q. And between January and October would you bother reading it to refresh your memory?

A. No, sir.

Once again, McCombie’s evidence denied Mr. Cogan the opportunity to see “the Occurrence Report”.

Mr. Cogan also engaged another cross-examination tactic at the preliminary hearing with Gail Brazeau that led to mixed success. He cross-examined Gail on what she had told the police in January, 1972, and then sought production of her statement. Beaulne J. ordered that it be produced so that Gail could identify it as her statement, but did not allow Mr. Cogan to read it nor file it as an exhibit.

Evidence of McCombie, Preliminary Hearing, Vol. 4, 357/10-20

Evidence of McCombie, Trial, Vol. 4, 899/20-30

Evidence of Gail Brazeau, Preliminary Hearing, Vol. 4, 296/1 to 299/30

See also Evidence of Neil Miller, Preliminary Hearing, Vol. 3, 188/50

26. The object, then, of the defence at the preliminary hearing was to try and learn as much as possible about the Crown’s case. However, there was no guarantee of success with any of the tactics that counsel

might use, and no consistent right to production of witness statements. As the *Law Reform Commission of Canada* put it in explaining the limits placed on disclosure by the Supreme Court of Canada in *Patterson*:

“*Patterson* seems to substantially diminish the value of the preliminary inquiry as a discovery vehicle.”

Law Reform Commission of Canada Report, 1974, p. 9

27. Advancing an affirmative defence was the exception rather than the norm; apart from the defence of alibi. Mr. Martin argued that evidence of an alibi should be handled with care; it should be called at the preliminary inquiry, or not at all. He took this position not only because a failure to call an alibi at the earliest opportunity allowed the trial judge to make an adverse comment about it but also

“... if an alibi does break down at the trial it usually leads to the conviction of the accused.... So, defence counsel should be extremely careful in calling an alibi defence and speaking for myself I never call one unless I am reasonable sure that it is not only necessary but one that the witnesses are able to give an accurate account of the events they are purporting to relate.”

In his opinion:

“It is a rare case, however, when you have a client in whom you have that confidence but where you are confident of the alibi, disclose it. *If you are not confident of it be very careful of using it at all.*” (emphasis added).

Martin; “Preliminary Hearings” pp 18-19

28. Given best practice and state of the law at the time, Arthur Cogan was effectively frustrated from obtaining information that would corroborate Romeo Phillion’s alibi such that he could safely raise it. It was not only the passage of time since Mr. Roy’s murder and an unreliable client that frustrated him. Non-disclosure, filibustering by Mr. Lindsay, incomplete answers by police officers, Detective McCombie’s loss of part of the original investigation including his police notes all contributed to his inability to lead alibi evidence. He did not have the necessary information to be “confident” that his client had an effective alibi.

(d) The Rationale for a Policy of Limited Disclosure

29. When Romeo Phillion was tried for murder there were two related justifications for the wide latitude accorded the Crown in the matter of disclosure and the resulting limits imposed on the defence. First, it was felt that to impose an obligation on the Crown to make genuine disclosure of the Crown's case to the defence would hamper Crown discretion too much - it would, in effect, "hamstring" the prosecution. In Ontario, Haines J. put that argument forcefully in 1971 in *Lalonde*. He viewed the role of the trial judge in reviewing the exercise of Crown discretion as engaging the need to balance the interests of the defence and the Crown. He said:

"The accused's right to pre-trial discovery is not an absolute value existing in a vacuum. It must be balanced by the need to maintain effective channels of investigation for the police. The criminal process is a balancing of interests."

In balancing those interests, he was clearly of the view that the greater interest was to assist the Crown. He continued:

"In ordering production of the statements of Crown witnesses, it must be kept in mind that many people would be unwilling to talk to the police if they felt that their statements would be given to defence counsel before trial so that they may be picked apart at leisure in preparation for their embarrassment in the witness stand or accosted by private investigators to recant."

The related rationale expressed satisfaction with the system as it was. The concern was not wrongful convictions, but "wrongful" acquittals. Haines J. was of the view that there was "a heavy onus" on the defence to establish "in the interests of justice, as distinct from the interests of the accused" that the

production of witness statements was appropriate. In support of that view he quoted U.S. jurist Learned

Hand:

(U.S. v. Garssom (1923), 291 F. 646 at p. 649):

“Under our criminal procedure the accused has every advantage. While the prosecution is held rigidly to the charge, he need not disclose the barest outline of his defense. He is immune from question or comment on his silence; he cannot be convicted when there is the least fair doubt in the minds of any one of the twelve. Why in addition he should in advance have the whole evidence against him to pick over at his leisure, and make his defense, fairly or foully, I have never been able to see ... Our dangers do not lie in too little tenderness to the accused. *Our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream. What we need to fear is the archaic formalism and the watery sentiment that obstructs, delays, and defeats the prosecution of crime.*” (emphasis added).

R v. Lalonde (1971) 5 C.C.C. (2d) 168 Ont. SC at pp 175, 179

30. This complacency was not universal. In 1974, a working paper on disclosure was published by the *Law Reform Commission of Canada*. The *Commission* argued that existing disclosure practices were “unsatisfactory” and proposed a regime of relatively full disclosure of the Crown case including statements of all witnesses, whether intended to be called by the Crown or not.

Law Reform Commission of Canada, “Criminal Procedure - Discovery, Working Paper 4 (1974)

31. The *Commissions’ Working Paper* was not well received in the profession. The Ottawa Law Review published three comments on it; from Judge Thomas R. Swabey, a judge of the Provincial Court (Criminal Division), Mr. John Sopinka, then a senior member of the defence bar, and from Mr. John Cassell, Q.C. the Crown Attorney for Ottawa - Carleton at the time of Romeo Phillion’s trial.

32. Judge Swabey was not persuaded any changes in the disclosure regime were needed. In opposing

the recommendations as expensive and likely to cause unwarranted delays in well founded prosecutions,

he said:

“Having regard for the complete lack of proof, or, for that matter, any well-grounded suspicions, that innocent persons are being subjected to the sanctions of our criminal laws, the adoption of any wholesale changes in our criminal procedure must be approached with considerable caution and skepticism.”

Judge Thomas R. Swabey, “Criminal Procedure: Discovery” (1975) 7 *Ottawa Law Review* 295-300 at p 296.

33. Mr. Sopinka , writing for the defence position, was concerned that in the absence of a system for reciprocal disclosure, the proposals would unfairly benefit the defence. He asked:

“Is there not a danger that complete disclosure from the Crown, coupled with its total absence from the accused, would reduce the clash to a rout?”

John Sopinka, “Criminal Procedure: Discovery” (1975) 7 *Ottawa Law Review* 288 - 294 at p 293.

34. Mr. Cassell, who acknowledged the duty on the Crown to ensure fairness, was particularly concerned. he asked:

“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 truth and at the same 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 choses to disclose, by way of surprise, undiscovered evidence?”

How, in the public interest, can such a proposal further the search for truth which, subject to the accused’s right against self-incrimination, must surely be the true purpose of the criminal process?”⁵

In short, the profession was not persuaded by the *Law Reform Commission’s* concerns, and remained

⁵ Haines J. in *Lalonde* also grounded his opposition to a regime that forced Crown disclosure in the tenets of the adversary system. However his rationale was rather different from that of Mr. Sopinka and Mr. Cassell. Haines J. said:

" A trial is not a faithful reconstruction of the events as if recorded on some giant television screen. It is an historical recall of that part of the events to which witnesses may be found and presented in an intensely adversary system where the object is quantum of proof. *Truth may be only incidental* " (emphasis added)

R. v. Lalonde (supra) at p. 172

sanguine that the system was convicting the right people.

John Cassell, Q.C., "Criminal Procedure: Discovery" (1975) 7 *Ottawa Law Review* 281-287 at p 282.

(e) The Disclosure Practices in the Crown's Office in Ottawa
at the Time of Mr. Phillion's Trial

35. The 1974 *Law Reform Commission of Canada's Working Paper* provides an insight into the disclosure practices in the Crown's office in Ottawa-Carleton at the time of Mr. Phillion's case. Firstly, as has already been seen, it led to a reaction from the Ottawa Crown at the time, John Cassells, who was clearly unimpressed by the *Working Paper's* recommendations. Nevertheless, Mr. Cassells described it as his "regular practice to disclose liberally the material in the Crown file to defence counsel" without further description as to what that entailed.

John Cassells Q.C. "Criminal Procedure Discovery" (1975) 7 *Ottawa Law Review*, 281-287 at 283

36. Secondly, the *Paper* reviewed disclosure practices at a national level, a province by province level and, in some cases, a localized level, including the actual prevailing disclosure practices in Ottawa. The *Commission* sent out questionnaires to Crown counsel and to defence counsel. Not unexpectedly, the Crowns claimed to be more willing to disclose material than the defence was prepared to recognize. Nevertheless, the results are helpful to an analysis of the practices of the time.

37. The *Commission* reported on the Ontario situation:

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

The *Commission* reviewed defence counsel’s practice of requesting disclosure from the Crown:

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

.

As noted earlier, 61.2% of defence counsel in Canada indicated that they do not request information from the prosecution because they generally assume that it will be denied by the prosecutor. In Toronto, 73% think this way, 58.1% in Hamilton, 70.8% in Ottawa and 52.8% throughout the rest of Ontario. Also, in Canada, 8.8% of defence counsel indicated as the reason a fear of having to disclose information in return. In Toronto, 11.7% gave the same reason, 9.7% in Hamilton, 12.5% in Ottawa and 10.2% throughout the rest of the Province.

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

38. 434 defence counsel for Ontario responded to the questionnaire. 24 of them were from Ottawa.

From this, the *Commission* felt able to derive some conclusions peculiar to Ottawa. For example, it reported that:

– In Canada, 53.5% of defence counsel usually obtain the names and addresses of witnesses the prosecution intends to call at trial; 49.1% in Toronto, 54.8% in Hamilton, 75% in *Ottawa*, and 68.5% throughout the rest of the Province.

– In Canada, 25.8% obtain the identity of persons who had an opportunity to, but failed to identify the accused; 18.4% in Toronto, 41.9% in Hamilton, 33% in *Ottawa*, and 32.9% throughout the rest of Ontario.

– In Canada, 60.5% of defence counsel obtain signed statements of the accused which the prosecution does not intend to use at trial; 49.7% in Toronto, 58.1% in Hamilton, 75% in *Ottawa*, and 68.5% throughout the rest of the Province. (emphasis added)

Especially interesting in Mr. Phillion's context were the findings relating to the disclosure of actual signed statements of witnesses as opposed to only willsays of witnesses:

“In Canada, 29.3% reported usually obtaining signed statements of witnesses the prosecution intends to call at trial; 19% in Toronto, 29% in Hamilton, 47.7% throughout the rest of the Province, and only 16.7% in *Ottawa*. However, the balance was re-established with respect to summaries of testimony expected to be given by these witnesses. In Canada, 66.1% reported obtaining this information; 58.9% in Toronto, 83.9% in Hamilton, 83.3% in *Ottawa* and 76.4% in other locations in Ontario.” (emphasis added)

The *Commission* continued:

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

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

in other locations of the Province.

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

From these figures, the reasonable conclusion is that, even within the limited disclosure regimes of the day, the Ottawa Crown’s office consistently had the worst record for disclosure not only in Ontario but also in Canada. This provides context to the analysis of the disclosure provided to Mr. Phillion’s defence.

“Discovery in Criminal Cases – Report on the Questionnaire Survey”, (*supra*), at p. 30

(f) Disclosure and Wrongful Convictions

39. The risk of wrongful conviction was not recognized when Romeo Phillion was tried. In 1972 a presumption of regularity surrounded the police investigation and the subsequent prosecution by the Crown. The trial tested the probative value of the evidence that the police provided and the Crown presented, and rarely strayed beyond these bounds. The accuracy and completeness of the police investigation itself was rarely queried or challenged. The defence was in no position to do this. Only Crown counsel had access to the police investigative file, and the purpose behind their having access was to strengthen the prosecution

case, not weaken it or assist the defence.⁶

⁶ T.G. Bowen-Colthurst, Q.C.. refers to best practice for Crowns in regard to the police file, which was to read it in search for the “sometimes very helpful information” that might have been overlooked by the police.

T.G. Bowen-Colthurst: “Some Observations on the Duties of a Prosecutor” (1968-69) 11 C.L.Q. 377 at pp. 384-385.

40. As a result of the lessons learned from wrongful convictions, the importance of testing the police investigation and ensuring the fullest disclosure to the defence has become recognized throughout the common law world. Learned Hand and all who agreed with him were wrong. Disclosure practices such as those followed in Romeo Phillion's case have played a major role in many of the now hundreds of confirmed cases of wrongful conviction. The analysis of DNA exonerations in the United States conducted by Barry Scheck and Peter Neufeld of the *Cardozo Law School Innocence Project* found that police and prosecutorial misconduct was the third highest cause of wrongful convictions (at 38% and 34% respectively) after mistaken identification (61%) and errors in serology inclusions (40%). On a further analysis, the *Project* found that the suppression of exculpatory evidence was the most significant factor in these cases (at 34% and 37% respectively).⁷

The Innocence Project, Cardozo Law School, New York, New York
<http://www.innocenceproject.org>; at <http://www.innocenceproject.org/causes/index.php>

41. Many of the British wrongful conviction cases demonstrate how post conviction disclosure has undermined "historical" convictions. One case in particular illustrates the point⁸. Mahmoud Mattan was convicted of the March 6, 1952 murder of Lily Volpert, a shopkeeper in Cardiff, Wales. Mr. Mattan was

⁷ The figures exceed 100% because, in many of the cases, more than one cause could be attributed to the wrongful conviction.

⁸ There are many others. For example, in the *Taylor* case, Michelle and Lisa Taylor, were convicted of murder in 1992. Suppressed evidence included a change in the key identification witness's description of the suspects from black to white (the Taylor sisters were white) and a successful application by the witness for the reward offered in the case. In *Ward*, Judith Ward was convicted in 1974 for a series of deadly terrorist attacks and sentenced to life imprisonment. Experimental data which undermined the crucial forensic evidence used by the prosecution in the case was deliberately withheld from her defence.
R v Taylor (1994) 98 Cr. App. R. 361.

hanged on September 8, 1952. On February 24, 1998, after a referral by the Criminal Cases Review Commission, the Court of Appeal posthumously allowed Mr. Mattan's appeal and quashed his conviction.

The Court found that sizeable portions of the investigation had not been made available to the defence at trial, including evidence material to the identification by an eyewitness of Mr. Mattan as the killer. Lord

Justice Rose said:

"It was unnecessary for the purposes of this appeal, even if after this length of time it had been practicable to do so, to investigate why material which we regard as crucial was not before the jury which tried Mr. Mattan. For better or worse, and this case shows for worse, it was not the practice, in 1952, for prosecution witness statements to be shown to the defence. At trial, the defence had the depositions made by witnesses before the committing justices. But unless, for some reason, witness statements were subsequently, for example, renewed by way of notice of additional disclosure, their terms were generally unknown to the defence."

Rose L.J. then listed six items of material non-disclosure, including the following:

"Fourthly, Detective Inspector Roberts' note specifically recorded that Cover [who at trial identified Mattan as the man in the shop doorway] had identified Gass as the man in the doorway. By the rules then prevailing, that note was probably not discloseable to the defence. But it has obvious significance for the Court, having regard to our task.

.

Sixthly, four eyewitnesses had failed to pick out the appellant on an identification parade and a fifth had positively asserted the appellant was not the man she had seen. Had the jury known about this, Cover's purported identification [of Mattan] must, as it seems to us, have been impaired."

In the conclusion to his judgment, Rose L.J. said:

"We add this. It is, of course, a matter for very profound regret that in 1952 Mahmoud Mattan was convicted and hanged and it has taken 46 years for that conviction to be shown to be unsafe. The Court can only hope that its decision today will provide some crumb of comfort for his surviving relatives. The case has a wider significance in that it clearly demonstrates five matters. First, capital punishment was not perhaps a prudent culmination for a criminal justice

system which is human and therefore fallible. Secondly, in important areas, to some of which we have alluded, criminal law and practice have, since Mattan was tried, undergone major changes for the better. Thirdly, the Criminal Cases Review Commission is a necessary and welcome body without whose work the injustices in this case might never have been identified. Fourthly, no one associated with the criminal justice system can afford to be complacent. Fifthly, injustices of this kind can only be avoided if all concerned in the investigation of crime, and the preparation and presentation of criminal prosecutions, observe the very highest standards of integrity, conscientiousness and professional skill.”

R. v. Mattan [1998] E.W.J. No. 4668 (C.A.)

42. Non disclosure has played its part in contributing to wrongful convictions in Canada as well. In the case of David Milgaard, the presence of Larry Fisher, a known serial rapist who committed his crimes in the vicinity of Gail Miller’s murder, was known to both police and prosecutors but never disclosed to the defence. DNA testing subsequently established Fisher’s guilt. A range of disclosure issues marred Guy Paul Morin’s two trials, the most significant non-disclosure concerning evidence which rendered key forensic testimony worthless.

R. v. Milgaard (1992), 71 C.C.C. (3d) 260 (S.C.C.)

Report of the Commission of Inquiry into Proceedings Against Guy Paul Morin, Volume II pp 197-225

43. The most recent inquiry into a wrongful conviction in Canada, that conducted by former justice of the Supreme Court of Canada Peter Cory, in the *Thomas Sophonow* case, found considerable evidence of material non-disclosure.. In his Introduction to his findings on the role of the lack of disclosure to the miscarriage of justice he said:

“It will be remembered that Thomas Sophonow's trials took place in 1982, 1983 and 1985, subsequent to the passage of the Canadian Charter of Rights and Liberties. It is clear that the decision in *R. v. Stinchcombe*, [1991] 3 S.C.R. 326 radically altered the approach to disclosure. It was this decision which imposed a duty on the police and the Crown to make full and complete disclosure. Since that decision, the duty has been recognized and, for the most part, meticulously and scrupulously honoured

Prior to *Stinchcombe*, the duty of disclosure was minimal, to say the least. The policy varied from province to province and from one Crown Counsel to another. Counsel acting for the Defence could expect very little. They would receive a brief summary of the case, the

statements, if any, of the accused and forensic reports.

There does, however, appear to have been agreement among the Crowns testifying at the Inquiry that fairness required them to disclose further information in the circumstances of this case. For example, they agreed that material which had a significant bearing on the credibility of a witness would usually be disclosed. For the purposes of this Report, I will only consider those materials which Crown Counsel agreed ought to have been disclosed to Defence Counsel in 1982 or 1985.”

In his Report, the Commissioner reviewed the evidence that should have been disclosed in the context of the narrow approach to disclosure operating at the time, including:

1. undisclosed evidence concerning the credibility of jailhouse informers,
2. undisclosed evidence which weakened eyewitness identification evidence,
3. undisclosed evidence affecting the probative value of physical evidence,
4. undisclosed evidence that tended to corroborate the accused’s alibi.

The Honourable Peter deC. Cory, *The Inquiry Regarding Thomas Sophonow*, Province of Manitoba, 2001, pp 75-78

44. The wrongful conviction of Donald Marshall, and its causes, demonstrated the danger of the dominant assumptions about the criminal justice system in Canada and led to Sopinka J.’s decision in *Stinchcombe*. On the issue of disclosure, the Royal Commission concluded:

“Both before and after trial, the Crown’s failure to disclose information to Marshall’s counsel contributed to his conviction and continued imprisonment.”

The Commission went on to say:

“The fundamental interest in a fair trial of the accused requires that the accused receive from the Crown all information known to the Crown that might reasonably be considered useful to the accused. The Crown should have a positive and continuing duty to provide this information to the defence. It is immaterial whether or not defence counsel fails to request disclosure of the information in the possession of the Crown, or indeed

whether defence counsel is negligent in failing to do so. The circumstances of non-disclosure should not be permitted to affect adversely the fairness of the trial received by the accused. The focal point of the issue of fairness is the fact of disclosure of material evidence.”

Commissioners’ Report 1989: Royal Commission on the Donald Marshall Jr., Prosecution at pp. 238 and 240

45. In *Stinchcombe*, Sopinka J. said:

“The right to make full answer and defence is one of the pillars of criminal justice on which we heavily depend to ensure that the innocent are not convicted. Recent events have demonstrated that the erosion of this right due to non-disclosure was an important factor in the conviction and incarceration of an innocent person. In the Royal Commission on the Donald Marshall Jr., Prosecution, vol. 1: Findings and Recommendations (1989) (the “Marshall Commission Report”), the commissioners found that prior inconsistent statements were not disclosed to the defence. This was an important contributing factor in the miscarriage of justice which occurred and led the commission to state that “anything less than complete disclosure by the Crown falls short of decency and fair play” (vol.1 at p. 238).”

R v Stinchcombe (1991), 68 C.C.C. (3d) 1 (S.C.C.) at 9

2. THE DISCLOSURE ACTUALLY PROVIDED TO PHILLION'S DEFENCE IN 1972

Introduction

46. In the Archives of Ontario, is a document which can be fairly described as the "Crown Brief". The words "Crown's Copy" is handwritten on the cover. The index to the document reads as follows:

"Short list and summary [of the evidence] of witnesses
 Synopsis [of the case]
 Oral testimony to be given by witnesses
 Written statements by witnesses
 Criminal records of witnesses
 Statement of accused
 Line up document
 Pathology report
 Photographs ⁹

The brief was apparently prepared by Detective Nadori.

Crown Brief, Record, Vol. 13, Tab 2
 Investigation Report of Det. Breman, Jan. 21/72, Record, Vol. 2, Tab 107

47. The evidence demonstrates that parts of this brief were disclosed to the defence, and parts were not. We have drawn our conclusions from our knowledge of the disclosure practices of the era, our particular knowledge of the practices of the Ottawa Crown's office at the time, an examination of the

⁹ No photographs are, in fact, in the brief.

preliminary hearing and trial record in Mr. Phillion's case and interviews with Mr. Cogan. At one point during the preliminary hearing, Mr. Cogan himself spoke of his mind having been "triggered to the brief". At another point, Mr. Lindsay referred to an aspect of McCombie's evidence as being "in the brief for Mr. Cogan to cross-examine on". There is no doubt, however, that Mr. Lindsay viewed Mr. Cogan as only having a *privilege* of disclosure of those parts of the brief that he considered appropriate. At one point during the preliminary hearing, Mr. Lindsay referred to an item of disclosure as being as "confidential, for instance, as our brief is". Mr. Cogan's cross-examination of Crown witnesses, statements made by Mr. Cogan and Mr. Lindsay on the record, Mr. Cogan's failure to confront Crown witnesses with previous inconsistent statements that have been found in the archives, his admission of facts as proven that are now known to have been false, and his failure to raise the Trenton alibi, all help in pointing to the materials that were, and were not, disclosed.

Preliminary Hearing, Vol. 1, 34/30, Vol. 4, 355/40, Vol. 5/488/1

48. Mr. Cogan received some early verbal disclosure from the Crown. On January 12, 1972 at 4:00 p.m., he met with the Crown, Mac Lindsay, and Detectives Huneault, Nadori and Norton in the Crown's office. Huneault wrote in his report of the meeting:

"... at [this] time full disclosure surrounding the arrest and parts of previous investigations were made to Mr. Cogan."

Mr. Lindsay told the Court at the preliminary hearing:

"The reason it happened that way was that Mr. Cogan came in, I believe the day after Mr. Phillion was booked and I wasn't familiar with the facts at all and he wanted some disclosure and to accommodate him I asked him if it would be all right if the three officers came in and went over what their evidence would be."

Mr. Cogan asked for Neil Miller's witness statements but Mr. Lindsay told him that he would first have to discuss this with Crown Attorney Mr. Cassells and that he "would [be] in further contact with him at a later [time] in reference to the statements."

See Preliminary Hearing, Vol. 5, 485/30 to 489/10
Report of Huneault, Jan. 13/72, Record, Vol. 2., Tab 98

49. Mr. Cogan, a respected counsel in 1967 and now, was interviewed by Michael Dale of the Criminal Conviction Review Group in 1996. Mr. Dale reported as follows:

"When questioned by departmental counsel about the applicant's allegations of a conspiracy against him by the Crown, the police and Mr. Cogan, Mr. Cogan said that he got very little cooperation from the police. He had to obtain a court order to allow the polygraph test to take place outside of the police station, but did receive disclosure of the confession and statements of Neil Miller before trial. He was retained by the applicant on a Legal Aid certificate in 1972 following the applicant's arrest for murder. He had not acted for the applicant before."

Mr. Cogan told Jack Parrish on April 11, 1995 that "he knew of no exculpatory evidence in the police file, or anywhere else that he failed to lead at trial."

Criminal Conviction Review Group Brief, Record, Vol. 15, Tab 15
Parrish interviews Cogan, Apr. 11/95, Record, Vol. 15, Tab 12

50. Specifically, our conclusions which generally accord with the disclosure practices of the day, and the contemporary practices of the Ottawa Crown's office, are as follows:

Disclosed

- the synopsis of the case was disclosed to the defence,
- the willsays of police officers who were called as witnesses were disclosed to the defence,
- statements of Mr. Phillion that were typed, and all oral statements made by him between January

11 and 12, 1967, were disclosed to the defence,

- the willsays of civilians who were called as witnesses were disclosed to the defence,
- police photographs and the pathology report were disclosed to the defence.

Not Disclosed

- the willsays of officers not called as witnesses were likely not disclosed – in particular, the willsay of P.C. Liboiron was definitely not disclosed to the defence,
- no police investigation reports were disclosed to the defence,
- statements made by Phillion to the New Liskeard police and the Ottawa police in 1967 and 1968 were not disclosed to the defence,
- subject to exceptions, original statements of civilians were not disclosed to the defence,
- the willsays of civilians who were not called as witnesses were not disclosed to the defence – in particular, the willsay of Paul Loyer was not disclosed to the defence.

In the case of witness willsays, there is no clear evidence to establish whether they were disclosed *in specie*, or by way of the Crown orally briefing Mr. Cogan (except in the case of Paul Loyer *infra*). No doubt Mr. Cogan was bound by the usual undertaking regarding them because not once did he attempt to cross-examine a witness on his/her willsay.

It is now proposed to review each of these items.

(a) Disclosure of Police Willsays

(i) Willsays of police officers who testified during the proceedings

51. From an examination of the preliminary hearing, particularly the evidence of Detectives Norton, Huneault and McCombie, it can be determined that the Crown disclosed the willsays of all police officers who testified during the proceedings.

Detective Sergeant Norton

52. Detective Sergeant Norton's conversation with Phillion on January 12 at 7:30 a.m. is in Norton's willsay in the Crown brief. By the time of the preliminary hearing, Mr. Cogan knew the contents of the conversation (Mr. Lindsay stated as such on the record at the preliminary hearing) from, it can be presumed, having disclosure of Norton's willsay by the time of the preliminary hearing.¹⁰

See Evidence of Norton, Preliminary Hearing, Vol. 7, 19/20 to 24/15
Evidence of Norton, Trial, *Voir Dire*, Vol. 2, 417/30 to 435/10

Detective Huneault

¹⁰ A copy of Det. Sgt. Norton's police notes for January 11-12, 1972, were in the archives. His were the only police notes in the archives. Norton's evidence on the *voir dire* proceedings at trial explain this. At one point during his testimony, there was an apparent pause in his evidence causing Norton to say:

"I am afraid I have my notes out of order here as a result of getting them xeroxed for Mr. Lindsay. They got out of order when they were put back in the looseleaf binder."

His notes, then, would have been in Mr. Lindsay's file which eventually made its way into the archives.

Evidence of Norton, *Voir Dire*, Vol. 2, 393/10-20
Notes of Norton, Record, Vol. 14, Tab 17

53. From Detective Huneault's cross-examination at the preliminary hearing, it can be determined that Mr. Cogan had Huneault's willsay. Mr. Cogan asked Huneault:

Q. Detective Huneault, in the course of your investigation I understand that you were apprised of certain information given by the accused that he was elsewhere at the time that the offence was committed. Did you conduct an investigation in the area in or about the city of Trenton or town of Trenton?

Mr. Cogan would have acquired the information that Huneault had done this from his willsay wherein it stated:

"This witness will state that on January 21st and 22nd, in company with Detective Nadori checked all Service Stations in the area of Trenton, Ontario in the vicinity of Highway 401, checking all exit roads, interviewed the proprietors of all service stations within a four or five mile radius of that location and failed to find a Supertest Service Station which the accused alleges to have traded a radio for gas and service on the evening or early morning of August 9th or 10th, 1967."

Evidence of Huneault, Preliminary Hearing, Vol. 7, 58/30-50
Willsay of Huneault, Crown Brief, Record, Vol. 13, Tab 23

Detective McCombie

54. From Detective McCombie's examination-in-chief by the Crown at the preliminary hearing, and comments made by the Crown on the record, it can be determined that Mr. Cogan had McCombie's willsay. After McCombie referred in his examination-in-chief to his meeting with Phillion in April, 1971, the Court asked Mr. Lindsay:

The Court: Are you aware of this Mr. Lindsay?

Mr. Lindsay: Yes, I am, Your Honour. I am not going to go into it. I think my learned friend is aware of it and if he wishes to cross-examine on it he may, but I do not wish to

hold the matter up further by going into it. (emphasis added)

Mr. Cogan would have acquired this knowledge from McCombie's willsay wherein it stated:

"Will state that on March 25th, 1971, at 4:00 p.m., Romeo Phillion came to the Detective Office, at #1 police station, in Ottawa and advised Det. John McCombie that his brother, Donald Phillion, who was presently serving a life sentence for murder in a Quebec penitentiary was the person responsible for a 1967 murder of Mr. Leopold Roy.

At this time he will indicate that Romeo Phillion indicated to him that Donald would be ready to confess to the murder concerned. That as a result , he, accompanied by Det. Dean Halliday proceeded to the Archambault Institute in Quebec and had a conversation with Donald Phillion, however subsequent to this conversation, no further actions were taken."

During his cross-examination of McCombie, Mr. Cogan unsuccessfully attempted to get access to McCombie's investigation report on this conversation with Phillion. He asked McCombie:

Q. Did you not make notes afterwards of the conversation?

A. No.

Q. Is it in any of the reports?

A. Yes, there is a report.

Q. Would the report help you to refresh your memory of what was said?

A. My memory does not need to be refreshed.

Q. You have told us all that took place in this conversation with the accused?

A. Yes.

Q. It was a brief conversation, I take it.

A. Yes.

**Evidence of McCombie, Preliminary Hearing, Vol. 4, 353/35 to 358/20
Willsay of McCombie, Crown Brief, Record, Vol. 13, Tab 12**

55. Further evidence that Mr. Cogan had Det. McCombie's willsay by the time of the preliminary

hearing is provided by his questioning McCombie at the preliminary hearing about the further involvement of the New Liskeard police in the case in 1968. Mr. Cogan's knowledge of this would have come from McCombie's willsay in which it was written:

“That in April 1968, certain information had been received and developed by the New Liskeard Police Force, and following an interview between Gail Brazeau and the New Liskeard Police Force information was conveyed to [McCombie], however as a result of the following investigation, no new evidence was discovered.”

Evidence of McCombie, Preliminary Hearing, Vol. 4, 392/10-30
Willsay of McCombie, Crown Brief, Record, Vol. 13, Tab 12

Conclusions to be Drawn

56. The evidence establishes that, by the time of the preliminary hearing, Mr. Cogan had the willsays of P.C. Huneault, Det. Sgt. Norton and Det. McCombie. These three witnesses testified at Mr. Phillion's proceedings, and were all significant witnesses. From this, it can reasonably be concluded that the willsays of all officers who testified at Phillion's preliminary hearing or trial were disclosed to the defence.¹¹ **These officers are:**

- **Det. Huneault**
- **Det. Sgt. Norton**
- **Det. McCombie**
- **Det. Nadori**
- **P.C. Storey**

¹¹ Some of the officers referred to their police notebooks so that Mr. Cogan was likely able to review them to some extent while they were on the witness stand. This was, however, always a difficult task to perform because the process of reading the notes had to be conducted in open court and, presumably, there were limits to the patience of the presiding judge.

See Evidence of Huneault, *Voir Dire*, Vol. 1, 141/10 - 40; Preliminary Hearing, Vol. 5, 482/10-20
Evidence of Nadori, Preliminary Hearing, Vol. 6, 575/20

- **P.C. Cederberg**
- **Sgt. Kearney**
- **P.C. Couture**
- **P.C. Aldrich**
- **P.C. Bayne**
- **P.C. Bowes**
- **P.C. Brown**
- **P.C. Bolger**

(ii) Willsays of police officers who did not testify during the proceedings

57. The evidence suggests that P.C. Liboiron's willsay was not disclosed to the defence. From this, it may be concluded that only willsays of officers who testified during the proceedings were disclosed.

P.C. Lee Liboiron

58. P.C. Liboiron's willsay the following information:

“This witness will state that he is a member of the Ontario Provincial Police, and that on August 8^h, 1967, at about 1800 hrs. while on patrol on Highway 17, he had occasion to stop a 1958 Ford convertible, bearing Ontario 1967 registration, 350-826. The vehicle was being driven at that time by Romeo Phillion, driver's permit #-3462-66753-990429, the date of birth, 29-04-39, address 106 Sweetland Avenue, Ottawa, apt. #5, and he will state that this person was also the owner of the vehicle.” (emphasis added)

59. Mr. Cogan knew that P.C. Liboiron was a potential witness because his name was typed on the back of the indictment. However, he was not on the list of witnesses that Mr. Cogan handwrote on the three pieces of paper that he subsequently stapled to Volume 1 of his preliminary hearing transcript, a list of trial witnesses that it can be concluded was provided verbally to him by Mr. Lindsay. It can be confidently stated that, since P.C. Liboiron was never called as a witness by the Crown, neither his willsay nor its contents were disclosed to the defence, which was in accordance with contemporary disclosure practice. If Mr. Cogan had known that Phillion had received a traffic ticket on August 8, for example, he would have realized that Phillion spoke to the Barbes on August 8, not August 9. He would not then have conceded at trial that his client was in Ottawa on August 9. It would also have caused him to further question the truthfulness of his client's confession. In fact, knowledge of the ticket would have fundamentally altered the conduct of the defence.

Conclusion to be Drawn

60. Since P.C. Liboiron's willsay was not disclosed to the defence, it can be reasonably inferred that willsays of police officers who did not testify during the proceedings were not disclosed. Besides Liboiron, this would include the willsays of the following officers:

- P.C. Johnson – he was the first officer on the scene¹²
- **Det. Coburn – he was McCombie's partner**

¹² P.C. Johnson did testify briefly at the Coroner's Inquest.

- **Supt. Flannigan – he led the search for the murder weapon**
- **P.C. Dunlevie and P.C. Roger – both did guard shifts of Phillion in the cells**
- **P.C. Carroll – he conducted the breathalyzer test on Phillion**
- **P.C. Shortt – he ticketed Phillion in New Liskeard on August 11 at 8:50 p.m.**

As it happens, in the case of these witnesses, their actual willsays that were found in the archives provided no new useful information to the defence which could not have been acquired through other disclosed sources.

(b) Disclosure of Police Investigation Reports

61. The police investigation reports that have been found are likely far from being a complete compilation of the reports that were prepared as a part of the investigation into Mr. Roy's murder. For example, it has been noted in the brief that there are no investigation reports for Mrs. Roy's three hotel sightings of men whom she thought had murdered her husband. There are no investigation reports that explain when Detective McCombie was first told by Mr. Phillion of his break down in Trenton, nor that detail his investigation and confirmation of the claim. Nevertheless, the investigation reports that have been found contain a wealth of information that would have established Phillion's defence. The information contained in them was so significant that, if disclosed, it might have resulted in the termination of the prosecution. For a number of reasons, it can be definitively stated that none of the police investigation

reports were disclosed to Mr. Cogan.

62. This conclusion, it should be noted, is consistent with the prevailing view of prosecuting authorities at the time, that police investigation reports were internal, secret, confidential documents that were never disclosed to the defence. The prosecution view was exemplified in a letter dated June 29, 1972 that Mr. Lindsay wrote to Mr. Cogan wherein he enclosed a statement from P.C. Couture. Mr. Lindsay wrote:

“Pursuant to our conversation of June 28th, 1972 concerning the evidence of Constable Couture of the Ottawa Police Department, I am enclosing with this letter a statement containing the conversations between Constable Couture and your client, prepared by Constable Couture on June 27th, 1972.

You will note that the document appears to be somewhat cut up at the time that I photostated it. This is because the document was first prepared in the form of a confidential police report by Constable Couture and I have xeroxed it in its present form for your purposes.” (emphasis added)

P.C. Couture’s actual report from which this statement was disclosed was in the archives. It was, as stated by Mr. Lindsay, prepared by Couture in the form of an investigation report on June 27, 1972. The photocopy provided by Mr. Lindsay did not include any part of the pre-typed investigation report on which the statement was typed, nor notations at the end of the report including the time it was made and P.C. Couture’s name in type. These “cut up” omissions by Mr. Lindsay were likely not coincidental. They suggest that he considered the actual *form* of a police investigation report to be confidential, and so ensured that it did not appear on the copy given to Mr. Cogan. P.C. Couture’s name would have been removed so that the document could not be said to be his “statement” such that he could be cross-examined on it. Consideration should also be given to what Mr. Lindsay did not disclose to Mr. Cogan in this regard. P.C. Couture had already prepared a contemporaneous investigation report on January 11, 1972,

which is in the archives, and which goes into more detail about the time that he was guarding Phillion than his June 27 report. Rather than disclose this original (confidential) report to Mr. Cogan, Mr. Lindsay presumably instructed Couture to draft a new statement that he could disclose to Mr. Cogan. He probably expected him to draft it in the form of a willsay. Instead, Couture prepared it as an investigation report. As it turned out, Couture's June 27, 1972 version of his January 11, 1972 investigation report was the only document in the form of an investigation report disclosed to Mr. Cogan, albeit the pre-printed part of the form was purposely cut out during the copying process..

June 29, 1972 letter from Lindsay to Cogan, enclosing June 27/72 statement of Couture, Record, Vol.14, Tab 26

Willsay of Couture, Crown Brief, Record, Vol. 13, Tab 35

Investigation Report of Couture, Jan. 11/72, Record, Vol. 2, Tab 90

Investigation Report of Couture, Jan. 27/72, Record, Vol. 2, Tab 121

63. Proof that the police investigation reports were not disclosed to the defence is supplied by defence counsel's conduct at Phillion's trial; through an examination of facts not raised, cross-examinations not attempted, and concessions made by the defence at trial. Mr. Cogan conceded that Phillion was in Ottawa on August 9, beyond the time of Mr. Roy's murder. If he had seen the reports of McCombie, Huneault, Nadori and others, he would have known that Phillion had left Ottawa before the murder. His cross-examinations of Mrs. Barbe and Mrs. Brazeau (and Mr. Barbe and Gail Brazeau at the preliminary hearing) would have relied on their original statements to McCombie. His cross-examinations of McCombie, Huneault, Nadori and Norton would have been shattering events for the Crown's case. In short, Mr.

Cogan's presentation of the case, through cross-examination of Crown witnesses, and through his own defence would have been manifestly different.¹³

64. Discussions at the preliminary hearing surrounding Det. Norton's dealings with Phillion at 7:30 a.m. on January 12, 1972 are instructive. This was the conversation during which Norton asked Phillion whether he remembered selling the car radio in Trenton. The contents of the conversation had been disclosed but

¹³ Mr. Cogan would also have been interested in the several other suspects investigated by McCombie. He only knew of one which McCombie mentioned in his testimony at the preliminary hearing. From the case synopsis and McCombie's willsay, he also knew that, after August 15, 1967, "several suspects had been picked up" and line-ups held, without results. "Synopsis", Crown Brief, Record, Vol. 13, Tab 4
See evidence of McCombie, Preliminary Hearing, Vol. 4, 388/25

Mr. Cogan did not know what was behind Norton's question.¹⁴ **The Crown successfully prevented the defence from leading the conversation and said during submissions:**

"Throughout this preliminary inquiry, Your Honour, we have heard much evidence on a lot of aspects of this thing to which there might be other references in the statement which I do not intend to tender. There is the fact that this question was asked by the officer the next morning. it has to be something that the court has confidence in the Crown to produce as to whether it will assist the court. But in my opinion, I do not wish to tender the statement that Mr. Cogan is examining Detective Sergeant Norton about and I have reasons for it which we may disclose at a later time after the preliminary inquiry is over. But in my experience at this stage, I do not wish to tender that statement for certain reasons."

Mr. Lindsay's view that he had an unfettered right to decide what to disclose is obvious from this extract. He did not even see it as necessary to explain his reasons for denying disclosure. It was enough simply to state that he had his reasons. At trial, during the *voir dire* proceedings, a similar objection was made, and then withdrawn by the Crown. After eliciting the contents of the statement, Mr. Cogan further elicited that the Trenton question was based on information that Norton "had learned from the main file". An attempt by Mr. Cogan to discover whether it was as a result of something said by Phillion led to the following exchange:

¹⁴ It can be assumed that Norton, who had by this time reviewed the homicide file, had read McCombie's April 12, 1968 report and/or other reports in which Phillion had told McCombie he was in the Trenton area at the time of the homicide.

Q. And would I be correct in saying that it was on the basis of something said by the accused back in 1967 - -

Mr. Lindsay: Excuse me, I object to that question. That is a violation of the hearsay rule. It is a written assertion made by a person other than the witness who is testifying and this witness, in my submission, cannot testify about this sort of thing unless he has some direct knowledge of it.

Mr. Cogan: It is not offered, with respect, for the truth; I am asking what the basis was for the question and just the fact that he read something. I am not offering, in fact, that the witness did say that – I am not offering it for the truth and I submit in that case it is not hearsay and he does not, in fact, understand what I mean when I say that; out of the blue the officer asks about a car radio in Trenton and I would like to know why he asks the question and I am not offering what he read on the file as the truth of what is on the file, it is something he read and surely, for that limited purpose – otherwise it does not make sense.

Her Ladyship: Mr. Cogan, why is it not sufficient that he found it in the file, if you are tendering it only for that purpose.

Mr. Cogan: I will be content with that.

Q. So on the basis of something that was in the file, you asked him that question?

A. That is correct sir.

Evidence of Norton, Preliminary Hearing, Vol. 7, 23/40 to 24/5

Evidence of Norton, Trial, Vol. 2, 434/10-40

65. Mr. Cogan's knowledge of the potential information that the police investigation reports could provide was undermined by McCombie's evidence. McCombie testified at the preliminary hearing that his notes had been mislaid by the time of Phillion's arrest in 1972, and added

"I do not think they would add anything..."

From the information now available, it can be safely concluded that McCombie's notes would be a gold mine of information. Then, at trial, McCombie acknowledged that he had prepared "an Investigation Report". At no time did he suggest that he had prepared a large number of reports.

In fact, after his acknowledgment that he had prepared a report, Mr. Cogan sought “back door” access to this investigation report (previously quoted *supra* paragraph 25):

Q. Well, is the Occurrence *Report* there [in the file], or is *that* lost too?

A. No. The Occurrence *Report* is there.

Q. Did you read that *report*?

A. Yes, I did.

Q. When did you read *that* Occurrence *Report* before you gave your evidence today?

A. In January.

Q. In January of this year?

A. Yes, sir.

Q. And between January and October would you bother reading *it* to refresh your memory?

A. No, sir. (emphasis added)

Evidence of McCombie, Preliminary Hearing, Vol. 4, 358/40

Evidence of McCombie, Trial, Vol. 4, 899/20-30

66. At the conclusion of McCombie’s evidence at the preliminary hearing, Beaulne J. made a special appeal to him to look for his missing notes:

The Court: Until [the next court date] Detective McCombie, will you investigate every possible avenue, contact the people with whom you had consultation, so that something does not come up after this preliminary.

A. I must say at this time that my investigations have been very exhaustive.

The Court: I appreciate that. But I should like to know whether Detective Nadori, Huneault, Coburn, Norton and all possible witnesses have no other information, that all witnesses from the police department who will be giving evidence have no other evidence to produce with regard to the missing material. It is most pertinent that you satisfy the court as to that. The court is not blaming anyone, I want that to be quite clear, but there

are some missing links here. Since you were the investigating officer, it would be better if you checked with all possible witnesses that they do not have in their possession any of the material that is missing.

A. Yes, Your Honour, I will do that.

The issue was re-visited very briefly during Huneault's cross-examination at the preliminary hearing. No further information was forthcoming. It is noteworthy that McCombie never suggested that his investigation reports could be used as a substitute for his missing notes. Nor did Mr. Lindsay volunteer this information.

Evidence of McCombie, Preliminary Hearing, Vol. 4, 399/10-30

Evidence of Huneault, Preliminary Hearing, Vol. 7, 59/40

**(c) Disclosure of Phillion's Conversations with,
and Statements, to the Police**

67. Phillion's conversations with the police, for present purposes, fell into five categories:

- statements that he made to the Ottawa Police that were typed and signed by Phillion – there were two statements that fell into this category, the statements of January 11, 1972 and March 10, 1972. These statements were not in the Crown brief but were disclosed to the defence,¹⁵
- **a statement that he gave in the Haileybury Jail to P.C. Brown and P.C. Bolger on April 4, 1968 – the police questions were pre-typed, the police then handwrote his answers.**

¹⁵ Phillion's March 10, 1972 statement to Norton and Coburn was raised during Norton's evidence at the preliminary hearing.

See Evidence of Norton, Preliminary Hearing, Vol. 7, 19/40, 21/30, 28/50 to 33/40

This statement was almost certainly not disclosed to Mr. Cogan. The only hint of its existence in the Crown brief was to found in that part of McCombie’s willsay, disclosed to Mr. Cogan, wherein McCombie spoke of “certain information” having been “received and developed” by New Liskeard police officers. At the preliminary hearing, McCombie responded to questions about this in vague terms and Mr. Cogan did not pursue it further. P.C. Brown of the New Liskeard police testified at the preliminary hearing about Phillion’s arrest on March 19, 1968 for assault and living on the avails charges. It was while he was held without bail on these charges that the New Liskeard police questioned him about the Roy murder. However, Brown made no mention of this in his testimony. Mr. Cogan would have shown more interest if he had known that the New Liskeard police had gone so far as to question Phillion himself about the murder. If Mr. Cogan had asked further questions, and Detective McCombie had answered them fully and honestly, it is conceivable that Mr. Cogan would have found out McCombie’s reaction in 1968 to New Liskeard police concerns – namely, that he had dismissed them because of his investigation of Phillion’s whereabouts on August 9, 1967,

Evidence of P.C. Brown, Preliminary Hearing, Vol. 5, 430/30 to 431/10

- **oral statements made to Ottawa officers on January 11 and 12, 1972 – these statements were disclosed to the defence in the form of willsays and evidence at the preliminary hearing. As regards one police witness, P.C. Couture, disclosure was made by letter in addition to his willsay. On June 29, 1972,¹⁶ Mr. Lindsay, under a covering letter, sent Mr. Cogan Couture’s statement wherein he advised of the contents of his conversations in the cells with Phillion. Couture’s evidence was presumably disclosed in this manner because his willsay in the Crown brief did not include the contents of his conversation with Phillion,**
- **the contents of a conversation on March 25, 1971 that Phillion had with McCombie in the Ottawa Police Station – the contents of this conversation were disclosed to the defence**

¹⁶ June 28 was the last day of the preliminary hearing. This was, as far as can be determined, the only disclosure provided to Mr. Cogan by way of a covering letter from the Crown.

(supra paragraph 25),

- **oral statements made by Phillion in August, 1967 to McCombie and to New Liskeard police officers – disclosure of these statements require further discussion.**

(i) Conversations with Det. McCombie in August, 1967

68. The defence was not privy to the conversation that McCombie had with Phillion after his arrest on August 13, 1967 in New Liskeard and thereafter on their drive to Ottawa.

- McCombie’s willsay simply stated that he and Coburn “interviewed Phillion, in reference to the warrant for break and enter and also he was warned at that time in connection with the murder investigation”.
- At the preliminary hearing, the Crown objected when the defence sought to question McCombie about any statements made by Phillion after his arrest in New Liskeard. Mr. Cogan conceded that he could only go into “the circumstances” of the statements “not into the statements themselves”. McCombie could not recall whether they talked about the case on the car journey to Ottawa. Mr. Cogan asked P.C. Brown of the New Liskeard Police Department one question of note at the preliminary hearing:

Q. Do you recall at any time Detective McCombie asking for a French police officer to be in the vicinity of the cell where Mr. Phillion was and some officer was called from Haileybury?

A. No, sir.

There is no further information to support the factual premise of Mr. Cogan's question.

Evidence of McCombie, Preliminary Hearing, Vol. 4, 392/40 to 393/10

- **At the preliminary hearing, the Crown stopped McCombie from relating his conversations with Phillion in Ottawa after he was driven there. He cautioned McCombie**

“Do not go into any conversations you had.”

There is very little further additional information available regarding these conversations.

McCombie had lost his notes by 1972. They are not in the archives. In his August 13, 1967 investigation report found in the archives, which was not disclosed to Mr. Cogan, McCombie stated that when interviewed in New Liskeard, Phillion denied any knowledge of the murder and claimed he was in New Liskeard at the time of the murder. During this conversation he would also have told McCombie about his car breaking down outside Trenton during his journey to New Liskeard via Toronto.

Evidence of McCombie, Preliminary Hearing, Vol. 4, 345/20, 382/1 to 383/20, 389/35 to 390/40, 392/40 to 393/5

69. Thus, to this day, the prosecution has failed to disclose and/or been unable to disclose material conversations between the investigating officer and Romeo Phillion – to wit, conversations in August, 1967 in which Mr. Phillion was first asked to respond to the allegation that he committed the murder.

(ii) Conversations with the New Liskeard Police in August, 1967

70. At the preliminary hearing, Mr. Cogan heard under oath from two witnesses, McCombie himself

and P.C. Brown of the New Liskeard Police Department, that the New Liskeard police did not question Phillion about the murder. An investigation report prepared by Nadori now suggests Brown may have interviewed Phillion after his arrest on August 13. It was a conversation of significance even if not told to, or recalled entirely accurately by Brown (see paragraph 215 in the main brief). Brown remembered Phillion telling him that he was stopped by the OPP as he left a Shell service station near Arnprior, and that on the evening of the murder he ran out of gas on a highway near Kingston and was driven by a police officer to a nearby gas station. Nadori's investigation report was not disclosed to Mr. Cogan.

Evidence of McCombie, Preliminary Hearing, Vol. 4, 391/40 to 393/10

Evidence of Brown, Preliminary Hearing, Vol. 5, 429/10, 426/50

Investigation report of Nadori, Jan. 17/72, Record, Vol. 2, Tab 103

(d) Disclosure of Civilian Willsays and Civilian Statements

Introduction

71. As in the case of police witnesses who were called during the proceedings, it can be deduced that willsays of civilian witnesses who were called were disclosed to the defence. We say this because it was the more usual procedure at the time, not because of any cross-examinations by Mr. Cogan that supports our belief. However, subject to exceptions, actual statements of civilians were not disclosed. A strong clue

in this regard is contained in Gail Brazeau's cross-examination at the preliminary hearing. Mr. Cogan was trying to gain access to her statement by questioning her about what she had told the police in her statement.

He then said:

Mr. Cogan Again for the purposes of identifying the statement, and without going into it all, would my friend simply produce it?

Mr. Lindsay: Your Honour, i have never heard of this procedure before. I do not have as much experience as my learned friend, but I do not understand this business of having a witness identify her statement. If Mr. Cogan wants to come right out with it and ask me if I will produce the statement, then that is one thing; but I have never heard of this idea of bringing out a witness' statement and asking the witness if they want to identify it.

After further submissions, Beaulne J. ruled:

The Court: My ruling at this point is that on your file you have a statement which may be shown to the witness. She can be asked whether that is her statement, but there can be no question as to what it says. She has stated as part of her evidence that she made a statement. Now, it may not be this statement, or on the other hand it may be, I do not know. However, I think it is relevant that whatever statement she made be part of the file at this stage of the proceedings.

Mr. Lindsay: Mr. Cogan is now picking up the witness' statement and reading it, or is about to read it, Your Honour.

The Court: Mr. Cogan, my ruling now is stricter than it was last time. I think Mr. Lindsay is right. I have had time to think about this. It is only for the purpose of her making a statement. If Mr. Lindsay wishes to produce the statements then there is no problem.

Mr. Lindsay: I am not producing them because I have finished my examination in chief, Your Honour.

The Court: You can re-examine and produce them, whatever you wish. I am not forcing you to do that; that is your prerogative. Mr. Cogan, the ruling I have made is that this is simply for the purpose of identification, nothing else.

Mr. Cogan: Yes, Your Honour.

As in the case of police witnesses, willsays were not disclosed for civilians who were not called

as witnesses during the proceedings.

Evidence of Gail Brazeau, Preliminary Hearing, Vol. 4, 296/40 to 298/30

(i) *Willsays and statements of civilians who testified during the proceedings*

72. In the case of Mr. Herbert, the furnace man, and Mrs. Robitaille and Mrs. Gagne, both of whom caught a glimpse of the intruder, their willsays would have been disclosed because they all testified during the proceedings. Their willsays were, in essence, all the disclosure available with respect to their evidence.

As regards other civilian witnesses, it is necessary to review them *seriatim*.

Neil Miller

73. Neil Miller made two statements to the police, on January 10 and 11, 1972. Neither of these statements were disclosed to the defence prior to the preliminary hearing. During Miller's examination-in-chief, Mr. Cogan said:

“With all respect Your Honour, my friend is going to come into that and I respectfully ask that he provide me with a copy of this witness’ statement, in view of the importance of the evidence. Surely my friend cannot deny me the right to look at the witness’ statement if this is the evidence.”

By the time of Miller's cross-examination, Mr. Cogan had a copy of Miller's January 11, 1972 statement to the police but seemed unaware that he had given an earlier statement on January 10, 1972. He discovered the existence of Miller's January 10 statement during his cross-examination of Huneault at the preliminary hearing at which time Huneault produced it for him briefly to see. At trial, both Miller's statements were filed as exhibits by the Crown.

Evidence of Neil Miller, Preliminary Hearing, Vol. 3, 187/10 , Vol. 4, 240/20; Trial, *Voir Dire*, Vol. 1, 146/20 (Exhibit A) 154/10 (Exhibit B),
Evidence of Huneault, Preliminary Hearing, Vol. 4, 477/10-40

Mr. and Mrs. Barbe

74. Disclosure of statements made by the Barbes is examined in detail in the body of this brief. In summary, it can be deduced that the following documents in connection with the Barbes were disclosed:

- Paul Barbe's willsay
- Denise Barbe's willsay

The following documents may have been disclosed:

- Paul Barbe's signed statement of January 13, 1972
- Denise Barbe's handwritten statement of the same date (which was produced to her by the Crown to look at during her examination-in-chief at the preliminary hearing).

The following documents were not disclosed:

- McCombie's investigation report of April 12, 1968 which, in combination with his evidence at the preliminary hearing, established that he took statements from the Barbes on August 11, 1967, and

in April, 1968.

As well, the defence did not know that the traffic ticket which Phillion told the Barbes he had received earlier on the day that they were speaking to him had been issued to him on Tuesday, August 8. As has been submitted in this brief *passim*, if Mr. Cogan had received this disclosure¹⁷, **he would not have conceded that Phillion was in Ottawa when the murder happened but would have argued that he had already left Ottawa many hours earlier.**

See the Brief herein, Part 5, paragraphs 337 to 339

Mrs. Brazeau and Gail Brazeau

75. As with the Barbes, disclosure of statements made by the Brazeaus is discussed in depth in the body of this brief. In summary, it can be deduced that the following documents in connection with the Brazeaus were disclosed:

- Mrs. Ellen Brazeau's willsay
- Gail Brazeau's willsay
- Gail Brazeau's criminal record (Mr. Cogan cross-examined her on it at the preliminary hearing)
- Romeo Phillion's handwritten letter to Gail Brazeau, dated August 11, 1967.

The following documents may have been disclosed:

- Gail Brazeau's signed statement, dated January 24, 1972.

¹⁷ Other disclosure too could have alerted Mr. Cogan to the Tuesday vs. Wednesday problem inherent in the Barbes' evidence. See, for example, the discussion regarding the non-disclosure of Paul Loyer's statement *infra*.

The following documents were not disclosed:

- McCombie's two investigation reports of August 13, 1967 wherein he advised that he interviewed Gail Brazeau on, most likely, August 11, 1967, spoke to her on the telephone on August 11, and met her at her residence on August 13,
- McCombie's investigation report of April 12, 1968 wherein he advised that
 - i) he took a statement from Gail on August 14, 1967,
 - ii) he spoke to Mrs. Brazeau around the same time, presumably on the same date,
 - iii) he re-interviewed Mrs. Brazeau in mid-April, 1968 in response to the New Liskeard investigation,
- Gail Brazeau's April 4, 1968 Statutory Declaration which she provided to the New Liskeard police,
- Huneault's investigation report of January 14, 1972 wherein he recorded a statement given to him by Mrs. Brazeau on January 14,¹⁸
- **Nadori's investigation report of January 19, 1972 wherein he recorded an interview of Gail Brazeau in Montreal on January 18, 1972,**
- **Nadori's investigation report of January 25, 1972 wherein he recorded claims made by Gail Brazeau during a conversation which led to the creation of her January 24, 1972 statement.**

See Evidence of Gail Brazeau, Preliminary Hearing, Vol. 4, 279/50 to 280/10
See the Brief herein, Part 4, paragraphs 308 to 325

76. The denial of access to the undisclosed Brazeau materials prejudiced the defence in several ways.

¹⁸ This statement may have been the one that led to the creation of Mrs. Brazeau's willsay.

The disclosure would have stopped Mr. Cogan conceding Phillion's presence in Ottawa at the time of the murder. They would have undermined Gail Brazeau's credibility (she was not, in fact, called by the Crown at trial). They would have provided substantial evidence of the methods used by Detectives Huneault and Nadori in cementing together a case against Mr. Phillion.

Mrs. Roy

77. Mrs. Roy's willsay would have been disclosed to the defence. Her February 18, 1972 handwritten witness statement was probably not disclosed but it contained little additional material. None of the police investigation reports which contained her descriptions of the intruder, her accounts of the events of August 9 and the details of various photograph and in-person line-ups that she viewed were disclosed. The defence was, however, aware of the essential details of all these reports except in the case of McCombie's August 15, 1967, September 8, 1967 and April 12, 1968 reports, and Huneault's February 8, 1972 report, which spoke of, *inter alia*, Mrs. Roy's inability to identify the intruder who stabbed her husband.

This information would have been helpful to Mr. Cogan in his defence of Mr. Phillion at his trial (see paragraphs 326 to 332 of the brief).

(ii) *Willsays of civilians who did not testify during the proceedings*

78. There were three civilians who did not testify at the preliminary hearing or trial but who had potentially significant evidence to give in the case. Consistent with the type of disclosure regime under which

Mr. Lindsay was operating, it is reasonable to conclude that their willsays were not disclosed to Mr. Cogan.

In the case of one of these civilians, Paul Loyer, there is further evidence to support this conclusion.

Paul Loyer

79. Paul Loyer, as a Board Member of the Notre Dame Parish in Ottawa, was the organizer of Wednesday night bingo for the Parish. In his willsay, he stated that during July and August, bingo nights organized by another Catholic organization, usually held on Friday nights, were held on Tuesday nights.

80. Mr. Cogan knew of Mr. Loyer's existence. His name was on the back of the indictment. As well, his name appeared on a handwritten list of witnesses that Mr. Cogan likely wrote down doing a verbal briefing from the Crown as to whom he might call at trial. Mr. Cogan wrote "Bingo" beside Mr. Loyer's name; probably as a result of the Crown telling him that Mr. Loyer would confirm Mrs. Barbe's evidence that bingo was held on Wednesday nights.

81. However, it can be reasonably concluded that Mr. Cogan's handwritten "Bingo" notation was indicative of the fact that Mr. Cogan was never given a copy of Mr. Loyer's willsay. If he had received a copy, he would have realized that the memories of Mr. and Mrs. Barbe that Mr. Barbe spoke to Phillion on a Wednesday night, because Mrs. Barbe had been to bingo that night, were open to question.¹⁹ Mr.

¹⁹ Of course, if the Barbes' 1967 and 1968 statements to Detective McCombie had been disclosed, Mr. Cogan would have already known that their new memories were wrong.

Cogan's failure to explore this possibility with the Barbes demonstrated that he never saw Mr. Loyer's willsay. In fact, Mr. Cogan wrongly conceded that Mr. Phillion was in Ottawa on the evening of August 9.

Willsay of Paul Loyer, Crown Brief, Record, Vol. 13, Tab 31

Gail Chartrand

82. Gail Chartrand, Donald Phillion's girlfriend, in 1967, was interviewed by Huneault and Nadori on January 21, 1972 in the Richmond Hill Police Station near where she lived. Her statement was typed and signed by her. Huneault's January 23, 1972 investigation report which recounted her interview, and also included attempts on the same day to locate the service station operator in Trenton, was never disclosed.

Investigation Report of Huneault, Jan. 23/72, Record, Vol.

83. In her statement, Ms. Chartrand provided some background information about the whereabouts of Romeo Phillion and Gail Brazeau in late July and early August, 1967. She met Romeo and Gail in Toronto. She took a train with them to North Bay where they stayed with Romeo's mother. It was there that she met Donald. In "about 3 days", Romeo and Gail left. After three weeks, she, Donald and Mrs. Phillion moved to New Liskeard, and stayed at a rooming house on Wellington Street. While there, she got a job at a local restaurant.

See Investigation Report of Huneault, Jan. 23/72, Record, Vol. 2, Tab 108

84. One evening, she saw Donald and Romeo coming towards the house. Later, she claimed in her

statement, she asked Donald what Romeo was doing in New Liskeard:

“[Donald] told me that he was running scared, and that it had something to do with a break-in and a stabbing, in Ottawa, and that he took off from there.”

Investigation Report of Huneault, Jan. 23/72, Record, Vol.2, Tab 108

85. Despite the seemingly incriminating nature of this part of her statement, Ms. Chartrand was not called as a witness at the preliminary hearing or at the trial. This may have been because her claim was based on hearsay from Donald. As well, she had been interviewed by McCombie in New Liskeard on August 13, 1967 and, in McCombie’s words, “it was learned that [she] could add nothing to this investigation”. Consequently, her evidence has never been tested by cross-examination. It is worth noting that she was interviewed by Huneault and Nadori at a time that their interview tactics were open to question. Ms. Chartrand’s interview was typed by them, not handwritten by her. In all the circumstances, it is submitted that little or no weight can be placed on Ms. Chartrand’s claims.

Investigation Report of McCombie, Aug, 13/67, Record, Vol. 2, Tab 26

Florence Gagne

86. Florence Gagne, who resided across the street from 275 Friel Street, saw a man flee from the building at 2:50 p.m. on August 9. At the time of the preliminary hearing, P.C. Huneault testified that he had been unable to find her. Mr. Cogan, however, knew of her evidence because she had testified at the Coroner’s Inquest.

Willsay of Florence Gagne, Crown Brief, Record, Vol. 13, Tab 10
Evidence of Huneault, Preliminary Hearing, Vol. 7, 59/30

(e) Disclosure of Photographs and Forensic Reports

87. Copies of relevant photographs were provided to Mr. Cogan. Dr. Tolnai's autopsy report was disclosed. It is unknown whether the forensic reports on knives submitted for forensic examination were disclosed. However, Mr. Cogan knew that several knives had been found in the vicinity of Mr. Roy's homicide, all of which had been sent to the laboratory for testing with negative results. Det. McCombie had testified as such at the Coroner's Inquest.

Evidence of McCombie, Coroner's Inquest, 35/25

Conclusion

88. The prevailing disclosure practices and the actual practices in the Ottawa Crown's office at the time, the records of the preliminary hearing and trial, and what has now been discovered, all support the conclusions drawn herein. In summary, Mr. Cogan did not have the disclosure necessary to conduct Mr. Phillion's defence.